SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

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

Registrar: Mr. Robin Vincent

Date filed: 4 June 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN

MOININA FOFANA

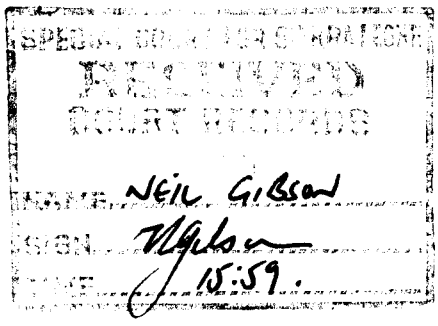
ALLIEU KONDEWA

Case No. SCSL – 2004 – 14 – PT

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

Office of the Prosecutor:
Luc Côté
James C. Johnson

Defence Counsel
James Jenkin-Johnston for Norman
Michiel Pestman for Fofana
Charles Margai for Kondewa



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I. INTRODUCTION

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court ("Rules"), the Prosecution submits this 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 ("Application").
2. On 9 February 2004, the Prosecution filed a Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, pursuant to Rules 50(A) and 73(A) of the Rules ("Request"). On 1 June 2004, the Trial Chamber issued its decision on the Prosecution's Request ("Decision"), denying the Request and holding that granting the sought amendments would prejudice the rights of the Accused to a fair and expeditious trial and would amount to an abuse of process.

II. ARGUMENTS FOR INTERLOCUTORY APPEAL

The legal standard

3. Rule 73(B) provides for interlocutory appeals "in exceptional circumstances and to avoid irreparable prejudice to a party". This Chamber established that, accordingly, two conditions must be met to warrant the granting of a leave to appeal: the existence of exceptional circumstances and the possibility of irreparable prejudice to a party if such leave is denied.[1]

Exceptional circumstances

4. The Prosecution believes that the different opinions expressed by the majority and dissenting opinion in the Decision, illustrates that the legal and factual issues raised by the Request to amend the Indictment are difficult ones that would benefit from the review of the Appeals Chamber. A strong and articulate dissenting opinion by a member of the Trial Chamber may in itself constitute an exceptional circumstance warranting the granting of this Application.
5. The Statute recognises the need to investigate allegations of gender based crimes in Article 15(2). The Prosecution is obligated to prosecute to the full extent of the law and to present before the Court all relevant evidence reflecting the totality of crimes committed by the Accused.[2] The high profile nature of gender based crimes under international law constitutes another exceptional circumstance. The current Indictment charges the Accused individuals with "Inhumane acts" and "Violence to life, health and physical or mental well-being of persons, in particular cruel treatment", under counts 3 and 4 therein.[3] Failing to amend the Indictment entails the unfortunate, yet inevitable, result, of prosecuting gender based crimes as if they were general violence offences, thereby undoing years of jurisprudential development in international criminal law. However, this Chamber emphasized "the necessity for international criminal justice to highlight the high profile nature of the emerging circus of gender offences with a view to bringing the alleged perpetrators to justice".[4] This is in line with the jurisprudence of the international criminal tribunals, which have consistently

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[1] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-PT, Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder, 13 Feb. 2004; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder, 13 Feb. 2004.
[2] *Prosecutor v. Musema*, ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 6 May 1999, para. 17. Annexed as Item no. 7 on Prosecution's Index of Authorities in Prosecution Request.
[3] These counts are based on the factual allegations made in paragraph 26 of the Indictment.
[4] Decision, para. 42.

allowed amendments for gender based crimes violence offences even while the trials were underway.[5] For example, in *Akayesu*, the ICTR allowed the Indictment to be amended over five months after the trial had commenced, in order to include gender based crimes. There, too, the Prosecution had information of gender based offences, prior to requesting the amendment, but it was still insufficient to link the Accused to the crimes. The Chamber allowed the amendment and held that "[t]he investigation and presentation of evidence relating to sexual violence is in the interest of justice".[6]

6. The important tasks this Court is mandated to fulfil include establishing a complete and accurate historical record of the crimes committed during the armed conflict in Sierra Leone, and bringing justice to the victims of these crimes. Failing to amend the Indictment hinders the fulfilment of these objectives, as the case against the Accused will fail to fully reflect the reality that gender based crimes were perpetrated by CDF members. Furthermore, it is the right of the victims to have the crimes committed against them characterized as gender based crimes. The possibility of undermining the objectives of the Special Court constitute another exceptional circumstance warranting the granting of leave to appeal.

Irreparable prejudice

7. the Decision denying the amendment causes irreparable prejudice to the Prosecution as it precludes the Prosecution from prosecuting sexual violence acts committed by CDF members as gender based crimes, as validated by the evidence in its possession. Following the split decision of the Trial Chamber the Prosecution is unable to fully discharge its duty regarding gender based crimes committed by CDF members, to reflect the totality of the acts and the nature of the crimes with which the Accused are charged.
8. Denial of the requested amendment also precludes the victims from having their crimes characterized as gender based crimes and impairs the remedies to which they are entitled.
9. Considering the time-limited mandate of the Special Court, the Accused will most likely be forever excused from being tried before this Court for gender based crimes. Furthermore, it is highly improbable that they will ever be prosecuted under domestic jurisdiction for such crimes. Hence denying the amendment establishes impunity with respect to gender crimes

[5] See e.g. *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, ("*Akayesu*, 2 Sept. 1998"), para. 417.
[6] *Akayesu*, 2 Sept. 1998, para. 417.

committed by CDF members, the same impunity this Court is charged with eradicating.

No Delay of Proceedings

10. The Prosecution emphasizes that granting this Application need not delay the current proceedings. The next session to be held in this trial is not until September 2004. Hence, if this Application is granted, there is sufficient time for the Appeals Chamber to be seized of and decide the matter. Furthermore, the Prosecution submits that if the Application is granted and the Appeals Chamber approves the amendments sought, the Defence will have sufficient time to prepare its case, since the September session is scheduled to last only three weeks and the next sessions will not take place until November 2004 and presumably February 2005, and since the Defence case will most probably not begin until well into 2005. Furthermore, if the amendment is granted, the Trial Chamber is free to order that evidence pertaining to gender based crimes be presented towards the end of the Prosecution's case, giving the Defence more than 6 months to prepare the cross examination of Prosecution witnesses.

III. ERRORS COMMITTED BY THE TRIAL CHAMBER

11. If granted leave to appeal, the Prosecution will argue the following:

12. The Trial Chamber erred when it considered that the investigations had begun 2 years ago.[7] The Chamber based its view on the Defence submissions, which were made in February 2004.[8] 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.

13. 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.[9] The Prosecution reasserts that only *indications* of gender based crimes were available to it in June 2003, and that only

[7] Decision, paras. 43, 57, 63, 64.
[8] Norman Response, para. 33, Kondewa Response, top of page 4. Prosecution denied this allegation in Prosecution's Consolidated Reply to Defence Response, para. 23
[9] Decision, para. 44.

in October 2003 did it obtain solid evidence capable of confirmation.[10] 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.[11] 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 is further submitted, that it was a proper exercise of the Prosecution's discretion, to wait for real evidence, before bringing charges and that basing charges on preliminary information which could not constitute prima facie evidence would be inconsistent with the Prosecution's obligations. This is in conformity with the view expressed in Judge Boutet's Dissenting Opinion.[12] Hence, the time period which should have been examined by the Chamber is that which passed from the date on which evidence was available, i.e. late October 2003, and until the date the Request was filed, i.e. beginning of February 2004.

14. The Chamber erred in considering that granting the Prosecution's Request would breach the right of the Accused to be tried without undue delay.[13] In contradiction to the 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, amending the Indictment need not entail re-scheduling of the commencement of the trial, as 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

[10] Prosecution's Consolidated Reply to Defence Response, para. 15; Prosecutor's Written Answers, paragraph 2.
[11] Boutet's Dissenting Opinion, paras. 6, 35, 37.
[12] Boutet's Dissenting Opinion, paras. 24, 25.
[13] Decision, para. 63.

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.[14] 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.

15. The Chamber erred in assuming that the Prosecution had acted without due diligence in the conduct of its investigations of gender based crimes.[15] The Prosecution submits, that obtaining evidence on gender based crimes necessitates much more time than collecting evidence concerning other crimes. This is in agreement with the view held by Judge Pierre Boutet in his Dissenting Opinion on the Decision.[16] The Prosecution asserts 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.

16. The Chamber erred in deeming "neither credible nor convincing" the Prosecution's submission that evidence relating to gender based crimes was only recently discovered.[17] The Chamber based its view on the (mistaken) facts that the investigations had begun 2 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 Chamber. The Prosecution submits, that the 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, demonstrates the Prosecution's keenness on charging such crimes before the initial appearance of the Accused, constituting proof that had the Prosecution possessed such

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[14] *Prosecutor v. Kovacevic*, IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, dated 2 July 1998 ("*Kovacevic*, 2 July 1998") para. 32. Annexed as Item no. 8 on Prosecution's Index of Authorities in its Request.
[15] Decision, paras. 43 and 64.
[16] Boutet's Dissenting Opinion, paras. 26-33.
[17] Decision, para. 57.

evidence against the CDF members prior to their initial appearance, they would have certainly been charged with gender based crimes in the original Indictment.

17. The 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 jurisdiction treat sexual violence crimes differently than other crime in accordance with the understanding that their investigating 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 investigation 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 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 reasserts, that the fact that it had indications of gender based crimes in June and that it only took four months to secure evidence from that information, is in no way odd or extraordinary, but rather reasonable under the circumstances. The Prosecution reasserts, in accordance with its statement in paragraph 19 of the Request, that it exercised due diligence in conducting its investigation, and, in accordance with the submission in paragraph 20 therein, that it carefully considered whether and at what point to file the Request to amend the Indictment.

18. 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".[18] The Prosecution emphasizes, in agreement with the view expressed 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

[18] Decision, para. 83.

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.

19. The Chamber also erred in deeming "unacceptable and untenable" the fact that time has passed between the date on which evidence was available to the Prosecution, and the date on which the Request was filed.[19] It, moreover, erroneously criticized the Prosecution's action in "withholding the application to amend because it was waiting for the outcome of the joinder motion".[20] The Prosecution asserts, 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, in light of the imminence of the expected decision on the joinder motion which was filed in October 2003, and due to the fact that requests to amend the Indictments of the Accused in the other cases before this Court were to be made, the Prosecution decided to wait and file the Request after the decision on the joinder motion was issued, rather than flooding the Chamber with nine separate motions. Underscoring this action was the principle of judicial economy, as instead of being faced with nine separate requests the Court would be faced with possibly only two (and eventually three). In any event, given the Court recess during December 2003, the earliest the Chamber could have deliberated on the matter had the Prosecution filed the request to amend in November 2003, was 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 Request on 9 February 2004 accords with good faith and due diligence on the part of the Prosecution, as does the immediate subsequent disclosure.
20. The 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 Chamber erred in interpreting the right of the Accused to be informed promptly of the charges against him, as enshrined in Article 9 of the ICCPR and in Article 17(a) of the Statute. These articles refer to the charges

[19] Decision, paras. 47 and 48.
[20] Decision, paras. 47 and 48.

contained in the Indictment at the time of arrest and not charges that could be brought subsequently.[21] 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 Request was filed and much earlier than required under Rule 50(B)(ii). Based on the circumstances of the case the Prosecution's Request was filed within a reasonable time, and the Chamber's above view is without merit.

21. The Trial Chamber mistakenly observed 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".[22] The ICTY Appeal 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".[23] 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."[24] The Prosecution reasserts that the 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 2003, was clearly reasonable under the circumstances. Notwithstanding, the possibility of postponing the trials should not be the paramount consideration in the decision as to whether or not to grant the 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

[21] *Kovacevic*, 2 July 1998, para. 36.
[22] Decision, para. 64.
[23] *Kovacevic*, 2 July 1998, para. 31.
[24] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-PT, Decision on Prosecution Request for Leave to Amend the Indictment, 6 May 2004, para. 52; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision on Prosecution Request for Leave to Amend the Indictment, 6 May 2004, para. 53.

of the Request. The Court should determine whether the timing of the 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.[25] 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.[26] Hence, the Request was filed within a reasonable time and at a stage when no prejudice would be caused to the Accused.

22. 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 was wrongful in giving excess 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 Chamber mistakenly concluded that it is undue. The Prosecution submits, that even if some delay would result, it is justifiable in light of the benefits to be gained by amending the indictment as requested. 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."[27]

23. The Chamber failed to consider the facts that the evidence concerning gender based crimes was disclosed to the Defence in February 2004; that the witnesses providing this evidence

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[25] *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, 19 December 2003 ("*Karemera*, 19 Dec. 2003") para. 29. Annexed as Item no. 6 on Prosecution's Index of Authorities in its Request.
[26] *Akayesu*, 2 Sept. 1998, para. 417.
[27] *Prosecutor v. Bizimungu*, 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 ("*Bizimungu*, 12 Feb. 2004"), para. 16, reaffirming and citing the decision in *Karemera*, 19 Dec. 2003. Annexed as Item no. 5 on Prosecution's Index of Authorities in its Request.

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.

24. The Trial Chamber, as demonstrated above, erred as to the facts upon which it exercised its discretion, failed to give sufficient weight to relevant considerations, and misdirected itself as to principles to be applied. The Prosecution therefore submits, that in accordance with international jurisprudence, the Chamber should grant the present Application.[28]

IV. CONCLUSION

25. Conducting the trial in a manner fully reflecting the nature of the criminal acts committed by the Accused, will meet the aims of this Court to create a historical record of the crimes committed during the armed conflict in Sierra Leone, while at the same time will bring justice on a reasonable time scale to the people of Sierra Leone.
26. For the foregoing reasons the Prosecution respectfully prays that the Trial Chamber grant the requested leave to file an interlocutory appeal against its decision on the Prosecution Request.

Freetown, 4 June 2004
For the Prosecution,

Luc Cote

James C. Johnson

[28] *Bizimungu*, 12 Feb. 2004, para. 11, reaffirming and citing the decision in *Karemera*, 19 Dec. 2003.

Prosecution Index of Authorities

Prosecutor v. Sesay, Kallon and Gbao, SCSL-2004-15-PT, Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder, 13 Feb. 2004

Prosecutor v. Brima, Kamara and Kanu, SCSL-2004-16-PT, Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder, 13 Feb. 2004.

Prosecutor v. Sesay, Kallon and Gbao, SCSL-2004-15-PT, Decision on Prosecution Request for Leave to Amend the Indictment, 6 May 2004.

Prosecutor v. Brima, Kamara and Kanu, SCSL-2004-16-PT, Decision on Prosecution Request for Leave to Amend the Indictment, 6 May 2004.

Prosecutor v. Musema, ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 6 May 1999. (Annexed as Item no. 7 on Prosecution's Index of Authorities in Prosecution Request).

Prosecutor v. Kovacevic, IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, dated 2 July 1998. (Annexed as Item no. 8 on Prosecution's Index of Authorities in its Request).

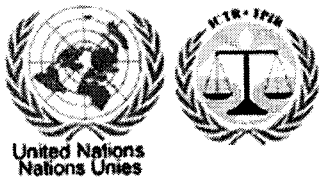
Prosecutor v. Karemera, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to file an Amended Indictment, 19 December 2003. (Annexed as Item no. 6 on Prosecution's Index of Authorities in its Request).

Prosecutor v. Bizimungu, 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. (Annexed as Item no. 5 on Prosecution's Index of Authorities in its Request).

Prosecutor v. Akayesu, ICTR-96-4-T, Judgement, 2 September 1998, para. 417. (Relevant part annexed hereto).

Annex I

Prosecutor v. Akayesu, ICTR-96-4-T, Judgement, 2 September 1998, para. 417.



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CHAMBER I - CHAMBRE I

OR : ENG

Before:

Judge Laïty Kama, Presiding
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry:

Mr. Agwu U. Okali

Decision of: 2 September 1998

THE PROSECUTOR
VERSUS
JEAN-PAUL AKAYESU

Case No. ICTR-96-4-T

JUDGEMENT

The Office of the Prosecutor:
Mr. Pierre-Richard Prosper
Counsel for the Accused:
Mr. Nicolas Tiangaye
Mr. Patrice Monthé

5.5 Sexual Violence (Paragraphs 12A & 12B of the Indictment)

Charges Set Forth in the Indictment

> 12A. Between April 7 and the end of June, 1994, hundreds of civilians (hereinafter "displaced civilians") sought refuge at the bureau communal. The majority of these displaced civilians were Tutsi. While seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. Displaced civilians were also murdered frequently on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.
> 12B. Jean Paul Akayesu knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean Paul Akayesu facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean Paul Akayesu encouraged these activities.

Events Alleged

416. Allegations of sexual violence first came to the attention of the Chamber through the testimony of Witness J, a Tutsi woman, who stated that her six year-old daughter had been raped by three Interahamwe when they came to kill her father. On examination by the Chamber, Witness J also testified that she had heard that young girls were raped at the bureau communal. Subsequently, Witness H, a Tutsi woman, testified that she herself was raped in a sorghum field and that, just outside the compound of the bureau communal, she personally saw other Tutsi women being raped and knew of at least three such cases of rape by Interahamwe. Witness H testified initially that the Accused, as well as commune police officers, were present while this was happening and did nothing to prevent the rapes. However, on examination by the Chamber as to whether Akayesu was aware that the rapes were going on, she responded that she didn't know, but that it happened at the bureau communal and he knew that the women were there. Witness H stated that some of the rapes occurred in the bush area nearby but that some of them occurred "on site". On examination by the Chamber, she said that the Accused was present during one of the rapes, but she could not confirm that he saw what was happening. While Witness H expressed the view that the Interahamwe acted with impunity and should have been prevented by the commune police and the Accused from committing abuses, she testified that no orders were given to the Interahamwe to rape. She also testified that she herself was beaten but not raped at the bureau communal.

417. On 17 June 1997, the Indictment was amended to include allegations of sexual violence and additional charges against the Accused under Article 3(g),Article 3(i) and Article 4(2)(e) of the ICTR Statute. In introducing this amendment, the Prosecution stated that the testimony of Witness H motivated them to renew their investigation of sexual violence in connection with events which took place in Taba at the bureau communal. The Prosecution stated that evidence previously available was not sufficient to link the Accused to acts of sexual violence and acknowledged that factors to explain this lack of evidence might include the shame that accompanies acts of sexual violence as well as insensitivity in the investigation of sexual violence. The Chamber notes that the Defence in its closing

statement questioned whether the Indictment was amended in response to public pressure concerning the prosecution of sexual violence. The Chamber understands that the amendment of the Indictment resulted from the spontaneous testimony of sexual violence by Witness J and Witness H during the course of this trial and the subsequent investigation of the Prosecution, rather than from public pressure. Nevertheless, the Chamber takes note of the interest shown in this issue by non-governmental organizations, which it considers as indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes. The investigation and presentation of evidence relating to sexual violence is in the interest of justice.

418. Following the amendment of the Indictment, Witness JJ, a Tutsi woman, testified about the events which took place in Taba after the plane crash. She that she was driven away from her home, which was destroyed by her Hutu neighbours who attacked her and her family after a man came to the hill near where she lived and said that the bourgmestre had sent him so that no Tutsi would remain on the hill that night. Witness JJ saw her Tutsi neighbours killed and she fled, seeking refuge in a nearby forest with her baby on her back and her younger sister, who had been wounded in the attack by a blow with an axe and two machete cuts. As she was being chased everywhere she went, Witness JJ said she went to the bureau communal. There she found more than sixty refugees down the road and on the field nearby. She testified that most of the refugees were women and children.

419. Witness JJ testified that the refugees at the bureau communal had been beaten by the Interahamwe and were lying on the ground when she arrived. Witness JJ encountered four Interahamwe outside the bureau communal, armed with knives, clubs, small axes and small hoes. That afternoon, she said, approximately forty more Interahamwe came and beat the refugees, including Witness JJ. At this time she said she saw the Accused, standing in the courtyard of the communal office, with two communal police officers who were armed with guns, one of whom was called Mushumba. Witness JJ said she was beaten on the head, the ribs and the right leg, which left her disabled. That evening, she said, the Accused came with a policeman to look for refugees and ordered the Interahamwe to beat them up, calling them "wicked, wicked people" and saying they "no longer had a right to shelter." The refugees were then beaten and chased away. Witness JJ said she was beaten by the policeman Mushumna, who hit her with the butt of his gun just behind her ear.