SPECIAL COURT FOR SIERRA LEONE
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CS7 - NOTICE OF DEFICIENT FILING FORM

Date:	26th Jan 2005	Case Name: Case No:	The Prosecutor v. Norman, Fofana & Sesay SCSL-2004-14-T
To:	**PROSECUTION: Luc Coté** **DEFENSE: Dr Bu-Buakei Jabbi, John Wesley Hall Jnr** **CHAMBER: Appeals Chamber** **OTHER: Defence Office**		
From:	Neil Gibson: Court Management		
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Subject	Pursuant to article 12 of the Directive to on Filing Documents before the Special Court, the following document(s) does not comply with the formal requirements laid down in Articles 3-11.		

Dated: 26th January 2005

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Signed: NGibson : DEPUTY CHIEF, COURT MANAGEMENT *Dated:* ~~2004~~ 26.1.2005.

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CMS7 FORM

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice Emmanuel Ayoola, Presiding
Justice George Gelaga King
Justice A. Raja N. Fenando
Justice Geoffrey Robertson, QC
Justice Renate Winter

Registrar: Robin Vincent

Date File: 14 January 2005

The Prosecutor Against Sam Hinga Norman
Moinina Fofana
Allieu Kondewa
Case No. SCSL -04-14-T

DEFENCE RESPONSE
TO
Prosecution Notice of Appeal Against the Trial Chamber's Decision of 29 November 2004 and Prosecution Submissions on Appeal

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Office of the Prosecutor
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NEIL GIBSON
16:40.

I. INTRODUCTION

1. Pursuant to rule 7(A) of the Rules of Procedure and Evidence (the Rules) of the Special Court for Sierra Leone (SCSL)~, to paragraph 12 of the Practice direction for Certain Appeals Before the Special court dated 30 September 2004, and to Article 6(D)(ii)(b) of the Practice Direction on Filing Documents before the SCSL, the First Accused files this response to the Prosecution Notice of Appeal Against the Trial Chamber's Decision of 29 November 2004 and Prosecution Submissions on appeal filed on 12 January 2005 and served upon the Court Appointed Counsel for the First Accused on 18 January 2005. This response opposes the said appeal, being an interlocutory appeal pursuant to Rule 73(B) of the Rules.

2. The grounds of the opposition or objection to the said interlocutory appeal and submissions in support thereof are set out further below.

3. For ease and clarity of reference, and to avoid multiple fulsome citations from the recurrent submissions and conclusions of the said interlocutory appeal, this response thereto will refer to it mainly by its section, subsection and paragraph numbers. In that regard, and taking into account its incomplete numbering of its principal sections and partly inaccurate subsection numbering, this response will assign letters A, B, and C respectively to its three unnumbered principal sections and will rectify its subsection numbering here and there as appropriate and specified herein: e.g. A. III: para. 10; B. II (2): para. 36; B. III: para.79; B. IV: para. 89; or C: para. 92. It should be noted that in its second principal section, paragraphs 26-78 and 79-88 all inclusive thereof are each separately marked II therein, and paragraphs 89-91 inclusive therein as III; the three sets of paragraphs are accordingly referred to herein as II, III, and IV respectively of principal section B thereof.

4. The following abbreviation scheme will also be used in this response: The previous separate individual indictment against the present respondent before the current consolidated indictment came into being, which is otherwise consistently referred to in the aforesaid interlocutory appeal as the "Original Norman Indictment", will be referred to herein as "ONI"; the current consolidated indictment, which is the subject matter of the Trial Chamber decision being appealed against as the "CI; the Trial Chamber's preceding enabling decision as the "Joinder Decision"; and the said prosecution interlocutory appeal being responded to herein will be referred to as the "PIA".

II. DETAILS OF THE P.I.A.

A. The Notice and Grounds of Appeal in the P.I.A.

5. In its sections A.I. to A. VI: paras. 1 to 23 inclusive, the P.I.A. sets out details of the Joinder Decision it is appealing, including those of the related background proceedings and its own grounds of appeal and the relief being sought therein.

6. The P.I.A. alleges at A. III: para.10 that the subject trial proceeded for the first three months "without any objection" being raised by any of the accused persons against the CI and without any issue being raised against it by the Trial Chamber itself "of its own motion". The P.I.A fails throughout its entire length to mention the Opening Statement by the respondent herein as self-defending First Accused on 14th June 2004, whereby, pursuant to Rule 84 of the Rules, he raised a serious oral objection that he had neither been served with nor arraigned upon the C.I. upon which his trial was about to commence and that he accordingly had no charge(s) standing against him before the Trial Chamber. The Trial Chamber then merely decided to note his protest and to proceed with the trial without any further comment on the said protest. It was indeed that same protest that later became the subject of the First Accused's Motion for Service and Arraignment dated 21st September 2004, the decision whereupon is now being appealed by the P.I.A.

7. The P.I.A. then proceeds to set out "two objections" raised in the said Motion for Service and Arraignment (at A. III: paras. 11-17 inclusive) to the C.I., without however mentioning the objection as to non-arraignment of the First Accused on the C.I. in terms of Rule 61 of the Rules, which was the second main objection in that motion. By this omission, the P.I.A. fails in its entirety to consider the issues involved in the non-arraignment objection, e.g. the consequential deprivation of the substantive rights of the Accused and its possible prejudice to his fair trial since the commencement of the trial. This aspect of the Joinder Decision is thus excluded from consideration by the over-selectivity of the P.I.A. in its recitation of details of the related proceedings.

8. The first of the "two objections" highlighted by the P.I.A. relates to the allegation that the First Accused had not been personally served with the C.I. (at A.III: para. 13) as required by Rule 52 of the Rules. Again, in its over-selectivity of details, the P.I.A. fails to mention either that Rule 52 is mandatory in its nature and design or that the order for the First Accused to be served with the C.I., which the prosecution had failed to comply with, was in fact a peremptory order of the Trial Chamber itself in its Joinder Decision. The implications of non-compliance with a mandatory rule as such and of disobedience of a peremptory judicial order are thus not further probed in the P.I.A. beyond merely reporting that the Trial Chamber had ruled that, given the facts and factors recited thereat, the said non-compliance and disobedience "did not in all the circumstances of this case unfairly prejudice the Accused's right to a fair trial" (A. III: para. 13). Understandably, the prosecution is not appealing this aspect of the Trial Chamber's decision.

9. The gravamen of the challenge in the P.I.A. is centred upon the second of the "two objections" highlighted therein and the Trial Chamber's findings thereon (A. III: paras. 14-17). That second "objection", as re-stated by the P.I.A., is that C.I. "allegedly contained new allegations that had not been included in the original indictments against the Accused", that the C.I. "expanded and elaborated upon some of the factual allegations contained in the ONI., and that some substantive elements of the charges had been added (A. III: paras. 14, 16 respectively). The Trial Chamber's findings and observations thereon as recorded in the first-paragraph 30 of the decision being appealed are then partially quoted in A. III: para 16 of the P.I.A., together with the contingent or conditional and suppositions observation by the Trial Chamber in the appealed decision that unfair prejudice "may" result to the First Accused and respondent herein "if" the C.I. is not "amended" as specifically proposed and served upon him. The particular finding and observation of the Trial Chamber against which the appeal is made is as underlined in the following sentence from its quoted paragraph: "while some of the differences between the two indictments simply provide greater specificity, and provide background facts, many of the changes are, however, material to the indictment" (Emphasis added).

10. It should be noted that the P.I.A. does not include in its target for appeal the Trial Chamber's proposal for "amendment" of the C.I. in either sense of "expunging" from or formally re-instating and retaining in it the portions selected to be "stayed" by the Trial Chamber. (The prosecution has, indeed, by separate application to the Trial Chamber already applied for leave to make the retention "amendments").

11. It should also be noted that, although the P.I.A. seeks to negate in various paragraphs presumed allegations of "new or additional charges" or "new criminal liability" (e.g. at B. II: paras. 40, 49, 56, 65, 73, 77, 78), such allegations were not however explicitly made anywhere in the appealed decision itself; in fact, the said decision strenuously seeks to appear not to concede that any of the changes or additions are tantamount to a new charge or new offence in the C.I. as compared with the ONI (e.g. see paras. 23 to 30 inclusive of the appealed decision).

12. The P.I.A. is otherwise quite clear and categorical as to its targets of appeal, which are two-fold (A. IV: paras. 18-20 inclusive), to wit, the Trial Chamber's findings that the specified changes or additions in the C.I. are "material" to the cases against the respondent First Accused and that if the C.I. remains "unamended" the said First Accused could be prejudiced as to his right to fair trial (see also B. IV: paras 89-91 inclusive thereof). The prosecution's grounds of appeal are that with respect to each of these findings, the Trial Chamber "erred".

13. The relief being sought by the P.I.A. is that the appealed decision, presumably, be reversed and the First Accused's Motion for Service and Arraignment which was subject thereof be "rejected in its entirety" (A.V: para. 21; C: para. 92). In both respects, however, the P.I.A. seems to attribute to the Appeals Chamber itself, rather than to the Trial Chamber, the very decision being appealed to the said Appeals Chamber, in that the prosecution thereby "requests the Appeals

Chamber to reverse the Norman Decision to the extent that it allowed the Norman Motion" (A. V: para. 21; C: para. 92, emphasis added).

B. The Appeal Submissions

14. By a series of comparisons between selected parallel paragraphs of the O.N.I. and C.I. respectively, the P.I.A. recurrently recites various findings by the Trial Chamber of material changes and additions in the C.I. and it simultaneously attempts equally recurrent refutations and denials of their alleged materiality or even of their being new or additional features or elements at all, indeed, even of their possibly being tantamount to new charges or new offences or new bases of criminal liability, even though in the latter case here the impugned decision made no express or categorical finding or conclusion in respect of any of the said material changes amounting to a new charge or new offence or new basis of criminal liability (B. II: paras. 26-78). The grand and ultimate design of the recitations and refutations is to show that the perceived differences are, according to the prosecution, either factually non-existent at all or are merely differences of expression and language for greater specificity, precision or particularity in the C.I. for better clarity and improvement upon the O.N.I. but without resulting in any one case into a "material" change to any pre-existing charge against the First Accused or into any new charge(s) or any new offence(s) or any "new substantive element(s) of charges(s)", as the case may be, against him (B. II (ll): para. 78). There is a general air of virtual rota recitation and refutation of the materiality of the said changes and additions.

15. Even though the recitations and refutations are presented individually and successively, however, for the purposes of the present response, they may be categorised according to related kinds or types of change or addition in issue and/or the characteristic reaction thereto by the prosecution in the P.I.A., with relative overlaps between certain categories thereof.

(i) Deletions of "but not limited to"
(See, e.g., paras. 27-31, 50-64, inclusive of P.I.A)

16. Among the paragraphs of the P.I.A. dealing with the presence of the phrase "but not limited to "in the O.N.I. and its deletions and replacements in the C.I., are B. II (i): paras. 27-31, B. II 96): paras. 50-53, B. II (7): paras. 57-61, and B. II (8): paras. 62-64. There are other such paragraphs, but which are considered in other categories in this analysis. The background details here are that it became necessary earlier on to delete and replace the said phrase pursuant to an order of the Trial Chamber in respect of the previous individual indictment against the now Third Accused. Since the said phrase also occurred in similar positions of the previous separate individual indictments against the now First Accused and Second Accused, which indictments had not been subject of the said order, the prosecution took the opportunity after the Joinder Decision to make the appropriate deletions and changes throughout the C.I. as much against the First and Second Accused as it had already done in the case of the Third Accused (A. III: paras. 4-8). As it turned out, however, changes effected in the C.I. as a result of the deletions of the said phrase were among those found by the Trial Chamber in its decision of 29 November 2004 to be material and/or "new

elements of charges" in the C.I. in respect of the First Accused, against which findings the prosecution now appeals.

17. The prosecution's reaction to the Trial Chamber's aforesaid findings is, in brief, that the changes and/or additions made by it in the C.I. in pursuance of the orders in the Joinder Decision were in effect only changes of expression which were implicit in the general language used in that regard in the O.N.I. and which had now been made explicit for the purposes of greater clarity, specificity and/or particularity, all of which redound to the improvement of the C.I. and the higher interest of the Accused, according to the prosecution. However, in almost all the relevant cases, this explanation seems not only specious but also clearly an altogether uneasy fit.

18. Take the additional specific locations of "in Moyamba District, the towns of Sembehun, Ghangbatoke and the surrounding areas, and in Bonthe District, the towns of Talia (Base Zero, Bonthe Town, Mobayeh, and surrounding areas, which are added in paragraph 27 of C.I. but had not been so included in the corresponding O.N.I. para. 22 (B. II (8(: paras. 62-64). The prosecution's reaction here is that these additional locations "clearly fall within the generality of" the language of the deleted phrase and "thus adds nothing that was not already included" therein "but merely states the allegations with greater specificity" (para 64). And yet the new locations for the pre-existing allegations include two completely new geographic districts, in respect of which the First Accused would now have to make further research and refutation in defending himself under the C.I., which he would not have had to do under O.N.I. In that case, would the new locations be any more material to the charges the First Accused has to face under the C. I.? Essentially the same situation applies to the two new subparagraphs 25(e) and (f) of the C.I., which are also lacking in the corresponding paragraph 20 of O.N.I. as considered in B. II (6): paras. 50-53; or to the addition of the phrase "and the Districts of Moyamba and Bonthe" as new locations of alleged activities by "the CDF, largely Kamajors" in C.I. para. 23, whereas no such expanded geographic scope obtained in the corresponding paragraph 18 of O.N.I. (See B.II (l): paras. 27-31).

(ii). Alleged necessary Implications
(See paras. 32-36, 44-46, 54-56, of the P.I.A

19. The prosecution asserts necessary implication of certain concepts and phenomena as between certain paragraphs of the O.N.I. and C.I. which are clearly problematic in various ways. These obtain mainly with its comparisons of the first sentence in each of paragraph 24 of C. I. and paragraph 19 of O.N.I. (B. II (2): paras. 32-36), of C.I. para. 24(c) and O.N.I: para. 19(c) (B. II (4): paras. 44-46), and of C.I. para. 25 (g) and O.N.I. para. 20 (e) (B. II (6): paras.54-56). The most glaring anomaly in the prosecution submissions in this area is its virtual hybridisation of "extortion" into "a particular form or example of looting" or "a more specific description of one type of looting" (para. 36). This is a clear example of a new offence having been added to the particulars for the First Accused in the C.I., but which the prosecution seeks to explain away here by collapsing two clearly distinct concepts into a self-serving hybrid.

Meanwhile, the added material clearly requires that the defence reckon with and satisfactorily counter it in the trial, even as the Trial Chamber itself recognises it merely as a "material addition".

(iii). Conscripting, Initiating, or Enlisting Children
(See paras. 66-71 of the P.I.A)

20. In its dealing with the changes necessitated in this regard, the prosecution comes very close to acknowledging that a new charge is involved here in the C.I. as distinct from the one in the corresponding particulars and charge in O.N.I. (B. II(9): paras.66-71). This concerns the changes as between the respective corresponding paragraphs of O.N.I. and C.I. and their respective counts 8 as well from "conscript or enlist children under the age of 15 years into armed forces....." to "initiate or enlist....." in one case, and from "enlisting children....." to "initiate or enlist children....." in the other case. Whereas the prosecution denies that these changes constitute "a material change to the indictment" as found by the Trial Chamber, it however concedes that the charge here has been changed from a wider to a narrow one.

> "In other words, Count 8 no longer includes a charge of 'Conscripting or enlisting' child soldiers, but only a charge of 'enlisting' child soldiers. This is clearly a narrower charge than that contained in count 8 of the Original Norman Indictment. The amendment to the wording of paragraph 29 of the Consolidated Indictment reflects this narrowing of the charge in count 8" (para. 71; emphasis added).

For the Accused, it is as material to widen a previous charge against him, as to narrow it down, in an amended indictment.

(iv). Refuting New/Additional charges
(See paras. 37-40, 47-49, 62-69, 72-77, of the P.I.A.

21. Although the Trial Chamber does not make any finding in its impugned decision as to any of the changes or additions in the C.I. being tantamount to new charges or new offences against the First Accused, indeed, even though the said decision strains to appear not to be doing so (see first-para. 30 thereof), the P.I.A. nonetheless expresses its refutations of some of the said judicial findings of materiality in the form of denials of their amounting to new charges, new offences, or new bases of criminal liability. For example, in refuting the materiality of the change from "occupied" in O.N.I.: para. 19(b) to "took control of "in C. I.: para. 24(b), it asserts as a conclusion that this change "does not constitute the addition of any new change or new criminal liability, but merely a change in the way that the existing charge was expressed" (B.II (3): para. 40; emphasis added). So also, the differences reflected in subparagraphs 24(d) and (e) of C.I.: "These new subparagraphs do not contain new facts constituting an additional charge (B. II (5): para. 49; emphasis added). Equally, the change to "civilian owned property" in C.I.: para. 27 from" private property" in O.N.I.: para. 22, "does not constitute the addition of any new charge" (B. II (8): para. 65). Surely, this indirectly lends force to the defence suggestion that all these

specified changes here are not merely material for the charges in question, but are in themselves new elements of charges and/or new offences, if not expressly new charges as such.

(v). Expanded Time Frames
(See paras. 50-53, 57-59, of the P.I.A.).

22. The P.I.A. deals or purports to deal with the issue of the expansion of time-frames in C.I. from what they were in O.N.I. in its own paragraphs 50-53 and 57-59 inclusive respectively, the said expansions of time-frames being part of what the Trial Chamber characterised in each case as constituting "a material change" in the C.I. (B. II(6): para. 52; B. II(7): para. 57). The first time-frame here occurs in paragraph 25 (a) of C.I., which extends the end of the stated time-frame in paragraph 20 (a) of O.N.I. by some three calendar months from "1 February 1998" to "30 April 1998". The second time-frame here occurs in paragraph 26 (a) of C.I., which also extends the corresponding time-frame in paragraph 21 of O.N.I. However, the P.I.A. fails to consider each of these time-frames specifically apart from either the additional details of unlawful killings or the additional geographic locations with which they are respectively associated. Rather, in both cases, the time-frames are considered to have been part of the generality of the language of the phrase "but not limited to" found in O.N.I.: paras. 20(a) and 21 respectively, and the deletion of that phrase in both contexts in the C.I. (as with the associated killings and locations respectively) "does not add something new (or adds nothing) that was not already included within the general language" of the relevant O.N.I. paragraph (B. II: paras. 53 and 59 respectively). The P.I.A. does not otherwise deal directly or specifically with the question of whether the expanded time-frames are of any materiality, which failure is clearly unsatisfactory

(vi). "C.D.F, Largely Kamajors"
(See paras. 27-28, 32-33, 72-77, of the P.I.A.)

23. The re-wording of general references to "Kamajors" in O.N.I. into "C.D.F., largely Kamajors" in C.I. is characterised as a material change by the Trial Chamber in its impugned decision. The prosecution submits, however, that this "change in wording" is merely that and nothing more, in view of various references in both O.N. I and C.I. as to the First Accused's alleged command responsibility status in relation to both the Kamajors and the C.D.F., to the extent that they are distinguished (B. II (10): paras. 72-77). Surely, the alleged criminal responsibility of the First Accused pursuant to either Article 6(1) or Article 6(3) of the relevant Statute, the proof or otherwise thereof, and the task of defending himself against specific charges in that regard, would be of varying materiality to the extent that the said specific charges or allegations relate only to the Kamajors (a discrete component body of the C.D.F.), or only to some other (and which?) component body of the C.D.F.(the latter reputedly being an umbrella organisation for various and different component bodies thereof), or indeed to any two or more of such component bodies at the same time. the scope of such allegations against him, the task of the prosecution proving them against him, and that of defending him or himself effectively against them, would be gravely material to the task of all involved, according to which or how

many of such component bodies is/are the basis for determining the First Accused's command responsibility in all the circumstances.

24. The prosecution's reasoning in seeking to show that the nature and scope of the First Accused's alleged command responsibility would not differ or vary whether "Kamajors" only or "C.D.F., largely Kamajors" was the "group" reference point for the subordinate membership for whose acts criminal responsibility was ascribed to the First Accused, is spurious, even possibly deviant or at least devious, if not downright deceptive and deliberately so into the bargain. It goes thus:

> "77. It follows that the change in language from "Kamajors" to "the CDF, largely Kamajors" does not constitute the addition of a new charge in the indictment, or an expansion of the scope of the charges against Norman. The Original Indictment charged Norman with criminal responsibility in respect of certain specified conduct engaged in by a specified group of people for whom Norman had superior responsibility. The consolidated Indictment charges Norman with criminal responsibility in respect of criminal acts by the same group of people. The only difference is that the Original Norman Indictment stated that all of the members of the group were Kamajors, while Norman Indictment stated that all of the members of the group were Kamajors, while the consolidated Indictment indicates that some members of the group may not have been Kamajors, although they were members of the CDF. This may constitute a slight correction to the particulars of the identity of the individuals for whose act Norman is alleged to have been criminally responsible. However, the amendment does not of itself affect the alleged criminal responsibility of Norman, nor add to the criminal conduct for which he alleged to be responsible. The change in language is a correction to a particular, and not a new material fact or a new charge.

25. The problem here is that the prosecution is pretending in paragraph 77 to ascribe the same meaning and content to the word "group" wherever it occurs in this passage, in which case it will be truly meaningless; whereas the passage can only be truly meaningful if that word is given its appropriate contextual meaning and content at every point of its occurrence therein, in which case the sham and shibboleth in the prosecution's reasoning will be well and truly unmasked. For the first occurrence of the word "group" in paragraph 77 refers to "Kamajors" within the context of O.N.I.; whereas the second occurrence thereof properly refers to the "C.D.F., largely Kamajors", within the context of C.I., in which case it is certainly not "the same group" as in O.N.I., the C.D.F. being reputed to have or have had at least six (6) component bodies, only one of which is/was the "Kamajors". The third occurrence of "group" refers to "Kamajors" within the O.N.I. context; whereas the fourth can only meaningfully refer to the C.D.F.,

largely Kamajors" within the context of C.I. Otherwise, if that fourth occurrence is made referable to the "Kamajors" as such, then the words "that some members of the group may not have been Kamajors" would be clearly self-contradictory.

26. If, therefore, the C.I. reference includes at least two or more C.D.F. component bodies and the O.N.I. reference only one such component body, then the enormity of command responsibility in respect of both that component body ("Kamajors") and possibly one or more other such component bodies ought to be immediately obvious in terms of the possible gravity and variety of the attesting allegations and required proof and also of the corresponding difficulty of the requisite defence to counter them. The prosecution is therefore severely under-stating, if not callously trivialising, the alleged criminal responsibility of the First Accused under the C.I. (as compared to under the O.N.I.) when it claims that the said "amendment" is only "a slight correction to the particulars of the identity of the individuals" giving rise to it by their various acts or that it "does not in itself affect the alleged criminal responsibility" of the First Accused (para. 77).

(vii). Prosecution Conclusion on the Changes
(See para. 78 of the P.I.A.)

27. The P.I.A. then summarises its conclusions on the changes effected in C.I. in a paragraph that faithfully reflects the blemishes, inadequacies and short-comings of the preceding prosecution analysis and submissions, as follows:

> "For the reasons given above, the Prosecution submits that none of the differences in language between the Original Norman Indictment and the Consolidated Indictment referred to in paragraph 38 of the Norman Decision constitute new or additional charges, or new factual allegations in support of any of the counts in the indictment. Rather the differences in language identified by the Trial Chamber are either the result of factual allegations in the consolidated Indictment being expressed with greater precision or particularity than in the Original Norman Indictment, or the consequence of the narrowing of a charge against the Accused (see paragraphs 65-70 above) or, in one instance, a correction to a particular (see paragraphs 71-76 above, or otherwise mere stylistic, editorial or other changes that were not material to the charges against the Accused (see for instance paragraphs 35, 39-40, 43 and 45-46 above). The changes did not lead to the raising of new charges against the Accused. The number of charges facing the Accused remains unaltered. Nor did the changes add "new substantive elements of he charges" –that is, the elements of the respective offences have not changed, nor have the number of charges. However, changes in language in the Consolidated Indictment have resulted in additional particulars being provided to the Accused". (B. II (11): para. 78; emphases added).

There is here the prosecution's almost obsessive concern with refutations as to alleged "new or additional charges" in the C.I., even though the impugned decision made no such findings but rather strenuously sought to avoid doing so or being perceived to have done so. And yet "the narrowing of a charge" against the First Accused is herein conceded in at least one case. There is also the contradiction or inconsistency in asserting both that the admitted changes "were not material to the Charges against" the First Accused and that they have "resulted in additional particulars" and at least "in one instance, a correction to a particular" in respect of the said First Accused, who inescapably or unavoidably has to contend with such particulars in his defence against the charges in the C.I. Clearly, the prosecution has failed to convincingly refute the findings of materiality of the specified changes and additions highlighted in the Trial chamber decision which it hereby seeks to appeal.

C. Prosecution Consolidation and Amendments

(i). Prosecution's Alleged Entitlement to Amend
(See paras. 81-85 of the P.I.A).

28. Throughout its comparisons of corresponding paragraphs and passages in the C.I. and O.N.I, the prosecution has consistently maintained that the O.N.I is "amended" in several crucial respects by the C.I. Indeed, the P.I.A. rightly emphatically rejects the emphasis in the majority decision and separate concurring opinion of 29 November 2004 on the form and framing of indictments, viz:

> "The issue in this case is not whether the Consolidated Indictment is consistent with general principles relating to the form of an indictment. Rather, the question is whether the prosecution was entitled in the circumstances of the present case to make the relevant amendments to the wording of the original indictments in the course of consolidating them into a single indictment" (B. III: para. 83; emphasis added).

However, notwithstanding this belated emphasis on the centrality of the need for "amendment" of the original indictments, the prosecution had nevertheless sedulously avoided using the vehicle provided for the purpose, to wit, Rule 50 of the SCSL Rules, especially Rule 50 (B) thereof, when it originally sought to consolidate the said indictments.

(ii). The Consolidation Process
(See paras. 79-81, 86-87, of the P.I.A.)

29. Presumably, the prosecution considers amendment as an essential or necessary, but ultimately only an incidental, component of the process of consolidation. However, even with respect to the imperative for consolidation, it can easily be demonstrated that the prosecution had studiously avoided the appropriate natural vehicle provided in the SCSL Rules for consolidation, to wit, Rule 48(A), and had fixated itself instead on using Rule 48(B) in its original Joinder Motions that gave rise ultimately to the C.I. These concerns are, in the present circumstances,

the appropriate subject matter for an appeal against the Trial Chamber's decision of 29 November 2004, which proposed that the prosecution elect to "amend" the C.I. either by "expunging" or retaining intact therein the specified material changes and additions it was prepared to "stay" for that purpose. The prosecution seeks to paper over these "cracks" in its present interlocutory appeal against that clearly irreparably flawed decision, except that it seeks to appeal against it precisely in the areas and aspects of its clearly unassailable strength, to wit, its findings of perceived changes and additions in the C.I. and the crucial materiality of most of them as specified in the said decision.

30. The clumsy self-defensive mechanism of he prosecution in seeking to paper over the "cracks" in its consolidation exercise and thereby explain them away, albeit so unconvincingly, is clear from the following passage.

> "As is the normal practice in other international criminal tribunals where the Trial Chamber orders the joint trial of persons who have been separately indicted pursuant to Rule 48 of the Rules, the Trial Chamber in this case ordered in its Joinder Decision that there should be a single consolidated indictment on which the joint trial would proceed.
>
> "In cases where the prosecution seeks the joint trial of accused who have been indicted separately, it has been the practice in some cases before other international criminal tribunals for the Prosecution to annex a draft consolidated indictment to the motion for joinder, for the approval of the Trial Chamber in the event that it grants the motion. However, nothing in the Rules requires this procedure to be followed. In this case, the Trial Chamber expressly considered (correctly, it is submitted) that it was not necessary for the Prosecution to exhibit an anticipated consolidated indictment as a condition precedent to establish a basis for joinder" (B. III: paras. 79-80; footnotes dropped; emphases added).

31. The First Accused has already dealt comprehensively with the "cracks" being papered over here by the prosecution. This is done in his own Interlocutory Appeal against the same decision of the Trial Chamber being appealed here on different grounds by the prosecution, the said Interlocutory Appeal by the First Accused having been filed in the Registry of the Special Court as Document No. 318 at Registry Pages 11297 – 11428 dated 14th January 2005 and filed on 17th January 2005. The First Accused herby respect fully urges the Appeal Chamber to permit the incorporation herein by reference of his own aforesaid Interlocutory appeal in its entirety, with particular reference to paragraphs 1 – 4, 22 – 49, and 52 – 102, and more particularly paragraphs 52 – 67, all inclusive thereof, and leave for the said incorporation is hereby presumed.

32. The First Accused submits that the prosecution grossly violated, and indeed abused, material and/or mandatory rules of practice and of court alike by deliberately avoiding relevant and applicable rules both for amendment (Registry Document 318: paras. 66-67) and also for consolidation itself

(paras.53-65 thereof), and in the case of the latter actually violating Rule 48(A). For by quite a hard and fast rule of prevalent general practice, the application for joinder ought to have attached a draft of the proposed text of the anticipated consolidated indictment to the said joinder motions (Registry Document 318: paras. 54-58 inclusive). The consolidation application as such also ought to have been specifically pursuant principally to SCSL Rule 48(A), at least preferably (paras. 53, 59-65 inclusive thereof). The First Accused submits, furthermore, that the non-compliances by the prosecution in the original joinder process rendered the subsequent consolidated indictment null and void and so substantively and definitively inappropriate and unavailable for amendment in any shape or form whatsoever and in any case, unavailable for the formal absurdity or logical impossibility of the particular "amendments" proffered in the Trial Chamber's decision of 29 November 2004. The prosecution is accordingly just being evasive in its comment citing "Rule 48 of the Rules" in the quotation cited above; and both the prosecution and the Trial Chamber were plainly wrong in ruling out the need for a draft consolidated indictment to have been attached to the original joinder motions on filing and hearing thereof.

33. The prosecution's submissions that there has been no demonstrated prejudice to the First Accused's right to fair trial and his other substantive rights (B. IV: paras. 89-91 inclusive) are also entirely without foundation, as has been comprehensively demonstrated by the First Accused in his aforesaid Interlocutory Appeal (Registry Document 318: paras. 68-101, especially paras. 87-98, all inclusive thereof).

III. CONCLUSION

34. The First Accused submits, finally, that the prosecution has failed to demonstrate convincing refutations of the materiality of the specified changes and additions in the C.I., as found by the Trial Chamber in its decision of 29 November 2004; and that, consequently, it has also failed to demonstrate any entitlement to the reliefs being sought in its subject interlocutory appeal against the said decision, to wit, that the Trial Chamber's decision be reversed "to the extent that it allowed the Norman Motion" of 21 September 2004, or that the Appeals Chamber do hold that the said Norman Motion is "rejected in its entirety" (See a. V: para. 21, C: para. 92).

35. Accordingly, on the foregoing analysis and submissions and for the reasons given above, the First Accused hereby requests and urges the Appeals Chamber to disallow the prosecution's interlocutory appeal against the Trial Chamber and to reject it in its absolute entirety.

Done in Freetown this 25th day of January 2005.

DR. BU-BUAKEI JABBEI

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FOR THE FIRST ACCUSED

SAM HINGA NORMAN

FIRST ACCUSED