SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER I

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

Registrar: Robin Vincent

Date: 25th of May, 2005

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

DISSENTING ORDER OF HON. JUSTICE BENJAMIN MUTANGA ITOE, PRESIDING JUDGE, ON THE CHAMBER MAJORITY CONSEQUENTIAL ORDER DATED THE 25TH OF MAY, 2005, ON THE DECISION OF THE APPEALS CHAMBER DATED THE 16TH OF MAY, 2005, RELATING TO THE AMENDMENT OF THE CONSOLIDATED INDICTMENT

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

MINDFUL OF the Trial ChamberMajority Consequential Order dated the 25th of May, 2005, on the Amendment of the Consolidated Indictment;

MINDFUL OF the Trial Chamber's Majority Decision on the Motion by the First Accused for Service and Arraignment on the Consolidated Indictment, issued by the Trial Chamber on the 29th of November 2004 ("Decision on Service and Arraignment");

CONSIDERING the Appeals filed by both the Prosecution and the Defence against this Majority Decision;

MINDFUL OF the Motion for the *Decision on Presentation of Witness Testimony on Moyamba Crime Base*, rendered by the The Chamber on the 1st of March, 2005, where The Chamber decided "that the trial proceedings will continue against the Accused persons and that the Prosecution may present witnesses to give testimony on areas relating to the Moyamba crime base and that the Trial Chamber will make a determination on the relevance of this testimony to the First Accused upon the rendering of the Appeals Chamber's Decision on this matter";

MINDFUL OF the Decision rendered by the Appeals Chamber on the 16th of May, 2005, on Appeals against the Trial Chamber Decision dated the 29th of November, 2004, filed by the Prosecution and the Defence on the First Accused's Motion for Service And Arraignment of the Consolidated Indictment;

CONSIDERING that the Appeals Chamber in this Decision exercised its appellate jurisdiction to revise the Trial Chamber Decision, and granted "leave to the Prosecution to make all the amendments introduced without leave by way of changes to the consolidated indictment, including additional sub-paragraphs d) and e) in paragraph 24 and the corresponding additional sub-paragraphs e) and f) in counts 1 and 2 (paragraph 25)";

CONSIDERING that the Appeals Chamber in its Decision dated the 16th of May, 2005, by granting leave to amend the Consolidated Indictment, determined that the "Districts of Moyamba and Bonthe" were areas now forming part of the Indictment against the First Accused;

MINDFUL OF the fact that the Appeals Chamber in that Decision then referred the matter to the Trial Chamber "to make any appropriate order necessary to ensure that the Defence is not incommoded";

MINDFUL OF Article 17(4) of the Statute and Rules 26*bis*, 47, 48, 50, 52, 61 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules");

LEAVE HAVING BEEN GRANTED by the Appeals Chamber in its Decision of the 18th of May, 2005, for the Prosecution to make the amendments introduced without leave by way of changes to the Consolidated Indictment;

NOW THEREFORE:

I, HON. JUSTINCE BENJAMIN MUTANGA ITOE, PRESIDING JUDGE, DO HEREBY ISSUE THIS DISSENT ON THE CHAMBER MAJORITY CONSEQUENTIAL ORDER DATED THE 25TH OF MAY, 2005, FOLLOWING THE DECISION OF THE APPEALS CHAMBER RELATING TO THE AMENDMENT OF THE CONSOLIDATED INDICTMENT:

FACTS OF THE CASE

1. On the 18th of May, 2005, Our Appeals Chamber published its unanimous Decision dated the 16th of May, 2005 on the Appeals filed by both the Prosecution and the Defence against our Chamber Decision dated the 29th of November, 2004, on a Motion by the First Accused, Samuel Hinga Norman, for Service and Arraignment of the Second Indictment filed on the 21st of September, 2004.

2. In that Decision our Appellate Chamber after an exhaustive analysis has this to say in Page 34, Para 87-88:

> "We shall exceptionally, exercise our appellate power to revise the Trial Chamber decision. We give leave to the Prosecution to make all the amendments introduced without leave by way of changes to the consolidated Indictment, including additional sub-paragraphs d) and e) in paragraph 24 and the corresponding additional sub-paragraphs e) and f) in counts 1 and 2 (paragraph 25). In respect of those sub-paragraphs, however, we leave it to the Trial Chamber to make any appropriate order necessary to ensure the Defence is not incommoded.
>
> Amendments that do not amount to new counts should generally be admitted, even at a late stage, if they will not prejudice the defence or delay the trial process."

3. As far as these amendments are concerned, it should be noted that the Appeals Chamber mandated the Trial Chamber seized of this matter, "... ***to make any appropriate order necessary to ensure that the Defence is not incommoded***".

4. It is pursuant to this mandate that Our Chamber, without having called for or heard any submissions or arguments from either the Prosecution or the Defence whose exercise of their appellate rights on this contentious issue, which arose from the Decision of the Appeals Chamber, proceeded to deliberate and to publish the Consequential Order on the Amendment of the Consolidated Indictment dated the 25th of May, 2005.

5. This Order ordains, inter alia, in its paragraph 1, that "***No further Service or Arraignment on this Consolidated Indictment is required***".

6. In effect, the Chamber in this Majority Consequential Order, and as far as arraignment on this Amended Consolidated Indictment is concerned, is of the opinion that the Appeals Chamber in its decision on this issue, directed or suggested that there should be no further arraignment or a further Initial Appearance of the 1st Accused on the amendments so approved by the Appeals Chamber.

7. It is on this understanding of the Appeals Chamber Decision by my Learned Colleagues which I very respectfully consider erroneous, and a failure by the Trial Chamber to hear the Appellants in this case and particularly, the Defence on the directives given by the Appeals Chamber in its Decision before publishing this Consequential Order, that I am respectfully basing my dissent on this Majority Order issued by my Learned Brothers and Colleagues, particularly in Their inferred interpretation, perception, effects and morale to be drawn from the Decision of the Appeals Chamber.

RECAPITULATORY GENESIS OF THE DISPUTED ISSUES UNDER CONSIDERATION

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

9. On the 17th of March, 2003, he was, in accordance with the provisions of Rule 61(ii) and 61(iii) of the Rules, arraigned before me on an 8-Count Individual Indictment dated the 7th of March, 2003. The number of the Indictment is SCSL-2003-08. He pleaded 'Not Guilty' to all the counts.

10. Moinina Fofana and Allieu Kondewa, the 2nd and 3rd Accused respectively, were also indicted on separate 8-Count Individual Indictments respectively numbered SCSL-2003-11 and SCSL-2003-12. They also made their separate Initial Appearances in June 2003 before Hon. Justice Boutet and individually pleaded "Not Guilty" to all the counts.

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

12. On the 21st of September, 2004, the First Accused, Samuel Hinga Norman, after an unsuccessful bid in open Court on the 15th of June, 2004 to be served with the New Consolidated Indictment and to be arraigned on it, filed a Motion for Service and Arraignment on the Second Indictment.

13. On the 20th of November, 2004, the Chamber disposed of this Motion in three different perspectives and opinions. There was a Majority Decision on the one hand that was punctuated by a Separate Concurring Opinion by Hon. Justice Bankole Thompson and furthermore, a Dissenting Opinion by Hon. Justice Benjamin Mutanga Itoe, the Presiding Judge of the Trial Chamber.

14. The issues involved were four in all. While there was unanimity in the Chamber on the factual findings, the Chamber remained very fundamentally divided on the law as far as the following issues were concerned:

i. The legality of the Service of the Consolidated Indictment;

ii. The status of the Initial Indictments in relation to the Rule against Double Jeopardy;

iii. The difference between the Initial Indictment and the Consolidated Indictment and whether the Consolidated Indictment was a New Indictment;

iv. Arraignment on the Indictment – whether a rearraignment, a further Initial Appearance on the Consolidated Indictment whose status (whether it was New or Not) was contested in view of the fact that it substantially amended the

Initial Indictment on which the 1st Accused's Initial Appearance was conducted in March, 2003.

15. As a result of these discordant notes in the harmony of the Trial Chamber Decision and an equally aggrieved posturing of the Parties against our Chamber Majority Decision of the 29th of November, 2004, both the Prosecution and the Defence sought and obtained our leave under Rule 73(B) of the Rules to appeal against our Decision. They did in fact appeal.

DECISION OF THE APPEALS CHAMBER ON THESE 2 APPEALS

16. On the 18th of May, 2005, the Appeals Chamber published its unanimous Decision dated the 16th of May, 2005, on the Appeals filed by both the Prosecution and the Defence against our Majority Chamber Decision of the 29th of November, 2004.

MY ANALYSIS AND CONCLUSIONS ON THE SAID DECISION

17. A close reading of the said Judgment shows that whilst the Appeals Chamber has issued clear directives on the contested issues, no very clear directive has been given on the issue of Rearraignment although the Appeals Chamber has carried out an analysis on this and on each of the contested issues.

These issues include:

1. Service of Indictment
2. Double Jeopardy
3. Whether the Indictment is NEW or NOT and lastly,
4. Whether there is any need for arraignment, a further initial appearance, under Rule 61.

SERVICE OF THE INDICTMENT

18. On this issue, the Appeals Chamber, without clearly holding that there was a breach of Rule 52 and of the Court Order, had this to say in Page 25 Para 68:

> "We do not think that the breach of a machinery provision in a Court Order, even if predicated on a Rule, can be regarded in such hyperbolic terms ... the object of the

> Court Order requiring personal service was achieved by substituted service on Counsel"

Here, the Appeals Chamber has ruled that a further Service of the Amended Consolidated Indictment is not necessary and on Page 24 Paragraph 65, the Appeals Chamber justifies this Decision by saying:

> "No prejudice could conceivably have been caused by the error"

NATURE OF THE CONSOLIDATED INDICTMENT – WHETHER IT IS NEW OR NOT

19. The Appeals Chamber in Page 25 Para 70 held that the Consolidated Indictment is New when it had this to say:

> "It is a somewhat metaphysical approach to say that each of three Indictments are 'essentially subsumed' in a Consolidated Indictment. ***The existential position is that the fourth Indictment (that is the Consolidated Indictment) is certainly different and 'new'***..."

The Appeals Chamber here has ruled that the Consolidated Indictment is New.

DOUBLE JEOPARDY –STATUS OF THE INITIAL INDICTMENTS

20. On this issue, the Appeals Chamber in its Decision in Page 26 Para 70 had this to say:

> "However much it may replicate in Language and Content, the 3 Original Indictments, they at present remain in file in the Registry, essentially unsubsumed ... Although we do not think that the fears expressed by the defendants about double jeopardy –i.e. that they might be tried on the counts of the old Indictments if acquitted on the consolidated Indictment – would ever be allowed to come to pass, we agree with them that the Prosecution should not be permitted to have it both ways. If the Prosecution declines to withdraw the old Indictments, then we must remove all apprehension from the Defence by ordering them to be marked 'not to be proceeded with'... "

21. In Page 34 para 89, the Appeals Chamber on this issue had this to say:

"For reasons given in para 68 above, this court orders that the three original Indictments, with document numbers SCSL-2003-08-I-001, SCSL-2003-11-I-15, SCSL-2003-12-I (pages 545-554) should not be proceeded with, and should be so marked."

On this issue, the Appeals Chamber in effect, upheld the contention that the continued existence of the 3 Initial Individual Indictments, violated or had the potential of violating the Rule Against Double Jeopardy.

WHETHER THERE IS NEED FOR A REARRAIGNMENT - A FURTHER INITIAL APPEARANCE UNDER RULE 61

22. If the Appeals Chamber has been clear in its conclusions and directives on the first 3 issues, this is not the case with the 4th issue which concerns a Further Initial Appearance of the Accused under Rule 50(B)(1) for the purposes of rearraignment under Rule 61 of the Rules.

23. As soon as this Decision was issued, the Draft of the now contested Majority Chamber Consequential Order was circulated amongst us and presented to me for signature on the 19th of May, 2005. This draft Order ruled out any further Service or any further Arraignment of the Accused. I refrained from signing the Order for the following reasons:

i. As a Chamber and before issuing any Order on this matter, we needed to have heard submissions from the Appellants either at the Status Conference that was to hold on Tuesday, the 24th of May 2005, or thereafter, by the entire Chamber which was to start sitting on this matter on Wednesday, the 25th of May, 2005, on what their views are on the implementation of the directives by the Appeals Chamber, particularly in relation to the amendment of the Consolidated Indictment where the Appeals Chamber directed that we could "***make any appropriate Order necessary to ensure that the Defence is not incommoded***".

ii. A Draft Order which, on the facts of this case as they are now known, rules out a further Arraignment of at least, the 1st Accused, Chief Hinga Norman, and in my view, Moinina Fofana and Allieu Kondewa as well, is ultra vires, and indeed violates the clear directive of the Appeals Chamber which, in using the term 'incommoded', means that nothing should be done to violate the rights of the Defence. To my mind therefore and in this perspective, a failure to rearraign the Accused on this New Consolidated Indictment, given the facts and

circumstances of this case, is clearly a violation of the rights of the Defence, particularly where the Defence is deprived of this right without having been heard, either by a Motion or an oral argument, on the crucial question of its understanding of the Appeals Chamber Decision.

24. In a matter which was so keenly contested not only in the Appeals submissions of the Prosecution and the Defence against our Majority Decision of the 29th of November 2004, but also, in the conflicting opinions amongst the Judges of the Trial Chamber as manifested by the 3 Decisions, it would appear to me neither right nor proper, nor is it in conformity with the requirements of the Rules of Due Process, for a Consequential Order, ruling out in particular, the crucial issue of a further Initial Appearance, to be issued without our having heard from the Appellants on their views in relation to their analysis and the conclusions and inferences to be drawn from the Decision of the Appeals Chamber on this mute but important point.

25. In view of this development that was unveiled by this Draft and in order to pre-empt certain consequences, I discussed the issue with My Colleagues and on the 23rd of May, 2005, circulated an analytical Confidential Chamber Memorandum on all the issues at stake and made proposals. In fact, this Dissenting Opinion is predicated on virtually all the arguments I canvassed in that Chamber Memorandum.

26. During our deliberation on this Memorandum on Tuesday, the 24th of May, 2005, My Colleagues, by a Majority of 2 to 1, held to their view in the contested Chamber Majority Decision of the 29th of November, 2004, that a further arraignment was not necessary and that the Draft Order should be signed and published as it was presented.

27. It was indeed and accordingly published on the 25th of May, 2005, and the trial proceeded on the 26th of May, 2005, without having put the issue of rearraignment on the table of the resumed session of the Chamber for the Parties to be heard on their views on the important and crucial issue of the fate of the argument for a further Initial Appearance.

28. Naturally, and for reasons which I have already outlined, I dissented from this Majority Stand, particularly so because I did not share the view that we were acting within the mandate defined by the Appeals Chamber which in its Decision, neither directly nor implicitly ruled out

a further Initial Appearance of the Accused after it granted and confirmed the irregularly introduced amendments into the New Consolidated Indictment.

29. It is important to mention here that The Appeals Chamber Decision dated the 16th of May, 2005, The Majority Trial Chamber Decision of the 29th of November, 2004, and Hon. Justice Itoe's Dissenting Opinion of the same date, are ad idem on this point and are unanimously in agreement that the said amendments were quite substantial and extensive.

THE NEED FOR A FURTHER APPEARANCE AND PLEA AT THE REQUEST OF THE ACCUSED

30. On the contrary, and on a thorough reading and analysis of that Appeals Chamber Decision, it is my view and opinion that Their Lordships, the Appellate Judges, were in fact directing that given the facts and circumstances of this case, a further Initial Appearance is necessary so as to avoid a violation of the rights of the Defence.

31. Rule 50(B) which regulates this situation stipulates as follows:

> "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."

32. In this case, the 1st Accused, Chief Samuel Hinga Norman, on the 15th of June, 2004, in the exercise of his right to make an Opening Statement under the provisions of Rule 84 of the Rules, requested the Court to record a plea from him on this Consolidated Indictment which has now been accepted as a New Indictment. This was not done. He followed up with a Motion filed on the 21st of September, 2004. The Motion was dismissed by a Majority Decision of the Chamber dated the 29th November, 2004. He sought and obtained leave to appeal against this Decision. He thereafter, appealed to the Appeals Chamber.

A PLEA

"NOT A ONCE AND FOR ALL PROCESS"

33. The Appeals Chamber in its Decision dated the 16th of May, 2005, had this to say on a further Initial Appearance on Page 27 Para 73:

> "We should point out, because some submissions seem to misunderstand the position, that a further appearance and plea is simply a formal act by which a count in an Indictment is read to the defendant in open court by the clerk, and he is asked to answer with his plea, normally "guilty" or "not guilty", which is thereupon recorded. ***It is by no means a "once and for all" process: very often the defendant at a later stage will ask for the Indictment to be "put again" in order to change a plea to "guilty."*** If he has been properly advised by Counsel, the Court will rarely hesitate to grant his request. An application to change a "guilty" plea to "not guilty" will, however, be carefully scrutinized. ***But there is no reason in principle why a defendant's request to further appear pursuant to Rule 61 on an unamended consolidated Indictment should be refused. It is not required by the Rules but it is a short formality that cannot prejudice the Prosecution and on this basis the Trial Chamber had a discretion to permit further appearance if requested."***, just as the 1st Accused, Chief Samuel Hinga Norman, did request orally on the 15th of June, 2004, and by a Motion on the 21st of September, 2004.

34. The Accused, Norman, orally moved the Court for a plea to be taken on the 15th of June 2004. His application, even though it was oral, ought to have been considered and granted given the facts and the evolution in this case, or at least, a Ruling in any form issued before we proceeded to start hearing evidence in this case.

35. In effect therefore, the motion for a "PLEA" and "SERVICE" of the Consolidated Indictment was before the Court on the 15th of June, 2004. However, even if the written motion was only filed on the 20th of September, 2004, it was because The Chamber took no action on his oral Application. However belatedly as it is now said it was brought is now irrelevant because Our Chamber all the same entertained it and issued a Decision on it on the 29th of November, 2004. We did not dismiss it then as having been filed belatedly nor was there any tangential comment by us in this regard in either the Majority, the Separate Concurring, or the Dissenting Opinion. The objections by the 1st Accused on the 15th of June,

2004, and subsequently in the written motion filed on the 20th of September 2004, cannot therefore today be said to have been belatedly taken.

36. What we know today, I observe, is that the Appeals Chamber has granted the amendment which the Chamber, in its Majority Decision, directed the Prosecution to seek from Our Chamber, and this amendment includes the new and extensively added allegations that did not form part of the Accused's Initial Indictment that is today extinct and finally laid to rest.

37. In any event, arraignment and rearraignment are of such fundamental and strategic importance in the conduct of criminal proceedings that no jurisdiction can afford, given certain circumstances, to side track them without being seen as having flagrantly and manifestly violated not only well known and entrenched principles of criminal law and practice, but also and above all, the rights of the Accused to a fair trial and hearing as guaranteed to him by Article 17(2) of the Statute of the Special Court as well as those of Article 17(4)(a) of the Statute guaranteeing him the right to be promptly informed and in detail in a language which he or she understands, of the nature and cause of the charge against him or her.

38. It is therefore my opinion that ***The 'Due Process' Rules and Practices and the 'Doctrine of Fundamental Fairness' therefore, have to he applied in order to ensure that the inalienable and entrenched rights of the Defence in this proceeding, are not violated and to quote the Appeals Chamber, "to ensure that the Defence is not incommoded."***

39. This confers on us, the powers to make any and such Order or Orders as would ensure that the rights of the Defence are not violated granted the fact that the extensive amendments in the Consolidated Indictment introduced by the Prosecution without prior leave have exceptionally been granted by the Appeals Chamber. This, to my mind, is in consonance with the doctrine of Equality of Arms.

THE CONSOLIDATED INDICTMENT IS INDEED NEW

40. This is the finding of Appeals Chamber on Page 25 Para 70 of the Decision which reads as follows:

"***The existential position is that the fourth Indictment is certainly different, and 'new'***".

41. Indeed, this Consolidated Indictment is rightfully characterised as "New" because it is my opinion that an Indictment is New when it has been substantially amended because the amendments bring the charges and the counts, in their altered form, within the meaning of Rule 50 of the Rules, thereby obligatorily bringing such amendments within the purview of Rules 50(B)(1) and 61 of the Rules which require a further Appearance of the Accused so affected by the amendment.

42. Indeed, the Joinder of the 3 Accused in one Consolidated Indictment and the extinction by the Appeals Chamber of the 3 Initial Indictments on which the pleas were taken also renders those pleas extinct, and emphasises the imperative necessity to rearraign all the Accused on this New Amended Consolidated Indictment on which the trial is now being conducted and in strict legality and reality, without a plea having been taken from those we are purportedly trying on the said New Amended Consolidated Indictment.

43. BLACKSTONE'S CRIMINAL PRACTICE, OXFORD UNIVERSITY PRESS, 2003 Edition, Page 1303 Paragraph D11.1 in situations like this, 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. In light of the above it is an imperative, given the indications and analysis of the Appeals Chamber Decision, that Norman should be rearraigned. Applying this Practice Directive, and following the extinction of the Initial Indictments on which pleas were taken, and the consequential and natural extinction of those pleas that were taken then on those Indictments, it is now clear that these Initial Indictments which have now been laid to rest, have been replaced by the now Amended Consolidated Indictment.

45. In view of the fact that the Consolidated Indictment that substantially and extensively added to and in so doing, fundamentally amended the charges against Norman and to a lesser degree, those against Fofana and Kondewa, it becomes necessary, indeed an imperative, in the interests of the integrity and credibility of our proceedings, to rearraign them together before we proceed with hearing the rest of the witnesses when the 5th Session of this trial commences on the 25th of May, 2005.

THE APPEALS CHAMBER POSITION ON THE INDICTMENT AND ON THE AMENDMENT

46. On Page 32 Paras 84 and 85E, the Appeals Chamber had this to say in confirmation of the novelty of the Indictment:

> "The Prosecution claim is that these additions 'merely' contain more specific details of some of the alleged conduct falling within the general language of Para 18 of the Norman Indictment ... ***In our view, the Prosecution claim must be rejected. These new allegations amount to serious charges of criminality in places and at times that are not indicated in the original paragraph.***"

47. The Appeals Chamber in its Decision on Page 18 Para 52, had this to say:

"***Once a Defendant is arraigned, i.e., required to plead to the counts of an Indictment which under International Criminal Procedure is reflected in our Rule 61 is referred to as an Initial Appearance and Plea, no word or phrase or any count or any particular of a count may be changed without the permission (leave) of the Court by an application to amend the Indictment which is made "In the presence of the Defence"***.

48. Further, The Appeals Chamber in Page 27 Para 72 had this to say:

> "We must point out that whatever the common sense of the general approach taken in Fyffe, under our Rule 50(B) 'if the amended Indictment includes new charges, the Accused must make a further appearance in order to enter a plea to them pursuant to Rule 61 – A count of the Indictment is the formal encapsulation of the legal basis of the charge – so if the Consolidated Indictment includes new counts, even though the particulars remain the same – Rule 50(B) applies and pleas must be taken."

49. Again, in Page 27 Para 74 of the Decision, The Appeals Chamber had this to say:

> "The case of Norman is more difficult, because the Prosecution chose to add to the Consolidated Indictment a number of further (and in some cases, better) particulars. In view of the representation made by their Counsel and supplementary opinion of Judge Itoe, this was a hazardous step, especially since they did not condescend to accompany service of the Consolidated Indictment on the 4th of February, 2004 with a Motion under Rule 73 seeking leave for the amendments..."

50. In Page 28 Para 76, The Appeals Chamber further had this to say:

> "The Prosecution should have applied to add these material particulars in February 2004; instead, and as a response to the defendant's Motion in September 2004, it was being given an option in November to make the application it should have made and was (given its representations) obliged to make nine months before. It is difficult to understand why the Prosecution chooses now to appeal this opportunity for it to correct so belatedly its earlier mistake."

51. On Page 25 Para 60 of the Decision, The Appeals Chamber had this to say:

> "Judge Itoe does however make an important point, both in his original concurring opinion on the Joinder decision and in his subsequent dissent in this case about the nature of the Consolidated Indictment. Assuming (as he and the other Judges did in reliance on the Prosecution representation) that there would be no significant changes, he nonetheless insisted that the Consolidated Indictment was a New Indictment, requiring the review process of Rule 47 and a further appearance and a plea pursuant to Rule 61".
>
> "Review and rearraignment or further appearance would be an entirely repetitive exercise, of course if there were no significant difference between the counts and particulars in the original Indictment and those which appeared on the Consolidated Indictment."

52. In this case however, it is my opinion that there are significant differences between the Counts and particulars in the now-extinct original Indictments and those which appear on the New and now amended Consolidated Indictment. The irresistible inference to be drawn here and message (although not clearly put) sent to The Trial Chamber by the Appeals Chamber is that a rearraignment, in the circumstances, is necessary and that it is in fact directing that a further Initial Appearance will not be superfluous since it is in fact necessary and that the Trial Chamber could proceed to make an Order to this effect, when in page 34 paragraph 87 the Appeals Chamber directed us "***To make any appropriate order necessary to ensure that the Defence is not incommoded***".

PRINCIPLE OF A FURTHER SERVICE OF THE INDICTMENT AND A FURTHER INITIAL APPEARANCE WAS CONCEDED, APPROVED AND ENVISAGED BY THE MAJORITY DECISION OF THE 29TH OF NOVEMBER, 2005, BACKED BY THE SEPARATE CONCURRING OPINION

53. On this subject and in the Majority Decision, Their Lordships clearly had this to say on Page 8 Para 15 of Their Majority Decision:

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

54. Furthermore, Their Lordships, in Page 10 Para 20 of Their Majority Chamber Decision, had this to say:

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

55. Further on Page 13 Paras 31 and 32, of this Decision, Their Lordships had this say:

> "... 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.[1]
>
> In the case at hand, the Accused entered a plea to the charges against him at his initial appearance in March, 2003. These charges remained in force against him, however, as we have found, ***there were material changes made to the Consolidated Indictment. The Trial Chamber finds that the Accused has not been afforded the opportunity to make a plea to these material changes to the Indictment, and that unfair prejudice***

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

> *may result if the Indictment is not amended and the Accused served with the Indictment and arraigned on the material changes to the Indictment.*"

56. In view of Their Lordships' finding in Their Majority Judgement that material changes were made to the Consolidated Indictment and that a prejudice may result if the Indictment is not amended and the Accused served with the Indictment and arraigned on the material changes, Their Lordships, in Page 16 Para 1 of the Majority Decision, Ordered as follows:

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

57. It is reasonable to conclude that it was because Their Lordships in this Majority Decision came to the conclusion that new factual allegations and substantive elements were included in the Consolidated Indictment they ordered the Prosecution to either:

a) expunge completely from the Consolidated Indictment such identified portions or

b) to seek an amendment of the said Indictment in respect of those identified portions and that either option is to be exercised with the leave of the Trial Chamber.

58. The Prosecution, in addition to appealing against the Majority Decision, also, on the 8th day of December, 2004, filed a Motion seeking the leave of the Trial Chamber to amend Indictment as directed by Their Lordships. The determination of this Motion was, pursuant to Rule 73(C) of the Rules, stayed pending the Decision of the Appeals Chamber on the 2 Appeals filed by both the Prosecution and the Defence against the contested Majority Chamber Decision.

59. The Appeals Chamber in its Wisdom and in its Decision under reference, granted the amendment sought by the Prosecution to include the new charges. The Chamber in granting and directing those amendments to that Indictment, authorised and mandated the Trial

Chamber, in proceeding with implementing its directives in this regard, "*to make any appropriate Order necessary to ensure that the Defence is not incommoded*".

60. In view of the fact that the Appeals Chamber in issuing the Order was concerned with respecting the rights of the Accused, it certainly, in my opinion, impliedly opted for a further Initial Appearance of the Accused since this is his inalienable legal right as an Accused in a criminal proceeding as this where he stands charged for very grave crimes against humanity..

61. In view of the fact that the Chamber in its Majority Decision had found that a further initial appearance of the Accused will be necessary should the Prosecution seek and amendment of the Consolidated Indictment by opting to add the extensive new changes and charges, there is no reason why Their Lordships should today opt, through a low-profiled Consequential Order, to overturn Their own comparatively high-profiled Majority Decision, rather than opt for a principled approach and for purposes of judicial consistency, to order, as They had envisaged in Their Chamber Majority Decision of the 29th of November, 2004 whose relevant portions I have just highlighted, that the Accused be rearraigned in order "*to ensure that the Defence is not incommoded*".

62. It is indeed my view, that this Consequential Order dated the 25th of May 2005, issued without regard to the Due Process obligations of a prior hearing of the interested Parties and which furthermore is contrary to Their Lordships finding in the Majority Chamber Decision on rearraignment, is null and void and should be regarded and declared as such.

THE LAW AND JURISPRUDENCE TO SUPPORT A FURTHER INITIAL APPEARANCE - REARRAIGNMENT

63. An examination and analysis of the following legal authorities which sustain the case for a further Initial Appearance in necessary for purposes of a resolution of this impasse.

64. In H. M. THE QUEEN VS JEFFREY MITCHEL (1997) 12 CCC (3d) 139 ONT. CA, it was affirmed 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.

65. Furthermore, LORD WIDGERY C.J. in the case of R. VS RADLEY 58 CR APP REPORTS 394, 404, had this to say:

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

66. In the case of HANLEY VS ZENOFF [398] p. 2d 241, NEVADA 1965, it was 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 indictment."

67. 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"

These Dicta, coupled with the facts of this case, sustain and further justify the argument that a further Initial Appearance is necessary. In fact, LORD WIDGERY'S advice in this regard is not only illuminating but appropriate in the circumstances.

68. BLACK'S LAW DICTIONARY 7TH ED PAGE 81 defines "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 the Indictment"

CONCERNS BY THE APPEALS CHAMBER FOR EXPEDITIOUSNESS

69. The justifiable concern of the Appeals Chamber in this Decision is that given the limited time mandate of this Court, the proceedings should be expeditiously conducted whilst at the same time ensuring that the substantive and procedural Rules are scrupulously observed in order to avoid making decisions that could amount to an abuse or a violation of the due process rights of the Accused.

70. In Page 30 Para 80, the Appeals Chamber had this to say:

> ***"The Prosecution at this stage must satisfy the Court not only that the substantial amendments cause no prejudice to the Defence but that they will not delay or interrupt the trial".***

71. In Page 34 Para 87, The Appeals Chamber, after a lengthy analysis and with an apparent hesitation, granted leave to the Prosecution to amend by including the vastly amended portions of the Consolidated Indictment. To safeguard the rights of the Defence and to ensure their inviolability, the Appeals Chamber had this to say in Page 34 PARA 87:

"In respect of these sub-paragraphs however, we leave it to the Trial Chamber to make any appropriate order necessary to ensure that the Defence is not incommoded"

Still on Page 34 Para 88 the Appeals Chamber has this to say:

"Amendments that do not amount to new counts should generally be admitted, even at a late stage, if they will not prejudice the defence or delay the trial process. The submissions before us indicate that they will not have either effect. The Norman Defence has known that the amendments were "on the cards" since June 2003 and, since February 2004, that the Prosecution was proceeding upon them. It did not invoke Rule 5, or make any complaint about their inclusion in the consolidated Indictment, until September 2004. It acquiesced in their inclusion for two trial sessions, and have prepared the case on the basis that they could be

included. ***We are satisfied that the amendment will not involve an undue lengthening of the time of trial."***

CONCLUSION

72. I am of the opinion, and I so do hold, that a failure to order a further Initial Appearance of the 1st Accused, Chief Samuel Hinga Norman would amount not only to a fundamental breach of the law and practice on Pleas in criminal proceedings but also a violation of the statutory rights of the Accused which we, as an International Criminal Tribunal, either in the exercise of our inherent jurisdiction as a Chamber or as a Judge of that Chamber, or at the instance of the Parties, are supposed to protect and uphold. The Appeals Chamber in its Decision particularly and in Page 34 PARA 87, had this to say:

"In respect of these sub-paragraphs however, we leave it to the Trial Chamber to make any appropriate order necessary to ensure that the Defence is not incommoded"

73. The Appeals Chamber here and in this regard, is directing us to case-manage the fall-outs of the amendment that it has granted and to proceed expeditiously and without unnecessary delays with the trial but to ensure in so doing, that we, as a Chamber, do not make any order that violates the rights of the Defence.

74. This concern of the Appeals Chamber could, in my opinion, properly be addressed by the 4 Orders that conclude this Dissent and which I clearly raised as proposals in My Confidential Chamber Memorandum For Judges' Deliberation dated the 23rd of May, 2005, (and earlier referred to) for approval by My Colleagues who in any event, rejected the said Memorandum and instead invited me to enter a Dissent if I wished.

75. It indeed stands to reason that a refusal to rearraign on an Indictment which is New in its form and its contents, in that it now jointly charges the 3 Accused Persons for purposes of a joint trial, certainly violates the rights of the Defence given that the Initial Individual Indictments and the pleas taken on them are now extinct.

76. In the light of the foregoing, and even without having had the benefit of hearing from the Parties, given the hurried circumstances under which the Chamber Majority Consequential Order and My Dissent were made,

I DO HEREBY ORDER AS FOLLOWS:

1. That there should be No Further Service of the said Amended Consolidated Indictment;

2. That a further Initial Appearance of the Accused, Chief Samuel Hinga Norman, pursuant to the provisions of Rule 50(B)(1) of the Rules for purposes of a rearraignment under Rule 61 of the Rules is necessary and should be organised immediately;

3. That the said further Initial Appearance of the 1st Accused should take place before A Designated Judge on Wednesday, the 25th or on Thursday, the 26th of May, 2005 and that this process takes place on the said Amended Consolidated Indictment on which the Trial has been conducted and is to proceed.

4. That the Chamber immediately thereafter or on Friday, the 27th of May, 2005, proceeds with hearing the evidence of the rest of the witnesses without prejudice to disposing of any Motions or Applications, if any, that may be made or filed by the Parties at this stage.

5. THAT THESE ORDERS BE CARRIED OUT.

Done in Freetown, Sierra Leone, this 25th day of May, 2005

Hon. Justice Benjamin Mutanga Itoe
Presiding Judge

[Seal of the Special Court for Sierra Leone]