SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 5 August 2004

PROSECUTOR Against Sam Hinga Norman
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-04-14-T)

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

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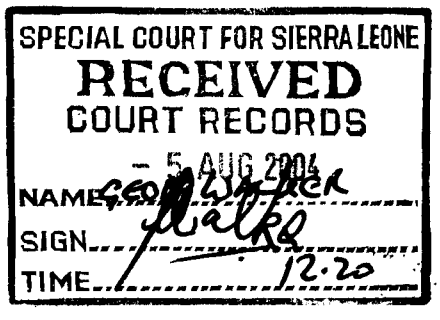

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1. With due respect for my Learned Brothers, Judge Benjamin Mutanga Itoe and Judge Bankole Thompson, I cannot agree with their analysis nor can I agree with their findings and disposition of this Application and therefore append this Dissenting Opinion.

INTRODUCTION

2. This Opinion concerns an Application filed by the Prosecution with the Trial Chamber seeking leave to appeal a Majority Decision of the Trial Chamber that denied the Application by the Prosecution for leave to amend the Consolidated Indictment. In dealing with such matters it is my view that a Trial Chamber is precluded from considering the merit of the Decision whose findings leave to appeal is sought about and in exercising that discretion the Court must be governed by the law applicable which is found in the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

APPLICABLE LAW

3. Rule 73(B) of the Rules of Procedure and Evidence for the Special Court for Sierra Leone ("Rules") provides that:

> Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

4. When discussing the rationale behind Rule 73(B) in the *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* ("Majority Decision"), the Majority relied on a passage from the *Decision on Prosecutor's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Motion for Joinder*,[1] ("Joinder Decision") which states:

> This interpretation is unavoidable, given the fact that the second limb of Rule 73(B) was added by the way of an amendment adopted at the August 2003 Plenary. This is underscored by the fact that prior to that amendment no possibility of an interlocutory appeal existed and the amendment was carefully couched in such terms so as only to allow appeals to proceed in very limited and exceptional situations. In effect, it is a restrictive provision.

[1] RUF, AFRC, 13 February 2004.

5. I would like to observe before proceeding any further that this passage quoted from the Joinder Decision by the Majority is not in my view an accurate statement of the law. According to Article 14 (1) of the Statute of the Special Court, the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda ("ICTR") shall apply *mutatis mutandis* to the conduct of legal proceedings before the Special Court. Subsection (2) of this Rule provides that the Judges of the Special Court may amend these Rules or adopt additional Rules. Rule 73(B) of the ICTR Rules, at the time that the Statute of the Special Court came into force, stated that "Decisions rendered on such Motions are without Interlocutory Appeal". At the March 2003 Plenary, the Judges of the Special Court, recognising the need for a limited right of interlocutory appeal, under certain conditions, amended Rule 73(B) to provide leave to appeal from decisions on motions on the grounds that a decision would be in the interests of a fair and expeditious trial. Rule 73(B) was amended to state:

> Decisions rendered on such motions are without interlocutory appeal save where leave is granted by the Trial Chamber on the grounds that a decision would be in the interest of a fair and expeditious trial.

6. At the subsequent Plenary in August 2003, Rule 73(B) was further amended to impose a more restrictive approach to granting leave to appeal, and required the existence of exceptional circumstances and avoidance of irreparable prejudice to the party. It is notable that the ICTR also amended Rule 73(B) to allow for a right of interlocutory appeal, which currently states:

> Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.[2]

7. Although, as stated, Rule 73(B) is a restrictive provision, it should not in my view be given such a limited interpretation that it would inevitably lead to never granting any leave provision, as this Rule would effectively be without purpose. A purposive interpretation of Rule 73(B), taking into account the restrictive nature of the Rule, must not and cannot be interpreted in such a way as to completely deny any real possibility of any leave to appeal regardless of the circumstances.

<u>Exceptional Circumstances and Irreparable Prejudice</u>

8. No definition is provided in the Rules as to the meaning of "exceptional circumstances" and "irreparable prejudice". The case law of this Court is at an early stage of its formation, and a

[2] 27 May 2003.

precedent for interpreting the meaning of these requirements is still developing. Some general assistance on interpretation of this Rule is given in two previous Decisions of the Trial Chamber, that applied Rule 73(B). In the Decision on the Concurrent Hearing of Evidence,[3] cited in the Majority Decision, the Trial Chamber states: "[a]s a general rule, interlocutory decisions are not appealable and consistent with a clear and unambiguous legislative intent, this rule involves a high threshold that must be met before this Chamber can exercise its discretion to grant leave to appeal. The two limbs of the test are clearly conjunctive and not disjunctive; in other words they must both be satisfied".[4] Reinforcing the restrictive nature of Rule 73(B) the Trial Chamber further observed that:

> The overriding legal consideration in respect of an application for leave to file an interlocutory appeal is that the applicant's case must reach a level of exceptional circumstances and irreparable prejudice. Nothing short of that will suffice having regard to the restrictive nature of Rule 73(B) of the Rules and the rationale that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals.[5]

9. In interpreting the concept of "exceptional circumstances", the European Court of Human Rights has stated that it "is capable of being interpreted and applied in a wide variety of ways in the absence of a more precise statutory definition of the circumstances".[6] When applying the imprecise nature of this statutory concept, the ECHR found exceptional circumstances in situations where public safety may be affected,[7] and where there is a serious risk that the course of justice might be interfered with.[8]

10. Several of the Rules contained in the Rules of Procedure and Evidence of the ICTY and ICTR ("ICTY Rules" and "ICTR Rules" respectively) specify the requirement of showing "exceptional circumstances". For example, in the ICTY Rules, Rule 53 provides for non-disclosure to the public of documentation, Rule 64 provides for detention on remand, and Rule 69(A) provides for the protection of victims and witnesses, and all such Rules refer to a requirement of "exceptional circumstances". Within the ICTR Rules, Rule 69(A) on the protection of victims and witnesses, and Rule 50 on amendment of the indictment, require a showing of exceptional circumstances. In

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[3] Decision on Prosecution Application for Leave to File An Interlocutory Appeal Against Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT, 1 June 2004.
[4] Decision on Prosecution Application for Leave to File An Interlocutory Appeal Against Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT, 1 June 2004. See also Decision on Prosecutor's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Motion for Joinder, 13 February 2004.
[5] *Id.*
[6] *H v. Belgium*, ECHR, 1/1986/99/147, 28 October 1987.
[7] *Clooth v. Belgium*, ECHR, 49/1990/240/311, 27 November 1991.
[8] *The Sunday Times*, ECHR, 29 March 1979.

previous versions of the ICTY and ICTR Rules, there was also a requirement that exceptional circumstances be shown for the granting of provisional release.[9] An analysis of the case law interpreting the concept of exceptional circumstances in relation to these Rules, leads us to conclude that the notion is dependant on the particular subject matter of the Rule and is assessed in the broader context of the interests of justice.[10]

11. The concept of "Irreparable Prejudice" has been considered by the International Court of Justice (ICJ) and the ECHR in the context of the risk of irreparable prejudice to rights in issue in judicial proceedings.[11] In a similar vein, the Supreme Court of Canada in the case of *R v. Carosella*, considered the rights of parties in the context of alleged irreparable prejudice to the "integrity of the judicial system".[12] In the ICJ cases, the concept is applied to preserve the rights of either party in a judicial proceeding,[13] and requires analysis of whether a breach of the rights at issue "might be capable of reparation by appropriate means".[14]

12. The notion of prejudice has been considered by the International Criminal Tribunals in various instances, for example, in the application of Rule 73(B) of the Rules. An earlier version of Rule 73(B)[15] of the ICTY Rules required a showing of "good cause" for granting an application for leave to appeal. In applying this Rule, the Trial Chamber of the ICTY considered whether a "Decision by the Trial Chamber appears to be vitiated by grave error which would cause substantial prejudice to the accused or be detrimental to the interests of justice".[16] Furthermore, a prior version of Rule 73(B) of the ICTY Rules, incorporated the concept of prejudice into the Rule:

> Decisions on motions are without interlocutory appeal save with the leave of a bench of three Judges of the Appeals Chamber which may grant such leave

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[9] Rule 65(B).

[10] See, for example, *Prosecutor v. Delalic*, Decision on Application for Leave to Appeal (Provisional Release), 15 October 1996; *Prosecutor v. Delalic*, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic, 25 September 1996; *Prosecutor v. Kupreskic*, Decision on Defence Motion for Provisional Release, 15 May 1998; *Prosecutor v. Delalic*, Decision on Application for Leave to Appeal (Form of the Indictment), 15 October 1996; *Prosecutor v. Rukundo*, Decision on Defence Motion to Fix a Date for the Commencement of the Trial of Father Emmanuel Rukundo or, in the Alternative, to Request His Provisional Release, 18 August 2003.

[11] See *Nuclear Tests Case* [1973] ICJ REP. at 103, para. 20; *Continental Shelf* [1976] ICJ REP. 11, para. 32; *Rep. Congo v. Fr.*, Request for a Provisional Measure, ECHR, 17 June 2003.

[12] *R v. Carosella* (1997), 112 C.C.C. (3d) 289 (S.C.C.).

[13] *Nuclear Tests Case* [1973] ICJ REP. at 103, para. 20.

[14] *Continental Shelf* [1976] ICJ REP. 11, para. 32.

[15] October/November 1997.

[16] *Prosecutor v. Delalic*, Decision on Application for Leave to Appeal (Form of the Indictment), 15 October 1996. See also *Prosecutor v. Delalic*, Decision on Application for Leave to Appeal (Provisional Release), 15 October 1996.

i. if the decision impugned would cause such prejudice to the case of the party seeking leave as could not be cured by the final disposal of the trial including post-judgment appeal; or
ii. if the issue in the proposed appeal is of general importance to proceedings before the Tribunal or in international law generally. (emphasis added)

13. This version of the Rule clearly links the concept of prejudice to a right of appeal, where there is an inability to cure such prejudice through the final dispositionl of the trial, including any post-judgment appeal.

14. Both the concept of "exceptional circumstances" and "irreparable prejudice" are to be considered in the light of the detriment caused to the interests of justice.

DISCUSSION

15. I will now proceed to set forth the reasons why I dissent from the Majority Decision in this case and hold that the Prosecution have met the criteria laid out in Rule 73(B) and should be granted leave to appeal the Decision of the Majority that determined leave to amend the Consolidated Indictment.

Exceptional Circumstances

16. Exceptional circumstances exist in this case for a number of reasons, and when assessed separately, or cumulatively, they reach the threshold of "exceptional circumstances". To begin, this is the first time in the case law of the International Tribunals, that a dissent has been given on a decision based upon a request for leave to amend an indictment. The fact that there is a dissent on a discretionary decision made by Majority Judges, supports the Prosecution's submissions that there are alleged errors in the exercise of the discretion of such Judges, and that of itself gives rise to exceptional circumstances and consequently grounds for granting this leave for interlocutory appeal. The fact of dissenting, in a number of jurisdictions, is a ground for appeal. In the Supreme Court Act of Canada, Section 691 (1) provides that "[a] person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada (a) on any question of law on which a judge of the court of appeal dissents". In Australia, the Judiciary Act of 1903 provides in Section 35A that:

> "[i]n considering whether to grant an application for special leave to appeal to the High Court under this Act or under any other Act, the High Court may have regard to any matters that it considers relevant but shall have regard to: [...] (ii) in respect of which a decision of the High Court, as the final

> appellate court, is required to resolve difference of opinion between different courts, or within the one court, as to the state of the law [...].

17. The fact that there is this Dissenting Decision of the Impugned Decision, in and of itself, in my opinion, constitutes in these circumstances sufficient grounds for granting leave to appeal in this case. In addition, the Prosecution, in their application for leave to appeal, have raised serious allegations of errors of mixed law and fact. They support their application by referring to the Dissenting Opinion of the Impugned Decision. Detailed analysis was provided in the Dissenting Opinion on issues that, *inter alia,* included undue delay, and the exercise of the Prosecutor's prosecutorial discretion. The Prosecution assert that the Majority Judges misdirected themselves on these issues, and the fact that there is a dissent on these issues, provides a basis for appeal. I would support this argument of the Prosecution and find that these alleged errors of mixed fact and law, when considered in conjunction with the *nature* of the Dissenting Opinion, gives rise to exceptional circumstances.

18. In reaching the Majority Decision on the request to amend the Indictment, the Judges exercised their discretion on a matter of fundamental significance to the integrity of the judicial system and the development of this Tribunal's jurisprudence. The request by the Prosecution to amend the Indictment concerned essentially serious charges of sexual violence against the Accused persons, in addition to alleged direct participation of the Accused in such crimes. It is my opinion that a failure to grant leave to appeal on such a fundamental issue could prejudice this Court's capacity, to fulfil its mandate outlined in Article 1(1) of the Statute, namely, "to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law", a mandate founded on recognition by the United Nations Secretary General that sexual violence committed against girls and women was one of the most egregious practices committed during the armed conflict in Sierra Leone.[17] Victims of sexual violence have the right to have crimes that are committed against them prosecuted with all due respect to the Rule of Law. I consider these factors to constitute, in themselves, exceptional circumstances within the meaning of Rule 73(B) of the Rules in that not to do so in these circumstances would not be in the interests of justice.

Irreparable Prejudice

19. A fundamental feature of any Indictment is that it reflects the full criminal culpability of the Accused. In this case, the Prosecution allege that the Accused persons, through individual and

[17] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, para. 12.

superior criminal responsibility, are responsible for grave crimes of sexual violence. Failure to allow leave to appeal the Impugned Decision, would cause irreparable prejudice to the Prosecution case and to the integrity of the judicial system and in the circumstances not in the interest of justice. As outlined above, the concept of irreparable prejudice refers to the inability to cure any prejudice suffered. Clearly, there would be no available remedy available to that party should this leave to appeal be denied.

20. Furthermore, failure to accurately represent the alleged acts committed by the Accused in the Indictment will result in serious prejudice to the Prosecution case and may affect the outcome of the trial. Such prejudice is irreparable and detrimental to the interests of justice. Such irreparable prejudice, in itself, constitutes exceptional circumstances.

Estoppel

21. I disagree with the Majority holding in its decision that the Prosecution was estopped from raising the issue of irreparable prejudice, where the Majority stated that:

> [I]n these circumstances, therefore, the Prosecution is now estopped from raising the issue of irreparable prejudice as this was occasioned the lack of diligence and promptitude on its part in carrying out investigations fro the gender crimes, which it rather belatedly wanted to incorporate into the consolidated indictment, coupled with the lack of respect for the principle of timeliness in seeking the amendment for a trial whose commencement was very imminent and which actually started on the 3 June 2004, after we rendered our decision which the Prosecution is contesting, on the 29 May 2004.

22. The doctrine of estoppel is a common law equity rule that both prevents parties from testifying or speaking to events that have already been legally decided and prohibits them from reasserting claims or rights that contradict their prior statements. The previously decided issues may be matters of fact or of law. The principle of estoppel is rooted in notions of consistency, good faith, equity, and public policy.[18] The international use of the docrine of estoppel draws most extensively on two types of common law estoppel doctrines, namely, equitable estoppel and estoppel by representation. Equitable estoppel is a defensive doctrine that prohibits one party from unfairly taking advantage of another party by means of misrepresentation. Estoppel by representation is similar to equitable estoppel and is invoked when one party makes a statement and this statement reasonably and detrimentally induces the other party to rely.[19] This doctrine is not directly, or by

[18] See Christopher Brown, "A Comparative and Critical Assessment of Estoppel in International Law", 50 U. Miami L. Rev. 369.

[19] See, for example, *Nuclear Tests (New Zealand v. France)*, 20 December 2974, International Court of Justice, para. 63; *Barcelona Traction, Light & Power Co. (Belg. V. Spain)*, 1964 I.C.J. 6 (July 24); *North Sea Continental Shelf (F.R.G. v. Den.,*

analogy, applicable in the particular circumstances of the case at hand. The Trial Chamber of this Court is governed by its Statute and Rules of Procedure and Evidence, which specifically enumerates a right of interlocutory appeal, albeit in limited circumstances, where the criteria listed in Rule 73(B) are met. No decision has been previously made by this Chamber with respect to leave to appeal the Impugned Decision and therefore the Majority was precluded from applying the doctrine of estoppel. A misapplied doctrine of estoppel can not be used to circumvent this right.

23. In my humble opinion it would be a fundamental miscarriage of justice, if a party were precluded from lodging an interlocutory appeal based upon what I consider to be a misplaced doctrine of estoppel. Rule 73(B) clearly provides for a right of interlocutory appeal, in the particular circumstances outlined, and the jurisprudence of the International Tribunals reveals that the Tribunals have distinctly interpreted the right of appeal from a discretionary decision by a Trial Chamber.

24. It is important to note and fundamental to appreciate that when an appeal is sought from a discretionary decision of a Trial Chamber, that may include a question of *whether to grant an amendment to an indictment*; determining which sentence to impose; or considering whether provisional release should be granted; the issue in the appeal is not whether the decision was correct, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision.[20] As stated by the Appeals Chamber of the ICTY in the *Milosevic* case, "[i]t is only where an error in the exercise of the discretion has been demonstrated that the Appeals Chamber may substitute its own exercise of discretion in the place of the discretion exercised by the Trial Chamber".[21] The party challenging the exercise of discretion should demonstrate a discernible error made by the Trial Chamber. The Appeals Chamber in the *Milosevic* case stated that:

> It must be demonstrated that the Trial Chamber 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.[22]

F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20); Tinoco (U.K. v. Costa Rica), 18 Am. J. Int'l L. .Brown, "A Comparative and Critical Assessment", p. 387-90.

[20] *Prosecutor v. Milosevic,* Reasons for Decision on Prosecution Interlocutory Appeal From refusal to Order Joinder, 18 April 2002, para. 4.

[21] *Id.*

[22] *Id,* para. 5.

25. Furthermore, through applying the doctrine of estoppel in its Decision, it is my view that the Majority have considered the merits of the Decision for which leave to appeal is sought, rather than determining whether leave should be granted or not, and consequently in my opinion exceeded their jurisdiction. The legal test to be applied in determining whether to grant leave to appeal in this case is strictly outlined in Rule 73(B).

26. In addition, the criteria of Rule 73(B) is further misapplied by the Majority, where it considers in paragraph 35 of that:

> "[F]or the Prosecution to be successful in establishing the conjunctive elements of exceptional circumstances and irreparable prejudice, it must, in our opinion, demonstrate that its conduct did not contribute to occasioning or causing the irreparable prejudice, if any, which forms the basis of the instant application for leave to appeal".

Upon a strict reading of this Rule, it is my opinion that there is no requirement that the Prosecution rebut a presumption of irreparable prejudice on their part. A prior holding by a Trial Chamber concerning a party's conduct can not be used to prevent that party from establishing grounds for leave to appeal. In addition, both a literal and purposive reading of this Rule is that the party seeking leave to appeal should show that exceptional circumstances exist for the granting of an interlocutory appeal, and to avoid irreparable prejudice to a party.

27. I further disagree with the Majority Decision where it states:

> On what grounds or principle, should the prosecutorial duty to prosecute to "the full extent of the law" be limited in application to the range of alleged criminality involved but not the range of the alleged perpetrators?[23]

In my opinion, the prosecutorial duty to prosecute to "the full extent of the law" must be assessed within the particular context of this Court, that functions pursuant to its own Statute and Rules. In keeping with this mandate, the Trial Chamber, in this Trial, is conducting a trial for three indictees who allegedly bear the greatest responsibility for serious violations of international humanitarian law. This Trial Chamber has a duty to ensure that this trial is conducted both fairly and expeditiously and in accord with the fundamental principles of justice. The duty of the Prosecution to prosecute to "the full extent of the law", within the confines of this trial, includes the duty to ensure that the Accused persons are charged with the offences that they allegedly committed, as specifically enumerated in the Statute. I would not reduce the importance of the Prosecution argument by extending it outside the mandate of this Court to the "range of alleged perpetrators".

[23] Majority Decision, para. 30.

28. Contrary to what was held by the Majority, I consider that the Prosecution have met the two pronged test laid out in Rule 73(B) and I would grant leave for this interlocutory appeal.

Done at Freetown this 5th day of August 2004

Judge Pierre Boutet

[Seal of the Special Court for Sierra Leone]