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SPECIAL COURT FOR SIERRA LEONE

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IN THE APPEALS CHAMBER

Before: Justice Emmanuel Ayoola, Presiding
Justice Raja Fernando
Justice George Gelaga King
Justice Renate Winter
Justice Geoffrey Robertson

Registrar: Robin Vincent

Date: 16 May 2005

PROSECUTOR Against **Samuel Hinga Norman**
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-04-14-AR73)

DECISION ON AMENDMENT OF THE CONSOLIDATED INDICTMENT

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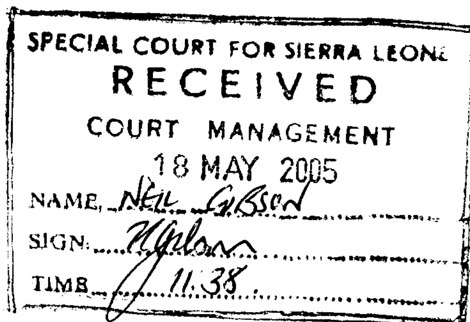
Court-Appointed Counsel for Fofana:
Michiel Pestman

Court-Appointed Counsel for Kondewa:
Charles Margai



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THE APPEALS CHAMBER of the Special Court for Sierra Leone ("Special Court" or "Court");

SEIZED of the Prosecution Appeal Against the Trial Chamber's Decision of 29 November 2004 filed on 12 January 2005 ("Prosecution Appeal");

SEIZED ALSO of the Interlocutory Appeal by the First Accused Against the Trial Chamber's Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment, 29 November 2004, which was filed on 17 January 2005 ("Defence Appeal").

NOTING the Decision on Service and Arraignment of the Consolidated Indictment of 29 November 2004 issued by Trial Chamber I, the Separate Concurring Opinion of Justice Thompson of the same date (collectively "Trial Chamber Decision"), as well as the Dissenting Opinion by Justice Itoe filed 3 December 2004 ("Dissenting Opinion");

NOTING the Decisions of Trial Chamber I of 15 and 16 December 2004 respectively granting both the Prosecution and First Accused leave to file these appeals pursuant to Rule 73(B) of the Rules and Procedure and Evidence ("Rules");

NOTING the submissions of the parties detailed below;

CONSIDERING that it is in the interests of justice to determine these appeals jointly as they relate to the same decision of Trial Chamber I,

HEREBY DECIDES:

I. PROCEDURAL HISTORY

1. On 12 January 2005 the Prosecution filed its Appeal against the Impugned Decision ("Prosecution Appeal").[1] While the Defence response was due on 21 January,[2] it was not

[1] Prosecution Notice of Appeal Against the Trial Chamber's Decision of 29 November 2004 and the Prosecution Submissions on Appeal, 12 January 2005.
[2] Paragraph 12 of the Practice Direction on Certain Appeals before the Special Court of 30 September 2004 provides: "A document may be filed outside the time limits set out in the Rules, in particular Rule 7 of the Rules. In such cases, the Party, State, organization or person filing the document shall indicate the reason for the delay on the relevant Court Management Section form. A Late Filing Form shall be completed by the Court Management Section and served with the document. The Judge or Chamber before which such document is filed shall decide whether to accept the document despite its late filing."

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filed until 26 January 2005. According to the Defence it had not been served with the Prosecution Notice of Appeal until 18 January.[3] No reply has been filed.

2. On 17 January 2005 the Norman Defence filed its Appeal against the Impugned Decision,[4] although it was due by 13 January 2005.[5] The Prosecution filed its Response on 24 January[6] and the Defence replied on 28 January.[7]

II. SUMMARY OF THE IMPUGNED DECISION

1. Background and Undisputed Facts

3. The First Accused made his initial appearance pursuant to Rule 61 of the Rules on 15, 17, 21 March 2003.[8] He pleaded not guilty to the initial Indictment, approved by Judge Thompson on 7 March 2003. The second and third Accused Fofana and Kondewa made their initial appearances on 1 July 2005. The Indictment against Kondewa was supplemented by a Bill of Particulars on 5 December 2003, pursuant to a decision of Trial Chamber I on 27 November 2003. The trial against the First Accused was joined with the trial of the two Accused Fofana and Kondewa pursuant to a decision of the Trial Chamber on 27 January 2004. This joinder decision further ordered the Prosecution to file a single consolidated Indictment as the basis for the joint trial. This Consolidated Indictment was filed on 5 February 2004. The joinder decision did not order that the new Consolidated Indictment needed to be confirmed again by a designated judge pursuant to Rule 47 of the Rules.[9] However, the joinder decision ordered that the Consolidated Indictment be served on each Accused in accordance with Rule 52 of the Rules.

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[3] Defence Response to Prosecution Notice of Appeal Against the Trial Chamber's Decision of 29 November 2004 and Prosecution Submissions on Appeal, dated 14 January 2005, filed 26 January 2005.

[4] Interlocutory Appeal by the First Accused Against the Trial Chamber's Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment, 29 November 2004, dated 14 January 2005, filed 17 January 2005.

[5] Rule 108(c) of the Rules provides: "In appeals pursuant to Rules 46, 65 and 73(B), the notice and grounds of appeal shall be filed within 7 days of the receipt of the decision to grant leave."

[6] Prosections Response to Interlocutory Appeal by the First Accused against the Trial Chamber's Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment, 29 November 2004, filed 25 January 2005.

[7] Defence Reply to the Prosecution Response to Interlocutory Appeal by the First Accused against the Trial Chamber's Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment 29 November 2004, 28 January 2005.

[8] The Rules of the Special Court refer to the initial appearance and further appearance of the accused. See Rule 61 and Rule 50 of the Rules. The Rules do not use the U.S. legal term of arraignment or re-arraignment. It might therefore be more adequate to speak of the initial appearance and further appearance than arraignment as this might steer confusion.

[9] But see Judge Itoe's dissenting opinion.

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4. The Consolidated Indictment was not served on the Accused personally, but only to his defence Counsel on 5 February 2004. Even though the Consolidated Indictment charged the First Accused with the same crimes as contained in the Initial Indictment, the factual allegations against the first Accused varied from those contained in the Initial Indictment. The nature and implications of these changes are discussed in detail below.

2. The Majority Decision and Separate Concurring Opinion

5. The Trial Chamber found that the failure to serve the Consolidated Indictment personally on the Accused constituted a procedural error, as Rule 52 of the Rules explicitly demands such a personal service on the Accused and not merely on the defence Counsel of the Accused. However, the Trial Chamber found that such a procedural error itself did not unfairly prejudice the Accused's right to a fair trial as he was served with the Initial Indictment.[10] A prejudice against the Accused could only be found if the Consolidated Indictment contained materially different charges from those listed in the Initial Indictment.

6. With regard to the differences between the Initial and Consolidated Indictment the Trial Chamber concluded that the factual allegations in the Initial Indictment have been expanded and elaborated upon in the Consolidated Indictment and that some substantive elements have been added.[11] The Trial Chamber found that the differences contained in the Consolidated Indictment constitute material changes to the Initial Indictment and could prejudice the Accused's right to a fair trial if the trial proceeds on the basis of the Consolidated Indictment.[12]

7. The Trial Chamber held that a consolidated or amended Indictment does not need to be confirmed by a Trial Chamber or Judge if the initial Indictment was already confirmed, and the charges are essentially the same (as it found they were in the present case). However, as the Trial Chamber had already found that there had been material changes to the Initial Indictment, it stated that the Accused could be prejudiced if he is not personally served and does not have the opportunity of a further appearance in order to enter a plea on the material changes to the Consolidated Indictment.

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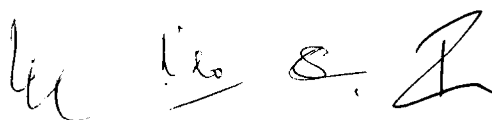
[10] Impugned Decision, para. 13.
[11] Impugned Decision, para. 20.
[12] Impugned Decision, para. 30.



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8. The Trial Chamber clarified that the Consolidated Indictment does not constitute a new Indictment, and that therefore fears of the Accused of being prosecuted once more on the Initial Indictment (*ne bis in idem*) are without basis, as it has been subsumed into the Consolidated Indictment[13]

9. On the basis of the above findings and in particular due to the stated material changes in the Consolidated Indictment the Trial Chamber ordered the following:

> "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. "[14]

10. Judge Thompson filed a Separate and Concurring Opinion, in which he held that the process of *consolidation* in itself does not necessarily constitute an amendment. He relied upon the Criminal Procedure Act 1965 (Sierra Leone) in concluding that the Accused is estopped from challenging the Consolidated Indictment because he has already pleaded "not guilty" to the 8 counts which are subsumed and replicated in the Consolidated Indictment. However, as a matter of fundamental fairness to the Accused, he considered it necessary to provide some remedy for the fact that new and expanded factual allegations were added without prior authorisation of the Court, notwithstanding the fact that these additions did not amount to a new Indictment or new charges.

3. Judge Itoe's Dissenting Opinion

11. In his Dissenting Opinion, Judge Itoe found that that the Consolidated Indictment *replaced* the Initial Indictments, but that it still should have been considered as a *new* Indictment that attracted the approval and pleading procedures contained in Rule 47 and Rule 61. However, he upheld the Defence claim that the Initial Indictment continues to exist, and found that it would need to be withdrawn to definitively avoid any risk of double jeopardy, at least in terms of re-arrest or detention on the Initial Indictment even if it never proceeded to trial.

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[13] Impugned Decision, para. 36.
[14] Impugned Decision, page 16.

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12. In relation to the question of the service on the Accused of the Consolidated Indictment, Judge Itoe held that the breach of the Rule 52 mandatory requirement of personal service was "an administrative muddle which should be put right since it is, in itself, a violation of the law for which there must be no other judicial remedy than declaring it illegal, annulling it accordingly, and ordering that service of the Consolidated Indictment be effected in conformity with ...the Rules..."[15]

13. On the question of the differences between the initial and Consolidated Indictment, Judge Itoe noted that in seeking to join the three initial Indictments together, under the Rules the Prosecution had two options:

   a. Seeking leave to amend the Indictment pursuant to Rule 50; or

   b. Filing a new Indictment, which would have been then subject to the normal procedures contained in Rules 47, 52 and 61.

In filing the Consolidated Indictment without seeking leave to amend, he deemed the Prosecution's action as having exercised the second option.[16]

14. Therefore, in essence he concludes that fulfilment of the legal formalities of both personal service and a "re-arraignment" (or in fact, a "new initial appearance") on the Consolidated Indictment are required. The failure to fulfil these legal formalities constituted a violation of the rights of the Accused guaranteed under Article 17 of the Statute of the Special Court.

15. The pleas already entered by the Accused to the charges in the Initial Indictment cannot be transferred to the Consolidated Indictment, as the act of consolidation had itself transformed the charges into new charges for the purposes of pleading. He noted that the gravity of the offences charged warrants the "exercise of even more caution than the ordinary and a reinforced posture of scrupulousness and scrutiny in the conduct of the proceedings" and to order a further appearance to avoid even the perception that the fair trial rights of the Accused have been violated.[17]

16. To summarise, the Dissenting Opinion found that:

[15] Dissenting Opinion, para 43.
[16] At para 95 of the Dissenting Opinion, however, Judge Itoe notes that the Prosecution's action in filing the Consolidated Indictment was with the tacit leave of the Trial Chamber.
[17] Ibid and para. 108.

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a. the continued existence of the Initial Indictment can only be cured by a withdrawal pursuant to Rule 51;
b. the (non-personal) service of the Consolidated Indictment should be declared null and void;
c. the Consolidated Indictment is valid but new and requires a further appearance;
d. that the situation could be remedied by a formal amendment as long as this does not prejudice the defence.

III. SUBMISSIONS OF THE PARTIES ON APPEAL

1. The Prosecution Notice of Appeal

17. The Prosecution submits three grounds of appeal:

a. That the Trial Chamber erred when it found that the Consolidated Indictment contained changes that were "material" to the case;

b. That the Trial Chamber erred when it found that any additions to the Consolidated Indictment could prejudice the Accused's right to a fair trial;

c. That the Trial Chamber erred when it considered that additions to the consolidated Indictment, without any amendments to the counts against the Accused could prejudice the rights of the Accused to a fair trial.

18. In regard to the first ground, the Prosecution submits that the differences in the language between the Initial Indictment and the Consolidated Indictment are not "material", but on the contrary spell out with greater precision and specificity the charges against the Accused in more detail than in the Initial Indictment. The differences in the language identified by the Trial Chamber in paragraph 38 of the impugned decision are either the result of factual allegations in the Consolidated Indictment being expressed with greater precision or particularity than in the Initial Indictment. Further, the narrowing of the charge against the Accused in paragraphs 27 and 29 of the Consolidated Indictment were simply stylistic and editorial and therefore not material to the charge against the Accused. The changes did not add new substantive elements of the charges, as the elements of the charges, nor have the numbers of counts changed.

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19. The Prosecution argues that it was not necessary to file a proposed consolidated Indictment to its application for joinder and that such a measure was not anticipated by the Trial Chamber.[18] The Prosecution further submits that the consolidation of three Indictments can never be a purely mechanical exercise and that due to the different wordings in the three initial Indictments there needed to be some adjustments and refining in the wording of the consolidated Indictment.

20. The Prosecution submits that the Consolidated Indictment does not prejudice the Accused as it gives better effect to the general principles governing the form of an Indictment than the Initial Indictment. The Prosecution makes particular reference in this regard to the Trial Chamber "Decision on Form of Indictment" in the initial case against Kondewa (now the third Accused in the Consolidated Indictment), which ordered the Prosecution to file a Bill of Particulars as the Initial Indictment was too vague and unspecific. The Prosecution acknowledges that these further particulars were then incorporated and reflected in the Consolidated Indictment.

21. With regard to the third ground of appeal the Prosecution submits that the Accused did not object to the Consolidated Indictment at the time it was served on his Defence Counsel, delaying his objections for many months, which in turn is an indication of the absence of prejudice. In this regard the Prosecution mentions the requirement of the parties in international criminal law to exercise due diligence. As the Defence has not raised its objections earlier, this may be reason for denying any relief to it at this late stage.[19]

22. Further, the Prosecution submits that the Defence has not proved that the Accused would suffer any prejudice.[20]

23. For the reasons above, the Prosecution requests the Appeals Chamber to reverse the Trial Chamber Decision (impugned Decision) to the extent that it allowed the Defence objections to the Consolidated Indictment, and to dismiss these objections.

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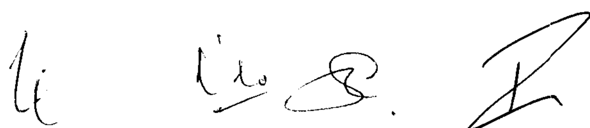
[18] However, it has to be noted that it is a general practice in the ICTR and ICTY to either annex a drafted amended or consolidated indictment to the motion. If such an annex is not attached the Trial Chamber would often specifically direct the Prosecution how to amend the indictment.
[19] Prosecution's Notice of Appeal, para. 90.
[20] Prosecution's Notice of Appeal, para. 91.



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2. **The Defence Response to the Prosecution's Notice of Appeal**

24. The Defence submits that the Prosecution has failed to demonstrate the non-materiality of the specified charges and additions in the consolidated Indictment. Therefore the Prosecution has failed to demonstrate any entitlement to the relief being sought.

25. More specifically the defence argues that Rule 52 of the Rules is mandatory in nature and that this rule was also spelled out in the Joinder Decision of the Trial Chamber. Therefore the failed service is not only non-compliance with a mandatory rule but in addition disobedience of a peremptory judicial order.[21]

26. The Defence submits that Norman did raise an oral objection to the Consolidated Indictment on 14 June 2004 and that the narrowing of a charge is a material change to the Indictment.

27. It is further argued by the defence that the Appeals Chamber does not have the authority to revise a Trial Chamber decision, but must refer it back to the Trial Chamber when it finds an error of fact or law.

3. **The Prosecution's Reply**

28. The Prosecution submits that it is not sufficient to raise oral objections, but that the Rules clearly state that parties need to move before the Trial Chamber with a motion pursuant to Rule 73 of the Rules.

29. The Prosecution argues that the Appeals Chamber has a clear authority under the rules to revise decisions of the Trial Chamber pursuant to Art. 20(2) of the Statute which expressly provides that the Appeals Chamber may "affirm, reverse or revise" the decision taken by the Trial Chamber.

30. The Prosecution reiterates its arguments that the narrowing of locations make the Indictment more specific and that therefore these changes do not constitute a material change to the Initial Indictment. The changes in the Consolidated Indictment therefore do not constitute any addition of a new charge or any new criminal liability.

[21] Defence Reply to the Prosecution's Notice of Appeal, para. 8.

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4. Defence Notice of Appeal

31. The Defence submissions deal in great length with alleged errors and violations of the "joinder rules", abuse of process and question the conformity of the wording in the Statute of "persons who bear the greatest responsibility" with the presumption of innocence. With regard to the Impugned Decision that is being appealed, the Defence submits that as the new Indictment contained new charges, the Accused should have had the opportunity to plead to these new charges pursuant to Rule 61 of the Rules and that he should have been served personally with the new amended Indictment.

32. The Defence urges the grant of following relief:

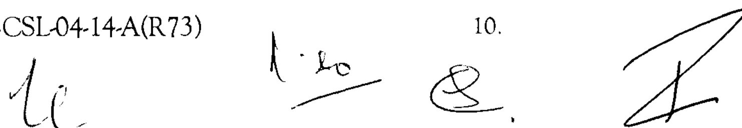
    a. Interim Stay of all trial proceedings, with immediate effect as from the beginning of the fourth session thereof, pending and up until final determination of this interlocutory appeal.

    b. A declaration that the current Consolidated Indictment is substantively and definitely unamendable to and unavailable for amendment in any shape or form because it is, and has been since its inception, invalid, null and void as a result of its illegal modes of genesis or coming into being.

    c. A declaration that the current Consolidated Indictment is formally and logically unamendable to and unavailable for amendment in the particular nature, form and manner proffered by the Trial Chamber, in that the so-called "amendment" involves a gross logical absurdity or formal impossibility as its seeks to retain intact and in whole in the Consolidated Indictment the said "stayed" elements as they are precisely and exactly contained in at present.

    d. A declaration that the current Consolidated Indictment and all trial proceedings thereon ought to be permanently stayed or terminated forthwith and immediately, on the ground of egregious abuse of process of the court in view of sustained and severe violations of the right of the Accused.

    e. To dismiss the current Consolidated Indictment forthwith and immediately, with prejudice to the Prosecutor.



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f. To direct or Order the immediate release of the Appellant from detention and the custody of the Special Court for Sierra Leone.

g. To direct or order that the Appellant be compensated satisfactorily and in full for the prolonged detention and subjection to trial proceedings so far on the current consolidated Indictment.

h. Any other or further relief or order as the Appeals Chamber may consider fit, proper and just in all circumstances.

5. Prosecution Response to the Defence Notice of Appeal

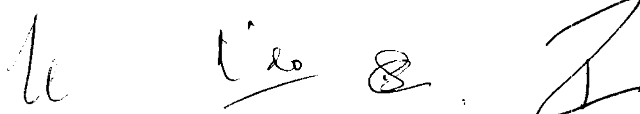
33. The Prosecution submits that the Notice of Appeal should only deal specifically with the decision on appeal and any alleged errors thereto. Further the clear onus is on the appellant to demonstrate how the Trial Chamber erred. The appellant has to specifically demonstrate on which aspects the Trial Chamber erred. A duplication of argument already submitted to the Trial Chamber is not sufficient.

34. On the personal service of the Indictment the Prosecution argues that none of the Defence teams objected to the Consolidated Indictment at the time that it was served on 5 February 2004. In particular the Prosecution points out that the trial started on 3 June 2004 and only three months later, on 21 September 2004, the Accused formally raised certain objections to the consolidated Indictment by filing a motion.

35. As the consolidation of three Indictments is not a mere mechanical exercise, the Prosecution submits that it is in the nature of this exercise that minor changes, which are not material to the Indictment need to be made. The changes and additions do not contain any material changes.

6. Defence Reply

36. By way of reply, the Defence refer to their response to the Prosecution Appeal, as well as their own appeal, and reiterate their abuse of process submissions.



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III. APPLICABLE LAW

37. Article 17(4) of the Statute of the Special Court provides:

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.

38. Rule 26*bis* of the Rules provides:

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.

39. Rule 47 – Review of Indictment – provides:

(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.

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(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.

40. Rule 48 – Joinder of Accused or Trials – provides:

(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.

41. Rule 50 – Amendment of Indictment – relevantly provides:

(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 char;
 (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.

42. Rule 52 - Service of Indictment – provides:

(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.

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(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. INTRODUCTORY DISCUSSION

43. These appeals, both by the Prosecution and the Defence, essentially concern amendments to the Indictment: matters that should be decided by the Trial Chamber in the course of the trial process and not become the subject of any interlocutory appeal. The standard for leave to appeal at an interlocutory stage is set high by Rule 73(B), which restricts such leave to "exceptional cases" where "irreparable prejudice" may otherwise be suffered. That test is not satisfied merely by the fact that there has been a dissenting opinion on the matter in the Trial Chamber, or that the issue strikes the Trial Chamber judges as interesting or important for the development of international criminal law. In this Court, the procedural assumption is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals on procedural matters, and that any errors which affect the final judgment will be corrected in due course by this Chamber on appeal. The consideration that weighed most relevantly with members of the Trial Chamber in granting leave to these appellants was that the differences between its members over the interpretation of the rules and procedures of the court were fundamental, and required authoritative resolution for the sake of this trial and others, sooner rather than later.

44. That differences in approach to the Rules arise in this particular trial is not surprising, because it was the first to begin in the Special Court. It commenced in June 2004 after a number of pre-trial hearings which featured decisions to join the three defendants and to order that the trial proceed upon a consolidated Indictment. What *is* surprising is that the objectionable consequences of these decisions did not become apparent to the Defence until late September 2004 after two trial sessions had been completed. Then, for the first time, they brought motions which raised objections to the form, content and validity of the consolidated Indictment upon which the trial had hitherto proceeded. The Trial Chamber, by a majority, in decisions rendered on 29 November 2004 (Norman) and 8 December 2004

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(Kondewa and Fofana) rejected those complaints – it is the first of these rejections that is the subject of the present Defence appeal. In Norman's case, the Trial Chamber stayed certain amendments that the Prosecution had made in producing the consolidated Indictment and directed that the Prosecution should either withdraw those new allegations or seek leave to amend the consolidated Indictment so as to include them. This is the subject of the present Prosecution appeal. The record for both appeals, which in this decision we consider together, is voluminous and convoluted, as the opening section of the decision demonstrates. In order to disentangle the relatively simple procedural questions at issue, we have had to survey the whole course of the CDF proceedings to date.

45. At the outset, we wish to emphasise a point of general application. This court is strictly bound in all its proceedings by its constitutive documents: the Statute and the Agreement, by which it was established by a treaty between the United Nations and the Government of Sierra Leone. Under that constitution, its judges in plenary session have adopted and from time to time will amend, the Rules of Evidence and Procedure which apply to proceedings in the Chambers. The purpose of these rules is to enable trials to proceed fairly, expeditiously and effectively and they are to be interpreted according to that purpose. In common law countries this "purposive interpretation" approach is now generally applied in respect of subsidiary legislation and rules of court, in preference to canons of construction used by courts for determining the meaning of Acts of Parliament – "the literal rule"; "the mischief rule"; "the golden rule"; and so on. The dissenting opinion in this case contains a lengthy discussion of early English authorities which favour adoption of the "literal rule" for interpretation of statutes – authorities now somewhat obsolete in England by virtue of the law requiring statutory interpretation to be consonant, so far as possible, with the provisions of the Human Rights Act 1998. There is no need for Trial Chambers to perform this kind of exegesis when applying the Special Court Rules: their language should be given its ordinary meaning but they must be applied in their context and according to their purpose in progressing the relevant stage of the trial process fairly and effectively.

46. It must also be remembered, both when applying the Rules and when making procedural decisions on matters about which the Rules are silent (as they often are) that this court is unique – as the UN Secretary General in his Report put it, *sui generis* – . It was provided at its outset with the Rules of Procedure and Evidence of the International Criminal Tribunal

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for Rwanda ("ICTR") as they existed in 2002, but its judges were expressly given the plenary power to amend and adapt them to the special circumstances of the Special Court. It follows that procedures and practices that have grown up in the ICTR and International Criminal Tribunal for the former Yugoslavia ("ICTY") should not be slavishly followed – they often reflect the different or difficult circumstances in which these courts have to operate – bilingually; sitting far from the scene of the crimes, and so on. This court has been permitted by Article 14(2) of its Statute to draw upon the Criminal Procedure Act, 1965 of Sierra Leone precisely because that Act lays down the basic procedures of adversary criminal trials that are followed in Sierra Leone, which may be appropriate for our circumstances. We have not, therefore, been impressed by Prosecution submissions which seek to justify unnecessary or inconvenient procedural steps on the basis that "this is the way it is usually done in The Hague". The question must always be whether a particular procedure is appropriate under the rules and practices of this Court.

47. One further matter to deal with at the outset is whether we should even consider the Defence appeal in Norman's case, which was filed, in contravention of the Rules, four days out of time.[22] Similarly, we would be entitled to consider the Prosecution appeal without looking at the Defence response, which was filed, again in contravention of the Rules, five days out of time.[23] It is ironic that an appeal which claims that it is an abuse of process for the Prosecution to fail in literal and rigid compliance with the Rules should itself fail to comply with a rule that lays down strict time limits. We have carefully considered whether we should disallow both the Defence appeal and the Defence response to the Prosecution appeal, but in the end we have decided to treat them as procedural errors by the Defence occurring in the course of a case which has included a number of procedural errors by the Prosecution and by the Trial Chamber itself. This indulgence must not be regarded as a precedent for any other parties which fail to comply with time limits for submissions to this court. The relevant time limits are clearly set out in both the Rules and the the Practice Direction on Certain Appeals before the Special Court of 30 September 2004 and will henceforth be strictly enforced unless leave is sought for an extension in accordance with the Rules.

[22] Rule 108(c) specifies that the notice and grounds of appeal shall be filed within 7 days of the receipt of the decision to grant leave. The final date for filing was 13 January 2005 but the appeal was not filed until 17 January 2005.
[23] Pursuant to paragraph 12 of the Practice Direction for Certain Appeals before the Special Court of 30 September 2004 , a response should be filed within 7 days of the filing of the appeal. The response was due on 21 January 2005. It was not filed until 26 January 2005.

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48. We finally note that while submissions to this Court ought not to contain robust criticism of the impugned Decision, they ought not use exaggerated language which could imply deceit rather than error. Rule 3(A) provides that "the working language of the Special Court shall be English". For the English language to work, it must be comprehensible and considered. Part of the Defence Reply dated 14 January 2005 is neither.

> "**B. Modes of Subsistence: Abuses of Process**
> Dogged and calculated Prosecution adamancy in the avoidance and evasion of material and/or mandatory rules of procedure, which readily tend to poke one in the eyes as compellingly applicable in the respective circumstances, together with the ulterior reasoning and impulsion thereto, plus the consistent (even if unintended) blessing of equally determined judicial endorsements thereof, and a certain congenital constitutive anomaly, have effectuated modes of subsistence or sustension for the current consolidated Indictment which are tantamount to a gross and sustained abuse of process that has, in its own turn, and from the very constituting of the Special Court and the earliest beginnings of the entire Prosecution process right up until the present proceedings, repeatedly violated and egregious prejudiced the due process rights (substantive and procedural alike) of the accused persons, and thereby subverted the interests of justice and the integrity of the international criminal justice process itself."

We hope not have to read a gibberish like this again.

III. THE THREE INDICTMENTS

49. This case began with the arrest of Sam Hinga Norman in March 2003, on charges contained in an Indictment filed on 7 March 2003 and numbered SCSL-2003-08-1-001. It was nine pages in length. It first briefly identified the Accused and then set out a series of "**General Allegations**" followed by particulars of "**Individual Criminal Responsibility**" followed by further particulars of "**Charges**". Only then, and at the end of the document, "**Counts**" relating to eight specific offences were set out. The Indictment was reviewed under Rule 47(E) by a designated judge for the purpose of ensuring that the crimes it charged were within the jurisdiction of the court and that allegations made by the Prosecution "would if proven, amount to the crime or crimes as particularised in the Indictment". This exercise does not, as in certain other courts, require a judicial finding of a *prima facie* case: the judge is concerned only to ensure that the particulars which the Prosecution claims it can prove would amount to a triable offence.

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50. The contents of an Indictment are set out in Rule 47(C), namely:

> "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."

51. The Norman Indictment, like the other Indictments laid by the Prosecution, may have been influenced by precedents from the ICTY and ICTR, but it is regrettable that they did not follow more accurately the style prescribed by Rule 47(C). This rule envisages that after particulars of personal identification there should be "a statement of each specific offence of which the named subject is charged". Each such statement is what is commonly known as a *count* of the Indictment, which encapsulates the offence with which the subject is charged – i.e. the law which he is alleged to have broken. The count should then be followed by a "short description" of the *particulars* of the offence – the time, place, reference to co-offenders and so on. Then, as a *separate document*, albeit appended to or served with the Indictment, a "prosecutor's case summary" briefly setting out the allegations he proposes to prove – a *précis* , as it were, of his opening speech.

52. Rule 47(C) is clear. The "Indictment" should comprise only a list of counts, with each count followed by brief particulars. The case summary which should accompany the Indictment forms no part of it. The significance of this practice is that once a defendant is *arraigned* - i.e. required to plead to the counts of an Indictment, which under international criminal procedure reflected in our Rule 61 is referred to as an "initial appearance and plea" - no word or phrase of any count or any particular of a count may be changed without the permission of the court, by an application to amend the Indictment which is made in the presence of the Defence. The Prosecutor's case summary, however, is not a document susceptible to amendment by the court. It accompanies the Indictment in order to give the Accused better details of the charges against him and to enable the designated judge to decide whether to approve the Indictment under Rule 47(E). It does not bind the Prosecutor in the sense that he is obliged to apply to amend it if his evidence changes. The Prosecutor is obliged to give full disclosure of any such evidence and is obliged to alert the Defence to any significant change in the way the case will be put at trial, but the

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"Prosecutor's case summary" is not part of the Indictment, which is the formal document which triggers the trial.

53. It appears to us that some of the difficulties in this case originated with the Prosecutor's failure to appreciate the clear distinction between what should go in the Indictment and what should be left to the case summary. He produced, as the Indictment, a document that put the counts at the end instead of at the beginning, as if they were conclusions to be inferred from detailed allegations, both "general" and "individual" and from "charges" which took the form of further general allegations, many details of which could have been left for the case summary. In the result, of course, the Defence was not prejudiced: on the contrary, the Indictment included many more "particulars" than the Prosecution was obliged to give. The Prosecutor, by his own choice, therefore shouldered a heavier burden of applying for amendments than was strictly necessary. The Defence understandably never complained that its Indictment was overloaded with particulars. The designated judge did not take the point, and did not need to: the Indictment was more than "sufficient" for the purpose of Rule 47.

54. The Prosecution inflicted this form of Indictment on the court and on itself, without prejudice to the defendants. An Indictment in this form is not invalid although it may be ill-advised. It was the form in which both Kondewa (SCSL-2003-12-I) and Fofana (SCSL-2003-2-I) were individually indicted on 24 June 2003, some three months after Hinga Norman. The counts in their two Indictments are identical, as are the sections headed "General Allegations" and "Charges". There are only minor changes to reflect their different alleged positions in the Civil Defence Forces ("CDF"), in the sections headed "Individual Criminal Responsibility". Their Indictments were similar to the Norman Indictment, although there were a number of minor changes which made the allegations against the CDF leadership more precise. There were two important additions, however: the "charges" in para 19(d) and (e) of the Fofana and Kondewa Indictments, reflected in counts 1 and 2 (para 20(e) and (f)), find no counterpart in the Norman Indictment. These "new" allegations against the CDF leadership – although the Prosecution says they are really details of the general allegation of unlawful conduct in the original Norman Indictment – were made public in June 2003, and it must have been obvious to Norman's very experienced lawyers that there was every likelihood that the Prosecution would in due course seek to level these charges against their

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client. The Prosecution alleged that he was the CDF leader, and the "new" charges, in the Indictments of his alleged lieutenants, would evidently apply to him as well. Obvious as this must have been, it remains the fact that the Prosecution made no application to amend so as to include them in the Norman Indictment.

55. It is unexplained as to why Fofana and Kondewa were not jointly indicted from the outset, since the evidence against them would certainly involve the same witnesses and legal arguments. Instead, the cases against the three CDF defendants proceeded separately for a time, and some made preliminary motions objecting to the lack of clarity in the particulars of their individual Indictments although no objection was ever raised to their form. On 27 November 2003, for example, the Trial Chamber gave a decision on a motion to delete certain words and phrases which were vague and imprecise: the Trial Chamber understandably ruled that the expressions "but not limited to these events" and "included but not limited to" were impermissibly open-ended. The Prosecution was ordered either to delete them or to provide details by way of a bill of particulars.[24]

IV. THE MOTION FOR JOINDER

56. In due course, the Prosecution applied for joinder of all three CDF defendants. Paragraph 1 of the application deserves attention. It was brought under Rule 48(B), as a motion for a joint trial. But it added "should the motion for joinder be granted, the Prosecution further moves that the Trial Chamber order that a consolidated Indictment be prepared as the Indictment upon which the joint trial will proceed". The application set out in well-argued detail a compelling case for a joint trial but made no mention of a consolidated Indictment until the very end, where it repeated the request, without giving reasons, but asked for the Registry to assign a new case number for the consolidated Indictment. It was from this unnecessary and unexplained request that a great deal of confusion was later to arise.

57. Rule 48 provides:

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.

[24] *Prosecutor v Kondewa*, SCSL-2003-12, Decision and Order on Defence Preliminary Motion For Defects in the Form of the Indictment, 27 November 2003.

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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.

58. Rule 48(A) permits the Prosecution, without leave of the court, to jointly indict persons accused of committing crimes in the course of the same transaction. This course it could have adopted when indicting Fofana and Kondewa. Instead, it sought leave to have them, and Norman, tried together. Rule 48(B) anticipates that such a joint trial will proceed on the individual Indictments on which the defendants have already appeared and pleaded pursuant to Rule 61. It does not provide for consolidation of individual Indictments, a step which is unnecessary and can make no sensible difference that we can see to the proceeding or the outcome. The Prosecution in its appeal submissions still cannot explain why it sought consolidation, other than that this is the "normal practice in other criminal tribunals". So it may be, but in this court it still requires to be justified.

59. The Prosecution motion for a joint trial was heard on 4 December 2003. It was not opposed by the experienced (and multiple) Counsel who appeared separately for the three defendants. They agreed with the Prosecution that a joint trial would be fair and in the interests of justice to all Parties. On that basis, a joint trial should have been ordered forthwith. In an adversarial system, the Court can rely upon agreements between experienced Prosecution and Defence Counsel on procedural matters of this kind, and it is unnecessary for the Court to embark upon a major academic disquisition on the law and practice relating to joint trials. That, however, is what the Trial Chamber chose to do, reserving its decision for almost two months in order to produce, on 27 January 2004, a lengthy decision on a question that was not the subject of any dispute. In that time, of course, the Prosecution could readily have provided the court, for its approval, with a copy of the proposed consolidated Indictment which it was seeking.

60. The only significant issue that had been raised by the Defence at the hearing on 4 December 2003 was the fact that the Prosecution had failed to exhibit the consolidated Indictment to its motion seeking that consolidation. The Trial Chamber did not recognise a need to scrutinise at that point a draft of the consolidated Indictment, although Judge Itoe in his separate concurring opinion set out his own view that this would amount to a "new" Indictment and would require to be processed according to Rule 47 which would in turn

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require a further appearance and plea of the Accused pursuant to Rule 61. He drew attention - as did the other judges - to the Prosecution's oral statement that the consolidated Indictment "will not result in any change in the substance of the original Indictments". It was upon that Prosecution representation that leave to file such an Indictment was granted by the Chamber.

61. In the event, the Trial Chamber on 27 January 2004 made the following order:
   i. That a single consolidated Indictment be prepared as the Indictment on which the joint trial shall proceed and that the Registry assign a new case number to the consolidated Indictment;
   ii. That the said consolidated Indictments (*sic*) be filed in the registry within ten days of the date of delivery of this decision;
   iii. That the said Indictment be served on each Accused in accordance with Rule 52 of the Rules.

62. The reference to Rule 52 is doubtless explained by the final sentence in Rule 50: "If leave to amend is granted, Rule 47(G) and Rule 52 apply to the amended Indictment." However, purposive interpretation of this provision means that it applies only to the extent that it can *sensibly* apply. Rule 47(G), for example, will have no application if leave to amend a particular is granted: it states "If at least one count is approved, the Indictment shall go forward. If no count is approved, the Indictment shall be returned to the Prosecutor." So far as Rule 52, set out below, is concerned, Rule 52(A) and Rule 52(C) are obviously inapplicable to the stage at which original Indictments are consolidated, although the requirements of personal service (Rule 52(B)) and publicity (Rule 52(D)) are sensibly applicable to the consolidated Indictment if it has been amended.

63. The reference to service in accordance with Rule 52 does not appear to have been the subject of any argument, although Rule 52 is plainly concerned principally with ensuring that the Accused is personally presented with the charges against him as soon as possible after his arrest, a fundamental defence right guaranteed by the Special Court Statute and all international human rights instruments. Rule 52 provides:

Service of the Indictment

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a. Service of the Indictment shall be affected 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 affected 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.

V. SERVICE OF THE CONSOLIDATED INDICTMENT

64. These three Accused had by now – 27 January 2004 - been taken into the custody of the Special Court many months before and had been personally served with their individual Indictments as Rule 52 provides. For much of that time they had been represented by teams of experienced Counsel who continued to act for them. In its plain terms Rule 52 was inappropriate to later service of an amended or consolidated Indictment which contained the same charges as the original process, but had been consolidated for the purposes of a joint trial. It would be impossible for the Prosecution to comply in terms with Rule 52, because the time period its application envisages, namely "at the time the Accused is taken into the custody of the Special Court or as soon as possible thereafter" – had long since passed. The only relevance of Rule 52 to the position proceedings had now reached was its definition of "personal service" in Rule 52(B). In that respect and (in the absence of clarification of the order by the Trial Chamber) the only respect in which the Prosecution could sensibly comply with part iii) of the Court's order was by serving the Accused personally with the consolidated Indictment. The Prosecution now recognises that it was under that duty and concedes that it erroneously failed to comply. Instead, it filed the consolidated Indictment with the Registry, on 5 February 2004, within the time ordered by the Court in part ii) of its Order, and the consolidated Indictment was thereupon served upon Defence Counsel but not upon their clients.

65. The scale of this error must be put in perspective. It was a failure to comply with the subsidiary part of a Court Order, which referred to a Rule designed for a different purpose. Service on Counsel, the agent for the defendant, normally constitutes service on the

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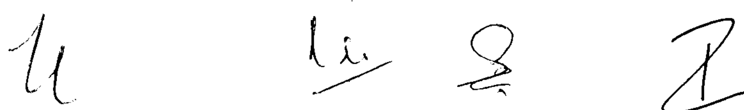
defendant, and in this case there is no doubt that Counsel quickly apprised all three defendants of the contents of the consolidated Indictment and advised them about it. In the geography of the Special Court, the Defence Counsel offices are situated in the court precincts a few hundred yards from the detention centre where the Accused are held in custody: it is not as if the Indictment was served on Counsel in another country or even in another part of town. No prejudice could conceivably have been caused by the error and this is emphasised by the fact that the Defence took no point on the incorrectness of the service for over six months, being content in the meantime for the case to continue on the consolidated Indictment as served on Counsel. The Defence, by this delay, is precluded from reliance upon Rule 5, which provides that "*Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber or the Designated Judge may grant relief.*"

66. This specific Rule – indexed and headed **Non Compliance with the Rules** – indicates that a party's failure to raise a timely objection to non-compliance may stop it from taking any advantage from a rule breach at a later stage.

67. Courts have inherent powers which they regularly use to excuse failures to comply with their orders and this failure, more technical than most, should have been excused after the tender of a suitable apology, once it was belatedly raised by the Defence. That was the approach of the Trial Chamber majority. In its decisions of 29 November 2004 (Norman) and 8 December 2004 (Fofana and Kondewa) it expressed itself as satisfied after reviewing the entire pre-trial process, that no unfair (or any) prejudice was caused to the Accused by the Prosecution's failure to comply with the terms of the Court Order as to personal service pursuant to Rule 52. Judge Itoe strongly dissented. He thought Rule 52 applied literally and compliance was mandatory. He explained his dissent in these terms:

> "It is my considered opinion, and I do so hold, that what law and justice is all about, for us judges, is to uphold and to prevent a breach of the law and to provide a remedy for such a breach if any, and in so doing, to boldly tick right what is right, and when it comes to it, to equally and boldly tick wrong, what is really and in the process, to disabuse our minds of any influence that could misdirect us to tick right, what is ostensibly wrong, or wrong, what is ostensibly right because it would indeed be unfortunate for justice and the due process if, by whatever enticing or justifying rhetoric, or by any means whatsoever, however ostensibly credible or plausible it may seem, we reverse this age-long legal norm and philosophy as this



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would amount to rocking the very foundation on which our Law and our Justice stand and have, indeed, held onto, and so firmly stood the test of times."[25]

68. We do not think that the breach of a machinery provision in a court order, even if predicated upon a Rule, can be regarded in such hyperbolic terms. Rule 52 was not intended to apply to the situation that had arisen and the object of the court order requiring personal service was achieved by substituted service on Counsel. The clear provision of Rule 5 makes relief for non-compliance contingent upon the default being raised "at the earliest opportunity" – not six months after it must have become apparent. Insofar as the Defence appeal turns on complaints about the service of the Indictment to Counsel rather than client, they must be rejected.

VI. THE NATURE OF THE CONSOLIDATED INDICTMENT

69. 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 a 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 plea pursuant to Rule 61. Review and re-arraignment 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 Indictments and those which appeared on the consolidated Indictment. The Trial Chamber majority held that a review and a further appearance and plea were unnecessary:

> "A consolidated Indictment which covers the same charges and Accused as the initial Indictment does not constitute a new Indictment. The initial Indictments are essentially subsumed into the consolidated Indictment. Official withdrawal of its initial Indictment is not necessary." (paragraph 36)

70. It is a somewhat metaphysical approach to say that each of three individual Indictments are "essentially subsumed" in a consolidated Indictment. The existential position is that the fourth Indictment is certainly different, and "new" in the sense that it is a separate document entered in the Registry with a different number – in this case, SCSL-2004-14-PT.

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[25] Para. 41 of the Dissenting Opinon

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However much it may replicate, in language and content, the three original Indictments, they at present remain on file in the Registry, essentially unsubsumed. What is their status? Might they revive in the event that the trial is abandoned or stopped for abuse of process? The defendants are understandably anxious on this score, while the Prosecution has been unhelpful and complacent. It informs us that it sees no reason to do anything about the initial Indictments. It makes no application to have them left on the file, marked "not to be proceeded with" which is a procedure sometimes adopted. 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". This trial has proceeded and will continue to proceed on a consolidated Indictment that was approved by the Trial Chamber in its decisions of 29 November and 8 December 2004. That approval was based, however, upon the Prosecution representation that there would be no material change in the statements of offence or the particulars provided in the consolidated Indictment.

VII. THE NEED FOR A FURTHER APPEARANCE AND PLEA

71. So far as the defendants Kondewa and Fofana were concerned the Trial Chamber was entirely satisfied that there were no material changes from their initial Indictments as supplemented by the bill of particulars which had been delivered pursuant to the court's previous order. On this basis, it held:

> With respect to arraignment on the Indictment, it is clear on the practice of international tribunals, 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 Indictments are essentially the same or similar to the original ones. The position is also clear in national systems. In the United Kingdom case of R v Fyffe, it was recognised that the general rule is that "re-arraignment is unnecessary where the amended Indictment merely reproduces the original allegations in a different form, albeit including a number of new counts".[26] (para 25)

[26] *R v Fyffe* 1992 Criminal Law Review, 442, Court of Appeal.

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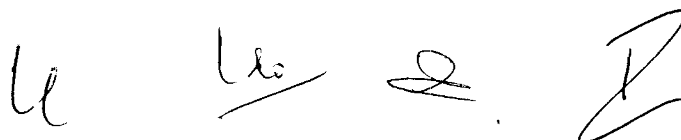
72. We must point out that whatever the commonsense of the general approach taken in *Fyffe*, under our Rule 50(B), "if the amended Indictment includes new charges" the Accused must make a further appearance in order to enter a plea to them pursuant to Rule 61. A count of an Indictment is the formal 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. However, in the cases of Kondewa and Fofana, the consolidated Indictment produced no significant changes, let alone any additional charge or count. A further appearance was therefore not required by the rule. The Trial Chamber was correct to reject that argument on the finding, in the cases of Kondewa and Fofana, that there had been no new count levelled against them by the consolidated Indictment.

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 scrutinised. 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.

VIII. THE NORMAN APPEAL

74. 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 the supplementary opinion of Judge Itoe, this was a hazardous step, especially since they did not condescend to accompany service of the consolidated Indictment on 4 February 2004 with a motion under Rule 73 seeking leave for the amendments. They acted no doubt in good faith, in the belief that the amendments were helpful to the Defence in narrowing the original general allegations by making the



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original particulars more particular, but that is for the Defence to decide after being given proper notice. The Defence had, of course, been well aware since the Indictments of Fofana and Kondewa in June 2003 that the be particulars were likely to be added. The Defence had been provided in February 2004 with the consolidated Indictment and took no point on the additions to it until 20 September, when it filed a motion seeking further appearance pursuant to Rule 61 on the consolidated Indictment and a formal quashing of the previous Indictment upon which he initially appeared. Norman was defending himself for part of this period, but that fact cannot avoid the consequence of his conduct if his own self-defence has created an estoppel: those who choose to defend themselves cannot then plead layman's oversight, or ignorance of legal rules.

75. The Trial Chamber did not dismiss his complaint on the basis of an estoppel, however: it examined the additions which had been made, without leave, to the consolidated Indictment, in order to determine whether they were "material" or "added new charges" and if so, whether these additions were "apt to prejudice the Defence". Having identified a number of such additions, the Trial Chamber 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 and 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."

76. This order seems to us entirely fair to the Prosecution, which had added material elements notwithstanding its representation to the Court on 4 December 2003 that "it will not involve any change in the substance of the original Indictments". 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. The Defence has argued that the Appeals Chamber does not have authority to alter a Trial Chamber decision but must merely remit it to the Trial Chamber when it finds an error of fact or law. This is plainly wrong and the Prosecution correctly points out that this Chamber has clear authority

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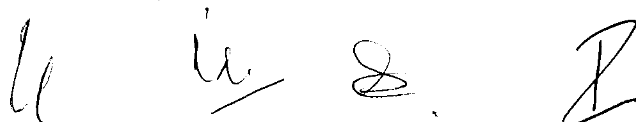
under the Rules to revise decisions of the Trial Chamber. Article 20(2) of the Statute puts the matter beyond doubt by providing that the Appeals Chamber may "affirm, reverse or revise" the decision taken by the Trial Chamber (and see Rule 106(B)). By initiating this appeal, the Prosecution shoulders the risk that this Chamber may decide finally whether it should have the permission to amend that the Trial Chamber order left open.

77. That order forced the Prosecution to choose whether to make the amendment application that it should have made before the trial started, or else to abandon its new particulars. Its appeal submissions seek to excuse their addition to the consolidated Indictment on the basis that they are not "new" particulars, or at least do not amount to material changes. We reject these submissions. The Prosecution has made a number of significant changes, contrary to the expectation its representation had fostered in obtaining approval for the consolidated Indictment, and was in consequence under a duty to apply for leave to amend. In deciding whether to cut the Gordian knot and now grant leave, we must first determine the test upon which such leave is granted. The matter is complicated by the fact that the application to add these details must be treated as an amendment application made in the middle of the trial and not as an application made in pre-trial proceedings back in February 2004, when the Defence was first notified of them through substituted service of the consolidated Indictment. The significance of this distinction is that the test for permitting late amendments is much more rigorous than a test of "interests of justice" and "lack of prejudice to the defence" that applies at the pre-trial stage. Had the Prosecution applied for leave at the correct time, namely February 2004, we have no doubt that the Trial Chamber would have permitted all these amendments. The more difficult question is whether we should permit them now.

78. In principle, the Indictment may be amended at any stage of the proceedings, up to the conclusion of the trial, if the court is satisfied that the defence will not be prejudiced by the amendment and that making it will be in the interests of justice. The Special Court Rules do not preclude late amendments. By "Indictment" we mean the counts stating the charges and the short particulars which should accompany them.

79. Amendments to an Indictment, broadly speaking, fall into three categories:

i. Formal or semantic changes, which should not be opposed.



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ii. Changes which give greater precision to the charge or its particulars, either by narrowing the allegation or identifying times, dates or places with greater particularity or detail. Such amendments will normally be allowed, even during the trial.

iii. Substantive changes, which seek to add fresh allegations amounting either to separate charges or to a new allegation in respect of an existing charge.

80. Amendments in the third category will be carefully scrutinised and call for clear justification if they are to be allowed once the trial is underway. 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. Once a criminal trial has begun it should proceed with as little distraction as possible to its conclusion on the Indictment as opened by the Prosecution. In inquisitorial systems and civil trials there is more flexibility, but it is fundamental to the adversarial system of criminal justice that once a trial is underway with live witnesses it should proceed straight-forwardly without change of goal-posts.

81. At a pre-trial stage, the position is very different although obviously more justification is required the closer to the date fixed for trial. But so long as the Defence can adequately prepare, amendments will normally be allowed. There are many reasons why justice requires the court to give the Prosecution pre-trial flexibility: the initial Indictment will not reflect the evidence it has gathered since, often as potential witnesses muster the courage to come forward as peace takes hold or as the court earns respect or as its outreach programmes take effect. It can only serve the interests of justice to permit the Prosecution to reconsider and refine its case in the pre-trial period.

82. That is not to say that the Trial Chamber should in this period allow the Prosecution its head. It is not concerned to "supervise" the Prosecutor but it is concerned to ensure that the trial which is in preparation is manageable and will work fairly and expeditiously. It is a notorious fact that Prosecutors sometimes overload their Indictments, and the Trial Chamber must be alert to prevent "overcharging" which can lengthen trials beyond endurance. The Prosecutor has no duty to indict a defendant for every offence in respect of which there exists *prima facie* evidence against him. We emphasise this, because the Prosecution submissions verge on asserting such a duty. In fact, the overriding duty of a Prosecutor – what determines, in fact, his or her professional ability – is to shape a trial by

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selecting just so many charges that can most readily be proved and which carry a penalty appropriate to the overall criminality of the Accused. In national systems, this is reflected in Prosecution practices of selecting specimen charges or proceeding only on certain counts of a long Indictment. In international courts, where defendants may be accused of command responsibility for hundreds if not thousands of war crimes at the end of a war that has lasted for years, the need to be selective in deciding which charges to include in a trial Indictment is a test of Prosecution professionalism. In this respect, the Trial Chamber must oversee the Indictment, in the interests of producing a trial which is manageable.

83. In paragraph 19 of its decision of 29 November 2004 the Trial Chamber correctly identified all the changes that had been made by the Prosecution in the consolidated Indictment. In some cases, the additions plainly fell into the second category we have identified above – they provide greater precision in respect of existing charges. For example, the objectively vague phrase "but not limited to, ...", which appeared in the original Norman Indictment has been excised and replaced by identifications of specific towns and places where crimes are alleged to have been committed or by specific descriptions of unlawful behaviour. There can be no objection to permitting amendments of this kind. In count 8, the allegation of "conscripting" children under 15 is watered down to the allegation of "initiating" them into armed forces – a less serious allegation. This amendment too must be allowed. Whatever "initiate" may mean, the change in wording, by lessening the seriousness of the original charge, cannot possibly prejudice the defendant.

84. The Trial Chamber identified two places – in paragraphs 24(D) and (E) of the charges, repeated in slightly less detail as particulars of counts 1 and 2 (at paragraph 25 (E) and (F)) where substantive changes have been made, adding in effect two new and separate allegations of Kamajor operations in which civilians were unlawfully killed. These allegations are precisely those we have identified, in para 11 above, as appearing for the first time in the Kondewa and Fofana Indictments back in June 2003. The Prosecution claim is that these additions "merely contain more specific details of some of the alleged conduct falling within the general language of paragraph 18 of the original Norman Indictment. These new sub-paragraphs do not contain new facts constituting an additional charge."

85. The original Norman Indictment, paragraph 18, states that:

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"The Kamajors engaged the combined RUF/ AFRC's forces in armed conflict in various parts of Sierra Leone – to include, but not limited to Tongo Field, Kenema, Bo and Koribondo and the surrounding areas. Civilians including women and children who were suspected to have supported, sympathised with, or simply failed to actively resist the combined RUF/ AFRC forces were termed **collaborators** and specifically targeted by the Kamajors. Once so identified, these **collaborators** and any captured enemy combatants were unlawfully killed. Victims were often shot, hacked to death or burned to death. Other practices included human sacrifices and cannibalism."

The new allegations which are said to contain no new facts and merely "more specific details of some of the alleged conduct" are in these terms:

"D. Between about 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, Bembay and 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.

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 18. They were, however, expressed in these exact terms in the Fofana and Kondewa Indictments.

86. These new allegations are reflected in particulars of counts 1 and 2 of the consolidated Indictment, as allegations of a crime against humanity and a violation of common article 3. The Prosecution maintains that "the new language of paragraph 25 of the consolidated Indictment states specifically what was previously included within more general language in

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the original Norman Indictment. It does not add something new that was not included at all in the original Norman Indictment". In our view, it certainly does. What it adds is as follows:

e. Between about October 1997 and December 1999 in location 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), Mobayeha, Makose and Bonthe Town, Kamajors unlawfully killed an unknown number of civilians;

These two particulars did not feature at all in the original counts against Norman. For the Prosecution to maintain that "it does not add something new" is risible. What it adds are the two detailed particulars which first appeared in the Indictments of Fofana and Kondewa. We do not understand how the Prosecution could have thought that these additions to the first two counts of the Indictment could have been added to the consolidated Indictment without making a specific application to amend. Had that application been made at the proper time – February 2004 – it should have been granted: the trial was three months hence, and the Norman team must have known since June 2003 that the application was likely to be made. But the failure to make it was only raised by the Defence after two six weeks trial sessions had been completed and well after the Prosecution had opened its case without objection. As a result of the court's order on 29 November 2004, all evidence and proceeding upon these particular allegations against Norman have been stayed until the next trial session, which begins on 25 May 2005. At that point, this trial will have proceeded for a year.

IX. CONCLUSIONS

87. It is not the Appeal Chamber's function to immerse itself in the detail of ongoing trials for the purpose of second guessing Trial Chamber decisions that are essentially discretionary, and must be informed by the grasp that experienced Trial Chamber judges will have of the state of the evidence and the course and future of the trial. However, these judges have given leave for this matter, which has occupied far too much time and expense already, to be referred to this Chamber for resolution. The arguments for and against the amendments have been extensively canvassed in submissions and we do not see why they need to be

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repeated at the same or greater length when the next trial session begins. 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 that the Defence is not incommoded.

88. 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 satisfied that the amendment will not involve an undue lengthening of the time of trial.

89. 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 to be proceeded with, and should be so marked.

Done at Freetown this sixteenth day of May 2005

Justice Ayoola
Presiding

Justice Fernando

Justice King

Justice Winter

Justice Robertson

[Seal of the Special Court for Sierra Leone]

Case No. SCSL-04-14-A(R73)

16 May 2005

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