



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: 8th of December, 2004

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

DECISION ON THIRD ACCUSED MOTION FOR SERVICE OF
THE CONSOLIDATED INDICTMENT AND FUTHER APPEARANCE

Office of the Prosecutor:

Luc Côté
James Johnson

Court Appointed Counsel for Sam Hinga Norman:

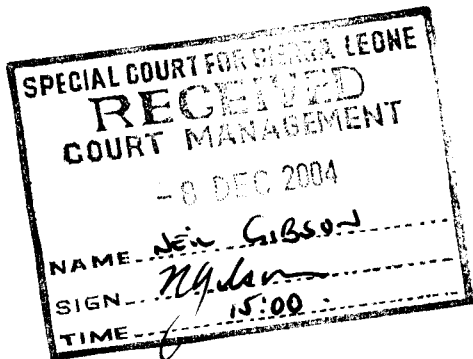
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Tim Owen, Q.C.

Court Appointed Counsel for Moinina Fofana:

Michiel Pestman
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Victor Koppe

Court Appointed Counsel for Allieu Kondewa:

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

SEIZED OF the *Allieu Kondewa Motion for Service of Consolidated Indictment and a Further Appearance*, filed on the 4th of November, 2004 (“Motion”);

NOTING the *Prosecution Response to Kondewa Motion for Service of Consolidated Indictment and a Further Appearance*, filed on the 10th of November, 2004 (“Response”);

MINDFUL of the Trial Chamber’s *Decision and Order on Prosecution Motions for Joinder*, including Separate Opinion of Hon. Judge Benjamin Mutanga Itoe, dated the 27th of January, 2004 (“Decision on Joinder”);

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

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;

MINDFUL of the Trial Chamber’s *Decision on the Second Accused’s Motion for Service and Arraignment on the Consolidated Indictment*, including Separate Concurring Opinion of Hon. Judge Bankole Thompson, dated the 6th of December, 2004;

CONSIDERING 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. PROCEDURAL HISTORY

1. On the 1st of July, 2003, the Accused, Allieu Kondewa was arraigned before the Trial Chamber and pleaded not guilty to eight counts listed in the indictment against him.¹ On the 7th of November, 2003, the Accused, Kondewa filed a motion alleging defects in the form of the Indictment.² On the 27th of November, 2003, the Trial Chamber delivered its decision on the said motion and ordered the Prosecution to elect either to delete in every count and wherever they appear in the Indictment the phrases “but not limited to those events”, and “including but not limited to”, or provide in a Bill of Particulars specific additional events alleged against the Accused in each count. Additionally, the Trial Chamber ordered that the Amended Indictment or Bill of Particulars be filed

¹ *Prosecutor v. Allieu Kondewa*, Case No. SCSL-03-12-I, Indictment, dated the 24th of June, 2003 (“Initial Indictment”).

² *Prosecutor v. Allieu Kondewa*, Case No. SCSL-03-12-PT, Preliminary Motion Based on Defects on the Indictment against Allieu Kondewa, dated the 7th of November, 2003.

within 7 days of the date of service of its decision and be served on the Accused according to Rule 52 of the Rules.³

2. In the introduction to the Bill of Particulars, filed on the 5th of December, 2003,⁴ the Prosecution stated that the Bill of Particulars contains “additional events in support of the Counts charged in the [Initial] Indictment.” These additional events, as was submitted by the Prosecution, were “an expansion of previously mentioned events referred to at Paragraphs 20-24 of the Indictment” and included districts and towns within the territory of Sierra Leone, and one reference to “road ambushes” at various locations.

3. On the 9th of October, 2003, the Prosecution sought in a Motion to join together Allieu Kondewa (Third Accused) with the Accused Sam Hinga Norman (First Accused) and the Accused Moinina Fofana (Second Accused). The Prosecution requested that the Indictments against the three Accused be consolidated into a single Indictment and these cases 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 PARTIES

Defence Motion:

4. By written Motion, the Third Accused seeks proper service of the Consolidated Indictment. The Third Accused expresses his support and agreement with the motions filed by the other co-accused with regard to the same subject matter.⁵ According to Counsel for the Third Accused, the latter has not yet been properly served with the Consolidated Indictment.⁶ In support of its Motion, the Third Accused refers to the Trial Chamber’s Decision on Joinder and submits that “the new indictment differed in its content with regards to the times and locations of the crimes allegedly committed by the Accused”.⁷

5. The Third Accused seeks the following relief from the Trial Chamber: (1) that the Initial Indictment be quashed; (2) that he be served with the Consolidated Indictment in accordance with Rule 52 of the Rules; and (3) that he be re-arraigned in accordance with Rule 50 (B) (i) of the Rules, given the differences between the two indictments.⁸

³ *Prosecutor v. Allieu Kondewa*, Case No. SCSL03-12-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, dated the 27th of November, 2003, para. 11; Annexure, paras (ii), (iii).

⁴ *Prosecutor v. Allieu Kondewa*, Case No. SCSL03-12-PT, Bill of Particulars, dated the 5th of December, 2003.

⁵ *Motion for Service and Arraignment on Second Indictment*, filed by Sam Hinga Norman on the 21st of September 2004 and *Moinina Fofana Motion for Service of Consolidated Indictment and a Further Appearance*, filed on the 21st of October, 2004.

⁶ Motion, para. 5.

⁷ *Ibid.*, para. 6 referring to the Decision on Joinder at para. 24.

⁸ *Ibid.*, para. 7.

Prosecution Response:

6. The Prosecution respond that the Motion should be dismissed in its entirety. The Prosecution submit that the Consolidated Indictment was served on the Defence Counsel for the Third Accused and not the Accused himself on the 5th of February 2004.⁹ The Prosecution submit that this failure amounts to an administrative error and has not caused any identifiable prejudice to the Accused. The Prosecution assert that the Defence has demonstrated knowledge of the charges contained in the Consolidated Indictment as it had defended the Third Accused against the charges during the first and second sessions of the trial.¹⁰

7. The Prosecution submit that the Third Accused, while claiming that there are “differences” between the Initial Indictment and the Consolidated Indictment, did not make attempt to define those differences. The Prosecution claim that the Counsel for the Accused misinterprets the Trial Chamber’s Decision on Joinder. The Prosecution further submit that “neither the content nor the times and locations contained in the Consolidated Indictment are new to this Accused” since they were already reflected in the Bill of Particulars.¹¹

8. The Prosecution submit that no further arraignment is necessary on the Consolidated Indictment as the latter contains no new charges. The Prosecution state that the majority in the Decision on Joinder found that the specific crimes charged in the counts of all three Indictments are exactly the same, and the Third Accused did not appeal any aspect of that Decision.¹²

9. The Prosecution submit that it is well understood from the Trial Chamber’s Decision on Joinder that the Consolidated Indictment supersedes the initial Indictment.¹³

Defence Reply:

10. No reply was filed by the Defence.

III. APPLICABLE PROVISIONS

11. The governing provisions applicable to the issues that have been raised in this application are embodied in the Rules of the Special Court that are further discussed hereafter:

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.

[...]

⁹ Response, paras 3, 7 referring to an e-mail attachment from Court Management.

¹⁰ *Ibid.*, para. 7.

¹¹ *Ibid.*, para. 8.

¹² *Ibid.*, para. 9.

¹³ *Ibid.*, para. 10.

(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.

IV. THE MERITS OF THE APPLICATION

1. Service of Indictment

12. The first issue to be determined by the Trial Chamber is whether the Third Accused was properly 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 Third 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 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 [...];
[...]
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 discussed and elaborated by Hon. Judge Thompson in his Separate Concurring Opinion,¹⁴ 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.

16. 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:

- (1) The Accused was served on the 27th of June, 2003, with a copy of the Initial Indictment that was approved on the 24th of June, 2003, which outlined the charges against him.
- (2) On the 27th of November, 2003, the Trial Chamber in its decision on the Accused's motion for defects in the form of the Indictment ordered the Prosecution to amend the Indictment or to provide in a Bill of Particulars specific additional events alleged against the Accused in each count.
- (3) Counsel, who represented the Accused at this time, were formally served with a copy of the Bill of Particulars, on the 5th of December, 2003.

¹⁴ Separate Concurring Opinion of Judge Bankole Thompson on Decision on First Accused's Motion for Service and Arraignment on the Consolidated Indictment, dated the 29th of November, 2004.

(4) A copy of the Consolidated Indictment was also served on Counsel on the 5th of February, 2004, and their obligation consisted of representing their client, which included familiarising him with the charges against him.

(5) The Accused did not raise the issue of non-service during the Pre-Trial Conference or any of the Status Conferences.

(6) The Accused responded to the charges against him in his Pre-Trial Brief filed on the 22nd of March, 2004 and in his Supplemental Pre-Trial Brief filed on the 18th of May, 2004, and has defended the charges against him in the first and second sessions of the CDF trial.

17. Before making a conclusive finding on this issue, however, the Trial Chamber considers it necessary to assess whether the Consolidated Indictment contains changes or additions that were not contained in the Initial Indictment and if there are such changes or additions whether these changes or additions are materially different from the allegations contained in the Initial Indictment. Furthermore, whether such changes or additions would constitute new offences or new charges that would differ substantially from the charges listed in the Initial Indictment which was served on the Accused and which would then require that the Accused be re-arraigned with respect to such new charges, if any.

2. Differences Between Initial Indictment and Consolidated Indictment

18. The Trial Chamber is aware that this 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 it is entitled *proprio motu* to raise issues as to the form of an Indictment. 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, or material, or additions to the Consolidated Indictment by comparison to the Initial Indictment.

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".¹⁵

20. The Third Accused, by his Motion, characterised the finding of the Trial Chamber in its Decision on Joinder as acknowledging that the Consolidated Indictment "differed in its content with regards to the times and locations of the crimes allegedly committed by the Accused".¹⁶ However, the Third Accused failed to further describe these alleged "differences".

21. The Trial Chamber has proceeded to make a complete reference to its finding in the above mentioned Decision, namely, that the specific crimes charged in the counts of three Indictments are exactly the same, "except for the allegations in respect of additional time and locations as regards

¹⁵ Prosecution Motion for Joinder, para. 10.

¹⁶ See *supra* footnote 7.

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Accused Moinina Fofana and Allieu Kondewa, which is an issue of no materiality for the instant purpose".¹⁷

22. It is notable that the Trial Chamber in its Decision on the Accused's motion on the form of the Indictment, 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.¹⁸ In accordance with the Trial Chamber's Decision 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.

23. As can be observed from the table below, a thorough comparison of the Consolidated Indictment with the Initial Indictment amended with the Bill of Particulars reveals clearly that no additions or changes were made to the Consolidated Indictment.

24. Comparative Table of the Initial Indictment with the Bill of Particulars and Consolidated Indictment (the additions are underlined).

Bill of Particulars (with reference to paragraphs of the Initial Indictment)	Consolidated Indictment
Paragraph 20(a) - <u>and at or near the towns of Lalehun, Kamboma, Konia, Talama, Panguma and Sembehun</u>	Paragraph 25(a) - <u>and at or near the towns of Lalehun, Kamboma, Konia, Talama, Panguma and Sembehun</u>
Paragraph 20(b) - at or near <u>the District Headquarters town of Kenema and at the nearby locations of SS Camp, and Blama</u>	Paragraph 25(b) - at or near <u>the District Headquarters town of Kenema and at the nearby locations of SS Camp, and Blama</u>
Paragraph 20(d) - <u>in locations in Bo District including the District Headquarters town of Bo, Kebi Town, Koribondo, Kpeyama, Fengehun and Mongere</u>	Paragraph 25(d) - <u>in locations in Bo District including the District Headquarters town of Bo, Kebi Town, Koribondo, Kpeyama, Fengehun and Mongere</u>
Paragraph 20(e) - <u>in locations in Moyamba District, including Sembehun, Taiama, Bylago, Ribbi and Gbangbatoke</u>	Paragraph 25(e) - <u>in locations in Moyamba District, including Sembehun, Taiama, Bylago, Ribbi and Gbangbatoke</u>
Paragraph 20(f) - <u>in locations in Bonthe District, including Talia (Base Zero), Mobayeh, Makose and Bonthe Town</u>	Paragraph 25(f) - <u>in locations in Bonthe District, including Talia (Base Zero), Mobayeh, Makose and Bonthe Town</u>
Paragraph 20(g) - <u>in road ambushes at Gumahun, Gerihun, Jembah and the Bo-Matotoka Highway</u>	Paragraph 25(g) - <u>in road ambushes at Gumahun, Gerihun, Jembah and the Bo-Matotoka Highway</u>
Paragraph 21(a) - <u>Kenema Town, Blama, Kamboma</u>	Paragraph 26(a) - <u>Kenema Town, Blama, Kamboma</u>
Paragraph 22 - <u>in Kenema District, the towns of Kenema, Tongo Field and surrounding areas, in Bo District, the towns of Bo, Koribondo, and the surrounding areas, in Moyamba district, the towns of Sembehun, Gbangbatoke and</u>	Paragraph 27 - <u>in Kenema District, the towns of Kenema, Tongo Field and surrounding areas, in Bo District, the towns of Bo, Koribondo, and the surrounding areas, in Moyamba district, the towns of Sembehun, Gbangbatoke and</u>

¹⁷ Para. 24.

¹⁸ *Supra* note 3, para. 11.

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<u>surrounding areas, and in Bonthe District, the towns of Talia (Base Zero), Bonthe Town, Mobayeh, and surrounding areas</u>	<u>surrounding areas, and in Bonthe District, the towns of Talia (Base Zero), Bonthe Town, Mobayeh, and surrounding areas</u>
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3. Arraignment on Indictment

25. With respect to arraignment on the Indictment, it is clear in the practice of the International Tribunals,¹⁹ 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”.²⁰

26. 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 and therefore would find application only when new charges have been added to the Initial Indictment, which is clearly not the situation with respect to this Accused.

4. Conclusions

27. The Trial Chamber finds that while the Third Accused 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 charges against the Accused contained in the Consolidated Indictment that were not contained in the Initial Indictment as amended with the Bill of Particulars. There is neither an amended indictment nor a new indictment. The only additions to the Initial Indictment are those stemming from the Bill of Particulars and these additions were made following the motion of the Third Accused alleging the defects on the Indictment. There is, therefore, in these circumstances, no requirement to arraign the Accused on the Consolidated Indictment, in accordance with Rule 50 of the Rules, considering that there are no new charges contained therein. The Trial Chamber considers that this Motion by the Third Accused is without any foundation. The Trial Chamber opines, with all due respect to the rights of the Third Accused to a fair trial, that this Motion is unnecessary and superfluous, as the Accused cannot, first, object to the form of an indictment for lack of particulars and then claim that the provision of such particulars, as ordered by the Court pursuant to such an application, is hindering the exercise of his right to a fair trial.

¹⁹ See for example, *Prosecutor v. Kvočka*, IT-98-30/T, 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, 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 *Prosecutor 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 the Special Court and Rule 50 of the Rules of Procedure and Evidence of the ICTR and ICTY, which provide that a further arraignment will be held where an amended indictment contains new charges.

²⁰ *R v. Fyffe* [1992] Crim. L.R. 442, C.A.

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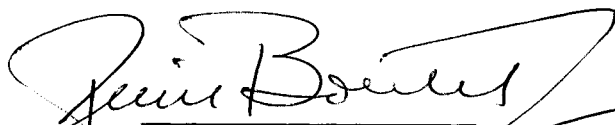
FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DISMISSES the Motion of the Third Accused in its entirety.

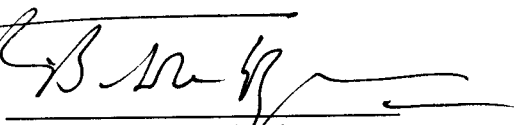
Hon. Judge Bankole Thompson appends a separate concurring opinion to this decision adopting his own reasoning and putting forward his reasons in support thereof;

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

Done in Freetown, Sierra Leone, this 8th day of December, 2004



Hon. Judge Pierre Boutet



Hon. Judge Bankole Thompson

[Seal of the Special Court for Sierra Leone

