



SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 29th of November, 2004

PROSECUTOR

Against

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

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

Office of the Prosecutor:

Luc Côté
James Johnson

Court Appointed Counsel for Sam Hinga Norman:

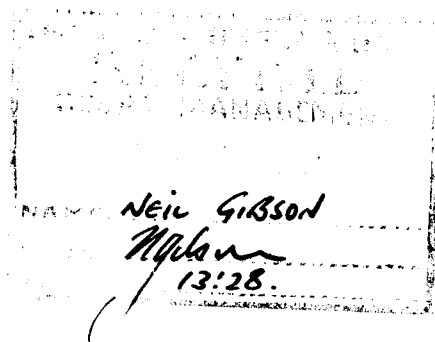
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Tim Owen, Q.C.

Court Appointed Counsel for Moinina Fofana:

Michiel Pestman
Arrow Bockarie
Victor Koppe

Court Appointed Counsel for Allieu Kondewa:

Charles Margai
Yada Williams
Ansu Lansana



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

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

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

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

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

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

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

THE TRIAL CHAMBER ISSUES THE FOLLOWING DECISION:

I. BACKGROUND

1. On the 15th, 17th and 21st of March, 2003, the First Accused was arraigned before the Trial Chamber and plead not guilty to eight counts listed in the Indictment against him.
2. On the 9th of October, 2003, the Prosecution sought a Motion for Joinder of the First Accused with the Accused Moinina Fofana (Second Accused) and Allieu Kondewa (Third Accused). The Prosecution requested that the Indictments against the three Accused be consolidated into a single Indictment and there cased joined. Written responses to this Motion were received from the Third Accused on the 20th of October, 2003, and from the Second Accused on the 12th of November, 2003. An oral response to the Motion was given by the First Accused at the joinder hearing held on the 4th of December, 2003. The Prosecution filed a Reply to the Defence response on the 24th of October, 2003. A Decision on the Motion for Joinder was delivered on the 27th of January, 2004, which ordered that a single Consolidated Indictment be prepared as the Indictment on which the joint trial would proceed and that the said Indictment be served on each Accused in accordance with Rule 52 of the Rules. The Consolidated Indictment was filed on the 5th of February, 2004.

II. SUBMISSIONS OF THE ACCUSED

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

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

Counts 1-2 - contained an additional particular (f) and an additional particular at (e) (the previous particular at (e) becoming the particular at (g) adding the additional geographic locations of Moyamba District at new particular (e) and of Bonthe District at new particular (f);

Counts 3-4 - expanded the time frame of particular (a) to 30 April 1998 and added the additional locations of Blama and Kamboma and expanded the time frame of particular (b) to December 1999 and added the Districts of Moyamba and Bonthe;

Counts 5 - changed the charge from looting "private property" to "civilian property";

Counts 6-8 - framed as occurring "at all times relevant to this indictment" were consequently expanded by some 20 months to December 1999 by reason of alterations referred to above.

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

III. PROSECUTION RESPONSE

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

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

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

IV. ACCUSED'S REPLY

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

V. APPLICABLE PROVISIONS

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

Statute

Article 17(4)

1. All accused shall be equal before the Special Court.
2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
 - a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
 - b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
 - c. To be tried without undue delay;
 - d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
 - e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
 - f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
 - g. Not to be compelled to testify against himself or herself or to confess guilt.

Rules

Rule 26bis

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.

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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.

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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 right to be tried within a reasonable time by an impartial court or tribunal.

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

V. THE MERITS OF THE APPLICATION

1. Service of Consolidated Indictment

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

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

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

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

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

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

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

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

2. Differences Between the Initial Indictment and Consolidated Indictment

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

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

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

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

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

¹ Prosecution Motion for Joinder, para. 10.

² Para. 24.

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

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

(d) Between October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Moyamba District, to include the towns of Sembehun and Gbangbatoke. As a result of the actions Kamajors continued to identify suspected “Collaborators” and others suspected to be not supportive of the Kamajors and their activities. Kamajors unlawfully killed an unknown number of civilians. They unlawfully destroyed and looted civilian owned property.

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Pleading Principles for an Indictment

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

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

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

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

³ *Prosecutor v. Kupreskic*, Appeals Judgement, para. 114.

⁴ *Supra*, para. 92.

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

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

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

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

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

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

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

⁵ See *Prosecutor v. Brdanin*, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001, para. 18.

⁶ *Id.*, para. 19.

⁷ *Id.*, para. 22.

⁸ *Supra*, para. 92.

⁹ *Prosecutor v. Kupreskic*, Appeal Judgement, para. 88.

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

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

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

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

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

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

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

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

30. In joint trials each Accused shall be accorded the same rights as if he or she were being tried separately.¹³ The rights of the Accused as enshrined in Articles 9 and 14 of the ICCPR and Article 7 of the ACHPR, and as outlined in Rule 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,”¹⁴ and “to have adequate time and facilities for the preparation of his or her defence,”¹⁵ apply equally to an Accused person tried separately on a single indictment as to an Accused person tried jointly on a consolidated indictment.¹⁶ In either instance, where new charges are sought to be added to an Indictment against an Accused person, whether in a separate or joint trial, the Prosecution is obligated pursuant to Rule 50 of the Rules, to seek leave of the Trial Chamber to amend the Indictment.¹⁷

4. Arraignment on Indictment

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

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

5. Ne Bis In Idem

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

¹³ See Rule 82(A) of Rules.

¹⁴ Para. 4(a).

¹⁵ Para. 4(b).

¹⁶ See *The Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Decision and Order on Prosecution Motions for Joinder, 27 January 2004, para. 4.

¹⁷ Rule 50 of the Rules.

¹⁸ *R v. Fyffe* [1992] Crim. L.R. 442, C.A.

¹⁹ See *Abney v United States* 431 US 651 (1977), at 660-662.

²⁰ Kriangsak Kittichaisaree, *INTERNATIONAL CRIMINAL LAW*, Oxford University Press (2001) p. 289.

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

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

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

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

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

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

6. Conclusions

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

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

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

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

²¹ See *Pankratz Lumber Co. V. U.S.*, 50 F.2d 174, C.A. 9 1931 (9th Circ.); *Dunaway v. United States* (1953) 92 US App DC 299, 205 F3d 23.

²² *R v. Fyffe*, (1991) Crim. L.R. 1992, Jun, 442-444, CA .

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

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

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

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

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

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

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

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

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

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

B

RST

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

ORDERS AS FOLLOWS FOR THE FIRST ACCUSED:

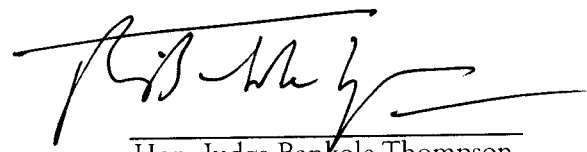
1. That the identified portions of the Consolidated Indictment that are material and embody new factual allegations and substantive elements of the charges be stayed, and that the Prosecution is hereby put to its election either to expunge completely from the Consolidated Indictment such identified portions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

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

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

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


Hon. Judge Pierre Boutet


Hon. Judge Bankole Thompson

