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:	6th of December, 2004

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

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

Office of the Prosecutor:

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Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
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Court Appointed Counsel for Moinina Fofana:

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Court Appointed Counsel for Allieu Kondewa:

Charles Margai
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NAME NEIL GIBSON
SIGN
TIME 9:00

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 Consolidated Indictment and a Second Appearance,* filed by the Second Accused, Moinina Fofana, on the 21st of October, 2004;

NOTING the *Prosecution Response to Fofana Motion for Service and Arraignment on Consolidated Indictment and a Second Appearance,* filed by the Prosecution on the 28th 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 9th of October, 2003, the Prosecution brought a Motion for Joinder. Written responses were received by the Third Accused on the 20th of October, 2003, and the Second Accused on the 12th of November, 2003. An oral response 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, where the Trial Chamber 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.

2. Prior to the consolidation of the Indictment, Counsel for Kondewa filed a Preliminary Motion based on Defects on the Indictment on the 7th of November, 2003. This Motion presented the following arguments:

> (i) The Prosecution failed to distinguish clearly and specify the alleged acts for which the Accused incurs criminal responsibility under Article 6(1). Such failure inhibits the ability of the Accused to adequately conduct his defence.
>
> (ii) The inclusion of the phrases "included but not limited to", "about" and "but not limited to those events" renders the Indictment vague and imprecise thereby impeding the Accused in the proper conduct of his defence.

3. A Decision and Order on this Motion was rendered on the 27th of November 2003,[1] together with an Annex to the Decision.[2] With respect to the first argument made by the Defence, the Trial Chamber held that the Prosecution had plead all the different heads of responsibility, consistent with its discretion, and that the Accused was in no way prejudiced by this pleading. In terms of the second argument, the Trial Chamber held, *inter alia*, that:

> The other head of challenges brought by the Defence against the Indictment concerns the inclusion of the phrases "*included but not limited to*", "*about*", and "*but not limited to these events*". In this connection, the Defence submits that the use of these phrases renders the Indictment vague and imprecise thereby impeding the Accused in the conduct of his defence. After a careful review of paragraphs 19-24 of the Indictment, the Chamber agrees with the Defence that the expressions "*but not limited to these events*" and "*included but not limited to*", except in so far as the phrase "*included but not limited to*" **relates only to dates and locations *simpliciter*** are, consistent with the principle in *Sesay*, "impermissibly broad and also objectionable in **not specifying the precise allegations against the Accused.**" The Chamber, therefore, upholds the Defence challenge on this issue. The Prosecution is, accordingly, put to its election: either to delete the said phrases in every count or wherever they appear in the Indictment **or provide in a Bill of Particulars specific additional events alleged against the Accused in each count.** The Amended Indictment or Bill of Particulars should be filed within 7(seven) days of the date of service of this Decision; and also served on the Accused in accordance with Rule 52 of the Rules.[3]

4. The Prosecution filed the related Bill of Particulars on the 5th of December, 2003.[4] In the introduction to the Bill of Particulars the Prosecution stated that it contained "additional events in support of the counts charged in the Indictment against the Accused Allieu Kondewa dated 24th June 2003". These additions included districts and towns within the territory of Sierra Leone, and one reference to "road ambushes" at various locations.

II. SUBMISSIONS OF THE PARTIES

Defence Motion:

5. By written Motion of the 21st of October, 2004, the Second Accused, Moinina Fofana, seeks service of the Consolidated Indictment, pursuant to Rules 50(A) and 52 of the Rules of Procedure and Evidence ("Rules"), and to be properly arraigned on the new charges against him and a further appearance, pursuant to Rule 50(B)(i) of the Rules.

6. The Defence for the Second Accused submit that the Trial Chamber, in its Decision on Joinder of the 27th of January, 2004, allowed the application for joinder of the three Accused, Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa, in spite of the fact that it acknowledged that the Consolidated Indictment contained "new allegations" in respect of the Accused. The Defence set out in a table the "new allegations" against the Second Accused as contained in the Consolidated Indictment (CI). These include:

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[1] *Prosecutor v. Allieu Kondewa*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 27 November 2003.

[2] *Prosecutor v. Allieu Kondewa*, Annexure to Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 27 November 2003.

[3] *Prosecutor v. Allieu Kondewa*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 27 November 2003, para. 11.

[4] *Prosecutor v. Allieu Kondewa*, SCSL-2003-12-PT, Bill of Particulars, 5 December 2003.

(i) Paragraph 25(a) (CI) - and at or near the towns of Lalahun, Kamboma, Konia, Talama, Panguma and Sembehun.

(ii) Paragraph 25(b) (CI) - and Blama.

(iii) Paragraph 25(d) (CI) - in locations in Bo District including the District Headquarters town of Bo, Kebi Town, Kpeyama, Fengehun and Mongere.

(iv) Paragraph 26(a) (CI) - Blama, Kamboma.

(v) Paragraph 27(a) (CI) - Kenema District, the towns of Kenema, Tongo Field and surrounding areas.

7. The Defence refer to Presiding Judge Benjamin Mutanga Itoe's appended Separate Opinion to the Joinder Decision which stated that the Consolidated Indictment "was to all intents and purposes new" and that "the indictment has been subjected to the new procedures of Rules 47 and 61 in the form which it will take and will be presented" following the Trial Chamber's decision.

Prosecution Response:

8. The Prosecution filed on the 28th of October, 2004, its *Prosecution Response to Fofana Motion for Service and Arraignment on Consolidated Indictment and a Second Appearance.* In this response the Prosecution submit that the Consolidated Indictment was served on Defence Counsel by an email dated the 5th of February, 2004 and that the failure to personally serve the Accused was an administrative error attributable to the Registry and when considering all the circumstances of this case there was no identifiable harm to the Accused. The Prosecution submit that there is no identifiable harm on account of service of the Consolidated Indictment on the Defence Team and the demonstrated knowledge of the Defence of the charges contained in the Consolidated Indictment, through defending the Accused against the charges contained in the Indictment throughout the first and second trial sessions.

9. The Prosecution further submits that the Consolidated Indictment contains no new charges against the Accused and that, therefore, no further arraignment is required. The Prosecution cite the Majority Joinder Decision which concluded 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".[5] The Prosecution submit that the Majority did not find it necessary to order a further arraignment of the Second Accused [sic] at this time and there is equally now no need to do so. The Prosecution submit that reliance on the Separate Opinion of Judge Itoe is of no relevance as the Court is guided by the majority opinion. The Prosecution reinforced the fact that the Defence did not appeal any aspect of the Joinder Decision.

Defence Reply:

10. No reply was filed by the Defence.

[5] Joinder Decision, para. 24.

III. APPLICABLE LAW

11. Prior to looking into the merits of this Motion, 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

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.

IV. THE MERITS OF THE APPLICATION

1. Service of Indictment

12. The first issue to be determined by the Trial Chamber is whether the Second Accused was personally served with the Consolidated Indictment, and if not, whether this non-service would prejudice the Accused's right to a fair trial.

13. The Chief of Court Management has informed the Trial Chamber that the Second Accused was not personally served with the Consolidated Indictment. According to this report, the said Indictment was only served on Counsel for the Accused.

14. In accordance with Rule 52 of the Rules, the Trial Chamber 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.

15. Based upon the foregoing, and as further elaborated by Hon. Judge Thompson in his Separate and Concurring Opinion,[6] the Trial Chamber finds that the service of the Consolidated 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. In making this finding, the Trial Chamber has reviewed the entire pre-trial and trial process and has noted the following:

> (1) The Accused was served on the 27th of June 2003, with a copy of the Initial Indictment that was approved on the 26th of June, 2003, which outlines the charges against him.
>
> (2) His Assigned Counsel, who represented him at this 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.
>
> (3) The Accused did not raise this issue during the Pre-Trial Conference or any of the Status Conferences.
>
> (4) The Accused responded to the charges against him in his Pre-Trial Brief filed on the 28th of May, 2004, and has defended the charges against him in the first and second sessions of the CDF trial.

[6] Separate Concurring Opinion of Judge Bankole Thompson on Decision on Second Accused's Motion for Service and Arraignment on the Consolidated Indictment, 6 December, 2004.

2. Arraignment on Indictment

16. With respect to arraignment on the Indictment, it is clear in the practice of the International Tribunals,[7] that a consolidated 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 consolidated 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".[8]

17. When dealing with an amended indictment containing new charges, Rule 50(B) of the Rules provides in this respect that a further appearance may be held to enable the Accused to enter a plea on the new charges. This particular Rule provides for a further appearance in relation to the new charges only. This provision would find application only when there have been new charges.

18. In accordance with the above-mentioned law, the Trial Chamber will now proceed to determine whether or not the charges outlined in the Consolidated Indictment, are new, and as such, materially different from the charges listed in the Initial Indictment which was served on the Accused.

19. The Trial Chamber notes 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".[9]

20. The Trial Chamber takes cognisance of its finding in its Joinder Decision, namely, that the counts are exactly the same in the Initial Indictments against the three Accused, "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".[10]

21. The Second Accused, by his Motion of the 21st of October, 2004, characterised the above finding of the Trial Chamber in its Joinder Decision as acknowledging that the Consolidated Indictment "contained new allegations in respect of the Accused". The Trial Chamber considers that there is absolutely no basis for this submission of the Defence, as is apparent from a plain reading of the Joinder Decision.

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[7] See for example, case of *Prosecutor v. Kvocka*, IT-98-30/T; *Prosecutor v. Kvocka*, Decision on Prosecution Request for Leave to File a Consolidated Indictment and to Correct Confidential Schedules, 13 October 2000; *Prosecutor v. Ademi*, IT-04-74, *Prosecutor v. Ademi*, Decision on Motion for Joinder of Accused, 30 July 2004; *Prosecutor v. Krajisnik*, IT-00-39; These cases are distinguishable, for example, from the case of *Prosecutor v. Blagojevic*, IT-02-60-PT, where the Indictment was consolidated before the initial appearances; and the case of *Prosecutor v. Limaj*, IT-03-66, where a further appearance was held on 27 February 2004, following new charges being added to the Second Amended Indictment; and in the case of *Proseuctor v. Mrksic*, IT-95-13/1, where a further plea was entered on 16 February 2004, to added counts in the Consolidated Indictment. For Rules governing the arraignment of the Accused on an amended Indictment, see Rule 50 of the Rules of Procedure and Evidence of the Special Court and Rule 50 of the Rules of the ICTR and ICTY, which provide that a further arraignment will be held where an amended indictment contains new charges.

[8] *R v. Fyffe* [1992] Crim. L.R. 442, C.A.

[9] Prosecution Motion for Joinder, para. 10.

[10] Para. 24.

22. It is notable that the Trial Chamber in its Decision on the Third Accused's Motion on the form of the indictment,[11] when ordering that the "precise allegations against the Accused" be included in a Bill of Particulars or Amended Indictment against the Third Accused, distinguished dates and locations *simpliciter*, from this requirement. The Prosecution subsequently filed a Bill of Particulars with additions that included towns within the territory of Sierra Leone, and one reference to "road ambushes" at various locations. The Trial Chamber notes that the differences between the Initial Indictment and the Consolidated Indictment against the Second Accused are contained in the Bill of Particulars added to the Initial Indictment against the Third Accused, Allieu Kondewa, which was served on his Counsel on the 5th of December, 2003. The Trial Chamber will turn now to consider the differences between the Initial Indictment and the Consolidated Indictment against the Second Accused.

a. Differences Between the Initial Indictment and Consolidated Indictment

23. Upon reviewing this Motion filed by the Second Accused, and consequently proceeding to specifically review the differences between the Initial Indictment against the Second Accused with the Consolidated Indictment, the Trial Chamber notes that the following additions have been made to the Consolidated Indictment. These additions are underlined in the text below:

a). Paragraph 25(a) (CI) - and at or near the towns of Lalahun, Kamboma, Konia, Talama, Panguma and Sembehun;

b.) Paragraph 25(b) (CI) - and Blama;

c.) Paragraph 25(d) (CI) - in locations in Bo District including the District Headquarters town of Bo, Kebi Town, Kpeyama, Fengehun and Mongere;

d.) Paragraph 25(e) (CI) - in Moyamba District including Sembehun, Taiama, Bylagao, Ribbi and Gbangbatoke;

e.) Paragraph 25(f) (CI) - in Bonthe District, including Talia (Base Zero), Mobayeh, Makose and Bonthe Town;

f.) Paragraph 25(g) (CI) - in road ambushes at Gumahun, Gerihun, Jembeh and the Bo-Matotoka Highway;

g.) Paragraph 26(a) (CI) - Blama, Kamboma;

h.) Paragraph 27(a) (CI) - Kenema District, the towns of Kenema, Tongo Field and surrounding areas.

24. The Trial Chamber turns now to consider whether these additions 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 an indictment with new charges, having not been arraigned on

[11] *Prosecutor v. Allieu Kondewa*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 27 November 2003, para. 11.

those charges in the Indictment, or alternatively, whether the additions simply provide greater specificity to general allegations.

b. Pleading Principles for an Indictment

25. 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.

26. If the Prosecution fails to plead the essential aspects of the Prosecution Case in the Indictment, it will suffer from a material defect.[12] 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.[13]

27. 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.[14] 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.[15]

28. 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

[12] *Prosecutor v. Kupreskic*, Appeals Judgement, para. 114.
[13] Supra, para. 92.
[14] See *Prosecutor v. Brdanin*, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001, para. 18.
[15] *Id*, para. 19.

> 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.[16]

29. 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."[17] 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 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.[18]

30. 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.[19]

31. In joint trials each Accused shall be accorded the same rights as if he or she were being tried separately.[20] 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 *26bis* 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,"[21] and "to have adequate time and facilities for the preparation of his or her defence,"[22] apply equally to an Accused person tried separately on a single indictment as to an Accused person tried jointly on a consolidated indictment.[23] 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.[24]

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[16] *Id*, para. 22.

[17] *Prosecutor v. Kupreskic*, Appeal Judgement, para. 88.

[18] *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.

[19] *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.

[20] See Rule 82(A) of Rules.

[21] Para. 4(a).

[22] Para. 4(b).

[23] See *The Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Decision and Order on Prosecution Motions for Joinder, 27 January 2004, para. 4.

[24] Rule 50 of the Rules.

32. Applying the foregoing principles 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".[25] 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.

33. The Trial Chamber has carefully considered the added locations in the Consolidated Indictment against the Second Accused and finds that these involve towns in the regions of Kenema, Bo and Moyamba. The Initial Indictment charged that the "CDF, largely Kamajors" engaged the RUF/AFRC forces in armed conflict in various parts of Sierra Leone that included, but were not limited to "the towns of Tongo Field, Kenema, Bo, Koribundo and surrounding areas and the Districts of Moyamba and Bonthe".[26] The various counts of the Initial Indictment charge various offences that were committed in Kenema and Bo, and in Moyamba District. The charges in the various counts of the Initial Indictment do not specify whether the references to Kenema and Bo are to the actual towns or to the districts, however, given that the pleading in paragraphs 18 and 19 of the Initial Indictment refers solely to the towns of Kenema and Bo, it would follow from this that the specific charges relate specifically to these towns and not to the districts. However, the language of the Initial Indictment states that the offences "were not limited to" the locations specified in the counts of the Initial Indictment. The Trial Chamber takes note that no new regions have been added to the Consolidated Indictment that were not included in the Initial Indictment against the Accused, nor has there been any extension of timeframes for the commission of the offences in the Consolidated Indictment. The only additions to the Indictment include the towns set forth in paragraph 21 of this Decision, which are towns within the Districts of Kenema, Bo, and Moyamba.

34. Upon close analysis of the Consolidated Indictment in comparison to the Initial Indictment, the Trial Chamber concludes that the additions made to the Consolidated Indictment are of no materiality as they simply provide details for greater specificity to the factual allegations included in the Initial Indictment against the Accused. There are no new crimes or charges against the Accused.

35. In the case at hand, the Accused entered a plea to the charges against him at his initial appearance on the 1st of July, 2003. These charges remained in force against him, and there have been no material changes made to the Consolidated Indictment. The Trial Chamber, therefore, finds that there are no requirements or obligations in the Rules or in the interests of justice to afford the Accused the opportunity to make a plea on the Consolidated Indictment. Consequently, it cannot be said that any unfair prejudice would result from him not being arraigned on the Consolidated Indictment.

5. Conclusions

36. The Trial Chamber finds that while the Second Accused, Moinina Fofana has not been personally served with the Consolidated Indictment, no unfair prejudice would enure through this procedural error. Furthermore, the Trial Chamber specifically finds that there are no new crimes or

[25] *Prosecutor v. Kanu*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 19 November 2003, Para. 21.
[26] Consolidated Indictment, para. 18.

charges against the Accused contained in the Consolidated Indictment that were not contained in the Initial Indictment. There is neither an amended indictment nor a new indictment. The additions made to the Consolidated Indictment are not material as they simply provide greater specificity to the factual allegations included in the Initial Indictment against the Accused. In accordance with Rule 50 of the Rules, there is no requirement to arraign the Accused on the Consolidated Indictment, given that there are no new charges contained therein.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DISMISSES the Motion of the Second Accused in its entirety.

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 6th day of December, 2004.

Hon. Judge Pierre Boutet

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

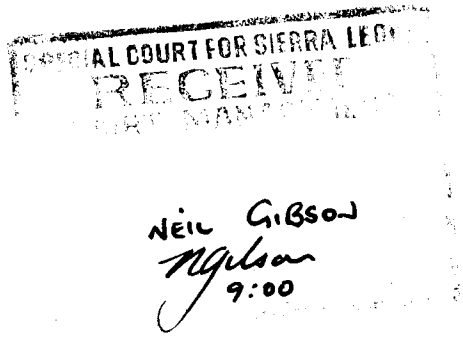
Date: 6th of December, 2004

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 SECOND ACCSUED'S MOTION FOR SERVICE AND ARRAIGNMENT ON THE CONSOLIDATED INDICTMENT

Office of the Prosecutor:

Luc Côté
James Johnson



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Court Appointed Counsel for Moinina Fofana:
Michiel Pestman
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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 wish to emphasize that I subscribe to and endorse the Conclusion and Order 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 Second Accused in his application to the Court. I have, however, in this brief Separate Opinion set out my own reasoning and reasons in support. I do adopt in their entirety the reproduction of (1) the Submissions of the Accused, (2) The Prosecution's Response, and (3) The Second Accused's Reply as set out in the Decision.

II. Non-Service of the Consolidated Indictment

2. The first specific issue for determination here is that of the alleged failure to serve the Consolidated Indictment. The contention of the Second 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 its recent Decision in this case entitled *Decision On First Accused's Motion for Service and Arraignment on the Consolidated Indictment*[1], addressing this same issue, the Trial Chamber took the view that while failure to serve the Consolidated Indictment personally on the Accused was a breach of Rule 52(B) of the Rules and of the Trial Chamber's Joinder Order, this procedural error *alone* would not, in and of itself, unfairly prejudice the Accused's right to a fair trial. In that Decision, the Trial Chamber did find that there was non-compliance with Rule 52, as a matter of fact and of law.

4. In a Separate Concurring Opinion, on the same issue, I opined that:

> "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

[1] *Prosecutor Against Sam Hinga Norman, Moinina Fofana and Allieu Kondewa* (Case No. SCSL-04-14-T) dated 29 November, 2004.

departs from the acknowledged and recognized body of jurisprudence on the subject, both nationally and internationally. Under 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."[2]

5. Consistent with the above reasoning, and noting in the context of this application that the records of the Court Management Office show that the Second Accused was not personally served with the Consolidated Indictment as prescribed by Rule 52(B), but that service was effected on his Counsel, I agree that there has been a breach of Rule 52(B) in relation to the Second 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 of the 22nd day of January, 2004.[3] I agree further, and hold, that such non-compliance does not procedurally invalidate the trial proceeding in this case on two key grounds. The first is that such omission or defect does not, ***without more***, prejudice the right of the Second Accused to a fair trial based on my recollection and assessment of the procedural steps so far in this case as correctly outlined in the majority Decision. The second ground upon which I base my reasoning that contravention of Rule 52(B) does not invalidate the trial proceeding and any subsequent proceedings 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***

[2] See Separate Concurring Opinion of Judge Bankole Thompson on Decision On First Accused's Motion For Service and Arraignment on the Consolidated Indictment, 29 November, 2004 at para 3.

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

any other matter arising out of the preliminary investigation."[4] The Second Accused is, therefore, in my considered view, estopped from contending that he is not properly upon his trial having pleaded "not guilty" to the indictment.

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

6. On the second issue of the alleged differences between the ***Original*** Indictment and the ***Consolidated*** Indictment after a meticulous comparison of both accusatory instruments, I find that the ***Consolidated*** Indictment does contain additions as to geographic locations, as detailed in the majority Decision of the Chamber. I do maintain, however, that these additions and elaborations are not ***new*** allegations. They are emanations from a successful challenge by the Third Accused with whom the Second Accused is herein jointly charged to the form of the ***Original*** Indictment following a Motion filed by the said Third Accused on Defects in the Form of the Indictment, complaining of lack of specificity and particularity in respect of certain counts where the formulations *"but not limited to these events", "including but not limited to", and "included but were not limited to"* had been used in the aforesaid indictment.[5] The Chamber found that these formulations were "impermissibly broad" except in so far as they referred to 'events', 'locations' and 'dates' *simpliciter*. Due to the joint nature of the indictment and of the charges the Second Accused, who did not challenge the form of the indictment, has indirectly and jointly, benefited from the Chamber's Order in response to the *Kondewa* Motion challenging the formal validity of his Original Indictment on grounds of lack of specificity in respect of these allegations.

7. In the light of such finding, it is legally implausible to suggest that they are new factual allegations transforming the ***Consolidated*** Indictment into a ***New*** Indictment. In essence, it was precisely in determining the issue of the extent to which, in the context of the framing of indictments within the jurisdiction of the Special Court, the required degree of specificity or particularity had been met in relation to the pleadings of the allegations in the ***Original*** Indictment preferred against the Third Accused, that the Trial Chamber did, in respect of the additions and elaborations now complained of, order that the Prosecution, pursuant to the Chamber's *Decision and Order on Defence*

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[4] Article 14(2) of the Statute of the Court authorizes recourse to the jurisprudence of Sierra Leone for guidance (albeit as a matter of discretion), whenever the Rules of Procedure and Evidence of the Court "do not, or adequately provide for a specific situation." It is crystal-clear that there is, at present, no rule of the Special Court on the legal effect or consequence of a plea of "not guilty" by an accused to an indictment as a matter of procedure. For instance, does non-compliance with a rule of procedure necessarily result in a nullity? Evidently, the Sierra Leone law does not adopt this approach. See section 133(1) and (2) of the *Sierra Leone Criminal Procedure Act* 1965.

Preliminary Motion on the Defects in the Form of the Indictment, file a ***Bill of Particulars*** providing further and better particulars in response to the Third Accused's objections to the form of the ***Original*** Indictment. In effect, these amplifications and elaborations were incorporated in the ***Consolidated*** Indictment during the process of consolidation.

8. Based on the reasoning and finding in paragraphs 6-7 herein, I hold that the Second Accused is clearly estopped from challenging the validity of the ***Consolidated*** Indictment, at this point in time, not having exercised his right to challenge the formal validity of the ***Original*** Indictment against him within the prescribed time frame prescribed by Rule 72. Having so held, the only question that remains to be addressed is whether the Second Accused is entitled to a re-arraignment on the ***Consolidated*** Indictment.

III. The Issue of Re-Arraignment

9. I make shortshrift of the issue of re-arraignment by noting that since the ***Consolidated*** Indictment is neither an amended nor a new Indictment, no re-arraignment is legally necessary or mandatory.

IV. Conclusion

10. I, accordingly, concur in the Conclusion as set out in the majority Decision and Order therein dismissing the Motion in its entirety.

Done in Freetown, Sierra Leone, this 6th day of December 2004

Hon. Judge Bankole Thompson

[Seal of the Special Court for Sierra Leone]

[5] *Prosecutor v. Kondewa*, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment (Case No. SCSL-2003-12-PT) 27th November, 2003.

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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

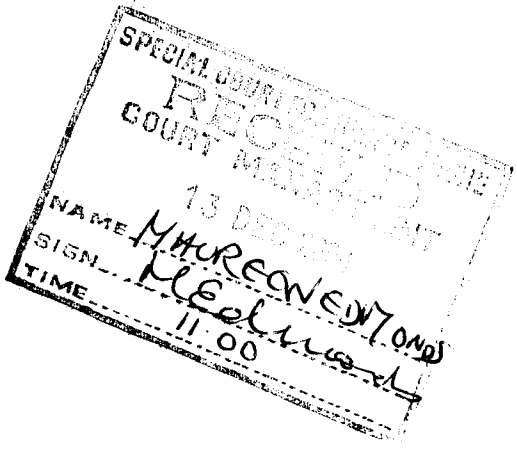
Date: 13th Day of December, 2004.

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 SECOND ACCUSED, MOININA FOFANA FOR SERVICE AND ARRAIGNMENT ON THE CONSOLIDATED INDICTMENT AND A SECOND APPEARANCE

Office of the Prosecutor:

Luc Côté
James Johnson



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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 Consolidated Indictment and a Second Appearance, filed on the 21st of October, 2004, for the 2nd Accused, Moinina Fofana ("Applicant");

MINDFUL of the Prosecution's Response to the said Motion filed on the 28th 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 the Trial Chamber's Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment, including Separate Concurring Opinion of Hon. Judge Bankole Thompson and Dissenting Opinion of Hon. Judge Benjamin Mutanga Itoe, dated the 29th of November, 2004 ("Decision on Norman's Indictment");

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 SECOND ACCUSED, MOININA FOFANA, FOR SERVICE AND ARRAIGNMENT ON THE CONSOLIDATED INDICTMENT AND A SECOND APPEARANCE.

(A) HISTORICAL BACKGROUND

1. The 2nd Accused, Moinina Fofana, was arrested on the 29th of May, 2003, on an 8 Count Individual Indictment dated the 26th of June, 2003, approved by His Lordship, Hon. Judge Pierre Boutet. 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.

2. For the purposes of this Dissenting Opinion, I adopt *mutatis mutandis* my review of the historical background in my Dissenting Opinion on the Motion Filed by the First Accused, Samuel Hinga Norman for Service and Arraignment on the Second Indictment, set forth in pages 3 to 6 of the same Opinion. Furthermore, I adopt the outline of the submissions of the parties and the applicable law as set forth in the Decision of the Majority on this current Motion, at pages 2 to 8 of its Decision.

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.

(B) SERVICE OF THE CONSOLIDATED INDICTMENT.

INTERPRETATION AND APPLICATION OF RULES 52(A) AND 52(B) OF THE RULES

4. 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.

5. 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.

6. 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.

7. 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 Second 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.*

13. 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.

14. 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."

15. 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.

16. 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...***"

17. 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.

18. 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 proffered 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.

19. 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.***

20. 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...***"

21. 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...***"

22. 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.

23. 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."

24. 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.

25. 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.

26. 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

27. 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.

28. 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.

29. 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.

30. 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.

31. 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.

32. In the course of examining the instant Motion for Service and Arraignment on the Consolidated Indictment and a Second Appearance filed by the 2nd 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 2nd Accused, Moinina Fofana (see underlined portions):

a). Paragraph 25(a) (CI) - and at or near the towns of Lalahun, Kamboma, Konia, Talama, Panguma and Sembehun;

b.) Paragraph 25(b) (CI) - and Blama;

c.) Paragraph 25(d) (CI) - in locations in Bo District including the District Headquarters town of Bo, Kebi Town, Kpeyama, Fengehun and Mongere;

d.) Paragraph 25(e) (CI) - in Moyamba District including Sembehun, Taiama, Bylagao, Ribbi and Gbangbatoke;

e.) Paragraph 25(f) (CI) - in Bonthe District, including Talia (Base Zero), Mobayeh, Makose and Bonthe Town;

f.) Paragraph 25(g) (CI) - in road ambushes at Gumahun, Gerihun, Jembeh and the Bo-Matotoka Highway;

g.) Paragraph 26(a) (CI) - Blama, Kamboma;

h.) Paragraph 27(a) (CI) - Kenema District, the towns of Kenema, Tongo Field and surrounding areas.

33. An analysis of the contents of the Consolidated Indictment and those of the Initial Indictment of the Applicant, the 2nd Accused, reveals that factual allegations have been added to the Counts of the Indictment that are material.

34. 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.***

35. 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."

36. 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.

37. 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.

38. 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

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

Indictment which I again say, merges and replaces the 3 Individual Indictments that had earlier been filed and given 3 different case numbers.

39. 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, on the Applicant.

40. In addition, a rearraignment of the 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?

41. 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.

42. 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.

43. 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"

44. 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.

45. It is my opinion that rearraignment, as the 2nd 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.

46. 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.

47. 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.

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

> 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.

49. 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.

50. 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".

51. 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.

52. 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."

53. In the case in hand, the Prosecution has expanded the factual allegations in the Consolidated Indictment than those contained in the Initial Individual Indictment, a fact which, of necessity, dictates that the Accused 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 is 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.

54. 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.

55. 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.

56. I would 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.

57. 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"

58. 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."

59. 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.

60. 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.

61. 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

62. 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.

63. 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.

64. 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 Fofana case has four Indictments – three individual and one consolidated in which they are all jointly charged and are now being jointly tried.

65. 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, T he Moinina Fofana 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.

66. In the Fofana 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 that did not feature in the Initial Individual Indictment against the Accused. ***In my Judgment, and as the facts have indeed established, these, unlike in Fyffe's case, are amendments in substance.***

67. 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."

68. 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 Fofana 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.

69. 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

70. 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. Fofana, 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

71. 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)

72. 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 rearraignment 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.

73. 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

74. From the facts now available, it is no longer in dispute that the charges and particulars of the offences against the Applicant, 2nd Accused, Moinina Fofana, have been expanded. ***In addition, he now is no longer being charged individually but jointly 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 factual allegations that did not exist in the Initial Individual Indictment dated the 26th of June, 2003 to which he had already pleaded "Not Guilty" to all counts.

(G) CONCLUSION

75. 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

76. 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) SERVICE OF THE INDICTMENT

77. 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.

78. 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.

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

79. 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.

80. 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).*"

81. 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".

82. 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.*"

83. 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.

84. 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.

85. 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.

86. 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.

87. Having regard to the above, I rule in favour of granting the 2nd 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.***

88. 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.

89. 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.

90. 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.

91. 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).

92. 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.

93. 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.

94. 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 and facts 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 a new initial appearances for the Accused 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 Accused 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 a personal service of the Consolidated Indictment dated the 5th of February, 2004, be immediately and personally effected on each of the Accused Persons.

4. THAT THESE ORDERS BE CARRIED OUT.

Done at Freetown this 13th Day of December, 2004.

Hon. Judge Benjamin Mutanga Itoe

Presiding Judge
Trial Chamber

[Seal of the Special Court for Sierra Leone]