SCSL-04-14-T
(10888-10894)

SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 29th of November, 2004

PROSECUTOR Against SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

DECISION ON THE FIRST ACCUSED'S MOTION FOR SERVICE AND ARRAIGNMENT ON THE CONSOLIDATED INDICTMENT

Office of the Prosecutor:

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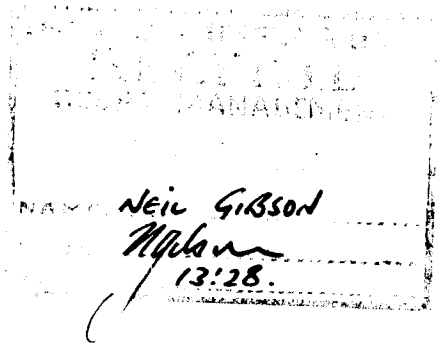

THE TRIAL CHAMBER ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Hon. Judge Bankole Thompson, and Hon. Judge Pierre Boutet;

NOTING the *Motion for Service and Arraignment on Second Indictment*, filed by the First Accused, Sam Hinga Norman, on the 21st of September, 2004;

NOTING the *Prosecution Response to Norman Motion for Service and Arraignment on Second Indictment*, filed by the Prosecution on the 1st of October, 2004;

NOTING the *Defence Reply to Prosecution Response to Norman Motion for Service and Arraignment on Second Indictment*, filed by the Defence on the 6th of October, 2004;

MINDFUL of the *Decision and Order on Prosecution Motions for Joinder*, delivered by the Trial Chamber on the 27th of January, 2004;

NOTING the Consolidated Indictment against the Accused, Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa, approved on the 5th of February, 2004;

CONSIDERING Article 17 of the Statute of the Special Court ("Statute") and Rule 26*bis*, Rule 47, Rule 48, Rule 50 and Rule 52 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules");

THE TRIAL CHAMBER ISSUES THE FOLLOWING DECISION:

I. BACKGROUND

1. On the 15th, 17th and 21st of March, 2003, the First Accused was arraigned before the Trial Chamber and plead not guilty to eight counts listed in the Indictment against him.

2. On the 9th of October, 2003, the Prosecution sought a Motion for Joinder of the First Accused with the Accused Moinina Fofana (Second Accused) and Allieu Kondewa (Third Accused). The Prosecution requested that the Indictments against the three Accused be consolidated into a single Indictment and there cased joined. Written responses to this Motion were received from the Third Accused on the 20th of October, 2003, and from the Second Accused on the 12th of November, 2003. An oral response to the Motion was given by the First Accused at the joinder hearing held on the 4th of December, 2003. The Prosecution filed a Reply to the Defence response on the 24th of October, 2003. A Decision on the Motion for Joinder was delivered on the 27th of January, 2004, which ordered that a single Consolidated Indictment be prepared as the Indictment on which the joint trial would proceed and that the said Indictment be served on each Accused in accordance with Rule 52 of the Rules. The Consolidated Indictment was filed on the 5th of February, 2004.

II. SUBMISSIONS OF THE ACCUSED

3. By written Motion of the 20th of September, 2004, the First Accused submits that he had not been personally served with the Consolidated Indictment, nor lawfully arraigned on this Indictment,

for which he is currently being tried before the Special Court. He seeks service and arraignment on this Indictment. He claims that the Consolidated Indictment extends the period of time covered by the Indictment to an additional 20 months and adds several geographic locations, namely:

> Counts 1-2 - contained an additional particular (f) and an additional particular at (e) (the previous particular at (e) becoming the particular at (g) adding the additional geographic locations of Moyamba District at new particular (e) and of Bonthe District at new particular (f);
> Counts 3-4 - expanded the time frame of particular (a) to 30 April 1998 and added the additional locations of Blama and Kamboma and expanded the time frame of particular (b) to December 1999 and added the Districts of Moyamba and Bonthe;
>
> Counts 5 - changed the charge from looting "private property" to "civilian property";
>
> Counts 6-8 - framed as occurring "at all times relevant to this indictment" were consequently expanded by some 20 months to December 1999 by reason of alterations referred to above.

4. The First Accused also seeks a formal quashing of the previous Indictment on which he was arraigned on the 7th of March, 2003. He submits that two Indictments are currently "lying against him", contrary to the rule of law against double jeopardy under Article 9(1) of the Statute. He submits that the former indictment is included within the superseding indictment, so that trial on the superseding indictment should prevent retrial on the former indictment. He has concerns based upon "experiences before domestic Sierra Leone tribunals", that a complete acquittal on the Consolidated Indictment could "make him vulnerable to further prosecution on the Initial Indictment".

III. PROSECUTION RESPONSE

5. The Prosecution respond that the Consolidated Indictment was served on the Defence Counsel for the First Accused and not the Accused himself. The Prosecution submit that this failure amounts to an administrative or procedural anomaly and has not caused any identifiable prejudice to the Accused. The Prosecution state that the Consolidated Indictment contains no additional charges. The Prosecution assert that the Consolidated Indictment was served on the Accused's Defence team and that he had demonstrated knowledge of the charges contained in the Consolidated Indictment as he had defended himself on these charges during the first and second sessions of the trial.

6. The Prosecution submit that no arraignment is necessary on the Consolidated Indictment as there are no new charges in this Indictment.

7. The Prosecution submit that "the Special Court has been held to be an International Tribunal by the Appeals Chamber and, as such, applies internationally recognised legal principles. Consequently, as rightly pointed out in the motion, trial on the superceding indictment should prevent retrial on the former indictment".

IV. ACCUSED'S REPLY

8. In his reply, the First Accused adopts all the facts and submissions contained in paragraphs 2 through 12 of his Motion, and further adds that any administrative or procedural anomaly that occurred in the service of the Indictment warrants the effecting of this service on him.

V. APPLICABLE PROVISIONS

9. It is appropriate to set out the applicable provisions of the Statue and the Rules of the Special Court, as well as certain provisions of the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples Rights (ACHPR).

Statute

Article 17(4)

1. All accused shall be equal before the Special Court.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

c. To be tried without undue delay;

d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;

g. Not to be compelled to testify against himself or herself or to confess guilt.

Rules

Rule 26*bis*

The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Rule 47 – Review of Indictment

(A) An indictment submitted in accordance with the following procedure shall be approved by the Designated Judge.

(C) The indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case.

(E) The designated Judge shall review the indictment and the accompanying material to determine whether the indictment should be approved. The Judge shall approve the indictment if he is satisfied that:

(i) the indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court; and
(ii) that the allegations in the Prosecution's case summary would, if proven, amount to the crime or crimes as particularised in the indictment.

Rule 48 – Joinder of Accused or Trials

(A) Persons accused of the same or different crimes committed in the course of the same transaction may be jointly indicted and tried.

(B) Persons who are separately indicted, accused of the same or different crimes committed in the course of the same transaction, may be tried together, with leave granted by a Trial Chamber pursuant to Rule 73.

(C) A Trial Chamber may order the concurrent hearing of evidence common to the trials of persons separately indicted or joined in separate trials and who are accused of the same or different crimes committed in the course of the same transaction. Such a hearing may be granted with leave of a Trial Chamber pursuant to Rule 73.

Rule 50 – Amendment of Indictment

(A) The Prosecutor may amend an indictment without prior leave, at any time before its approval, but thereafter, until the initial appearance of the accused pursuant to Rule 61, only with leave of the Designated Judge who reviewed it but, in exceptional circumstances, by leave of another Judge. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and Rule 52 apply to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already made his initial appearance in accordance with Rule 61:

(i) A further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges;
(ii) Within seven days from such appearance, the Prosecutor shall disclose all materials envisaged in Rule 66(A)(i) pertaining to the new charges;
(iii) The accused shall have a further period of ten days from the date of such disclosure by the Prosecutor in which to file preliminary motions pursuant to Rule 72 and relating to the new charges.

Rule 52 - Service of Indictment

(A) Service of the indictment shall be effected personally on the accused at the time the accused is taken into the custody of the Special Court or as soon as possible thereafter.

(B) Personal service of an indictment on the accused is effected by giving the accused a copy of the indictment approved in accordance with Rule 47.

(C) An indictment that has been permitted to proceed by the Designated Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Special Court. If the accused does not understand English and if the language understood is a written language known to the Registrar, a translation of the indictment in that language shall also be prepared. In the case that the accused is illiterate or his language is an oral language, the Registrar will ensure that the indictment is read to the accused by an interpreter, and that he is served with a recording of the interpretation.

(D) Subject to Rule 53, upon approval by the Designated Judge the indictment shall be made public.

ICCPR

Article 9

1. Everyone has the right to liberty and security of persons. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

[...]

Article 14

[...]

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay.

[...]

ACHPR

Article 7

1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the fright to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

V. THE MERITS OF THE APPLICATION

1. Service of Consolidated Indictment

10. The first issue to be determined by the Trial Chamber is whether the First Accused was properly served with the Consolidated Indictment, and if not, whether this situation would unfairly prejudice the Accused's right to a fair trial.

11. The Chief of Court Management has informed the Trial Chamber that the Accused was not personally served with the Consolidated Indictment. According to this report, the said Indictment was only served on Counsel for the Accused, as the Prosecution had not asked for *personal service* on the Accused.

12. In accordance with Rule 52 of the Rules, the Trial Chamber had ordered in its Decision on Joinder, for the Consolidated Indictment to be served on each Accused person. This order was as follows:

> 1. That a single consolidated indictment be prepared as the Indictment on which the joint trial shall proceed [...];
> 2. [...]
> 3. That the said Indictment be served on each Accused in accordance with Rule 52 of the Rules.

13. Based upon the foregoing, the Trial Chamber finds that the service of the Indictment on Counsel for the Accused does not comply with Rule 52 of the Rules, or the Order of the Trial Chamber. While such a failure to serve the Consolidated Indictment personally on the Accused constitutes a procedural error, this alone would not, however, in and of itself, unfairly prejudice the Accused's right to a fair trial.

14. Having so found, the Trial Chamber must now determine whether any unfair prejudice has or will result to the Accused as a result of this non-compliance. In so doing the Trial Chamber has reviewed the entire pre-trial and trial process and has noted the following. The Accused was served on the 10th of March, 2003, with a copy of the Initial Indictment that was approved on the 7th of March, 2003, which outlines the charges against him. His Assigned Counsel, who represented him at that

time, were formally served with a copy of the Consolidated Indictment on the 5th of February, 2004, and their obligation consisted of representing their client, which included to familiarise him with the charges against him. The Accused did not raise this issue of non-service during the Pre-Trial Conference or any of the Status Conferences. Furthermore, the Accused responded to the charges against him in his Pre-Trial Brief filed on the 31st of May, 2004, and has defended the charges against him in the first and second sessions of the CDF trial.

15. Before making any conclusive finding on this issue of unfair prejudice, however, the Trial Chamber considers it necessary to assess whether or not the charges outlined in the Consolidated Indictment, are materially different from the charges listed in the Initial Indictment which was served on the Accused and would therefore constitute new charges as contemplated by Rule 50 of the Rules.

2. Differences Between the Initial Indictment and Consolidated Indictment

16. The Trial Chamber is aware that it is not its function to ascertain for itself whether the form of an Indictment complies with the pleading principles as outlined in the Rules, as this is normally a function for the parties, although a Court is entitled *proprio motu* to raise issues as to the form of an Indictment, particularly when such matters may affect the fairness of the process. In accordance with the principle of a fair trial, and the obligation to consider any unfair prejudice that may ensue from non-service and arraignment on the Consolidated Indictment, the Trial Chamber will consider whether there are any new charges to the Consolidated Indictment by comparison to the Initial Indictment.

17. The Prosecution assert that the Consolidated Indictment contains no additional charges against the First Accused. It should be observed that when the Prosecution applied for joinder of the trial of the three Accused persons, it did not exhibit the proposed Consolidated Indictment. The Prosecution submitted that the Consolidated Indictment would not amend the Initial Indictments but that it was confined to a "mere putting together" of the three Initial Indictments. The Prosecution submitted that there was no need for further approval of the Consolidated Indictment "given it will not involve any change in the substance of the original Indictments".[1]

18. Based upon these submissions by the Prosecution, and without the benefit of an appended Indictment to the Motion for joinder, the Trial Chamber held in its Joinder Decision that a comparison of the Indictments of the three Accused "reveals that the specific crimes charged in those several counts are exactly the same, except for the allegations in respect of additional time and locations as regards Accused Moinina Fofana and Allieu Kondewa, which is an issue of no materiality for the instant purpose".[2]

19. Upon receiving this Motion from the First Accused, and consequently proceeding to specifically review the differences between the Initial Indictment against the First Accused with the Consolidated Indictment, the Trial Chamber notes that the following changes have been made:

> (a) Paragraph 23 (CI) - This paragraph refers to the armed conflict occurring in various parts of Sierra Leone. In the Initial Indictment (II), the qualifier, "but not limited to" is given. The CI adds the "towns of Tongo Field", instead of just Tongo Field, "and surrounding areas and

[1] Prosecution Motion for Joinder, para. 10.
[2] Para. 24.

the Districts of Moyamba and Bonthe" for parts of Sierra Leone where the armed conflict allegedly occurred.

(b) Paragraph 24 (CI) – This paragraph adds to the actions committed by CDF, largely Kamajors, "personal injury and the extorting of money from civilians". Subparagraph (c) adds that the Kamajors not only attacked, but "took control of" various towns, and instead of allegations that Kamajors destroyed and looted, the CI alleges that Kamajors "unlawfully" destroyed and looted. Subparagraphs (d) and (e) are entirely new and state that:

> (d) Between October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Moyamba District, to include the towns of Sembehun and Gbangbatoke. As a result of the actions Kamajors continued to identify suspected "Collaborators" and others suspected to be not supportive of the Kamajors and their activities. Kamajors unlawfully killed an unknown number of civilians. They unlawfully destroyed and looted civilian owned property.
>
> (e) Between about October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Bonthe District, generally in and around the towns and settlements of Talia, Tihun, Maboya, Bolloh, Bemebay, and the island town of Bonthe. As a result of these actions Kamajors identified suspected "Collaborators" and others suspected to be not supportive of the Kamajors and their activities. They unlawfully killed an unknown number of civilians. They destroyed and looted civilian owned property.

Additions to subparagraph (f) are that the CDF blocked all major highways and roads leading "to and from", which previously referred to "leading to" only.

(c) Paragraph 25 (CI) – subparagraph (a) extends the timeframe for alleged commission of unlawful killings to 30 April 1998, instead of 1 February 1998 as in the II. Additional places are mentioned where the killings allegedly took place, including "at or near the towns of Lalehun, Kamboma, Konia, Talama, Panguma and Sembehun". The II used general language "but were not limited to" and referred to "at or near Tongo Field". Subparagraph (b) included "District Headquarters town of" Kenema, whereas the II just referred to "Kenema" and added "at the nearby locations of Blama". Subparagraph (c) adds "Kamajors unlawfully killed"; Subparagraph (d) adds "including the District Headquarters town" and "Kebi Town, Kpeyama, Fengehun and Mongere" and that "Kamajors unlawfully killed". Subparagraphs (e) and (f) are new and were not in the II. These subparagraphs state:

> (e). between about October 1997 and December 1999 in locations in Moyamba District, including Sembehun, Taiama, Bylago, Ribbi and Gbangbatoke, Kamajors unlawfully killed an unknown number of civilians;
>
> (f). between about October 1997 and December 1999 in locations in Bonthe District including Talia (Base Zero), Mobayeh, Makose and Bonthe Town, Kamajors unlawfully killed an unknown number of civilians.

Additions to subparagraph (g) included "unlawfully killed" and capture of enemy combatants "in road ambushes at Gumahun, Gerihun, Jembeh and the Bo-Matotoka Highway".

(d) Paragraph 26 (CI) - subparagraph (a) extends the timeframe for alleged commission of acts of physical violence and infliction of mental harm or suffering to 30 April 1998, which previously was 1 April 1998. Blama and Kamboma are also listed as areas where the acts were committed. Kenema is also qualified as "Kenema town". Subparagraph (b) of the II referred

to commission of acts from 1 November 1997 to 1 April 1998, and the CI refers to November 1997 to December 1999 and adds "in the towns of" for Tongo Field and "the Districts of Moyamba and Bonthe". The subparagraph further adds the offences of "illegal arrest and unlawful imprisonment". The II used general language of "but not limited to".

(e) Paragraph 27 (CI) - this paragraph alleging looting and burning adds the locations of "Kenema District, the towns of Kenema, Tongo Field and surrounding areas", "District" to Bo, "the towns of Bo", "Bonthe District, the towns of Talia (Base Zero), Bonthe Town, Mobayeh, and surrounding areas". This paragraph also refers to the unlawful taking and destruction by burning of "civilian owned" property, instead of "private" property".

(f) Paragraph 29 (CI) - adds that the CDF "conscript" instead of "initiate" children under the age of 15 years into armed forces or groups "throughout" the Republic of Sierra Leone.

Other changes to the CI include, for example, reference to "CDF, largely Kamajors", instead of Kamajors, as in the II.

20. Upon a detailed comparative analysis of the differences between the Initial Indictment for the First Accused and the Consolidated Indictment, the Trial Chamber comes to the conclusion that the factual allegations adduced in support of existing confirmed counts in the Initial Indictment (II) have been expanded and elaborated upon in the Consolidated Indictment (CI), and that, furthermore, some substantive elements of the charges have been added.

21. The Trial Chamber turns now to consider *proprio motu* whether these additions and changes to the Consolidated Indictment are material to the Indictment, in which case an unfair prejudice might enure to the Accused on account of him facing these changes, having not been personally served and arraigned on the Consolidated Indictment, or alternatively, whether the additions simply provide greater specificity to general allegations, that are not material.

3. Pleading Principles for an Indictment

22. An Indictment, as the primary accusatory instrument against an Accused person, must plead the essential aspects of the Prosecution case with sufficient detail. In accordance with Rule 47(c) of the Rules:

> The indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case.

23. If the Prosecution fails to plead the essential aspects of the Prosecution Case in the Indictment, it will suffer from a material defect.[3] As stated by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in the *Kupreskic* case:

> It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the Indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[4]

[3] *Prosecutor v. Kupreskic*, Appeals Judgement, para. 114.
[4] Supra, para. 92.

24. Pursuant to Article 17(4) of the Statute, the Accused must be informed of the "nature and cause of the charge against him". There is a distinction between the material facts upon which the prosecution relies, and which must be pleaded in the Indictment, and the evidence by which those material facts will be proved, which do not need to be pleaded.[5] The materiality of the facts to be pleaded depend on the nature of the Prosecution case and the alleged proximity of the Accused to those events. As stated by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Brdanin* case, in a trial based upon, for example, superior responsibility:

> [W]hat is most material is the relationship between the accused and the others who did the acts for which he is alleged to be responsible, and the conduct of the accused by which he may be found to have known or had reason to know that the acts were about to be done, or had been done, by those others, and to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who did them. However, so far as those acts of the other persons are concerned, although the prosecution remains under an obligation to give all the particulars which it is able to give, the relevant facts will usually be stated with less precision, and that is because the detail of those acts (by whom and against whom they are done) is often unknown - and because the acts themselves often cannot be greatly in issue.[6]

25. The Trial Chamber in the *Brdanin case* further considered that in a case based upon individual responsibility where the Accused is alleged to have personally committed the acts pleaded in the Indictment:

> [T]he material facts must be pleaded with precision - the information pleaded as material facts must, so far as it is possible to do so, include the identity of the victim, the places and the approximate date of those acts and the means by which the offence was committed. Where the prosecution is unable to specify any of these matters, it cannot be obliged to perform the impossible. Where the precise date cannot be specified, a *reasonable* range of dates may be sufficient. Where a precise identification of the victim or victims cannot be specified, a reference to their category or position as a group may be sufficient. Where the prosecution is unable to specify matters such as these, it must make it clear in the indictment that it is unable to do so and that it has provided the best information it can.[7]

26. An Indictment may be amended, however, at trial, where the evidence turns out differently than expected. The Trial Chamber may grant an adjournment for this purpose, or certain evidence may be excluded as not being within the scope of the Indictment.[8] In cases where an Indictment provides insufficient details as to the essential elements of the Prosecution case, the jurisprudence of the Tribunal accepts that a defendant may not be unfairly prejudiced where the defence is put on reasonable notice of the Prosecution case before trial, for example, in the Prosecution Pre-Trial Brief, or at the latest, in the Prosecution opening statement.

27. In the *Kupreskic* case, the Appeals Chamber of the ICTY held that "the question whether an Indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence."[9] Trial Chambers of the ICTY have held that:

> [a]ll legal prerequisites to the application of the offences charged constitute material facts, and must be pleaded in the indictment. The materiality of other facts (facts not directly going to legal prerequisites), which also have

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[5] See *Prosecutor v. Brdanin*, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001, para. 18.
[6] *Id*, para. 19.
[7] *Id*, para. 22.
[8] Supra, para. 92.
[9] *Prosecutor v. Kupreskic*, Appeal Judgement, para. 88.

> to be pleaded in the Indictment, cannot be determined in the abstract. Each of the material facts must usually be pleaded expressly, although it may be sufficient in some circumstances if it is expressed by necessary implication. This fundamental rule of pleading, however, is not complied with if the pleading merely assumes the existence of a pre-requisite.[10]

28. This Trial Chamber, in its Decision in the case of *Sesay*, held that when framing an Indictment, the degree of specificity required:

> [m]ust necessarily depend upon such variables as (i) the nature of the allegations; (ii) the nature of the specific crimes charged; (iii) the scale or magnitude on which the acts or events allegedly took place (iv) the circumstances under which the crimes were allegedly committed; (v) the duration of time over which the said acts or events constituting the crimes occurred; (vi) the time span between the occurrence of the events and the filing of the indictment; (vii) the totality of the circumstances surrounding the commission of the alleged crimes.[11]

29. Applying the foregoing principle to the instant situation, the Trial Chamber considers that given the alleged nature and scale of the offences charged, and the alleged mode of participation of the Accused in a position of command responsibility, and as part of a joint criminal enterprise with a common plan to commit such offences, it would not be realistic to expect for these offences to be plead with "pin-point particularity". [12] At the same time, however, greater specificity will be required for other modes of participation in offences pursuant to Article 6(1) of the Statute, and the alleged offences and material facts must be plead with enough precision to inform the Accused clearly of the charges against him so that he may prepare his defence.

30. Upon close analysis of the Consolidated Indictment, there are clearly new factual allegations adduced in support of existing confirmed counts, as well as new substantive elements of the charges that were not in the Initial Indictment of the First Accused. In the opinion of the Trial Chamber these changes do not appear to be simply "semantic", as alleged by the Prosecution in their Motion for Joinder, but rather are material to the Indictment. While some of the differences between the two Indictments simply provide greater specificity, and provide background facts, many of the changes are, however, material to the Indictment. Such as the addition of geographic locations in paragraphs 23 to 27 of the Consolidated Indictment, that introduce new districts, such as Bonthe and Moyamba; and the extension of temporal jurisdiction for some counts from April 1998, as outlined in the Initial Indictment, to December, 1999 in the Consolidated Indictment, constitute material changes to the Indictment. In addition, there are new substantive elements of charges, in paragraphs 24 to 27 and 29 of the Consolidated Indictment, that are material, and include the charges of unlawful arrest and detention, "conscription" of children, personal injury and extorting of money from civilians. We consider that all these additions to the Consolidated Indictment, without any amendment to the counts against the Accused and personal service on the Accused, in accordance with the prescribed procedure, could prejudice the Accused's right to a fair trial if the trial proceeds on this basis.

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[10] *Prosecutor v. Enver Hadzihasanovic et al.*, Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001 ("*Hadzihasanovic* Decision on Form of the Indictment"), para. 10; see also *Prosecutor v. Mile Mrksic*, Case No. IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003, para. 11.

[11] *Prosecutor v. Issa Hassan Sesay*, Decision and Order on defence Preliminary Motion for Defects in the Form of the Indictment, 13 October 2003, para. 8.

[12] *Prosecutor v. Kanu*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 19 November 2003, Para. 21.

30. In joint trials each Accused shall be accorded the same rights as if he or she were being tried separately.[13] The rights of the Accused as enshrined in Articles 9 and 14 of the ICCPR and Article 7 of the ACHPR, and as outlined in Rule 26*bis* of the Rules, including the right to a fair and expeditious trial, and in Article 17 of the Statute, which include the right "to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her,"[14] and "to have adequate time and facilities for the preparation of his or her defence,"[15] apply equally to an Accused person tried separately on a single indictment as to an Accused person tried jointly on a consolidated indictment.[16] In either instance, where new changes are sought to be added to an Indictment against an Accused person, whether in a separate or joint trial, the Prosecution is obligated pursuant to Rule 50 of the Rules, to seek leave of the Trial Chamber to amend the Indictment.[17]

4. Arraignment on Indictment

31. With respect to arraignment on the Indictment, it is clear in the Rules and the practice of the International Tribunals, that a consolidated or amended indictment need not be confirmed by a Trial Chamber or Judge if the initial indictments that were subject to joinder were already confirmed, and the charges in the amended indictment are essentially the same or similar to the original ones. This position is also clear in national systems. In the United Kingdom case of *R v. Fyffe*, it was recognised that the general rule that "[r]e-arraignment is unnecessary where the amended indictment merely reproduces the original allegations in a different form, albeit including a number of new counts".[18]

32. In the case at hand, the Accused entered a plea to the charges against him at his initial appearance in March, 2003. These charges remained in force against him, however, as we have found, there were material changes made to the Consolidated Indictment. The Trial Chamber finds that the Accused has not been afforded the opportunity to make a plea to these material changes to the Indictment, and that unfair prejudice may result if the Indictment is not amended and the Accused served with the Indictment and arraigned on the material changes to the Indictment.

5. *Ne Bis In Idem*

33. The common law prohibition of double jeopardy prevents an Accused person from being subject to a further trial in which he or she has been charged with an offence and either acquitted or convicted on these charges. The prohibition prevents an Accused from being convicted twice for the same offence.[19] The Civil law principle of *ne bis in idem* also entitles the Accused not to be tried twice for the same offence. Unlike double jeopardy, however, the principle of *ne bis in idem* prevents repeated prosecutions for the same conduct in the same or different legal systems, whereas the notion of double jeopardy "is a double exposure to sentencing which is applicable to all the different stages of the criminal justice process in the *same* legal system: prosecution, conviction, and punishment".[20]

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[13] See Rule 82(A) of Rules.
[14] Para. 4(a).
[15] Para. 4(b).
[16] See *The Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Decision and Order on Prosecution Motions for Joinder, 27 January 2004, para. 4.
[17] Rule 50 of the Rules.
[18] *R v. Fyffe* [1992] Crim. L.R. 442, C.A.
[19] See *Abney v United States* 431 US 651 (1977), at 660-662.
[20] Kriangsak Kittichaisaree, INTERNATIONAL CRIMINAL LAW, Oxford University Press (2001) p. 289.

34. The principle that an Accused may not be subject to subsequent proceedings in respect of the same offence for which he or she has already been convicted or acquitted is expressed in the context of international human rights law, which is respected by the Trial Chamber of the Special Court. Article 14(7) of the *International Covenant on Civil and Political Rights* provides that:

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

35. Article 9(1) of the Statute enshrines the principle of *non bis in idem*, and provides that:

> No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.

36. A consolidated indictment which covers the same charges and accused as the initial indictments does not constitute a new indictment. The initial indictments are essentially subsumed into the consolidated indictment. Official withdrawal of the initial indictment is not necessary. In the United States, for example, indictments that are consolidated become, in legal effect, separate counts of one indictment.[21] Under English law, where an 'amended' indictment adds no new allegations or offences such that it represents a change in form but not in substance, it is not a fresh indictment. There is only one indictment.[22]

37. There is clearly only one indictment in existence against the Accused person, as reflected in the Joinder Decision and Consolidated Indictment. No official withdrawal of the Initial Indictment is necessary.

6. Conclusions

38. The Trial Chamber finds that the Accused has not been personally served with the Consolidated Indictment. Furthermore, the Trial Chamber finds that the Consolidated Indictment contains new factual allegations adduced in support of existing confirmed counts, and substantive elements of charges, that are material to the case against the Accused. In accordance with the Accused's right to a fair trial and in the interests of justice, the Trial Chamber will stay the following portions of counts of the Consolidated Indictment, that constitute material changes to the Indictment against the First Accused. The remainder of the Indictment, excluding the stayed portions, constitutes a valid Indictment against the Accused. The stayed portions of the Indictment are outlined in brackets in the text below:

(a) Paragraph 23 (CI) "and surrounding areas and the Districts of Moyamba and Bonthe".

(b) Paragraph 24 (CI) – "personal injury and the extorting of money from civilians"; "took control of"; and "unlawfully" destroyed and looted; and subparagraphs (d) and (e) which include:

> "(d) Between October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Moyamba District, to include the towns of Sembehun and Gbangbatoke. As

[21] See *Pankratz Lumber Co. V. U.S.*, 50 F.2d 174, C.A. 9 1931 (9th Circ.); *Dunaway v. United States* (1953) 92 US App DC 299, 205 F3d 23.
[22] *R v. Fyffe*, (1991) Crim. L.R. 1992, Jun, 442-444, CA .

a result of the actions Kamajors continued to identify suspected "Collaborators" and others suspected to be not supportive of the Kamajors and their activities. Kamajors unlawfully killed an unknown number of civilians. They unlawfully destroyed and looted civilian owned property.

(e) Between about October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Bonthe District, generally in and around the towns and settlements of Talia, Tihun, Maboya, Bolloh, Bemebay, and the island town of Bonthe. As a result of these actions Kamajors identified suspected "Collaborators" and others suspected to be not supportive of the Kamajors and their activities. They unlawfully killed an unknown number of civilians. They destroyed and looted civilian owned property."

(c) Paragraph 25 (CI) – the timeframe for alleged commission of unlawful killings, namely "30 April 1998"; "at or near the towns of Lalehun, Kamboma, Konia, Talama, Panguma and Sembehun"; "at the nearby locations of Blama"; "Kamajors unlawfully killed"; "including the District Headquarters town"; "Kebi Town, Kpeyama, Fengehun and Mongere" ; and subparagraphs (e) and (f) which state:

"(e). between about October 1997 and December 1999 in locations in Moyamba District, including Sembehun, Taiama, Bylago, Ribbi and Gbangbatoke, Kamajors unlawfully killed an unknown number of civilians;

(f). between about October 1997 and December 1999 in locations in Bonthe District including Talia (Base Zero), Mobayeh, Makose and Bonthe Town, Kamajors unlawfully killed an unknown number of civilians."

Additions to subparagraph (g) including "unlawfully killed" and capture of enemy combatants "in road ambushes at Gumahun, Gerihun, Jembeh and the Bo-Matotoka Highway".

(d) Paragraph 26 (CI) - subparagraph (a) extends the timeframe for alleged commission of acts of physical violence and infliction of mental harm or suffering to "30 April 1998"; "Blama and Kamboma" are also listed as areas where the acts were committed; subparagraph (b) "November 1997 to December 1999"; "the Districts of Moyamba and Bonthe"; "illegal arrest and unlawful imprisonment".

(e) Paragraph 27 (CI) – "Kenema District, the towns of Kenema, Tongo Field and surrounding areas"; "Bonthe District, the towns of Talia (Base Zero), Bonthe Town, Mobayeh, and surrounding areas"; the unlawful taking and destruction by burning of "civilian owned" property.

(f) Paragraph 29 (CI) – "conscript" instead of "initiate" children under the age of 15 years into armed forces or groups "throughout" the Republic of Sierra Leone.

(g) General references to "CDF, largely Kamajors", instead of Kamajors.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

ORDERS AS FOLLOWS FOR THE FIRST ACCUSED:

1. That the identified portions of the Consolidated Indictment that are material and embody new factual allegations and substantive elements of the charges be stayed, and that the Prosecution is hereby put to its election either to expunge completely from the Consolidated Indictment such identified portions or seek an amendment of the said Indictment in respect of those identified portions, and that either option is to be exercised with leave of the Trial Chamber.

Hon. Judge Bankole Thompson appends a separate concurring opinion to this decision adopting his own reasoning and putting forward his reasons in support thereof;

Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, appends his dissenting opinion to this decision.

Done in Freetown, Sierra Leone, this 29th day of November, 2004

Hon. Judge Pierre Boutet

Hon. Judge Bankole Thompson

[Seal of the Special Court for Sierra Leone]

SCSL-04-14-T
(10899-10909)

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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 29th November, 2004

PROSECUTOR Against SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

SEPARATE CONCURRING OPINION OF JUDGE BANKOLE THOMPSON ON DECISION ON FIRST ACCUSED'S MOTION FOR SERVICE AND ARRAIGNMENT ON THE CONSOLIDATED INDICTMENT

Office of the Prosecutor:

Luc Côté
James Johnson

Court Appointed Counsel for Sam Hinga Norman
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Tim Owen, Q.C.

Court Appointed Counsel for Moinina Fofana:
Michiel Pestman
Arrow Bockarie
Victor Koppe

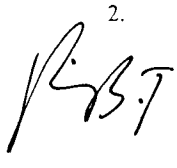
Court Appointed Counsel for Allieu Kondewa:
Charles Margai
Yadda Williams
Ansu Lansana

I. Introduction

1. As regards the merits of the instant Motion, I entirely agree with and endorse the conclusion and Order as set out in the majority Decision of the Chamber written by my learned brother, the Hon. Judge Pierre Boutet on the specific issues raised by the First Accused in his application to the Court. I have, however, found it judicially compelling and necessary to adopt my own reasoning and put forward my own reasons in support in a Separate Concurring Opinion because this is an area where the law, in some respects, remains intolerably unclear, if not confusing. In addition, it seems to me that the specific issues raised by this Motion are extremely complex and controversial both in terms of legal theory and practice. Hence, my considered position that while it is of utmost importance for the Chamber to pronounce its authoritative position on them, yet is equally necessary to recognise the diverse legal perspectives from which the issues can be approached. I have also articulated in paragraphs 7-10 my own considered appreciation of the evolving jurisprudence of the Special Court governing pleadings in an indictment as expounded in a series of seminal Decisions of the Court in the year 2003, under two main heads: (i) the régime of rules generally governing the framing of indictments, and (ii) the specific issue of defects in the form of the indictment especially as regards particularity and specificity in the context of international criminality. This would seem to be an opportune time for the Chamber to restate this Court's adaptations of the key principles on this aspect of the law. In supporting the majority Decision, let me indicate that I adopt in their entirety the reproduction of (1) the Submissions of the Accused, (2) The Prosecution's Response, and (3) The First Accused's Reply as detailed in that Decision.

II. Non-Service of the Consolidated Indictment

2. Let me, now address the first specific issue for determination. It is that of the alleged omission to serve the Consolidated Indictment. The contention of the First Accused on this issue is that he was not served the said document in the manner stipulated by law. Clearly, the law of this tribunal makes it mandatory for an accused person to be served a copy of the indictment personally at the time the accused is taken into the custody of the Court or as soon as possible thereafter. To this effect is Rule 52(A) of this Court's Rules of Procedure and Evidence. In the context of Rule 52, "personal service" is effected by giving the accused a copy of the indictment approved in accordance with Rule 52(B) of the aforesaid Rules of Procedure and Evidence.



3. In my considered view, as a matter of statutory interpretation, Rule 52(B) governing the service of indictments within the jurisdiction of the Special Court for Sierra Leone departs from the acknowledged and recognized body of jurisprudence on the subject, both nationally and internationally. Under some national criminal law systems and in international criminal law practice, the notion of "personal service" of legal process bears the extended legal meaning of service of the process in question on Counsel for the accused as the duly authorised legal representative, on record, for the said accused. In effect, based on the foregoing reasoning, it would be sufficient in law, for the purposes of "personal service", if the Consolidated Indictment in question were served upon Counsel for the First Accused. By contrast, however, the legislative intent behind our Rule 52(B) was to adopt a restrictive rather than an extended legal connotation of "personal service" of indictments within the Special Court adversarial scheme. It does not fall within the judicial domain of the Trial Chamber to question the legislative wisdom behind the formulation of Rule 52(B) in its present form. Therefore, applying the golden rule of statutory interpretation, Rule 52(B) must be given its plain and literal meaning.

4. Having thus articulated the law on this specific issue, it remains for me to ascertain from the records whether the First Accused was personally served with the Consolidated Indictment. Based on a Memorandum[1] from Court Management that the First Accused was not personally served with the Consolidated Indictment, and that service was effected upon his counsel, I find that there has been a breach of Rule 52(B) in relation to the First Accused's entitlement to be personally served with a copy of the Consolidated Indictment in conformity with the Order of the Trial Chamber made pursuant to its Joinder Decision in this case of the 22nd day of January 2004.[2] Conceding the finding of non-compliance with Rule 52(B), it is my considered opinion that such non-compliance is not fatal for the reason that it has not in any way derogated from the right of the First Accused to a fair trial or caused any prejudice to him, taking into account all the procedural steps taken by him subsequent to the making of his opening statement in court and his decision to represent himself and having participated actively in the cross-examination of some prosecution witnesses against him as noted in the majority Decision.

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[1] NG/CMS/LO/045/04 - Service of Consolidated Indictment, 9 November, 2004.

[2] See *Prosecutor against Sam Hinga Norman, Moinina Fofana, Allieu Kondewa,* Decision and Order on Prosecution Motion for Joinder, para 35(3).

III. Alleged Differences Between the Original Indictment and the Consolidated Indictment

5. The second key issue raised by the Motion that needs to be addressed is whether there are major differences between the First Accused's ***Original*** Indictment and the ***Consolidated*** Indictment. After a meticulous comparison of both accusatory instruments, the inference seems irresistible that the latter accusatory instrument, to wit, the ***Consolidated*** Indictment, embodies certain new material factual allegations within existing counts as highlighted in the majority Decision of the Chamber. There is, therefore, merit in the First Accused's contention that the ***Consolidated*** Indictment confronts him with "a considerably extended indictment period of an additional 20 months, until December 1999, and additional geographic locations."[3] For an avoidance of doubt, ***I stress that it is not my view that the Consolidated Indictment contains new offences or crimes against the First Accused. Nor is it my hypothesis that because the Consolidated Indictment incorporates new expanded factual allegations, it is therefore a new accusatory instrument.*** Consistent with accepted national criminal law and international criminal law approaches, I adhere to the view that a ***consolidated*** indictment that does not incorporate additional crimes or offences authorised pursuant to a joinder decision is simply a consolidating and superseding accusatory instrument taking the place of the ***original*** indictments.

6. It is, however, equally important to determine whether these new material expanded factual allegations within existing counts are of such a nature as to prejudice the right of the First Accused to a fair trial on the ***Consolidated*** Indictment? To answer this key question, it seems necessary, first to recapitulate the principles governing pleadings in an indictment designed to reflect the peculiar and special juridical features of the Special Court for Sierra Leone, and crafted out of the evolving jurisprudence of our contemporary predecessor international criminal tribunals, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

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[3] Motion para 8.

Principles Governing the Pleading of an Indictment

7. In its seminal Decision entitled *Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment*[4], this Chamber opined as follows:

> "The fundamental requirement of an indictment in international law as a basis for criminal responsibility underscores its importance and nexus with the principle of *nullum crimen sine lege* as a *sine qua non* of international criminal responsibility. Therefore, as the foundational instrument of criminal adjudication, the requirements of due process demand adherence, within the limits of reasonable practicability, to the régime of rules governing the framing of indictments. The Chamber notes that the rules governing the framing of indictments within the jurisdiction of the Special Court are embodied in the Founding Instruments of the Court."

8. Highlighting the specific relevant governing statutory provisions, the Chamber noted thus:

> "Firstly, according to Article 17(4)(a) of the Court's Statute, the accused is entitled to be informed "promptly" and "in detail" of the nature of the charges against him. Secondly, Rule 47(C) of the Rules of Procedure and Evidence of the Special Court expressly provides that:
>
> > The indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case."[5]

9. Furthermore, by a process of logical deduction from existing authorities of a persuasive nature, the Chamber proceeded to infer from the evolving jurisprudence of ICTY and ICTR, thirteen specific principles governing the framing of indictments,[6] and reasoned that:

> "Based generally on the evolving jurisprudence of sister international tribunals, and having particular regard to the object and purpose of Rule 47(C) of the Special Court Rules of Procedure and Evidence which, *in its plain and ordinary meaning*, does not

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[4] *The Prosecutor against Issa Hassan Sesay* (Case No. SCSL-2003-05-PT) 13th day of October, 2003. para 5.
[5] Id. para 5.
[6] Id., See especially paragraph 7 where the said propositions are set out in detail.

> require an unduly burdensome or exacting degree of specificity in pleading an indictment, but is logically consistent with the foregoing propositions of law, the Chamber considers it necessary to state that in framing an indictment, the degree of specificity required must necessarily depend upon such variables as (i) the nature of the allegations, (ii) the nature of the specific crimes charged, (iii) the scale or magnitude on which the acts or events allegedly took place, (iv) the circumstances under which the crimes were allegedly committed, (v) the duration of time over which the said acts or events constituting the crimes occurred, (vi) the time span between the occurrence of the events and the filing of the indictment, (vii) the totality of the circumstances surrounding the commission of the alleged crimes."[7]

10. In adapting those principles to the unique and peculiar features of the Court, as a war crimes tribunal, the Chamber had this to say:

> "In this regard, it must be emphasized that where the allegations relate to ordinary or conventional crimes within the setting of domestic or national criminality, the degree of specificity required for pleading the indictment may be much greater than it would be where the allegations relate to unconventional or extraordinary crimes for example, mass killings, mass rapes and wanton and widespread destruction of property (in the context of crimes against humanity) and grave violations of international humanitarian law within the setting of international criminality."[8]

11. Evidently, the foregoing principles constitute the foundational elements of our evolving jurisprudence on the subject of the régime of rules governing the framing of indictments charging crimes falling within the jurisdiction of the Special Court for Sierra Leone. It is of interest to note that the principles as developed in the seminal Decision of the Court were applied in two subsequent Decisions of this Chamber, to wit, *The Prosecutor against Santigie Borbor Kanu,*[9]and *The Prosecutor against Allieu Kondewa*[10]. In *Kanu*, the Chamber reiterated the specificity doctrine as to the framing of indictments in exercise of the Special Court's jurisdiction as not being unduly exacting and burdensome, as to amount to a requirement to adduce evidence in an accusatory document.

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[7] Id., para 8.
[8] Id., para 9.
[9] Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, (Case No. SCSL-2003-13-PT) 19th day of November, 2003.
[10] Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment (Case No. SCSL-2003-12-PT) 27th day of November, 2003.

12. From the key perspective of the imperative of specificity in framing indictments the thrust of the distinction sought to be made by the Trial Chamber in *Sesay* and the subsequent *Decisions* referred to here is that specificity in cases of extraordinary crimes that occur within the setting of international criminality is not an absolute concept. It is a quality of necessarily variable content depending upon the peculiar facts and circumstances, as alleged, and in so far as the context for the pleading of the factual allegations of such extraordinary crimes admit. This distinction as to the régime of rules governing the framing of indictments has not hitherto been sufficiently or clearly articulated by the authorities on the subject.

13. Instructively, the foregoing principles were adapted, modified and, as it were, tailored to the needs of the Special Court for two key reasons. First, to differentiate between the rules governing the framing of indictments in the context of domestic or national criminality and the régime of rules designed to govern the framing of indictments in the sphere of international criminality. Second, to reflect the unique specificities and peculiarities of the Special Court in the fulfilment of its mandate.

14. Guided by the above restatement of the law, and having regard specifically to the proposition enunciated in *Sesay* that the degree of specificity required in framing an indictment must necessarily depend upon the variables articulated at paragraph 8 of that Decision, it follows, as the Chamber stated in *Kanu*, that it would not be realistic to expect the offences charged in an indictment, in the sphere of international criminality whether in its ***original*** or ***consolidated*** form, to be pleaded with "pin-point particularity".[11]

15. Contrastingly and significantly, the pith of the First Accused's complaint here is not that the crimes charged in the ***Consolidated*** Indictment have not been pleaded with "pin-point particularity" but that the said Indictment is, as it were, overloaded with particulars and details in relation to the First Accused that were not embodied in the ***Original*** Indictment and in respect of which, inferentially, he had not been, in the language of Article 17(4)(a) of the Court's Statute, ***"informed promptly and in detail"***, a conjunctive concept (I must add). In this context, therefore, one critical question is whether exceeding the degree of particularity required by law, albeit later, is, *ipso facto*, prejudicial to the Accused and impacts adversely on his right to a fair trial even where such specificity does not result in the charging of new offences. And so, the issue for ultimate resolution here is whether the Chamber is foreclosed from examining whether the discovered new material expanded

[11] Id., para 21.

factual allegations as to geographical locations and time frames within existing counts are consistent with the doctrine of fundamental fairness and the overall interests of justice thereby disentitling the First Accused from some appropriate remedy in law, attaching normative primacy to Article 17(4)(a) of the Statute which mandates that every person accused of crime be informed ***"promptly and in detail"*** of the charges against him/her.

IV. Issue of Re-Arraignment

16. It is in this regard, that I perceive some legal nexus between the issue of the discovery of the new material expanded factual allegations found in the ***Consolidated*** Indictment herein and the issue of the legal necessity, if any, for a re-arraignment.

17. *As to the issue of arraignment on a* ***consolidated*** *indictment authorised pursuant to a joinder decision, there is no specific governing rule of procedure directly on the point in international criminal tribunals. The only analogous situation is that of arraignment on an* ***amended*** *indictment.* On this latter aspect, the prevailing position in ICTY, ICTR and the Special Court is that where the ***amended*** indictment incorporates ***new charges*** and the accused has already appeared before a Trial Chamber consistent with the procedure for initial appearance, a further appearance shall be held as soon as practicable to afford the accused the opportunity to plead to the new charges.[12]

18. It is my considered view that there is a clear legal distinction between a ***consolidated*** indictment and an ***amended*** indictment, though, logically there may be some overlapping of the ***concept of consolidation*** and the ***concept of amendment*** in the context of an indictment, and justifiably so, given the dynamics of prosecutorial strategies and the investigatory process. In effect, they may be mutually inclusive depending on the circumstances, but not necessarily mutually exclusive. This reasoning is partly based on an appreciation of the etymology of each word. According to *The Oxford Dictionary of Word Histories* 'consolidate' means to "combine into a single whole". It derives from the latin word '*consolidare*' meaning "to make firm together"[13] The word '*amend*' which comes from the French '*emend*' however means to improve or make corrections.[14] In

[12] See Rule 50 of ICTY Rules as amended on 28 July 2004; see also Rule 50 of ICTR Rules and Rule 50 of SCSL Rules as amended on 14 March 2004.
[13] Glynnis Chantrell (ed.) Oxford: Oxford University Press, 2002, p115.
[14] Id., pp20 and 175.

Black's Law Dictionary, '*consolidate*' means "to combine or unify into one mass or body".[15] The word '*amend*' means to "correct or rectify". Guided by the foregoing definitions, I am fortified in my analysis that a ***consolidated*** indictment is not necessarily, without more, an ***amended*** indictment by reason of its consolidated nature or being the product of the merger of, at least, two separate original indictments. Legally, a ***Consolidated Indictment*** which is ***amended***, with leave of the Court or not, becomes an ***Amended Consolidated Indictment.*** Given the validity of my analysis, it would follow that there is a *lacuna* in our régime of rules as to the requirement of re-arraignment on a ***consolidated*** indictment *simpliciter* as distinct from re-arraignment on an ***amended*** indictment.

19. The law is that where the Rules of Procedure and Evidence applicable in the Special Court "do not, or adequately provide for a specific situation", the Court "may be guided, as appropriate, by the Criminal Procedure Act, 1965 of Sierra Leone"[16] In effect, the Court's Statute provides for some jurisprudential resource to which recourse may be had whenever there is a *lacuna* in our Rules. It is to the Sierra Leone legal system, specifically the *Criminal Procedure Act, 1965*. The only guidance that can be derived from the aforesaid Sierra Leone statute though not directly on the point but on a kindred and relevant procedural issue, is as to the effect of a plea of "not guilty". ***It is that where an accused person has pleaded "not guilty" to a charge or charges in an indictment, he shall, "without further form, be deemed to have put himself upon his trial, and after such a plea, it shall not be open to the accused, except with leave of the Court, to object that he is not properly upon his trial by reason of some defect, omission or irregularity relating to the depositions, or preliminary investigation, or any other matter arising out of the preliminary investigation."***[17] Adopting this approach it would seem, therefore, that ordinarily the First Accused is, at this stage of the proceedings, estopped from objecting that he is not properly upon his trial by reason of any defect in the ***Consolidated*** Indictment, having pleaded on the 15th, 17th and 21st of March 2003 "not guilty" to each of the eight counts charged in the ***Original*** Indictment, all of which said counts are subsumed and replicated in the ***Consolidated*** Indictment with no incorporation of new counts or offences. But should the estoppel be applied to bar the recovery by the First Accused of some appropriate remedy considering the material nature of the expanded factual allegations and having been granted leave of the Court to object? I now address this issue.

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[15] Bryan A, Garner (ed.), St. Paul: West Publishing Inc. 1990 at p303.
[16] Article 14(2) of the Statute of the Special Court for Sierra Leone.
[17] Sections 133(1) and (2)

20. My first observation on this issue is that the First Accused is not, by way of a procedural due process right, entitled to a re-arraignment on the ***Consolidated*** Indictment by reason simply of its being consolidated. What I understand the Defence to be saying is that the ***Consolidated*** Indictment has confronted the First Accused with "*a considerably extended indictment period of an additional 20 months, until December 1999 and additional geographic locations.*" (my emphasis)[18] ***Also, the Defence complaint is not that the Consolidated Indictment confronts the First Accused with new offences or crimes.*** But does this first observation dispose of the issue in the face of the findings that the ***Consolidated*** Indictment, though not a ***New*** Indictment, *per* se, does incorporate new material factual allegations of an expanded nature within existing counts? I think not. In the circumstances, as I noted earlier, there is nothing which precludes the tribunal from examining whether such material additions and elaborations are consistent with the doctrine of fundamental fairness and the overall interests of justice according primacy to Article 17(4)(a) of the Court's Statute entitling the First Accused to some appropriate remedy.

21. My second observation is that what we are confronted with here, as a ***Consolidated*** Indictment, is an accusatory instrument whose complexion and character has been transformed in some material respects (though not out of recognition) during the process of consolidation from the complexion and character of the separate, individual, ***Original*** Indictment to that of an ***Amended*** Indictment incorporating new and expanded factual allegations within existing counts for which there exists no Order of this Court authorising incorporation of the same, but falling short of a ***New*** Indictment (***which phraseology I apply only and restrictively to an accusatory instrument charging new offences or new crimes using the terms "offences", "crimes" and "charges" synonymously in this context).***[19] It goes against both legal orthodoxy and the preponderant weight of the jurisprudence, national and international, to characterise the Consolidated Indictment as new.

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[18] Motion, para 8.

[19] In the context of legal requirements for indictments in both municipal law systems, and for the purposes of international criminal trials, the "nature" of the charge is a full description of the legal characterization of the charge, that is the specific provision of the Statute alleged to have been violated. For this proposition, see an instructive article by Michael J. Keegan and Daryl A. Mundis reflecting the complexities of the legal requirements of indictments in the international criminal law sphere, entitled "Legal Requirements for Indictments" in *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk Macdonald* edited by Richard May et al., published by Kluwer International Law, The Hague 2001 page 125 note 1. I am indeed grateful to Judge Boutet for making this article available to me.

22. Based on these two observations, I opine from all the circumstances of the case and according primacy to Article 17(4)(a) of the Court's Statute, that the doctrine of fundamental fairness and the overall interests of justice demand granting the First Accused some remedy in respect of the objectionable portions of the ***Consolidated*** Indictment by requiring the Prosecution to elect either to expunge them completely from the aforesaid ***Consolidated*** Indictment or seek an amendment in respect thereof.

V. Issue of Double Jeopardy

23. I need not dwell on the issue of double jeopardy raised by the First Accused since it does not arise for determination based on my finding that the ***Consolidated*** Indictment is not a ***New*** Indictment and, that it consolidated and superseded the ***Original*** individual separate indictments including that of the First Accused thus, as it were, extinguishing and relegating them into a state of legal oblivion. There is only one Indictment legally in existence at this point in time. It is the Consolidated Indictment.

VI. Conclusion

24. In conclusion, I concur in the Conclusion and the Order as set out in the majority Decision.

Done in Freetown, Sierra Leone, this 29th day of November 2004

Hon. Judge Bankole Thompson

[Seal of the Special Court for Sierra Leone]

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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 29th Day of November, 2004.

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

DISSENTING OPINION OF HON. JUDGE BENJAMIN MUTANGA ITOE, PRESIDING JUDGE, ON THE CHAMBER MAJORITY DECISION SUPPORTED BY HON. JUDGE BANKOLE THOMPSON'S SEPARATE BUT CONCURRING OPINION, ON THE MOTION FILED BY THE FIRST ACCUSED, SAMUEL HINGA NORMAN FOR SERVICE AND ARRAIGNMENT ON THE SECOND INDICTMENT

Office of the Prosecutor:

Luc Côté
James Johnson

Defence Counsel for Sam Hinga Norman:

Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Tim Owen, QC

Defence Counsel for Moinina Fofana:

Michiel Pestman
Arrow Bockarie
Victor Koppe

Defence Counsel for Allieu Kondewa

Charles Margai
Yada Williams
Ansu Lansana

I, HON. JUDGE BENJAMIN MUTANGA ITOE, Judge of the Trial Chamber of the Special Court for Sierra Leone, Presiding Judge of the said Chamber;

MINDFUL of the Motion for Service and Arraignment on the Second Indictment filed on the 21st of September, 2004, for the 1st Accused, Samuel Hinga Norman;

MINDFUL of the Prosecution's Response to the said Motion filed on the 1st of October, 2004;

MINDFUL of the Defence Reply to the Prosecution's Response filed on the 6th of October, 2004;

MINDFUL of the Decision delivered by the Trial Chamber on the 27th of January, 2004, on the Prosecution's Motion for Joinder;

MINDFUL of my Separate Opinion dated the 27th day of January, 2004 on the "NATURE AND LEGAL CONSEQUENCES OF THE RULING IN FAVOUR OF THE FILING OF CONSOLIDATED INDICTMENTS" which is annexed to the Chamber's Decision also dated the 27th day of January, 2004, granting the Prosecution's Motion for Joinder;

CONSIDERING the provisions of the Statute of the Special Court ("The Statute") and particularly those of Articles 9(1), 17(2), 17(4)(a), 17(4)(b) and 17(4)(d);

CONSIDERING the provisions of Rules 26(bis), 40(bis)(J), 47, 48, 50, 51, 52, 61 and 82 of the Rules of Procedure and Evidence of the Special Court ("The Rules");

MINDFUL of the International Convention on Civil and Political Rights, particularly the provisions of its Articles 9(2) and 14(3)(a);

ISSUE THE FOLLOWING DISSENTING OPINION ON THE CHAMBER MAJORITY DECISION SUPPORTED BY HON. JUDGE BANKOLE THOMPSON'S SEPARATE BUT CONCURRING OPINION, RELATING TO THE MOTION FILED BY THE FIRST ACCUSED, SAMUEL HINGA NORMAN, FOR SERVICE AND ARRAIGNMENT ON THE SECOND INDICTMENT.

HISTORICAL BACKGROUND

1. The 1st Accused, Samuel Hinga Norman, the Applicant in this Motion, was arrested on the 10th of March, 2003. He made his initial appearance before me in Bonthe on the 15th , 17th, and 21st of March, 2003, in accordance with the provisions of Rule 61 of the Rules.

2. On the 17th of March, 2003, he was, in accordance with the provisions of Rule 61(ii) and 61(iii) of the Rules, arraigned before me on an eight Count Individual Indictment dated the 7th of March, 2003. This Indictment was approved by His Lordship, Hon. Judge Bankole Thompson, under the provisions of Rule 47 of the Rules. The number of the Indictment is SCSL-2003-08. He pleaded 'Not Guilty' to all the counts.

3. For purposes of this Dissenting Opinion, I am adopting in its entirety, the contents of my Separate Opinion dated the 27th of January, 2004, appended to the Chamber Joinder Decision also dated the 27th of January 2004, and am integrating and appending it to this Opinion. It would, in this regard, become necessary for me, at certain stages of this Opinion, to also highlight the status of the Applicant's Co-Accused Persons, namely, Moinina Fofana, the 2nd Accused, and Allieu Kondewa, the 3rd Accused in the Consolidated Indictment dated the 5th of February, 2004.

4. The 2nd Accused, Moinina Fofana, I would like to recall, was arrested on the 29th of May, 2003, also on an 8 Count Individual Indictment dated the 26th of June, 2003, approved by His Lordship, Hon. Judge Pierre Boutet, charging him with virtually the same offences as those in the 1st Accused's Indictment. He made his initial appearance before Hon. Judge Pierre Boutet in accordance with the provisions of Rules 61(ii) and 61(iii) of the Rules. He pleaded 'Not Guilty' to all the counts. The number of this Indictment is SCSL-2003-11.

5. The 3rd Accused, Allieu Kondewa, was, like the 2nd Accused, arrested on the 29th of May, 2003, also on an 8 Count Individual Indictment, dated the 26th of June, 2003, again approved by His Lordship, Hon. Judge Pierre Boutet, with virtually the same offences as those in the indictments of both the 1st and the 2nd Accused. Like the 2nd Accused, he also made his initial appearance before Hon. Judge Pierre Boutet in accordance with the provisions of Rules 61(ii) and 61(iii) of the Rules. He pleaded 'Not Guilty' to all the counts of the Indictment. The number of this Indictment is SCSL-2003-12.

6. As can easily be gleaned from this analysis, the three indictments were Individual Indictments with their numbers, different from each other.

7. This was the status of these three accused persons before the Prosecution filed a Motion for Joinder on the 9th of October, 2003. In that Motion, the Prosecution, pursuant to Rules 73 and 48(B) of the Rules, moved the Chamber to order that Samuel Hinga Norman, the Applicant in this Motion, Moinina Fofana, and Allieu Kondewa, be charged and tried jointly and that should the Motion for Joinder be granted, the Trial Chamber should further order that a Consolidated Indictment be prepared as the Indictment on which the joint trial would proceed.

8. In objecting to the granting of this Motion, the Defence for Allieu Kondewa conceded that the exercise by the Trial Chamber of its prerogatives under Rule 48(B) of the Rules is discretionary. It argued however, that such a consolidation should not be granted if it would prejudice the rights of the accused. It further argued that in advising its client on the Prosecution's Application For Joinder, adequate time was needed for consultation with the proposed Co-Accused's Counsel so as to determine their client's position vis-à-vis the proposed Co-Accused.

9. The Kondewa Defence further contended that "prior to today, only one of the proposed co-accused has received the Prosecutions disclosure material pursuant to Rule 66(A)(i) of the Rules." It submitted that for the Article 17 rights of the Accused to be fully respected for purposes of ensuring a proper hearing of the Motion, materials subject to disclosure must be made available to them for a review with a view to making "responsible submissions on the issue of 'material prejudice' likely to be suffered by the Accused in being tried jointly"

10. As a Chamber, and unanimously as should have been expected, having regard to the similarity in the content and in the wording of the three Indictments, coupled with the provisions of Rule 48(B) of the Rules, we rightly, in my judgment, granted the Joinder Motion and made the following Consequential Orders:

    1. That a single Consolidated Indictment be prepared as the Indictment on which the joint trial shall proceed and that the Registry assign a new case number to the Consolidated Indictment.

    2. That the said Consolidated Indictment be filed in the Registry within (10) days of the date of delivery of this Decision.

3. That the said Indictment be served on each Accused in accordance with Rule 52 of the Rules.

11. I would like to recall however, that the Consolidated Indictment which the Prosecution said would be filed as soon as the Joinder Motion was granted, was not, as should ordinarily, in my opinion, have been the case, annexed to the Prosecution's Motion for Joinder so as to enable us as a Court, to determine the nature and extent of the Consolidated Indictment vis-à-vis the three Initial Individual Indictments of the three Accused persons, and how this Single Indictment may have impacted on each of the three Initial Indictments.

12. In granting the Motion, the Chamber credulously believed the Prosecution when it gave assurances in Court during the hearing of that Motion, that the Consolidated Indictment remained textually the same as the Initial Individual Indictments, excepting for a few changes which were insignificant. The said Consolidated Indictment was subsequently filed following the Joinder Decision and was given a new case Number SCSL-04-14.

13. However, in view of the fact that the Consolidated Indictment which was to replace and has in fact replaced the 3 Individual Indictments on which the joint trial was to proceed and is indeed proceeding today, was not annexed to the Motion or even produced in Court by the Prosecution for examination and verification, I took a personal view that it was a New Indictment.

14. Having taken this view, I further expressed the opinion that the Consolidated Indictment in its new form, that is, 3 indictments merged into one, should be subjected to the approval procedures stipulated in Rule 47 of the Rules and further, that the 3 Accused persons, now poised to be tried jointly on an Indictment which I considered new, to intents and purposes, should be called upon by the Chamber, to plead afresh to the New Consolidated Indictment. These views, I suggested, should be included as point (4) of the Consequential Orders in the Joinder Decision.

15. My Honourable Learned Brothers and Colleagues, His Lordship, Hon. Judge Bankole Thompson, Presiding Judge of the Chamber (as he then was) and His Lordship, Hon. Judge Pierre Boutet however, did not share my point of view. It is because of this disagreement on the inclusion of this 4th point which constituted my preoccupation, concern and suggestion, that persisted even after lengthy deliberations on the issue, that I decided to put on record, a Separate Opinion, dated the 27th of January, 2004, which is appended to Our Chamber's

Joinder Decision that I signed in principle and in approval of the 3 Consequential Orders contained therein.

THE MOTION

16. This Motion for Service and Arraignment on The Second Indictment filed by the 1st Accused, certainly results from the concerns that have arisen after Counsel for the Accused Persons later took real cognizance of the contents of this New Consolidated Indictment.

In this Motion dated the 20th of September, 2004, the 1st Accused argues:

i. That he has not been personally served with the Consolidated Indictment;

ii. That he has not pleaded to the Consolidated Indictment on which he is currently being tried;

iii. That the contents of the Consolidated Indictment are not the same as those of the Initial Individual Indictment as the former extends the temporal jurisdiction of the Indictment to an additional 20 months in addition to including several new geographic locations, as well as changing the charge from looting of 'private property to civilian property';

iv. That the Initial Individual Indictment against him be withdrawn or quashed as its continued existence in the records violates the Rule Against Double Jeopardy.

PROSECUTION'S RESPONSE

17. While admitting that the Consolidated Indictment was not served on the Accused personally as provided for under Rule 52 of the Rules, the Prosecution submits and I quote, that it is a "***procedural anomaly that has not caused any identifiable prejudice to the Accused***".

18. The Prosecution further states that the Consolidated Indictment contains "*no new charges*" and that the Accused has, in any event, been conducting his defence on the charges in the Consolidated Indictment during the 1st and 2nd sessions of the trial.

19. That no arraignment on the Consolidated Indictment is necessary ***since there are no new charges to those which are in the Initial Indictments.***

20. That the Special Court for Sierra Leone, as an International Tribunal, applies internationally recognised principles and that I quote, a "***trial on the superseding (Consolidated) Indictment***", and I quote, again, "'***should' prevent a retrial on the former Indictment.***"

APPLICABLE LAW

21. The Legal Instruments on which this opinion will be premised include the provisions of the Statute and the Rules and the provisions of the International Covenant on Civil and Political Rights (ICCPR).

22. As far as the Statute is concerned, the relevant provisions of Articles 9 and 17 provide as follows:

Article 9(1)

No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.

Article 17

Article 17(1) - All accused shall be equal before the Special Court.

Article 17(2) - The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

Article 17(3) - The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

Article 17(4) - In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality.

Article 17(4)(a) - To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her.

Article 17(4)(b) - To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing.

23. On the provisions of the Rules of Procedure and Evidence, Rules 26(bis), 40(bis)(J), 47, 48, 50, 51, 52, 61 and 82 of the Rules provide as follows:

Rule 26 (bis)

The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the

Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Rule 47

(A) An indictment submitted in accordance with the following procedure shall be approved by the Designated Judge.

(C) The indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case.

(E) The designated Judge shall review the indictment and the accompanying material to determine whether the indictment should be approved. The Judge shall approve the indictment if he is satisfied that:

i. the indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court; and
ii. that the allegations in the Prosecution's case summary would, if proven, amount to the crime or crimes as particularised in the indictment.

Rule 48

(A) Persons accused of the same or different crimes committed in the course of the same transaction may be jointly indicted and tried.

(B) Persons who are separately indicted, accused of the same or different crimes committed in the course of the same transaction, may be tried together, with leave granted by a Trial Chamber pursuant to Rule 73.

Rule50

(A) The Prosecutor may amend an indictment, without prior leave, at any time before its approval, but thereafter, until the initial appearance of the accused pursuant to Rule 61, only with leave of the Designated Judge who reviewed it but, in exceptional circumstances, by leave of another Judge. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and Rule 52 apply to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already made his initial appearance in accordance with Rule 61:

i. A further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges;

Rule 52

(A) Service of the indictment shall be effected personally on the accused at the time the accused is taken into the custody of the Special Court or as soon as possible thereafter.

(B) Personal service of an indictment on the accused is effected by giving the accused a copy of the indictment approved in accordance with Rule 47.

Rule 61

Upon his transfer to the Special Court, the accused shall be brought before the Designated Judge as soon as practicable, and shall be formally charged. The Designated Judge shall

ii. Read or have the indictment read to the accused in a language he speaks and understands, and satisfy himself that the accused understands the indictment

iii. Call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf.

Rule 82

(A) In joint trials, each accused shall be accorded the same rights as if he were being tried separately.

(B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

24. The ICCPR in its Articles 9 and 14 provides as follows:

Article 9(2)

Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

Article 14

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him

Article 14(7)

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each Country.

(A) VIOLATION OF THE RULE AGAINST DOUBLE JEOPARDY

25. For purposes of this Opinion, I will first consider the Applicant's appeal and submission, that the Initial Indictment against him be withdrawn in the light of the Consolidated Indictment on which the trial is now proceeding. He argues that the continued existence of the Initial Indictment, violates the Rule against double jeopardy.

26. In this regard, it is necessary to examine the provisions of Article 9(1) of the Statute of the Special Court, entitled, "***Non Bis In Idem***" which provides that:

> "No person shall be tried before a National Court of Sierra Leone for acts which he or she has already been tried by the Special Court.",

And those of Article 14(7) of the International Covenant for the Protection of Civil and Political Rights which provides as follows:

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the Law and penal procedure of each country.

27. The issue to be addressed here is whether, with the continued existence of the Initial Individual Indictment, there is a looming threat or a genuine apprehension or a possibility, even if it were not yet real, that the Applicant, if acquitted on the Consolidated Indictment on which the proceedings are now based, could still be prosecuted on the Individual Initial Indictment, thereby exposing him to the effects of the Rule against double jeopardy.

28. The Prosecution in this regard, submits and argues, that this Court, being an International Tribunal, applies internationally recognised principles, and that, to quote the Prosecution, "a trial on the superseding Indictment 'should' prevent a retrial on the former indictment" and "will not leave him vulnerable to a further prosecution on the old indictment in the event of a complete acquittal on the Consolidated Indictment".

29. I find this argument unconvincing and speculative because it neither offers nor does it represent a concrete, certain, and unequivocal legal assurance that an acquittal, ***per se***, of the Accused on the Consolidated Indictment, automatically confers on him, an immunity from a possible harassment of a rearrest and a prosecution on the Initial Indictment. The reality is that if the Accused were ever rearrested or detained on the Initial Indictment after an acquittal, the said arrest or detention would, in any event, have already taken place and it is only after

appearing in Court, that arguments on '***autrefois acquit***' may be raised, properly examined, and probably, upheld.

30. Even if it is conceded that the verdict of the Court on a preliminary objection based on the plea of 'autrefois acquit' will, in these circumstances, be favourable to the Accused, he all the same would have been put through a situation where the Rule against double jeopardy would have been violated to his detriment, certainly, not the jeopardy of a conviction, but of deprivation of his liberty which, h owever briefly it lasts, usually accompanies arrests and detentions.

31. As a Tribunal, albeit as International as the Special Court is, these proceedings should be conducted with a semblance of transparency that contributes to ensuring and preserving the integrity of the proceedings. This, I observe, cannot be attained in a case such as this, where the anomalous situation of 4 contemporaneous Indictments which in the circumstances of this case, are still being considered as legally valid, continue to hang over the heads of the 3 Indictees.

32. It is my finding that this situation impacts negatively on the neatness and transparency of the judicial process, and that there is an imperative necessity for the 3 Initial Individual Indictments to be withdrawn in order to avoid, not only a procedural confusion that is now apparent, but also and to put to rest, an understandably justified and continued apprehension, even if it were not yet founded, of a possible violation in future by whoever, of the Rule against Double Jeopardy.

33. This course of action is even more imperative in the overall interests of justice and the integrity of the judicial process because the Prosecution in this case is seeking to circumvent the imperative necessity of an arraignment on the New Consolidated Indictment, on the argument and understanding that the 3 Accused Persons had after all, been earlier arraigned and pleaded to their Initial Individual Indictments whose contents, the Prosecution claims, are the same as those in this Consolidated Indictment.

34. The analysis which follows will show that this affirmation by the Prosecution has turned out to be unreliable and misleading and that the interests of justice, in these circumstances, would not be served, indeed, would be defeated, if these 3 Initial Indictments were not withdrawn because keeping them in place, in the sole interests of this prosecutorial strategy, violates the

principle of fundamental fairness as well as it contravenes the provisions of Articles 9(1) and 17(2) of the Statute as read with those of Rule 26(bis) of the Rules.

(B) SERVICE OF THE CONSOLIDATED INDICTMENT. INTERPRETATION AND APPLICATION OF RULES 52(A) AND 52(B) OF THE RULES

35. On arguments relating to this issue that are raised by the Applicant, it is contended that the provisions of Rule 52 of the Rules have been violated in that he has not been personally served with the Consolidated Indictment as ordered by the Chamber in its Joinder Decision of the 27th of January, 2004. The Chamber in this regard, it would be recalled, ordered that "The said Indictment be served on each of the Accused in accordance with the provisions of Rule 52 of the Rules." It is on record that service of the said Indictment was, contrary to that Order, effected instead on the Applicant's Counsel.

36. Rule 52 of Rules provides as follows:

Rule 52(A):

Service of the Indictment ***shall be effected personally on the accused*** at the time the accused is taken into the custody of the Special Court or as soon as possible thereafter.

Rule 52(A):

Personal service of an indictment on the accused is effected by giving the accused a copy of the indictment approved in accordance with Rule 47.

37. The question to be answered at this stage is whether the provisions of Rule 52 of the Rules and the Order of the Court to this effect were or have been complied with.

38. The Prosecution in answer to this question, clearly admits that service on Counsel instead of on the Accused personally "was an administrative anomaly" which, according to them, "has caused no identifiable prejudice to him" because, again according to the Prosecution, "The First Accused has demonstrated knowledge of the charges contained in the Consolidated Indictment, as he has defended himself against these charges in the first trial session and at the beginning of the second trial session."

39. These arguments, to my mind, are neither convincing, acceptable, nor are they sustainable, particularly in this case, and upholding them would have the effect of empowering one party to

the proceedings, in this case, the Prosecution, to flout the law to the detriment of the interests of the other party, the Accused, and his statutory right to a fair and public trial as well as to be promptly informed of the charges against him as guaranteed by the provisions of Articles 17(2) and 17(4)(a) of the Statute, by Rule 26(bis) of the Rules, by Article 9(2) of the ICCPR, and more pertinently still, by the necessary intendment, interpretation, and the combined effects of the application of both Rules 52(A) and 52(B) of the Rules.

40. In resolving issues of this nature, it is my opinion that a fidelity, not only to strictly interpreting but also, strictly applying the provisions of the Statute or of the Rule that is alleged to have been violated, is of primary importance. Both arms of Rule 52 of the Rules are not only clear but mandatory. They should therefore be interpreted and applied as mandatorily as they are enacted.

41. It is my considered opinion, and I do so hold, that what law and justice is all about, for us Judges, is to uphold and to prevent a breach of the law and to provide a remedy for such a breach if any, and in so doing, to boldly tick right what is right, and when it comes to it, to equally and boldly tick wrong, what is really wrong and in the process, to disabuse our minds of any influence that could misdirect us to tick right, what is ostensibly wrong, or wrong, what is ostensibly right because it would indeed be unfortunate for justice and the due process if, by whatever enticing or justifying rhetoric, or by any means whatsoever, however ostensibly credible or plausible it may seem, we reverse this age-long legal norm and philosophy as this would amount to rocking the very foundation on which our Law and our Justice stand and have, indeed, held on to, and so firmly stood the test of times.

42. The questions to be asked and to be answered directly without any justifying rhetoric are indeed twofold; firstly, whether the said Consolidated Indictment was served in accordance with the provisions of Rule 52 of the Rules and secondly, whether in execution of the Order of the Court, the said Indictment was served in accordance with the prescriptions of the said Order. The answer to one which holds good for the other, is in the negative.

43. It must in this regard, be conceded that "an administrative anomaly" as the Prosecution has rightly described the failure to effect personal service on the Applicant in accordance with the provisions of Rule 52(A) and 52(B) of the Rules, was an administrative muddle which should be put right since it is, in itself, a violation of the law for which there must be no other judicial remedy than declaring it illegal, annulling it accordingly, and ordering that service of the

Consolidated Indictment be effected in conformity with the provisions of Rules 50(A) and 50(B) of the Rules ***rather than resorting to advancing interpretations or arguments of convenience which were clearly deplored in the International Criminal Tribunal For The Former Yugoslavia (ICTY) case of THE PROSECUTOR V DELALIC***, all in order ***to justify and redeem a manifest violation of the mandatory provisions of Laws or Rules that leave no room for the exercise of a judicial discretion and which, in their context, are as clear and as unambiguous as these twin Rules in question.***

44. Our Chamber has always taken these principles and factors into consideration and has opted for the Literal Rule in the sphere of Statutory Interpretation in interpreting texts by giving them their ordinary and everyday meaning and applying them exactly as they are written.

45. For instance, in The Chamber's Decision of the 6th of May, 2004, on The Applicant's Motion Against Denial By The Acting Principal Defender To Enter A Legal Services Contract For The Assignment Of Counsel, Case No. SCSL-04-16-PT, commonly known as Brima - Principal Defender Case, we refused to accept importing extraneous interpretations to statutory provisions or regulations which are as clear, I would say, as those of Rule 52 of the Rules, and took the view that '***holding otherwise would be attributing to a very clear regulatory instrument, a strange and extraneous interpretation and meaning which was never envisaged'***. The Chamber in so holding, relied on the dictum of LORD HERSCHEL in the case of THE BANK OF ENGLAND V VAGLIANO BROTHERS [1891] AC 107 at page 144 where His Lordship had this to say:

> "I think the proper cause is in the first instance, to examine the language of the Statute and to ask what its natural meaning is."

46. It would certainly amount to attributing to a very clear regulatory instrument, a strange and extraneous interpretation, meaning, and application which was never intended by the Legislator, the Regulatory Body or Authority that enacted it, if it were ever decided that serving a judicial process on the Accused's Counsel is good and justifiable when it statutorily and mandatorily should be served on the Accused personally.

47. In our Decision on the Kondewa Motion To Compel The Production of Exculpatory Witness Statements, Witness Summaries And Materials Pursuant To Rule 68 of the 8th of July, 2004, a decision rendered soon after the BRIMA PRINCIPAL DEFENDER DECISION, This

Chamber had this to say on an issue that involved the interpretation to be given to the provisions of Rule 68 of the Rules, and I quote:

"In addressing this aspect, the Chamber wishes to observe, by way of first principles, that no rule, however formulated, ***should be applied in a way that contradicts its purpose***. A kindred notion here is that a statute or rule must not be interpreted so as to produce an absurdity. In effect, it is rudimentary law that ***a statute or rule must be interpreted in the light of its purpose. Another basic canon of statutory interpretation is that a statute is to be interpreted in accordance with the legislative intent.***" Restating the law on statutory interpretation, the Trial Chamber of the ICTY in the case of THE PROSECUTOR V. DELALIC had this to say:

"...The rationale is that the ***law maker should be taken to mean what is plainly expressed***. The underlying principle which is also consistent with common sense is that the meaning and intention of a statutory provision ***shall be discerned from the plain and unambiguous expression used therein rather than from any notions which may be entertained as just and expedient...***"

48. The absurdity in issue in this case, and what 'may be entertained as just and expedient' as stated in the foregoing dicta will be to hold that service on his Counsel should substitute personal service on the Accused himself as mandated by Rule 52.

49. Certainly, seeking like the Prosecution is, to justify, a flagrant violation of a mandatory provision by submitting that the breach has caused no "identifiable prejudice" to the Applicant, is a cover up argument of convenience which, in the context of the dictum in the DELALIC CASE, is proferred only to be accepted just for the purposes of convenience and expediency, and not because it is, nor is it convincing to argue, that it is in conformity with the law.

50. The issue at stake here, to my mind, is not only one of interpretation but also and equally, one of the application of the provisions of the Regulatory Instrument in issue. In this regard, I am of the opinion that to give effect to the necessary intendment of the Regulatory Body that enacted the provisions of Rule 52 as they appear in the Regulatory Instrument, ***they must not only be strictly interpreted but also and equally, strictly applied.***

51. In this regard, LORD DENNING had this to say in the case of ROYAL COLLEGE OF NURSING VS DEPARTMENT OF HEALTH AND SOCIAL SECURITY [1980] AC 800:

"...Emotions run so high on both sides that I feel we as Judges must go by the very words of the Statute without stretching in one way or the other and writing nothing in which is not there..."

LORD ESHER M. R., in the case of R. V JUDGE OF THE CITY OF LONDON COURT [1892] 1 QB 273 9 CA stated that "***if the words of the Act are clear, you must follow them even though they lead to a manifest absurdity...***"

52. In the case of DUPORT STEEL VS SIRS [1980] 1AER 529 LORD DIPLOCK said that:

"...where the meaning of the statutory words is plain and unambiguous, it is not for the Judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral..."

and JERVIS CJ in the case of ABLEY VS DALE (1851) N.S. pt. 2, ol. 20, 233,235, had this to say:

"***...if the precise words used are plain and unambiguous, in our judgment we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice...***"

53. Still on this trend of reasoning, BLANEY J in the case of BYRNE V IRELAND [1972] IR 241, reproduced the treatise in Maxwell on the Interpretation of Statutes (12th Ed.) 1969 at p.29 and I quote:

"Where by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a Statute is not to be collected from any notions which may be entertained by the Court as to what is just and expedient; words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded. The duty of the Court is to expound the law as it stands..."

I would say here, that our duty as Judges of this Chamber, is to expound the law and in addition, to apply it as it is or as it is written.

54. In light of the above, it is my considered opinion, that Rule 52 of the Rules which mandatorily provides for the personal service on the Accused as soon as "the accused is taken into the

custody of the Special Court" reiterates and gives effect to the statutory provisions of Article 17(4)(a) and 17(4)(b) which require respectively that the Accused:

" be informed promptly and in detail in a language which he or she understands, of the nature and cause of the charge against him or her" and

"have adequate time and facilities for the preparation of his or her defence and to communicate with Counsel of his or her own choosing."

55. It would appear apparent therefore, as it is clear, that the Plenary of Judges of the Special Court for Sierra Leone, the Regulatory Authority of this Court, in conceiving, drafting, adopting and promulgating the two arms of Rule 52 as they are worded, was conscious of and wanted to give effect to the preponderance of the personal involvement of the Accused in the process as well as of the statutorily recognised predominance of his personal implication and that of his choices in that process and particularity in the conduct of his defence as provided for in Article 17 of the Statute.

56. It can therefore be deduced, that what the Plenary meant and intended in achieving, by giving the provisions of Rules 52(A) and 52(B) the insistent and mandatory coloration of a personal service of the Indictment on the Accused, which should in fact be the case, is that a service of the Consolidated Indictment which is the subject matter of this contention, should personally be effected on the Accused himself, and not on any other person, albeit, his Counsel, and that proceeding otherwise or doing it the way it was done in this case, violates this clearly written Rule.

57. Besides, and in addition, the directive that the service be effected personally on the Applicant was an Order of the Court. Its execution therefore, in the manner that was contrary to what the Court had directed in that Order, is, in itself, a breach of the law which the Prosecution has implicitly acknowledged but is, at the same time, seeking to circumvent through convenient interpretational, procedural or administrative mechanisms and arguments which, to my mind, neither justify nor do they redeem this fundamental breach of the law.

(C) DIFFERENCES BETWEEN THE 3 INITIAL INDICTMENTS AND THE CONSOLIDATED INDICTMENT AND THE ISSUE OF A REARRAIGNMENT

58. The issue that has given rise to the controversy here relates to the differences in the contents of the 3 Initial Individual Indictments and the Consolidated Indictment and whether or not, depending on the nature of the differences or changes reflected or appearing in the Consolidated Indictment, rearraignment on this new Indictment against the 3 accused, is an imperative.

59. I would like to observe here preliminarily, that even though the Rules, in their Rule 50, contain provisions for amending an Indictment, there is no Rule that institutes or regulates the phenomenon of what we are now referring to as a Consolidated Indictment. The Rules provide for an Indictment under Rule 47, which should be served personally on the Accused in accordance with the provisions of Rule 52 of the Rules.

60. If the Prosecution, for any legal reason such as provided for in Rule 48 and after the initial appearance of the Accused, seeks to modify the already approved Indictment, it is my opinion that it has the option of either applying to the Trial Chamber, under the provisions of Rule 50(A) of the Rules, or filing a New Indictment which should necessarily involve going through the Rule 47 procedures, particularly if it turns out that the amendments sought by the Prosecution are substantial and in fact, contain new particulars and new charges. Should the Prosecution opt to apply for an amendment which contains new charges, the provisions of Rule 50(B)(i) of the Rules should ordinarily apply without a further recourse to the Rule 47 procedures.

61. It is necessary to recall here again that when the Prosecution presented its Joinder Motion under Rule 48(B), it did not annex the Consolidated Indictment to it so as to enable the Trial Chamber to appreciate the nature and the extent of its contents. Notwithstanding this flaw which I highlighted as significant and substantial in my Separate Opinion dated the 27th of January, 2004, The Trial Chamber, without the benefit of having seen or verified the proposed Consolidated Indictment before ruling on this Motion, granted it and ordered that a Consolidated Indictment be filed merely on the assurances furnished by the Prosecution and which they did not live up to. In these circumstances, I was, and am still of the opinion that

this Consolidated Indictment should have been subjected to the Rule 47 procedures since I consider it to be a New Indictment.

62. The Majority Decision of the Court overruled my point of view on this particular issue and the Prosecution thereafter proceeded to file directly in the Registry, the Consolidated Indictment after the Order granting the Joinder Motion. It is on this Consolidated Indictment that the Trial of the Applicant, First Accused, Samuel Hinga Norman, Moinina Fofana, the 2nd Accused, and Allieu Kondewa, the 3rd Accused, is now proceeding.

63. In the course of examining the instant Motion for Service and Arraignment on the Second Indictment filed by the 1st Accused, the Trial Chamber, after putting the 3 Initial Individual Indictments and the New Consolidated Indictment under scrutiny, has come to realise that this Indictment has made the following significant amendments and additions to the Individual Indictment of the 1st Accused, Samuel Hinga Norman:

(i) Paragraph 23 of the Consolidated Indictment - This paragraph refers to the armed conflict occurring in various parts of Sierra Leone. In the Initial Indictment, the qualifier, "but not limited to" is given. The Consolidated Indictment adds the "towns of Tongo Field", instead of just Tongo Field, "and surrounding areas and the Districts of Moyamba and Bonthe" for parts of Sierra Leone where the armed conflict allegedly occurred.

(ii) Paragraph 24 of the Consolidated Indictment - This paragraph adds to the actions committed by CDF, largely Kamajors, "personal injury and the extorting of money from civilians". Subparagraph (iii) adds that the Kamajors not only attacked, but "took control of" various towns, and instead of allegations that Kamajors destroyed and looted, the Consolidated Indictment alleges that Kamajors "unlawfully" destroyed and looted. Subparagraphs (d) and (e) are entirely new and state that:

> (d) Between October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Moyamba District, to include the towns of Sembehun and Gbangbatoke. As a result of the actions Kamajors continued to identify suspected "Collaborators" and others suspected to be not supportive of the Kamajors and their activities. Kamajors unlawfully killed an unknown number of civilians. They unlawfully destroyed and looted civilian owned property.
>
> (e) Between about October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Bonthe District, generally in and around the towns and settlements of Talia, Tihun, Maboya, Bolloh, Bemebay, and the island town o Bonthe. As a result of these actions Kamajors identified suspected "Collaborators" and others suspected to be not supportive of the Kamajors and their activities. They unlawfully killed an unknown number of civilians. They destroyed and looted civilian owned property.

Additions to subparagraph (f) are that the CDF blocked all major highways and roads leading "to and from", which previously referred to "leading to" only.

(iii) Paragraph 25 of the Consolidated Indictment - subparagraph (a) extends the timeframe for alleged commission of unlawful killings to 30 April 1998, instead of 1 February 1998 as in the Initial Indictment. Additional places are mentioned where the killings allegedly took place, including "at or near the towns of Lalehun, Kamboma, Konia, Talama, Panguma and Sembehun". The Initial Indictment used general language "but were not limited to" and referred to "at or near Tongo Field". Subparagraph (b) included "District Headquarters town of" Kenema, whereas the Initial Indictment just referred to "Kenema" and added "at the nearby locations of Blama". Subparagraph (c) adds "Kamajors unlawfully killed"; Subparagraph (d) adds "including the District Headquarters town" and "Kebi Town, Kpeyama, Fengehun and Mongere" and that "Kamajors unlawfully killed". Subparagraphs (e) and (f) are new and were not in the Initial Indictment. These subparagraphs state:

> (e). between about October 1997 and December 1999 in locations in Moyamba District, including Sembehun, Taiama, Bylago, Ribbi and Gbangbatoke, Kamajors unlawfully killed an unknown number of civilians;
>
> (f). between about October 1997 and December 1999 in locations in Bonthe District including Talia (Base Zero), Mobayeh, Makose and Bonthe Town, Kamajors unlawfully killed an unknown number of civilians.

Additions to subparagraph (g) included "unlawfully killed" and capture of enemy combatants "in road ambushes at Gumahun, Gerihun, Jembeh and the Bo-Matotoka Highway".

(iv) Paragraph 26 of the Consolidated Indictment - subparagraph (a) extends the timeframe for alleged commission of acts of physical violence and infliction of mental harm or suffering to 30 April 1998, which previously was 1 April 1998. Blama and Kamboma are also listed as areas where the acts were committed. Kenema is also qualified as "Kenema town". Subparagraph (b) of the Initial Indictment referred to commission of acts from 1 November 1997 to 1 April 1998, and the Consolidated Indictment refers to November 1997 to December 1999 and adds "in the towns of" for Tongo Field and "the Districts of Moyamba and Bonthe". The subparagraph further adds the offences of "illegal arrest and unlawful imprisonment". The Initial Indictment used general language of "but not limited to".

(v) Paragraph 27 of the Consolidated Indictment - this paragraph alleging looting and burning adds the locations of "Kenema District, the towns of Kenema, Tongo Field and surrounding areas", "District" to Bo, "the towns of Bo", "Bonthe District, the towns of Talia (Base Zero), Bonthe Town, Mobayeh, and surrounding areas". This paragraph also refers to the unlawful taking and destruction by burning of "civilian owned" property, instead of "private" property".

(vi) Paragraph 29 of the Consolidated Indictment - adds that the CDF "conscript" instead of "initiate" children under the age of 15 years into armed forces or groups "throughout" the Republic of Sierra Leone.

Other changes to the Consolidated Indictment include, for example, reference to "CDF, largely Kamajors", instead of Kamajors, as in the Initial Indictment.

64. An analysis of the contents of the Consolidated Indictment and those of the Initial Indictment of the Applicant, the 1st Accused, reveals that the particulars of the offences and time frames have been expanded and that new offences have been added.

For instance, paragraphs 22 to 27 of the Consolidated Indictment introduce new locations like Bonthe and Moyamba while the time frames for the commission of some offences changed from April 1998 as alleged in the Initial Indictment to December 1999 in the Consolidated Indictment. Furthermore, in paragraphs 24 to 27 and 29 of the Consolidated Indictment, new offences of unlawful arrest and detention, conscription of children, personal injury and extorting money from civilians have been added.

65. Furthermore, a comparison between the Consolidated Indictment and the 2 Individual Indictments of Moinina Fofana and Allieu Kondewa, the 2nd and 3rd Accused respectively, reveals the following:

i. Paragraph 25(a) of the Consolidated Indictment adds new locations where unlawful killings are alleged to have occurred and those include "at or near Tongo Field and at or near towns of Lalehum, Kambom a, Konia, Talama, Panguma and Sembehun," whereas paragraph 20(a) of the Individual Indictments mention that such unlawful killings occurred only "at or near the Tongo Field".

ii. In paragraph 25(b) of the Consolidated Indictment, the location of "Blama" which is absent in Paragraph 25(b) of the Individual Indictments, has been added.

iii. Paragraph 25(e) of the Consolidated Indictment includes the Moyamba District including Sembehun, Atiama, Bylagoa, Ribbi and Gbangbatoke which do not feature in the Initial Individual Indictments.

iv. Paragraph 25(f) of the Consolidated Indictment includes the Bonthe District, including Talia (Base Zero) Mobayeh, Makose and Bonthe Town, which did not feature in the Initial Individual Indictments.

v. Paragraph 25(g) of the Consolidated Indictment adds that in the Southern and Eastern Provinces, the CDF, during Operation Black December, unlawfully killed civilians and captured combatants "in road ambushes in Gumahun, Gerihum, Jembeh

and Bo-Matotoka Highway", whereas the corresponding paragraph 20(g) of the Individual Indictments do not mention the above additions.

vi. Paragraph 25 of the Consolidated Indictment simply states that by their acts or omissions "in relation to those events" while the Individual Indictments in Paragraph 20 states "in relation but not limited to, these events."

vii. Paragraph 26(a) of the Consolidated Indictment, new locations like Blama and Kamboma have been added while they are absent in the Individual Indictments in 21(a).

viii. Paragraph 27(a) of the Consolidated Indictment includes Kenema District, the towns of Kenema, Tongo Field and surrounding area, which do not feature in the Initial Individual Indictment.

66. In my Separate Opinion dated the 27th of January, 2004, in expressing my concerns which today are very and even more legitimate, for our failure to subject the Consolidated Indictment to the Rule 47 judicial scrutiny procedures, I had this to say:

> "During our examination of and deliberation on the final draft on the 23rd of January, 2004, I raised certain issues with the Learned and Honourable Brothers and Colleagues, which I thought should be set out as the fourth, in addition to the three Orders we made at the tail end of our unanimous Judgement just after the mention of 'FURTHER CONSEQUENTIAL ORDERS.' It was to read as follows:
>
> 'That the said Indictment be submitted to a designated Judge for verification and approval in accordance with the provisions of Rule 47 of the Rules within 10 days of the delivery of this Decision.'

"I further added that the Accused Persons had to be called upon to plead afresh to the Consolidated Indictments. What ran through my reasoning in making this proposal was that the Consolidated Indictment we are ordering the Prosecution to prepare was in fact, to all intents and purposes, a new indictment which needed to be subjected to the procedures outlined in Rule 47 and 61 of the Rules of the Special Court and this, notwithstanding the fact that all of the Accused persons already earlier made their initial appearances and had already been arraigned individually on the individual indictments, ***which might not necessarily contain the same particulars as those in the consolidated indictment that are yet to be served on the Accused persons for subsequent procedures and proceedings before the Trial Chamber.***"

67. In addition, I had this to say on Page 4, Paras 13-15 of my Separate Opinion:

13. "The other issue which I consider important in the present context is the submission by the Defence Counsel for Mr. Samuel Hinga Norman, Mr Jenkins Johnston, who argued that the anticipated consolidated indictment should have been exhibited as part of the Motion and that a failure by the Prosecution to do this in order to ensure judicial scrutiny amounted to non-compliance with a condition precedent for the granting or even the examining of the application for joinder. Defence Counsel for Mr. Moinina Fofana, Mr. Bockarie, agreed with this submission by his colleague.

14. On this submission, the Prosecution replied that the Rules do not provide for this procedure and that the Defence contention must not be considered as a condition precedent for the filing or granting of the application for joinder. O ur finding on this argument in the circumstances, is, and I quote:

"...the Chamber is of the opinion that, due to the need for expeditiousness and flexibility in its processes and proceedings...recourse to procedural technicalities of this nature will unquestionably impede the Special Court in the expeditious dispatch of its judicial business...The Chamber, therefore, does not think that it is necessary for the Prosecution to exhibit an anticipated consolidated indictment...to establish a basis for joinder."[1]

15. I share these views expressed in our judgment but even though we have unanimously upheld the argument of the Prosecution in this regard, and although we know that the consolidated indictment is still undisclosed, I think that we should remain resolved in our determination and quest to steadily build up some jurisprudence from certain shortcomings or lacunae in our Rules, which case law will enhance, advance, and not necessarily prejudice a proper and equitable application or interpretation of our Rules. This will in fact encourage the application of the 'Best Practices Rule' which is neither contrary to nor inconsistent with the general principles of international criminal law and procedure."

68. I took this stand largely because I felt that the Consolidated Indictment that was to be filed, considered only on the basis that it was a merger of 3 Individual Indictments involving 3 Individual Accused Persons, who in fact, had already been arraigned individually, was New, and particularly in the context of apprehensions of uncertainty as to the expected content of the Consolidated Indictment which the Chamber neither had the privilege nor was it given the opportunity to examine before it was filed by the Prosecution.

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[1] Decision of 27 January 2004, Supra note 1 at paragraph 11.

69. It is indeed my considered opinion, even putting aside the extensive and significant changes that the Prosecution has introduced in the Consolidated Indictment, that this Indictment, a product of a merger of 3 Indictments, coupled with its altered form, is New, and this, even if those additional particulars or charges, which we now know of, did not feature in it. This position is supported by the various dictionary meanings of the word New contained in Paragraph 23 of my Separate Opinion already referred to.

70. If We as a Chamber in our Joinder Decision dated the 27th of January, 2004, ordered that the Consolidated Indictment be assigned a new case number and that the said Indictment be filed in the Registry within 10 days of the date of the delivery of our Decision, coupled with a further order for fresh service of the said Indictment under the provisions of Rule 52 of the Rules, it is in my opinion, and in a sense, a recognition by the Chamber of the novelty of this Indictment which I again say, merges and replaces the 3 Individual Indictments that had earlier been filed and given 3 different case numbers.

71. In a situation such as this, the provisions of Article 17(2), 17(4)(a) and 17(4)(b) of the Statute including those of Rule 26 (bis) of the Rules which guarantee to an Accused, the right to a fair, public, and expeditious trial as well as the right to be promptly informed of the nature and cause of the charge against him or her, would, in my opinion, be violated if this trial proceeds without a fulfilment of the legal formality of a regular personal service of the Consolidated Indictment, not only on the Applicant, the 1st Accused, but also on his Co-Accused, Moinina Fofana and Allieu Kondewa the 2nd and 3rd Accused, respectively.

72. In addition, a rearraignment of the 3 Accused on the entirety of that extensively amended Indictment is necessary because it has now unveiled itself and confirmed its real designation and characterisation as a New Indictment; a fact which stands on even firmer grounds today that we are witnessing the bare reality of the extensive and fundamental amendments which the Prosecution had introduced into it, to the extent of even including the New Charges.

(D) WHY THEREFORE IS REARRAIGNMENT IN THIS CASE NECESSARY?

73. On the 15th of June, 2004, in the exercise of his right to make an opening statement under the provisions of Rule 84 of the Rules, 1st Accused, the Applicant, made the following submission:

"There is or are no charge or charges legally placed before this Chamber against me. If there is or are charges against me before this Chamber, the I submit that by law I have not taken any plea before this

Chamber or any indictment against me before your Honours. I will state the reasons when I hear the response from you Lordships."

74. In reply to this submission, I as Presiding Judge, had this to say as requested by the 1st Accused:

"[w]e have taken note of your observations in the exercise of your rights under the Rules to make an opening statement, and I'm sure the records have reflected what you have said, and it is our decision that having noted what you have said, that we'll proceed with the trial without any further comments on that."

75. It is necessary, and I think it is important and proper for me to recall here, for the records and for posterity, that the very first session of this trial was on the 3rd of June, 2004. It however never took off until the 15th of June, 2004 because of preliminary procedural issues arising from the application by the 1st Accused for self representation and his dismissal of his entire Defence Team.

76. After all this was sorted out, the proceedings we billed to start on the 15th of June, 2004. Whilst waiting in Chambers and before proceeding to the Court Room to take the first witness, TF2-198, I again passionately reminded and sensitised my Colleagues, this time, as Presiding Judge, on the necessity for us, before taking evidence from this first witness, to rearraign the 3 Accused Persons, now jointly charged and soon to be jointly tried on the Consolidated Indictment. My Honourable Brothers and Colleagues, by a two to one majority, again like on the 27th January, 2004, in the Joinder Motion Decision, overruled my humble suggestion. I did not press the point any further, given the time constraints.

77. When we then entered the Courtroom and started sitting soon thereafter to hear the first witness, our first challenge came from the 1st Accused, who, in his opening statement made under Rule 84 of the Rules, and in the exercise of his right to self-representation, rose and surprisingly, raised the issue which we had just been discussing in Chambers, ***of there being no charge or charges against him and that if there were any, he had not taken any plea before this Chamber or any Indictment before us.***

78. I felt very uncomfortable and uneasy about these submissions and for very understandable reasons but had, in reply, to reluctantly give him the response which I know, and must here admit, I did not believe in at all because it was, even to me who gave this response, very unconvincing. ***I however was obliged to reply to him the way I did anyway, in order to***

reflect the majority opinion of my Colleagues that no rearraignment should take place; an opinion which of course, in the spirit of the traditions of Judicial Independence and Collegiality, I respect, with the usual professional deference.

79. This said however, I would like to state here, again for posterity and would want to be understood in these circumstances, that I neither subscribe to, nor do I approve of this Majority Opinion on the grounds of the reasoning and the legal analysis that will now follow.

80. This part of the opening statement by the 1st Accused made under the provisions of Rule 84 of the Rules and in the exercise of his qualified right of self representation that had just been granted to him by the Chamber, was a legitimately orally taken legal objection challenging the opening of the Trial without an indictment having been served on him and without his having taken a plea on that Indictment on which the trial was about to proceed in a couple of minutes.

81. This legal objection should, in my very considered opinion, have been addressed as soon as it was raised because in the case of R V JOHAL AND RAM, [1972] CAR, 348, The Court of Appeal of England observed that the longer the interval there is between arraignment and an amendment, the more likely it is that injustice will be caused, and in every case in which an amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby.

82. In this regard, I had this to say in my RULING ON THE MOTION FOR A STAY OF PROCEEDING IN THE FODAY SANKOH CASE, CASE NO.SCSL-03-02-PT

> "*In taking this stand, I was and still am guided by a reverence to the importance a plea occupies in a criminal trial because it marks, after the filing of the indictment, the actual commencement of criminal proceedings which, in any event, cannot get underway without a plea having been entered.*"

See Page 5 line 14-17 of my Ruling dated the 27th of July, 2003.

83. In fact, BLACKSTONE'S CRIMINAL PRACTICE, OXFORD UNIVERSITY PRESS, 2003 Edition, Page 1303 Paragraph D11.1 directs as follows:

> "If there is a joint indictment against several accused, normal practice is to arraign them together. Separate pleas must be taken from each of those named in any joint Count"

84. This longstanding and respected practice directive, should, in my opinion, be adopted and applied to this situation where the Trial Chamber did, under Rule 48(A) of the Rules, rightfully grant the joinder of the 3 persons who initially were individually indicted, but are today being jointly charged and tried. The necessity for a rearraignment here is dictated by the fact that even though they are charged jointly, they have to be tried as if they were, as provided for under Rule 82 of the Rules, being tried separately, \\so as to forestall a violation of their individual statutory rights spelt out in Article 17 of the Statute and particularly, their right to a fair trial.

85. It is my opinion that rearraignment, as the 1st Accused is soliciting in this case, is necessary since the Consolidated Indictment which I hold is New, is vastly amended and is different in its contents from the Initial Individual Indictments. Furthermore, since arraignment which involves reading the charges to the Accused and explaining them to him or her should need arise, so as to promptly acquaint him with the charge or charges against him or her before obtaining his or her plea is an important and vital triggering element in any criminal trial, it is further and also my opinion, and I do so hold, that a plea is an equally important component of the provisions of Article 17(4)(a) of the Statute, when considering and determining whether the provisions of this Article, have been respected or have been violated.

86. It was stated in the Canadian Decision of the Ontario Court of Appeal in the case of H. M. THE QUEEN V JEFFREY MITCHELL, (1997), 121 C.C.C. (3d) 139 (ONT. C.A.), that arraignment is intended to ensure that an accused person is aware of the exact charges when he or she elects and pleads and further that all parties to the proceedings have a common understanding of the charges which are to be the subject matter of the proceedings which follow.

87. As a follow up and to give effect to this statutory provision, Rule 47(C) of the Rules provides as follows:

> The Indictment shall contain and be sufficient if it contains the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence.

88. Furthermore, Rule 61 of the Rules provides as follows:

(i) Upon his transfer to the Special Court, the accused shall be brought before the designated Judge as soon as practicable and shall be formally charged. The Designated Judge shall:

(ii) Read or have the indictment read to the accused in a language he speaks and understands, and satisfy himself that the accused understands the indictment;

(iii) Call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf;

89. Rule 50 of the Rule provides as follows:

50(B)

If the amended indictment includes new charges and the accused has already made his initial appearance in accordance with Rule 61.

50(B)(i)

A further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

90. BLACK'S LAW DICTIONARY, 7TH ED. Page 81 defines an 'AMENDMENT OF INDICTMENT' as:

"The alternative of changing terms of an indictment either literally or in effect after the grand jury has made a decision on it. The indictment usually cannot legally be amended at trial in any way that would prejudice the defendant by having a trial on matters that were not contained in that Indictment".

91. In fact, to give effect to the provisions of Article 17(4)(a) of the Statute and Rule 47(C) of the Rules, greater specificity, as in this expanded Consolidated Indictment in issue, is required for proof of participation in the commission of the alleged offences and must, as has been extensively done in this Consolidated Indictment, be pleaded with enough clarity, detail and precision so as to clearly inform the Accused of the charges against him and enable him thereby, to prepare his defence.

92. In the case of THE PROSECUTOR V KUPRESKIC, the Appeals Chamber of the ICTY held as follows:

"the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution's case with enough detail to inform the defendant clearly of the charges against him so that he may prepare his defence."

93. In the case in hand, the Prosecution has expanded and added more material facts in the particulars including new offences in the Consolidated Indictment than those contained in the Initial Individual Indictments, a fact which, of necessity, dictates that they must be arraigned on the Consolidated Indictment which to me, and under the law and the Rules that I have cited and the analysis I have made, is New. I would add here that if this trial proceeds without a rearraignment and individual pleas taken on each count of the Consolidated Indictment and the Accused Persons are convicted, this trial could, on appeal, be declared a nullity by Our Appellate Jurisdiction, The Appeals Chamber, which could, depending on the circumstances, quash the conviction, and enter either a verdict of acquittal, of discharge, or of a retrial.

94. The Majority Opinion in this Motion rightfully concludes that the Consolidated Indictment on which the trial is proceeding is extensively expanded in its details, particulars and time frames. In fact, it is not, and has turned out not to be, what the Prosecution made us believe in their written submissions and at the oral hearing of the Joinder Motion, that is, that it is a replica of the Initial Individual Indictments to which the Accused persons had already pleaded in separate initial appearances and before 2 different Judges; Hon. Judge Itoe and Hon. Judge Boutet.

95. In these circumstances, I have no hesitation in concluding that the Prosecution in introducing a Consolidated Indictment, has indeed filed, with the leave of the Trial Chamber, a New Indictment. Under normal circumstances, it should have been subjected to the scrutiny of a Designated Judge under the provisions of Rule 47. In the alternative, the Prosecution has, in accordance with the provisions of Rule 50 of the Rules, and with the tacit leave of the Trial Chamber, amended the 3 Initial Individual Indictments of the 3 Accused persons and has merged them into this one Consolidated Indictment which contains substantial additions to what was alleged in the 3 Initial Indictments.

96. In either case, a combined reading of the provisions of Articles 17(2) and 17(4)(a) of the Statute and of Rules 47(C),48(A), 50(A) and 50(B)(i), 52(A), 52(B), 61(ii), 61(iii), and 82(A) of the Rules, clearly demonstrates and confirms the necessity for a rearraignment of the 3 Accused

persons on the Consolidated Indictment which, notwithstanding views to the contrary expressed in the Majority Decision is, and indeed, has all the characteristics of what it takes to be a New Indictment.

97. I will like to add that in law, a plea on an old Indictment is not, and should no longer be valid, nor does it hold good any longer, in respect of a New Indictment, particularly where the New Indictment contains new elements. It is therefore my opinion that the pleas recorded during all the initial appearances of the 3 Accused Persons, are not transferable for them to constitute a basis for proceeding on the new Indictment without going through the obligatory stage and formality of arraigning these same persons on the New Indictment or which they are now being, not only jointly indicted but also jointly tried.

98. The International Criminal Tribunal for former Yugoslavia has held the view that where an indictment is amended or where a consolidated indictment is prepared and either the amended or the consolidated indictment contains new charges, it will, as decided by the Trial Chamber in the case of THE PROSECUTOR V BLAGOJEVIC, (where a consolidated indictment was the document in issue), be termed a New Indictment. The Chamber noted as follows:

> "the Amended Indictment included new charges and the accused has already appeared before the Trial Chamber, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges"

99. In yet another case of THE PROSECUTOR V MARTIC, The Trial Chamber of the ICTY arraigned the Accused on the amended indictment which it declared to be a new indictment. His Lordship, Hon Judge Liu had this to say in this case:

> "I will ask Madam Registrar to read out the new charges brought against you. Then I will ask you whether you plead guilty or not guilty to the specific charge. Since the initial indictment has been replaced by the amended indictment, I will ask you to enter pleas with regard to all charges contained in the new indictment."

100. It has been argued that the Consolidated Indictment is not a new Indictment and that accordingly, there should be no rearraignment since the Accused Persons had already been arraigned on their Initial Individual Indictments. In effect, the Prosecution takes the view that the Initial Individual Indictments are still valid notwithstanding the existence of the Consolidated Indictment dated the 4th of February, 2004, on which the trial is now proceeding.

101. I of course do not subscribe to this view at all because if, as the Prosecution contends, the 3 Individual Indictments are the same in content as the Consolidated Indictment, one wonders why it felt obliged to go through the procedures of applying to replace them with the single Consolidated Indictment, into which the 3 Initial Individual Indictments are now all merged. In any event, the question should be put as to why the Prosecution is seeking to hang on to the 4 Indictments in one proceeding involving 3 Accused Persons who today are jointly indicted and are being jointly tried.

102. In my opinion, the Consolidated Indictment introduced after the Joinder Decision, as an indictment which has superseded the 3 Initial Individual Indictments against the Accused persons, is a New Indictment. Indeed, in my Separate Opinion on the Joinder Motion, I expressed the view that the trimming down of the 3 indictments to form one Consolidated Indictment constituted a fundamental amendment to the 3 Initial Individual Indictments and that it would require compliance with the provisions of Rule 47 followed by a rearraignment of the Accused Persons on the New Consolidated Indictment under the provisions of Rule 61(ii) and 61(iii) of the Rules.

THE CASE OF R. V FYFFE AND OTHERS [1992] CLR 442

103. I have taken cognizance of the dictum in Fyffe's Case where Their Lordships, Russel, Douglas Brown and Wright J. J., recognised that the general rule is that arraignment is unnecessary where the amended indictment merely reproduces the original allegations in a different form, albeit including a number of new Counts.

104. A closer analytical examination of this case reveals however, that the facts and the ***raison d'être*** of Fyffe's decision are distinguishable from those in the present motion. In the Fyffe case which was decided in the Criminal Division of the Court of Appeal, the 5 Accused Persons/Appellants faced but a single 11 Count Indictment for drug offences. This Indictment was substituted by a 27 count indictment alleging basically the same facts as the 11 count indictment did against the same accused persons who had been arraigned together and jointly tried all along. Learned Counsel, Mr. Wright, submitted that there should have been a rearraignment on the substituted 27 count indictment and that failure by His Lordship, The Learned Trial Judge, to call a rearraignment, rendered the proceedings, null and void. This submission was overruled. The Lord Justices of the Court of Appeal had this to say:

"In the circumstances that we have described, we are satisfied that ***no more than one indictment was ever before the Court in this Case*** and ***that what happened was an amendment of the indictment as originally granted***" and in addition, that this was done for the convenience of Defending Counsel.

105. Comparing and distinguishing this decision with our case in hand, and very much unlike the situation in the Fyffe Case with only one Indictment in issue, the Norman case has four Indictments – three individual and one consolidated in which they are all jointly charged and are now being jointly tried.

106. Let me however observe and say here, that if in Fyffe's case, Their Lordships found, with only 2 exceptions which the Law Lords considered immaterial, that the 27 counts later preferred, reproduced what had appeared in the initial 11 count Indictment, The Hinga Norman situation is clearly distinguishable from Fyffe's. In the latter case, it was one 11 count Indictment charging the 5 Appellants only for drug offences that was replaced by the 27 count Indictment charging the same five indictees with the same drug offences.

107. In the Norman situation, 3 indictees, originally indicted on 3 Individual Indictments, are now standing jointly charged and tried on a Consolidated Indictment that has replaced, stayed, and in my opinion, extinguished the 3 Initial Individual Indictments. In addition, the records now clearly show, that this Consolidated Indictment, unlike Fyffe's, has introduced new locations and expanded time frames and also charged new offences that did not feature in the 3 Initial Individual Indictments against the 3 Accused Persons. ***In my Judgment, and as the facts have indeed established, these, unlike in Fyffe's case, are amendments in substance.***

108. Their Lordships in Fyffe's case further had this to say:

"With two immaterial exceptions the ***27 counts reproduced what had appeared in the 11 counts. They added no new allegations and charged no new offences.*** In our judgment, there were no amendments of substance; there were amendments of form. We are satisfied that this being the proper interpretation of what happened the Judge gave leave to amend and it was unnecessary to re-arraign the defendants. They had pleaded to precisely the same charges as were laid in the 27 counts, albeit when they were encapsulated in the 11 counts. ***There was no indictment to be stayed and no new indictment to be preferred.*** In our view the judge was right to reject the motion to arrest judgment.

We are fortified, Their Lordships continued, in the views we have formed by some observations of LORD WIDGERY CJ in the case of R V RADLEY, 58 Cr App Rep 394, 404 when His Lordship said:

> "*It is perfectly permissible, if an amendment is made of a substantial character after the trial has begun and after arraignment, for the arraignment to be repeated*, and we think that it is a highly desirable practice that this should be done wherever amendments of any real significance are made. It may be that in cases like Harden (supra) where amendments are very slight and cannot really be regarded as in any way introducing a new element into the trial, a second arraignment is not required, but judges in doubt on this point will be well advised to direct a second arraignment."

109. It is pertinent to observe here that in Fyffe's case, drug offences which were the core issue. Certainly these are less significant and indeed minor offences, when compared to the grave charges of murders and killings for which Norman and his Co-Accused Persons are indicted, and for which the due process dictates the exercise of even more caution than the ordinary and a reinforced posture of scrupulousness and scrutiny in the conduct of the proceedings.

110. On this issue and having regard to the nature and the gravity of the offences for which the 3 Accused Persons stand indicted, the necessity to strictly respect and apply the procedural rules, and in the exercise of this judicial caution, to order a rearraignment, is even a more imperative obligation in order to avoid being perceived or seen to have violated any of the fundamental rights guaranteed to the Accused Persons by either the Statute or the Rules of Procedure and Evidence and particularly, their right to a fair trial as guaranteed under the provisions of Article 17(2) of the Statute and Rule 26(bis) of the Rules.

(E) EFFECTS OF LACK OF ARRAINGMENT ON THE VALIDITY OF THE PROCEEDINGS

111. In the case of R. V WILLIAMS, [1978] QB 373, it was held that a failure by the Court to have the accused arraigned does not necessarily render invalid, subsequent proceedings on the indictment where the defence, as in the Williams's case, waives the right of the accused to be arraigned, either expressly or impliedly, by simply remaining silent while the trial proceeded without arraignment. Williams's conviction was upheld despite a lack of arraignment because he, being the only person in court who knew he had not been arraigned, raised no objection at

the time. Had he objected but the court nonetheless refused to arraign him, it is submitted that any conviction would have been quashed. Norman, the Applicant in this case however, clearly objected to his trial going underway without his having entered a plea on the Consolidated Indictment.

THE AMERICAN PERSPECTIVE ON REARRAIGNMENT

112. In the PEOPLE V WALKER, [338 . 2d, 6 Cal App. 19], the California Court of Appeal held that ***where an indictment is amended, regular and orderly procedure requires that the defendant be rearraigned and be required to plead thereon before trial, but if the defendant makes no demand or objection and is convicted on trial without having entered a plea, an objection that there was no plea is waived and is unavailable to him***. This case was decided on the same rationale as the English case of R V WILLAMS (ante)

113. In HANLEY V ZENOFF [398 p.2d 241 Nevada 1965], a Neveda Court held that ***when an amended indictment is filed which changes materially the information to which the defendant has entered a plea, he must be arraigned on such amended indictmen***t. In McGILL V STATE, [348 f.2d 791 (1965)], it was held that ***if rearraingment is necessary to avoid the possibility of prejudice, the defendant should be arraigned***. I consider, as I have already indictated, that there is a possibility of a prejudice of an unfair trial to the 3 Accused Persons if they are not served with and rearraigned on the Consolidated Indictment as early as possible so as to avoid an aggravation of the said prejudice.

114. In SHIEVER V STATE [234 P.2d 921 Okla Crim. App 1951], it was held that where an amendment to an information charges a new crime or where the effect is to charge a crime when the information prior to the amendment/information did not, the defendant should be rearraigned.

(F) ANALYSIS

115. In all, and having regard to the foregoing and the overall analysis, the Norman situation is very much unlike Williams's. He, unlike Williams, on the first day of his trial, raised an oral objection against being tried without either having been arraigned or served with an indictment. Our Chamber was silent and indifferent to the merits of this objection which I consider valid, validly raised, and at the right time. As a follow up, he has brought this written

motion which again, challenges the propriety of the trial without his plea having been taken in addition to the absence of a personal service of the Consolidated Indictment on him.

116. From the facts now available, it is no longer in dispute that the charges and particulars of the offences against the Applicant, 1st Accused, Hinga Norman, have been vastly expanded. ***In addition, he now is no longer being charged individually but collectively in one indictment with two other accused persons.*** This, in my opinion, subjects him to either a New Indictment which, indeed, it is, or to an amended indictment which contains new offences and particulars that did not exist in the Initial Individual Indictment dated the 7th of March, 2003, to which he had already pleaded "Not Guilty" to all counts.

117. It is suggested, in order to sideline the controversy that surrounds the Consolidated Indictment, to expunge some of its paragraphs so as to bring it in line with the content of the Initial Individual Indictments. I observe, with a reinforced sentiment of rejection, that this option would further have the effect of casting a doubt on the integrity of the proceedings as it would be interpreted as an admission of a fundamental legal flaw which could only be cured by the Prosecution applying to amend the Indictment under Rule 50 of the Rules and to subsequently have the 3 Accused Persons rearraigned under the provisions of Rule 61(ii) and 61(iii), or in the alternative, to subject the said Indictment to the Rule 47 procedures.

118. In any event, should the option to expunge some portions from the Consolidated Indictment be confirmed and adopted by the Prosecution, it does not, in my opinion, derogate from my finding that this Indictment, as a merger of 3 Individual Indictments is, and indeed would still remain a New Indictment which calls for the application of either the provisions of Rule 47 or of Rule 50 and those of Rules 61(ii) and 61(iii) of the Rules.

(G) CONCLUSION

119. In the light of the above, and considering the predominantly consistent pattern of the law and the jurisprudence relating to the issues raised, I do find as follows:

1) ON RULE 26(bis) OF THE RULES OF PROCEDURE AND EVIDENCE

120. Having regard to the foregoing factual and legal analysis of the issues that have been raised by the Applicant in this Motion, and the provisions of Rule 26(bis) which reads as follows:

The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules with full respect for the rights of the accused and due regard for protection of victims and witnesses,

I find that the following points contravene, not only the provisions of Articles 9(1), 17(2), 17(4)(a), and 17(4)(b) of the Statute of the Special Court as well as those of Articles 9(2) and 14(3)(a) and 14(7) of the International Covenant on Civil and Political Rights, but also those of Rules 26(bis), 50, 52, and 61 of the Rules.

2) ON THE ISSUE OF FOUR INDICTMENTS IN ONE JOINT CRIMINAL TRIAL

121. The continued existence on the records, on the one hand, of the ***3 Initial Individual Indictments against the Applicant and his 2 Co-Accused to which they had all pleaded, and a Consolidated Indictment on the other to which they have not pleaded***, but which has replaced the 3 Indictments, and on which their trial is now proceeding, is manifestly a legal and procedural anomaly and irregularity .

122. It is my opinion that to comply, and to be seen to have complied with the provisions of Article 17(4)(a) of the Statute, it is not just enough for the Prosecution to inform the Accused of the nature and cause of the charge against him or her, but also, and more importantly, to do so clearly and without any ambiguity or uncertainty.

123. This basic requirement cannot be attained in this case because it is negated by the existence of a new set of facts in the Consolidated Indictment which are different from those in the Initial Individual Indictments and which the Prosecution still wants to be considered as valid in the records so as to serve its own purposes of justifying why a rearraignment of the 3 Accused Persons is unnecessary.

124. In addition, it is again contrary to the norms and principles of the integrity of the proceedings for the Prosecution to be allowed to conduct its case with 2 sets of indictments in the same proceedings and against the same people because this creates a doubt, not only as to which indictment it is really relying on, but also as to the real "nature and cause of the charge against the accused persons" as required by Article 17(4)(a) of the Statute. This uncertainty, I say, can only be resolved by a withdrawal, under Rule 51 of the Rules, of the 3 Initial Individual Indictments so as to cleanse the records and ensure that the statutory right of the Accused

Persons to a fair trial guaranteed them under Article 17(2) of the Statute of the Special Court, is not violated.

(3) SERVICE OF THE INDICTMENT

125. Having granted the Joinder Motion and ordered service of the Consolidated Indictment (which bears a new number) in accordance with Rule 52 of the Rules, the Trial Chamber should give effect to its own Order, consistent with the provisions of the said Rule and those of Rule 26(bis), as it would again, to my mind, violate the statutory rights of the Accused, if service of the Consolidated Indictment were effected in a manner other than that provided for under Rule 52 on which the Order of the Chamber was based and made.

126. I say here that any action taken in violation of a mandatory provision of the law should, of necessity, be declared null and void even if that provision, as could possibly be argued to justify a toleration of that violation, fails to prescribe that remedy. This is even the more so in criminal matters where the liberty of the individual which is universally considered sacred, is at stake and where, as I have said, ***the necessary intendment of the enacting body of these provisions of the Statute and of the Rules in relation thereto, is to effect a personal service on the Accused and on no other person in his stead.*** I accordingly therefore, declare the service of the Consolidated Indictment on the Accused's Counsel, null and void.

(4) DIFFERENCES BETWEEN THE INITIAL INDICTMENTS AND THE CONSOLIDATED INDICTMENT AND THE NECESSITY FOR A REARRAIGNMENT

127. The foregoing analysis demonstrates that there are clear differences between the Initial Individual Indictment to which the 3 Accused Persons had already pleaded, and the Consolidated Indictment on which they are now stand indicted and on which the trial is now proceeding.

128. In further justifying its stand on the Consolidated Indictment, the Prosecution argues that since the Consolidated Indictment contains 'no new charge', no further arraignment is required and further, "***that as held by the Joinder Decision and referred to in the Norman Motion, the Indictments against the Three Accused contain exactly the same charges(Counts).***"

129. This argument to me is as curious as it is misleading because we indeed could not, as a Trial Chamber, at the time we were rendering the Joinder Decision, arrive at such a finding and conclusion when it is clear from the records, that we did not have the opportunity of seeing the Consolidated Indictment which, in my opinion, ought to have been annexed to the Motion so as to enable Their Lordships to ascertain the real content of that "yet-to-be-disclosed Consolidated Indictment".

130. In fact, we could not have arrived at such a finding because we overruled the submission to have it annexed to the Joinder Motion on the grounds that "***it will impede the Special Court in the expeditious dispatch of its judicial business.***"

131. It would, to my mind, occasion a breach, not only of the provisions of Article 17(4)(a) of the Statute, of Articles 9(2) and 14(3)(a) of the International Convention on Civil and Political Rights, but also, those of the provisions of Rules 26(bis), 47, 50, 61, 82 of the Rules, if the Accused Persons were not individually rearraigned and a plea entered by each of them on each of the counts in the Consolidated Indictment, particularly within the context of, and the necessary intendment of the promulgators of the provisions of Rule 82(A) of the Rules.

132. It is my opinion, that the service of the indictment on the accused as well as his arraignment on that indictment, are very important components in the mechanism that is, and should in fact always serve as an instrument to convey to the accused, a clear picture of, and a message regarding "***the nature and cause of the charge against him or her***" as required by Article 17(4)(a) of the Statute. This, to my mind, is cardinal to the issues in this case.

133. Consistent with this legal position that I am stating, it cannot be said, as far as this matter is concerned, that these statutory provisions have been complied with having regard to the uncertainty created in the minds of the accused persons as to the status of and the facts in the Initial Individual Indictments, vis-à-vis the status of and facts contained in the ongoing Collective Consolidated Indictment.

134. In the absence therefore of a message to this effect, which is clear, certain, and unambiguous, on the nature and content of the Consolidated Indictment as well as of its effective service on the Accused as stipulated in Rule 52(A) and 52(B) of the Rules and by Our Court Order, it is my considered opinion, that the provisions of Article 17(4)(a) would not have been complied with. I would add and say, that they would indeed have been violated.

135. Having regard to the above, I rule in favour of granting the 1st Accused's Motion on all grounds that are canvassed in his arguments and do hold that that the Consolidated Indictment filed with the Unanimous Leave of The Chamber and on which the trial is now proceeding ***is not only a valid, but also is a New Indictment***;

136. We indeed, to my mind, could have arrived at a unanimous decision that the Consolidated Indictment is New and that a rearraignment is necessary if We all took the view that because the Indictment, contrary to the assurances proffered by the Prosecution, contained largely expanded details and particulars and more importantly, new charges, and that this discovery that has just been rather belatedly made, could not be, and was not available to Us during the hearing of the Joinder Motion and this, because the proposed Consolidated Indictment on which we could have made this judgment, was not exhibited to the Motion.

137. In my opinion, it is not too late at this stage of these proceedings, given the facts and the circumstances of this case, for the Prosecution to either apply for an amendment of the Consolidated Indictment so as to have the new particulars and charges featuring therein to be integrated into it, or for the Court to direct the same and thereafter, for the Accused to be rearraigned on the amended Indictment.

138. In R V. JOHAL AND RAM (ante), it was decided that the Court has the power to order an amendment which involves the substitution of a different offence for that originally charged in the Indictment or even the inclusion of an additional count for an offence not previously charged.

139. This I would say, is an inherent power exercised by the Court either on its motion or at the request of the Prosecution, since an amendment of any kind, including the addition or subtraction of a count, may be made at any stage of the trial, provided that having regard to the circumstances of the case and the power of the Court to postpone the trial and if, as we held in the Majority Decision dated the 2nd of August, 2004, on the Prosecution's Request For Leave To Amend The Indictment Against Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa, Case No. SCSL-04-14-T, the amendment can be made without injustice. See also R V JOHAL AND RAM (ante).

140. In the ICTR decision of **THE PROSECUTOR V KAJELIJELI** on the Prosecutor's Motion to Correct the Indictment dated the 22nd of December, 2000 and the Prosecutor's Motion For Leave to File and Amended Indictment, the Trial Chamber warned that once leave to correct

or to amend is given, the correction or the amendment may not go beyond what was permitted or directed by the Trial Chamber. The parties will have and should, in this event, indeed be given an opportunity to be heard when the amendment is sought as it could affect the accused's case and preparation of his defence. ARCHBOLD: INTERNATIONAL CRIMINAL COURTS (PRACTICE PROCEDURE & EVIDENCE, RODNEY DIXON AND KARIM A. A. KHAN) Page 131, Paras 6-71 and 6-72.

141. In the Motion before us and contrary to assurances given by the Prosecution that there was nothing new in the Consolidated Indictment as compared to the Initial Indictment, we have now discovered that this disputed Indictment actually contains new particulars and new offences, and that the Prosecution has obviously gone beyond what would seem to be the implied expectations of the Chamber in ordering the filing of the said Indictment without having verified it. This being the case, it is clear, and I do so hold, that the plausible principle outlined in the **KAJELIJELI CASE** which impliedly and by analogy, appears to have been violated, should be remedied.

142. Accordingly, I do make the following Orders:

1. That the Prosecution immediately and forthwith, and by a written Motion, applies to amend the said indictment under the provisions of Rule 50 of the Rules so as to have lawfully incorporated in the said indictment, the particulars, facts, and offences featuring in the said Consolidated Indictment and which are new.

OR IN THE ALTERNATIVE

That the Prosecution submits the said Indictment to the verification process provided for in Rule 47 of the Rules with a view to new initial appearances of the 3 Accused Persons for purposes of their rearraignment on the approved and confirmed Consolidated Indictment under the provisions of Rules 61(ii) and (61(iii) of the Rules.

2. That the 3 Accused Persons should, after the amendment is granted, be rearraigned on the amended Consolidated Indictment before the trial proceeds further and this, only after some procedural formalities required or permitted by the law, including, but not limited to, those provided for under Rule 66 and 72 of the Rules, as well as those related to recalling certain witnesses who have so far already testified, if the defence so desires and makes an application to this effect by way of a Written Motion.

3. That the Prosecution immediately and forthwith, proceeds, under the provisions of Rule 51 of the Rules, to file a Motion applying to the Chamber for a withdrawal of the 3 Initial Individual Indictments against the 3 Accused Persons.

4. That a personal service of the Consolidated Indictment dated the 5th of February, 2004, be immediately and personally effected on each of the Accused Persons.

5. THAT THESE ORDERS BE CARRIED OUT.

Done at Freetown this 29th Day of November, 2004.

Hon. Judge Benjamin Mutanga Itoe

Presiding Judge
Trial Chamber

[Seal of the Special Court for Sierra Leone]