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SCSL-2004-14-T
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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Judge Emmanuel Ayoola, Presiding
Judge A. Raja N. Fernando
Judge George Gelaga King
Judge Geoffrey Robertson, QC
Judge Renate Winter

Registrar: Mr Robin Vincent

Date filed: 30 August 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

CASE NO. SCSL – 2004 – 14 – T

PROSECUTION APPEAL AGAINST THE TRIAL CHAMBER'S DECISION OF 2 AUGUST 2004 REFUSING LEAVE TO FILE AN INTERLOCUTORY APPEAL

Office of the Prosecutor:
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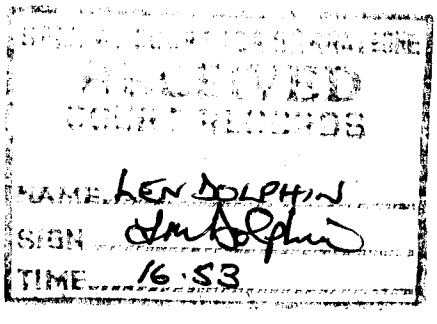

SPECIAL COURT FOR SIERRA LEONE
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1. The Prosecution applies herewith to the Appeals Chamber to appeal against the Trial Chamber's decision of 2 August 2003 (the "**Impugned Decision**"),[1] in which the Trial Chamber refused a Prosecution request under Rule 73(B) for leave to file an interlocutory appeal.

I. BACKGROUND

2. On 9 February 2004, the Prosecution filed a request before the Trial Chamber to amend the Indictment in these proceedings (the "**Prosecution Amendment Request**").[2] In this request, the Prosecution sought to include additional charges based on acts of sexual violence committed against women, to extend the timeframes and locations of certain existing charges, and to make certain consequential amendments to the Indictment. The amendments were requested as the result of additional evidence uncovered by the Prosecution in the course of its ongoing investigations.

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[1] *Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, 2 August 2004, Registry Pages ("**RP**") 8862-8867.

[2] "Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", filed by the Prosecution on 9 February 2004, RP 102-218.

3. The Prosecution Amendment Request was refused by the Trial Chamber, in a decision dated 20 May 2004 (the "**Trial Chamber Amendment Decision**").[3] That decision was given by majority, with Judge Boutet dissenting.

4. On 4 June 2004, the Prosecution applied to the Trial Chamber pursuant to Rule 73(B) of the Rules of Procedure and Evidence (the "**Rules**") for leave to file an interlocutory appeal against the Trial Chamber Amendment Decision (the "**Prosecution Leave to Appeal Request**").[4] The Accused filed a response to that request, to which the Prosecution filed a reply (the "**Prosecution Leave to Appeal Reply**").[5]

5. The Prosecution Leave to Appeal Request was refused by the Trial Chamber in a decision of 2 August 2004 (the "**Impugned Decision**" or "**Majority Opinion**").[6] That decision was also given by majority, with Judge Boutet dissenting.[7] The Prosecution now applies herewith to the Appeals Chamber to appeal against the Impugned Decision.

II. ARGUMENT

(1) The jurisdiction of the Appeals Chamber to entertain this appeal

6. There is no provision in the Rules which expressly permits a party to appeal to the Appeals Chamber against a decision of the Trial Chamber under Rule 73(B) refusing leave to file an interlocutory appeal. However, it is clear from the case law of the ICTY and ICTR that the Appeals Chamber has the power to hear appeals in certain circumstances, even where no appeal is expressly provided for in the Statute or Rules. For instance, in the *Tadic* case, a defence counsel had been found guilty of contempt of the ICTY by the Appeals Chamber ruling in the first instance. Although the Rules at that time made no provision for an appeal against such a first-instance decision of the Appeals Chamber, an appeal was in fact entertained by a differently constituted Appeals Chamber.[8] In the *Brdanin and Talic* case, a

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[3] *Decision on Prosecution Request for Leave to Amend the Indictment*, dated 20 May 2004, RP 7001-7040.

[4] "Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", 4 June 2004, RP 7234-7250.

[5] "Prosecution Reply to the Defence Joint Response to Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on Request for Leave to Amend the Indictment", filed by the Prosecution on 18 June 2004, RP 7479-7533.

[6] See footnote 1 above.

[7] *Dissenting Opinion of Judge Pierre Boutet on Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, dated 5 August 2004, RP 8893-8903, ("**Judge Boutet's Dissenting Opinion**").

[8] *Prosecutor v. Tadic, Appeal Judgement on Allegations of Contempt by Prior Counsel*, Case No. IT-94-1-A-AR77, Appeals Chamber, 27 February 2001. Only one of the five members of the Appeals Chamber in this decision (Judge Wald) was of the view that no appeal could be heard in the circumstances in the absence of any authorisation in the Statute or Rules. (Subsequent to this decision, the Rules of the ICTY were amended to provide expressly that where a person is found to be in contempt of the Tribunal by the Appeals Chamber, the person concerned can appeal to a differently constituted Appeals Chamber: see present Rule 77(K) of the ICTY Rules.)

Trial Chamber of the ICTY rejected a motion filed by a witness who sought to have a subpoena set aside on the ground that he enjoyed a testimonial privilege as a journalist. The Appeals Chamber permitted the journalist to appeal against that decision, and ultimately allowed the appeal, notwithstanding the lack of any legislative provision for appeals by witnesses against orders addressed to them.[9] In the *Milosevic* case, the Appeals Chamber entertained an interlocutory appeal brought by *amici curiae*, even though it acknowledged that "Not being a party to the proceedings, the *amici* are not entitled to use Rule 73 [of the Rules of the ICTY] to bring an interlocutory appeal."[10]

7. Indeed, the Appeals Chamber of the ICTY has gone even further. It has also expressly held that the Appeals Chamber has an inherent power to reconsider any of its own decisions, whether an interlocutory decision, or even a final judgement. This power can be exercised where the Appeals Chamber, in its discretion, is persuaded that the judgement or decision sought to be reconsidered has led to an injustice.[11] The Appeals Chamber of the ICTY has said that this power is an aspect of its inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by the Statute is not frustrated and that its basic judicial functions are safeguarded. This power of the Appeals Chamber to reconsider its own decisions has been held to be necessary to address the prospect of any injustice resulting from the fact that the ICTY has only one level of appeal which is not a *de novo* hearing.[12]

8. The Prosecution does not suggest that the Appeals Chamber has a general power to hear any appeal from any decision of a Trial Chamber at any time and in any circumstances, regardless of whether or not the Statute or Rules provide for it. Indeed, the Appeals Chamber of the ICTY and ICTR has on various occasions rejected appeals that had no basis in the Statute or Rules of those Tribunals.[13] However, the Prosecution submits that the case law of

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[9] *Prosecutor* v. *Brdanin and Talic, Decision on Interlocutory Appeal,* Case No. IT-99-36-AR73.9, Appeals Chamber, 11 December 2002.

[10] *Prosecutor v. Milosevic, Decision on the Interlocutory Appeal by the* Amici Curiae *Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case*, Case No. IT-02-54-AR73.6, Appeals Chamber, 20 January 2004, paras. 4-5.

[11] *Prosecutor v. Delalic et al. (Celebici case), Judgement on Sentence Appeal*, Case No. IT-96-21-A*bis*, Appeals Chamber, 8 April 2003, para. 49; and also the *Separate Opinion of Judge Shahabuddeen*, paras. 10-15 (but see the *Separate Opinion of Judges Meron and Pocar*, who considered that it was unnecessary to decide this question). In relation to the International Criminal Court ("**ICC**"), it has also been said that other remedies of "reconsideration" or "review" could be fashioned in the exercise of the Appeals Chamber's inherent jurisdiction: William A. Schabas, *An Introduction to the International Criminal Court* (2001), p.135.

[12] *Celebici Sentencing Appeal Judgement*, paras. 50-52.

[13] See *Dragan Opacic, Decision on Application for Leave to Appeal*, Case No. IT-95-7-Misc.1, Bench of the Appeals Chamber, 3 June 1997 (in which a Bench of the Appeals Chamber refused to grant leave to appeal to a witness); *Prosecutor* v. *Bagosora and 28 Others, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Théoneste Bagosora and 28 Others,* Case No. ICTR 98-37-A, Appeals Chamber, 8 June 1998 (in which the Appeals Chamber refused to permit an appeal by the Prosecution against the refusal of a judge to confirm an indictment presented by the Prosecutor for confirmation).

the International Tribunals referred to above reflects a general principle that any decision (whether of the Trial Chamber or of the Appeals Chamber), that is erroneous and that has led to an injustice, and which is not capable of being remedied by any other means, must be amenable to correction by the Appeals Chamber. It would simply be inconsistent with the judicial nature of international criminal courts and tribunals for an injustice caused by a decision of the court or tribunal itself to be incapable of being remedied in any way. Where there is no other possibility of correcting such an injustice, the Appeals Chamber must have an inherent power to intervene.

9. The need for the Appeals Chamber to exercise this inherent power will arise only very rarely at an interlocutory stage. Normally, interlocutory decisions of a Trial Chamber are capable of effective remedy (if necessary) in a post-judgement appeal. In exceptional circumstances, if an interlocutory appeal is necessary to avoid irreparable prejudice, a Trial Chamber can grant leave to appeal under Rule 73(B). In cases where the Trial Chamber, in the valid exercise of its discretion, refuses to grant leave to appeal under Rule 73(B), there is unlikely to be any basis for the Appeals Chamber to exercise its inherent power: even if the applicant for leave to appeal disagrees with the Trial Chamber's decision to refuse leave to appeal, that decision cannot be said to have caused an injustice if it is a proper exercise of the Trial Chamber's judicial discretion.

10. However, in the present case, there are reasons why the Appeals Chamber should exercise its inherent power to hear an appeal against the Impugned Decision.

    (1) The Prosecution position is that the Impugned Decision erred in the interpretation and application of the test in Rule 73(B) for determining whether to grant leave to bring an interlocutory appeal. Thus, the denial of leave to appeal was not a proper exercise of the Trial Chamber's discretion under that provision.

    (2) The effect of the alleged errors in the Impugned Decision cannot be cured by a post-judgement appeal. The Prosecution Amendment Request seeks to have additional charges against the Accused tried as part of the present trial proceedings. If the Appeals Chamber were to decide in a post-judgement appeal that the Trial Chamber should have granted leave to appeal, and that the Prosecution should have been given leave to amend the Indictment, it would by that stage obviously be impossible to include the additional charges in the present trial proceedings, which by then will have been completed.

    (3) There is no other avenue available to the Prosecution in practice to deal with the adverse effects of the Impugned Decision. The reality is that if the Prosecution is denied the possibility of filing an interlocutory appeal, and thereby denied the possibility of amending the Indictment to deal with the additional charges in the

present trial proceedings, it is highly unlikely that the Accused will be tried at all in respect of the additional charges. Moreover, the judgement in the present case will not reflect the full alleged criminal culpability of the Accused. The prejudice to the Prosecution is thus irreparable.[14]

(4) The issues at stake (in particular, the issue whether it is consistent with the objectives of the Special Court to charge gender based crimes as if they were general violence offences, and the issue of whether it is consistent with the Accused's fair trial rights to amend the Indictment) are of particular importance.

(5) If the Impugned Decision contains the errors that the Prosecution alleges, it has thus caused an injustice. Justice requires not only a fair trial for the accused, but also for the Prosecution (which acts in the interests of the international community, including the victims of crimes).[15] For the Prosecution to be erroneously deprived of an interlocutory appeal causes injustice where its practical effect is to erroneously deprive the Prosecution of the possibility of bringing important charges against the Accused, despite the existence of evidence justifying these charges.

11. It is also highly desirable that the Appeals Chamber hear this appeal, in order to give guidance on the correct interpretation and application of Rule 73(B), which is an issue of general importance to the functioning of the Special Court. The discharge of the Special Court's mandate would be hindered if, at the end of a long and expensive trial, the verdict were overturned (possibly necessitating a whole new trial) as a result of an error by the Trial Chamber that might easily have been corrected by the Appeals Chamber at an interlocutory stage. Rule 73(B) promotes the effective functioning of the Special Court, not only by filtering out unnecessary interlocutory appeals, but also by ensuring that interlocutory appeals can be brought where there are proper reasons for so doing. In the existing case law of the Trial Chamber of the Special Court,[16] there is disagreement about the correct legal test to be applied under Rule 73(B) (given Judge Boutet's dissent in the Impugned Decision, in which he expressly considered that the Trial Chamber's statement of the law in an earlier

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[14] See, in this respect, Prosecution Leave to Appeal Request, paras. 7-9; Prosecution Leave to Appeal Reply, paras. 5-7; Judge Boutet's Dissenting Opinion, at paras. 19-20.

[15] As Judge Boutet's Dissenting Opinion states (at para. 18), "Victims ... have the right to have the crimes that are committed against them prosecuted with all due respect to the Rule of Law".

[16] The other decisions of the Trial Chamber on Rule 73(B) are (1) *Prosecutor v. Sesay et al., Decision on Prosecution Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder*, Case No. SCSL-2004-15-PT, Trial Chamber, 13 February 2004 (the "***Joinder Decision***"); (2) *Prosecutor v. Sesay et al., Decision on Prosecution Application for Leave to File an Interlocutory Appeal Against Decision on Motion for Concurrent Hearing of Evidence Common to Cases*, Case No. SCSL-2004-15-PT, Trial Chamber, 1 June 2004 (the "***Common Evidence Decision***"); and (3) *Prosecutor v. Sesay et al., Decision on Application for Leave to Appeal—Gbao—Decision on Application to Withdraw Counsel*, Case No. SCSL-2004-15-T, Trial Chamber, 4 August 2004 (the "***Withdrawal of Counsel Decision***").

decision was wrong[17]). Furthermore, the decisions of the Trial Chamber on the application of Rule 73(B) do not seem to be entirely consistent.[18] Guidance cannot be found in the case law of the ICTY and ICTR, since the wording of the equivalent provisions in the Rules of the ICTY and ICTR is different. The need for an authoritative pronouncement by the Appeals Chamber on the interpretation and application of Rule 73(B) is therefore pressing.

(2) The errors in the Impugned Decision

12. Rule 73(B) confers a discretion on the Trial Chamber whether or not to grant leave to appeal. For the Appeals Chamber to intervene in the exercise of a discretion by a Trial Chamber, it must be established that the Trial Chamber:

> "has misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion."[19]

13. In the Impugned Decision, the Majority Opinion has misdirected itself as to the applicable principle and/or law in the exercise of its discretion under Rule 73(B).

14. First, in deciding whether to grant leave to file an interlocutory appeal, the Majority Opinion based its decision on its view of the merits of one of the main issues in the proposed appeal. This was the issue of whether the Prosecution had acted diligently in investigating the case and had been timely in making its request to amend the Indictment. The Prosecution Amendment Request had strenuously argued that the Prosecution had acted with due diligence and timeliness.[20] The Trial Chamber Amendment Decision disagreed, and cited a lack of diligence by the Prosecution as a principal reason for refusing the request to amend the Indictment.[21] A key issue in the proposed appeal was thus whether the Trial Chamber

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17 Judge Boutet's Dissenting Opinion, paras. 4-5.

18 See paragraphs 18 and 19, and footnote 26, below.

19 *Prosecutor v. Milosevic, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder*, Case No. IT-99-37-AR73, Appeals Chamber, 18 April 2002, para. 5 "***Milosevic Joinder Appeal Decision***"). See also *Prosecutor v. Milosevic, Decision on the Interlocutory Appeal by the* Amici Curiae *Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case*, Case No. IT-02-54-AR73.6, Appeals Chamber, 20 January 2004, para. 7; *Prosecutor v. Bizimungu, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment*, Case No. ICTR-99-50-AR50, Appeals Chamber, 12 February 2004, para. 11; *Prosecutor v. Karemera, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File Amended Indictment*, Case No. ICTR-98-44-AR73, Appeals Chamber, 19 December 2003, para. 9.

20 Prosecution Amendment Request, paras. 17-21; "Consolidated Reply to Defence Response to Prosecution Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", filed by the Prosecution on 24 February 2004, RP 405-416, paras. 21-31.

21 Trial Chamber Amendment Decision, especially paras. 54-58, 77-79.

Amendment Decision erred in finding that the Prosecution had not acted with diligence.[22] In determining whether to grant leave to appeal, the Majority Opinion held that the Prosecution's lack of diligence estopped the Prosecution from arguing that there was "irreparable prejudice" for the purposes of Rule 73(B). In making this finding, the Majority Opinion merely quotes (and thereby assumes the correctness of) various paragraphs of the Impugned Decision that the Prosecution seeks to challenge on appeal.[23] The Majority Opinion thereby effectively decides one of the main issues in the proposed appeal, and uses its decision on that issue as a reason for denying leave to appeal.

15. This is a manifest error in the application of Rule 73(B). An application for leave to appeal is only ever brought under Rule 73(B) in circumstances where the Trial Chamber has made an adverse ruling against the party making the application, and the fact that the Trial Chamber disagrees with the applicant on the merits of the decision sought to be appealed must therefore be irrelevant to whether leave to appeal should be granted. In a Rule 73(B) application, the Trial Chamber can only be concerned with whether the criteria of Rule 73(B) itself are satisfied, and not with the merits of the decision sought to be appealed.[24]

16. Secondly, the Majority Opinion erroneously proceeds from a preconception that Rule 73(B) is a "restrictive provision"[25] providing a "very limited" exception[26] that must be applied with "stringency,"[27] and that a "high threshold"[28] must be met to justify an interlocutory appeal. As noted in paragraph 11 above, Rule 73(B) serves two purposes: (1) to ensure that inappropriate interlocutory appeals are not brought; and (2) to ensure that appropriate interlocutory appeals can be brought. The Majority Opinion, like earlier decisions of the Trial Chamber, erroneously emphasises only the first of these two purposes, that is, the purpose of ensuring that "criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals."[29] The Prosecution agrees that under Rule 73(B), interlocutory appeals are intended to be the exception rather than the norm. However, in determining an application under Rule 73(B), the relevant inquiry is always whether it is appropriate to make an exception to the general rule, having regard to the criteria in Rule

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22 Prosecution Leave to Appeal Request, paras. 12-24.

23 Impugned Decision, para. 37.

24 This is clearly recognized in Judge Boutet's Dissenting Opinion, at paras. 2 and 25-26.

25 Impugned Decision, para. 23. See also *Joinder Decision*, para. 11; *Common Evidence Decision*, para. 21; *Withdrawal of Counsel Decision*, para. 37.

26 Impugned Decision, para. 23. See also *Joinder Decision*, para. 11, *Common Evidence Decision*, para. 21; *Withdrawal of Counsel Decision*, para. 37. The *Joinder Decision*, at para. 9, perhaps inconsistently used the expression "extremely limited exception".

27 Impugned Decision, para. 25.

28 Impugned Decision, para. 21. See also *Joinder Decision*, para. 10; *Common Evidence Decision*, para. 21; *Withdrawal of Counsel Decision*, para. 36.

29 Impugned Decision, para. 24. See also *Common Evidence Decision*, para. 21; *Withdrawal of Counsel Decision*, para. 38.

73(B) and the circumstances of the case. The expression "exceptional circumstances" means no more than circumstances that justify making an exception to the general rule.[30] Where there is an intention that an exception will be applied very stringently, other expressions are normally used such as "wholly exceptional circumstances"[31] or "very exceptional circumstances"[32] or "most exceptional circumstances."[33]

17. Thirdly, the Majority Opinion, like earlier decisions of the Trial Chamber, erroneously treats "exceptional circumstances" and "irreparable prejudice" as two distinct requirements of Rule 73(B), that must both be separately satisfied.[34] Thus, in the present case, the Majority Opinion considered that because "exceptional circumstances" had not been established, the Trial Chamber was not obliged judicially to consider the issue of "irreparable prejudice".[35] This approach is incorrect as a matter of law. It is submitted that the Trial Chamber is always required to look at all of the circumstances of the case as a whole, in order to determine whether the requirements of Rule 73(B) as a whole are met. As Judge Boutet's Dissenting Opinion indicates,[36] the existence of irreparable prejudice may of itself constitute exceptional circumstances. A Trial Chamber should not be able to reject an application under Rule 73(B) on the ground of lack of "exceptional circumstances," without even addressing its mind to the grave and irreparable prejudice that a party would suffer if the decision sought to be appealed was wrong and remained uncorrected.

18. The Majority Opinion also failed to give sufficient weight to relevant considerations. It gave no consideration to the issue of irreparable prejudice (apart from stating that the Prosecution was estopped from raising this point, which, for the reasons given above, is erroneous). Nor did the Majority Opinion give sufficient weight to the fact that the proposed appeal involved difficult and uncertain issues (as evidenced by the fact that Judge Boutet dissented in the Impugned Decision), on which the guidance of the Appeals Chamber was desirable.[37] In this respect, the Impugned Decision seems inconsistent with the Trial Chamber's *Withdrawal of*

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30 See, e.g., *Prosecutor v. Delalic et al. (Celebici), Decision on Motion for Provisional Release Filed by the Accused Esad Landzo*, Case No. IT-96-21-T, Trial Chamber, 16 January 1997, para. 33:"The Trial Chamber accordingly considers that an 'exceptional circumstance' to a general rule is a condition or situation enabling a modification to, or indeed exclusion of, the application of the general rule."

31 See *Prosecutor v. Tadic, Decision on Motion for Review*, Case No. IT-94-1-R, Appeals Chamber, 30 July 2002, paras. 26-27.

32 *Kanyabashi v. Prosecutor, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I; Joint Separate and Concurring Opinion of Judge Wang and Judge Nieto-Navia*, Case No. ICTR-96-15-A, Appeals Chamber, 3 June 1999, para. 13.

33 See *Prosecutor v. Barayagwiza, Decision*, Case No. ICTR-97-19-A, Appeals Chamber, 3 November 1999, footnote 170.

34 Impugned Decision, para. 21. See also *Joinder Decision*, para. 10, *Common Evidence Decision*, para. 21; *Withdrawal of Counsel Decision*, para. 36.

35 Impugned Decision, para. 34. The same approach was taken in *Joinder Decision*, para. 15 (first sentence); *Common Evidence Decision*, para. 24.

36 Judge Boutet's Dissenting Opinion, para. 20.

37 See Impugned Decision, paras. 26-27.

Counsel Decision, in which it held that the desirability of guidance from the Appeals Chamber can be an "exceptional circumstance" for the purposes of Rule 73(B).[38] Furthermore, even if a dissenting opinion is not necessarily of itself an exceptional circumstance, it is on any view a factor to be considered together with other circumstances.[39] The Trial Chamber failed to give due weight to the circumstances as a whole.[40]

19. Similarly, even if the high profile nature of gender based crimes was not the "sole determinant or overriding variable," and even if the obligation of the Prosecution to prosecute to the full extent of the law was not the "paramount consideration,"[41] these were certainly factors to which the Trial Chamber should have given due weight in considering the circumstances as a whole. The Majority Decision may be inconsistent with the *Withdrawal of Counsel Decision*, which suggests (at paras. 53-57) that importance of the issues at stake may be an exceptional circumstance.

20. In its discussion of exceptional circumstances, the Majority Opinion says (at para. 32) that the Prosecution's argument "that no delay would be occasioned" by an interlocutory appeal was "highly speculative." However, the Prosecution did not suggest that the fact that no delay would be caused was an "exceptional circumstance". Rather, this was a factor to be taken into account in the exercise of the Trial Chamber's discretion under Rule 73(B). The Prosecution did not say that there would definitely be no delay, but merely that there "need not" be a delay.[42] Even if it could not be known for certain that an interlocutory appeal would cause no delay, there is no particular reason for thinking that an interlocutory appeal would necessarily cause any particularly significant delay, and this was a relevant factor to which the Trial Chamber should have given due weight.

(3) The remedy requested by the Prosecution

21. For the reasons given above, in the Impugned Decision the majority erred in the exercise of the Trial Chamber's discretion under Rule 73(B). Accordingly, the Appeals Chamber can substitute its own exercise of discretion in the place of the discretion exercised by the Trial Chamber.[43] For the reasons given above, and for the reasons given in the Prosecution Leave to Appeal Request and the Prosecution Leave to Appeal Reply, and for the reasons given in Judge Boutet's Dissenting Opinion, the Appeals Chamber is requested to reverse the Impugned Decision of the Trial Chamber, and to exercise its discretion to hold that the

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38 *Withdrawal of Counsel Decision*, paras. 53-57.

39 See Judge Boutet's Dissenting Opinion, para. 16.

40 See Judge Boutet's Dissenting Opinion, para. 16, indicating that the cumulative effect of all the circumstances should also be considered.

41 Impugned Decision, para. 29.

42 Prosecution Leave to Appeal Request, para. 10.

43 *Milosevic Joinder Appeal Decision*, footnote 19 above, para. 4.

Appeals Chamber will entertain an interlocutory appeal against the Trial Chamber Amendment Decision.

22. In the event that the Appeals Chamber so decides, the Prosecution's submissions on appeal against the Trial Chamber Amendment Decision are set out in the Annex to the present filing. The Prosecution acknowledges that the submissions in the Annex only fall to be considered by the Appeals Chamber if the Appeals Chamber first decides to allow the appeal against the Impugned Decision. The inclusion of the Annex to this filing in no way seeks to presume the outcome of the Appeals Chamber's consideration of the submissions above. Rather, the submissions in the Annex are included at this stage in order to avoid unnecessary delay in the event that the Appeals Chamber allows the appeal against the Impugned Decision.

CONCLUSION

23. For the reasons given above, the Prosecution requests the Appeals Chamber:

(1) To find that it has the power to entertain an appeal against the Impugned Decision, and to exercise that power;

(2) To reverse the Impugned Decision, and to hold that the Appeals Chamber will entertain an interlocutory appeal against the Trial Chamber Amendment Decision;

(3) To proceed to deal with the interlocutory appeal against the Trial Chamber Amendment Decision, and in particular:

(i) to order that the submissions in the Annex to this filing shall be the Prosecution submissions in the appeal against the Trial Chamber Amendment Decision; and

(ii) to fix a date for the filing of Defence responses to those submissions.

Freetown, 30 August 2004.

For the Prosecution,

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James C. Johnson

Christopher Staker

Adwoa Wiafe

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Judge Emmanuel Ayoola, President
Judge A. Raja N. Fernando
Judge George Gelaga King
Judge Geoffrey Robertson, QC
Judge Renate Winter

Registrar: Mr Robin Vincent

Date filed: 4 August 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA

CASE NO. SCSL – 2004 – 14 – T

ANNEX TO THE PROSECUTION APPEAL AGAINST THE TRIAL CHAMBER'S DECISION OF 2 AUGUST 2004 REFUSING LEAVE TO FILE AN INTERLOCUTORY APPEAL

PROSECUTION SUBMISSIONS ON APPEAL AGAINST THE TRIAL CHAMBER'S DECISION OF 20 MAY 2004

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PROSECUTION SUBMISSIONS ON APPEAL AGAINST THE TRIAL CHAMBER'S DECISION OF 20 MAY 2004

I. INTRODUCTION

1. The Prosecution presents these submissions on appeal against the Trial Chamber's *Decision on Prosecution Request for Leave to Amend the Indictment*, dated 20 May 2004 (the "**Decision**"), in the event that the Appeals Chamber entertains this appeal.

2. The Decision (by majority) rejected a request by the Prosecution pursuant to Rule 50(A) and Rule 73(A) of the Rules of Procedure and Evidence (the "**Rules**") to amend the Indictment in this case (the "**Prosecution Amendment Request**").[1] For the reasons given below, the Prosecution submits that in the Decision the majority erred in the exercise of the Trial Chamber's discretion.[2]

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[1] "Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", filed by the Prosecution on 9 February 2004, Registry Pages ("**RP**") 102-218.

[2] For the standard of review in an appeal against an exercise of a discretion by the Trial Chamber, see *Prosecutor v. Milosevic, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder*, Case No. IT-99-37-AR73, Appeals Chamber, 18 April 2002 (the "***Milosevic Joinder Appeal Decision***"), para. 5. See also *Prosecutor v. Milosevic, Decision on the Interlocutory Appeal by the* Amici Curiae *Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case*, Case No. IT-02-54-AR73.6, Appeals Chamber, 20 January 2004, para. 7.

II. ARGUMENT

(1) General submissions

3. The Prosecution's reasons for seeking an amendment to the Indictment are set out in the Prosecution Amendment Request.[3] The amendments were requested as the result of additional evidence uncovered by the Prosecution in the course of its ongoing investigations. The considerations underlying the request include:

   (1) **The obligation of the Prosecutor to prosecute to the full extent of the law.** This obligation has been recognised in the case law of the ICTY and ICTR.[4] The obligation does not require the Prosecution to prosecute every person for every crime of which the Prosecution has evidence. However, it does require the Prosecution to exercise its prosecutorial discretion in accordance with the mandate of the Special Court to "prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law."[5] It would be inconsistent with this mandate for the Prosecution only to prosecute low-level perpetrators, or only to prosecute high-level perpetrators for the most minor of their crimes. If the Prosecution has additional evidence of a particularly serious crime committed by one of its Accused, that crime should be prosecuted (including by way of an amendment to an existing indictment, if necessary) unless other legitimate interests militate against this.

   (2) **The seriousness with which the international community regards gender based crimes in armed conflict and the inadequacy of prosecuting such crimes as ordinary crimes of violence.** The seriousness of such crimes is reflected, for instance,

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[3] And see also the "Consolidated Reply to Defence Response to Prosecution Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", 24 February 2004, RP 405-416 (the "**Prosecution Amendment Reply**").

[4] See *Prosecutor v. Naletilic and Martinovic, Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Naletilic's Preliminary Motion to the Amended Indictment*, Case No. IT-98-34-PT, Trial Chamber, 14 February 2001 ("The jurisprudence of the ICTY and the ICTR on the exercise of the discretion contained in Rule 50 thus demonstrates that a decision to accept an amendment will normally be forthcoming unless prejudice can be shown to the accused. This recognises the duty of the Prosecutor to prosecute the accused to the full extent of the law"); *Prosecutor v. Kajelijeli, Decision on Prosecutor's Motion to Correct the Indictment Dated 22 December 2000 and Motion for Leave to File and Amended Indictment*, Case No. ICTR-98-44A-T, Trial Chamber, 25 January 2001 ("As to the propriety of the timing of the Prosecutor's Motion, the Chamber concurs with the jurisprudence of the Tribunal in *Prosecutor v. Musema*, ICTR-96-13-T (6 May 1999) (Decision on the Prosecutor's Request for Leave to Amend the Indictment), which held, at par. 17 that, '[...] Rule 50 of the Rules does not explicitly prescribe a time limit within which the Prosecutor may file to amend the Indictment, leaving it open to the Trial Chamber to consider the motion in light of the circumstances of each individual case. A key consideration would be whether or not, and to what extent, the dilatory filing of the motion impacts on the rights of the accused to a fair trial. In order that justice may take its proper course, due consideration must also be given to the Prosecutor's unfettered responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence before the Trial Chamber.'"). See also *Prosecutor v. Bizimungu et al., Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to Amend Indictment*, Case No. ICTR-99-50-AR50, Appeals Chamber, 12 February 2004, para. 13.

[5] Statute of the Special Court, Article 1(1).

in Security Council resolution 1325 of 31 October 2000,[6] and the work of the United Nations High Commissioner for Human Rights.[7] As one commentator on the ICC Statute explains, it was critical to women's human rights advocates to enumerate rape and other sexual crimes as a separate category of war crimes in its own right, since "Fitting rape within other categories of crimes such as 'inhuman or degrading treatment' as was often the case in past judicial decisions ... trivializes the extreme physical and psychological harm caused by rape."[8] Thus, where the Prosecution has evidence of gender based crimes, it is important that they be prosecuted as such.

4. It is acknowledged that in deciding the Prosecution Amendment Request, the Trial Chamber had to weigh these considerations against other important considerations, in particular the overall interests of justice and the Accused's right to an expeditious trial.[9]

5. The Trial Chamber's main reason for rejecting the Prosecution Amendment Request was that it considered that the Prosecution has not acted diligently in obtaining the evidence in question and in seeking the amendment to the Indictment. Indeed, it is evident from the reasons of the majority that the majority regarded this as the overriding consideration in its decision to reject the Prosecution request.[10] The majority went so far as to suggest that it

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[6] In which the Security Council, amongst other matters: "9. *Calls upon* all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians, ...10. *Calls on* all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict; 11. *Emphasizes* the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard *stresses* the need to exclude these crimes, where feasible from amnesty provisions".

[7] See, e.g., Report of the United Nations High Commissioner for Human Rights, *Systematic rape, sexual slavery and slavery-like practices, during armed conflicts* (UN Doc. E/CN.4/Sub.2/2004/35), 8 June 2004: "44. Despite legal achievements at the international level, exemplified by the latest judgements from ICTY and ICTR, the work of SCSL and the provisions of the Rome Statute of the International Criminal Court, acknowledging that rape and sexual enslavement, committed as part of a widespread or systematic attack directed against any civilian population, constitute crimes against humanity, and that perpetrators should be held accountable and punished for such crimes, sexual gender-based violence, systematic rape and various forms of enslavement are still widespread during armed conflicts. 45. Armed conflicts exacerbate violence against women and illustrate its linkage to a system of patriarchal domination, based on gender inequality and on the subordination of women by men. Recent reports from the United Nations human rights mechanisms reveal that in armed conflict women and girls face widespread sexual gender-based violations in the form of, but not limited to, rape, sexual violence, sexual slavery and forced marriage. ... 46. As a landmark document, Security Council resolution 1325 (2000) on women, peace and security retains a vital role in the efforts to strengthen the protection of the human rights of women and girls during and after armed conflicts and in acknowledging that sexual violence against women during armed conflicts has a major negative impact on international peace and security."

[8] Michael Cottier, commentary on Article 8(2)(b)(xxii) of the ICC Statute in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), pp. 248-249.

[9] See Prosecution Amendment Request, para. 9.

[10] See especially Decision, paras. 54-64. And see in particular para. 78. In para. 78, the majority of the Trial Chamber indicates that it is a "valid argument" that the request to amend the indictment was timely as the trial had not yet commenced. However, it added that this argument "collapsed" because of the "Prosecution inattention to appreciate the particularity of the cases ... and to have acted more diligently, and indeed, expeditiously".

would "occasion a palpable miscarriage of justice" to allow the amendment to the Indictment when the Prosecution had not exercised due diligence,[11] and indeed, went even further still, to suggest that this would be an abuse of process.[12]

6. For the reasons given in section (2) below, the Trial Chamber erred in fact when it determined that the Prosecutor had not acted with due diligence in investigating this case, and that it had not acted in a timely manner in seeking the amendment to the Indictment. It follows that the Decision is based on an error of fact, and that there is no justification for the Trial Chamber's conclusion that a lack of diligence by the Prosecution would make it unjust or an abuse of process for the Indictment to be amended. Having based the Decision on this erroneous consideration, the majority failed to give appropriate weight to the various relevant considerations.

(2) The errors in the Trial Chamber's Decision

7. The Trial Chamber erred when it considered that the investigations had begun 2 years ago.[13] The Trial Chamber based its view on the Defence submissions, which were made in February 2004.[14] Had this been true, investigations would have commenced on February 2002, five months before the funds to create the Court were secured, and six months prior to the arrival of the Prosecutor and the Head of Investigations in Sierra Leone. In fact, since the Head of Investigations arrived in Sierra Leone in August 2002, and since he was engaged in selecting and hiring investigators until October 2002, full investigations in a coordinated fashion did not begin until November 2002.

8. The Trial Chamber erred when it considered that the Prosecution had in its possession evidence relating to gender based crimes as early as June 2003.[15] Only *indications* of gender based crimes were available to it in June 2003, and only in October 2003 did it obtain solid evidence capable of confirmation.[16] Not only was this previously submitted by the Prosecution on several occasions, but it was also stressed by Judge Boutet in his Dissenting Opinion on the Decision.[17] It is emphasized by the Prosecution that what is meant by "solid evidence capable of confirmation" is evidence that is sufficient to prove the crimes alleged. It was a proper exercise of the Prosecution's discretion to wait for such evidence, and not to bring charges based only on preliminary information which could not constitute prima facie

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11 Decision, para. 85.

12 Decision, paras. 80-86.

13 Decision, paras. 43, 57, 63, 64.

14 Norman Response to the Prosecution Amendment Request, para. 33, Kondewa Response to the Prosecution Amendment Request, top of page 4. The Prosecution denied this allegation in Prosecution Amendment Reply, para. 23.

15 Decision, para. 44.

16 Prosecution Amendment Reply, para. 15; Prosecutor's Written Answers, paragraph 2. The basis of such evidence was statements taken in September 2003, analysis of which was completed in October 2003.

17 Decision, Judge Boutet's Dissenting Opinion, paras. 6, 35, 37.

evidence. This is in conformity with the view expressed in Judge Boutet's Dissenting Opinion.[18] Hence, the time period which should have been examined by the Trial Chamber was the period from the date on which such evidence was available, i.e. late October 2003, until the date the Prosecution Amendment Request was filed, i.e. beginning of February 2004.

9. The Trial Chamber erred in assuming that the Prosecution had acted without due diligence in the conduct of its investigations of gender based crimes.[19] The Prosecution submits that obtaining evidence on gender based crimes necessitates much more time than collecting evidence concerning other crimes. This is acknowledged in Judge Boutet's Dissenting Opinion on the Decision.[20] The Prosecution submits that even more time is required when gathering evidence against CDF members, as victims of CDF members are subject to greater risks to their personal security and reputation, in light of the popular support the CDF receives in some areas of Sierra Leone (where it is regarded as the force which protected the nation from the rebels), and also in light of the fact that CDF members committed gender based crimes against their own supporters, who still live in the same communities as their perpetrators. The specific security risk related to the CDF case was acknowledged in the Trial Chamber's own decision of 8 June 2004, in which it granted protective measures to such witnesses.[21]

10. The Trial Chamber erred in deeming "neither credible nor convincing" the Prosecution's submission that evidence relating to gender based crimes was only recently discovered.[22] The Trial Chamber based its view on the (mistaken) facts that the investigations had begun two years ago, and that evidence concerning gender based crimes was indeed found against the six Accused individuals in the other two cases before the Special Court, i.e. the RUF and AFRC cases, prior to their initial appearance before the Trial Chamber. The Prosecution submits that the Trial Chamber failed to understand that evidence of gender based crimes against CDF members was much harder to obtain than evidence against RUF and AFRC members, as explained above. Furthermore, the fact that gender based crimes were indeed charged in the RUF and AFRC cases before the initial appearance of the accused in those cases demonstrates that it was the policy of the Prosecution to charge such crimes where it has evidence of them. This supports the conclusion that had the Prosecution possessed such evidence against the CDF members prior to their initial appearance, they would have been charged with gender based crimes in the original Indictment.

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18 Decision, Judge Boutet's Dissenting Opinion, paras. 24, 25.

19 Decision, paras. 43 and 64.

20 Decision, Judge Boutet's Dissenting Opinion, paras. 26-33.

21 *Prosecutor v. Norman, Fofana and Kondewa, Decision on Prosecution Motion for Modification of Protective Measure for Witnesses*, Case No. SCSL-2004-14-PT, Trial Chamber, 8 June 2004.

22 Decision, para. 57.

11. The Trial Chamber erred in failing to consider the nature of the charges as a justification for the passage of time between the Prosecution's obtaining the initial indication that gender based crimes occurred, and the date in which this indication crystallized into real evidence. The Prosecution submits that in order to obtain evidence from victims and perpetrators of gender base crimes much more time is required than that needed to obtain evidence relating to other crimes. Most domestic jurisdictions treat sexual violence crimes differently to other crime in accordance with the understanding that their investigation and prosecution requires more time. Under international criminal law, this is even more so, taking into account cultural differences which necessitate even greater sensitivity and caution when investigating and prosecuting such crimes. It is therefore submitted that had the Trial Chamber taken into account that the investigation of gender based crimes, especially when they involve CDF members, as explained above, requires much time and caution, the Trial Chamber would not have concluded that the right of the Accused to be tried without undue delay was breached, and nor would it have concluded that granting the request would amount to an abuses of process. The Prosecution had indications of gender based crimes in June 2003, that it only took four months to secure solid evidence based on that information. This timeframe was reasonable under the circumstances. As stated in paragraphs 19 and 20 of the Prosecution Amendment Request, the Prosecution submits that it exercised due diligence in conducting its investigation, and that it carefully considered whether and at what point to file the request to amend the Indictment.

12. The Trial Chamber misdirected itself as to the principle to be applied, when it held that "the rules relating to the detection and prosecution of these [gender based] offences are the same as those governing the other war crimes and international humanitarian offences".[23] The Prosecution emphasizes, as was acknowledged by Judge Boutet in his Dissenting Opinion on the Decision, that the detection of evidence relating to gender crimes requires much more time and vigilance than the detection of other crimes. Furthermore, since it requires special efforts to build the trust of victims in the judicial process and in the protective measures provided to secure them during the proceedings, investigating and prosecuting gender based crimes usually takes longer than prosecuting other crimes. Hence, even after the witnesses reveal their accounts to the Prosecution, arriving at the stage where they are willing to testify publicly takes much longer than in the case of general, non-gender based, crimes.

13. The Trial Chamber also erred in deeming "unacceptable and untenable" the fact that time has passed between the date on which solid evidence was available to the Prosecution, and the date on which the Prosecution Amendment Request was filed.[24] It, moreover, erroneously criticized the Prosecution's action in "withholding the application to amend because it was

[23] Decision, para. 83.
[24] Decision, paras. 47 and 48.

waiting for the outcome of the joinder motion".[25] The Prosecution submits that since evidence was available in October 2003 and witness cooperation was secured thereafter, a request to amend the Indictment could not have been prepared and filed until November 2003 at the earliest. However, at that time, there were nine separate cases pending before the Special Court, and the Prosecution also wished to seek to have amendments made to the indictments in certain of the other cases. If the Prosecution had at that time filed motions for any amendments it wished to make in all of those cases, it would have flooded the Trial Chamber with nine separate motions to amend indictments. The Prosecution decided instead to await the then imminently expected decision on the joinder motion, which was filed in October 2003. Underscoring this action was the principle of judicial economy, since it meant that instead of being faced with nine separate requests, the Trial Chamber would be faced with possibly only two (and eventually three). In any event, given the Court recess during December 2003, the earliest the Trial Chamber could have deliberated on the matter had the Prosecution filed the request to amend in November 2003, would have been in January 2004. Since the joinder decision was not given until 28 January 2004, and the Consolidated Indictment was filed on 5 February 2004, waiting to file the Prosecution Amendment Request on 9 February 2004 was in accordance with good faith and due diligence on the part of the Prosecution, as was the immediate subsequent disclosure.

14. The Trial Chamber erred in holding that "the accused would have, if the Prosecution were reasonably diligent, been informed properly and in detail, of 'the nature and cause of the charges against them.'" The Prosecution submits that the Trial Chamber erred in interpreting the right of the Accused to be informed promptly of the charges against them, as enshrined in Article 9 of the ICCPR and in Article 17(a) of the Statute. These articles refer to the charges contained in the Indictment at the time of arrest and not charges that could be brought subsequently.[26] As the Accused were informed of the existing charges against them at the time of their arrest, their right to be informed promptly of the charges was not violated. Further, the evidence supporting the charges requested to be added to the Indictment was promptly disclosed in February 2004, shortly after the Prosecution Amendment Request was filed and much earlier than required under Rule 50(B)(ii). Based on the circumstances of the case the Prosecution Amendment Request was filed within a reasonable time.

15. The Trial Chamber mistakenly concluded that "the prosecution was in breach of the ingredient of timeliness as statutorily required by the Statute and so would any order emanating from us granting this motion to amend their indictment."[27] The ICTY Appeals

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25 Decision, paras. 47 and 48.

26 *Prosecutor v. Kovacevic, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998*, Trial Chamber, 2 July 1998 ("*Kovacevic*, 2 July 1998") para. 36.

27 Decision, para. 64.

Chamber in *Kovacevic* held that "the timeliness of the Prosecutor's request for leave to amend the Indictment must ... be measured within the framework of the overall requirement of the fairness of the proceedings."[28] Furthermore, this very same Trial Chamber, has previously permitted the amendment of indictments, stating that "this application to amend, for the reasons that the offences sought to be added were disclosed to the accused and the Defence promptly, fulfils the criterion of timeliness having been filed even before the trial proceedings take off although we know that some applications for amendments could, and have in fact been accepted, at the depth of the trial for considerations based on the overall interest of justice."[29] The Prosecution reasserts that the Prosecution Amendment Request in the present case was also timely, as the amendments were sought before a trial date was set, and the evidence was properly disclosed to the Accused. The lapse of time between the availability of evidence in October 2003 (witness cooperation confirmed in November) and the filing of the Request in February 2004, was clearly reasonable under the circumstances. Furthermore, the possibility of postponing the trials should not be the paramount consideration in the decision as to whether or not to grant the Prosecution Amendment Request. The nature of the charges requested to be added, and the effect the amendment would have on the integrity of the proceedings as a whole, are equally relevant. In any case, this time lapse should not, in and of itself, form the basis of the denial of the Prosecution Amendment Request. The Court should determine whether the timing of the Prosecution Amendment Request was such as to deny the Accused the opportunity to prepare their case. The ICTR Appeals Chamber in *Karemera*, noting that the requested amendments had been sought at the pre-trial stage, held that although the trial had already commenced and 8 prosecution witnesses had already testified, the request to amend the Indictment was not filed so late as to prejudice the accused by depriving them of a fair opportunity to prepare their case.[30] Furthermore, the ICTR in *Akayesu* permitted the amendment of the Indictment to include charges of gender based crimes, over five months after the trial had commenced.[31] Hence, the Prosecution Amendment Request was filed within a reasonable time and at a stage when no prejudice would be caused to the Accused.

16. The Trial Chamber erred in considering that granting the Prosecution's Request would breach the right of the Accused to be tried without undue delay.[32] In contradiction to the

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28 *Kovacevic*, 2 July 1998, para. 31.

29 *Prosecutor v. Sesay, Kallon and Gbao, Decision on Prosecution Request for Leave to Amend the Indictment*, Case No. SCSL-2004-15-PT, Trial Chamber, 6 May 2004, para. 52; *Prosecutor v. Brima, Kamara and Kanu, Decision on Prosecution Request for Leave to Amend the Indictment*, Case No. SCSL-2004-16-PT, Trial Chamber, 6 May 2004, para. 53.

30 *Prosecutor v. Karemera, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to file an Amended Indictment*, Case No. ICTR-98-44-AR73, Appeals Chamber, 19 December 2003 ("*Karemera*, 19 Dec. 2003"), para. 29.

31 *Akayesu*, 2 Sept. 1998, para. 417.

32 Decision, para. 63.

majority view, and in conformity with Judge Boutet's Dissenting Opinion, the Prosecution submits that amending the Indictment would not cause undue delay under the circumstances of the present case. Firstly, the newly added charges could be dealt with later in the Trial. Furthermore, it is a well established practice of the international criminal tribunals that investigations are carried out after the commencement of trial and throughout. These investigations often reveal new evidence which is sought to be introduced through motions made in the course of the trial, and at times even warrant the amendment of the Indictment. In addition, the possibility of motions challenging amendments to the Indictment cannot be a basis to deny the Request, especially considering that Rule 72 of the Rules does not require a stay of proceedings and provides that objections based on lack of jurisdiction or on the form of an amendment indictment shall be raised by a party in one motion only. Such challenges are all part of the fair trial process and the possibility of objections being raised should not bar the amendment of the Indictment. In any event, in this case, such motions need not delay the trial as they relate only to the new charges of gender based crimes and not the entire Indictment. It is further emphasised that in accordance with international jurisprudence, a delay which is substantial would be undue only if it occurred due to improper tactical advantage sought by the Prosecution.[33] In this case, the Prosecution stresses that no such tactical advantage is sought by seeking to amend the Indictment at this stage of the proceedings.

17. The Trial Chamber erred in failing to give sufficient weight to the interests of justice in amending the indictment to fully reflect the totality of the criminal acts allegedly committed by the Accused individuals, and gave undue weight to the impact of such amendment on the expeditious nature of the proceedings against the Accused. Furthermore, in its examination of the delay that may be caused to the proceedings by amending the Indictment, the Trial Chamber mistakenly concluded that this would be undue delay. The Prosecution submits that even if some delay would result, it is justifiable in light of the countervailing considerations. As was held by the ICTY Appeals Chamber in *Karemera*, "the Trial Chamber must consider all of the circumstances bearing on a Request to amend the indictment. Interference with the orderly scheduling of trial, however, is one such circumstance." In addition, the ICTY Appeals Chamber held that "'postponement of the trial date and a prolongation of the pretrial detention of the Accused' are 'some, but not all' of the considerations relevant to determining whether a proposed amendment would violate the right of the accused to a trial 'without undue delay', which in turn bears on the broader question whether the amendment is justified under Rule 50 of the Rules."[34]

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33 *Kovacevic*, 2 July 1998, para. 32.

34 *Prosecutor v. Bizimungu, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment*, Case No. ICTR-99-50-AR50,

18. The Trial Chamber failed to consider the fact that the evidence concerning gender based crimes was disclosed to the Defence in February 2004; that the witnesses providing this evidence are on the witness list submitted to the Court on 26 April 2004; and, that the current Indictment includes general violence counts, which could encompass sexual violence.

(3) The remedy requested by the Prosecution

19. For the reasons given above, in the Impugned Decision the Trial Chamber erred in the exercise of its discretion under Rule 73(B). Accordingly, the Appeals Chamber can substitute its own exercise of discretion in the place of the discretion exercised by the Trial Chamber.[35] For the reasons given in the Prosecution Amendment Request and Prosecution Amendment Reply, the Appeals Chamber should exercise the discretion by granting the Prosecution Request.

CONCLUSION

20. For the reasons given above, the Prosecution requests the Appeals Chamber to reverse the Decision and to grant the Prosecution Amendment Request.

Freetown, 30 August 2004.

For the Prosecution,

Luc Côté

James C. Johnson

Christopher Staker

Adwoa Wiafe

35 *Milosevic Joinder Appeal Decision*, footnote 2 above, para. 4.

PROSECUTION INDEX OF AUTHORITIES

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