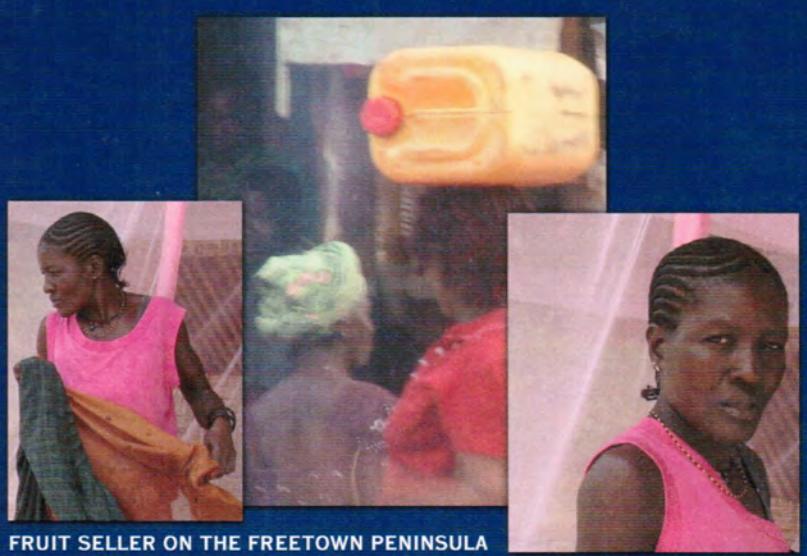
Silencing Sexual Violence

Recent developments in the CDF Case at the Special Court for Sierra Leone



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SILENCING SEXUAL VIOLENCE:
Recent Developments in the CDF case at the Special Court for Sierra Leone

SARA KENDALL AND MICHELLE STAGGS
28 June 2005

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I. Overview

Introduction

> Prosecutor: After that incident, did anything happen?
> Witness: Yes.
> Prosecutor: Yes, what happened?
> Witness: Kondewa made me into his wife.[1]

This exchange from Trial Chamber I of the Special Court for Sierra Leone does not exist outside the notes of court observers who were present at the public session when it transpired; it has since been expunged from the official court record. The details of this allegation - that the witness was forced to become the "wife" of one of the men on trial - will never be explored, tested or weighed as evidence against the accused. It forms part of a silent group of sexual violence allegations that have been excluded from witness testimony following a series of rulings in one of the court's three cases currently at trial. The reasoned opinion of Justice Bankole Thompson of Sierra Leone and Justice Benjamin Mutanga Itoe of Cameroon forming the basis of these rulings was only issued late last week, one month after the evidence was initially excluded by an unreasoned decision; Justice Pierre Boutet of Canada issued a separate dissenting opinion. These rulings and the majority decision upon which they were based created a slippery slope: any evidence that directly or even remotely relates to the sexual act was deemed inadmissible. As a result of this and other decisions, all considerations of serious allegations of systematic sexual violence on the part of one of the main parties to the Sierra Leone conflict has been excluded by the Special Court.

[1] Testimony of Witness TF2-188 in Trial Chamber I, 31 May 2005, author's notes.

The Chamber justified excluding this testimony on the grounds that the acts in question lay within the realm of "forbidden evidentiary territory",[2] relying on a narrow interpretation of admissibility that contrasts dramatically with the wide ambit of discretion afforded to the judges. The rules of evidence governing the court's proceedings enable the bench to admit all relevant evidence; its weight and probative value will then be determined at a later stage. In this case, the evidence was excluded on the grounds that rape and sexual violence were not charged as specific offences under the indictment.

This paper traverses the history of the exclusion of sexual violence evidence in the trial against three members of the Civilian Defence Force, from its initial omissions in the indictments against the accused to its most recent relegation to the realm of forbidden evidentiary territory. It looks at how an initial oversight by the prosecution became the premise upon which the majority of the bench in Trial Chamber I adopted a language of exclusion: all testimony "tainted" by sexual violence was effectively silenced. As a result, nine witnesses in the CDF trial were unable to tell their full stories. This paper argues that they should have been permitted to speak.

Summary of recent developments

In a majority decision (Boutet J dissenting) released by Trial Chamber I on 23 June 2005 and back-dated to 24 May 2005, the Chamber has excluded any evidence of sexual violence from being admitted in the case against three members of the Civilian Defence Force (CDF), a pro-government militia comprised in part by a traditional hunting society known as the Kamajors, who fought against rebel groups during the conflict in Sierra Leone. The Chamber's reasoned decision follows an unreasoned ruling issued nearly one month before, which denied the prosecution's motion and essentially gave the Chamber blanket authority to determine the degree of admissibility when the witnesses testified in court.

Before closing its case against Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa, the prosecution intended to call nine women to testify regarding acts of sexual violence that they experienced or witnessed. The prosecution had notified the defence over one year ago in its pre-trial discovery that this evidence would be heard under existing counts of the indictment as "physical violence and mental suffering."[3] Some of these crimes were allegedly committed by the third accused, Allieu Kondewa, including rape and forced marriage; other crimes were committed by troops allegedly under the control of some or all of the accused individuals.[4] Three of these witnesses were not

[2] *Oral ruling with regards to the testimony of TF2-187*, 1 June 2005, Majority decision (Boutet J dissenting) delivered by Judge Thompson.

[3] *Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004*, 22 April 2004. This was noted in the *Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence*, 24 May 2005 (released 23 June 2005), paragraph 25.

[4] According to the prosecution's pre-trial brief, two of these witnesses (TF2-187 and TF2-188) would have testified that Kondewa personally raped them.

called as a consequence of the recent rulings,[5] and those who did testify were actively silenced by the bench whenever any of the testimony they sought to give related in any respect to sexual violence.

The decision issued last week provides retrospective justification for excluding what one of the two judges in the majority refers to as "gender evidence" or "gender testimony"[6] rather than crimes of a sexual nature. In some instances, witnesses were stopped from answering questions after establishing the gender or marital status of the alleged victim, which in itself was not sufficient to demonstrate that their answers would include evidence of sexual violence.[7] Factual details bearing any relationship to sexual violence seemed tainted by association: in one instance, the Trial Chamber did not allow a witness to give evidence about making a rape complaint to the second accused, Moinina Fofana, solely due to the nature of the complaint. The majority of the bench ruled that sexual violence crimes "constitute part of a single, integrated, continuous transaction or *res gestae*",[8] which was first formulated to exclude evidence of a miscarriage on the grounds that it was inseparable from the rape that caused it. This logic was then adopted and applied to evidence of command responsibility: the bench ruled that such evidence could not be separated from the alleged sexual violence offences themselves. An accused's failure to prevent or punish a rape or an act of sexual violence could not amount to a separate crime, despite the accused's liability for unlawful acts of his subordinates under the Special Court's Statute regardless of whether the specific acts were charged.[9] This ruling precluded the prosecution's efforts to establish Fofana's command responsibility for the acts solely because of their sexual nature.

In the CDF case, sexual violence has effectively become an invisible war crime. Members of the bench, the bar, and observers in the public gallery were well aware of what the women would have been testifying about if the Chamber had ruled differently, since it heard submissions detailing the proposed testimony before ruling against taking it into evidence. The remaining witnesses were only permitted to give evidence in support of other crimes, including physical violence and mental suffering, killings, theft and the destruction of property, which they often witnessed as they were subjected to acts of sexual violence. In a disturbing outcome of the Chamber's majority rulings, the beatings,

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[5] Witness TF2-129 would have testified that she was raped by Kamajors and kept as a wife. Witness TF2-135 would have testified that she reported her rape to second accused Moinina Fofana. Witness TF2-189 would have testified that she was forced into marriage with a Kamajor at CDF Base Zero. *Prosecution Supplementary Pre-trial Brief*, 22 April 2004.

[6] *Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence*, 24 May 2005 (released 23 June 2005), at paragraphs 19 and 44.

[7] This first transpired during the testimony of child ex-combatant TF2-021 in November of 2004, and again with Witness TF2-189 described below. However, the bench's recent majority ruling argues that Witness TF2-189's answer "would have elicited evidence about forced marriage." *Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence*, paragraph 14.

[8] Author's notes of *Oral ruling with regards to the testimony of TF2-187*, 1 June 2005, Majority decision (Boutet J dissenting) delivered by Judge Thompson.

[9] Under Article 6(3) of the Special Court's Statute: "The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

amputations, and imprisonments that the witnesses described could qualify as physical violence or mental suffering, whereas rape and sexual violence could not. In the written decision issued this week, the majority of the bench reasoned that "other inhumane acts" could only be interpreted to cover acts "of a non-sexual nature", and that sexual violence must be charged specifically and separately under the indictment.[10] This conclusion is inconsistent with the jurisprudence of other international tribunals, which have held since the decision of the ICTR in the *Akayesu* case that sexual violence can fall within the definition of "other inhumane acts" or "outrages upon personal dignity."

Summary of procedural background

The complete exclusion of evidence of sexual violence in the case against three members of the CDF has been developing for over a year, since the prosecution sought and failed to obtain leave to amend the CDF indictment to include sexual violence charges. According to the Office of the Prosecutor, early investigations did not uncover enough evidence to support sexual violence counts against members of the CDF. These charges were included in the indictments of the other two cases currently at trial, and the Special Court has heard testimony in those cases concerning acts that were allegedly committed by members of the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC). However, subsequent investigations revealed that members of the CDF may have also abducted civilian women and girls, who were allegedly "confined and subjected to acts of sexual violence such as multiple rapes, sexual slavery," and "forced 'marriages' or conjugal-like situations."[11]

Four months before the start of trial, the prosecution attempted to amend its indictment to include charges of rape, sexual slavery, forced marriage, and other forms of sexual violence; their motion was denied in a majority decision of the Trial Chamber over the vigorous dissent of Judge Boutet. The prosecution then sought leave to appeal the decision; when leave to appeal was also denied, it appealed directly to the Appellate Chamber, which found that it did not have jurisdiction over the matter. As the trial continued and after members of the bench appeared reluctant to hear any evidence of sexual violence, the prosecution moved to clarify whether this evidence could be admitted under existing counts of the indictment.

This request was denied in a majority ruling despite the fact that such evidence has been led to support other kinds of charges in the international criminal tribunals for Rwanda and the former Yugoslavia. The ruling stated that the matter at issue was not whether the evidence could be led under other charges, but instead whether doing so would prejudice the rights of the accused.[12] It emphasized the importance of the indictment in notifying the accused individuals of the charges against them. Despite the detailed allegations in the prosecution's pre-trial brief filed over a year ago, the majority decision further stated

[10] *Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence,* 24 May 2005 (released 23 June 2005), paragraph 19(iii)(b).
[11] *Prosecutor's Case Summary in the Form of an Investigators Statement* at paragraph 11, appended to the *Request for Leave to Amend the Indictment Against Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa,* 9 February 2004.
[12] *Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence,* 24 May 2005 (published 22 June 2005), at paragraph 17.

"nothing in the records seems to support the Prosecution's assertion that the evidentiary material under reference had been disclosed to the Defence 'in some form' over 12 months ago".[13] In focusing exclusively on the indictment, this characterization contrasts sharply with the approach taken at the ICTR in the *Muhimana* case, where the defence was considered to be "on notice upon disclosure of the witness statements that the criminal conduct described therein might form part of the Prosecution case."[14]

II. Background

Before assessing the recent reasoned decisions and the exclusion of sexual violence testimony at trial, this paper briefly considers how the obligation to prosecute crimes of sexual violence has been framed at the Special Court as well as the prosecution's efforts to fulfil this obligation. While the court's Statute both implicitly and explicitly acknowledges the significance of prosecuting acts of sexual violence, the Special Court is also bound to a time-limited mandate. Since the court's inception, the prosecution has been at once responsible for trying alleged perpetrators of sexual violence and for making tactical decisions to ensure that its cases are brought expediently. In weighing these concerns, early decisions made by the prosecution have contributed to an unfortunate outcome. However, the Trial Chamber has overemphasized its pressures to meet the court mandate as quickly as possible, seizing upon an early delay as the grounds for increasingly restrictive rulings regarding sexual violence.

The obligation to prosecute sexual violence offences

> "The investigation and presentation of evidence relating to sexual violence is in the interest of justice"[15] *Prosecutor vs. Akayesu,* International Criminal Tribunal for Rwanda

The jurisprudence emerging from the international criminal tribunals in Rwanda and the former Yugoslavia has firmly established sexual violence among the most serious crimes committed in the course of an armed conflict: rape and sexual violence have been prosecuted as forms of war crimes, crimes against humanity (including torture, enslavement, other inhumane acts, and outrages against human dignity), and genocide. Particularly ground-breaking decisions often involved considerable pressure from both inside the tribunals and from outside groups to combat a culture of impunity that has historically surrounded sexual violence in times of war. Recent foundational documents such as the statute of the International Criminal Court and the Special Court statute reflect the significance of these kinds of crimes in international criminal law.

Acts of sexual violence were prevalent in the armed conflict in Sierra Leone: the UN Secretary General reported that sexual violence against girls and women was one of the most egregious practices committed during the decade-long conflict.[16] The Special Court

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[13] *Ibid.*, at paragraph 19 (v).

[14] *The Prosecutor v. Mikaeli Muhimana,* ICTR-1995-1B-I, *Decision on Motion to Amend Indictment,* 21 January 2004, paragraph 9.

[15] *The Prosecutor versus Jean-Paul Akayesu,* ICTR-96-4-T, 2 September 1998, paragraph 417.

[16] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Document S/2000/915, 4 October 2000, paragraph 12. This is noted in *Dissenting Opinion of Judge Pierre Boutet on Decision of the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision*

is required by its Statute to prosecute "those bearing the greatest responsibility" for acts of sexual violence as crimes against humanity and as a violation of the Geneva Conventions.[17] The Statute also directs the court prosecutor to pay special attention to gender-based violence in investigations and staff hires.[18] Early commentary on the court praised its attention to sexual violence: a letter to the prosecutor of the Rwandan tribunal from a leading women's rights organization noted the promising developments in the SCSL, including a substantial part of the investigations team specializing in sexual assault investigations.[19]

Consequences of early omissions by the prosecution

Despite the emphasis placed on sexual violence offences in the Court's Statute and clearly articulated support for the prosecution's mandate in this regard, the prosecution did not include sexual violence offences in the original CDF indictments on the grounds that allegations of sex crimes had not been substantiated at the time the accused were arrested.[20] Although the prosecution relied upon jurisprudence from the *ad hoc* tribunals to claim that the prosecutor must demonstrate sufficient legal and factual grounds for amending an indictment, the Special Court's Rules provide a low threshold for including new offences in an indictment.[21] As the Appeals Chamber recently ruled, approval of an indictment at the Special Court "does not, as in certain other courts, require a judicial finding of a *prima facie* case: the judge is concerned only to ensure that the particulars which the prosecution claims it can prove would amount to a triable offence."[22] Bearing this consideration in mind, the prosecution could have included counts of sexual violence as soon as it found indications of this evidence, and it could have then sought leave to withdraw the counts at a later stage in the proceedings if necessary.[23]

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on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, 5 August 2004, at paragraph 18.

[17] Article 2(g) of the Statute of the Special Court for Sierra Leone requires it to prosecute "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence" as a crime against humanity; Article 3(e) requires it to prosecute "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault" as a violation of Article 3 common to the Geneva Conventions and Additional Protocol II.

[18] Article 15(4) of the Statute of the Special Court for Sierra Leone states: "Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice."

[19] Letter from the Coalition for Women's Human Rights in Conflict Situations to ICTR Prosecutor dated 12 March 2003, available on line at http://www.ichrdd.ca/english/prog/women/coalitionLetterRwanda.html.

[20] *Consolidated Reply to Defence Response to Prosecution Request for Leave to Amend the Indictments Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa* SCSL-2004-14-T, 24 February 2004, paragraph 15. This is despite the fact that international organizations such as Human Rights Watch had reported interviews with victims of gender-based violence as early as January 2003. See HRW Vol. 15, No. 1(A), "'We'll Kill You if You Cry': Sexual Violence in the Sierra Leone Conflict," page 46.

[21] *Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, 9 February 2004, paragraph 8. However, Rule 50(A) of the Rules does not provide any guidance regarding the evidentiary requirements at the Special Court for adding new counts to an indictment.

[22] *Decision on Amendment of the Consolidated Indictment* SCSL-04-14-AR73, 16 May 2005, paragraph 49.

[23] This was, in fact, the course of action they took in the trial against the three AFRC accused. In that case, charges alleging that the accused had participated in the abduction of peacekeepers were withdrawn shortly before the trial began.

According to the prosecution, indications of sexual violence were available in June of 2003, but it was not yet in possession of solid evidence that could be confirmed.[24] Statements of potential witnesses were taken in late September, and the evidence was analyzed and confirmed by October or November of 2003. However, leave to amend the indictments was only sought three months later, as a motion for a joint trial of the three members of the CDF had already been filed. When justifying its delay in filing the request to add sexual violence charges, the prosecution argued that it was "in the interests of judicial economy" to file the motion *after* the decision on joinder had been made in order "to avoid filing separate motions for each accused as would have been the case if the application had been made earlier."[25] A request to consolidate the indictments was included as part of the prosecution's motion for joinder; according to a recent ruling by the Appeals Chamber, however, there is no basis for assuming that a joint trial requires consolidating the indictments.[26] The prosecution did not need to wait for the outcome of the joinder motion to file the motion to amend; in fact, it should have proceeded with the motion to amend as soon as evidence of sexual violence was confirmed in late October or early November. Under the time pressures it was facing in the pre-trial stage of the proceedings, the prosecution seemed to prioritize joining the cases over including sexual violence charges.

The prosecution vigorously sought leave to appeal the Trial Chamber's decision, including an inventive but unsuccessful appeal directly to the Appellate Chamber. However, it did not exhaust all possible remedies. At the time its appeal was denied, the prosecution could have sought clarification as to whether the evidence could be admitted under other counts rather than waiting until one trial session before the sexual violence evidence was to be led. Furthermore, nothing prohibited the prosecution from bringing a new and separate indictment for the sexual violence counts, which would have only required the approval of one judge.[27]

Decisions by the prosecution from early in the trial process continue to form the basis upon which the majority of the bench refuses to hear evidence of sexual violence. In the most recent rulings on this issue, Judge Itoe argues that the prosecution was not granted leave to amend their indictment out of a "lack of promptitude [sic] and diligence",[28] and it appears that the prosecution's obligation to present all relevant evidence before the court

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[24] The prosecution refers to a witness statement taken on 9 May 2003: "girls came from surrounding villages into Base Zero, plenty of them. This was the only safe place in Talia. I know there was plenty of Gonnorea [sic] around there." *Prosecution Reply to 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*, 18 June 2004, footnote 29.

[25] *Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, 9 February 2004, at paragraph 21.

[26] *Decision on Amendment of the Consolidated Indictment* SCSL-04-14-AR73, 16 May 2005, at paragraph 58.

[27] Rule 47 of the Rules of Evidence and Procedure only requires that an indictment be submitted to a "designated judge" for review; it does not specify that the judge must be from the trial chamber in which the case will be heard.

[28] *Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence,* 24 May 2005 (released 23 June 2005), paragraph 37.

has been overshadowed by the majority's concerns regarding the accused's statutory rights to be tried without undue delay. Indeed, the majority ruling denying leave to appeal the amendment decision claimed that the prosecution's "neglect in respecting the statutory obligation of timeliness" was "solely responsible for the refusal by the majority decision of the Chamber, of the Application for leave to amend the indictment."[29]

The tactical decisions and omissions by the prosecution from early in the trial process should not preclude it from leading evidence of sexual violence. The prosecution did not need to wait for the outcome of the joinder decision, which caused a three-month gap between the time in which it had confirmed evidence of sexual violence and the time when it sought to amend its indictment. If it had been fully prioritizing the prosecution of sexual violence crimes, it would have sought leave to amend immediately. However, this gap could not be characterized as an excessive or undue delay, nor did it jeopardize the rights of the accused at that point in the pre-trial proceedings. The relevant evidence was disclosed to the defence four months before the start of the trial, and the witnesses were identified on a list submitted before trial in April of 2004.[30] Before leave to amend the indictment was denied, the prosecution had listed the particular sexual violence offences under counts 3 and 4 of the indictment in its pre-trial brief, notifying the defence and the bench that it would seek to lead evidence of sexual violence under these counts.[31] These witnesses were not called until the close of the trial over a year after their identities and statements were disclosed to the defence.

Despite this, the Chamber's most recent majority decision contends that admitting this evidence at this stage in the proceedings would violate the accused's right to be informed "promptly and in detail" of the nature of the charges.[32] In the reasoning of this decision, the prosecution's three-month delay in seeking leave to amend the indictment is figured as an original, inescapable error: in order for the evidence to be deemed admissible, it would have needed to be in the indictment and pled specifically as a sexual violence count as soon as there were indications of such crimes. All efforts by the prosecution to argue that the evidence can be adduced in other ways were confronted with this original omission as the grounds upon which it must subsequently be excluded. The Chamber's majority ruling articulates a strict understanding of "notice" as occurring solely by way of the indictment; in refusing to grant leave to amend it to include sexual violence charges on the grounds that the prosecution's three-month delay was excessive, the Chamber is largely responsible for preventing this evidence from being led.

III. Analysis of Trial Proceedings and Rulings

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[29] *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, at paragraph 36.

[30] *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,* SCSL-2004-14, 4 June 2004, paragraph 23.

[31] *Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004,* 22 April 2004.

[32] *Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence,* 24 May 2005 (released 23 June 2005), paragraph 19(viii).

The exclusion of sexual violence evidence from the CDF case hinges upon the Chamber's assessment of the importance of an indictment in framing the case against the accused. The reasoned majority decision frames the issue as a matter of "new" evidence against the indictees: factual allegations not plead in the indictment are considered by the majority to be potentially prejudicial.[33] However, this indictment-centered view was not fully articulated until the most recent ruling issued last week, when it became clear that the only way the prosecution could have led this evidence would be if it had included sexual violence counts on the indictment. The majority of the bench gave indications of this position at trial in November 2004, and the defence was able to argue strenuously from that moment onwards that the prosecution was bringing in evidence "through the back door" when it sought to lead testimony concerning sexual violence. Some of the defence objections suggested that the prosecution was either subverting the authority of the Trial Chamber or attempting to obtain a tactical advantage by surprising the defence with allegations outside the indictment. However, the dissenting opinion of Judge Boutet and a recent ruling by the Appeals Chamber both indicate that the indictment does not need to be as detailed and authoritative as these arguments suggest.

Trial Chamber refuses to grant leave to amend indictment

The prosecution sought leave to add sexual violence counts in early February of 2004; the Chamber did not issue its ruling on the matter until the CDF trial was about to start at the beginning of June.[34] In refusing to grant leave to amend, the majority decision of the Trial Chamber states that the most important considerations were matters of timing, and particularly whether the proposed amendment was brought at a stage in the proceedings that would not prejudice the rights of the accused.[35] The prosecution was accused of "obvious prosecutorial lapses"[36] for not moving to amend the indictment earlier. In a confusing formulation, the majority opinion appears to concede that the application could be considered timely, but it then states that this argument "collapses" because the prosecution did not seek leave to amend the indictment "much earlier".[37]

As previously discussed, it does not seem possible that the prosecution could have added the charges much earlier, since there was minimal evidence available in the summer of 2003. The majority decision puts substantial weight on the fact that the prosecution had *some* evidence of sexual violence in June of 2003 without considering the nature and extent of the evidence and whether it was sufficient to support new indictment counts. Judge Pierre Boutet's dissenting opinion takes issue with the characterization of the amendments as untimely, noting that the prosecution must possess sufficient evidence to secure a conviction before adding a count to the indictment. According to Judge Boutet, this evidence only existed at the end of November 2003, less than three months before the prosecution sought leave to amend.[38]

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[33] *Ibid.*, at paragraph 19(iv).

[34] Although the ruling is dated 20 May 2004, it was not issued until 1 June 2004, the day of the status conference at the beginning of the CDF trial. Trial proceedings began on the following day.

[35] *Decision on Prosecution Request for Leave to Amend the Indictment*, 20 May 2004, paragraph 35.

[36] *Ibid.*, at paragraph 77.

[37] *Ibid.*

[38] *Dissenting Opinion of Judge Pierre Boutet on the Decision on Prosecution Request for Leave to Amend the Indictment*, 31 May 2004, paragraphs 25 and 37.

The Chamber did not carefully consider what complicating factors may have contributed to the prosecution's delay in seeking leave to amend. Neither the prosecution nor the majority decision considered the *Muhimana* case from the International Criminal Tribunal for Rwanda (ICTR), in which the Trial Chamber granted leave to the prosecution to include a sexual violence charge on an amended indictment. In considering what constitutes delay as a consequence of an amendment and the potential prejudice to an accused, the Chamber notes that it must consider "the general complexity and difficulties necessarily inherent in the investigation of [war crimes]" which requires "reasonable judicial flexibility in relation to such amendments."[39]

The prosecution had submitted that securing evidence of sexual violence requires much more time than evidence of other crimes, especially considering that "CDF members committed gender based crimes against their own supporters, who still live in the same communities as their perpetrators".[40] Evidence was more difficult to obtain in the CDF case than in the other two cases due to the different social and political circumstances of this pro-government faction compared with the rebel groups, and sexual violence was not nearly as prevalent in the CDF as in the other two factions.[41] However, the majority decision of the Chamber claimed that it was difficult to understand how the prosecution easily acquired evidence of sexual violence in the other two cases.[42] According to the decision, "if any gender offence or offences existed at all against those accused persons who are the subject matter of this motion, this should have been uncovered through the exercise of the ordinary and normally expected professional diligence on the part of the prosecution and the investigators".[43] Unlike the dissenting opinion of Judge Boutet, which notes that the nature of the offences requires a "special consideration" in light of the reluctance of victims to come forward to testify,[44] the Chamber's majority ruling refused to recognize the added difficulties faced by the prosecution in obtaining this evidence.

The prosecution at the ICTR sought to add three sexual violence counts to an indictment against Jean-Paul Akayesu five months into his trial. Leave was granted, and the trial resumed four months later.[45] In contrast, and despite the fact that the request to amend was filed by the prosecution four months before the start of trial, the majority opinion of Trial Chamber I at the Special Court argued that granting leave to include sexual violence charges would prejudice the rights of the accused to a fair and expeditious trial and would

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[39] *The Prosecutor v. Mikaeli Muhimana,* ICTR-1995-1B-I, *Decision on Motion to Amend Indictment,* 21 January 2004, paragraph 4.

[40] *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, paragraph 15.

[41] See "'We'll Kill You if You Cry': Sexual Violence in the Sierra Leone Conflict"; Human Rights Watch Vol. 15, No. 1(A), January 2003, Section V; also "Sierra Leone Truth and Reconciliation Commission Final Report" Volume 2, Chapter 2 (Findings), available online at http://ictj.org/downloads.

[42] *Decision on Prosecution Request for Leave to Amend the Indictment*, 20 May 2004, paragraph 57.

[43] Paragraph 58.

[44] *Dissenting Opinion of Judge Pierre Boutet on the Decision on Prosecution Request for Leave to Amend the Indictment*, 31 May 2004, paragraph 26.

[45] *The Prosecutor versus Jean-Paul Akayesu*, ICTR-96-4-T, 2 September 1998, paragraph 23.

constitute an abuse of process. Although the prosecution mentioned the *Akayesu* case in its application,[46] the bench did not consider the decision in its majority ruling on the grounds that "the facts available to us at this moment, do not give us a clue on what the decision granting the amendment was based."[47]

The *Akayesu* excerpt attached to the prosecution's motion included enough facts about the case's procedural history to indicate that the case would have assisted the bench in its ruling: in both the ICTR case and in the CDF case before the chamber, the prosecution had encountered difficulties securing evidence during investigations. The evidence supporting sexual violence counts came out during witness testimony during the *Akayesu* trial: the prosecution argued that "evidence previously available was not sufficient to link the Accused to acts of sexual violence," and it further 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."[48] The prosecution's motion to amend the CDF indictment raises similar issues: the prosecution stated that "fears expressed by potential witnesses if they came forward to testify meant that the Prosecutor could not have easy access to the newly acquired evidence at the time that the Indictments were approved", adding that in some instances the indictment and incarceration of the accused was what had enabled the witnesses to come forward.[49]

The majority decision of the chamber does note that it is "pre-eminently conscious of the importance gender crimes occupy in international criminal justice given the very high casualty rates of females in sexual and other brutal gender-related abuses during internal and international conflicts."[50] The gravity of rape or sexual violence appears to be tied to the "very high casualty rates" that may accompany such crimes; however, the chamber does not mention the significance of what it calls "gender crimes" in and of themselves. Furthermore, it does not provide any special considerations in light of the difficulties faced in investigating and prosecuting such crimes.

Trial Chamber denies leave to appeal decision

According to the Rules of the Special Court, appealing a Trial Chamber decision requires meeting a high threshold: the appellant must demonstrate both exceptional circumstances as well as irreparable prejudice to the party if the appeal is not granted. The prosecution sought leave to appeal by arguing a number of exceptional circumstances, including the strong dissenting opinion of Judge Boutet as well as its own statutory obligations to investigate gender-based crimes and to present evidence reflecting the totality of the crimes committed by the accused. At this point in the proceedings the prosecution appeared confident that it would still be able to lead evidence of sexual violence under other counts of the indictment: the issue was *how* the crimes would be prosecuted rather than *whether* they would be prosecuted, and it asserted the "right of the victims to have

[46] *Request for Leave to Amend the Indictment Against Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa,* 9 February 2004, at paragraph 31.
[47] *Decision on Prosecution Request for Leave to Amend the Indictment*, 20 May 2004, paragraph 82.
[48] *Akayesu*, paragraph 417.
[49] *Request for Leave to Amend the Indictment Against Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa,* 9 February 2004, at paragraph 20.
[50] *Decision on Prosecution Request for Leave to Amend the Indictment*, 20 May 2004, paragraph 82.

the crimes committed against them prosecuted as gender based crimes."[51] It further indicated that including the charges under existing counts was not its desired approach: it would entail "prosecuting gender based crimes as if they were general violence offences, thereby undoing years of jurisprudential development in international criminal law."[52]

In its majority ruling, the Chamber did not address the prosecution's claim that the omission of gender-based crimes from the indictment constitutes exceptional circumstances; it focused instead on prosecutorial discretion, claiming that the prosecutor is not obliged to prosecute all crimes that may have supporting evidence.[53] It argued further that the prosecution could not claim "irreparable prejudice" if its conduct had contributed to the prejudice.[54] Judge Boutet contested this "unclean hands" view in his dissenting opinion, arguing that "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."[55]

Unlike the majority opinion, which sidestepped the issue of sexual violence and focused instead on the rights of the accused, the nature of the crimes was a central theme in Judge Boutet's dissenting opinion. The opinion argues that victims of sexual violence have a right to have the crimes committed against them prosecuted, and the alleged errors of fact and law in the Chamber's majority ruling gave rise to exceptional circumstances when coupled with the nature of his dissenting opinion.[56] The opinion further argued that the request concerned "essentially serious charges of sexual violence against the accused persons, in addition to alleged direct participation of the Accused in such crimes", which constituted a "fundamental issue" that could prejudice the Special Court's capacity to fulfil its mandate.[57] Failure to accurately represent these alleged acts would also cause "irreparable prejudice," as there would be no available remedy if the leave to appeal was denied, which could also be seen to constitute exceptional circumstances.

The Chamber did make a finding of "exceptional circumstances" and "irreparable prejudice" in relation to another indictment issue in the CDF case, which allowed the issue to go forward on appeal. In this decision, the different opinions expressed by the judges as well as the "controversial nature" of the issues addressed in the decision, which had to do with the potential inclusion of extra charges against the accused, were

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[51] *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*, SCSL-2004-14, 4 June 2004, at paragraph 6.

[52] *Ibid.*, at paragraph 5.

[53] *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, at paragraph 30.

[54] *Ibid.*, at paragraph 35.

[55] *Dissenting Opinion of Judge Pierre Boutet on Decision of 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,* 5 August 2004, at paragraph 26.

[56] *Ibid* at paragraphs 17 and 18.

[57] *Ibid* at paragraph 18.

perceived to constitute exceptional circumstances.[58] The unanimous opinion granting leave to appeal noted that irreparable prejudice could result by impacting upon the accused's rights to a fair trial. The substantial difference between the two requests for leave to appeal was that one concerned the rights of the accused, while the other involved the prosecution's obligation to carry out its mandate. Subsequent majority rulings issued in relation to the sexual violence charges have reasserted the importance of the rights of the accused while de-emphasizing the duty of the prosecutor to present all relevant evidence against accused individuals.

Events in the trial chamber

The recent reasoned decisions issued by Trial Chamber I follow a series of events at trial that forced the issue of admissibility of evidence of sexual violence. Embedded in the history of the silencing of sexual violence testimony is a history of responses to defence objections, the first of which was raised in November of 2004. Prior to that time, the Chamber had admitted testimony of sexual violence on two separate occasions without questioning it.[59]

The defence first objected to admitting evidence of sexual violence testimony when a former child combatant testified to capturing women and bringing them to the house of third accused Allieu Kondewa at "Base Zero", the CDF headquarters in south-western Sierra Leone. The witness admitted that he had brought the women to Base Zero because Kondewa wanted "to woo them – marriage."[60] The prosecution then asked, "What did they do with [them] at his house?"[61] Kondewa's counsel objected on the grounds that the testimony related to forced marriage and was therefore inadmissible, and the prejudicial effect of admitting this evidence would outweigh its probative value. The objection seemed wholly premature, given that no evidence of the women's marital status or of coerced sexual acts had been led at that point: all that had been established was that Kondewa had the intention "to woo them." The prosecution argued that the evidence was admissible under other counts in the indictment.

Early traces of the arguments the judges articulate in their most recent decisions are evident in their responses to the defence's objection. Judge Boutet was the only judge of the three to express an unqualified interest in hearing the testimony, on the grounds that no foundation had been laid to suggest its exclusion. While he agreed that forced marriage would be inadmissible, he pointed out that "there are many, many things that may happen other than forced marriage – beating of these women; physical, mental abuse

[58] *Decision on Prosecution Application for Leave to Appeal "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment"*, 15 December 2004.

[59] On 9 September 2004: "They kill them with a stick; they put the stick into their female genitals and the stick came out through their mouths". Testimony of Witness TF2-159, author's own notes.
On 17 September 2004: "They even raped people in their houses." Testimony of Witness TF2-042, 17 September 2004, Transcript of Proceedings, page 97 line 15.

[60] 2 November 2004 Transcript of Proceedings, Page 47 line 27.

[61] 2 November 2004 Transcript of Proceedings, Page 48 line 17. Kondewa's counsel argued in the alternative that the prejudicial effect of admitting this evidence would outweigh its probative value and that the evidence did not support an indictment count.

of these women"[62]. Consistent with his recent dissenting opinion, he seemed to be articulating the view that the Chamber could intervene *ex officio* to exclude from the proceedings evidence that, for one or more reasons laid out in the court's rules, ought not to be admissible; as professional judges, the Chamber should first hear the testimony and then make an assessment as to the degree of admissibility.[63] This is also consistent with the opinion he expressed in his recent dissent that evidence of acts of sexual violence are no different than evidence of any other act of violence and are not inherently prejudicial or inadmissible by virtue of their nature or characterization as "sexual".[64]

Judge Itoe urged the prosecution not to bring evidence "through the backdoor" and pointed out that it was "a controversial point" if the prosecution wanted "to say that sexual assaults and so on and so forth" constitute part of other counts in the indictment.[65] The characterization appears misplaced, given this practice has been well grounded in the jurisprudence of other tribunals.[66] Judge Thompson stated that he would not admit any evidence suggesting forced marriage, because it would "undermine the integrity of these proceedings", given "the Court is on record as having refused any count of forced marriage to be included in this indictment."[67] He therefore adopted a far lower threshold for excluding the witness's testimony that Judge Boutet, and articulated an indictment-centered approach. This seems consistent with the view that the suggestion of acts of sexual violence should be relegated to "forbidden evidentiary territory"[68], a view that Judge Thompson would develop in the months to come. In this instance, however, all three judges agreed that the objection was premature, and the evidence of what happened was admitted. No explicit evidence of sexual violence was subsequently led[69].

During the fifth trial session in March of 2005 it grew increasingly clear that sexual violence testimony would be considered inadmissible. A key insider witness, Albert Nallo, described the capture of sixty to eighty women who were buying palm oil in the villages surrounding Talia. The witness went on to tell how Kamajors captured the women and brought to the CDF "Base Zero" in the Bonthe district. When the prosecution then asked what happened to the women, the witness responded "we the Kamajors were adults, so we took them –"[70] at which point counsel for third accused Kondewa objected on the grounds that evidence relating to sexual violence was outside

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[62] 2 November 2004 Transcript of Proceedings, page 54 lines 22-25.

[63] *Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling On the Admissibility of Evidence* (SCSL-04-14-PT), 24 May 2005 (released 22 June 2005) at paragraph 11.

[64] *Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling On the Admissibility of Evidence* (SCSL-04-14-PT), 24 May 2005 (released 22 June 2005) at paragraph 33.

[65] 2 November 2004 Transcript of Proceedings, page 53 lines 25-27.

[66] In their submissions in support of hearing sexual violence evidence under other indictment counts, the prosecution notes a number of cases from the ICTY and ICTR where this has been permitted. *Motion for a Ruling on the Admissibility of Evidence*, 15 February 2005, paragraphs 21 and 27.

[67] 2 November 2004 Transcript of Proceedings, page 54 line 15.

[68] *Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence* (SCSL-04-14-PT) issued on 22 June 2005 (backdated 24 May 2005) at paragraph 12, quoting from the majority ruling delivered on 1 June 2005 regarding the Prosecution's application to permit prosecution witness TF2-187, to testify.

[69] *Ibid.* The witness subsequently testified that he saw Kondewa take the women to a neighbouring village so that they could be initiated into the Bondo society, implying that the women underwent female circumcision. However, the witness testified that he did not know what the Bondo society was.

[70] Testimony of Albert Nallo on 11 March 2005.

the scope of the indictment. Although his client had not been named, counsel for the third accused further argued that the evidence in question was "geared towards embarrassing the accused person"[71]. The witness had not testified to the women engaging in any sexual acts at this point in the proceedings.

The extent to which sexual violence testimony would be admissible was under the Chamber's determination at that time.[72] Reiterating what he saw as the importance of procedural integrity, Judge Thompson stated that if the evidence was the subject of a pending motion, admitting it would allow for the court's processes to be subverted and would defeat the purpose of that motion. Judge Boutet disagreed, again taking the opposing view regarding the admissibility of evidence. Consistent with the principle of flexible admissibility often purported by the Chamber,[73] he argued that notwithstanding the pending motion, the evidence should be considered admissible on the grounds that it could be led under the existing counts.

Judge Itoe reiterated his previous concerns about the importance of prohibiting the admission of evidence on matters that had not been plead in the indictment. However, after hearing the legal arguments regarding the outstanding motion and the issue under determination, he adopted a firmer line than he had previously taken regarding the admissibility of sexual violence testimony. Judge Itoe stated that if the women were captured and retained "on the other side" against their consent, this was enough to suggest that the women were either raped or retained as wives.[74] Judge Itoe appeared to suggest that not only evidence relating to sexual violence, but also evidence about *women* that *may lead* to evidence of sexual violence, should be considered inadmissible.[75] In refusing to hear testimony relating to the treatment of women at Base Zero, he effectively silenced testimony based on the gender to which it related: the story of how women were treated was being omitted on the grounds that it was somehow "tainted" with sexual violence even before those acts had been alleged. The shift in his thinking seems consistent with the reasoning he adopts in his most recent concurring opinion, when he

[71] Testimony of Albert Nallo on 11 March 2005, Counsel for Kondewa's objection.

[72] All the relevant motions regarding the admissibility of evidence had, at that stage, been filed. See *Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence*, 15 February 2005, *Response of first accused to prosecution's 'Urgent Prosecution Motion For Ruling on Admissibility of Evidence' and Objection to Other Crimes Evidence* 18 February 2005, *Response of second accused to prosecution's 'Urgent Prosecution Motion For Ruling on Admissibility of Evidence'*, 25 February 2005, *Response of third accused to prosecution's 'Urgent Prosecution Motion For Ruling on Admissibility of Evidence'* 28 February 2005 and *Prosecution Reply to 'Response of First Accused to Prosecution's "Urgent Prosecution Motion for Ruling on Admissibility of Evidence" and Objection to Other Crimes Evidence'* 23 February 2005.

[73] *Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker*, SCSL-04-15-T, 23 May 2005.

[74] At one point during the proceedings, after describing the women's capture, Judge Itoe asked the prosecution, "What other element of rape do you want than that?" Testimony of Albert Nallo, 11 March 2005, author's notes.

[75] *Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion For A Ruling on the Admissibility of Evidence*, 24 May 2005 (released 23 June 2005), paragraph 19.

uses the term "gender evidence" to describe the testimony the majority is seeking to exclude.[76]

The prosecution sought to lead witnesses giving "evidence of acts of a sexual nature"[77] during the first week of June. During that week, the Chamber issued three rulings relying on an unreasoned decision they delivered on 23 May 2005. In the unreasoned decision, the majority judges (Boutet J dissenting) deny the prosecution's motion requesting clarification on the extent to which it could lead sexual violence testimony under existing indictment counts. The judges did not provide any analysis regarding the extent or degree to which the evidence was inadmissible at that stage.[78]

The Chamber's reaction to Albert Nallo's testimony during the November trial session proved portentous. The defence objected strenuously for the exclusion of any evidence relating to sexual violence. During the course of the week, the three rulings the majority issued excluded evidence of women who were taken as Kamajor wives, even before it was clearly established that the marriage was forced, a miscarriage resulting from a rape, and the reporting of a rape to the second accused, Moinina Fofana.[79]

The first ruling, which precluded evidence of a miscarriage resulting from the rape, was the only reasoned ruling and is therefore perhaps the most worthy of note. In explaining why the evidence should be inadmissible, Judge Thompson stated that the majority did not think it "prudent to go in the direction of application of legal niceties" which would require the Chamber to adopt some doctrine of "judicial severability" in admitting the evidence, even though some of it *might* be admissible in proving certain allegations. This portion of the explanation has been omitted from the reasoned majority decision, yet it is significant: it seems to tentatively admit that there may be grounds to find that some of the evidence falls outside "forbidden evidentiary territory" and could be admissible.[80] The evaluation seemed premature given the Special Court's Rules only require the Chamber to determine whether the evidence is relevant prior to admitting it: the probative value of evidence is then determined at a later stage.

The ruling does not appear to be consistent with the previous decisions of the Chamber relating to admissibility, where the judges have tended to err on the side of admitting any evidence that may have some relevance to the proceedings. As Judge Boutet pointed out in his dissenting ruling, considering the previous decisions of the Court as to the ability of the judges to determine the necessary differences and nuances in the testimony as and

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[76] *Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion For A Ruling on the Admissibility of Evidence*, 24 May 2005 (released 23 June 2005), paragraph 19.

[77] *Urgent Prosecution Motion For a Ruling on the Admissibility of Evidence* 15 February 2005 at paragraph 10. The witnesses in question were: TF2-108, TF2-109, TF2-129, TF2-133, TF2-134, TF2-135, TF2-187, TF2-188, TF2-189.

[78] Perhaps mindful of its target to close their case this session, the prosecution did not seek leave to call the witnesses after the reasoned decision had been issued. As such, at the time the witnesses testified, there had been no clarification as to the degree to which the evidence of sexual violence would be admissible.

[79] Testimony of Witness TF2-188, Witness TF2-187 and Witness TF2-135 respectively.

[80] Proceedings at trial, 1 June 2005, author's notes.

when the evidence was being weighed, Judge Boutet was of the opinion that the evidence should be allowed.[81]

What emerges from an analysis of the trial proceedings is a clear shift in the reasoning of the majority of the bench: the judges went from adopting a flexible approach to the admissibility of evidence to an increasingly restrictive approach, which allowed for evidence of acts of a sexual nature to be precluded before the evidence was even introduced. Judge Thompson supported this view by asserting the importance of procedural integrity. Judge Itoe seemed mindful of the relationship of the evidence to the gender of the alleged victim. These views were to be articulated in the reasoned decision that followed and then retrospectively applied to the exclusion of the evidence at trial.

Efforts to admit evidence under other counts of the indictments

> A fair trial means fair treatment to the Prosecution and to witnesses as well as to the Accused.[82]

In its motion as to whether it could lead evidence of sexual violence under other counts of the indictment, the prosecution argued that the evidence it sought to lead had always been relevant and admissible under counts in the current indictment: the fact that it were not permitted to add new counts did not preclude it from leading the evidence under other counts.[83] The prosecution argued, "any testimony which relates to the unlawful activities of the Civilian Defence Force ("CDF") is relevant, in the context of the Indictment against each of the Accused, and is admissible if it satisfies, as it does, the general evidentiary requirements."[84] The sexual element of the crime was one discrete factor in the overall understanding of the harm suffered or the injury caused to the victims in question. Over three months later, and just before the witnesses were about to be called, the Chamber issued a majority opinion in which they denied the prosecution's request; however, no reasons were provided in the opinion, with the statement that a reasoned ruling would be forthcoming. The reasoned ruling followed one month later.

In their responses to the prosecution's motion, counsel for the three accused alleged among other things that evidence outside the scope of the Indictment is not relevant, as the Trial Chamber had already ruled,[85] the admission of such evidence would unduly

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[81] Notes from trial: Dissenting oral ruling read by Judge Boutet, 1 June 2005.

[82] *Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence*, 15 February 2005, paragraph 13.

[83] *Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence*, 15 February 2005, paragraph 35.

[84] *Ibid.*, at paragraph 11.

[85] *Response of first accused to prosecution's 'Urgent Prosecution Motion For Ruling on Admissibility of Evidence' and Objection to Other Crimes Evidence* 18 February 2005 at paragraph 4. Counsel for the first accused further stated erroneously "a sex offence simply has to be more prejudicial than relevant." This blanket assertion, which seemingly has no basis in international law, wrongly categorized evidence relating to crimes of a sexual nature as fundamentally prejudicing the rights of the accused and wrongly assumed that the sexual act somehow "taints" the relevance of the evidence in question. See *Response of First Accused to prosecution's 'Urgent Prosecution Motion For Ruling on Admissibility of Evidence' and Objection to Other Crimes Evidence*, 18 February 2005 at paragraph 16.

prejudice the defence by unduly delaying the proceedings,[86] and because the indictment contained no reference to crimes of sexual violence, there was no reasonable basis for the accused to have focused his defence with such charges in mind.[87] In response to these arguments, the prosecution noted that the evidence was not outside the existing indictment because sexual violence falls within the scope of 'other inhumane acts' and 'serious bodily or mental harm',[88] a lack of specificity of particulars under the counts does not make the evidence outside the scope of the indictment, as a distinction can be drawn between the charges laid and the particulars included,[89] and the accused's ability to prepare his defence had not been materially prejudiced, since witness statements relating to the testimony had been issued to them over a year ago.[90]

However, none of the defence counsels directly responded to the prosecution's argument that some of the evidence it sought to lead was distinct from the category of "gender crimes," such as testimony relating to non-sexual violence and individual criminal responsibility.[91] Furthermore, they did not treat the prosecution's motion as a request for clarification based on the *extent* or *degree* to which the evidence should be admissible under the existing counts in the Indictment. Instead, they argued that all the testimony of the witnesses in question relating to sexual acts, however remote, should be inadmissible, on the grounds that this was really a "backdoor way of avoiding the Trial Chamber's ruling excluding the evidence."[92]

The prosecution responded by stating that the defence had mischaracterized the issue for which it sought clarification in its motion: the Chamber's majority decision refusing leave to add sexual violence counts to the indictment did not simultaneously prohibit it from leading evidence that included acts of a sexual nature to support its case against the accused under other counts. According to the prosecution, the applicable test is not whether the evidence can be excluded from consideration because it was admissible on deleted counts, but rather whether it is relevant and admissible on the existing counts. While the prosecution conceded that it had not specifically described the acts in question under the relevant counts in the indictment, it argued that the accused had received timely disclosure of the evidence upon which the prosecution sought to rely.[93]

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[86] *Response of second accused to prosecution's 'Urgent Prosecution Motion For Ruling on Admissibility of Evidence'*, 25 February 2005 at paragraph 4.

[87] *Response of third accused to prosecution's 'Urgent Prosecution Motion For Ruling on Admissibility of Evidence'* 28 February 2005 at paragraph 20.

[88] *Prosecution Reply to 'Response of First Accused to Prosecution's "Urgent Prosecution Motion for Ruling on Admissibility of Evidence" and Objection to Other Crimes Evidence'* 23 February 2005 at paragraph 2. In their response, the prosecution cited the *Akayesu* judgment as authority for this proposition.

[89] *"Prosecution Reply to 'Response of the Second Accused to Urgent Prosecution Motion for Ruling on the Admissibility of Evidence'"* 2 March 2005 at paragraph 6.

[90] *Ibid.*, at paragraphs 10 and 11. According to the prosecution, the defence first received witness statements disclosing acts of sexual violence were first issued to the defence as early as July 2003.

[91] *Urgent Prosecution Motion For a Ruling on the Admissibility of Evidence* 15 February 2005 at paragraph 16. The prosecution further asserted that evidence of this nature should remain relevant and admissible, regardless of the outcome of the ruling.

[92] *Response of first accused to prosecution's 'Urgent Prosecution Motion For Ruling on Admissibility of Evidence' and Objection to Other Crimes Evidence* 18 February 2005 at paragraph 9.

[93] The prosecution had included a summary of the evidence in question in its pre trial brief and had disclosed statements of the witnesses in question to the defence over twelve months prior to the witnesses were due to testify.

The prosecution argued that it would be "illogical and artificial to differentiate between those acts which can be categorized as 'sexual' acts or 'gender crimes' and those which can be defined as 'non-sexual' acts or crimes of violence."[94] However, this is precisely what Trial Chamber I ruled in its reasoned majority opinion: according to the ruling, the Statute provided for a "separate specific residual category of sexual violence" in light of which it was "impermissible" to allege sexual violence under other counts that only cover "acts of a non-sexual nature."[95] When taken together with the previous rulings, the majority of the Chamber has expressed that while sexual violence must be plead as a separate and special category of crime, it should not receive any special consideration at the investigative or procedural level. Indeed, Justice Itoe's separate concurring opinion repeats a section of the opinion denying leave to amend the indictment, in which the majority states that evidence of sexual violence "should have been uncovered through the exercise of ordinary and normally expected professional diligence."[96]

As previously discussed, the recent series of rulings reveals a shift from foregrounding the flexible admission of evidence in accordance with the Rules of Procedure to a strict exclusion of any evidence that could be construed as prejudicial towards the accused. Although this shift is implicit in most of the majority rulings, Judge Itoe's separate concurring opinion explicitly voices his concern that admitting evidence in support of uncharged allegations could taint the view of the bench. Judge Itoe defines prejudicial evidence as follows:

> evidence which, if adduced, has the potential of staining mind [sic] of the Judge with an impression that adversely affects his clean conscience toward all parties, and particularly, towards the party who is the victim of that evidence which is tendered, to the extent that it leaves in the mind of the Judge, an indelible scar of bias which could make him ill disposed to the cause of the victim of the said evidence.[97]

Notably, the case authority cited in support of this definition refers to the discretion of a judge to exclude evidence in a *jury trial* as opposed to a trial by professional judges, as is the case at the Special Court.[98] In a dissenting oral ruling at trial in relation to evidence of sexual violence, Judge Boutet maintained that evidence should be admitted considering that the bench is comprised of professional judges, who had noted their ability to make necessary distinctions with the admitted evidence in previous decisions.[99] In his dissenting written opinion, Judge Boutet argued that evidence of acts of sexual violence does not constitute "inherently prejudicial or inadmissible character evidence by virtue of their nature or characterization as 'sexual.'"[100]

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[94] *Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence*, 15 February 2005, paragraph 9.
[95] *Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence*, 24 May 2005 (issued 22 June 2005),
[96] *Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence*, 24 May 2005 (released 23 June 2005), paragraph 50.
[97] *Ibid.*, at paragraph 64.
[98] *Ibid.*, at paragraph 68.
[99] *Oral ruling with regards to the testimony of TF2-187*, 1 June 2005, dissenting opinion of Judge Boutet.
[100] *Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence*, 24 May 2005 (released 23 June 2005), paragraph 33.

The majority reasoned decision looks to the indictment as the source of all potential evidence that the prosecution can bring against the accused. It argues that the broad number of categories of sexual violence offences included under Article 2(g) of the Statute required the prosecution to include specific reference to that Article in the indictment, rather than relying on the more general provisions of the Statute included under counts 3 and 4.[101] In the majority's opinion, the fact that no reference was made to sexual violence means this evidence cannot be introduced, because it requires the Chamber to depart from a restrictive interpretation of the Statute, hence permitting the prosecution to exercise a degree of "prosecutorial latitude" that undermines the due process rights of the accused.[102]

However, the approach adopted by the majority of the bench at trial did not appear entirely consistent with the analysis provided in their decision. The majority judges refused to hear evidence of the second accused, Moinina Fofana, failing to prevent or punish perpetrators of sexual violence, despite the accused being held liable for the acts of his subordinates "for the crimes referred to in Articles 2, 3 and 4 of the Statute" in paragraph 21 of the indictment. The more general language of this paragraph would tend to suggest that the evidence should have been admissible, given the accused is charged in that paragraph for failure to punish the perpetrators of the crimes referred to in the Statute, not in the indictment: the reasoned decision did not address this point.

The decision claims that an accused's due process rights would be undermined if he was confronted with new evidence in support of factual allegations that were not specifically plead in the indictment.[103] It alleges that admitting evidence of sexual violence at this stage in the trial proceedings would be unfair to the accused, a claim that gives full weight to the indictment as the sole form of notice of evidence to be led against the accused. In his dissenting opinion, Judge Boutet distinguishes between facts, which he claims should be included in an indictment, and evidence by which the facts will be proven, which may be included in pre-trial discovery.[104] Citing rulings from Trial Chamber I as well as jurisprudence from the ICTR and ICTY, Judge Boutet's opinion finds that a lack of specificity in an indictment can be compensated for by notifying the accused of the charges in other forms, such as the pre-trial brief and the prosecutor's opening statement. He finds that these two forms of notice provided by the prosecution

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[101] *Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence* 24 May 2005 (released 23 June 2005), at paragraphs 19(iii) and (iv). The analysis applied by the majority decision can really only apply to count 3, which charges the accused with "inhumane acts", a crime against humanity, under Article 2(i) of the indictment. According to the majority decision, Article 2(g) refers to "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence" and hence should have been referred to, presumably either under count 3 or as a separate count. Count 4 is plead as a war crime under Article 3(a) of the indictment and therefore, the majority decision should have included reference to Article 3(e) of the Statute, which refers to "humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" in support of its claim that sexual violence offences should be plead more specifically under this count.

[102] *Ibid.*, at paragraph 19(iii)(b) and (iv).

[103] *Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence*, 24 May 2005 (released 23 June 2005), paragraph 19(iv).

[104] *Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence*, 24 May 2005 (released 23 June 2005), paragraph 10.

and the witness statements disclosed to the defence were adequate to indicate that the accused "have been on notice since before the start of trial that evidence of sexual violence would be elicited at trial as relevant and probative evidence to establish the allegations set forth in Counts 3 and 4".[105] This opinion seems to be supported by a ruling from the Appellate Chamber of the Special Court, which recently determined that an indictment "should comprise only a list of counts, with each count followed by brief particulars";[106] indeed, the Chamber added that the indictment "included many more 'particulars' than the prosecution was obliged to give."[107]

IV. Conclusion

> "Although rape and other forms of sexual violence often constitute torture, genocide, mutilation and enslavement, they have, with rare exception, not been punished with the same seriousness as other war crimes. That continues to remain the case."[108]

In its majority ruling refusing leave to appeal, the Chamber acknowledges that the Court's role includes "meting out justice to victims".[109] Surprisingly, the only "victim" mentioned in the recently issued majority and separate concurring opinions is the hypothetical figure of the accused as a victim of prejudicial evidence.[110] In tracing the history of these rulings, from the Chamber's refusal to grant leave to the prosecution to amend its indictment to the most recent decision on admitting evidence of sexual violence, the rights of the accused have emerged as the most significant consideration of the majority of the bench. While upholding these rights is a responsibility under the Statute, in practice the bench has stretched beyond due process considerations into a more abstract and speculative realm, relegating evidence of sexual violence into "forbidden evidentiary territory" that may taint the "clean conscience" of the adjudicator who hears it.

Furthermore, the majority decision of the Chamber focuses solely on the particularity of the indictment counts. This approach is in keeping with the opinions they articulated at trial, and reveals that the evidence relating to sexual violence was excluded from the moment the prosecution was denied leave to amend the indictment. The prosecution's subsequent attempts to include the evidence under counts 3 and 4 were characterized as a

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[105] *Ibid.*, at paragraph 29.

[106] *Decision on Amendment of the Consolidated Indictment*, SCSL Appeals Chamber, 16 May 2005, at paragraph 52.

[107] *Ibid.*, at paragraph 53.

[108] "We Can Do Better Investigating and Prosecuting International Crimes of Sexual Violence," Paper presented by Coalition for Women's Human Rights in Conflict Situations member Binaifer Nowrojee, at the Colloquium of Prosecutors of International Criminal Tribunals in Arusha, Tanzania, November 25-27, 2004. Accessed on line at http://www.womensrightscoalition.org/publications/papers/doBetter_en.php on 13 June 2005.

[109] *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, paragraph 31.

[110] *Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence*, 24 May 2005 (released 23 June 2005), paragraph 50.

challenge to the Chamber's authority, in which the prosecution was seeking to let it in "through the back door" and prejudice the rights of the accused.

The prosecution could have sought leave to amend the CDF indictment earlier, but it does not appear that three months constitutes undue delay, nor was it clearly articulated how the rights of the accused could have been prejudiced at that point in the pre-trial process. Once leave to amend was denied, the prosecution had no other option – apart from filing a separate indictment – than to lead the evidence under the existing indictment counts, as it has been presented in other international criminal tribunals. Although the prosecution made clear that it would have preferred to lead the evidence as distinct sexual violence counts, it noted that the crimes also constituted physical violence and mental suffering. By using the three-month delay in filing the attempt to amend the indictment as the reason why the prosecution was not permitted to lead the evidence, the majority of the Trial Chamber disavows its own role in creating a slippery slope of inadmissibility.

Refusing to hear this evidence simply because it was not plead in the indictment conflicts with the Chamber's own flexible approach to admitting evidence, insults their own capability to weigh the evidence effectively as professional judges, and ultimately silences important testimony that would have served the interests of justice. As Judge Boutet noted in a dissenting opinion, "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."[111] Following this recent ruling, the voices of the victims of alleged sexual violence by members of the CDF will not be heard. Beyond this, the Special Court has lost an important opportunity to clarify for Sierra Leoneans the nature and scope of the violence unleashed in the conflict and the role of those who bear "the greatest responsibility" for its perpetration.

[111] *Dissenting Opinion of Judge Pierre Boutet on the Decision on Prosecution Request for Leave to Amend the Indictment*, 31 May 2004, paragraph 18.