SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

TRIAL CHAMBER I

Before:	Hon. Justice Benjamin Mutanga Itoe, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Pierre Boutet
Registrar:	Robin Vincent
Date:	18th of March, 2005

PROSECUTOR Against Issa Sesay
Morris Kallon
Augustine Gbao
(Case No. SCSL-2004-15-T)

PARTIALLY DISSENTING OPINION OF HON. JUSTICE BENJAMIN MUTANGA ITOE ON THE CHAMBER MAJORITY DECISION OF THE 9TH OF DECEMBER, 2004 ON THE MOTION ON ISSUES OF URGENT CONCERN TO THE ACCUSED MORRIS KALLON

Office of the Prosecutor:
Luc Côté
Lesley Taylor

Defence Counsel for Issa Hassan Sesay:
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:
Shekou Touray
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao:
Girish Thanki
Andreas O'Shea

I, HON. JUSTICE BENJAMIN MUTANGA ITOE, Judge in Trial Chamber I of the Special Court for Sierra and Presiding Judge of the said Chamber;

SEIZED of the *Motion on Issues of Urgent Concern to Morris Kallon* ("Motion"), filed on the 1st of October, 2004;

NOTING the *Kallon – Order for Expedited Filing* of the 4th of October, 2004;

MINDFUL of the Response to the Motion filed on the 8th of October, 2004 ("Response") by the Office of the Prosecutor ("Prosecution"); and the Reply thereto by the Defence filed on the 11th of October, 2004 ("Reply");

MINDFUL of the *Decision and Order on Prosecution Motion for Joinder* and the *Corrigendum* thereto of 28th of January, 2004 ("Joinder Decision");

COGNISANT of the *Consolidated Indictment* filed by the Prosecution on the 5th of February, 2004;

CONSIDERING the *Kallon – Decision on Motion for Quashing of Consolidated Indictment* of the 21st of April, 2004;

MINDFUL of the *Decision on Prosecution Request for Leave to Amend the Indictment* of the 6th of May, 2004 and the *Corrigendum and Consequential Order* thereto of the 12th of May, 2004;

MINDFUL of the *Amended Consolidated Indictment* filed by the Prosecution on the 13th of May, 2004;

NOTING the further appearance of the Accused Issa Sesay, Morris Kallon and Augustine Gbao on the Amended Consolidated Indictment on the 17th of May, 2004;

MINDFUL of the Chamber Majority Decision of the 29th of November, 2004, on the Motion by Samuel Hinga Norman for the Service and Arraignment on the 2nd Indictment;

CONSIDERING my Dissenting Opinion dated the 29th of November, 2004 on the said Chamber Majority Decision of the same date on the Motion filed by Samuel Hinga Norman for Service and Arraignment on the 2nd Indictment.

MINDFUL of the provisions of Rules 48, 50, 52 and 73 of the Rules of Procedure and Evidence ("Rules");

HAVING CONSIDERED the facts of this Motion and the Applicable Law;

AND AS INDICATED, NOW ISSUE THE FOLLOWING WRITTEN DISSENTING OPINION TO THE CHAMBER MAJORITY DECISION ON THIS MOTION BY THE 2ND ACCUSED.

I. PROCEDURAL HISTORY

1. Mr. Morris Kallon, the 2nd Accused in this matter, was arrested on the 10th of March, 2003 and charged alone on a 17 count Initial Indictment dated the 7th of March, 2003, for offences ranging from war crimes and crimes against humanity alleged to have been committed by him. This Initial Indictment did not charge him with sexual offences.

2. He made his initial appearance pursuant to Rule 47 of the Rules of Procedure and Evidence before myself, Hon. Justice Benjamin Mutanga Itoe on the 15th, 17th, 21st of March 2003, and pleaded "Not Guilty" to all the counts in the Initial Individual Indictment.

3. On the 9th of October, 2003, the Prosecution filed a motion seeking a Consolidation of the 9 initially approved indictments against the 9 accused persons, to 2 Consolidated Indictments only, that is, 6 Accused namely, Issa Hassan Sesay, Alex Tamba Brima, Morris Kallon, Augustine Gbao, Brima Bazzy Kamara, Santigie Borbor Kanu in one Consolidated Indictment, and 3 Accused, namely, Sam Hinga Norman, Moinina Fofana and Allieu Kondewa, in the other.

4. In filing this Motion for Consolidation, the Prosecution did not annex the proposed Consolidated Indictment to enable the Chamber to verify the nature and extent of the contents of the Consolidated Indictment vis-à-vis the 9 Initial Indictments and furthermore, their regularity and conformity with the Statute, the Rules, and the generally accepted principles that govern the amendment or variation of Indictments, including how the said Consolidated Indictments may have impacted on each of the 3 Initial Indictments.

5. Notwithstanding this procedural flaw which I highlighted in my Separate Opinion of the 27th of January, 2004, to the Majority Decision of this same date, The Chamber, without having had the benefit of seeing or verifying the proposed Consolidated Indictment before ruling on that Motion, granted it and ordered that 3 Consolidated Indictments, each with 3 Accused Persons instead of only 2 Consolidated Indictments as solicited by the Prosecution, be filed. This Decision was premised on the assurances furnished by the Prosecution, (and which turned out to be untrue), that the contents of the Consolidated Indictments were the same as those of the Initial Individual Indictments.

6. Following this Joinder Decision of the 27th of January, 2004, Morris Kallon found himself jointly indicted to be jointly tried with 2 Accused persons namely, Issa Hassan Sesay as the 1st Accused, himself as the 2nd, and Augustine Gbao, as the 3rd Accused.

7. In another development and by a Motion dated the 9th of February, 2004, the Prosecution applied for leave to amend the Consolidated Indictment in which this Applicant was charged. The purpose of this amendment was to enable them to add new counts relating to sexual offences. A unanimous Chamber Decision dated the 6th of May, 2004, granted the Prosecution's application. A Chamber Consequential Order dated the 12th of May, 2004, directed the Registrar to prepare a certified copy of the Amended Consolidated Indictment and to serve it on the 2nd Accused in accordance with the provisions of Rule 52 of the Rules.

8. The Initial Individual Indictment against him, the Consolidated Indictment against the 3 of them, and the Amended Consolidated Indictment still against the 3 of them, continue to remain in force.

II. THE MOTION

9. It is against this background that Morris Kallon, the Applicant, raises the following issues for determination:

i. That the Consolidated Indictment was not served on him in accordance with the procedure outlined in Rule 52 of the Rules and pursuant to the Joinder Decision;

ii. That there has been a non-compliance with the Trial Chamber's Consequential Order of the 12th of May, 2004, directing the Registrar to prepare a certified copy of the Amended Consolidated Indictment and serve it on him in accordance with the provisions of Rule 52 of the Rules;

iii. That he was not properly arraigned before the Trial Chamber on the Amended Consolidated Indictment on which the trial proceedings are now based;

iv. That the original Indictment against him on which he made his initial appearance and was properly arraigned, has not been stayed despite the Trial Chamber's Joinder Decision that a Consolidated Indictment be prepared as the Indictment on which the Trial shall proceed.

III. THE PROSECUTION'S RESPONSE

10. The Prosecution in urging the Chamber to dismiss the entire Motion, argues as follows:

i. That the amended Consolidated Indictment was served on the Applicant;
ii. That he has been arraigned on the said Indictment;
iii. That he had been served with the Amended Consolidated Indictment on the 16th of May, 2004;
iv. That even if there had been a failure to serve the Consolidated Indictment personally on the Applicant, he has not suffered any prejudice;
v. That in accordance with the legal principles, trial on a subsequent indictment prevents a retrial on the former indictment and that the application for an Order to stay the Original Indictment or the Consolidated Indictment is unnecessary.

IV. THE DEFENCE RESPONSE

11. The Defence contends that personal service has not been effected and that the Rules do not contain a deeming provision by virtue of which it could be presumed or concluded that personal service has been effected in accordance with the Rules.

12. The Applicant further states that the fact of his participation in the trial does not bar him from raising issues relevant to his trial nor is he barred from canvassing substantial issues relating to his arraignment.

V. THE APPLICABLE LAW

13. The Statutory provisions on which the issues raised will be determined include the Statute of the Court, particularly Articles 9(1) and 17, its Rules of Procedure and Evidence, particularly Rules 26(bis), 40(bis)(J), 47, 48, 50, 51, 52, 61 and 82, and the International Covenant on Civil and Political Rights in its Articles 9(2), 14(3)(a), and 14(7).

VI. ANALYSIS

14. The issues that call for a determination in this Motion include:

A) Non service of the Consolidated Indictment;
B) Non service of the Amended Consolidated Indictment;

C) Rearraignment;

D) Staying of the Original Indictment;

E) As the Applicant finally canvasses and urges the Chamber, to issue any further or other Consequential Orders as the Court may deem appropriate.

A) NON-SERVICE OF THE CONSOLIDATED INDICTMENT

15. I agree with the reasoning and conclusion of the Majority Decision in so far as it concludes that service on the Applicant's Counsel was not personal service on himself and that the provisions of Rule 52 were clearly violated. I further agree with the Majority Decision in its finding that the Applicant has "subsequently appeared to take his trial and that his Counsel have cross-examined extensively, Prosecution witnesses on his behalf" and I would add, on charges appearing on that Indictment whose service he is contesting, and that this should not necessarily invalidate the trial proceedings.

16. This said however, and even if it is conceded that this portion of the Majority Decision is, in my opinion, logical as I have indicated, the fundamental issues of law relating to the irregularity of the service of the Consolidated Indictment and the consequences that go with it should be clearly stated and highlighted and not to be treated lightly or ignored. I observe that this is just what the Majority Decision has done instead of addressing the said issues with a view to applying the law as the first and fundamental option, and thereafter, providing an appropriate consequential legal or procedural remedy.

17. In my Dissenting Opinion in the Norman Motion for Service and Arraignment on the 2nd Indictment, I had this to say:

> "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."

"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."

18. In this regard, the Decision of the Trial Chamber of the International Criminal Tribunal for Former Yugoslavia in the case of the *Prosecutor vs Delalic* is pertinent when the Honorable Judges had this to say I quote:

"...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..."

19. What needs to be put right in this case is not only finding that there has been a non-compliance with, or a violation of Rule 52 of the Rules and concluding that the Applicant had after all suffered no prejudice for the acceptable reasons advanced in the Majority Judgment, but also, and in addition, to impose a judicial sanction by declaring the service to the Applicant's Counsel as illegal, null and void; to annul it accordingly, and thereafter, to order that service of the Consolidated Indictment be effected, not only in conformity with Rule 50(A) and 50(B) of the Rules, but also in execution of the Order of the Chamber in its Joinder Decision of the 28th of January, 2004.

20. This to my mind, and I do so hold, is a neater and more legalistic approach to resolving this issue instead of, as I mentioned in the Norman Service and Arraignment on Second Indictment Motion "resorting to advancing interpretations or arguments of convenience on provisions 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."

21. It is my opinion therefore that not only should the illegality of the service be admitted as a first step but also, that the said service be declared null and void before applying the legal remedy

of ordering a fresh service and thereafter, and without any interruption or unnecessary adjournments, to continue the proceedings on that same indictment on which the Applicant has been standing trial and in respect of which his Counsel, as has been pointed out by the Prosecution, has extensively cross examined the witnesses presented by the Prosecution on the evidence advanced on this same improperly and illegally served Indictment. Thereafter the proceedings will continue with the next witness who will be called after the last one who testified during the 3rd Session of this case in which the Applicant is the 2nd Accused.

22. Having said this, I would like to observe that a personal re-service of this Consolidated Indictment on the Applicant in compliance with the provisions of Rule 52 which should have been the normal legal remedy in this situation, is, at this stage, no longer necessary because the said Consolidated Indictment has been overtaken by events and replaced by the Amended Consolidated Indictment on which the trial is now proceeding and which I consider and hold, was legally served on him.

B) NON-SERVICE OF THE AMENDED CONSOLIDATED INDICTMENT

23. I recall here for the records that the Defence reiterates that personal service on the 2nd Accused/Applicant of the Amended Consolidated Indictment has not been effected in accordance with the Rules and contends that the said Rules provide no room for a deeming provision as the Prosecution suggests by relying on the statement by the Designated Judge, Hon. Justice Pierre Boutet, who deemed the Amended Consolidated Indictment to have been personally served. Did the 2nd Accused/Applicant expect the Court Management Team to withdraw and walk away with the copy of the Amended Consolidated Indictment after he deliberately refused to accept personal service of the document? Could the Applicant have been expecting to see the Chamber remain indifferent to such conduct which tantamounts to delaying and frustrating the judicial process?

24. I indeed find no difficulty in dismissing the argument by Counsel for Morris Kallon, the Applicant, that there was no personal service of the Indictment and that there is no "deeming clause" in the Rules which enabled the Court to conclude that the Indictment was deemed to have been personally served on the Applicant.

25. It is necessary to observe here that Judges and the Courts have the latitude to invoke their inherent jurisdiction to prevent an abuse or a frustration of the judicial process. This justifies the

stand taken by of Hon. Justice Pierre Boutet in finding that the Applicant, after he refused service, was deemed to have been served because a failure to do so would have amounted to a capitulation of the judicial process to the unreasonable stands of the 2nd Accused which constitute not only an abuse by the Accused of the judicial process but also a total misconception of the rights conferred on him by the Statute and the Rules of Procedure and Evidence of the Special Court.

26. In the light of the foregoing observations, I entirely concur with the Majority Decision and findings on the issue of Non-Service of the Amended Consolidated Indictment .

27. In addition, I do observe that service of that Indictment on the Accused on Sunday, the 16th of April, 2004, cannot be said to have been vitiated because it took place on a Sunday. Indeed, Statutory Instruments governing the structure and functioning of this Court, I do observe and hold, do not prohibit the service of processes on Sundays or even on public holidays. The situation here is therefore not analogous to the Sierra Leonean judicial system which Mr. Melron Nicol-Wilson, Learned Counsel for the Applicant, is relying on to question the service of this process on his client on a Sunday.

28. In any event, I would like to draw the attention of Learned Counsel, Mr. Nicol-Wilson, to the provisions of Section 11(2) of the Special Court Agreement, 2002, Ratification Act, 2002 which stipulates as follows:

> "The Special Court shall not form part of the Judiciary of Sierra Leone" and to lay this contention to rest on the understanding that it lacks any merits on which the arguments that the traditions and practices in Sierra Leonean Courts are binding on the Special Court, can be sustained."

C) THE ISSUE OF REARRAIGNMENT

29. Mr. Kallon, the Applicant, was arraigned on the Initial Individual Indictment when he made his initial appearances on the 15th, 17th and 21st of March, 2003. He pleaded "Not Guilty" to all the 17 counts of that Individual Indictment.

30. After the Joinder Decision of the 28th of January, 2004, the Prosecution, on the 5th of February, 2004, filed the Consolidated Indictment against Sesay, Kallon and Gbao. Mr. Kallon, on the 10th of February, 2004, challenged the Consolidated Indictment and moved that it be

quashed on the grounds that it contained new allegations which did not exist in the Initial Individual Indictment.

31. On the 21st of April, 2004, the Chamber dismissed the Motion on the basis that the Consolidated Indictment did not contain new allegations but rather, provided additional specificity. Mr. Morris Kallon did not appeal against this decision. During his 2nd appearance to take the pleas on the Amended Consolidated Indictment, His Lordship Hon. Justice Boutet had this to say:

> "So we will now proceed with the appearance on the new counts but I will ask the Court to read the amended Consolidated Indictment in total and when we get to the new count, I will ask you to stop at the time and read that count for each and everyone – every Accused and at that time, I will ask them to plead to that specific count."

32. When asked to enter a plea, Morris Kallon, the 2nd Accused, Applicant in this Motion, declared as follows:

> " I'm not prepared to enter a plea in this Court until I get the feedback from the submission of the Supreme Court of Sierra Leone. Then if this Consolidated Indictment is bringing 3 of us together, it means reading it all over again. So I will not enter a plea just for one Count."

33. Having refused to take a plea when he was invited to do so, The Honorable Designated Judge entered a plea of "Not Guilty" only for Count 8 on his behalf. In situations such as this, where it is evident and established that an Accused has the mental and physical capacity, as Kallon demonstrated at that appearance, to enter a plea and he refuses to do so, the Hon. Judge so seized of such a situation has no alternative but to enter a plea of 'Not Guilty" and for the trial to proceed. This is what happened in this case when the Chamber proceeded with trying the 3 Accused, including the Applicant, on the 5th of July, 2004.

FACTUAL AND LEGAL BASIS FOR KALLON'S REFUSAL TO PLEAD ONLY TO NEW COUNT 8

34. Let me observe here that there are 5 Indictments in force in this one trial where the 3 Accused Persons are jointly indicted and are being tried jointly. These include the 3 Initial Indictments which are not yet withdrawn by the Prosecution and where the 3 Accused persons were indicted and arraigned individually sometime between the 14th to the 21st of March, 2003;

the one Consolidated Indictment merging the 3 Individual Indictments into that Indictment and for which no plea was called nor was any entered by the 3 Accused persons, and finally, the Amended Consolidated Indictment where a plea was taken but only for Count 8.

35. It is observed that the Applicant contended, during the arraignment process that followed the addition of a new count, that he could not plead only to this new Count 8. This appears to suggest, in that context, that he was seemingly protesting against entering a plea only on the new Count 8 instead of on all the Counts of that Amended Consolidated Indictment.

ANALYSIS

36. The main reason that has been advanced to justify the non arraignment of the Applicant on the Consolidated and on all the Counts of the Amended Consolidated Indictment is that he had pleaded to the Initial Individual Indictment in March 2003, and that that the pleas to that Initial Indictment stand and hold good for the Consolidated Indictment whose charges and contents, it is contended, were the same as those in the said Initial Indictment and therefore, the same as those in the Amended Consolidated Indictment, excepting of course, the 8th Count which is new and was only added after the Chamber had granted leave to amend in order to include it.

37. I have always held the view and do not yet have cause to shift grounds on this, that where 3 Individual Indictments are merged into one with a view to jointly charging and trying 3 Accused Persons who were individually indicted and were to be tried separately, the product of the merger which we are currently referring to as a Consolidated Indictment, is either a New or an Amended Indictment. In the light of this reality, the Accused Persons should logically have been rearraigned individually on all the Counts of the Amended Consolidated Indictment which replaced the Consolidated Indictment before the commencement of their joint trial, indeed and more appropriately, during their appearance whey they were called upon to plead only to the 8th Count after all the counts in that Indictment had been read to them.

38. The Majority Decision of the 28th of November 2004 held that the Consolidated Indictment is not, as I have indicated, New because it is founded on the Initial Individual Indictment to which he had pleaded. It is still on this same understanding and reasoning that His Lordship, Hon. Justice Pierre Boutet, did not rearraign the Applicant on all the Counts of the Amended Consolidated Indictment.

39. If, as I hold, the Consolidated Indictment is New as compared to the Initial Individual Indictment, it to my mind, follows that the Amended Consolidated Indictment which is based, this time, not only on the Initial Individual Indictment but also and above all, on the Consolidated Indictment for which no plea was taken by the Applicant, is also a New Indictment. If this is the case, as I indeed hold it is, it follows that a plea on all the Counts of that Amended Consolidated Indictment should necessarily and obligatorily have been taken instead of rightfully having the entire Counts on the Indictment read to the Accused and taking and recording a plea only on one of them, that is, on Count 8.

40. BLACKSTONES 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."

41. In my Dissenting Opinion dated the 29th day of November 2004, in the Norman Motion for Service and Arraignment of the 2nd Indictment, I had this to say on Blackstones Directive and I quote:

> "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."

42. Furthermore in that same Dissenting Opinion, I had this to say :

> "I will 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 on which they are now being, not only jointly indicted but also jointly tried."

43. In my opinion, since the Amended Consolidated Indictment is the successor Indictment not only to the Initial Individual Indictment of the Applicant but also to the Consolidated Indictment, the said Amended Consolidated Indictment, is, like the latter Indictment, a New Indictment for which the obligation of the rearraignment of the Applicant on all its Counts was and remains a procedural imperative.

D) STAYING OF THE ORIGINAL INDICTMENT

44. The Applicant under this rubric, is seeking an order staying the Original Indictment against him. Indeed, as I mentioned earlier, the case against the Applicant, 2nd Accused, is proceeding with 5 validly subsisting sets of Indictments, namely, 3 Individual Initial Indictments, the Consolidated and the Amended Consolidated Indictments.

45. In the view of the Applicant, and according to the Majority Decision, this situation has the potential of a standby Indictment against the Accused in the hands of the Prosecution should the Amended Consolidated Indictment be thrown out. In addition, the Defence submits that the Chamber should have gone through the procedural steps of staying in Original Indictments in the absence of any indication on the part of the Prosecution to have them withdrawn soon after consolidation was ordered.

46. The Prosecution for its part, argues that in accordance with legal principles, trial on a subsequent indictment prevents a retrial on the former indictment concluding thereby, that the Defence application for an Order for a Stay of the Original Indictment or Consolidated Indictment is not necessary. The question to be asked is why it is necessary to still keep and hold on to 5 valid and still subsisting Indictments in one case involving a joint trial. If, as the Prosecution affirms, a trial on a subsequent indictment prevents a retrial on the former and that an Order for a Stay of that Initial Indictment is unnecessary, why should the Prosecution not simply withdraw the former Indictment or Indictments under the provisions of Rule 51 of the Rules of Procedure and Evidence? Why still keep them on the records when the proceedings are on-going on the most current Accusatory Instrument which is Amended Consolidated Indictment?

47. On this issue, the Chamber Majority Decision is ad idem with the view of the Prosecution and holds that "the issue of staying the Original Indictment is meretricious for the reason that as a matter of law, the veiled suggestion of double jeopardy is misconceived. It is trite law that the

Amended Consolidated Indictment merely consolidated and superseded the Original Individual Separate Indictments" including that of the 2nd Accused, "thus as it were, extinguishing and relegating them into a state of legal oblivion".

48. If this Majority Chamber Decision which I respectfully do not agree with on this particular issue concluded that the Amended Consolidated Indictment merely "Consolidated and Superseded the Original Individual Separate Indictments, thus extinguishing and relegating them into a state of oblivion, this Decision should have gone further to direct that an order for the withdrawal of "what should now be forgotten", is necessary so as to lay to rest, those potentially active Indictments in the conventional legally accepted manner under Rule 51 of the Rules. It is my opinion that as long as this is not done, these Indictments which are considered to have been "superseded and relegated into a state of oblivion" have a potential to resurrect even if in future, they do not indeed.

49. The issue to be addressed here which is relevant is whether, with the continued existence of the Initial Individual Indictment, there is a looming threat or a genuine apprehension or a possibility, even if it were not yet real, that the Applicant, if acquitted on the Consolidated Indictment on which the proceedings are now based, could still be prosecuted on the Individual Initial Indictment, thereby exposing him to the effects of the Rule against double jeopardy.

50. I, with due respect, find the argument of the Prosecution and the conclusions of the Majority Decision on this issue unconvincing because they neither offer nor do they represent a concrete, certain, and unequivocal legal assurance that an acquittal, ***per se***, of the Accused on the Amended Consolidated Indictment, automatically confers on him, an immunity from a possible harassment of a rearrest and a prosecution on the Initial Indictment. The reality is that if the Accused were ever rearrested or detained on the Initial Indictment after an acquittal, the said arrest or detention would, in any event, have already taken place and it is only after appearing in Court that the legal arguments based on '***autrefois acquit***' may be raised, properly examined, and probably, upheld.

51. Even if it is conceded that the verdict of the Court on a preliminary objection based on the plea of 'autrefois acquit' will, in these circumstances, be favourable to the Accused, he all the same would have been put through a situation where the Rule against double jeopardy would have been violated to his detriment; certainly, not the jeopardy of a conviction, but of a

deprivation of his liberty which, however briefly it lasts, usually accompanies arrests and detentions.

52. As a Tribunal, albeit as International as the Special Court is, these proceedings should be conducted with a semblance of transparency that contributes to ensuring, preserving and fostering the integrity of the proceedings. This, I observe, cannot be attained in a case such as this where the anomalous situation of 5 contemporaneous Indictments which, in the circumstances of this case, are still being considered as and indeed still remain legally valid in so far as they have not yet been withdrawn under Rule 51, continue to hang over the heads of the 3 Indictees, of course including the Applicant.

53. It is my finding that this situation impacts negatively on the neatness and transparency of the judicial process and that there is an imperative necessity for the 3 Initial Individual Indictments and the Consolidated Indictment to be withdrawn in order to avoid, not only a procedural confusion that is now apparent, but also and to put to rest, an understandably justified and continued apprehension, even if it were not yet founded, of a possible violation in future by whoever, of the Rule against Double Jeopardy which is provided for in the Article 9(1) and 14(7) respectively of the Statute of the Special Court and the International Covenant for the Protection of Civil and Political Rights.

54. This course of action is even more imperative in the overall interests of justice and the integrity of the judicial process because the Prosecution in this case is all along seeking to circumvent the imperative necessity of an arraignment on the Consolidated Indictment, and now the Amended Consolidated Indictment, on the argument that the 3 Accused Persons had after all, been earlier arraigned and pleaded to their Initial Individual Indictments whose contents, the Prosecution claims, are the same as those in the earlier Consolidated Indictment and now as those of the Amended Consolidated Indictment which is said to have superseded the former.

55. This affirmation by the Prosecution as I have said, has turned out to be unreliable and misleading because apart from the New Count 8, there are some other new elements characterised by the Chamber as "additional specificity" in the Consolidated and in the Amended Consolidated Indictment, and that the interests of justice, in these circumstances, would not be served, indeed, would be defeated, if these 3 Initial Indictments were not withdrawn because keeping them in place, in the sole interests of this prosecutorial strategy, violates the principle of fundamental

fairness as well as it contravenes the provisions of Articles 9(1) and 17(2) of the Statute as read with those of Rule 26*bis* of the Rules.

56. Besides and in addition, it is again contrary to the norms and principles of the integrity of the proceedings for the Prosecution to be allowed to conduct its case on more than one indictment in the same proceedings and against the same people because this creates a doubt, not only as to which indictment it is really relying on, but also as to the real "nature and cause of the charge against the accused persons" as required by Article 17(4)(a) of the Statute. This uncertainty, I say, can only be resolved by a withdrawal, under Rule 51 of the Rules, of the 3 Initial Individual Indictments and the Consolidated Indictment so as to cleanse the records and ensure that the statutory right of the Accused Persons to a fair trial guaranteed them under Article 17(2) of the Statute of the Special Court, is not violated.

57. Finally, I note that the Prosecution submitted that the Applicant, by participating in the proceedings is barred from contesting issues relevant to the continuation of the proceedings. I do not agree with this submission which I accordingly dismiss as frivolous and misconceived and on the contrary, uphold the submission by the Applicant that the fact of his participation in the trial neither bars nor precludes him from raising all issues that are relevant to his trial as he has done in the Application under consideration.

58. In the light of the above, I dismiss this Motion on the issues of Non-Service of both the Consolidated and the Amended Consolidated Indictments. However, I find the arguments in relation to Rearraignment and Staying the Original Indictment factually and legally convincing and **GRANT THE MOTION ON THESE GROUNDS**.

59. ACCORDINGLY **I DO ORDER** AS FOLLOWS:

1) That the Applicant immediately be rearraigned on all the Counts of the Amended Consolidated Indictment.

2) That the Prosecution immediately and forthwith and by a written Motion, applies under Rule 51, to withdraw, not only the Initial Individual Indictment of the Applicant but also the Consolidated Indictment in which he is charged jointly with Issa Hassan Sesay and Augustine Gbao.

3) THAT THESE ORDERS ARE CARRIED OUT

Done in Freetown, Sierra Leone, this 18th day of March, 2005

Hon. Justice Benjamin Mutanga Itoe,
Presiding Judge,
Trial Chamber I

[Seal of the Special Court]