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TRIAL CHAMBER I

Before: Hon. Justice Bankole Thompson, Presiding Judge
Hon. Justice Pierre Boutet
Hon. Justice Benjamin Mutanga Itoe

Registrar: Mr. Lovemore G. Munlo SC

Date: 31st of July 2006

PROSECUTOR Against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

Public Document

DECISION ON PROSECUTION APPLICATION FOR LEAVE TO AMEND THE INDICTMENT

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TRIAL CHAMBER I ("Trial Chamber I") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Bankole Thompson, Presiding Judge, Hon. Justice Pierre Boutet and Hon. Justice Benjamin Mutanga Itoe;

SEIZED of the "Prosecution Application for Leave to Amend Indictment" filed publicly by the Office of the Prosecutor ("Prosecution") on the 20th of February 2006 ("Motion");

NOTING the Response to the Motion filed by the Defence for the First Accused, Issa Sesay, on the 2nd of March 2006 ("*Sesay* Response"), the Response to the Motion filed by the Defence for the Second Accused, Morris Kallon, on the 2nd of March 2006 ("*Kallon* Response") and the Response to the Motion filed by the Defence for the Third Accused, Augustine Gbao, on the 2nd of March 2006 ("*Gbao* Response");

NOTING the Reply to the *Sesay* Response filed by the Prosecution on the 7th of March 2006 ("Reply to *Sesay*") and the joint Reply to the *Kallon* Response and the *Gbao* Response filed by the Prosecution on the 7th of March 2006 ("Joint Reply to *Kallon* and *Gbao*");

MINDFUL of the Amended Consolidated Indictment filed in this case by the Prosecution on the 13th of May 2006 ("Indictment");

PURSUANT to Article 17 of the Statute of the Special Court ("Statute") and Rules 26*bis*, 50, 52 and 54 of the Rules of Procedure and Evidence ("Rules");

NOW HEREBY ISSUES THE FOLLOWING UNANIMOUS DECISION:

I. THE SUBMISSIONS

A. The Motion

1. The Prosecution through this application, seeks to amend the Amended Consolidated Indictment in the RUF Case. The two proposed amendments are the following:

> A. Paragraphs 48, 62 and 80 to be amended so that the words "Between about 14 February 1998 and 30 June 1998..." be changed to read "Between about 14 February 1998 and 31 January 2000..." ("Proposed Amendment A");

B. Paragraph 31 to be amended so that the word "from" is deleted and replaced with "between" so that the sentence reads: "In this position, between about April 1997 and about mid 1998, Augustine Gbao was subordinate..." ("Proposed Amendment B")[1]

2. The Prosecution submits that the aforementioned Proposed Amendment A relates exclusively to the time frames pleaded as particulars of the crimes of unlawful killings, under Counts 3-5, physical violence, under Counts 10-11, and looting and burning, under Count 14, respectively, alleged to have occurred in the Kono District[2] while Proposed Amendment B is solely a formal or semantic change.[3]

3. According to the Prosecution, some of the witnesses who testified before the Trial Chamber in relation to these crimes for the Kono District already gave evidence indicating or suggesting that some crimes may have fallen outside the specific time period stated in paragraphs 48, 62 and 80 of the current Indictment.[4] The Prosecution submits that if the Trial Chamber is ultimately satisfied beyond a reasonable doubt that an Accused is criminally responsible for a particular crime to which the said paragraphs relate, the Accused must be convicted of that crime even if the evidence does not establish that the crime necessarily occurred within the time specified in those paragraphs of the Indictment, or even if the evidence establishes that the crime occurred outside that specific time period.[5] The Prosecution submits that is not seeking to add new allegations to the existing charges and that it would be good practice in the present circumstances to seek an amendment to the Indictment in order make the stated periods consistent with the evidence already before the Chamber and give the Defence better notice and particulars of the case that the Accused have to meet.[6]

4. In addition, the Prosecution further submits that Proposed Amendment A will not cause any prejudice to the Accused. According to the Prosecution, all concerned witnesses were extensively cross-examined on the facts because the evidence in question was relevant to Counts 1 and 2 which incorporate all the acts alleged in relation to all of the other counts and which therefore, include

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[1] Motion, para. 2.
[2] *Id.*, para. 4.
[3] *Id.*, para. 16.
[4] *Id.* para. 4.
[5] *Id.*, para. 6. The Prosecution argues that the amendment is justified in Common Law on the basis of the so called *Dossi* principle. According to this principle "From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence." See *R v. Dossi*, 13 CR. App.R. 158 (CCA), at pp. 159-160. See also *Archbold Criminal Pleading, Evidence and Practice*, 2002 Edition, paras. 1-127 to 128. See also *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgment, 26 May 2003, paras 296-306.
[6] Motion, para 5.

relevant events in the Kono District, spanning the broader time period until January 2000. The Prosecution contends that there should therefore be no need to recall any witness.[7]

B. The Defence Responses

9. All of the Defence teams object to the Proposed Amendment A on the grounds that the amendment of the Indictment is not in the interest of justice, is prejudicial to the Accused, and that the Prosecution acted without the ordinary diligence in promptly bringing the Motion. The Defence contend that the proposed amendment, if granted, will unduly delay the proceedings. Proposed Amendment B is not opposed by the Defence.

i. The Sesay Response

10. The Defence asserts that if Proposed Amendment A is granted it would amount to addition of multiple "fresh allegations amounting either to separate charges or to new allegations in respect of an existing charge" which would cause irreparable prejudice to the accused.[8]

11. The Defence also submits that, if leave is granted, Rule 50(B) of the Rules would be invoked and witnesses who have already testified might have to be recalled. This, according to the Defence, would delay the Accused's trial which to date has imposed a three year detention on a man presumed to be innocent and thereby breach the Accused's right to be tried without undue delay under Article 17(4)(c) of the Statute.[9] The Defence also submit that the Prosecution has offered no reasons to explain the delay in bringing forward the Motion.[10]

12. Accordingly, the Defence concludes that it would be wholly unfair to allow the Prosecution to prosecute the trial until two-thirds of their case has been presented and the Accused have been in custody for three years, having given notice that there would be no prosecution of alleged offences in Kono from 30 June 1998, and then to allow a change of the goal posts by 17 months to allow the introduction of over one hundred more factual allegations of such crimes.[11]

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[7] *Id.*, paras 13-14.
[8] *Sesay* Response, para. 11.
[9] *Id.*, paras 8-10.

ii. The Kallon Response

13. The Defence argues that there has been a protracted interval of 9-24 months between the discovery of the evidence alleged to be in support of the proposed new amendments, and the filing of the instant Motion[12] and that such protracted interval since discovery amounts to undue delay which, if ignored, will defeat the judicial guarantees and safeguards of the rights of the Accused to be tried fairly and expeditiously.[13] According to the Defence, the expansion of the time frames by about one and a half years constitutes new charges under Rule 50 of the Rules.[14]

14. According to the Defence, the jurisprudence requires that the Prosecution should have immediately filed its application after the first witness was heard. Defence argues further that it was the Prosecution's duty to investigate further and promptly find out whether any of the witnesses it intended to call were likely to testify on events outside the temporal scope of the indictment. [15]

iii. The Gbao Response

15. The Defence submits that certain circumstances militate against the fairness of the proposed amendments, and that they include: lack of due diligence or attempt to demonstrate due diligence by the Prosecution in making the application; the quantum of testimony already given and affected by the application; the potential delay in the proceedings and the fault of the Prosecution in not mitigating that delay; the substantive nature of the proposed changes; the fact that the changes involve an expansion rather than a narrowing or more specific framing of the Prosecution case against the Accused; the significant length of the expansion in time frame rendering the temporal change more than merely cosmetic; the significance of dates in this Indictment where the particulars of specific crimes are not articulated with precision; and the advanced stage of the proceedings. Finally, the Defence contends that the effect of the Prosecution's failure to bring the Motion for at least more than 12 months is tantamount to "trial by ambush."[16]

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[10] *Id.*, para. 10.
[11] *Id.*, paras 7-9, 13 and 17.
[12] *Kallon* Response, para. 14.
[13] *Id.*, para. 22.
[14] *Id.*, paras 18 and 16.

C. The Prosecution Replies

i. The Reply to Sesay

16. The Prosecution reiterates that the amendment sought will not bring additional evidence of additional crimes. According to the Prosecution, it is seeking to make the Indictment more consistent with the evidence that is already before the Trial Chamber and the Defence know what evidence has been adduced so far.[17]

17. The Prosecution notes that the general time frame alleged for the charges against these Accused under Counts 1-2 of the Amended Consolidated Indictment is "at all times relevant to the indictment", that is from 16 November 1996 up to 10 March 2003. In Kono District, the Indictment already and expressly includes various crimes committed between 25 May 1997 and about January 2000.[18]

ii. The Joint Reply to Kallon and Gbao

18. In its Joint Reply, in addition to the submissions made in its Reply to *Sesay*, the Prosecution states that the Defence has been on notice for some time that some of the crimes alleged in paragraphs 48, 62 and 80 of the Indictment may have occurred outside the timeframe specified therein. As regards the argument that the time frame is broad, the Prosecution states that this Trial Chamber already held that "the sheer scale of the alleged crimes makes it 'impracticable' to require a high degree of specificity in such matters as the identity of the victims and the time and place of the events", and that a time frame could acceptably be formulated, for instance, as "at all times relevant to this indictment."[19]

III. THE APPLICABLE LAW

A. Statutory Provisions

19. In the Special Court for Sierra Leone, applications for leave to amend an indictment are governed by Rule 50 of the Rules. Rule 50 provides that:

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[15] *Id.*, para. 30.
[16] *Gbao* Response, para. 12.
[17] Reply to *Sesay*, paras 4, 5, 9, 14, 20.
[18] *Id.*, paras 8, 13, 15, 17.
[19] Joint Reply to *Kallon* and *Gbao*, para. 8. See also *Prosecutor v Sesay*, SCSL-2003-05-PT, Decision and Order on Defense Preliminary Motion for Defects in the Form of the Indictment, Trial Chamber, 13 October 2003, para. 21.

> (A) The Prosecutor may amend an indictment, without prior leave, at any time before its approval, but thereafter, until the initial appearance of the accused pursuant to Rule 61, only with leave of the Designated Judge who reviewed it but, in exceptional circumstances, by leave of another Judge. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and Rule 52 apply to the amended indictment.
>
> (B) If the amended indictment includes new charges and the accused has already made his initial appearance in accordance with Rule 61:
>
> (i) A further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges;
>
> (ii) Within seven days from such appearance, the Prosecutor shall disclose all materials envisaged in Rule 66(A)(i) pertaining to the new charges;
>
> (iii) The accused shall have a further period of ten days from the date of such disclosure by the Prosecutor in which to file preliminary motions pursuant to Rule 72 and relating to the new charges.

B. Existing Case-Law

20. Since its inception, this Chamber has had occasion, in some Decisions on the subject, to articulate the general operative principles in this area of the law.[20]

21. Firstly, in our CDF Amendment Decision, we laid down the applicable standard for evaluating the merits of applications of this nature. There, we stated as follows:

> The crucial consideration in this process, in our opinion, is one of timing and whether the application for the amendment is brought at a stage in the proceedings where it would not prejudice the rights of the accused to a fair and expeditious trial and furthermore, whether it is made in the overall interests of justice rather than its having the effect of giving an undue advantage to the prosecution, thereby putting in jeopardy, the doctrine of equality of arms between the Prosecution and the Defence.[21]

In that Decision, we emphasised that in general, time is of the essence in such matters and delay would militate against the granting of an amendment to an indictment if it would result in unfairness to the Accused. From the Chamber's perspective, this principle remains tenable and valid as the overriding test.

22. In its *Decision on Amendment of the Consolidated Indictment*, the Appeals Chamber observed as follows:

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[20] See *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment, 20 May 2004 ("CDF Amendment Decision"); See also *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-PT, Decision on Prosecution Request for Leave to Amend the Indictment, 6 May 2004 ("RUF Amendment Decision").

[21] CDF Amendment Decision, *supra* note 20, para. 35. See also RUF Amendment Decision, *supra* note 20, para. 27.

> In principle, the Indictment may be amended at any stage of the proceedings, up to the conclusion of the trial, if the Court is satisfied that the Defence will not be prejudiced by the amendment and that making it will be in the interests of justice. The Special Court Rules do not preclude later amendments.[22]

23. The said Appeals Chamber then proceeded to distinguish three categories of amendments to indictments, indicating their respective degrees of permissibility or impermissibility in these terms:

> Amendments to an Indictment, broadly speaking, fall into three categories:
>
> i. Formal or semantic changes, which should not be opposed.
>
> ii. Changes which give greater precision to the charge or its particulars, either by narrowing the allegation or identifying times, dates or places with greater particularity or detail. Such amendments will normally be allowed, even during the trial.
>
> iii. Substantive changes, which seek to add fresh allegations amounting either to separate charges or to a new allegation in respect of an existing charge.[23]

24. As to the permissibility or otherwise of the third category, the Appeals Chamber had this to say:

> Amendments in the third category will be carefully scrutinised and call for clear justification if they are to be allowed once the trial is underway. The Prosecution at this stage must satisfy the court not only that the substantial amendments cause no prejudice to the defence but that they will not delay or interrupt the trial. Once a criminal trial has begun it should proceed with as little distraction as possible to its conclusion on the Indictment as opened by the Prosecution. In inquisitorial systems and civil trials there is more flexibility, but it is fundamental to the adversarial system of criminal justice that once a trial is underway with live witnesses it should proceed straight-forwardly without change of goal-posts.[24]

25. We would like, in this regard to refer to the case of *Prosecutor v. Muhimana*, where the Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") stressed that "the fundamental issue in relation to granting leave to amend an indictment is whether the amendment will prejudice the Accused unfairly".[25] On the issue as to whether any delay resulting from the amendment infringes the right of the Accused to be tried without undue delay, the Chamber in that case reasoned that this could depend upon "(i) the circumstances of the particular case, including any improper tactical advantage sought by the Prosecution, and (ii) the exceptional character of criminal

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[22] *Prosecution v. Noman, Fofana and Kondewa.*, Case No. SCSl-04-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005 ("CDF Appeals Chamber Amendment Decision"), para. 78.
[23] *Id.* para. 79.
[24] *Id.*, paras 78 and 80. See also *Prosecutor v. Niyietegeka*, Case No. ICTR-96-14-T, Decision on Prosecutor's Request for Leave to file an Amended Indictment, 21 June 2004, para. 33.
[25] *Prosecutor v. Muhimana*, Case No. ICTR-1995-1B-I, Decision on Motion to Amend the Indictment, 21 January 2004, para. 4.

proceedings involving war crimes, including the general complexity and difficulties necessarily inherent in the investigation of such crimes".[26]

IV. EVALUATION OF MERITS OF THE APPLICATION

26. In evaluating the merits of the application, the Chamber considers it necessary, to address first, the Prosecution's contentions as regards "Proposed Amendment A". The amendments sought here are in respect of paragraphs 48, 62, and 80 of the existing Amended Consolidated Indictment so that the words "Between about 14 February 1998 and 30 June 1998" be replaced by the words "Between about 14 February 1998 and 31 January 2000".

27. The Prosecution's submission in support of this proposed amendment is threefold: (i) that some of the witnesses who testified before the Chamber in relation to these crimes for the Kono District already gave evidence indicating or suggesting that some events may have fallen outside the specific time periods stated in the paragraphs 48, 62, and 80 of the existing Indictment; (ii) that if the Trial Chamber is satisfied beyond a reasonable doubt that an accused is criminally responsible for a particular crime to which the said paragraphs relate, the Accused must be convicted of the crime even if the evidence does not establish that the crime necessarily occurred within the specific time period stated in those paragraphs of the Indictment or even if the evidence establishes that the crime occurred outside that specific time period, (iii) that it is not seeking to add new allegations to the existing charges and that it would be good practice in the present circumstances to seek an amendment to the Indictment in order to make the stated periods consistent with the evidence already before the Chamber and give the Defence better notice and particulars of the case that the Accused has to meet.

28. On the issue of possible delay, the Prosecution contends that the application is being made at this stage of the proceedings because the evidence regarding the Kono District is still being heard and it was not possible to know previously to what extent the testimony would diverge from that known to the Prosecution at the time the Indictment was filed. It contends further that evidence relating to

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[26] *Id.* For further articulation of this general applicable standard, being variations of the same theme, see also *Prosecutor v. Bizimungu*, Case No. ICTR-98-44-PT, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision on 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004; *Prosecutor v. Karemera*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 12 December 2003. See also *Prosecutor v. Kovacevic*, IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998; *Prosecutor v. Halilovic*, Case No. IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December2004.

Kono District was heard during the first four trial sessions, and that significant evidence relevant to Kono District was heard in the fifth trial session (Witnesses TF1-272, TF1-361, TF1-360 and TF1-036), and in the sixth trial session (Witness TF1-366).

29. It is further argued by the Prosecution that witnesses it intends to call in the seventh trial session were expected to testify about events in Kono District. It therefore argues that it has not delayed in bringing the application and that there would have been little purpose in bringing it immediately after the evidence of the first witness to events in Kono District differed from the Indictment in terms of the timing of these events.

30. As already noted, each Defence Team objected to the proposed amendment. The pith and substance of the Defence submissions in support of their objection can be summed up in four propositions, namely, (i) that it is not in the interest of justice, (ii) that it is prejudicial to each Accused, (iii) that the Prosecution acted without due diligence by not promptly bringing the Motion, and (iv) that if the amendment is granted, it will unduly delay the proceedings.

31. We would like to observe that the Prosecution is making this application at a time when its case is drawing to an end. Even though it is conceded that the Court could, depending on the circumstances, grant an amendment at one stage or the other of the trial, the Chamber must advise itself properly in examining such applications, guided by the nature and substance of the amendment sought, to ensure that it could not negatively impact on the doctrine of fundamental fairness and on the rights of the Accused at this late stage of the trial.

32. In our Majority Decision in the case of *Prosecutor v. Sesay et al.*, the Prosecution's application was for leave to amend the Indictment to add a new Count related to forced marriage. The Chamber granted the amendment because it was of the opinion that "the amendment sought is not a novelty that should necessitate fresh investigations as the defence contends".[27] We further held that "[t]his is only logical because granting it would neither occasion an 'undue delay' of the trial of the accused, nor a breach of the statutory rights of the accused as provided for under the provisions of Article 17(4)(a) of the Statute".[28]

33. In the instant case, the circumstances are different. The amendment sought seeks to expand the time frames of the Indictment by about 18 months in order to align it with the evidence that has

[27] RUF Amendment Decision, *supra* note 20, para. 51.
[28] *Id.*

already been adduced by the Prosecution. The Chamber is of the opinion that if this amendment were granted, it will not only change the goal posts that were fixed by the Indictment on which the trial has so far been conducted, but will also be prejudicial to the rights of the Accused to a fair and expeditious trial and to be informed promptly of the nature, and we would say, the scope and extent of the charges against him, as guaranteed by Article 17 of the Statute of this Court.

34. The Prosecution admits that it knew of the disparity between the time frames alleged in the Amended Consolidated Indictment and the evidence that it had so far adduced, but that it was waiting for the right moment to apply for the amendment, preferably after all the evidence had been adduced.

35. In this regard, and in disallowing the Prosecution's Appeal against a refusal by the Trial Chamber to grant a motion for an amendment of the indictment, the Appeals Chamber of the ICTR had this to say in the case of the *Prosecution v. Bizimungu et al.*:

> ... amendments that narrow the indictment and thereby increase the fairness and efficiency of the proceedings should be encouraged and usually accepted ... Had the Prosecution solely attempted to add particulars to its general allegations, such an amendment might well have been allowable because of their positive impact on the fairness of the trial...[29]

36. The Chamber observes, as we did earlier on, that this amendment sought by the Prosecution does not accord with the principles and considerations enunciated in the *Sesay* case nor does it, with the *dictum* of the Justices of the Appeals Chamber of the ICTR in the *Bizimungo* case cited above.

37. It is significant, in our considered view, to note that in terms of its character and substance, Proposed Amendment A is legally different from any of the amendments falling within the three-fold category of the CDF Appeals Chamber Amendment Decision. In the present situation, the Chamber is confronted with a proposed amendment that is fundamentally different in the sense that it seeks judicial endorsement of the exercise of a prosecutorial discretion, at such an advanced stage of the trial, to reconcile a divergence or discrepancy between the evidence adduced on highly contentious matters and the allegations as to material times in respect of such matters in the Indictment.

38. Guided by the law on the subject of indictments as already enunciated, and putting in judicial focus, the respective contentions and submissions of the Prosecution and the Defence specifically in

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[29] *Prosecutor v. Bizimungo et al.*, Case No. ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004, paras 19-20.

relation to Proposed Amendment A, the clear issues for determination are: (i) whether the Prosecution acted with due professional diligence in bringing the Motion at the time it did, (ii) whether the proposed amendment will amount to new charges or new allegations, (iii) whether granting the said amendment sought will unfairly prejudice the Accused, and (iv) whether granting the said amendment will serve the overall interests of justice.

39. Addressing the first issue, that is whether the Prosecution acted with due professional diligence in bringing the Motion at the time it did, the Chamber opines that even though "in principle", an indictment "may be amended at any stage of the proceedings"[30] such latitude as is granted to the Prosecution in applications of this type is only permissible "within the confines of the law and by respecting, not only the legal protection accorded to the Accused by the Statute, but also, the principle of 'a fair and expeditious trial'."[31] It is equally pertinent, from the Chamber's perspective, that such prosecutorial latitude be subject, amongst other factors, to the limited time mandate dynamic of the Court. On this specific issue, we have had occasion to remark that:

> ... what could amount to an "undue delay" in trying an accused is certainly more demanding, and we would say that it really means "a much shorter time frame" that may be longer in municipal judiciaries which are institutional monuments that do not wither away with time like international criminal tribunals such as ours, do. Extreme expeditiousness in trying the Accused Persons should therefore be, and is in fact, our watchword .....while we remain permanently preoccupied by, and still determined in ensuring that justice to appear credible and to be so perceived, should not only be done, but should manifestly and undoubtedly be seen to have been done.[32]

40. In support of the application, the Prosecution argues that it was not possible, prior to the time of the hearing of the evidence regarding the Kono District to discern the extent to which the testimony would diverge from that known to the Prosecution at the time the Indictment was filed. This contention, in the Chamber's view, on its face, is far-reaching in its implications in so far as the delay factor is concerned in that it implies the enjoyment of an unfettered latitude by the Prosecution to seek an amendment at any time there is a divergence between the evidence known to the Prosecution at the time of the filing of the Indictment and that given at the trial. This proposition, if upheld, would amount to granting an absolute discretion to the Prosecution to align the evidence with the charges at any stage of the trial. This has never been the law. We therefore reject that argument.

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[30] See CDF Appeals Chamber Amendment Decision, *supra* note 22, para. 78.
[31] CDF Amendment Decision, *supra* note 20, para. 52.
[32] *Id.*, para. 53.

41. In the Chamber's view, a delay of this nature in seeking the amendment, is not acceptable in that it clearly evidences lack of due diligence on the part of the Prosecution to act with promptitude in seeking the said amendment. The records disclose, for instance, that Witness TF1-304 testified before the Trial Chamber between the 12th and 17th of January, 2005, while Witness TF1-012 testified between the 2nd and the 4th of February, 2005. Other witnesses testified as early as April 2005.[33]

42. By parity of reasoning, the twofold contention of the Prosecution that it would have been of little purpose to seek the proposed amendment after the evidence of the first witness had been addressed,[34] and that it was necessary to wait after the relevant witnesses have testified,[35] is likewise legally untenable since the Prosecution did have notice from the time of the testimonies of the first witnesses relating to the expanded time frames in respect of the events in the Kono District, and, therefore, could have exercised due professional diligence in notifying the Chamber and the Defence of the expanded time frames, and thus be in conformity with the principle of equality of arms and respect for the right of each Accused to be promptly informed of the case against him. We opine that the principle that amendments can be granted at any time is not absolute. It is subject to the two aforementioned statutory principles. Where a late amendment infringes the principle of equality of arms and the statutory right of an accused to be informed promptly of the nature of the case against him, it will be unconscionable to grant the amendment. In support of this reasoning, we adopt the view taken by the Appeals Chamber of the ICTR in the case of *Prosecutor v. Muvunyi*, where it was held as follows:

> Under some circumstances, the Prosecution might justifiably wait to file an amendment while it continues its investigation so as to determine whether further evidence either strengthens its case or weakens it. ... Where the Prosecution has delayed unnecessarily in bringing particular allegations, and this delay has caused prejudice to the defendant, it is

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[33] For the various witnesses mentioned by the Prosecution as giving their testimony relating to events in Kono District falling outside the current time periods of the Amended Consolidated Indictment, see Motion, para. 14 and *id.*, Annex A. In addition, Witness TF1-263 testified between the 6th and the 11th of April, 2005; Witness TF1-141 testified between the 11th and the 19th of April, 2005; Witness TF1-363 testified between the 19th and the 26th of April, 2005;Witness TF1-272 testified on the 5th of July, 2005; Witness TF1-361 testified between the 11th and the 19th of July, 2005; Witness TF1-360 testified between 19th and the 26th of July, 2005; and Witness TF1-036 testified between the 27th of July and the 3rd of August, 2005.

[34] See Motion, para. 14.

[35] See Reply to *Sesay* Response, para. 15.

within the Trial Chamber's discretion to find that this delay constitutes sufficient ground to refuse and amendment to an indictment.[36]

43. In the light of the foregoing analyses of the applicable principles of law on the subject of amendment of indictments, the factual state of the records as to the protracted time lapse of about 7 months, as a minimum, to 13 months, as a maximum,[37] between the discovery of the divergence between the testimonial evidence and the alleged time frames in the Indictment, and the filing of the Motion, and our reasoning in respect of the first issue for determination, we hold that it logically follows, as regards the second, third, and fourth issues for determination as articulated, that it would be unfair and prejudicial to the Accused herein to grant Proposed Amendment A. To do so would unleash an unpredictable chain of procedural possibilities regarding the protection and guarantees of the rights of the Accused under our Rules of Procedure and Evidence occasioning undue and protracted delay of the trial especially having regard to the advanced stage we have now reached in the proceedings. The Chamber, accordingly, refuses leave in respect of Proposed Amendment A.

44. In the case of Proposed Amendment B, the majority of this Chamber agrees with the Prosecution that the changes sought are of a semantic nature with no adverse impact on the rights of the Accused and fall within the ambit of the first category of amendments to indictments as indicated by the Appeals Chamber.[38] Such amendment will merely correct the current form of the Amended Consolidated Indictment and will not touch upon its substance. We accordingly, grant Proposed Amendment B.

VI. DISPOSITIONS

44. Proposed Amendment B is allowed to proceed as it is non-contentious.

45. Having found that the Prosecution did not act with the due professional diligence in bringing forward Proposed Amendment A in a timely manner and that this constitutes undue delay, the Motion fails in this regard.

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[36] *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005, 12 May 2005, para. 51. See also Id., Case No. ICTR-00-55A-PT, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, 23 February 2005, paras 43-50.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

HEREBY GRANTS THE MOTION IN PART solely with reference to Proposed Amendment B, and accordingly:

ORDERS that the Prosecution shall file by no later than Wednesday, the 2nd of August 2006 at 12:00pm, a corrected version of the Amended Consolidated Indictment, to be marked as "Corrected Amended Consolidated Indictment" which will become the Indictment under which the trial shall proceed;

ORDERS that the Corrected Amended Consolidated Indictment shall be immediately and personally served to each of the Accused pursuant to Rule 52 of the Rules, as well as to each of their respective Defence Counsel;

ORDERS that the current Amended Consolidated Indictment shall be thereafter marked "not to be proceeded with."[39]

DISMISSES THE REMAINING OF THE MOTION with reference to Proposed Amendment A.

Hon. Justice Benjamin Mutanga Itoe appends a Separate Dissenting Opinion to the present Decision with sole reference to Proposed Amendment B.

Done at Freetown, Sierra Leone, this 31st day of July 2006

Hon. Justice Benjamin Mutanga Itoe | Hon. Justice Bankole Thompson, Presiding Judge, Trial Chamber I | Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]

[39] See *supra* note 30.
[38] See CDF Appeals Chamber Amendment Decision, *supra* note 22, para. 79. See also *infra*, para. 23.
[39] See also CDF Appeals Chamber Amendment Decision, supra note 22, para. 89; *Prosecutor v. Taylor*, Case No. SCSL-03-01-I, Decision on Prosecution's Application to Amend the Indictment and on Approval of Amended Indictment, 16 March 2006, para. 12.

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TRIAL CHAMBER I

Before: Hon. Justice Bankole Thompson, Presiding Judge
Hon. Justice Pierre Boutet
Hon. Justice Benjamin Mutanga Itoe

Registrar: Mr. Lovemore G. Munlo SC

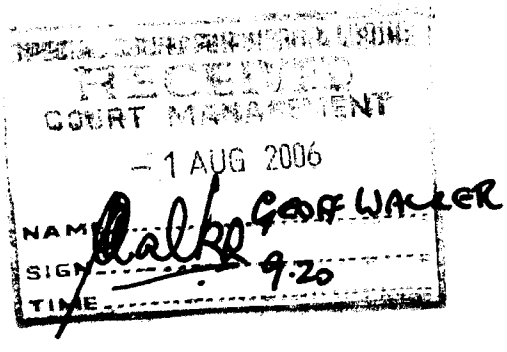
Date: 31st of July, 2006

PROSECUTOR Against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

Public Document

PARTIALLY DISSENTING OPINION OF HON. JUSTICE BENJAMIN MUTANGA ITOE ON THE CHAMBER DECISION ON PROSECUTION'S APPLICATION FOR LEAVE TO AMEND THE INDICTMENT

Office of the Prosecutor:
James Johnson
Peter Harrison



Defence Counsel for Issa Hassan Sesay:
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:
Shekou Touray
Charles Taku
Melron Nicol-Wilson

Court Appointed Counsel for Augustine Gbao:
Andreas O'Shea
John Cammegh

TRIAL CHAMBER I ("Trial Chamber I") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Bankole Thompson, Presiding Judge, Hon. Justice Pierre Boutet and Hon. Justice Benjamin Mutanga Itoe;

SEIZED of the Prosecution's Application for Leave to Amend Indictment filed on the 20th of February, 2006, and in which it sought 2 Amendments, namely, Proposed Amendment A and Proposed Amendment B;

MINDFUL of the Chamber's Unanimous Decision dated the 31st July, 2006, refusing to grant leave to amend in respect of Proposed Amendment A as solicited by the Prosecution;

MINDFUL of the Chamber's Majority Decision dated the 31st of July, 2006, granting Proposed Amendment B, as solicited by the Prosecution;

CONSIDERING that Hon. Justice Benjamin Mutanga Itoe is not of the opinion that Proposed Amendment B should be granted, and that it should, as was the case with Proposed Amendment A, also have been denied even though the Defence acquiesced and consented to the granting of the said Amendment B;

NOW THEREFORE, I, HON. JUSTICE BENJAMIN MUTANGA ITOE, DO HEREBY ISSUE THE FOLLOWING PARTIAL DISSENT ONLY IN RELATION TO THE CHAMBER'S MAJORITY DECISION TO GRANT THE PROSECUTION'S APPLICATION IN RELATION TO PROPOSED AMENDMENT B.

1. As I have already indicated, this Dissent is based mainly on the granting, by the Chamber's Majority Decision, of Leave to Amend the Indictment in relation to Proposed Amendment B and on the Orders made by the Majority but only in relation to the implementation of the Majority Decision to include and to incorporate Proposed Amendment B into what the Decision has characterised as the "Corrected Amended Consolidated Indictment".

2. In our unanimous Decision refusing the Prosecution leave to introduce Proposed Amendment A, we premised our reasoning on the necessity for applications to amend Indictments to have due regard to the element of timeliness.

3. In the Chamber Majority Decision, Amendment B is characterised as merely semantic and that it should therefore ordinarily be granted.

4. I do not, with respect, share this view. I am humbly of the view that an amendment, be it semantic as this instant one is characterized to be, or in its simplest and acceptable form, is still an amendment for purposes of the proceedings and that the procedural fall-outs in the process resulting or arising from such an amendment, should not be ignored by The Chamber.

5. In fact, if the Proposed Amendment B which is now referred to as being merely semantic were not important to the case for the Prosecution, it would not have made an application to seek that amendment. In fact, I am of the opinion that granting leave to include Proposed Amendment B certainly, and notwithstanding the Defence's waiver to object to it, gives a tactical advantage, however slight, to the Prosecution, a factor which clearly motivated their seeking the amendment which they, in any event, would not have sought if they were very sure that the Indictment, without Proposed Amendment B, was irreproachable.

6. It is and has always been my view, that once any new feature is added to an existing indictment as is the case with Proposed Amendment B, the Indictment, at least for the relevant Count in which it is introduced, becomes a new Count and should accordingly be subjected to the procedural formalities of Rule 61 of the Rules of Procedure and Evidence.

7. This is the view I took in my Dissenting opinion in the Hinga Norman Case in relation to the Accused's Application for Service of the Indictment and Rearraignment.[1] I would like to recall here that this was a situation where the Accused complained of facing extensive new allegations and new geographical locations in the Consolidated Indictment filed by the Prosecution without a formal application for leave to amend and for which he was not called upon by the Chamber to plead, and this, not even after the Decision of the Appeals Chamber on this matter dated the 16th of May, 2005.[2]

8. My understanding of this Appeals Chamber Unanimous Decision is that it approved the principle and credible option of a rearraignment of the Accused by Our Chamber on the Consolidated Indictment. In fact, from a reading through the excerpts of this Unanimous Decision, it can be inferred that the Learned Justices of the Appeals Chamber, were in favour of a rearraignment so that the rights of the Accused should, as they directed, not be "***incommoded***".

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[1] *Prosecutor v. Norman, Fofana and Kondewa*, Case No SCSL-04-14-T, Dissenting Opinion of Hon. Judge Benjaming Muranga Itoe, Presiding Judge, on the Chamber Majority Decision Supported by Hon. Judge Bankole Thompson's Separate but Concurring Opinion , on the Motion Filed by the First Accused, Samuel Hinga Norman for Service and Arraignment on the Second Indictment, 29 November 2004.

[2] *Id.*, Case No. SCSL-04-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005.

9. The Appeals Chamber had this to say on the controversy as to whether the Consolidated Indictment was New or not.

> ... It is a somewhat metaphysical approach to say that each of the 3 Indictments are 'essentially subsumed' in a Consolidated Indictment. The existential position is that the fourth Indictment (that is the Consolidated Indictment) is certainly different and new.[3]

10. Indeed, if the Indictment in the instant case were not New following the Majority Decision to grant Proposed Amendment B, there would be no necessity for this Majority Decison to order as follows:

> 1. "That the Prosecution shall file by no later than Wednesday, the 2nd of August, 2006, at 12:00pm a corrected version of the Amended Consolidated Indictment to be marked as 'Corrected Amended Consolidated Indictment' which will become the Indictment under which the trial shall proceed.";
>
> 2. "That the Corrected Amended Consolidated Indictment shall be immediately and personally served to each of the Accused pursuant to Rule 52 of the Rules as well as to each of their Respective Defence Counsel."; and
>
> 3. "That the Consolidated Indictment shall be thereafter marked 'not to be proceeded with'."

REARRAIGNMENT

11. One of the issues of principle which, as far as I am concerned, has created the divergence of opinion between myself and the Majority Opinion, is that I am of the view that there should be a rearraignment of the Accused on that Proposed Amendment B and that even if it were characterised as semantic or simple, it was still, in that new and amended form, a New Count for which the Accused persons had to be called upon to plead, the justification being that the simplicity of an amendment cannot be pleaded to warrant or to justify a breach of fundamental procedural imperatives of the due process, namely, a rearraignment on the New Count or on Counts as the case may be, after applications for such amendments are granted by The Chamber.

12. The Majority Opinion on the issue of rearraignment on Proposed Amendment B is that there should be no rearraignment on that Count because the Appeals Chamber did not, in the Hinga Norman Case, order a rearraignment even though it found that the Indictment was 'New'.

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[3] *Id.*, para. 70.

13. Again, I do not, with respect, share this point of view and the interpretation given by My Learned Colleagues to the Appeals Chamber Decision on this issue.

14. In the Hinga Norman Case, the Appeals Chamber approved the changes and amendments which the Prosecution had introduced without leave of the Chamber and mandated us, to "***make any appropriate Order necessary to ensure that the Defence is not incommoded***".[4]

15. Infact on this issue of rearraignment, the Appeals Chamber in that Decision observed that a pleas is not a 'once and for all' process and further, that "there is no reason in principle why a defendant's request to further appear pursuant to Rule 61 on an Amended Consolidated Indictment should be refused. It is not required by the Rules but is a short formality that cannot prejudice the Prosecution and on that basis, the Trial Chamber had a discretion to permit".

16. In the context therefore of granting powers to Our Chamber to "***make any appropriate order necessary to ensure that the Defence is not incommoded***", it is my view and conviction, that the Appeals Chamber expected Our Chamber to rearraign the Accused because a failure to do so would tantamount to violating the rights of the Accused given the facts and circumstances of the case where the Accused, according to the Appeals Chamber, were facing a New Indictment, and where at least one of them, Samuel Hinga Norman, had formally requested that he be rearraigned on this Amended Consolidated Indictment.

17. In paragraph 69 of its Decision under reference, the Appeals Chamber had this to say:

> Judge Itoe does however make an important point, both in his original concurring opinion on the Joinder decision and in his subsequent dissent in this case about the nature of the Consolidated Indictment. Assuming (as he and the other Judges did in reliance on the Prosecution representation) that there would be no significant changes, he nonetheless insisted that the Consolidated Indictment was a New Indictment, requiring the review process of Rule 47 and a further appearance and a plea pursuant to Rule 61. Review and rearraignment or further appearance would be an entirely repetitive exercise, of course if there were no significant difference between the counts and particulars in the original Indictment and those which appeared on the Consolidated Indictment.

18. Notwithstanding the clear strong finding and signal from the Appeals Chamber that the Consolidated Indictment was new, and accordingly directed Our Chamber ***to make any appropriate Orders that will not 'incommode' the Accused***, a Majority Consequential Order dated the 25th of

[4] Id., para. 77.

May, 2005, did not deem it necessary to include in that Order, a Directive that there be a rearraignment which was requested by Samuel Hinga Norman and indeed, justified and founded, following the Appeals Chamber finding that the Consolidated Indictment was new.[5]

19. Moreover, and in addition, notwithstanding the express and mandatory Directive of the Appeals Chamber that the 3 Indictments be marked 'Not to be proceeded with' following the finding that these Indictments should not be kept in the records as they had the potential, even if remote, of offending against the Rules against Double Jeopardy, it is clear from that order and I noted that the Chamber Majority Consequential Order against which I issued a dissent dated the 25th of May, 2005,[6] failed to order that 3 Indictments be so marked and withdrawn.

20. The Chamber, by its Majority Consequential Order dated the 25th day of May, 2005, and certainly in execution of the findings and directives of the Appeals Chamber in its decision dated the 18th of May, 2005, for Our Chamber to "***make any appropriate order necessary to ensure that the Defence is not incommoded***", only limited itself, in a very carefully selective manner, and without addressing other issues that had to and should have been examined and resolved following the Directive of the Appeals Chamber, to issuing only the following restricted Order:

> That pursuant to the Decision of the Trial Chamber of the 15th of March, 2005, relating to the presentation of witness testimony on the Moyamba crime base, and the Decision of the Appeals Chamber of the 18th of May , 2005 granting leave to amend the Consolidated Indictment, the Districts of 'Moyamba and Bonthe' are considered to be areas forming part of the indictment against the First Accused and therefore the evidence of witnesses who gave testimony on areas relating to the Moyamba crime base is admissible.

21. There was no Order relating to the obvious and significant issue of rearraignment nor was there one in execution of the Appeals Chamber Directive that the 3 Indictments be marked, "Not to be Proceeded With".

22. My Dissenting Opinion dated the 25th of May, 2005, was to express my rejection of the way that the Majority Consequential Order was conceived, and its incompleteness in the sense that it did not resolve the vital issues that ought to have addressed.

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[5] *Id.*, Case No. SCSL-04-14-T, Consequential Order on Amendment of the Consolidated Indictment, 25 May 2005.

[6] *Id.*, Dissenting Order of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Consequential Order Dated the 25th of May, 2005, on the Decision of the Appeals Chamber Dated the 16th of May, 2005, relating to the Amendment of the Consolidated Indictment, 25 May 2005.

23. In conclusion, I would reiterate the following position:

a. That I agree with Our Unanimous Decision to deny the Prosecution's application to incorporate Proposed Amendment A into the Indictment for reasons stated in Our Decision.

b. That I respectfully do not share the view taken by My Colleagues in the Majority Decision to grant the application to amend in relation to Proposed Amendment B which, in my opinion, should also have been denied on the same reasoning of timeliness as was Proposed Amendment A.

c. That even if Proposed Amendment B is granted, as the Majority Decision has ordered, there must be a rearraignment only on that amended Count which, because of that amendment is, in my opinion, a New Count;

d. In addition to the preceding analysis, I would add that it does not appear logical to me that we refuse to grant leave to the Prosecution to introduce Proposed Amendment A in the Consolidated Indictment on the grounds that it did not introduce them with due diligence and in a timely manner and yet, grant Proposed Amendment B when these same exigencies of diligence and timeliness, still stand as valid in the circumstances of this Decision

FOR THE ABOVE REASONS,

I DO ORDER AS FOLLOWS:

1. **THAT** the Proposed Amendment B, like Proposed Amendment A is denied in its entirety and that the Application by the Prosecution is accordingly dismissed;

2. **THAT** even if Proposed Amendment B is granted by the Chamber Decision, there should be, as indicated in that Decision, not only, Service of the Amended Indictment to the Accused and Counsel, but also, a rearraignment of the Accused and only on the Count that has been affected by the granting of the application to amend Proposed Amendment B.

Done at Freetown, Sierra Leone, this 31st day of July, 2006

Hon. Justice Benjamin Mutanga Itoe

[Seal of the Special Court for Sierra Leone]