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: 13th Day of December, 2004.

PROSECUTOR Against Sam Hinga Norman
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-04-14-T)

**DISSENTING OPINION OF HON. JUDGE BENJAMIN MUTANGA ITOE, PRESIDING JUDGE, ON THE CHAMBER MAJORITY DECISION SUPPORTED BY HON. JUDGE BANKOLE THOMPSON'S SEPARATE BUT CONCURRING OPINION, ON THE MOTION FILED BY THE SECOND ACCUSED, MOININA FOFANA FOR SERVICE AND ARRAIGNMENT ON THE CONSOLIDATED INDICTMENT AND A SECOND APPEARANCE**

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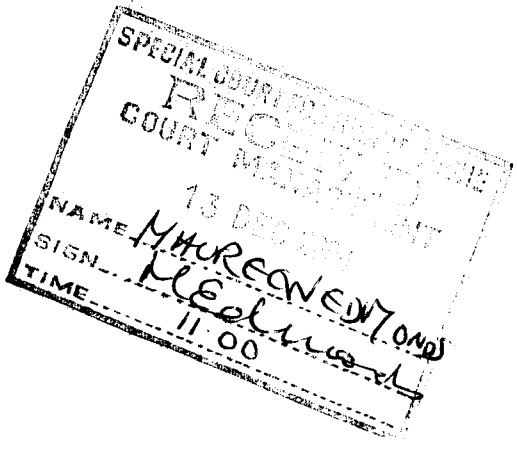

**I, HON. JUDGE BENJAMIN MUTANGA ITOE,** Judge of the Trial Chamber of the Special Court for Sierra Leone, Presiding Judge of the said Chamber;

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

**MINDFUL** of the Prosecution's Response to the said Motion filed on the 28th of October, 2004;

**MINDFUL** of the Decision delivered by the Trial Chamber on the 27th of January, 2004, on the Prosecution's Motion for Joinder;

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

**MINDFUL** of my Separate Opinion dated the 27th day of January, 2004 on the "NATURE AND LEGAL CONSEQUENCES OF THE RULING IN FAVOUR OF THE FILING OF CONSOLIDATED INDICTMENTS" which is annexed to the Chamber's Decision also dated the 27th day of January, 2004, granting the Prosecution's Motion for Joinder;

**CONSIDERING** the provisions of the Statute of the Special Court ("The Statute") and particularly those of Articles 9(1), 17(2), 17(4)(a), 17(4)(b) and 17(4)(d);

**CONSIDERING** the provisions of Rules 26(bis), 40(bis)(J), 47, 48, 50, 51, 52, 61 and 82 of the Rules of Procedure and Evidence of the Special Court ("The Rules");

**MINDFUL** of the International Convention on Civil and Political Rights, particularly the provisions of its Articles 9(2) and 14(3)(a);

ISSUE THE FOLLOWING DISSENTING OPINION ON THE CHAMBER MAJORITY DECISION SUPPORTED BY HON. JUDGE BANKOLE THOMPSON'S SEPARATE BUT CONCURRING OPINION, RELATING TO THE MOTION FILED BY THE SECOND ACCUSED, MOININA FOFANA, FOR SERVICE AND ARRAIGNMENT ON THE CONSOLIDATED INDICTMENT AND A SECOND APPEARANCE.

## (A) HISTORICAL BACKGROUND

1. The 2nd Accused, Moinina Fofana, was arrested on the 29th of May, 2003, on an 8 Count Individual Indictment dated the 26th of June, 2003, approved by His Lordship, Hon. Judge Pierre Boutet. He made his initial appearance before Hon. Judge Pierre Boutet in accordance with the provisions of Rules 61(ii) and 61(iii) of the Rules. He pleaded 'Not Guilty' to all the counts. The number of this Indictment is SCSL-2003-11.

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

3. For purposes of this Dissenting Opinion, I am adopting in its entirety, the contents of my Separate Opinion dated the 27th of January, 2004, appended to the Chamber Joinder Decision also dated the 27th of January 2004.

## (B) SERVICE OF THE CONSOLIDATED INDICTMENT.

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

4. On arguments relating to this issue that are raised by the Applicant, it is contended that the provisions of Rule 52 of the Rules have been violated in that he has not been personally served with the Consolidated Indictment as ordered by the Chamber in its Joinder Decision of the 27th of January, 2004. The Chamber in this regard, it would be recalled, ordered that "The said Indictment be served on each of the Accused in accordance with the provisions of Rule 52 of the Rules." It is on record that service of the said Indictment was, contrary to that Order, effected instead on the Applicant's Counsel.

5. Rule 52 of Rules provides as follows:

   Rule 52(A):

   Service of the Indictment ***shall be effected personally on the accused*** at the time the accused is taken into the custody of the Special Court or as soon as possible thereafter.

   Rule 52(A):

   ***Personal service of an indictment on the accused is effected by giving the accused a copy of the indictment*** approved in accordance with Rule 47.

6. The question to be answered at this stage is whether the provisions of Rule 52 of the Rules and the Order of the Court to this effect were or have been complied with.

7. The Prosecution in answer to this question, clearly admits that service on Counsel instead of on the Accused personally "was an administrative anomaly" which, according to them, "has caused no identifiable prejudice to him" because, again according to the Prosecution, the Second Accused has demonstrated knowledge of the charges contained in the Consolidated Indictment, as he has defended himself against these charges in the first trial session and at the beginning of the second trial session.

8. These arguments, to my mind, are neither convincing, acceptable, nor are they sustainable, particularly in this case, and upholding them would have the effect of empowering one party to the proceedings, in this case, the Prosecution, to flout the law to the detriment of the interests of the other party, the Accused, and his statutory right to a fair and public trial as well as to be

promptly informed of the charges against him as guaranteed by the provisions of Articles 17(2) and 17(4)(a) of the Statute, by Rule 26(bis) of the Rules, by Article 9(2) of the ICCPR, and more pertinently still, by the necessary intendment, interpretation, and the combined effects of the application of both Rules 52(A) and 52(B) of the Rules.

9. In resolving issues of this nature, it is my opinion that a fidelity, not only to strictly interpreting but also, strictly applying the provisions of the Statute or of the Rule that is alleged to have been violated, is of primary importance. Both arms of Rule 52 of the Rules are not only clear but mandatory. They should therefore be interpreted and applied as mandatorily as they are enacted.

10. It is my considered opinion, and I do so hold, that what law and justice is all about, for us Judges, is to uphold and to prevent a breach of the law and to provide a remedy for such a breach if any, and in so doing, to boldly tick right what is right, and when it comes to it, to equally and boldly tick wrong, what is really wrong and in the process, to disabuse our minds of any influence that could misdirect us to tick right, what is ostensibly wrong, or wrong, what is ostensibly right because it would indeed be unfortunate for justice and the due process if, by whatever enticing or justifying rhetoric, or by any means whatsoever, however ostensibly credible or plausible it may seem, we reverse this age-long legal norm and philosophy as this would amount to rocking the very foundation on which our Law and our Justice stand and have, indeed, held on to, and so firmly stood the test of times.

11. The questions to be asked and to be answered directly without any justifying rhetoric are indeed twofold; firstly, whether the said Consolidated Indictment was served in accordance with the provisions of Rule 52 of the Rules and secondly, whether in execution of the Order of the Court, the said Indictment was served in accordance with the prescriptions of the said Order. The answer to one which holds good for the other, is in the negative.

12. It must in this regard, be conceded that "an administrative anomaly" as the Prosecution has rightly described the failure to effect personal service on the Applicant in accordance with the provisions of Rule 52(A) and 52(B) of the Rules, was an administrative muddle which should be put right since it is, in itself, a violation of the law for which there must be no other judicial remedy than declaring it illegal, annulling it accordingly, and ordering that service of the Consolidated Indictment be effected in conformity with the provisions of Rules 50(A) and 50(B) of the Rules ***rather than resorting to advancing interpretations or arguments of***

*convenience which were clearly deplored in the International Criminal Tribunal For The Former Yugoslavia (ICTY) case of THE PROSECUTOR V DELALIC*, all in order *to justify and redeem a manifest violation of the mandatory provisions of Laws or Rules that leave no room for the exercise of a judicial discretion and which, in their context, are as clear and as unambiguous as these twin Rules in question.*

13. Our Chamber has always taken these principles and factors into consideration and has opted for the Literal Rule in the sphere of Statutory Interpretation in interpreting texts by giving them their ordinary and everyday meaning and applying them exactly as they are written.

14. For instance, in The Chamber's Decision of the 6th of May, 2004, on The Applicant's Motion Against Denial By The Acting Principal Defender To Enter A Legal Services Contract For The Assignment Of Counsel, Case No. SCSL-04-16-PT, commonly known as Brima - Principal Defender Case, we refused to accept importing extraneous interpretations to statutory provisions or regulations which are as clear, I would say, as those of Rule 52 of the Rules, and took the view that '*holding otherwise would be attributing to a very clear regulatory instrument, a strange and extraneous interpretation and meaning which was never envisaged*'. The Chamber in so holding, relied on the dictum of LORD HERSCHEL in the case of THE BANK OF ENGLAND V VAGLIANO BROTHERS [1891] AC 107 at page 144 where His Lordship had this to say:

> "I think the proper cause is in the first instance, to examine the language of the Statute and to ask what its natural meaning is."

15. It would certainly amount to attributing to a very clear regulatory instrument, a strange and extraneous interpretation, meaning, and application which was never intended by the Legislator, the Regulatory Body or Authority that enacted it, if it were ever decided that serving a judicial process on the Accused's Counsel is good and justifiable when it statutorily and mandatorily should be served on the Accused personally.

16. In our Decision on the Kondewa Motion To Compel The Production of Exculpatory Witness Statements, Witness Summaries And Materials Pursuant To Rule 68 of the 8th of July, 2004, a decision rendered soon after the BRIMA PRINCIPAL DEFENDER DECISION, this Chamber had this to say on an issue that involved the interpretation to be given to the provisions of Rule 68 of the Rules, and I quote:

"In addressing this aspect, the Chamber wishes to observe, by way of first principles, that no rule, however formulated, ***should be applied in a way that contradicts its purpose.*** A kindred notion here is that a statute or rule must not be interpreted so as to produce an absurdity. In effect, it is rudimentary law that ***a statute or rule must be interpreted in the light of its purpose. Another basic canon of statutory interpretation is that a statute is to be interpreted in accordance with the legislative intent.***" Restating the law on statutory interpretation, the Trial Chamber of the ICTY in the case of THE PROSECUTOR V. DELALIC had this to say:

"...The rationale is that the ***law maker should be taken to mean what is plainly expressed.*** The underlying principle which is also consistent with common sense is that the meaning and intention of a statutory provision ***shall be discerned from the plain and unambiguous expression used therein rather than from any notions which may be entertained as just and expedient...***"

17. The absurdity in issue in this case, and what 'may be entertained as just and expedient' as stated in the foregoing dicta will be to hold that service on his Counsel should substitute personal service on the Accused himself as mandated by Rule 52.

18. Certainly, seeking like the Prosecution is, to justify, a flagrant violation of a mandatory provision by submitting that the breach has caused no "identifiable prejudice" to the Applicant, is a cover up argument of convenience which, in the context of the dictum in the DELALIC CASE, is proffered only to be accepted just for the purposes of convenience and expediency, and not because it is, nor is it convincing to argue, that it is in conformity with the law.

19. The issue at stake here, to my mind, is not only one of interpretation but also and equally, one of the application of the provisions of the Regulatory Instrument in issue. In this regard, I am of the opinion that to give effect to the necessary intendment of the Regulatory Body that enacted the provisions of Rule 52 as they appear in the Regulatory Instrument, ***they must not only be strictly interpreted but also and equally, strictly applied.***

20. In this regard, LORD DENNING had this to say in the case of ROYAL COLLEGE OF NURSING VS DEPARTMENT OF HEALTH AND SOCIAL SECURITY [1980] AC 800:

"...Emotions run so high on both sides that I feel we as Judges must go by the very words of the Statute without stretching in one way or the other and writing nothing in which is not there..."

LORD ESHER M. R., in the case of R. V JUDGE OF THE CITY OF LONDON COURT [1892] 1 QB 273 9 CA stated that "***if the words of the Act are clear, you must follow them even though they lead to a manifest absurdity...***"

21. In the case of DUPORT STEEL VS SIRS [1980] 1AER 529 LORD DIPLOCK said that:

> "...where the meaning of the statutory words is plain and unambiguous, it is not for the Judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral..."

and JERVIS CJ in the case of ABLEY VS DALE (1851) N.S. pt. 2, ol. 20, 233,235, had this to say:

> "***...if the precise words used are plain and unambiguous, in our judgment we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice...***"

22. Still on this trend of reasoning, BLANEY J in the case of BYRNE V IRELAND [1972] IR 241, reproduced the treatise in Maxwell on the Interpretation of Statutes (12th Ed.) 1969 at p.29 and I quote:

> "Where by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a Statute is not to be collected from any notions which may be entertained by the Court as to what is just and expedient; words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded. The duty of the Court is to expound the law as it stands..."

I would say here, that our duty as Judges of this Chamber, is to expound the law and in addition, to apply it as it is or as it is written.

23. In light of the above, it is my considered opinion, that Rule 52 of the Rules which mandatorily provides for the personal service on the Accused as soon as "the accused is taken into the custody of the Special Court" reiterates and gives effect to the statutory provisions of Article 17(4)(a) and 17(4)(b) which require respectively that the Accused:

" be informed promptly and in detail in a language which he or she understands, of the nature and cause of the charge against him or her" and

"have adequate time and facilities for the preparation of his or her defence and to communicate with Counsel of his or her own choosing."

24. It would appear apparent therefore, as it is clear, that the Plenary of Judges of the Special Court for Sierra Leone, the Regulatory Authority of this Court, in conceiving, drafting, adopting and promulgating the two arms of Rule 52 as they are worded, was conscious of and wanted to give effect to the preponderance of the personal involvement of the Accused in the process as well as of the statutorily recognised predominance of his personal implication and that of his choices in that process and particularity in the conduct of his defence as provided for in Article 17 of the Statute.

25. It can therefore be deduced, that what the Plenary meant and intended in achieving, by giving the provisions of Rules 52(A) and 52(B) the insistent and mandatory coloration of a personal service of the Indictment on the Accused, which should in fact be the case, is that a service of the Consolidated Indictment which is the subject matter of this contention, should personally be effected on the Accused himself, and not on any other person, albeit, his Counsel, and that proceeding otherwise or doing it the way it was done in this case, violates this clearly written Rule.

26. Besides, and in addition, the directive that the service be effected personally on the Applicant was an Order of the Court. Its execution therefore, in the manner that was contrary to what the Court had directed in that Order, is, in itself, a breach of the law which the Prosecution has implicitly acknowledged but is, at the same time, seeking to circumvent through convenient interpretational, procedural or administrative mechanisms and arguments which, to my mind, neither justify nor do they redeem this fundamental breach of the law.

## (C) DIFFERENCES BETWEEN THE 3 INITIAL INDICTMENTS AND THE CONSOLIDATED INDICTMENT AND THE ISSUE OF A REARRAIGNMENT

27. The issue that has given rise to the controversy here relates to the differences in the contents of the 3 Initial Individual Indictments and the Consolidated Indictment and whether or not, depending on the nature of the differences or changes reflected or appearing in the Consolidated Indictment, rearraignment on this new Indictment against the 3 Accused, is an imperative.

28. I would like to observe here preliminarily, that even though the Rules, in their Rule 50, contain provisions for amending an Indictment, there is no Rule that institutes or regulates the phenomenon of what we are now referring to as a Consolidated Indictment. The Rules provide for an Indictment under Rule 47, which should be served personally on the Accused in accordance with the provisions of Rule 52 of the Rules.

29. If the Prosecution, for any legal reason such as provided for in Rule 48 and after the initial appearance of the Accused, seeks to modify the already approved Indictment, it is my opinion that it has the option of either applying to the Trial Chamber, under the provisions of Rule 50(A) of the Rules, or filing a New Indictment which should necessarily involve going through the Rule 47 procedures, particularly if it turns out that the amendments sought by the Prosecution are substantial and in fact, contain new particulars and new charges. Should the Prosecution opt to apply for an amendment which contains new charges, the provisions of Rule 50(B)(i) of the Rules should ordinarily apply without a further recourse to the Rule 47 procedures.

30. It is necessary to recall here again that when the Prosecution presented its Joinder Motion under Rule 48(B), it did not annex the Consolidated Indictment to it so as to enable the Trial Chamber to appreciate the nature and the extent of its contents. Notwithstanding this flaw which I highlighted as significant and substantial in my Separate Opinion dated the 27th of January, 2004, The Trial Chamber, without the benefit of having seen or verified the proposed Consolidated Indictment before ruling on this Motion, granted it and ordered that a Consolidated Indictment be filed merely on the assurances furnished by the Prosecution and which they did not live up to. In these circumstances, I was, and am still of the opinion that

this Consolidated Indictment should have been subjected to the Rule 47 procedures since I consider it to be a New Indictment.

31. The Majority Decision of the Court overruled my point of view on this particular issue and the Prosecution thereafter proceeded to file directly in the Registry, the Consolidated Indictment after the Order granting the Joinder Motion. It is on this Consolidated Indictment that the Trial of the Applicant, First Accused, Samuel Hinga Norman, Moinina Fofana, the 2nd Accused, and Allieu Kondewa, the 3rd Accused, is now proceeding.

32. In the course of examining the instant Motion for Service and Arraignment on the Consolidated Indictment and a Second Appearance filed by the 2nd Accused, the Trial Chamber, after putting the 3 Initial Individual Indictments and the New Consolidated Indictment under scrutiny, has come to realise that this Indictment has made the following significant amendments and additions to the Individual Indictment of the 2nd Accused, Moinina Fofana (see underlined portions):

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

b.) Paragraph 25(b) (CI) – and Blama;

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

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

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

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

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

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

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

34. In my Separate Opinion dated the 27th of January, 2004, in expressing my concerns which today are very and even more legitimate, for our failure to subject the Consolidated Indictment to the Rule 47 judicial scrutiny procedures, I had this to say:

> "During our examination of and deliberation on the final draft on the 23rd of January, 2004, I raised certain issues with the Learned and Honourable Brothers and Colleagues, which I thought should be set out as the fourth, in addition to the three Orders we made at the tail end of our unanimous Judgement just after the mention of 'FURTHER CONSEQUENTIAL ORDERS.' It was to read as follows:
>
> 'That the said Indictment be submitted to a designated Judge for verification and approval in accordance with the provisions of Rule 47 of the Rules within 10 days of the delivery of this Decision.'

I further added that the Accused Persons had to be called upon to plead afresh to the Consolidated Indictments. What ran through my reasoning in making this proposal was that the Consolidated Indictment we are ordering the Prosecution to prepare was in fact, to all intents and purposes, a new indictment which needed to be subjected to the procedures outlined in Rule 47 and 61 of the Rules of the Special Court and this, notwithstanding the fact that all of the Accused persons already earlier made their initial appearances and had already been arraigned individually on the individual indictments, ***which might not necessarily contain the same particulars as those in the consolidated indictment that are yet to be served on the Accused persons for subsequent procedures and proceedings before the Trial Chamber.***

35. In addition, I had this to say on Page 4, Paras 13-15 of my Separate Opinion:

> 13. "The other issue which I consider important in the present context is the submission by the Defence Counsel for Mr. Samuel Hinga Norman, Mr Jenkins Johnston, who argued that the anticipated consolidated indictment should have been exhibited as part of the Motion and that a failure by the Prosecution to do this in order to ensure judicial scrutiny amounted to non-compliance with a condition precedent for the granting or even the examining of the application for joinder. Defence Counsel for Mr. Moinina Fofana, Mr. Bockarie, agreed with this submission by his colleague."
>
> 14. On this submission, the Prosecution replied that the Rules do not provide for this procedure and that the Defence contention must not be considered as a condition precedent for the filing or granting of the application for joinder. O ur finding on this argument in the circumstances, is, and I quote:

"...the Chamber is of the opinion that, due to the need for expeditiousness and flexibility in its processes and proceedings...recourse to procedural technicalities of this nature will unquestionably impede the Special Court in the expeditious dispatch of its judicial business...The Chamber, therefore, does not think that it is necessary for the Prosecution to exhibit an anticipated consolidated indictment...to establish a basis for joinder."[1]

15. I share these views expressed in our judgment but even though we have unanimously upheld the argument of the Prosecution in this regard, and although we know that the consolidated indictment is still undisclosed, I think that we should remain resolved in our determination and quest to steadily build up some jurisprudence from certain shortcomings or lacunae in our Rules, which case law will enhance, advance, and not necessarily prejudice a proper and equitable application or interpretation of our Rules. This will in fact encourage the application of the 'Best Practices Rule' which is neither contrary to nor inconsistent with the general principles of international criminal law and procedure."

36. I took this stand largely because I felt that the Consolidated Indictment that was to be filed, considered only on the basis that it was a merger of 3 Individual Indictments involving 3 Individual Accused Persons, who in fact, had already been arraigned individually, was New, and particularly in the context of apprehensions of uncertainty as to the expected content of the Consolidated Indictment which the Chamber neither had the privilege nor was it given the opportunity to examine before it was filed by the Prosecution.

37. It is indeed my considered opinion, even putting aside the extensive and significant changes that the Prosecution has introduced in the Consolidated Indictment, that this Indictment, a product of a merger of 3 Indictments, coupled with its altered form, is New, and this, even if those additional particulars or charges, which we now know of, did not feature in it. This position is supported by the various dictionary meanings of the word New contained in Paragraph 23 of my Separate Opinion already referred to.

38. If We as a Chamber in our Joinder Decision dated the 27th of January, 2004, ordered that the Consolidated Indictment be assigned a new case number and that the said Indictment be filed in the Registry within 10 days of the date of the delivery of our Decision, coupled with a further order for fresh service of the said Indictment under the provisions of Rule 52 of the Rules, it is in my opinion, and in a sense, a recognition by the Chamber of the novelty of this

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

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

39. In a situation such as this, the provisions of Article 17(2), 17(4)(a) and 17(4)(b) of the Statute including those of Rule 26 (bis) of the Rules which guarantee to an Accused, the right to a fair, public, and expeditious trial as well as the right to be promptly informed of the nature and cause of the charge against him or her, would, in my opinion, be violated if this trial proceeds without a fulfilment of the legal formality of a regular personal service of the Consolidated Indictment, on the Applicant.

40. In addition, a rearraignment of the Accused on the entirety of that extensively amended Indictment is necessary because it has now unveiled itself and confirmed its real designation and characterisation as a New Indictment; a fact which stands on even firmer grounds today that we are witnessing the bare reality of the extensive and fundamental amendments which the Prosecution had introduced into it, to the extent of even including the New Charges.

**(D) WHY THEREFORE IS REARRAIGNMENT IN THIS CASE NECESSARY?**

41. In the case of R V JOHAL AND RAM, [1972] CAR, 348, The Court of Appeal of England observed that the longer the interval there is between arraignment and an amendment, the more likely it is that injustice will be caused, and in every case in which an amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby.

42. In this regard, I had this to say in my RULING ON THE MOTION FOR A STAY OF PROCEEDING IN THE FODAY SANKOH CASE, CASE NO.SCSL-03-02-PT

> "*In taking this stand, I was and still am guided by a reverence to the importance a plea occupies in a criminal trial because it marks, after the filing of the indictment, the actual commencement of criminal proceedings which, in any event, cannot get underway without a plea having been entered.*"

See Page 5 line 14-17 of my Ruling dated the 27th of July, 2003.

43. In fact, BLACKSTONE'S CRIMINAL PRACTICE, OXFORD UNIVERSITY PRESS, 2003 Edition, Page 1303 Paragraph D11.1 directs as follows:

"If there is a joint indictment against several accused, normal practice is to arraign them together. Separate pleas must be taken from each of those named in any joint Count"

44. This longstanding and respected practice directive, should, in my opinion, be adopted and applied to this situation where the Trial Chamber did, under Rule 48(A) of the Rules, rightfully grant the joinder of the 3 persons who initially were individually indicted, but are today being jointly charged and tried. The necessity for a rearraignment here is dictated by the fact that even though they are charged jointly, they have to be tried as if they were, as provided for under Rule 82 of the Rules, being tried separately, so as to forestall a violation of their individual statutory rights spelt out in Article 17 of the Statute and particularly, their right to a fair trial.

45. It is my opinion that rearraignment, as the 2nd Accused is soliciting in this case, is necessary since the Consolidated Indictment which I hold is New, is vastly amended and is different in its contents from the Initial Individual Indictments. Furthermore, since arraignment which involves reading the charges to the Accused and explaining them to him or her should need arise, so as to promptly acquaint him with the charge or charges against him or her before obtaining his or her plea is an important and vital triggering element in any criminal trial, it is further and also my opinion, and I do so hold, that a plea is an equally important component of the provisions of Article 17(4)(a) of the Statute, when considering and determining whether the provisions of this Article, have been respected or have been violated.

46. It was stated in the Canadian Decision of the Ontario Court of Appeal in the case of H. M. THE QUEEN V JEFFREY MITCHELL, (1997), 121 C.C.C. (3d) 139 (ONT. C.A.), that arraignment is intended to ensure that an accused person is aware of the exact charges when he or she elects and pleads and further that all parties to the proceedings have a common understanding of the charges which are to be the subject matter of the proceedings which follow.

47. As a follow up and to give effect to this statutory provision, Rule 47(C) of the Rules provides as follows:

The Indictment shall contain and be sufficient if it contains the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence.

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

> Upon his transfer to the Special Court, the accused shall be brought before the designated Judge as soon as practicable and shall be formally charged. The Designated Judge shall:
>
> (ii) Read or have the indictment read to the accused in a language he speaks and understands, and satisfy himself that the accused understands the indictment;
>
> (iii) Call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf.

49. Rule 50 of the Rule provides as follows:

> 50(B)
>
> If the amended indictment includes new charges and the accused has already made his initial appearance in accordance with Rule 61.
>
> 50(B)(i)
>
> A further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

50. BLACK'S LAW DICTIONARY, 7TH ED. Page 81 defines an 'AMENDMENT OF INDICTMENT' as:

> "The alternative of changing terms of an indictment either literally or in effect after the grand jury has made a decision on it. The indictment usually cannot legally be amended at trial in any way that would prejudice the defendant by having a trial on matters that were not contained in that Indictment".

51. In fact, to give effect to the provisions of Article 17(4)(a) of the Statute and Rule 47(C) of the Rules, greater specificity, as in this expanded Consolidated Indictment in issue, is required for proof of participation in the commission of the alleged offences and must, as has been extensively done in this Consolidated Indictment, be pleaded with enough clarity, detail and precision so as to clearly inform the Accused of the charges against him and enable him thereby, to prepare his defence.

52. In the case of THE PROSECUTOR V KUPRESKIC, the Appeals Chamber of the ICTY held as follows:

> "the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution's case with enough detail to inform the defendant clearly of the charges against him so that he may prepare his defence."

53. In the case in hand, the Prosecution has expanded the factual allegations in the Consolidated Indictment than those contained in the Initial Individual Indictment, a fact which, of necessity, dictates that the Accused must be arraigned on the Consolidated Indictment which to me, and under the law and the Rules that I have cited and the analysis I have made, is New. I would add here that if this trial proceeds without a rearraignment and individual pleas taken on each count of the Consolidated Indictment and the Accused is convicted, this trial could, on appeal, be declared a nullity by Our Appellate Jurisdiction, The Appeals Chamber, which could, depending on the circumstances, quash the conviction, and enter either a verdict of acquittal, of discharge, or of a retrial.

54. In these circumstances, I have no hesitation in concluding that the Prosecution in introducing a Consolidated Indictment, has indeed filed, with the leave of the Trial Chamber, a New Indictment. Under normal circumstances, it should have been subjected to the scrutiny of a Designated Judge under the provisions of Rule 47. In the alternative, the Prosecution has, in accordance with the provisions of Rule 50 of the Rules, and with the tacit leave of the Trial Chamber, amended the 3 Initial Individual Indictments of the 3 Accused persons and has merged them into this one Consolidated Indictment which contains substantial additions to what was alleged in the 3 Initial Indictments.

55. In either case, a combined reading of the provisions of Articles 17(2) and 17(4)(a) of the Statute and of Rules 47(C),48(A), 50(A) and 50(B)(i), 52(A), 52(B), 61(ii), 61(iii), and 82(A) of the Rules, clearly demonstrates and confirms the necessity for a rearraignment of the 3 Accused persons on the Consolidated Indictment which, notwithstanding views to the contrary expressed in the Majority Decision is, and indeed, has all the characteristics of what it takes to be a New Indictment.

56. I would like to add that in law, a plea on an old Indictment is not, and should no longer be valid, nor does it hold good any longer, in respect of a New Indictment, particularly where the New Indictment contains new elements. It is therefore my opinion that the pleas recorded

during all the initial appearances of the 3 Accused Persons, are not transferable for them to constitute a basis for proceeding on the new Indictment without going through the obligatory stage and formality of arraigning these same persons on the New Indictment or which they are now being, not only jointly indicted but also jointly tried.

57. The International Criminal Tribunal for former Yugoslavia has held the view that where an indictment is amended or where a consolidated indictment is prepared and either the amended or the consolidated indictment contains new charges, it will, as decided by the Trial Chamber in the case of THE PROSECUTOR V BLAGOJEVIC, (where a consolidated indictment was the document in issue), be termed a New Indictment. The Chamber noted as follows:

> "the Amended Indictment included new charges and the accused has already appeared before the Trial Chamber, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges"

58. In yet another case of THE PROSECUTOR V MARTIC, The Trial Chamber of the ICTY arraigned the Accused on the amended indictment which it declared to be a new indictment. His Lordship, Hon Judge Liu had this to say in this case:

> "I will ask Madam Registrar to read out the new charges brought against you. Then I will ask you whether you plead guilty or not guilty to the specific charge. Since the initial indictment has been replaced by the amended indictment, I will ask you to enter pleas with regard to all charges contained in the new indictment."

59. It has been argued that the Consolidated Indictment is not a new Indictment and that accordingly, there should be no rearraignment since the Accused Persons had already been arraigned on their Initial Individual Indictments. In effect, the Prosecution takes the view that the Initial Individual Indictments are still valid notwithstanding the existence of the Consolidated Indictment dated the 4th of February, 2004, on which the trial is now proceeding.

60. I of course do not subscribe to this view at all because if, as the Prosecution contends, the 3 Individual Indictments are the same in content as the Consolidated Indictment, one wonders why it felt obliged to go through the procedures of applying to replace them with the single Consolidated Indictment, into which the 3 Initial Individual Indictments are now all merged. In any event, the question should be put as to why the Prosecution is seeking to hang on to the

4 Indictments in one proceeding involving 3 Accused Persons who today are jointly indicted and are being jointly tried.

61. In my opinion, the Consolidated Indictment introduced after the Joinder Decision, as an indictment which has superseded the 3 Initial Individual Indictments against the Accused persons, is a New Indictment. Indeed, in my Separate Opinion on the Joinder Motion, I expressed the view that the trimming down of the 3 indictments to form one Consolidated Indictment constituted a fundamental amendment to the 3 Initial Individual Indictments and that it would require compliance with the provisions of Rule 47 followed by a rearraignment of the Accused Persons on the New Consolidated Indictment under the provisions of Rule 61(ii) and 61(iii) of the Rules.

## THE CASE OF R. V FYFFE AND OTHERS [1992] CLR 442

62. I have taken cognizance of the dictum in Fyffe's Case where Their Lordships, Russel, Douglas Brown and Wright J. J., recognised that the general rule is that arraignment is unnecessary where the amended indictment merely reproduces the original allegations in a different form, albeit including a number of new Counts.

63. A closer analytical examination of this case reveals however, that the facts and the ***raison d'être*** of Fyffe's decision are distinguishable from those in the present motion. In the Fyffe case which was decided in the Criminal Division of the Court of Appeal, the 5 Accused Persons/Appellants faced but a single 11 Count Indictment for drug offences. This Indictment was substituted by a 27 Count indictment alleging basically the same facts as the 11 count indictment did against the same accused persons who had been arraigned together and jointly tried all along. Learned Counsel, Mr. Wright, submitted that there should have been a rearraignment on the substituted 27 Count indictment and that failure by His Lordship, The Learned Trial Judge, to call a rearraignment, rendered the proceedings, null and void. This submission was overruled. The Lord Justices of the Court of Appeal had this to say:

> "In the circumstances that we have described, we are satisfied that ***no more than one indictment was ever before the Court in this Case*** and ***that what happened was an amendment of the indictment as originally granted***" and in addition, that this was done for the convenience of Defending Counsel.

64. Comparing and distinguishing this decision with our case in hand, and very much unlike the situation in the Fyffe Case with only one Indictment in issue, the Fofana case has four Indictments – three individual and one consolidated in which they are all jointly charged and are now being jointly tried.

65. Let me however observe and say here, that if in Fyffe's case, Their Lordships found, with only 2 exceptions which the Law Lords considered immaterial, that the 27 counts later preferred, reproduced what had appeared in the initial 11 count Indictment, T he Moinina Fofana situation is clearly distinguishable from Fyffe's. In the latter case, it was one 11 count Indictment charging the 5 Appellants only for drug offences that was replaced by the 27 count Indictment charging the same five indictees with the same drug offences.

66. In the Fofana situation, 3 indictees, originally indicted on 3 Individual Indictments, are now standing jointly charged and tried on a Consolidated Indictment that has replaced, stayed, and in my opinion, extinguished the 3 Initial Individual Indictments. In addition, the records now clearly show, that this Consolidated Indictment, unlike Fyffe's, has introduced new locations that did not feature in the Initial Individual Indictment against the Accused. ***In my Judgment, and as the facts have indeed established, these, unlike in Fyffe's case, are amendments in substance.***

67. Their Lordships in Fyffe's case further had this to say:

> "With two immaterial exceptions the ***27 counts reproduced what had appeared in the 11 counts. They added no new allegations and charged no new offences.*** In our judgment, there were no amendments of substance; there were amendments of form. We are satisfied that this being the proper interpretation of what happened the Judge gave leave to amend and it was unnecessary to re-arraign the defendants. They had pleaded to precisely the same charges as were laid in the 27 counts, albeit when they were encapsulated in the 11 counts. ***There was no indictment to be stayed and no new indictment to be preferred.*** In our view the judge was right to reject the motion to arrest judgment.

We are fortified, Their Lordships continued, in the views we have formed by some observations of LORD WIDGERY CJ in the case of R V RADLEY, 58 Cr App Rep 394, 404 when His Lordship said:

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

68. It is pertinent to observe here that in Fyffe's case, drug offences which were the core issue. Certainly these are less significant and indeed minor offences, when compared to the grave charges of murders and killings for which Fofana and his Co-Accused Persons are indicted, and for which the due process dictates the exercise of even more caution than the ordinary and a reinforced posture of scrupulousness and scrutiny in the conduct of the proceedings.

69. On this issue and having regard to the nature and the gravity of the offences for which the 3 Accused Persons stand indicted, the necessity to strictly respect and apply the procedural rules, and in the exercise of this judicial caution, to order a rearraignment, is even a more imperative obligation in order to avoid being perceived or seen to have violated any of the fundamental rights guaranteed to the Accused Persons by either the Statute or the Rules of Procedure and Evidence and particularly, their right to a fair trial as guaranteed under the provisions of Article 17(2) of the Statute and Rule 26(bis) of the Rules.

## (E) EFFECTS OF LACK OF ARRAINGMENT ON THE VALIDITY OF THE PROCEEDINGS

70. In the case of R. V WILLIAMS, [1978] QB 373, it was held that a failure by the Court to have the accused arraigned does not necessarily render invalid, subsequent proceedings on the indictment where the defence, as in the Williams's case, waives the right of the accused to be arraigned, either expressly or impliedly, by simply remaining silent while the trial proceeded without arraignment. Williams's conviction was upheld despite a lack of arraignment because he, being the only person in court who knew he had not been arraigned, raised no objection at the time. Had he objected but the court nonetheless refused to arraign him, it is submitted that any conviction would have been quashed. Fofana, the Applicant in this case however, clearly objected to his trial going underway without his having entered a plea on the Consolidated Indictment.

## THE AMERICAN PERSPECTIVE ON REARRAIGNMENT

71. In the PEOPLE V WALKER, [338 . 2d, 6 Cal App. 19], the California Court of Appeal held that ***where an indictment is amended, regular and orderly procedure requires that the defendant be rearraigned and be required to plead thereon before trial, but if the defendant makes no demand or objection and is convicted on trial without having entered a plea, an objection that there was no plea is waived and is unavailable to him.*** This case was decided on the same rationale as the English case of R V WILLAMS (ante)

72. In HANLEY V ZENOFF [398 p.2d 241 Nevada 1965], a Neveda Court held that ***when an amended indictment is filed which changes materially the information to which the defendant has entered a plea, he must be arraigned on such amended indictment.*** In McGILL V STATE, [348 f.2d 791 (1965)], it was held that ***if rearraignment is necessary to avoid the possibility of prejudice, the defendant should be arraigned.*** I consider, as I have already indictated, that there is a possibility of a prejudice of an unfair trial to the 3 Accused Persons if they are not served with and rearraigned on the Consolidated Indictment as early as possible so as to avoid an aggravation of the said prejudice.

73. In SHIEVER V STATE [234 P.2d 921 Okla Crim. App 1951], it was held that where an amendment to an information charges a new crime or where the effect is to charge a crime when the information prior to the amendment/information did not, the defendant should be rearraigned.

## (F) ANALYSIS

74. From the facts now available, it is no longer in dispute that the charges and particulars of the offences against the Applicant, 2nd Accused, Moinina Fofana, have been expanded. ***In addition, he now is no longer being charged individually but jointly in one indictment with two other accused persons.*** This, in my opinion, subjects him to either a New Indictment which, indeed, it is, or to an amended indictment which contains new factual allegations that did not exist in the Initial Individual Indictment dated the 26th of June, 2003 to which he had already pleaded "Not Guilty" to all counts.

## (G) CONCLUSION

75. In the light of the above, and considering the predominantly consistent pattern of the law and the jurisprudence relating to the issues raised, I do find as follows:

### 1) ON RULE 26(bis) OF THE RULES OF PROCEDURE AND EVIDENCE

76. Having regard to the foregoing factual and legal analysis of the issues that have been raised by the Applicant in this Motion, and the provisions of Rule 26(bis) which reads as follows:

> The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules with full respect for the rights of the accused and due regard for protection of victims and witnesses,

I find that the following points contravene, not only the provisions of Articles 9(1), 17(2), 17(4)(a), and 17(4)(b) of the Statute of the Special Court as well as those of Articles 9(2) and 14(3)(a) and 14(7) of the International Covenant on Civil and Political Rights, but also those of Rules 26(bis), 50, 52, and 61 of the Rules.

### (2) SERVICE OF THE INDICTMENT

77. Having granted the Joinder Motion and ordered service of the Consolidated Indictment (which bears a new number) in accordance with Rule 52 of the Rules, the Trial Chamber should give effect to its own Order, consistent with the provisions of the said Rule and those of Rule 26(bis), as it would again, to my mind, violate the statutory rights of the Accused, if service of the Consolidated Indictment were effected in a manner other than that provided for under Rule 52 on which the Order of the Chamber was based and made.

78. I say here that any action taken in violation of a mandatory provision of the law should, of necessity, be declared null and void even if that provision, as could possibly be argued to justify a toleration of that violation, fails to prescribe that remedy. This is even the more so in criminal matters where the liberty of the individual which is universally considered sacred, is at stake and where, as I have said, ***the necessary intendment of the enacting body of these provisions of the Statute and of the Rules in relation thereto, is to effect a personal service on the Accused and on no other person in his stead.*** I accordingly therefore, declare the service of the Consolidated Indictment on the Accused's Counsel, null and void.

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

79. The foregoing analysis demonstrates that there are clear differences between the Initial Individual Indictment to which the 3 Accused Persons had already pleaded, and the Consolidated Indictment on which they are now stand indicted and on which the trial is now proceeding.

80. In further justifying its stand on the Consolidated Indictment, the Prosecution argues that since the Consolidated Indictment contains 'no new charge', no further arraignment is required and further, "*that as held by the Joinder Decision and referred to in the Norman Motion, the Indictments against the Three Accused contain exactly the same charges(Counts).*"

81. This argument to me is as curious as it is misleading because we indeed could not, as a Trial Chamber, at the time we were rendering the Joinder Decision, arrive at such a finding and conclusion when it is clear from the records, that we did not have the opportunity of seeing the Consolidated Indictment which, in my opinion, ought to have been annexed to the Motion so as to enable Their Lordships to ascertain the real content of that "yet-to-be-disclosed Consolidated Indictment".

82. In fact, we could not have arrived at such a finding because we overruled the submission to have it annexed to the Joinder Motion on the grounds that "*it will impede the Special Court in the expeditious dispatch of its judicial business.*"

83. It would, to my mind, occasion a breach, not only of the provisions of Article 17(4)(a) of the Statute, of Articles 9(2) and 14(3)(a) of the International Convention on Civil and Political Rights, but also, those of the provisions of Rules 26(bis), 47, 50, 61, 82 of the Rules, if the Accused Persons were not individually rearraigned and a plea entered by each of them on each of the counts in the Consolidated Indictment, particularly within the context of, and the necessary intendment of the promulgators of the provisions of Rule 82(A) of the Rules.

84. It is my opinion, that the service of the indictment on the accused as well as his arraignment on that indictment, are very important components in the mechanism that is, and should in fact always serve as an instrument to convey to the accused, a clear picture of, and a message

regarding "***the nature and cause of the charge against him or her***" as required by Article 17(4)(a) of the Statute. This, to my mind, is cardinal to the issues in this case.

85. Consistent with this legal position that I am stating, it cannot be said, as far as this matter is concerned, that these statutory provisions have been complied with having regard to the uncertainty created in the minds of the accused persons as to the status of and the facts in the Initial Individual Indictments, vis-à-vis the status of and facts contained in the ongoing Collective Consolidated Indictment.

86. In the absence therefore of a message to this effect, which is clear, certain, and unambiguous, on the nature and content of the Consolidated Indictment as well as of its effective service on the Accused as stipulated in Rule 52(A) and 52(B) of the Rules and by Our Court Order, it is my considered opinion, that the provisions of Article 17(4)(a) would not have been complied with. I would add and say, that they would indeed have been violated.

87. Having regard to the above, I rule in favour of granting the 2nd Accused's Motion on all grounds that are canvassed in his arguments and do hold that that the Consolidated Indictment filed with the Unanimous Leave of The Chamber and on which the trial is now proceeding ***is not only a valid, but also is a New Indictment.***

88. We indeed, to my mind, could have arrived at a unanimous decision that the Consolidated Indictment is New and that a rearraignment is necessary if We all took the view that because the Indictment, contrary to the assurances proffered by the Prosecution, contained largely expanded details and particulars and more importantly, new charges, and that this discovery that has just been rather belatedly made, could not be, and was not available to Us during the hearing of the Joinder Motion and this, because the proposed Consolidated Indictment on which we could have made this judgment, was not exhibited to the Motion.

89. In my opinion, it is not too late at this stage of these proceedings, given the facts and the circumstances of this case, for the Prosecution to either apply for an amendment of the Consolidated Indictment so as to have the new particulars and charges featuring therein to be integrated into it, or for the Court to direct the same and thereafter, for the Accused to be rearraigned on the amended Indictment.

90. In R V. JOHAL AND RAM (ante), it was decided that the Court has the power to order an amendment which involves the substitution of a different offence for that originally charged in

the Indictment or even the inclusion of an additional count for an offence not previously charged.

91. This I would say, is an inherent power exercised by the Court either on its motion or at the request of the Prosecution, since an amendment of any kind, including the addition or subtraction of a count, may be made at any stage of the trial, provided that having regard to the circumstances of the case and the power of the Court to postpone the trial and if, as we held in the Majority Decision dated the 2nd of August, 2004, on the Prosecution's Request For Leave To Amend The Indictment Against Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa, Case No. SCSL-04-14-T, the amendment can be made without injustice. See also R V JOHAL AND RAM (ante).

92. In the ICTR decision of **THE PROSECUTOR V KAJELIJELI** on the Prosecutor's Motion to Correct the Indictment dated the 22nd of December, 2000 and the Prosecutor's Motion For Leave to File and Amended Indictment, the Trial Chamber warned that once leave to correct or to amend is given, the correction or the amendment may not go beyond what was permitted or directed by the Trial Chamber. The parties will have and should, in this event, indeed be given an opportunity to be heard when the amendment is sought as it could affect the accused's case and preparation of his defence. ARCHBOLD: INTERNATIONAL CRIMINAL COURTS (PRACTICE PROCEDURE & EVIDENCE, RODNEY DIXON AND KARIM A. A. KHAN) Page 131, Paras 6-71 and 6-72.

93. In the Motion before us and contrary to assurances given by the Prosecution that there was nothing new in the Consolidated Indictment as compared to the Initial Indictment, we have now discovered that this disputed Indictment actually contains new particulars and new offences, and that the Prosecution has obviously gone beyond what would seem to be the implied expectations of the Chamber in ordering the filing of the said Indictment without having verified it. This being the case, it is clear, and I do so hold, that the plausible principle outlined in the **KAJELIJELI CASE** which impliedly and by analogy, appears to have been violated, should be remedied.

94. Accordingly, I do make the following Orders:

    1. That the Prosecution immediately and forthwith, and by a written Motion, applies to amend the said indictment under the provisions of Rule 50 of the Rules so as to have

lawfully incorporated in the said indictment, the particulars and facts featuring in the said Consolidated Indictment and which are new.

OR IN THE ALTERNATIVE

That the Prosecution submits the said Indictment to the verification process provided for in Rule 47 of the Rules with a view to a new initial appearances for the Accused for purposes of their rearraignment on the approved and confirmed Consolidated Indictment under the provisions of Rules 61(ii) and (61(iii) of the Rules.

2. That the Accused should, after the amendment is granted, be rearraigned on the amended Consolidated Indictment before the trial proceeds further and this, only after some procedural formalities required or permitted by the law, including, but not limited to, those provided for under Rule 66 and 72 of the Rules, as well as those related to recalling certain witnesses who have so far already testified, if the defence so desires and makes an application to this effect by way of a Written Motion.

3. That a personal service of the Consolidated Indictment dated the 5th of February, 2004, be immediately and personally effected on each of the Accused Persons.

4. THAT THESE ORDERS BE CARRIED OUT.

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

Hon. Judge Benjamin Mutanga Itoe

Presiding Judge
Trial Chamber

[Seal of the Special Court for Sierra Leone]