

**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

THE TRIAL CHAMBER

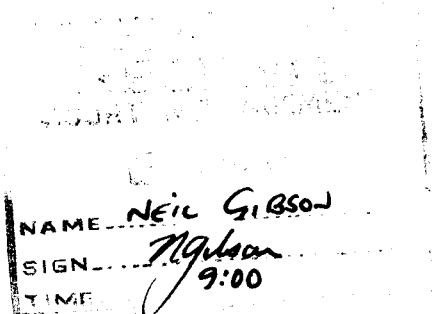
Before: Hon. Judge Benjamin Mutanga Itoe, Presiding Judge
 Hon. Judge Bankole Thompson
 Hon. Judge Pierre Boutet

Registrar: Robin Vincent

Date: 6th of December, 2004

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

**DECISION ON THE SECOND ACCUSED'S MOTION FOR SERVICE AND ARRAIGNMENT
 ON THE CONSOLIDATED INDICTMENT**

Office of the Prosecutor:Luc Côté
James JohnsonCourt Appointed Counsel for Sam Hinga Norman:Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Tim Owen, Q.C.Court Appointed Counsel for Moinina Fofana:Michiel Pestman
Arrow Bockarie
Victor KoppeCourt Appointed Counsel for Allieu Kondewa:Charles Margai
Yada Williams
Ansu Lansana

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

NOTING the *Motion for Service and Arraignment on Consolidated Indictment and a Second Appearance*, filed by the Second Accused, Moinina Fofana, on the 21st of October, 2004;

NOTING the *Prosecution Response to Fofana Motion for Service and Arraignment on Consolidated Indictment and a Second Appearance*, filed by the Prosecution on the 28th of October, 2004;

MINDFUL of the *Decision and Order on Prosecution Motions for Joinder*, delivered by the Trial Chamber on the 27th of January, 2004;

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

CONSIDERING Article 17 of the Statute of the Special Court (“Statute”) and Rule 26bis, Rule 47, Rule 48, Rule 50 and Rule 52 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (“Rules”);

THE TRIAL CHAMBER ISSUES THE FOLLOWING DECISION:

I. BACKGROUND

1. On the 9th of October, 2003, the Prosecution brought a Motion for Joinder. Written responses were received by the Third Accused on the 20th of October, 2003, and the Second Accused on the 12th of November, 2003. An oral response was given by the First Accused at the joinder hearing held on the 4th of December, 2003. The Prosecution filed a Reply to the Defence response on the 24th of October, 2003. A Decision on the Motion for Joinder was delivered on the 27th of January, 2004, where the Trial Chamber ordered that a single Consolidated Indictment be prepared as the Indictment on which the joint trial would proceed and that the said Indictment be served on each Accused in accordance with Rule 52 of the Rules. The Consolidated Indictment was filed on the 5th of February, 2004.

2. Prior to the consolidation of the Indictment, Counsel for Kondewa filed a Preliminary Motion based on Defects on the Indictment on the 7th of November, 2003. This Motion presented the following arguments:

(i) The Prosecution failed to distinguish clearly and specify the alleged acts for which the Accused incurs criminal responsibility under Article 6(1). Such failure inhibits the ability of the Accused to adequately conduct his defence.

(ii) The inclusion of the phrases “included but not limited to”, “about” and “but not limited to those events” renders the Indictment vague and imprecise thereby impeding the Accused in the proper conduct of his defence.

3. A Decision and Order on this Motion was rendered on the 27th of November 2003,¹ together with an Annex to the Decision.² With respect to the first argument made by the Defence, the Trial Chamber held that the Prosecution had plead all the different heads of responsibility, consistent with its discretion, and that the Accused was in no way prejudiced by this pleading. In terms of the second argument, the Trial Chamber held, *inter alia*, that:

The other head of challenges brought by the Defence against the Indictment concerns the inclusion of the phrases “*included but not limited to*”, “*about*”, and “*but not limited to these events*”. In this connection, the Defence submits that the use of these phrases renders the Indictment vague and imprecise thereby impeding the Accused in the conduct of his defence. After a careful review of paragraphs 19-24 of the Indictment, the Chamber agrees with the Defence that the expressions “*but not limited to these events*” and “*included but not limited to*”, except in so far as the phrase “*included but not limited to*” **relates only to dates and locations *simpliciter*** are, consistent with the principle in *Sesay*, “impermissibly broad and also objectionable in **not specifying the precise allegations against the Accused.**” The Chamber, therefore, upholds the Defence challenge on this issue. The Prosecution is, accordingly, put to its election: either to delete the said phrases in every count or wherever they appear in the Indictment or **provide in a Bill of Particulars specific additional events alleged against the Accused in each count.** The Amended Indictment or Bill of Particulars should be filed within 7(seven) days of the date of service of this Decision; and also served on the Accused in accordance with Rule 52 of the Rules.³

4. The Prosecution filed the related Bill of Particulars on the 5th of December, 2003.⁴ In the introduction to the Bill of Particulars the Prosecution stated that it contained “additional events in support of the counts charged in the Indictment against the Accused Allieu Kondewa dated 24th June 2003”. These additions included districts and towns within the territory of Sierra Leone, and one reference to “road ambushes” at various locations.

II. SUBMISSIONS OF THE PARTIES

Defence Motion:

5. By written Motion of the 21st of October, 2004, the Second Accused, Moinina Fofana, seeks service of the Consolidated Indictment, pursuant to Rules 50(A) and 52 of the Rules of Procedure and Evidence (“Rules”), and to be properly arraigned on the new charges against him and a further appearance, pursuant to Rule 50(B)(i) of the Rules.

6. The Defence for the Second Accused submit that the Trial Chamber, in its Decision on Joinder of the 27th of January, 2004, allowed the application for joinder of the three Accused, Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa, in spite of the fact that it acknowledged that the Consolidated Indictment contained “new allegations” in respect of the Accused. The Defence set out in a table the “new allegations” against the Second Accused as contained in the Consolidated Indictment (CI). These include:

¹ *Prosecutor v. Allieu Kondewa*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 27 November 2003.

² *Prosecutor v. Allieu Kondewa*, Annexure to Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 27 November 2003.

³ *Prosecutor v. Allieu Kondewa*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 27 November 2003, para. 11.

⁴ *Prosecutor v. Allieu Kondewa*, SCSL-2003-12-PT, Bill of Particulars, 5 December 2003.

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(i) Paragraph 25(a) (CI) - and at or near the towns of Lalahun, Kamboma, Konia, Talama, Panguma and Sembahun.

(ii) Paragraph 25(b) (CI) - and Blama.

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

(iv) Paragraph 26(a) (CI) - Blama, Kamboma.

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

7. The Defence refer to Presiding Judge Benjamin Mutanga Itoe's appended Separate Opinion to the Joinder Decision which stated that the Consolidated Indictment "was to all intents and purposes new" and that "the indictment has been subjected to the new procedures of Rules 47 and 61 in the form which it will take and will be presented" following the Trial Chamber's decision.

Prosecution Response:

8. The Prosecution filed on the 28th of October, 2004, its *Prosecution Response to Fofana Motion for Service and Arraignment on Consolidated Indictment and a Second Appearance*. In this response the Prosecution submit that the Consolidated Indictment was served on Defence Counsel by an email dated the 5th of February, 2004 and that the failure to personally serve the Accused was an administrative error attributable to the Registry and when considering all the circumstances of this case there was no identifiable harm to the Accused. The Prosecution submit that there is no identifiable harm on account of service of the Consolidated Indictment on the Defence Team and the demonstrated knowledge of the Defence of the charges contained in the Consolidated Indictment, through defending the Accused against the charges contained in the Indictment throughout the first and second trial sessions.

9. The Prosecution further submits that the Consolidated Indictment contains no new charges against the Accused and that, therefore, no further arraignment is required. The Prosecution cite the Majority Joinder Decision which concluded that "the specific crimes charged in those several counts are exactly the same, except for the allegations in respect of additional time and locations as regards Accused Moinina Fofana and Allieu Kondewa, which is an issue of no materiality for the instant purpose".⁵ The Prosecution submit that the Majority did not find it necessary to order a further arraignment of the Second Accused [sic] at this time and there is equally now no need to do so. The Prosecution submit that reliance on the Separate Opinion of Judge Itoe is of no relevance as the Court is guided by the majority opinion. The Prosecution reinforced the fact that the Defence did not appeal any aspect of the Joinder Decision.

Defence Reply:

10. No reply was filed by the Defence.

⁵ Joinder Decision, para. 24.

III. APPLICABLE LAW

11. Prior to looking into the merits of this Motion, it is appropriate to set out the applicable provisions of the Statute and the Rules of the Special Court, as well as certain provisions of the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples Rights (ACHPR).

Statute

Article 17

1. All accused shall be equal before the Special Court.
2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
 - a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
 - b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
 - c. To be tried without undue delay;
 - d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
 - e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
 - f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
 - g. Not to be compelled to testify against himself or herself or to confess guilt.

Rules

Rule 26bis

The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute

and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Rule 47 – Review of Indictment

- (A) An indictment submitted in accordance with the following procedure shall be approved by the Designated Judge.
- (C) The indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case.
- (E) The designated Judge shall review the indictment and the accompanying material to determine whether the indictment should be approved. The Judge shall approve the indictment if he is satisfied that:
- (i) the indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court; and
 - (ii) that the allegations in the Prosecution's case summary would, if proven, amount to the crime or crimes as particularised in the indictment.

Rule 48 – Joinder of Accused or Trials

- (A) Persons accused of the same or different crimes committed in the course of the same transaction may be jointly indicted and tried.
- (B) Persons who are separately indicted, accused of the same or different crimes committed in the course of the same transaction, may be tried together, with leave granted by a Trial Chamber pursuant to Rule 73.
- (C) A Trial Chamber may order the concurrent hearing of evidence common to the trials of persons separately indicted or joined in separate trials and who are accused of the same or different crimes committed in the course of the same transaction. Such a hearing may be granted with leave of a Trial Chamber pursuant to Rule 73.

Rule 50 – Amendment of Indictment

- (A) The Prosecutor may amend an indictment without prior leave, at any time before its approval, but thereafter, until the initial appearance of the accused pursuant to Rule 61, only with leave of the Designated Judge who reviewed it but, in exceptional circumstances, by leave of another Judge. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and Rule 52 apply to the amended indictment.
- (B) If the amended indictment includes new charges and the accused has already made his initial appearance in accordance with Rule 61:
- (i) A further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges;
 - (ii) Within seven days from such appearance, the Prosecutor shall disclose all materials envisaged in Rule 66(A)(i) pertaining to the new charges;

- (iii) The accused shall have a further period of ten days from the date of such disclosure by the Prosecutor in which to file preliminary motions pursuant to Rule 72 and relating to the new charges.

Rule 52 - Service of Indictment

- (A) Service of the indictment shall be effected personally on the accused at the time the accused is taken into the custody of the Special Court or as soon as possible thereafter.
- (B) Personal service of an indictment on the accused is effected by giving the accused a copy of the indictment approved in accordance with Rule 47.
- (C) An indictment that has been permitted to proceed by the Designated Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Special Court. If the accused does not understand English and if the language understood is a written language known to the Registrar, a translation of the indictment in that language shall also be prepared. In the case that the accused is illiterate or his language is an oral language, the Registrar will ensure that the indictment is read to the accused by an interpreter, and that he is served with a recording of the interpretation.
- (D) Subject to Rule 53, upon approval by the Designated Judge the indictment shall be made public.

ICCPR

Article 9

- 1. Everyone has the right to liberty and security of persons. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
- 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

[...]

Article 14

[...]

- 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay.

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ACHPR

Article 7

1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

IV. THE MERITS OF THE APPLICATION

1. Service of Indictment

12. The first issue to be determined by the Trial Chamber is whether the Second Accused was personally served with the Consolidated Indictment, and if not, whether this non-service would prejudice the Accused's right to a fair trial.

13. The Chief of Court Management has informed the Trial Chamber that the Second Accused was not personally served with the Consolidated Indictment. According to this report, the said Indictment was only served on Counsel for the Accused.

14. In accordance with Rule 52 of the Rules, the Trial Chamber ordered in its Decision on Joinder, for the Consolidated Indictment to be served on each Accused person. This order was as follows:

1. That a single consolidated indictment be prepared as the Indictment on which the joint trial shall proceed [...];
2. [...]
3. That the said Indictment be served on each Accused in accordance with Rule 52 of the Rules.

15. Based upon the foregoing, and as further elaborated by Hon. Judge Thompson in his Separate and Concurring Opinion,⁶ the Trial Chamber finds that the service of the Consolidated Indictment on Counsel for the Accused does not comply with Rule 52 of the Rules, or the Order of the Trial Chamber. While such a failure to serve the Consolidated Indictment personally on the Accused constitutes a procedural error, this alone would not, however, in and of itself, unfairly prejudice the Accused's right to a fair trial. In making this finding, the Trial Chamber has reviewed the entire pre-trial and trial process and has noted the following:

- (1) The Accused was served on the 27th of June 2003, with a copy of the Initial Indictment that was approved on the 26th of June, 2003, which outlines the charges against him.
- (2) His Assigned Counsel, who represented him at this time were formally served with a copy of the Consolidated Indictment on the 5th of February, 2004, and their obligation consisted of representing their client, which included to familiarise him with the charges against him.
- (3) The Accused did not raise this issue during the Pre-Trial Conference or any of the Status Conferences.
- (4) The Accused responded to the charges against him in his Pre-Trial Brief filed on the 28th of May, 2004, and has defended the charges against him in the first and second sessions of the CDF trial.

⁶ Separate Concurring Opinion of Judge Bankole Thompson on Decision on Second Accused's Motion for Service and Arraignment on the Consolidated Indictment, 6 December, 2004.

2. Arraignment on Indictment

16. With respect to arraignment on the Indictment, it is clear in the practice of the International Tribunals,⁷ that a consolidated indictment need not be confirmed by a Trial Chamber or Judge if the initial indictments that were subject to joinder were already confirmed, and the charges in the consolidated indictment are essentially the same or similar to the original ones. This position is also clear in national systems. In the United Kingdom case of *R v. Fyffe*, it was recognised that the general rule that “[r]e-arraignment is unnecessary where the amended indictment merely reproduces the original allegations in a different form, albeit including a number of new counts”.⁸

17. When dealing with an amended indictment containing new charges, Rule 50(B) of the Rules provides in this respect that a further appearance may be held to enable the Accused to enter a plea on the new charges. This particular Rule provides for a further appearance in relation to the new charges only. This provision would find application only when there have been new charges.

18. In accordance with the above-mentioned law, the Trial Chamber will now proceed to determine whether or not the charges outlined in the Consolidated Indictment, are new, and as such, materially different from the charges listed in the Initial Indictment which was served on the Accused.

19. The Trial Chamber notes that when the Prosecution applied for joinder of the trial of the three Accused persons, it did not exhibit the proposed Consolidated Indictment. The Prosecution submitted that the Consolidated Indictment would not amend the Initial Indictments but that it was confined to a “mere putting together” of the three Initial Indictments. The Prosecution submitted that there was no need for further approval of the Consolidated Indictment “given it will not involve any change in the substance of the original Indictments”.⁹

20. The Trial Chamber takes cognisance of its finding in its Joinder Decision, namely, that the counts are exactly the same in the Initial Indictments against the three Accused, “except for the allegations in respect of additional time and locations as regards Accused Moinina Fofana and Allieu Kondewa, which is an issue of no materiality for the instant purpose”.¹⁰

21. The Second Accused, by his Motion of the 21st of October, 2004, characterised the above finding of the Trial Chamber in its Joinder Decision as acknowledging that the Consolidated Indictment “contained new allegations in respect of the Accused”. The Trial Chamber considers that there is absolutely no basis for this submission of the Defence, as is apparent from a plain reading of the Joinder Decision.

⁷ See for example, case of *Prosecutor v. Kvocka*, IT-98-30/T; *Prosecutor v. Kvocka*, Decision on Prosecution Request for Leave to File a Consolidated Indictment and to Correct Confidential Schedules, 13 October 2000; *Prosecutor v. Ademi*, IT-04-74, *Prosecutor v. Ademi*, Decision on Motion for Joinder of Accused, 30 July 2004; *Prosecutor v. Krajisnik*, IT-00-39; These cases are distinguishable, for example, from the case of *Prosecutor v. Blagojevic*, IT-02-60-PT, where the Indictment was consolidated before the initial appearances; and the case of *Prosecutor v. Limaj*, IT-03-66, where a further appearance was held on 27 February 2004, following new charges being added to the Second Amended Indictment; and in the case of *Prosecutor v. Mrksic*, IT-95-13/1, where a further plea was entered on 16 February 2004, to added counts in the Consolidated Indictment. For Rules governing the arraignment of the Accused on an amended Indictment, see Rule 50 of the Rules of Procedure and Evidence of the Special Court and Rule 50 of the Rules of the ICTR and ICTY, which provide that a further arraignment will be held where an amended indictment contains new charges.

⁸ *R v. Fyffe* [1992] Crim. L.R. 442, C.A.

⁹ Prosecution Motion for Joinder, para. 10.

¹⁰ Para. 24.

22. It is notable that the Trial Chamber in its Decision on the Third Accused's Motion on the form of the indictment,¹¹ when ordering that the "precise allegations against the Accused" be included in a Bill of Particulars or Amended Indictment against the Third Accused, distinguished dates and locations *simpliciter*, from this requirement. The Prosecution subsequently filed a Bill of Particulars with additions that included towns within the territory of Sierra Leone, and one reference to "road ambushes" at various locations. The Trial Chamber notes that the differences between the Initial Indictment and the Consolidated Indictment against the Second Accused are contained in the Bill of Particulars added to the Initial Indictment against the Third Accused, Allieu Kondewa, which was served on his Counsel on the 5th of December, 2003. The Trial Chamber will turn now to consider the differences between the Initial Indictment and the Consolidated Indictment against the Second Accused.

a. Differences Between the Initial Indictment and Consolidated Indictment

23. Upon reviewing this Motion filed by the Second Accused, and consequently proceeding to specifically review the differences between the Initial Indictment against the Second Accused with the Consolidated Indictment, the Trial Chamber notes that the following additions have been made to the Consolidated Indictment. These additions are underlined in the text below:

- 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.

24. The Trial Chamber turns now to consider whether these additions to the Consolidated Indictment are material to the Indictment, in which case an unfair prejudice might enure to the Accused on account of him facing an indictment with new charges, having not been arraigned on

¹¹ *Prosecutor v. Allieu Kondewa*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 27 November 2003, para. 11.

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those charges in the Indictment, or alternatively, whether the additions simply provide greater specificity to general allegations.

b. Pleading Principles for an Indictment

25. An Indictment, as the primary accusatory instrument against an Accused person, must plead the essential aspects of the Prosecution case with sufficient detail. In accordance with Rule 47(c) of the Rules:

The indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case.

26. If the Prosecution fails to plead the essential aspects of the Prosecution Case in the Indictment, it will suffer from a material defect.¹² As stated by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in the *Kupreskic* case:

It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the Indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.¹³

27. Pursuant to Article 17(4) of the Statute, the Accused must be informed of the "nature and cause of the charge against him". There is a distinction between the material facts upon which the prosecution relies, and which must be pleaded in the Indictment, and the evidence by which those material facts will be proved, which do not need to be pleaded.¹⁴ The materiality of the facts to be pleaded depend on the nature of the Prosecution case and the alleged proximity of the Accused to those events. As stated by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Brdanin* case, in a trial based upon, for example, superior responsibility:

[W]hat is most material is the relationship between the accused and the others who did the acts for which he is alleged to be responsible, and the conduct of the accused by which he may be found to have known or had reason to know that the acts were about to be done, or had been done, by those others, and to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who did them. However, so far as those acts of the other persons are concerned, although the prosecution remains under an obligation to give all the particulars which it is able to give, the relevant facts will usually be stated with less precision, and that is because the detail of those acts (by whom and against whom they are done) is often unknown - and because the acts themselves often cannot be greatly in issue.¹⁵

28. The Trial Chamber in the *Brdanin* case further considered that in a case based upon individual responsibility where the Accused is alleged to have personally committed the acts pleaded in the Indictment:

[T]he material facts must be pleaded with precision - the information pleaded as material facts must, so far as it is possible to do so, include the identity of the victim, the places and the approximate date of those acts and the means by which the offence was committed. Where the prosecution is unable to specify any of these matters, it cannot be obliged to perform the impossible. Where the precise date cannot be specified, a *reasonable* range of dates may be sufficient. Where a precise identification of the

¹² *Prosecutor v. Kupreskic*, Appeals Judgement, para. 114.

¹³ *Supra*, para. 92.

¹⁴ See *Prosecutor v. Brdanin*, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001, para. 18.

¹⁵ *Id.*, para. 19.

victim or victims cannot be specified, a reference to their category or position as a group may be sufficient. Where the prosecution is unable to specify matters such as these, it must make it clear in the indictment that it is unable to do so and that it has provided the best information it can.¹⁶

29. In the *Kupreskic* case, the Appeals Chamber of the ICTY held that “the question whether an Indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.”¹⁷ Trial Chambers of the ICTY have held that:

[a]ll legal prerequisites to the application of the offences charged constitute material facts, and must be pleaded in the indictment. The materiality of other facts (facts not directly going to legal prerequisites), which also have to be pleaded in the Indictment, cannot be determined in the abstract. Each of the material facts must usually be pleaded expressly, although it may be sufficient in some circumstances if it is expressed by necessary implication. This fundamental rule of pleading, however, is not complied with if the pleading merely assumes the existence of a pre-requisite.¹⁸

30. This Trial Chamber, in its Decision in the case of *Sesay*, held that when framing an Indictment, the degree of specificity required:

[m]ust necessarily depend upon such variables as (i) the nature of the allegations; (ii) the nature of the specific crimes charged; (iii) the scale or magnitude on which the acts or events allegedly took place (iv) the circumstances under which the crimes were allegedly committed; (v) the duration of time over which the said acts or events constituting the crimes occurred; (vi) the time span between the occurrence of the events and the filing of the indictment; (vii) the totality of the circumstances surrounding the commission of the alleged crimes.¹⁹

31. In joint trials each Accused shall be accorded the same rights as if he or she were being tried separately.²⁰ The rights of the Accused as enshrined in Articles 9 and 14 of the ICCPR and Article 7 of the ACHPR, and as outlined in Rule 26bis of the Rules, including the right to a fair and expeditious trial, and in Article 17 of the Statute, which include the right “to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her,”²¹ and “to have adequate time and facilities for the preparation of his or her defence,”²² apply equally to an Accused person tried separately on a single indictment as to an Accused person tried jointly on a consolidated indictment.²³ In either instance, where new changes are sought to be added to an Indictment against an Accused person, whether in a separate or joint trial, the Prosecution is obligated pursuant to Rule 50 of the Rules, to seek leave of the Trial Chamber to amend the Indictment.²⁴

¹⁶ *Id.*, para. 22.

¹⁷ *Prosecutor v. Kupreskic*, Appeal Judgement, para. 88.

¹⁸ *Prosecutor v. Enver Hadzihasanovic et al.*, Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001 (“*Hadzihasanovic* Decision on Form of the Indictment”), para. 10; see also *Prosecutor v. Mile Mrksic*, Case No. IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003, para. 11.

¹⁹ *Prosecutor v. Issa Hassan Sesay*, Decision and Order on defence Preliminary Motion for Defects in the Form of the Indictment, 13 October 2003, para. 8.

²⁰ See Rule 82(A) of Rules.

²¹ Para. 4(a).

²² Para. 4(b).

²³ See *The Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Decision and Order on Prosecution Motions for Joinder, 27 January 2004, para. 4.

²⁴ Rule 50 of the Rules.

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32. Applying the foregoing principles to the instant situation, the Trial Chamber considers that given the alleged nature and scale of the offences charged, and the alleged mode of participation of the Accused in a position of command responsibility, and as part of a joint criminal enterprise with a common plan to commit such offences, it would not be realistic to expect for these offences to be plead with "pin-point particularity".²⁵ At the same time, however, greater specificity will be required for other modes of participation in offences pursuant to Article 6(1) of the Statute, and the alleged offences and material facts must be plead with enough precision to inform the Accused clearly of the charges against him so that he may prepare his defence.

33. The Trial Chamber has carefully considered the added locations in the Consolidated Indictment against the Second Accused and finds that these involve towns in the regions of Kenema, Bo and Moyamba. The Initial Indictment charged that the "CDF, largely Kamajors" engaged the RUF/AFRC forces in armed conflict in various parts of Sierra Leone that included, but were not limited to "the towns of Tongo Field, Kenema, Bo, Koribundo and surrounding areas and the Districts of Moyamba and Bonthe".²⁶ The various counts of the Initial Indictment charge various offences that were committed in Kenema and Bo, and in Moyamba District. The charges in the various counts of the Initial Indictment do not specify whether the references to Kenema and Bo are to the actual towns or to the districts, however, given that the pleading in paragraphs 18 and 19 of the Initial Indictment refers solely to the towns of Kenema and Bo, it would follow from this that the specific charges relate specifically to these towns and not to the districts. However, the language of the Initial Indictment states that the offences "were not limited to" the locations specified in the counts of the Initial Indictment. The Trial Chamber takes note that no new regions have been added to the Consolidated Indictment that were not included in the Initial Indictment against the Accused, nor has there been any extension of timeframes for the commission of the offences in the Consolidated Indictment. The only additions to the Indictment include the towns set forth in paragraph 21 of this Decision, which are towns within the Districts of Kenema, Bo, and Moyamba.

34. Upon close analysis of the Consolidated Indictment in comparison to the Initial Indictment, the Trial Chamber concludes that the additions made to the Consolidated Indictment are of no materiality as they simply provide details for greater specificity to the factual allegations included in the Initial Indictment against the Accused. There are no new crimes or charges against the Accused.

35. In the case at hand, the Accused entered a plea to the charges against him at his initial appearance on the 1st of July, 2003. These charges remained in force against him, and there have been no material changes made to the Consolidated Indictment. The Trial Chamber, therefore, finds that there are no requirements or obligations in the Rules or in the interests of justice to afford the Accused the opportunity to make a plea on the Consolidated Indictment. Consequently, it cannot be said that any unfair prejudice would result from him not being arraigned on the Consolidated Indictment.

5. Conclusions

36. The Trial Chamber finds that while the Second Accused, Moinina Fofana has not been personally served with the Consolidated Indictment, no unfair prejudice would enure through this procedural error. Furthermore, the Trial Chamber specifically finds that there are no new crimes or

²⁵ *Prosecutor v. Kamu*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 19 November 2003, Para. 21.

²⁶ Consolidated Indictment, para. 18.

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charges against the Accused contained in the Consolidated Indictment that were not contained in the Initial Indictment. There is neither an amended indictment nor a new indictment. The additions made to the Consolidated Indictment are not material as they simply provide greater specificity to the factual allegations included in the Initial Indictment against the Accused. In accordance with Rule 50 of the Rules, there is no requirement to arraign the Accused on the Consolidated Indictment, given that there are no new charges contained therein.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

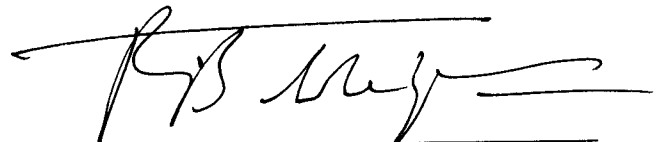
DISMISSES the Motion of the Second Accused in its entirety.

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

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

Done in Freetown, Sierra Leone, this 6th day of December, 2004.


 Hon. Judge Pierre Boutet


 Hon. Judge Bankole Thompson

