THE SPECIAL COURT FOR SIERRA LEONE

CASE NO. SCSL-2004-14-T
Trial Chamber I

THE PROSECUTOR
OF THE SPECIAL COURT
v.
SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA

MONDAY, 29 NOVEMBER 2004
10.42 a.m.
TRIAL

Before the Judges:

Benjamin Mutanga Itoe, Presiding
Bankole Thompson
Pierre Boutet

For Chambers:

Ms Sharelle Aitchison
Ms Chiarra Galletti

For the Registry:

Ms Maureen Edmonds
Mr Geoff Walker

For the Prosecution:

Mr James C Johnson
Mr Raimund Sauter
Mr Kevin Tavener
Ms Adwoa Wiafe
Mr Mohamed Stevens
Ms Sharan Parmar

For the Principal Defender:

Mr Ibrahim Yillah
Mr Kingsley Belle

For the Accused Sam Hinga Norman:

Dr Bu-Buakei Jabbi.
Ms Claire da Silva

For the Accused Moinina Fofana:

Mr Arrow Bockarie
Mr Andrew Ianuzzi

For the Accused Allieu Kondewa:

Mr Charles Margai
Mr Ansu Lansana

Monday, 29 November 2004

[The accused present]

[Open session]

[Upon commencing at 10.42 a.m.]

PRESIDING JUDGE: Good morning, learned counsel. I hope you all had an enjoyable weekend and that you relaxed properly for the long and yet another week of trials. We think -- I wish all of us the health that we require to get through this process. Thank you.

We did announce on Friday that we were going to deliver a judgment on the motion filed by the first accused in this trial and we shall start by delivering the majority opinion -- the majority judgment which will be presented by learned Judge Boutet.

JUDGE BOUTET: Thank you, Mr Presiding Judge.

This is the decision of the Trial Chamber on the first accused's motion for service and arraignment on the consolidated indictment. I will not read the totality of my decision. I will read the salient portion of the decision that is to be filed right after my delivering of it in open court this morning.

I will read firstly the background to this application.

On the 15th, 17th, and 21st of March 2003, the first accused was arraigned before the Trial Chamber and pleaded not guilty to eight counts listed in the indictment against him.

On the 9th of October 2003, the Prosecution sought a motion for joinder of the first accused with the accused

Moinina Fofana (second accused) and Allieu Kondewa (third accused). The Prosecution requested that the indictments against the three accused be consolidated into a single indictment and their case joined. Written responses to this motion were received from the third accused on the 20th of October, 2003, and from the second accused on the 12th of November 2003. An oral response to the motion 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, which 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 October 2003.

By written motion of the 20th of September 2004, the first accused submits that he had not been personally served with a consolidated indictment, nor lawfully arraigned on this indictment, for which he is currently being tried before the Special Court. He seeks service and arraignment on this indictment. He claims that the consolidated indictment extends the period of time covered by the indictment to an additional 20 months and adds several geographic locations that are further described in the decision.

The first accused also seeks a formal quashing of the previous indictment on which he was arraigned on the

7th of March 2003. He submits that two indictments are currently "lying against him", contrary to the rule of law against double jeopardy under Article (91) of the Statute. He submits that former indictment is included within the superseding indictment, so that trial on the superseding indictment should prevent retrial on the former indictment. He has concerns based upon "experiences before domestic Sierra Leone tribunals", that is, a complete acquittal on the consolidated indictment could make him vulnerable to further prosecution on the initial indictment.

There was a Prosecution response to this application and an accused reply which I will not read in court today, and I will move to the merits of the application.

Service of the Consolidated Indictment.

The first issue to be determined by the Trial Chamber is whether the first accused was properly served with the consolidated indictment, and if not, whether this situation would unfairly prejudice the accused's right to a fair trial.

The Chief of Court Management has informed the Trial Chamber that the accused was not personally served with a consolidated indictment. According to this report, the said indictment was only served on counsel for the accused, as the Prosecution had not asked for personal service on the accused.

In accordance with Rule 52 of the Rules, the Trial Chamber had ordered in its decision on joinder for the consolidated indictment to be served on each accused

person. This order was a follows:

1. That a single consolidated indictment be prepared as the indictment on which the trial shall proceed; and

3. That the said indictment be served on each accused in accordance with Rule 52 of the Rules.

Based upon the foregoing, the Trial Chamber finds that the service of the 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.

Having so found, the Trial Chamber must now determine whether any unfair prejudice has or will result to the accused as a result of this non-compliance. In so doing the Trial Chamber has reviewed the entire pre-trial and trial process and has noted the following. The accused was served on the 10th of March 2003, with a copy of the initial indictment which was approved on the 7th of March 2003, which outlines the charges against him. His assigned counsel, who represented him at that 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. The accused did not raise the issue of non-service during the pre-trial conference or at any of the status

conferences. Furthermore, the accused responded to the charges against him in his pre-trial brief filed on 31st of May 2004, and has defended the charges against him in first and second session of the CDF trial.

Before making any conclusive finding on this issue of unfair prejudice, however, the Trial Chamber considers it necessary to assess whether or not the charges outlined in the consolidated indictment are materially different from the charges listed in the initial indictment which was served on the accused and would therefore constitute new charges as contemplated by Rule 50 of the Rules.

Difference between the initial indictment and the consolidated indictment.

The Trial Chamber is aware that it is not its function to ascertain for itself whether the form of an indictment complies with the pleading principles as outlined in the Rules, as this is normally a function for the parties, although a court is entitled proprio motu to raise issues as to the form of an indictment, particularly when such matters will affect the fairness of the process. With the principle of a fair trial, and the obligation to consider any unfair prejudice that may ensue from non-service and arraignment on the consolidated indictment, the Trial Chamber will consider whether there are any new charges to consolidated indictment by comparison to the initial indictment.

The Prosecution assert that the consolidated indictment contains no additional charges against the

first accused. It should be observed that when the Prosecution applied for joinder of the trial of three accused persons, it did not exhibit the proposed consolidated indictment. The Prosecution submitted that the consolidated indictment would not amend the initial indictment, but that it was confined a to "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".

Based upon these submissions by the Prosecution and without the benefit of an appended indictment to the motion for joinder, the Trial Chamber held in its joinder decision that a comparison of the indictments of the three accused "reveals 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".

Upon receiving this motion from the first accused, and consequently proceeding to specifically review the differences between the initial indictment against the first accused with the consolidated indictment, the Trial Chamber notes that the following changes have been made:

(A) Paragraph 23 of the consolidated indictment - this paragraph refers to the armed conflict occurring in various parts of Sierra Leone. In the initial

indictment, the qualifier "but not limited to" is given. The consolidated indictment adds the "towns of Tongo Field", instead of just Tongo Field "and surrounding areas and the districts of Moyamba and Bonthe" for parts of Sierra Leone where the armed conflict allegedly occurred.

(B) Paragraph 24 - this paragraph adds to the actions committed by the CDF, largely Kamajors "personal injury and the extorting of money from civilians". Subparagraph (C) adds that the Kamajors not only attacked, but "took control of" various towns and instead of allegations that Kamajors destroyed and looted, they consolidated indictment alleges that Kamajors "unlawfully" destroyed and looted. Subparagraphs (D) and (E) are entirely new and state that:

(D) Between October 1997 and December 1999, Kamajors attacked and conducted armed operations in the Moyamba District, to include the towns of Sebehun and Gbangbatoke. As a result of actions Kamajors continued to identify suspected "collaborators" and others suspected to be not supportive of the Kamajors and their activities. Kamajors unlawfully killed an unknown number of civilians. They unlawfully destroyed and looted civilian owned properly.

And subparagraph (E) between about October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Bonthe District, generally in and around the towns and settlements of Talia, Tihun, Maboya, Bolloh, Bemebay, and the island town of Bonthe. As a

result of these actions Kamajors identified suspected "collaborators" and others suspected to be not supportive of the Kamajors and their activities. They unlawfully killed an unknown number of civilians. They destroyed and looted civilian owned property.

Additions to paragraph F are that the CDF blocked all major highways and roads leading "to and from", which previous referred to "leading to" only.

(C) Paragraph 25 of the consolidated indictment, subparagraph (A) extends the time frame for alleged commission of unlawful killings to 30 April 1998, instead of 1 February 1998 as in the initial indictment. Additional places are mentioned where the killings allegedly took place, including "at or near the towns of Lalehun, Kamboma, Konia, Talama, Panguma and Sembehun". The initial indictment used general language "but were not limited to" and referred to "at or near Tongo Field". Subparagraph (B) included "District Headquarters town of Kenema", whereas the initial indictment just referred to "Kenema" and added "at the nearby locations of Blama". Subparagraph (C) adds "Kamajors unlawfully killed", and subparagraph (D) adds "including the District Headquarters town" and "Kebbi Town, Kpeyama, Fengehun and Mongere" and that "Kamajors unlawfully killed". Subparagraph (E) and (F) are new and were not in the initial indictment. These subparagraphs state:

(E) Between about October 1997 and December 1999 in locations in Moyamba District, including Sembehun, Tiama, Bylago, Ribbi and Gbangbatoke, Kamajors unlawfully killed

an unknown number of civilians.

(F) Between about October 1997 and December 1999 locations in Bonthe District including Talia (Base Zero) Mobayeh, Makose and Bonthe Town, Kamajors unlawfully killed an unknown number of civilians.

Additions to subparagraph (G) include "unlawfully killed" and capture of enemy combatants "in road ambushes at Gumahun, Gerihun Jembeh and the Bo-Matotoka Highway".

(D) Paragraph 26 of the consolidated indictment, subparagraph (A) extends the time frame for alleged commission of acts of physical violence and infliction of mental harm or suffering to October 1998, which previously was 1 April 1998. Blama and Kamboma are also listed as areas where the acts were committed. Kenema is also qualified as "Kenema Town". Subparagraph (B) of the initial indictment referred to commission of acts from 1 November 1997 to 1 April 1998 and the consolidated indictment refers to November 1997 to December 1999 and adds "in the towns of" for Tongo Field and "the Districts of Moyamba and Bonthe". The subparagraph further adds the offences of illegal arrest and unlawful imprisonment. The initial indictment used general language of "but not limited to."

(E) Paragraph 27 - this paragraph alleging looting and burning adds the locations of "Kenema District, the towns of Kenema, Tongo Field and surrounding areas", "District" to Bo, "the towns Bo", "Bonthe District, the towns of Talia (Base Zero), Bonthe Town, Mobayeh, and surrounding areas." This paragraphs also refers to the

unlawful taking and destruction by burning of "civilian owned" property, instead of "private property."

(F) Paragraph 29 of the consolidated indictment adds that the CDF "conscript" instead of "initiate" children under the age of 15 years into armed forces or groups "throughout" Republic of Sierra Leone.

Other changes to the consolidated indictment include, for example, reference to "CDF, largely Kamajors", instead of "Kamajors" as in the initial indictment.

Upon a detailed comparative analysis of the differences between the initial indictment for the first accused and the consolidated indictment, the Trial Chamber comes to the conclusion that the factual allegations adduced in support of existing confirmed counts in the initial indictment have been extended and elaborated upon in the consolidated indictment, and that, furthermore, some substantive elements of the charges have been added.

The Chamber turns now to consider proprio motu whether these additions and changes 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 these charges, having not been personally served and arraigned on the consolidated indictment, or alternatively, whether the additions simply provide greater specificity to general allegations that are not material.

Pleading Principles for an Indictment.

An indictment as the primary accusatory instrument against an accused person, must plead the essential aspect of the Prosecution case with sufficient detail. In accordance with 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.

If the Prosecution fails to plead the essential aspect of the Prosecution case in the indictment, it will suffer from a material defect. As stated by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ICTY in the Kupreski 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.

Pursuant to Article 17(4) of the Statute, the accused must be informed of the "nature and the 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. 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 a Brdjanin case, in a trial based upon, for example, superior responsibility:

What 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 person 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.

The Trial Chamber in the Brdjanin 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:

"The 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 precise identification of a 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 that clear in the indictment that it is unable to do so and that it has provided the best information it can."

An indictment may be amended, however, at trial, where the evidence turns out differently than expected. The Trial Chamber may grant an adjournment for this purpose, or certain evidence may be excluded as not being within the scope of the indictment. In cases where the indictment provides insufficient details as to the essential elements of the Prosecution case, the jurisprudence of the Tribunal accepts that a defendant may not be unfairly prejudiced where the Defence is put on reasonable notice of the Prosecution case before trial, for example, in the Prosecution pre-trial brief, or in the latest, in the Prosecution opening statement.

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." The Trial Chambers of the ICTY have held:

"All legal prerequisites to the application of the offences charged constituted material facts, and must be pleaded in the indictment. The materiality of the facts (facts not directly going to legal prerequisites), which also have to be plead in the indictment, cannot be determine 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 prerequisite."

This Trial Chamber, in its decision in the case of Sesay, held that when framing an indictment, the degree of specificity required:

"Must necessarily depend on such variables as (i) the nature 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 indictments; (vii) the totality of the circumstances surrounding the commission of the alleged crimes."

Applying the foregoing principle 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 pled with "pinpoint particularity". 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 pleaded with enough precision to inform the accused clearly of the charges against him so that he may prepare his defence.

Upon close analysis of the consolidated indictment, there are clearly new factual allegations adduced in support of existing confirmed counts, as well as new substantive elements of the charges that were not in the initial indictment of the first accused. In the opinion of the Trial Chamber, these changes do not appear to be simply "semantic", as alleged by the Prosecution in their motion for joinder, but are rather material to the indictment. While some of the differences between the two indictments simply provide greater specificity, and provide backgrounds fact, many of the changes, however, are material to the indictment. Such as the addition of graphical locations in paragraph 23 to 27 of the consolidated indictment, that introduced new districts, such as Bonthe and Moyamba; and the extension of temporal jurisdiction for some counts from April 28, as outlined in the initial indictment, to December 1999 in the consolidated indictment, constitute material changes to

the indictment. In addition, there are new substantive elements of charges in the paragraphs 24 to 27 and 29 of the consolidated indictment that are material and include the charges of unlawful arrest and detention, "conscription" of children, personal injury and extorting of money from civilians. We consider that all of these additions to the consolidated indictment, without any amendment to the counts against the accused and personal service on the accused, in accordance with the prescribed procedure, could prejudice the accused's right to a fair trial if the trial proceeds on this basis.

In joint trials each accused shall be accorded the same rights as if he or she were being tried separately. The rights of the accused as enshrined in Articles of 9 and 14 of the ICCPR and Article 7 of the ACHPR, and as outlined in Rule 26(bis) of the Rules, including the right to a fair and expeditious trial, and in Article 17 of the Statue, which include the right "to be informed promptly and in detail in a language which he and or she understands of the nature and cause of the charge against him or her," and to have adequate time and facilities to prepare for his or her defence, apply equally to an accused person tried separately on a single indictment as to an accused person tried jointly on a consolidated indictment. 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.

Arraignment on Indictment.

Which respect to arraignment on the indictment, it is clear in the Rules and the practice of the international tribunals, that a consolidated or amended 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 amended 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 a general Rule that the general rule that re-arraingment is unnecessary where the amended indictments merely reproduces the original allegations in a different form, albeit including a number of new counts.

In the case at hand, the accused entered a plea to the charges against him at his initial appearance in March 2003. These charges remain in force against him, however, as we have found, there were material changes made to the consolidated indictment. The Trial Chamber finds that the accused has not been afforded the opportunity to make a plea to these material changes to the indictment, and that unfair prejudice may result if the indictment is not amended and the accused served with the indictment and arraigned on the material changes to the indictment.

Ne bis in idem.

The common law prohibit of double jeopardy prevents

an accused person from being subject to a further trial in which he or she has been charged with an offence and either acquitted or convicted on these charges. The prohibition prevents an accused from being convicted twice for the same offence. The civil principle of ne bis in idem also entitles the accused not to be tried twice for the same offence. Unlike double jeopardy, however, the principle of ne bis in idem prevents repeated prosecutions for the same conduct in the same or different legal systems, whereas the notion of double jeopardy "is a double exposure to sentencing which is applicable to all the different stages of the criminal justice process in the same legal system: prosecution, conviction, and punishment."

The principle that an accused may not be subject to subsequent proceedings in respect of the same offence for which he or she has already been convicted or acquitted is expressed in the context of international human rights law, which is respected by the Trial Chamber of the Special Court. Article 14(7) of the International Covenant on Civil and Political Rights provides that:

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal principle of each country.

Article 9(1) of the Statute enshrines the principle of non bis in idem, and provides that:

No person shall be tried before a national court of Sierra Leone for acts for which he or she has already

been tried by the Special Court.

The consolidated indictment which covers the same charges against an accused as the initial indictments does not constitute an new indictment. The initial indictments are essentially subsumed in the consolidated indictment. Official withdrawal of the initial indictment is not necessary. In the United States, for example, indictments that are consolidated become, in legal effect, separate counts of one indictment. Under English law, where an 'amended' indictment adds no new allegations or offences such that it represents a change in form but not in substance, it is not a fresh indictment. There is only one indictment.

There is clearly one indictment in existence against the accused person as reflected in the joinder decision and consolidated indictment. No official withdrawal of the initial indictment is necessary.

Conclusions.

The Trial Chamber finds that the accused has not been personally served with the consolidated indictment. Furthermore, the Trial Chamber finds that the consolidated indictment contains new factual allegations adduced in support of existing confirmed counts, and substantive elements of charges, that are material to the case against the accused. In accordance with the accused's right to a fair trial and in the interests of justice, the Trial Chamber will stay the following portions of counts of the consolidated indictment, that constitute material changes to the indictment against the

first accused. The remainder of the indictment, excluding stayed portions, constitute a valid indictment against the accused. The stayed portions of the indictment are outlined in brackets in the text below.

(A) Paragraph 23 "and surrounding areas of the Districts of Moyamba and Bonthe".

(B) Paragraph 24 "personal injury and the extorting of money from civilians"; and "took control of"; and "unlawfully" destroyed and looted; and subparagraphs (D) and (E) which include:

"(D) Between October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Moyamba District, to including the towns of Sembehun and Gbangbatoke. As a result of the actions Kamajors continued to identify suspected 'collaborators' and others suspected to be not supportive of the Kamajors and their activities. Kamajors unlawfully killed an unknown number of civilians. They unlawfully destroyed and looted civilian property."

All of this being subparagraph (D) of paragraph 24. And subparagraph (E) which reads:

"Between October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Bonthe District, generally in and around the towns and settlements of Talia, Tihun, Maboya, Bolloh, Bemebay, and the island town of Bonthe. As a result of these actions Kamajors identified suspected 'collaborators' and others suspected to be not supportive of the Kamajors and their activities. They unlawfully killed an unknown number of

civilians. They destroyed and looted civilian owned property."

That is the end of subparagraph (E).

(C) Paragraph 25 of the consolidated indictment - the time frame for alleged commission of unlawful killings, namely "30 April 1998"; "at or near the towns of Lalehun, Kamboma, Konia, Talama, Panguma and Sembehun"; "at the nearby locations of Blama"; "Kamajors unlawfully killed" - all of these are in quotations - "including the Distinct Headquarters town, Kebbi Town, Kpeyama, Fengehun and Mongere"; and subparagraphs (E) and (F) which state:

That is (E) and (F) of paragraph 25.

"(E) between about October 1997 and December 1999 in locations in Moyamba District, including Sembehun, Tiama, Bylago, Ribbi and Gbangbatoke, Kamajors unlawfully killed an unknown number of civilians;

(F) about October 1997 and December 1999 in locations in Bonthe District, including Talia (Base Zero), Mobayeh, Makose and Bonthe Town, Kamajors unlawfully killed an unknown number of civilians."

That is the end of quotations of subparagraph (F).

Additions to subparagraph (G) including "unlawfully killed" and capture of enemy combatants at "in road ambushes at Gumahun, Gerihun, Jembeh and the Bo-Matotoka Highway".

(D) Paragraph 26 - subparagraph (A) extends the time frame for alleged commission of acts of physical violence and infliction of mental harm or suffering to "30 April

1998"; "Blama and Kamboma" are also listed as areas where the acts were committed; subparagraph (B) "November 1997 to December 1999"; and "the Districts of Moyamba and Bonthe"; "illegal arrest and unlawful imprisonment".

(E) Paragraph 27 - "Kenema District, the towns of Kenema, Tongo Field and surrounding areas"; "Bonthe District, the towns of Talia, (Base Zero), Bonthe Town, Mobayeh and surrounding areas"; and the unlawful taking and destruction by burning of "civilian owned" property.

(F) Paragraph 29 of the consolidated indictment - "conscript" instead of "initiate" children under the age of 15 years into armed forces or groups "throughout" the Republic of Sierra Leone.

(G) General references to "CDF, largely Kamajors", instead of Kamajors.

For the above reasons, the Trial Chamber orders as follows for the first accused:

1. The identified portions of the consolidated indictment that are material and embody new factual allegations and substantive elements of the charges be stayed, and that the Prosecution is hereby put to its election either to expunge completely from the consolidated indictment such identified portions or seek an amendment of the said indictment in respect of those identified portions, and that either option is to be exercised with leave of the Trial Chamber.

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

thereof.

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

Done in Freetown, Sierra Leone, this 29th day of November, 2004.

That concludes the Trial Chamber's decision, majority decision. Thank you.

Mr Presiding Judge.

PRESIDING JUDGE: Thank you, my learned brother.

As Honourable Judge Boutet has announced, the majority decision of this Court is supported by the concurring -- the separate but concurring opinion of Honourable Bankole Thompson. The conclusions are the same, to be more precise, but the reasoning to arriving at those conclusions is slightly different. And Honourable Judge Bankole Thompson for personal reasons and for the economy of time has preferred not to read his concurring opinion, but it will be filed in the records for the parties to be able to read it and know what they can do about it.

This said, and as my colleague has stated, I have appended, like I did on the 27th of January 2004, a dissenting judgment, in fact, a dissenting opinion on the majority opinion and this is my dissenting judgment on this issue.

I will not read the mindfuls, but I say that I, Honourable Judge Benjamin Mutanga Itoe, Judge of the Trial Chamber for the Special Court for Sierra Leone, and

Presiding Judge of the said Chamber, do issue the following dissenting opinion on the Chamber majority decision supported by Honourable Judge Bankole Thompson's separate but concurring opinion, relating to the motion filed by the first accused, Samuel Hinga Norman for service and arraignment on the second indictment.

I would like to say here straightaway, that the decision of the Court is not my decision. It is not my decision. The decision of the Court that applies is the decision of my colleagues. This is merely a dissenting opinion, which I thought professionally, I mean, in the exercise of my independence I should append to this decision.

The historical background on this case is that first accused, Samuel Hinga Norman, the Applicant in this motion, was arrested on the 10th of March, 2003. He made his initial appearance before me in Bonthe on the 15th, 17th, and 21st of March, 2003, in accordance with the provisions of Rule 61 of the Rules.

On the 17th of March, 2003, he was, in accordance with the provisions of Rule 61(ii) and 61(iii) of the Rules, arraigned before me on an eight count indictment, dated the 7th of March, 2003. This indictment was approved by His Lordship Honourable Judge Bankole Thompson under the provisions of Rule 47 of the Rules. The number of this indictment is SCSL-2003-08. He pleaded not guilty to all the counts.

For purposes of this dissenting opinion, I am adopting it in its entirety, the contents of my separate

opinion, dated the 27th of January, 2004, appended to the Chamber joinder decision also dated the 27th of January 2004, and I am integrating and appending it to this opinion. It would, in this regard, become necessary for me at certain stages of this opinion to also highlight the status of the applicant's co-accused persons, namely, Moinina Fofana the second accused, and Allieu Kondewa the third accused, in the consolidated indictment dated the 5th of February, 2004.

The second accused, Moinina Fofana, I would like to recall, was arrested on the 29th of May, 2003, also on an eight count individual indictment, dated the 26th of June, 2003, approved His Lordship Honourable Pierre Boutet, charging him with virtually the same offences as those in the first accused's indictment. He made his initial appearance before Honourable Judge Boutet in accordance with the provisions of Rule 61(ii) and 61(iii) of the Rules. He pleaded not guilty to all the counts. The number of this indictment, I would like to mention, is SCSL-2003-11.

The third accused, Allieu Kondewa, was, like the second accused, arrested on the 29th of May 2003, also on an eight count indictment, dated the 26th of June, 2003, again approved by His Lordship Honourable Judge Pierre Boutet, with virtually the same offences as those in the indictments of both the first and the second accused. Like the second accused, he also made his initial appearance before Honourable Judge Boutet in accordance with the provisions of Rule of 61(ii) and 61(iii) of the

Rules. He pleaded guilty to all counts on the indictment. The number of this indictment is SCSL-2003-12.

As can easily be gleaned from this analysis, the three indictments were individual indictments with their numbers different from each other.

This was the status of these three accused persons before the Prosecution filed a motion for joinder on the 9th of October 2003. In that motion, the Prosecution, pursuant to Rule 73 and 48(B) of the Rules, moved the Chamber to order that Samuel Hinga Norman, the applicant in this motion, Moinina Fofana, and Allieu Kondewa, be charged and tried jointly and that should this motion for joinder be granted, the Trial Chamber should further order that a consolidated indictment be prepared as an indictment on which the joint trial will proceed.

In objecting to the granting of this motion, the Defence for Allieu Kondewa conceded that the exercise by the Trial Chamber of its prerogatives under Rule 48(B) of the Rules is discretionary. It argued, however, that such a consolidation should not be granted if it would prejudice the rights of the accused. It further argued that in advising its client on the Prosecution's application for joinder, adequate time was needed for consultation with the proposed co-accused counsel so as to determine their client's position vis-a-vis the proposed co-accused.

The Kondewa defence further contended that "prior to today only one of the proposed co-accused has received

the Prosecution's disclosure material pursuant to 66(A)(i) of the Rules." It submitted that for the Article 17 rights of the accused to be fully respected for purposes of ensuring a proper hearing of the motion, materials subject to disclosure must be made available to them for a review with a view to making "responsible submissions on the issue of 'material prejudice' likely to be suffered by the accused in being tried jointedly."

As a Chamber, we unanimously, and as should have been expected, having regard to the similarity in the content in the wording of the three indictments, coupled with the provisions of Rule 48(B) of the Rules, we rightly, in my judgment, granted the joinder motion and made the following consequential orders:

1. That a consolidated indictment be prepared as an indictment on which the joint trial shall proceed and that the Registry assigned a new case number to the consolidated indictment.

2. That the said consolidated indictment be filed with the Registry within ten days of the date of delivery of this decision.

3. That the said indictment be served on each accused in accordance with Rule 52 of the Rules.

I would like to recall, however, that the consolidated indictment which the Prosecution said would be filed as soon as the joinder motion was granted was not, as should ordinarily, in my opinion, have been the case, annexed to the Prosecution's motion for joinder so as to enable us as a court, to determine the nature and

extent of the consolidated indictment vis-a-vis the three initial indictments of the three accused persons, and how this single indictment may have impacted on each of the three indictments.

In granting the motion, the Chamber credulously believed that the Prosecution when it gave its assurance during hearing of that motion in court, that the consolidated indictment remained textually the same as the initial individual indictment, excepting for a few changes which were insignificant. The said consolidated indictment was subsequently filed following the joinder decision and was given a new case number SCSL-03-14-1.

However, in view of the fact that the consolidated indictment which was to replace and has in fact replaced the three individual indictments on which the joint trial was to proceed and is indeed proceeding today, was not annexed to the motion or even produced in court by the Prosecution for examination and verification, I took a personal view that it was a new indictment.

Having taken this view, I further expressed the opinion that the consolidated indictment in its new form, that is, three indictments merged in one should be subjected to the approval procedures stipulated in Rule 47 of the Rules and further, that the three accused persons, now poised to be tried jointly on an indictment which I consider new, to all intents and purposes, should be called upon by the Chamber, to plead afresh to the new consolidated indictment. These views, I suggested, should be included as point 4 of the consequential orders

in the joinder decision.

My honourable and learned brothers, however, did not share my viewpoint. It is because of this disagreement that on the inclusion of this fourth point which constituted my preoccupation, concern and suggestion, that persisted even after lengthy deliberations on the issue, that I decided to put on record a separate opinion dated the 267th of January, 2004, which is appended to our Chamber joinder decision that I signed in principle and in approval of the three consequential orders contained therein.

The motion for service and arraignment on the second indictment filed by the first accused, certainly results from the concerns that have arisen after counsel for the accused persons later took real cognizance of the contents of this new consulted indictment.

In this motion dated the 20th of September, 2004, the first accuses:

1. That he has not been personally served with a consolidated indictment;

2. That he has not pleaded to the consolidated indictment on which he is currently being tried;

3. That the contents of the consolidated indictment are not the same as those of the individual indictment as the former extends the temporal jurisdiction of the indictment to an additional 20 months in addition to including several new geographic locations, as well as changing the charge from looting of "private property"; to "civilian property".

4. That the initial indictment against him be withdrawn or quashed as its continued existence in the records violates the rule against double jeopardy.

The Prosecution's response consist in admitting that the consolidated indictment was not served on the accused personally as provided for under Rule 52 of the Rules, but the Prosecution submits that is a "procedural anomaly that has not caused any identifiable prejudice to the accused."

The Prosecution further states that the consolidated indictment contains no new charges and that the accused has, in any event, been conducting his defence on the charges in the consolidated indictment during the first and second sessions of the trial.

Furthermore, that no arraignment on the consolidated indictment is necessary since there are no new charges to those which are in the initial indictments.

Furthermore, that the Special Court for Sierra Leone, as an international tribunal, applies internationally recognised principles and that a "trial on the superseding (consolidated) indictment should prevent a retrial on the former indictment."

The applicable law on this issue is diversely contained in the Statute of this Court, the Rules of Procedure and Evidence of this Court, the provisions of the International Covenant on Civil and Political Rights, respectively. They are in the decision, but I do not intend to dwell on those, because those are familiar grounds for learned lawyers who are here in this

sanctuary.

On the violation of the Rule against double jeopardy and for purposes of this opinion, I will first consider the applicant's appeal and submission, that the initial indictment against him be withdrawn in the light of the consolidated indictment on which the trial is proceeding. He argues that the continued existence of the initial indictment violates the rule against double jeopardy.

In this regard, it is necessary to examine the provisions of Article 91 of the Statue the Special Court entitled non bis in idem which provides:

"No person shall be tried before a national court of Sierra Leone for acts which he or she has already been tried by the Special Court", and those of Article 14(7) of the International Covenant for the Protection of the Civil and Political Rights which provides that:

"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

The issue to be addressed here is whether, with the continued existence of the initial individual indictment, there is a looming threat or a general 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.

[HN291104B 11.45 a.m.]

The Prosecution in this regard submits and argues that this Court, being an international tribunal, applies internationally recognised principles and that, to quote the Prosecution again, a trial on the superseding indictment should prevent a trial on the former indictment and will not leave him vulnerable to a further prosecution on the old indictment in the event of a complete acquittal on the consolidated indictment.

I find this argument unconvincing and speculative, because it neither offers nor does it represent a concrete, certain and unequivocal legal assurance that an acquittal per se of the accused on the consolidated indictment automatically confers on him an immunity from a possible harassment of a re-arrest and a prosecution on the initial indictment.

The reality is that if the accused were ever re-arrested 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 arguments of autrefois acquit may be raised, properly examined and probably upheld.

Even if it is conceded that the verdict of the Court on the 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, accompanies arrests and detentions.

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 and preserving the integrity of the proceedings. This, I observe, cannot be attained in a case such as this, where the anomalous situation of four contemporaneous and still legally valid indictments continue to hang over the heads of three indictees.

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 initial individual indictments 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 founded, of a possible violation in future by whoever of the rule against double jeopardy.

This cause 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 seeking to circumvent the imperative necessity of an arraignment on the new consolidated indictment on the argument and understanding that the three accused persons had, after all, been earlier arraigned and pleaded to the initial indictments whose contents, the Prosecution claimed, are the same as those in this consolidated

indictment.

The analysis which follows will show that this affirmation by the Prosecution has turned out to be unreliable and misleading, and that the interests of justice in these circumstances would not be served. Indeed, would be defeated if these three 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 and 17(2) of the Statute as read with those of Rule 26 (bis) of the Rules.

On arguments related to the service of the consolidated indictment, it is contended that the provisions of Rule 52 of the Rules have been violated, in that he has not been personally served with a consolidated indictment as ordered by the Chamber in its joinder decision of the 27th of January 2004. The Chamber in this regard, it would be recalled, ordered that "the said indictment be served on each of the accused in accordance with the provisions of Rule 52 of the Rules." It is on record that service of the said indictment was, contrary to that order, effected instead on the applicant's counsel.

Rule 52 clearly states: "Service of the indictment shall be effected personally on the accused at the time the accused is taken into custody."

Rule 52(A) states: "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."

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

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

These arguments, to my mind, are neither convincing, acceptable, nor are they sustainable, particularly in this case, and upholding them would have the effect of empowering one party to the proceedings - in this case the Prosecution - to flout the law to the detriment of the interest of the other party, the accused, and his statutory right to a fair and public trial, as well as to be promptly informed of the charges against him as guaranteed by the provisions of Article 17(2) and 17(4)(b) of the Statute, by Rule 26(bis) of the Rules, by Article 9(2) of the International Covenant for Civil and Political Rights, and, more importantly still, by the necessary intendment, interpretation and the combined effect of the application of Rules 52(A) and 52(B) of the Rules.

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

It is my considered opinion that what law and justice is all about for us judges is, indeed, 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 take right what is right and, when it comes to it, to equally and boldly take wrong what is really wrong, and, in the process, to disabuse ourselves of any influence that could misdirect us to take right what is ostensibly wrong or wrong what is ostensibly right; for 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 possible it may seem, will reverse this age-long legal trend and philosophy, because this would amount to rocking the very foundation on which our law and our justice stand and have, indeed, held on and stood the test of times.

The questions to be asked and to be answered directly without any justifying rhetoric are twofold: Firstly, whether the said consolidated indictment was set in accordance with the provisions of Rule 52 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.

It must in this regard be conceded that an administrative anomaly, as the Prosecution has rightly described the failure to effect personal service on the accused/applicant in accordance with the provisions of Rule 52(A) and 52(B) of the Rules, was an administrative muddle which should be put right, since it is, in itself, a violation of the law for which there must be no other remedy than declaring it illegal, annulling it accordingly, and ordering that service of the consolidated indictment be effected in accordance with the provisions of Rule 50(A) and 50(B) of the Rules, rather than resorting to advancing interpretations or arguments of convenience which were clearly deplored in the ICTY Delalic case, all in order to justify a manifest violation of the mandatory provisions of laws or Rules that leave no room for the exercise of the judicial discretion, and which, in their context, are clear and as unambiguous as these two twin Rules in question.

Our Chamber has always taken these principles and factors into consideration, and has opted for the literal role in the sphere of statutory interpretation in interpreting text by giving them their ordinary and everyday meaning and applying them exactly the way they are written.

For instance, in the case we commonly refer to as

Brima Principle Defender case, we refused to accept importing extraneous interpretations to statutory provisions or regulations which are as clear, I will say, as those of Rule 52 of the Rules, and took the view that "Holding otherwise would be attributing to a very clear regulatory instrument a strange and extraneous interpretation and meaning which was never envisaged." The Chamber, in so holding, relied on the dictum of Lord Herschel in the case of the Bank of England v Vagliano Brothers [1981] AC 107, and this was in page 144, where His Lordship, Lord Herschel, had this to say: "I think the proper course is, in the first instance, to examine the language of the Statute and to ask what its natural meaning is."

If it is held that serving a judicial process on an accused counsel, when it statutorily and mandatorily should be served on the accused personally, it would certainly amount to attributing to the very clear regulatory instrument a strange and extraneous interpretation, meaning and application which was never intended by the legislator, the regulatory body or the authority that enacted it.

In our decision, the decision of this Chamber, in the Kondewa motion to compel the production of exculpatory statements, witness summaries and materials which was rendered soon after the Brima Principal Defender decision, this Chamber had this to say on an issue that involved the interpretation to be given to the provisions of Rule 68 of the Rules: "In addressing this

aspect, the Chamber wishes to observe, by way of first principles, that no rule, however formulated, should be applied in a way that contradicts its purpose." A kindred notion here is that a Statute or rule must not be interpreted so as to produce an absurdity. In effect, it is rudimentary that a Statute or rule must be interpreted in the light of its purpose. Another basic canon of statutory interpretation is that a Statute is to be interpreted in accordance with its legislative intent. Restating the law on the statutory interpretation, the Trial Chamber of the ICTY, in the case of the Prosecutor v Delalic, had this to say: "The rationale is that the law maker should be taken to mean what is plainly expressed. The underlying principle, which is also consistent with common sense, is that the meaning and intention of a statutory provision shall be discerned from the plain and unambiguous expression used therein, rather than from any notions which may be entertained as just and expedient."

The absurdity in issue in this case, and what may be entertained as just and expedient as stated in the above dicta, will be to hold that service on counsel should substitute personal service on the accused himself as mandated by Rule 52.

Certainly, seeking like the Prosecution is, to justify a flagrant violation of a mandatory provision by submitting that the breach has caused no "identifiable prejudice" to the applicant, is a cover-up argument of convenience which, in the context of the dictum in the

Delalic case, the Prosecution is proffering to be accepted just for purposes of convenient expediency and not because it is, nor are they in any way convinced, that it is in conformity with the law.

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

In this regard, Lord Denning had this to say in the case of the Royal College of Nursing v the Department of Health and Social Security [1980] AC 800: "Emotions run so high on both sides that I feel we, as judges, must go by the very words of the Statute without stretching in one way or the other and writing nothing which is not there."

Lord Esher, in the case of R v the Judge of the City of London Court [1892] 1 QB 273 stated: "If the words of the Act are clear, you must follow them even though they lead to a manifest absurdity."

In the case of Duport Steel v Sirs [1980] 1 AER 529 Lord Diplock had this to say: "Where the meaning of the statutory words is plain and unambiguous, it is not for the judges to invent fancy ambiguities as an excuse for failing to give effect to its plain meaning because they

themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral." And Jervis CJ, in the case of Ableу v Dale, had this to say: "If the precise words used are plain and unambiguous, in our judgment we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice."

Still on this trend of legal reasoning, Blaney J, in the case of Byrne v Ireland, said this -- they reproduced the treatise of Maxwell on statutory interpretation, which is in the 12th edition 1969 on page 29: "Where the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a Statute is not to be collected from any notions which may be entertained by the Court as what is just or expedient. Words are not to be construed contrary to their meaning as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded. The duty of the Court is to expound the law as it is." I would say here that our duty as judges of this Chamber is to expound the law and, in addition, to apply it as it is or as it is written.

In the light of the above, it is my considered opinion that Rule 52 of the Rules, which mandatorily provides for personal service on the accused as soon as the accused is taken into the custody of the Special Court reiterates and gives effect to the statutory

provisions of Article 17(4)(a) and 17(4)(b), which require respectively that the accused "be informed promptly and in detail in a language he understands of the nature and cause of the charge against him or her," and, further, "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."

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

It can, therefore, be deduced that what the plenary meant and intended in achieving by giving the provisions of Rule 52(A) and 52(B) the insistent and mandatory coloration of a personal service of the indictment on the accused, which should in fact be the case, is a service of the consolidated indictment, which is a subject matter of this contention, personally on the accused himself and not service on any other person, albeit on his counsel, and that proceeding otherwise, as was done in this case, violates this clearly written rule.

Besides and in addition, the directive that the

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

On the differences between the three initial indictments and the consolidated indictment, the issue that has given rise to the controversy here relates to the differences in the content of the three individual indictments and the consolidated indictment, and whether or not, depending on the nature of the differences or changes reflected or appearing in the consolidated indictment, re-arraignment on this new indictment against the three accused is an imperative.

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

If the Prosecution for any legal reason such as provided for in Rule 48 and after the initial appearance

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

It is necessary to recall here again that when the Prosecution presented its joinder motion under Rule 48(B), it did not annex the consolidated indictment to it so as to enable the Trial Chamber to appreciate the nature and the extent of its contents. Notwithstanding this flaw, which I highlighted as significant and substantial in my separate opinion dated the 27th of January 2004, the Chamber, without the benefit of having seen or verified the proposed consolidated indictment before ruling on this motion, granted it and ordered that the consolidated indictment be filed merely on the assurances furnished by the Prosecution which they did not live up to. In these circumstances, I was and am still of the opinion that this consolidated indictment should have been subjected to the Rule 47 procedures, since I consider it to be a new indictment.

The majority decision overruled my viewpoint on this

particular issue, and the Prosecution thereafter proceeded to file in the Registry the consolidated indictment after the order granting the joinder motion. It is on this consolidated indictment that the trial of the applicant, the first accused Samuel Hinga Norman, Moinina Fofana, the second accused, and Allieu Kondewa, the third accused, is now proceeding.

In the course of examining the instant motion for service and arraignment on the second indictment filed by the first accused, the Trial Chamber, after putting the three indictments and the consolidated indictment under scrutiny, has come to realise that the indictment has made the following significant amendments and additions to the individual indictment of the first accused, Samuel Hinga Norman. I would not read the details. They are in the judgment.

I will move on to say that an analysis of the contents of the consolidated indictment and those of the initial indictment of the applicant, the first accused, reveals that particulars of offences and time frames have been expanded, and that new offences have been added. Again, this has details which will be seen in the judgment.

Furthermore, a comparison between the consolidated indictment and the two individual indictments of Moinina Fofana and Allieu Kondewa respectively reveal that here there are also new locations and substantial changes which have been added.

In my separate opinion dated the 27th of January

2004, in expressing my concern for our failure to subject the consolidated indictment to the Rule 47 judicial scrutiny procedures, I had this to say: "During our examination of and deliberation on the final drafts on the 23rd of January 2004, I raised certain issues with the learned and honourable brothers and colleagues which I thought should be set out as the fourth in addition to the three orders we made at the tail-end of our unanimous judgment just after the mention 'Further Consequential Orders'. It was to read as follows: 'That the said indictment be submitted to a designated judge for verification and approval in accordance with the provisions of Rule 47 of the Rules within 10 days of the delivery of this decision.'

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

I had this to say in my opinion: "The other issue which I consider important in the present context is a submission by the Defence for Mr Samuel Hinga Norman, Mr Jenkins, who argued that the anticipated consolidated indictment should have been exhibited as part of the motion, and that the failure by the Prosecution to do this in order to ensure judicial scrutiny amounted to noncompliance with a condition precedent for the granting or even the examining of the application for joinder. Defence counsel for Mr Moinina Fofana, Mr Bockarie, agreed to this submission by his colleague."

On this submission, the Prosecution replied that the Rules do not provide for this procedure and that the Defence contention must not be considered as a condition precedent for the filing or granting of the application for joinder. Our finding on this argument in these circumstances is: "The Chamber is of the opinion that due to the need for expeditiousness and flexibility in its processes and proceedings, recourse to procedural technicalities of this nature will unquestionably impede the Special Court in the expeditious dispatch of its judicial business. The Chamber, therefore, does not think it is necessary for the Prosecution to exhibit an anticipated consolidated indictment as a basis to grant the joinder motion."

I share these views expressed in our judgment, but even though we unanimously upheld the argument of the Prosecution in this regard, and although we know that the consolidated indictment is still undisclosed, I think we

should remain resolved in our determination and quest to steadily build up some jurisprudence from certain shortcomings or lacunae in our Rules which case law will enhance, advance and not necessarily prejudice a proper and acquitable application or interpretation of our Rules. This will in fact encourage the application of the best practices rule which is neither contrary to nor inconsistent with the general principles of international criminal law and procedure."

I took this stand largely because I felt that the consolidated indictment that was to be filed, considered only on the basis that it was a merger of three indictments involving three individual accused persons who in fact had already been arraigned individually, was new, particularly in the context of the apprehensions of uncertainty as to the expected content of the consolidated indictment, which the Chamber neither had the privilege nor given the opportunity to examine before it was filed by the Prosecution.

It is my considered opinion, even put putting aside the extensive and significant changes that the Prosecution has introduced in the consolidated indictment, that this indictment, a product of a merger of three indictments, coupled with its altered form, is new and this even if those additional particulars or changes did not feature in it. This position is supported by the various dictionary meanings on the word "new" as contained in paragraph 23 of my separate opinion already referred to.

If we as a Chamber in our joinder decision dated the 27th of January 2004 ordered that the consolidated indictment be assigned a new number, and that the said indictment be filed in the Registry within 10 days of the delivery of our decision, coupled with a further order for a fresh service of the said indictment under the provisions of Rule 52 of the Rules, it is my opinion and, in a sense, a recognition of the novelty of this indictment which merges and replaces three individual indictments that had earlier been filed and given three different case numbers.

In a situation such as this, the provisions of Article 17(2), 17(4)(a) and 17(4)(b) of the Statute, including those of Rule 26(bis) of the Rules, which guarantee an accused the right to a fair, public and expeditious trial, as well as the right to be promptly informed of the nature and cause of the charge against him or her, would in my opinion be violated if this trial proceeds without a regular personal service of the consolidated indictment not only on the applicant, but also on his co-accused persons, Moinina Fofana and Allieu Kondewa, the second and the third accused respectively.

In addition, the re-arraignment of the three accused on the entirety of that extensively amended indictment is necessary, because it has now unveiled itself and confirmed its real designation and characterisation of a new indictment as I did in my separate opinion of the 27th of January 2004, a fact which stands on firmer grounds today that we are witnessing the bare reality of

the extensive and fundamental amendments which the Prosecution had introduced into it to the extent of even including new charges.

Why therefore is re-arraignment in this case necessary? On the 15th of June 2004, in the exercise of his right to make an opening statement under the provisions of Rule 84 of the Rules, the first accused, the applicant, made the following submission: "There is or are no charge legally placed before this Chamber against me. If there is or are any charges against me before this Chamber, I submit that by law I have not taken any plea before this Chamber or any indictment against me before Your Honours. I will state the reasons when I hear the response from Your Lordships."

In reply to this submission, I as Presiding Judge had this to say in response as requested by the first accused: "We have taken note of your observations in the exercise of your rights under the Rules to make an opening statement and I am sure that the records have reflected what you have said, and it is our decision that, having noted what you have said, we will proceed with the trial without any further comment on that."

It is necessary and I think it is important and proper for me to recall here for the records and for posterity that the very first session of this trial was on the 3rd of June 2004. It, however, never took off until the 15th of June because of preliminary procedural issues arising from the application of the first accused for self representation.

After all this was sorted out, the proceedings were billed to start on the 15th of June 2004. Whilst waiting in chambers and before proceeding to the Courtroom to take the first witness, TF2-198, I again passionately reminded and sensitised my colleagues, this time as the Presiding Judge, on the necessity for us, before taking evidence from the first witness, to re-arraign the three accused persons now jointly and soon to be tried jointly on the consolidated indictments. I was put in the minority. We did not fulfil this formality.

When we then entered the Courtroom and started sitting soon thereafter to hear the first witness, our first challenge came from the first accused who, in his opening statement made under Rule 84 of the Rules and in the exercise of his right to self representation, rose and surprisingly raised the issue we had just discussed in chambers of there being no charge or charges against him and that, if there were any, he had not taken any plea before this Chamber or any indictment before us.

I felt uncomfortable and uneasy about this remark for understandable reasons, but had, in reply, to reluctantly give him the response which I know and must admit here I did not believe in because it was, to me, unconvincing. I, however, was obliged to reply in the way I did, in order to reflect the majority opinion of my colleagues that re-arraignment was not necessary.

This said, however, I would like to state here again for posterity and would want to be understood in these circumstances, that I neither subscribe to nor do I

approve of this majority opinion on the grounds of the reasoning and the legal analysis that will follow.

This part of the opening statement by the first accused made under Rule 84 of the Rules, and in the exercise of his newly acquired right to self representation, was a legitimately taken legal objection challenging the opening of the trial without an indictment having been served on him and without having taken his plea on that indictment on which the trial was about to proceed in a couple of minutes.

This legal objection should, in my considered opinion, have been addressed soon after it was raised, because in the case of R v Johal and Ram [1972] CAR 348 the Court of Appeal in England observed that the longer the interval there is between arraignment and then amendment, the more likely it is that injustice will be caused, and in every case in which an amendment is sought it is essential to consider with great care whether the accused will be prejudiced thereby.

In this regard, I had this to say in my ruling on the motion for a stay of proceedings in the Foday Sankoh case, and I quote: "In taking this stand I was and still am guided by the reverence to the importance a plea occupies in a criminal trial, because it marks, after the filing of the indictment, the actual commencement of the criminal proceedings, which, in any event, cannot get underway without a plea having been entered."

In fact, in Blackstones Criminal Practice 2003 Edition page 1303 at paragraph D11.1, it is directed

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

This long-standing and respected practice directive should, in my opinion, be applied to this situation where the Trial Chamber did, under Rule 48(A) of the Rules, rightfully grant the joinder of the three accused persons who initially were individually indicted, but are today being jointly charged and tried. The necessity for re-arraignment 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 42 of the Rules, being tried separately, so as to preempt a violation of their individual statutory rights as spelt out in Article 17 of the Statute and particularly their rights to a fair trial.

It is my opinion that re-arraignment, as the first accused is soliciting in this case, is necessary since the consolidated indictment, which I hold is new, is vastly amended and is different in its contents from the initial individual indictments. Furthermore, since arraignment, which involves reading the charges to the accused and explaining to him or her should need arise so as to promptly acquaint him of the charge or charges against him or her before obtaining a plea, is an important and vital starter element in any criminal proceeding. It is necessary and I so do hold that a plea is an important component of the provisions of Article

17(4)(a) of the Statute in considering whether the provisions of this article have been respected or violated.

It was stated in the Canadian case of the Ontario Court of Appeal in the case of Her Majesty the Queen v Jeffrey Mitchell that arraignment is intended to ensure that an accused person is aware of the exact charges when he or she elects and pleads, and, further, that all parties to the proceedings have a common understanding of the charges which are to be the subject matter of the proceedings which follow.

As a follow-up, and to give effect to this statutory provision, Rule 47(C) of the Rules provides as follows: "The indictment shall contain and is 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."

Furthermore, Rule 61 of the Rules provides: "Upon his transfer to the Special Court, the accused shall be brought before the designated judge as soon as practicable and shall be formally charged. The designated judge shall read or have the indictment read to the accused in a language which he speaks and understands and satisfy himself that the accused understands the indictment; call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf."

In Black's Law Dictionary, the 7th Edition, page 81, an amendment of the indictment is defined as "the alternative changing terms of an indictment, either literally or in effect after the grand jury has made a decision on it. The indictment usually cannot legally be amended at a trial in a way that would prejudice the defendant by having a trial on matters that were not contained in the indictment."

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

In the Kupreskic case, the Appeals Chamber of the ICTY held as follows: "The question whether an indictment is pleaded with sufficient particularity is dependant upon whether it sets out the material facts of the Prosecution's case with enough detail to inform the defendant clearly of the charges against him so that he may prepare his defence."

In the case in hand the Prosecution has provided, expanded and added more material facts in the particulars, including new offences in the consolidated indictment than those contained in the initial indictment; a fact which, of necessity, dictates that

they must be arraigned on the consolidated indictment which, to me, and under the law and the Rules that I have cited and the analysis that I have made, is new. I would add here that if this trial proceeds without a re-arraignment and individual pleas taken on each count of the consolidated indictment and the accused persons are convicted, this trial could - I am speculating here - on appeal be declared a nullity by our appellate jurisdiction, which could, depending on the circumstances, quash the conviction and enter either a verdict of acquittal, of discharge or of a retrial.

The majority decision in this motion rightfully concludes that the consolidated indictment on which the trial is proceeding is extensively expanded in its details, particulars and time frames. In fact, it is not and has turned out not to be what the Prosecution made us to believe in their written submissions and at the oral hearing of the joinder motion; that is, that it is a replica of the initial individual indictments to which the accused persons have already pleaded in separate initial appearances before two different judges, Honourable Judge Itoe and Honourable Judge Boutet.

In these circumstances, I have no hesitation in concluding that the Prosecution in introducing a consolidated indictment has indeed filed, with the leave of the Trial Chamber, a new indictment. Under these circumstances, it should have been subjected to the scrutiny of the designated judge under the provisions of Rule 47. In the alternative, the Prosecution has, in

accordance with the provisions of Rule 50 of the Rules, and with the tacit leave of the Trial Chamber, amended the three individual indictments of the three accused persons and has merged them into one consolidated indictment which contains substantial amendments.

In either case, a combined reading of the provisions of Article 17(2) and 17(4)(a) of the Statute and Rules 47(C), 48(A), 50(A), 50(B)(i), 52(A), 52(B), 61(ii), 61(iii) and 82(A) of the Rules clearly demonstrates and confirms the necessity for a re-arraignment of the three accused persons on the consolidated indictment, which, notwithstanding views to the contrary expressed in the majority decision, is and indeed has all the characteristics of a new indictment.

I would like to add that in law a plea on an old indictment is not and should no longer be valid, nor does it hold good any longer in respect of a new indictment, particularly where the new indictment contains new elements. It is, therefore, my opinion that the pleas recorded during the initial appearances of the three accused persons are not transferrable for them to constitute a basis for proceeding on the new indictment without going through the obligatory stage and formality of arraigning these same persons on the new indictment or on which they are now being not only jointly indicted, but also jointly tried.

The International Criminal Tribunal for Former Yugoslavia has held the view that where an indictment is amended or where a consolidated indictment is prepared,

and either the amended or consolidated indictment contains new charges, it will, as decided by the Trial Chamber in the case of Blagojevic, where a consolidated indictment was a document in issue, be termed a new indictment. The Chamber noted as follows: "The amended indictment included charges and the accused has already appeared before the Trial Chamber. A further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges."

In yet another case of Martic of the ICTY, the accused was arraigned on an amended indictment which the Court declared should be a new indictment. In that case His Lordship Judge Liu had this to say: "I will ask Madam Registrar to read out the new charges brought against you. Then I will ask you whether you plead guilty or not guilty to the specific charge. Since the initial indictment has been replaced by the amended indictment, I will ask you to enter pleas with regard to all charges contained in the new indictment."

It has been argued that the consolidated indictment is not a new indictment and that, accordingly, there should be no re-arraignment since the accused persons had already been arraigned under initial indictments. In effect, the Prosecution takes the view that the initial individual indictments are still valid, notwithstanding the existence of the consolidated indictment dated the 4th of February 2004 on which the trial is now proceeding. I, of course, do not subscribe to this view at all, because if the Prosecution contends that the

three individual indictments are the same in content as the consolidated indictment, one wonders why it felt obliged to go through the procedures of applying to replace them with a single consolidated indictment into which the three individual indictments are now merged. In any event, the question should be put as to why the Prosecution is seeking to hang on four indictments in one proceeding involving three accused persons who are today jointly indicted and are being jointly tried.

In my opinion, the consolidated indictment introduced after the joinder decision as an indictment, which has superseded the three initial indictments against the accused persons, is a new indictment. Indeed, in my separate opinion on the joinder motion, I expressed the view that the trimming down of three indictments to form one consolidated indictment constituted a fundamental amendment to the three initial indictments, and that would require compliance with the provisions of Rule 47, followed by a re-arraignment of the accused persons on the new consolidated indictment under the provisions of the Rules.

I have taken cognizance of the dictum in Fyffe's case, where their Lordships Russel, Douglas, Brown and Wright recognised that the general rule is that re-arraignment is unnecessary where the amended indictment merely reproduces the original allegations in a different form, albeit including new charges.

But a closer and analytical examination of this case reveals, however, that the fact and the raison d'être in

Fyffe's decision are different from those in the present one. I mean that they are distinguishable from those in the present one. In the Fyffe's case, which was decided in the Criminal Division of the Court of Appeal, the five accused persons faced an 11 count indictment for drug offences. This indictment was substituted by a 27 count indictment alleging basically the same facts as the 11 count indictment did against the same accused persons who had been arraigned together and jointly tried all along. Learned counsel, Mr Wright, submitted that there should have been a re-arraignment on the substituted 27 count indictment and that failure by His Lordship, the learned trial judge, to call a re-arraignment rendered the proceedings null and void. This submission was overruled and the learned justices of the Court of Appeal had this to say: "In the circumstances that we have described, we are satisfied that no more than one indictment was ever before this Court" - this is the Fyffe decision - "in this case and that what happened was an amendment of the indictment as originally granted, and, in addition, that this was done for the convenience of defending counsel."

Comparing this decision with our case in hand and very much unlike the situation in Fyffe's case, with only one indictment in issue, the Norman case has four indictments - three individual indictments and one consolidated indictment - in which they are all jointly charged and are now being tried.

Let me, however, observe here that in Fyffe's case their Lordships found that with only two exceptions that

the Law Lords considered immaterial that the 27 counts later preferred reproduced what had appeared in the initial 11 count indictment. The Hinga Norman situation is clearly distinguishable from Fyffe's. In the latter case it was one 11 count indictment charging five appellants with drug offences that was replaced by the 27 count indictment charging the same five indictees with the same offences.

In the Norman case, the three indictees originally indicted on three separate indictments are now standing charged and tried on a consolidated indictment that has replaced, stayed, and, in my opinion, extinguished the three initial individual indictments. In addition, the records now clearly show that the consolidated indictment, unlike Fyffe's, has introduced new locations and expanded time frames, and also charged new offences that did not feature in the three initial indictments against the three accused persons. In my judgment, and as the facts have indeed established, unlike in Fyffe's case, the amendments are substantial.

Their Lordships in Fyffe's case further had this to say: "With two material exceptions, the 27 counts reproduced what had appeared in the 11 counts. They added no new allegations and charged no new offences. In our judgment, there were no amendments of substance; there were amendments of form. We are satisfied that this being the proper interpretation of what the judge gave leave to amend, it is unnecessary for us to re-arraign the defendants. They had pleaded to precisely

the same charges as were laid in the 27 counts, albeit when they were encapsulated in the 11 counts. There was no indictment to be stayed and no indictment to be preferred. In our view, the judge was right to reject the motion to arrest judgment."

The judges continued: We are fortified in the views we have formed by some observations of Lord Widgery CJ in the case of R v Radley 58 CAR 394 where His Lordship said: "It is perfectly permissible if an amendment is made of a substantial character after the trial has begun and after arraignment, for the arraignment to be repeated, and we think that it is a highly desirable practice that should be done wherever amendments of any real significance are made. It may be that cases like Harden (Supra), where amendments are very slight and cannot really be regarded as in any way introducing a new element into the trial, a second arraignment is not required, but judges in doubt on this point will be advised to direct a second arraignment."

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

On this issue and having regard to nature and

gravity of the offences for which the three accused stand indicted, the necessity to strictly respect and apply the procedural Rules, and in the exercise of this judicial caution to order a re-arraignment given it is more imperative in these circumstances as is provided for by the Statute and the Rules.

The effects of the lack of an arraignment on the validity of proceedings were considered in the case of R v Williams [1978] QB 373. It was held that a failure by the Court to have the accused arraigned does not necessarily render invalid subsequent proceedings on the indictment where the Defence, as in the Williams case, waives the right of the accused to be arraigned either expressly or impliedly by simply remaining silent while the trial proceeded without arraignment. Williams's conviction was upheld despite the lack of arraignment, because he, being the only person in court who knew he had not been arraigned, raised no objection at any time. Had he objected, His Lordship observed, and the Court nonetheless refused to arraign him, it is submitted that any conviction would have been quashed.

In the People v Walker the California Court of Appeal held that where an indictment is amended, regular and orderly procedure requires that the defendants be re-arraigned and be required to plead thereon before trial, but if the defendant makes no demand or objection and is convicted on trial without having entered a plea, an objection that there was no plea is waived and is unavailable to him.

In Hanley v Zenoff the Court in Nevada held that when an amended indictment is filed which changes materially the information to which the defendant has entered the plea, he must be arraigned on such an indictment. While in McGill v the State it was held that if re-arraignment is necessary to avoid the possibility of prejudice, the defendant should be arraigned. I consider and I have already indicated that there is a possibility of prejudice and unfair trial to the three accused persons if they are not served with and re-arraigned on the consolidated indictment as early as possible so as to avoid aggravation of the said prejudice.

In all, and having regard to the foregoing, the Norman situation is very much unlike Williams's. He, unlike Williams, on the first day of the trial raised an objection against being tried without either having been arraigned or served with an indictment. Our Chamber was silent and indifferent to the merits of this objection, which I consider validly raised and at the right time. As a follow-up, he has brought this written motion which again challenges the propriety of the trial without his plea having been taken, in addition to the absence of the personal service of the consolidated indictment on him.

From the facts now available, it is no longer in dispute that the charges and particulars of the offences against the applicant, Samuel Hinga Norman, have been vastly expanded. In addition, he now is no longer being charged individually, but collectively in one indictment

with two other accused persons. This, in my opinion, subjects him to either a new indictment, which indeed it is, or to an amended indictment which contains new offences and particulars that did not exist in the initial individual indictment dated the 7th of March 2003 to which he had already pleaded not guilty to all the counts.

It is suggested, in order to sideline the controversy that surrounds the consolidated indictment, to expunge some paragraphs so as to bring it in line with the content of the initial individual indictment. I observe, with the reinforced sentiment of dejection, that this option would further have the effect of casting a doubt on the integrity of the proceedings as it would be interpreted as an admission of the fundamental legal flaw which could only be cured by the Prosecution applying to amend the indictment under Rule 50 of the Rules and to subsequently have the three accused persons re-arraigned under the provisions of Rule 61(2) and Rule 61(3) or, in the alternative, to subject the said indictment to the Rule 47 procedures.

In any event, should the option to expunge some portions of the consolidated indictment be confirmed and adopted by the Prosecution, it does not in my opinion derogate from my finding that this indictment, as a merger of three individual indictments, is and indeed remains a new indictment which calls for the application of either the provisions of Rule 47 or of Rule 50 and 61 of the Rules.

In the light of the foregoing and considering the predominantly consistent pattern of the law and the jurisprudence relating to the issues raised, I do find as follows: Having regard to this analysis and the provisions of Rule 26(bis), I find that the following points contravene not only the provisions of Article 9, 17(2), 17(4)(a) and 17(4)(b) of the Statute, as well as Articles 9(2), 14(3) and 14(7) of the International Covenant on Civil and Political Rights, but also those of Rules 26(bis), 50, 52 and 61 of the Rules.

On the issue of four indictments in one joint criminal trial, the continued existence in the records, on the one hand, of three individual indictments against the applicants and his two co-accused persons to which they had all pleaded, and a consolidated indictment on the other two which they have not pleaded but which has replaced the three indictments on which their trial is now proceeding, is manifestly a legal and procedural anomaly and irregularity.

It is my opinion that to comply and to be seen to have complied with the provisions of Article 17(4)(a) of the Statute, it is not just enough for the Prosecution to inform the accused of the nature and cause of the charge against him or her, but also and more importantly, to do so clearly and without any ambiguity or uncertainty.

This basic requirement cannot be attained in this case because it is negated by the existence of a new set of facts in the consolidated indictment which are different from those in the initial indictment, and which

the Prosecution still wants to be considered as valid in the records so as to serve its purposes of justifying why re-arraignment of the three accused persons is unnecessary.

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 with two sets of indictments 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 three initial indictments so as to close the records and ensure that the statutory rights of the accused persons to a fair trial guaranteed under Article 17(2) of the Statute of the Special Court is not violated.

On the service of the indictment, having granted the joinder motion and ordered service of the consolidated indictment which bears a new number in accordance with Rule 52 of the Rules, the Trial Chamber should give effect to its own order consistent with the provisions of the Rules and those of Rule 26(bis), as it would again to my mind violate statutory rights of the accused if service of the consolidated indictment were effected in a manner other than that provided for under Rule 52 on which the order of the Chamber was based and made.

I say here that any action taken in violation of a

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

The foregoing analysis demonstrates the fact that there are clear differences between the initial indictment to which the three accused persons had pleaded and the consolidated indictment on which they now stand indicted and on which the proceedings are now based.

In justifying further its stand on the indictment, the Prosecution argues that since a consolidated indictment contains no new charge, no further re-arraignment is required, and, further, that as held by the joinder decision and referred to in the Norman motion, the indictment against the three accused contain exactly the same charges.

This argument to me is curious as it is misleading, because we indeed could not, as a Trial Chamber, at the time we were rendering the joinder decision, arrive at such a finding and conclusion when it is clear from the

records that we did not have the opportunity of seeing the consolidated indictment which, to my mind, ought to have been exhibited to the motion so as to enable their Lordships to ascertain the real content of the yet to be disclosed consolidated indictment.

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

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

It is my opinion that service of the indictment on the accused, as well as his arraignment on that indictment, are very important components in the mechanism that is and should in fact always be used to convey to the accused a clear picture of and message regarding the nature and cause of the charge against him as required by Article 17(4)(a) of the Statute. This, to my mind, is cardinal to the issues in this case.

Consistent with this legal position that I am

taking, it cannot be said, as far as this matter is concerned, that these mandatory provisions have been complied with, having regard to the uncertainty created in the minds of the accused persons as to the status of and the facts in the initial individual indictments vis-a-vis the status of and facts contained in the ongoing collective consolidated indictment.

In the absence, therefore, of a message to this effect, which is clear, certain and unambiguous on the nature and content of the consolidated indictment, as well as of its effective service on the accused as stipulated in Rule 52(A) and Rule 52(B) of the Rules by our court order, it is my considered opinion that the provisions of Section 17(4)(a) would not have been complied with. I would add and say that they would indeed have been violated.

Having regard to the above, I rule in favour of granting the applicant, the first accused in this motion, on all grounds as he has conversed in his arguments, and do hold that the consolidated indictment filed with the unanimous leave of the Trial Chamber and on which the trial is now proceeding, is not only valid, but is also and above all a new indictment.

We indeed, to my mind, could have arrived at a unanimous decision that the consolidated indictment is new and that a re-arraignment is necessary if we took the view that because the indictment, contrary to the assurances proffered by the Prosecution, contained expanded materials and particulars and more importantly

new charges, and that this discovery has just been rather belatedly made to us and therefore could not be made available to us in this matter for us to take a proper position.

To my mind, it is not too late at this stage of the proceedings, given the facts and the circumstances of this case, for the Prosecution to either apply for an amendment of the consolidated indictment so as to have the new particulars and charges featuring therein to be integrated into it, or for the Court to direct same and thereafter for the accused to be re arraigned on the amended indictment.

In the case of Johal and Ram it was decided that the Court has the power to order an amendment which involves a substitution of a different offence for that originally charged in the indictment or even the inclusion of an additional count for an offence not previously charged.

This, I would say, is an inherent power exercised by the Court either on its own motion or at the request of the Prosecution, as an amendment of any kind, including the addition or subtraction of a count, may be made at any stage of the trial provided that, having regard to the circumstances of the case and the power of the Court to postpone the trial, and if, as we held in our majority decision dated the 2nd of August 2004 on the Prosecution's request to file to amend the indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, the amendment can be made without injustice.

In the decision of the Prosecutor v Kajelijeli, on

the Prosecutor's motion to correct the indictment dated the 22nd of December 2000 and the Prosecutor's motion for leave to file an amended indictment, the Chamber warned that once leave to correct or amend is given, the correction or amendment may not go beyond what is permitted or directed by the Chamber. The parties have an opportunity to be heard when the amendment is sought as it could affect the accused's case and the preparation of his defence. Archbold International Criminal Courts Practice, Procedure and Evidence. It's on page 131 paragraph 6-71 and 6-72.

In the motion before us and contrary to the assurances given to us by the Prosecution that there was nothing new in the consolidated indictment as compared to the initial indictment, and that this disputed indictment actually contains new particulars and new offences, we have now discovered that the Prosecution has obviously gone beyond the implied expectations of the Chamber in ordering the filing of the said indictment without having verified it. This being the case, it is clear and I so hold that the possible principle outlined in the Kajelijeli case has been violated and should be remedied.

Accordingly, I do make the following orders: That the Prosecution immediately and forthwith and by a written motion applies to amend the said indictment under the provisions of Rule 50 of the Rules, so as to have lawfully incorporated in the said indictment the particulars, facts and offences featuring in the consolidated indictment which are new; or, in the

alternative, that the Prosecution submits the said indictment to the verification process provided for under Rule 47 of the Rules, with a view to new initial appearances of the accused persons for purposes of their arraignment on the approved and confirmed consolidated indictment under the provisions of Rule 61 of the Rules.

That the three accused persons should, after the amendment is granted, be re-arraigned on the amended consolidated indictment before the trial proceeds, and this only after some procedural formalities required or permitted by the law, including but not limited to those provided for under Rules 66 and 72 of the Rules as well as those related to recalling certain witnesses who have so far already testified if the Defence desires and makes an application to this effect by way of a written motion.

That the Prosecution immediately and forthwith proceeds under the provisions of Rule 51 of the Rules to file a motion applying to the Chamber for a withdrawal of the three initial indictments against the three accused persons.

That a personal service of the consolidated indictment dated the 5th of February 2004 be immediately effected on each of the accused persons.

That these orders be carried out.

Done in Freetown this 29th day of November 2004.

We are at 1.00 o'clock already, so I think that we would take the usual lunch break and resume our proceedings at 2.30, unless there are some quick issues which anybody wants sorted out. This decision -- the

contents of these three decisions would be made available as soon as possible. As I was reading through I saw some small errors which have to be put right. So we think that it should be available, at the latest, tomorrow.

MR MARGAI: It's just a clarification, My Lords, I wish to seek in the light of the ruling. I should have been continuing with my cross-examination, so I don't know what the position will be.

PRESIDING JUDGE: The proceedings continue. It doesn't stay the proceedings at all.

MR MARGAI: As My Lords please.

JUDGE THOMPSON: It also doesn't prevent an interlocutorial appeal.

PRESIDING JUDGE: We will continue with you in the afternoon.

JUDGE BOUTET: The Prosecution was to make an application. Are you making that this afternoon -- about the child witness, if I'm not mistaken? Do we finish first with the witness who's there and then you are going to make your application?

MR TAVENER: I'll make the application immediately after lunch. It will be very short. The witness falls under a certain category. Then we'll continue with the cross-examination with Mr Margai, thank you.

JUDGE BOUTET: Thank you.

PRESIDING JUDGE: It has been a long morning, but it is over and we shall go back to normal business and leave the issues to be sorted out the way they have to be sorted out. We shall rise and resume at 2.30.

[Luncheon recess taken at 1.08 p.m.]

[Upon resuming at 2.45 p.m.]

PRESIDING JUDGE: Good afternoon, learned counsel. We'll be resuming the session. I think we stopped on Friday at a certain point in learned counsel Mr Margai's cross-examination of this witness. I think we may continue. Mr Witness.

THE WITNESS: Yes.

PRESIDING JUDGE: Learned counsel Mr Margai did not finish his cross-examination of you for the third accused person Mr Allieu Kondewa. So he will now continue. And probably conclude. You may proceed, Mr Margai.

MR MARGAI: Thank you, my Lords.

WITNESS: TF2-088 [Continued]

[Witness answered through interpretation]

CROSS-EXAMINED BY MR MARGAI: [Continued]

Q. Mr Witness, your last answer, as I may recall, was you were neither a doctor, nor a druggist, nor a nurse.

JUDGE THOMPSON: I think he'd broadened it, never been in the medical field.

MR MARGAI: Yes, my Lords.

Q. Is that correct?

A. That is what I said.

JUDGE BOUTET: Druggist?

JUDGE THOMPSON: Never been in the medical field.

MR MARGAI: Never been in the medical field.

PRESIDING JUDGE: However, there is a controversy as to who is a druggist and who is a pharmacist. Anyway, that's all right. They quarrel among themselves. That's okay.

We are understanding to mean anyway that he was not

a pharmacist either.
JUDGE BOUTET: That was the question asked by Mr Margai. You were neither a doctor, nor a druggist, nor a nurse. That was your question.
MR MARGAI: That was my question.
JUDGE BOUTET: And his answer was no, I have never been in the medical field.
MR MARGAI: Yes.
Q. Now, Mr Witness, did you receive complaints from inhabitants from Valunia Chiefdom that your eldest son was the head of a gang?
A. It never happened.
PRESIDING JUDGE: Mr Margai, Valunia kingdom?
MR MARGAI: Valunia, V-A-L-U-N-Y-A, Chiefdom.
PRESIDING JUDGE: Was the head of a gang?
MR MARGAI: A gang.
PRESIDING JUDGE: A gang.
MR MARGAI:
Q. Was it also brought to your attention that this son was also moving around the chiefdom, meaning Valunia Chiefdom, robbing people of their property?
A. It is only today that I have heard that from you.
Q. Now, Mr Witness --
PRESIDING JUDGE: Mr Margai, please.
MR MARGAI: Sorry, my Lord.
Q. Now, Mr Witness, do you know one Francis Gaima?
A. Not at all.
Q. Gaima is spelled G-A-I-M-A.
PRESIDING JUDGE: Mr Margai, you say it's spelled?

MR MARGAI: G-A-I-M-A.
Q. Now, Mr Witness, did you hear that a Mr Francis Gaima was ambushed by your eldest son at Nyandehun village?
A. That is complete lies.
JUDGE THOMPSON: Where did you say, Mr Margai?
MR MARGAI: Nyandehun, N-Y-A-N-D-E-H-U-N, Nyandehun village.
PRESIDING JUDGE: That he assaulted?
MR MARGAI: That Francis Gaima was ambushed by the eldest son of the witness.
JUDGE THOMPSON: He says that's a complete lie?
MR MARGAI: That's what he's saying.
Q. Mr Witness, I'm putting it to you that you know for a fact that Mr Francis Gaima was ambushed along Nyandehun village by your eldest son.
A. That name is unknown to me. There is no Francis Gaima in our village, in fact.
Q. Mr Witness, I'm putting it to you that Mr Francis Gaima was shot and wounded in his right arm in that attack by your elder son, and you know it.
A. Why was it not reported? It is a lie.
PRESIDING JUDGE: Mr Margai, shot and wounded on the?
MR MARGAI: Right arm.
PRESIDING JUDGE: Right arm.
MR MARGAI:
Q. Now, Mr Witness, do you know of an incident where the town chief of Nyandehun was arrested by police personnel from Bo Town?
A. That has never happened. He is my brother.
PRESIDING JUDGE: At the police in Bo, you say?

MR MARGAI: Yes, my Lord.
JUDGE THOMPSON: Is he saying that the town chief is his brother?
MR MARGAI: Yes, my Lord.
THE WITNESS: If anything happened to him, I'll be aware.
MR MARGAI:
Q. Mr Witness, do you know whether your brother, the town chief of Nyandehun, was at any time invited to the Bo Police Station in connection with a shooting incident?
A. Never. It's never happened, never.
PRESIDING JUDGE: Are you saying it never happened, or that you do not know?
THE WITNESS: Yes, never. It did not happen at all. The man is my brother. If anything happened, I know. I'm here to defend him.
MR MARGAI:
Q. Mr Witness, I'm putting it to you that the town chief of Nyandehun was invited to Bo Police Station in connection with the shooting of Francis Gaima, and you know it.
A. It is not true.
Q. Now, Mr Witness, did Alhaji Hassan Sherrif not inform you of the numerous complaints he had received from the people of Valunia Chiefdom about their properties being looted by your elder son?
A. Repeatedly lies.
Q. And I'm putting it to you, Mr Witness, that you were so informed by Alhaji Hassan Sherrif.
A. These are all lies.
Q. And I further put it to you that Alhaji Hassan Sherrif

told you that the inhabitants of Valunia Chiefdom feared for their lives because your elder son was going around threatening them with a gun.

A. That is your job. You are just telling lies.

MR MARGAI: My Lords, may I ask for your protection, please.

PRESIDING JUDGE: Yes, you are entitled to it. Mr Witness, please. Mr Witness, listen to me. You answer the questions put to you by counsel. You have no right, absolutely no right, to tell learned counsel that he is lying. He can tell you that you are lying, and it is for you to say yes or no as to whether you are lying. But you cannot tell him that he is lying. Have you understood me, Mr Witness? You have to be very respectful to learned counsel. Okay?

MR MARGAI: Thank you, my Lords.

THE WITNESS: Yes, sir.

PRESIDING JUDGE: Let us get the reply. He says -- he said these are lies and he denies the suggestion --

MR MARGAI: He denies the suggestion.

PRESIDING JUDGE: -- that the report was made to him by --

MR MARGAI: By Alhaji Hassan Sherrif.

THE WITNESS: Never, never. No report was made to me.

MR MARGAI:

Q. And I'm putting it to you, Mr Witness, that you authorised Alhaji Hassan Sherrif to go in pursuit of this elder child of yours because of the repeated complaint.

A. Untrue. Untrue.

Q. And I put it to you further that whilst the Kamajors were pursuing him, he boarded a boat and opened fire at the

Kamajors.
A. I told you earlier that no civilian was in possession of a gun. These are all lies. It is not true, sir.
Q. And I further put it to you that it was when the Kamajors returned fire that he was fatally wounded and died consequently.
A. Two of my nephews and my sons were killed in the incident you are talking about. It is not true.
Q. Mr Witness, your younger son, was he not a drug pusher in Valunia Chiefdom?
A. Never.
Q. Now, Mr Witness, is it not a fact that your younger son opted to join the Kamajor society but was rejected because they considered him an outlaw?
PRESIDING JUDGE: Mr Margai, you have left the elder son. You're now on the younger son.
MR MARGAI: I'm on the younger son, yes.
THE WITNESS: They had wanted to force him. I rejected the idea.
MR MARGAI:
Q. My question is, is it not a fact --
A. No.
Q. -- that your son opted to join the Kamajor society but was rejected because he was regarded as an outcast?
JUDGE THOMPSON: Which is it; outlaw or outcast?
MR MARGAI: Outlaw, my Lord.
Q. As an outlaw.
A. He never attempted because he was under my control.
Q. And Mr Witness, like his elder brother, he, too, was

going around the chiefdom stealing people's property; isn't that correct?

A. It's false.

Q. Now, Mr Witness, did Alhaji Hassan Sherrif not bring to your attention the despicable conduct of this younger son of yours within the chiefdom?

A. This never happened.

Q. Now, Mr Witness, did Alhaji Hassan Sherrif suggest to you that this younger son of yours should go and stay with him in the hope that he might change his behaviour?

A. Never did he --

JUDGE THOMPSON: [Previous translation continues]...

MR MARGAI: Sorry.

JUDGE THOMPSON: That is a loaded question put to the witness. And what kind of response, if one insists on the question being put as it is, do we get?

MR MARGAI: Well, he has responded in the negative, that no such suggestion was made to him by Alhaji Hassan Sherrif. That's my understanding.

JUDGE THOMPSON: I see. I see. If that's what you construe it to be, then I'll be satisfied with it.

MR MARGAI: That's my understanding of it.

JUDGE THOMPSON: I thought it was loaded.

MR MARGAI: The question was, did Alhaji Hassan Sherrif not suggest to you that this younger son of yours should go and stay with him. Stop.

JUDGE THOMPSON: And then it was for the purpose of being reformed.

MR MARGAI: Yes, based on the suggestions put to you.

JUDGE THOMPSON: I'm just saying that -- that's my problem. Because he could have suggested that he go and stay with him, but not for that purpose.

MR MARGAI: I see the point. As my Lord pleases. I shall rephrase the question.

JUDGE THOMPSON: Yes.

MR MARGAI:

Q. Now, Mr Witness, did Alhaji Hassan Sherrif suggest to you that this younger son of yours should go and stay with him at any time?

A. Not at all.

JUDGE THOMPSON: [Previous translation continues]...The second point doesn't arise unless you've put it to him.

THE WITNESS: There was no discussion between Alhaji and myself, never.

JUDGE THOMPSON: Thank you, Mr Margai.

MR MARGAI: Thank you, my Lord.

Q. Mr Witness, I'm putting it to you that Alhaji Hassan Sherrif did suggest to you that your younger son should go and stay with him.

A. Even if millions were given to me by Hassan Sherrif, I will never have done that. I have never had any discussion with him.

Q. And I further put it to you, Mr Witness, that the purpose was to reform your younger son.

A. My son didn't -- he was with me. Nobody came to me at that time, he should stay with them. Nobody came to me.

Q. Mr Witness, did your younger son take refuge at XXXXXXXXXX village at any time?

MR MARGAI: Spelled XXXXXXXXXX

Q. Did he take refuge at XXXXXXXXXX village at any time?

A. There is no more XXXXXXXXXX. The place is known as XXXXXXXXXX. That is where I'm residing. That is the name of the village. The name of the village is XXXXXXXXXX. No more XXXXXXXXXX where I reside.

Q. When did XXXXXXXXXX ceased to exist, if I might ask? Can you answer that?

A. Ten years back. Ten years back.

PRESIDING JUDGE: He says the name of the village now is what?

THE WITNESS: XXXXXXXXXX. I call it XXXXXXXXXX / XXXXXXXXXX.

MR MARGAI:

Q. Although it ceased to exist ten years ago, you still call it XXXXXXXXXX / XXXXXXXXXX

JUDGE THOMPSON: Mr Margai, is that a little lesson in sociology?

MR MARGAI: So it would seem, my Lord.

THE WITNESS: For us to remember a minute, so I call it that way.

MR MARGAI:

Q. For the sake of remembrance, did your younger son take refuge at XXXXXXXXXX / XXXXXXXXXX village at any time?

A. Not to hide. We were there. That was the place we resided. We have people there.

PRESIDING JUDGE: [Previous translation continues]...

THE WITNESS: It is our village. That was where we resided.

JUDGE THOMPSON: So it's your place of residence, not a place of refuge.

THE WITNESS: Of course, yes, sir. Yeah, there are people

there now. I have five houses there.
MR MARGAI:
Q. Mr Witness, I'm merely putting my instructions to you.
PRESIDING JUDGE: I'm sure he understands.
MR MARGAI:
Q. Mr Witness, I'm putting it to you that your youngest son went to XXXXXXXXXX after stealing a gun with cartridges.
A. That never happened.
PRESIDING JUDGE: Mr Margai, for the record, this is still the junior son. Correct?
MR MARGAI: The junior son.
PRESIDING JUDGE: We should always refer to him as the junior son.
MR MARGAI: Junior son.
PRESIDING JUDGE: Stealing a gun and cartridges.
MR MARGAI: Stealing a gun and cartridges.
Q. And I put it to you, Mr Witness, that this incident was brought to your attention by Mr Alhaji Hassan Sherrif; the stealing of the gun and the cartridges.
A. Alhaji Hassan Sherrif never told me this, and it never happened.
Q. And I further put it to you that Alhaji Hassan Sherrif reported to you that this younger son of yours sexually assaulted an old woman of over 70 years old in that village.
JUDGE THOMPSON: You said the youngest son?
MR MARGAI: [Previous translation continues]...
PRESIDING JUDGE: [Previous translation continues]... answer the question, please. It is not all offences that are

committed and reported.
THE WITNESS: It is not true. The boy never did that. He never did it. My son never did it.
JUDGE BOUTET: Mr Margai, I'm getting concerned with these kind of questions. I understand you may have instructions, but I think you're borderline on harassment of the witness as such. You can ask questions, but I feel that you are overdoing it at this particular moment. You are trying to confront the witness on some issues, I take it, and I do understand you have instructions, but I am getting concerned with these type of questions as if, because you have instructions, you can throw anything to the witness. I'm concerned about it.
MR MARGAI: My Lord, I appreciate Your Lordship's concern, but I have a job to do. The Prosecution in leading the witness said lots of things here which, as per our instructions, are not true. But because the Prosecution had to present its case as had been reported to them, we accepted the situation. And at the end of the day, Your Lordship's will have an opportunity to evaluate the evidence as to who is speaking the truth. But these are my instructions, and I believe I would be remiss in my duty if I don't put my instructions across to him, albeit I'm sure the response is going to be negative.
JUDGE BOUTET: Carry on, but I'm concerned about it, too, because I'm concerned that there's a limit to put questions of that nature to a witness when it is of a very, very personal nature of trying to -- if you have some more evidence, then just say "I put it to you." I

do have concerns about that. Yes, Mr Prosecutor.
MR TAVENER: The Prosecution's concerns relate to relevance. We've obviously listened to a number of questions about the two sons, the older son and the younger son. At this stage, obviously I'll allow the questions to go a bit further, but there appears to be no relevance to these questions.
JUDGE BOUTET: I think the relevance has to do with credibility, so on that issue I overruled you.
MR MARGAI: No, it's not credibility, Your Honour. When I started in relation to the elder son, I concluded by giving you the circumstances under which he met his death, contrary to what had been said by the witness in evidence-in-chief. And this is where I'm leading to in respect of the second --
JUDGE THOMPSON: In other words, learned counsel, this is all part of evidence in rebuttal.
MR MARGAI: Precisely, my Lord.
JUDGE THOMPSON: I, myself, I do understand where my learned brother, Honourable Justice Boutet, is coming from. But I certainly would not myself say that you have exceeded the limits because clearly if this is meant to be evidence in purported rebuttal of serious allegations from the Prosecution, again, appealing to the principle of equality of arms, I think you're entitled to do that as long as you do that politely and without meaning to embarrass or humiliate the witness.
MR MARGAI: Far from it, my Lord. In fact, I think in fairness to the witness, if these questions are not put

to him as per my instructions --
JUDGE THOMPSON: Yes.
MR MARGAI: -- when it comes to the turn of the Defence --
JUDGE THOMPSON: In other words, we would be left with uncontradicted evidence.
MR MARGAI: Precisely. You would ask me, "But why did you not put these questions to the witness when you had the opportunity?"
JUDGE THOMPSON: I'm satisfied, as long as you do not in the process, attempt to humiliate, harass, embarrass this witness.
MR MARGAI: I give you that assurance, My Lords. I give you that assurance.
JUDGE BOUTET: Mr Margai, what I've said to you is I had concerns and my concerns are in line with what my brother --
MR MARGAI: Your concerns are legitimate; no doubt about it, My Lord, but then I'm only following my instructions.
JUDGE BOUTET: But even if it is instruction, if it becomes harassment on the witness, it is not acceptable either. But I have said what I had to say, and I accept your explanation on this, and I'll go along with that.
MR MARGAI: Thank you, my Lords.
JUDGE BOUTET: Please carry on.
MR MARGAI:
Q. Now, Mr Witness, is it not a fact that you disowned this second witness --
JUDGE THOMPSON: Second son.
MR MARGAI:

Q. -- second son because of the persistent complaint about his conduct?
A. I never did.
Q. Thank you. Now, Mr Witness, do you know one Sheku Mammy?
A. [Inaudible] Yes.
PRESIDING JUDGE: Sheku?
MR MARGAI: Mammy, M-A-M-M-Y.
JUDGE THOMPSON: Is that spelling consistent with your instruction?
MR MARGAI: Yes, it should be M-A-M-M-Y.
PRESIDING JUDGE: Sheku.
MR MARGAI: S-H-E-K-U. K-U.
PRESIDING JUDGE: Okay.
MR MARGAI:
Q. Now, was this younger son of yours brought to you by Sheku Mammy in the company of Alhaji Hassan Sherrif?
A. It's never happened at all.
Q. Now, Mr Witness, did the rebels attack Valunia Chiefdom at all?
A. Yes.
Q. When?
A. I did not record that.
Q. Which year?
A. 1994, May.
Q. And where was your younger son at that time when the attack was launched?
A. Inside XXXXXXXXXX Town. I was XXXXXXXXXX XXXXXXXXXX there. My children were there with me.
Q. When the attack was launched at Valunia.

A. At Valunia. And the first attack, they came and attacked us in May.

PRESIDING JUDGE: [Previous translation continues]....

THE WITNESS: We were in XXXXXXXXXX Town.

MR MARGAI: XXXXXXXXXX XXXXXXXXXX XXXXXXXXXX Town.

Q. Did the rebels get to XXXXXXXXXX Town, Mr Witness?

PRESIDING JUDGE: And you say you were XXXXXXXXXX XXXXXXXXXX there?

MR MARGAI: He was XXXXXXXXXX XXXXXXXXXX, yes.

Q. Did the rebels get to XXXXXXXXXX Town?

A. They came there later. But at that time we left there, we were in the hiding. We were in the bush. They came there later, after Valunia attack.

Q. Now, was -- did XXXXXXXXXX come under rebel attack, Mr Witness?

A. Yes.

Q. What year?

A. 1995. It was the time they came and took away all my goat. 1995.

Q. What month? What month?

A. I cannot tell now.

Q. Where was your younger son?

A. XXXXXXXXXX.

Q. [Previous translation continues] village?

A. When they attacked there, when the attack was there, I sent him there. It is the home of his mother.

Q. You did not go with him?

A. Not at all.

PRESIDING JUDGE: What is the name of the town where the son went?

THE WITNESS: XXXXXXXXXX. That is XXXXXXXXXX Chiefdom. XXXXXXXXXX.

MR MARGAI:

Q. And there was an exchange of fire between the rebels and the Kamajors, wasn't there, Mr Witness?

A. This time, no Kamajor was at XXXXXXXXXX in 1995. There was no Kamajor. Kamajors went there in 1997.

Q. Mr Witness, I'm putting it to you that there were Kamajors at XXXXXXXXXX in 1995.

A. That was not. There were two people. They were not Kamajors. They were just taking care of the town. And there were two -- only two guns there that were with us at that time, my gun and other gun. They borrow my gun. They said that it should be with them. In the evening, the men go round the town. But they were not Kamajors. The Kamajors went there in 1997 after Chief Hinga Norman has come to Bo.

Q. Now, were these people referred to as vigilantes?

A. Well, that name was not mentioned to me. But only that --

Q. [Previous translation continues]...

A. -- they were -- well, it may be termed so, but I don't know how to --

Q. [Previous translation continues]...

A. -- I don't know how specific names are given to them.

Q. All right. I accept that. Now, in 1997, did the rebels attack Valunia Chiefdom?

A. They were now coming towards the north. They have left Masingbi coming towards --

PRESIDING JUDGE: [Previous translation continues]... answer the question. Did the rebels in 1997 attack the Valunia Chiefdom?
THE WITNESS: They had now left our area. They were coming towards Yele, Bonkolenken Chiefdom.
PRESIDING JUDGE: It's a kingdom.
MR MARGAI:
Q. Mr Witness, Mongere shares a common boundary with Yele, not so?
A. It is true.
Q. [Previous translation continues]
A. Yes.
Q. Did the rebels attack Mongere in 1997?
A. Not to my knowledge again. It was only in 1994 and part of 1995. And they left our area coming towards the north.
JUDGE THOMPSON: So your answer is that you do not know whether the rebels attacked Mongere in 1997?
THE WITNESS: It was only in 1994.
JUDGE THOMPSON: [Previous translation continues]
THE WITNESS: They did not come there.
JUDGE THOMPSON: [Previous translation continues]
THE WITNESS: No, no, no.
JUDGE THOMPSON: [Previous translation continues]
THE WITNESS: They did not.
JUDGE THOMPSON: [Previous translation continues]
THE WITNESS: Indeed. In 1997, no attack.
JUDGE THOMPSON: What's the answer, Mr Margai?
MR MARGAI: He says he doesn't know. Or they did not.

JUDGE THOMPSON: That's different from "I do not know whether they did." It must be obvious. Yes, he knows as a fact that they did not.
MR MARGAI: That they did not.
Q. Now, did Mongere in 1997 have a large concentration of Kamajors?
A. Surely. Many, many, many.
Q. Over 1,000?
A. I did not count them. But Kamajors were coming from all over the chiefdoms of Bo District. They were coming there.
Q. I'm putting it to you, Mr Witness, that the rebels attacked Valunia Chiefdom in 1997.
A. That is not to my knowledge.
Q. And I further put it to you --
A. And as I have said, the attack was made in 1994 and part of 1995. But if you say they came there in 1997, it is not to my knowledge because that is my place.
Q. And I'm further putting it to you that it was in that attack that your second son lost his life.
PRESIDING JUDGE: [Previous translation continues]
MR MARGAI: Yes, my Lord, in 1997.
Q. Now, do you bear any relation --
A. I have not answered that question.
PRESIDING JUDGE: He protested, you know, that he has not given an answer, and I agree.
THE WITNESS: I'm still insisting that the rebels attacked from part of 1996. They police my place. Up to 1997, there was no attack. It never happened. It never

happened. There was no rebel attack in 1997.
MR MARGAI:
Q. [Previous translation continues]
A. You made that statement, but there was no more rebel attack --
MR MARGAI: [Previous translation continues]
PRESIDING JUDGE: [Microphone not activated]
THE WITNESS: All right, sir. It has never happened.
JUDGE THOMPSON: [Previous translation continues] he was denying. Is he denying that there was an attack in Valunia Chiefdom in 1997?
MR MARGAI: He's denying it.
JUDGE THOMPSON: I understood him before to say that it was not to his knowledge.
MR MARGAI: Yes, he said not to his knowledge, but now he's denying it, my Lord.
JUDGE THOMPSON: And then you put to him the question that his second son lost his life in that attack.
MR MARGAI: In that attack.
JUDGE THOMPSON: And what is his answer?
MR MARGAI: That was the response, that there was no such attack.
Q. Now, Mr Witness, do you bear a relationship to XXXXXXXXXX XXXXXXXXXX?
A. True, true, true.
Q. Blood relationship, I mean?
A. Well, let me clarify it because his XXXXXXXXXX --
MR TAVENER: Sorry, excuse me, Mr Witness. Can this be done another way, rather than identify the witness? Is there

another way to ask this question rather than having him identify the nature of the relationship --

JUDGE BOUTET: It has to do with the protection of witnesses, presumably.

MR TAVENER: Yes.

MR MARGAI: Don't you worry. The protection will be secure.

MR TAVENER: [Microphone not activated]

JUDGE BOUTET: Sorry. What was the question?

MR MARGAI:

Q. Do you bear any blood relationship, yes or no? It's this question of volunteering that sometimes threatens to reveal identities. Do you bear any blood relationship, yes or no?

A. Extended relationship.

Q. Extended family relationship. Accepted.

JUDGE THOMPSON: Yeah.

MR MARGAI:

Q. Now, because of this extended family relationship, did XXXXXXXXXX XXXXXXXXXX lend financial assistance towards the education of your children?

A. Yes, that happened. He has never given me a cent towards the existence of my family, and I have never made any request to him. I am able to maintain my children and my family.

Q. Did one of your sons study at private college? Don't name him.

A. There are people right now who are sitting here who know that I am here. God will protect me from here. True.

Q. Will you now answer the question. Thank you.

PRESIDING JUDGE: If he feels that the question will reveal his identity, Mr Margai, I'm concerned here now, concerned. I don't know how we are proceeding. This is my concern.
MR MARGAI: My Lord, I'm sure --
PRESIDING JUDGE: I don't know how we can circumvent this --
MR MARGAI: I'm sure there are many --
PRESIDING JUDGE: -- because we appear to be coming close to the red line.
MR MARGAI: My Lord, there are miles away from the red line. I'm sure there are many parents --
PRESIDING JUDGE: I see you very close, Mr Margai. I see you very close to the red line.
MR MARGAI: It depends on which direction Your Lordship is viewing me. I assure Your Lordship that I am very conscious not to disclose the identity of this witness. But I'm sure there are many families who have had children at private college --
PRESIDING JUDGE: It depends on the area you come from.
MR MARGAI: I'm talking of Valunia Chiefdom.
PRESIDING JUDGE: The Valunia Chiefdom.
MR MARGAI: Oh, yes, I know the place very well. I was in Bo for 27 years.
JUDGE BOUTET: But when you combine all the factors together, I don't think you have dozens and dozens of family.
MR MARGAI: Well, it was he who said he was XXXXXXXXXX XXXXXXXXXX.
JUDGE BOUTET: I agree with you.
MR MARGAI: It's all right, my Lords. We will leave it for our witnesses when they came.

PRESIDING JUDGE: Yes, I was going to suggest that you graciously slip out of that question. Allow him -- spare him the trouble of answering that question.
MR MARGAI:
Q. Mr Witness, I'm putting it to you that your version of the death of your eldest son in this court is far from being the truth.
PRESIDING JUDGE: Answer the question.
MR MARGAI:
Q. Yes, Mr Witness.
A. I do not understand.
Q. My question is --
PRESIDING JUDGE: Is your version of the death of your eldest son truthful or it is false?
THE WITNESS: Well, my son was killed by these people willfully. He was not killed in the right way.
MR MARGAI:
Q. What is the answer?
JUDGE THOMPSON: Witness, counsel wants to know whether what you told us about how he was killed is the truth.
THE WITNESS: I said it is not true. My son was killed wrongly. It was not true. The way he was killed was not right. He did not do any wrong.
MR MARGAI:
Q. Please understand the question.
JUDGE THOMPSON: Counsel wants to know whether what you told this Court about how he was killed is the truth.
THE WITNESS: The way explained is the truth. What I said, the way he was killed, how I saw -- what I explained

here. So if there is any other version, the one that I explained to you is the true version. Exactly.

JUDGE THOMPSON: [Previous translation continues] thank you.

JUDGE BOUTET: Mr Margai, that concludes your cross-examination?

MR MARGAI: No, my Lord. The Prosecution took a day and a half.

JUDGE BOUTET: That's okay. No, no --

MR MARGAI: I don't intend to follow suit unless it is absolutely necessary, which I don't think it is in this case. I'm winding up, My Lords.

Q. Mr Witness, I'm further putting it to you that your version of the death of your second son is also not true.

A. I know that what I said is the truth.

Q. Mr Witness, was it you who volunteered to make a statement to the investigators?

A. I planned it long ago. It took me a long time --

PRESIDING JUDGE: Was it you who volunteered -- Mr Witness, wait. Mr Witness, wait. Learned counsel is asking you, were you the one who volunteered the statement to the Prosecutors in this case? Were you the one who volunteered the statement?

THE WITNESS: Yes. My wife and I decided that I should do it. I volunteered it myself.

MR MARGAI:

Q. Thank you. And did you tell the investigators of all of these killings you narrated here in this court?

A. I did not talk of all the killings. There were very many killings, but I only talk of my own here. Most people

were indoctrinated that they should not come. But I volunteered to do so.

Q. Thank you very much. Will you now answer the question: Did you tell the investigators about the killings you testified to in this Court?

A. Yes.

Q. Did you, Mr Witness, identify the remains of any of these people who were killed, according to your testimony, to the investigators?

PRESIDING JUDGE: Mr Margai, the question again, please.

MR MARGAI:

Q. Did you identify the remains of any of these people whom you testified were killed to the investigators? I don't want to use the terminology --

A. I only explained to them exactly what happened to my children because it was a long period, and I cannot keep their remains.

Q. So you never identified any of the remains?

A. I did not have the access to the dead bodies.

Q. Did you identify or did you not? Whether you had access, that is immaterial. Did you identify or did you not?

A. I only identified my relation to them.

Q. [Previous translation continues]. You have talked about people being killed in your presence, et cetera, et cetera. You volunteered a statement to the investigators. My question now is, having told them about these killings, did you identify the remains of any of these people who were killed?

A. Only two were buried. The others were away, so no.

Q. So you did not? Thank you.Mr Witness, I'm putting it to you that there was no identification of these bodies by you because no such deaths occurred, apart from the two sons. Yes, Mr Witness?
A. That one is now left with the Court. I said that the others were sent into the river. Their bones were taken by them. The other two were buried. So you say if -- they will show you the place where they are buried. That one -- what happened to me is what I've explained. I did not have the access to the others. Their bodies were thrown. And the others, their bones were taken away. What can identify that is only my explanation.
Q. Thank you. Now, Mr Witness, you told this Court that you were a supporter of Honourable Matilda Conteh, as she was then, hundred per cent?
A. That has passed 20 years back. Yes.
Q. And she was a member of parliament representing the All People's Congress party, APC for short?
A. That was one-party state, yes.
Q. Mr Witness, do you identify the Kamajors with any political party?
A. That one, I don't know.
MR MARGAI: Thank you, My Lords. That will be all for the witness. Thank you very much, Mr Witness.
JUDGE BOUTET: Thank you, Mr Margai. Any re-examination?
MS WIAFE: No, Your Honours.
JUDGE BOUTET: Thank you.
[The Trial Chamber confers]
JUDGE BOUTET: Mr Prosecutor, are you ready to proceed with

your next witness? I think your next witness will be TF2-057 if my list is accurate.

MR TAVENER: Yes, it is.

JUDGE BOUTET: But I also raised with you on Friday the issue about the application about another witness to come. I think the one after the next one.

MR TAVENER: That's correct.

JUDGE BOUTET: What we'll do is -- we'll break shortly to allow this witness to go away, and when we come back, I suggest we hear the application for the child witness. Subsequent to that, we'll start with the next witness.

MR TAVENER: Thank you.

JUDGE BOUTET: Because you told us that your application will be short.

MR TAVENER: Very short.

JUDGE BOUTET: Okay.

PRESIDING JUDGE: If it becomes too long, Mr Tavener, we shall send you back to put it on paper.

MR TAVENER: Thank you, Your Honour.

PRESIDING JUDGE: I'm very sensitive to longish oral applications. Anyway, we don't expect it would.

This said, Mr Witness, we have finished with you. And I think you can go home now. We want to thank you for coming to testify before this Court. We are not saying that we are releasing you entirely. Necessity may arise - you never know - for us to call you back here for further testimony. I'm not saying it is the case now, but I say it may arise. So if it does, we'll get in touch with you through the right channels. This said, we

wish you a safe journey back home and successful pursuit of your professional and private life back wherever you are. The Tribunal --

THE WITNESS: Thank you.

PRESIDING JUDGE: -- will rise to allow this witness to retire and for us to come back in the next couple of minutes.

We'll rise, please.

[The witness withdrew]

[Break taken at 3.58 p.m.]

[on resuming at 4.22 p.m.]

[HN291104D]

JUDGE BOUTET: Mr Prosecutor, we are listening to you.

MR TAVENER: Thank you, Your Honour. In respect of -- this is an application or more an advisement to the Court in respect of TF2-067. In making the application or advising the Court, the Prosecution --

PRESIDING JUDGE: Witness number?

MR TAVENER: TF2-067. The Prosecution relies on the decision on Prosecution motion for modification of protective measures for witnesses, dated the 8th of June 2004, a decision of this Trial Chamber.

In that particular decision there was a number of categories of witnesses and the protection to be accorded to each category. This particular witness, 067, is a child and therefore falls under Category B. He's a vulnerable witness and the Prosecution seeks the protections that are outlined in that particular order -- or particular decision of the Court.

The child was born on the 17th of March 1987 and I

understand his age was told to him by his parents. At the time of giving evidence he will be under the age of 18.

PRESIDING JUDGE: He was born on what date?

MR TAVENER: The 17th of March 1987. Consequently he's a child by definition and attracts the protections outlined in the order -- in the decision of the Court I've referred to.

JUDGE BOUTET: But this is, if I'm not mistaken, a witness that had not been so described in the application up to now. Am I right? In the list that you have provided the Court with --

MR TAVENER: The Prosecution motion for modification of protective measures for witnesses I have him as being listed at 6122, if I'm reading it correctly. He was one of the witnesses nominated as a Category B witness, and that was filed with the Court on the 4th of May 2004. It is a document containing a number of annexures identifying Category A witnesses, Category B and Category C and 067 was nominated as a Category B witness.

Relying upon that decision and the --

JUDGE THOMPSON: What is the date of the decision?

MR TAVENER: 8th of June 2004. If I could read from paragraph 13, it's page 7332: "Witnesses in sub-Category B above, namely child witnesses, should be allowed to testify on closed circuit television to avoid, as far as possible, serious emotional distress by facing the accused while the image appearing on the public's monitor is to be distorted." That was requested.

And paragraph 48, page 7342: "Based upon this information and the evidence submitted the Chamber finds that such risk as described would exist and, therefore, deems its necessary in the interests of justice for children to be allowed to testify in the way the Prosecution asks for in accordance with Rule 75(B)(i)(a)." This child -- this witness, being a child, attracts those protections.

JUDGE THOMPSON: In other words, this is an application which we -- based on the decision that you've cited, we grant as a matter of course?

MR TAVENER: That is in effect --

JUDGE BOUTET: But why are we facing with this application, because he had not been properly described in the list provided; that was my question.

MR TAVENER: I think it was raised that there be an application and that's why when I started it we don't see it quite as an application, but simply advising the Court that that's the way in which this witness will testify. It is more information than an application.

JUDGE BOUTET: Based on that decision, it appears to be quite clear that if the witness is a child, he comes under Category B and Category B means this.

MR TAVENER: On this occasion we're not arguing, Your Honours.

JUDGE BOUTET: I will ask the Defence if they have any argument, but I don't --

JUDGE THOMPSON: In other words, you're invoking a principle of automaticity here, just having regard to a decision that just automatically applies.

MR TAVENER: More for information for the Court as to how we will proceed.

MR YILLAH: My Lord, I'm appearing for the first accused and I have instructions from Dr Jabbi to do so. In light of what -- we don't have a problem with what he has said, but in light of the order that he has just read, do those protective measures apply when the accused persons are in court or not? It is not too clear from what he has read in court, My Lord, it's not too clear. You may want to -- Your Lordships may want to direct him re-read what he has just read in court, because I hear a reference being made to when the accused persons are in court. So when they are not in court, I don't know whether different measures that apply. That is based on what he has just read, My Lord.

JUDGE BOUTET: Well, I have the decision. The reference was to paragraph 13, if I'm not mistaken. 13 was the application made by the Prosecution asking for additional protective measures for certain groups of witnesses. "Witnesses in sub-Category B above, namely child witnesses, should be allowed to testify on closed circuit television to avoid, as far as possible, serious emotional distress by facing the accused while the image appearing on the public's monitor is to be distorted." That is the argument that was put forward.

MR YILLAH: So if that is the argument, My Lord, I don't think in the circumstances --

JUDGE BOUTET: Because there is no --

MR YILLAH: Absolutely, it would definitely will not apply.

JUDGE BOUTET: You may be right. May we hear from the second accused. Yes, the purpose of that, you're quite right, was to give that protection to a child witness so he would not be more emotionally distressed than is required by facing an accused in those circumstances, but the facts are as we speak -- and I think you will agree with me that if the accused comes up tomorrow morning, we're going in a different scenario. But, as we speak, there is no accused in court, so that will have little application at this particular time.

MR YILLAH: I take the cue, My Lord. My Lord, may we treat this situation --

PRESIDING JUDGE: Mr Yillah, are you suggesting that this care of this witness would only be generated by accused persons and no other circumstances around this Courtroom? Is that what you're suggesting?

MR YILLAH: My Lord, I'm taking the Prosecution on the authority that they have presented to this Court.

PRESIDING JUDGE: Are you saying that this Court, this Tribunal, is tied up with that decision and cannot --

MR YILLAH: Based on the jurisprudence that they have cited, My Lord. If we go by that, the authority that he is relying on, that cannot be tenable. That would not support his application. Maybe he would find some other means to rely --

PRESIDING JUDGE: Or maybe the Tribunal may find some other means, if it comes to that.

MR YILLAH: As My Lord pleases.

JUDGE BOUTET: But you still agree, however, that there would

have to be basic protection.
MR YILLAH: We don't have a problem with that. We only have a problem with the supportive material that he has furnished to the Court. That would not support his application.
JUDGE BOUTET: Thank you very much.
JUDGE THOMPSON: Suppose he were to come under some omnibus concept of the overall interest of justice, would that defeat his application? Of course, the point that you make is perfectly valid from my perspective too, as my learned brothers have said, but suppose you were to rely on some omnibus perspective of the overall interests of justice would dictate that this particular witness be afforded the protective measures, notwithstanding the absence of the accused. Would that be an attractive position to take legally?
THE WITNESS: My Lord, Your Honours, as constituted as a Bench, proprio motu can apply an omnibus rule in the interests of justice, even without it being --
JUDGE THOMPSON: Consistent with a discretionary authority?
MR YILLAH: We don't have a problem with that, My Lord
PRESIDING JUDGE: Being that we are not taken prisoner or hostage by our own decisions, they are rendered in particular situations and they could be -- we could come around them depending on the facts and circumstances that we're examining at any material time. Anyways, okay, in principle you don't have any particular objection. Okay, thank you.
MR YILLAH: Yes, Your Honour.

MR BOCKARIE: Yes, Your Honour. Just in line with what Mr Yillah said, generally we are not opposed to the application, but just when the portion of that ruling was read, we too entertained the same apprehension.

JUDGE BOUTET: I don't want to mislead you. The portion that was read was, so this is very clearly understood, that was the Prosecution's application. Paragraph 13 that was quoted by the Prosecution was a repeat of their application to this Court. The decision per se does not say so. The decision -- I can quote to you on the decision. It says: "Special protective measures for sub-Categories A, B, C voice distortion and closed circuit television." "The closed circuit television for child witnesses in sub-Category B while the image appearing on the public's monitor is distorted", that is all it is. So it does not make that preference in that decision per se.

MR BOCKARIE: Well, we are not opposed to the application, Your Honour.

JUDGE BOUTET: Thank you. Mr Margai?

MR MARGAI: We're indifferent, My Lord.

MR TAVENER: Perhaps just for completeness in response to the counsel for the first accused, at paragraph 47, the second, third sentence -- sorry, the fourth sentence: "As stated by psychologist Anne Michel, especially children are vulnerable witnesses, the risk of re-traumatisation and the possibity of stigmatisation and rejection is real and high." So there is a number of bases for treating children in a different way, not just

confronting the accused. And that appears to be the basis of the Court's decision as well. Thank you.

JUDGE BOUTET: The Court's decision, if I can quote to that portion, Mr Yillah: "That witnesses in sub-Category B, that is child witnesses, testify with the use of a closed circuit television the image appearing on the public monitor is being distorted." That is all the decision reads about. So there is no reference in the decision per se to the accused being present or not in the order of the Court. Thank you.

MR YILLAH: As My Lord pleases.

JUDGE BOUTET: The application made by the Prosecution is granted and we'll provide some additional details after, but for your information at this time the application will be granted and we'll provide some reasoned details.

PRESIDING JUDGE: We mean a written decision will be provided on this, but for now, to enable the proceedings to continue without interruptions, we will work on granting it orally.

JUDGE BOUTET: So are we ready, Mr Prosecutor, to call the next witness who is not the child witness?

MR SAUTER: Right. Your Honours, the Prosecution calls witness TF2-057. To my knowledge he is witness number 34.

JUDGE BOUTET: This witness will testify in Krio?

MR SAUTER: He will testify in Krio.

JUDGE BOUTET: Thank you. Please call the witness in.

PRESIDING JUDGE: Mr Sauter, it is the 34th witness?

MR SAUTER: Yes, 34th witness.

[The witness entered court]

WITNESS: TF2-057 sworn

[The witness answered through interpretation]

JUDGE BOUTET: Mr Prosecutor, you may proceed, please.

EXAMINED BY MR SAUTER:

Q. Good afternoon, Mr Witness?

A. Yes, sir.

Q. I'm going to put to you some questions. Please answer the questions directly, make short answers and speak slowly. I will begin with some questions concerning your personal data. How old are you, Mr Witness?

A. I am 45 years old.

Q. And in which chiefdom are you born?

A. Tonkolili, District, XXXXXXXXXX Chiefdom.

JUDGE BOUTET: Spell that out, please.

THE WITNESS: XXXXXXXXXX is XXXXXXXXXX . XXXXXXXXXX Chiefdom. Tonkolilli is T-O-N-K-O-L-I-L-L-I District. Tonkolilli District.

MR SAUTER:

Q. Where are you residing, Mr Witness?

A. I live in XXXXXXXXXX now.

Q. Are you married?

A. Yes, sir.

Q. And do you have children?

A. Yes, sir.

Q. How many children do you have?

A. I have five.

Q. Did you attend school, Mr Witness?

A. Yes, sir.

Q. For how many years?
A. Ten years. Ten years I spent at school.
Q. Which languages are you speaking?
A. I speak three languages.
Q. Which ones, please?
A. I speak Temne, Krio and Susu.
Q. And what is your profession?
A. Diamond miner.
Q. That is all concerning your personal data, Mr Witness.
A. Yes, sir.
Q. Mr Witness, are you familiar with the term Kamajors?
A. Yes, sir.
Q. Could you please explain to the Court what you understand under the term Kamajors?
A. Kamajors, these are people Sam Hinga Norman brought in our own society and told us that they are coming to fight for us during the time when the rebels were in our country.
Q. So you say they were fighters?
A. Yes, sir.
Q. How do you recognise a person as being a Kamajor?
A. Well, they came with special uniform which they wore and they tied different things there which identified them as Kamajors.
Q. Could you please describe what kind of uniform they wore?
A. Yes, sir, ronko, ronko uniform. They had ronko uniform.
Q. Could you please describe what a ronko uniform is like?
A. Yes, sir. The ronko uniform which they wore was shaped in a small waiste and they tied some different things

there and that was what they used to wear.
Q. When you say they tied different things there, which kind of things?
A. It is a ronko and they tied something like talisman there.
Q. Okay. We'll leave it like this. Mr Witness, where did you live during the years 1996, 1997, 1998?
A. I was around Bo Town.
Q. During this period from 1996 to 1998 had there been Kamajors in Bo Town?
A. Yes, sir.
Q. Can you remember when the Kamajors first came to Bo?
A. Yes, sir.
Q. So when was it?
A. 1996 they were in Bo.
Q. At this time 1996, you say, were there any other fighters or military forces in Bo?
A. Yes, sir. Yes, sir.
Q. Who else was in Bo?
A. It was the Sierra Leone Army.
Q. And how was the relationship between the soldiers of the army and the Kamajors at this time?
A. Well, they worked together during that period.
Q. Did this cooperation come to an end at any time?
A. Yes, sir.
Q. When was this, Mr Witness?
A. Well, it was the time when the AFRC overthrew; that was the time when the relationship ceased.
Q. Could you recall when this happened?

A. It was 1997 when Johnny Paul Koroma took power. That was the time when the relationship between the Kamajors and the army ceased.
Q. And did the Kamajors stay at Bo after this point of time?
A. No. When AFRC had power, the Kamajors had left Bo and they were in the bush during this time.
Q. Did the Kamajors at any time return to Bo Town?
A. Yes, sir.
Q. When did this happen?
A. In 1998. That was the time the Kamajor came back in Bo.
Q. Could you give us a month?
A. Yes, sir. It was around March, sir.
Q. When the Kamajors returned to Bo, were the soldiers still there?
A. The soldiers were not there again.
Q. Could you tell the Court how long, approximately, before the Kamajors came the soldiers left Bo?
A. Well, Kamajors left Bo in 1997. That was the time the Kamajors left Bo and they came back in 1998. They came back in 1998 in Bo town.
JUDGE THOMPSON: Learned counsel, what was your question?
MR SAUTER: I was just about to repeat my question.
JUDGE THOMPSON: Yes, it was difficult to follow.
MR SAUTER:
Q. This was not my question, Mr Witness. My question was whether you can remember how many day before the Kamajors returned to Bo in, as you say, March of 1998, the soldiers had left Bo? Do you understand my question?
A. I did not get it clearly.

Q. You said the Kamajors returned in March 1998 to Bo and you said at this point of time the soldiers were not any more in Bo. What I want to know from you is how many days, or how many weeks or months, whatever, before the Kamajors returned that the soldiers had left Bo?
JUDGE THOMPSON: Perhaps if you say before after the soldiers left Bo before the Kamajors came. Perhaps that may well help.
MR SAUTER: Okay.
Q. Mr Witness, could you answer my question otherwise I'll put it the other way round?
A. Well, I know in 1997 the Kamajors had left Bo. In 1998, they came back. That was during March period.
Q. And when did the soldiers leave Bo? Could you remember this?
A. The soldiers, when the Kamajors have entered, when they came in 1998, it was -- the soldiers had left. They left.
Q. How many days after or weeks or months after the soldiers had left Bo the Kamajors came into Bo? Can you remember this?
A. Well, almost it was about eight months, because it was from 1997 when they left and they came back in 1998, so I cannot give the exact time. All I know is that it was between 1998 -- 1997 when they left and the Kamajor returned again.
JUDGE BOUTET: I don't think he understood your question. Certainly his answer does not indicate that.
MR SAUTER: I think there is no need to follow this question

further.
Q. But you said when the Kamajors returned there were not any soldiers in Bo; is that right?
A. They were not there. They were not there.
Q. Okay. Did you have any personal encounter with the Kamajors after they returned to Bo, as you say, in March 1998?
A. Yes, sir. Yes, sir.
Q. Could you please describe what happened?
A. Yes, sir.
Q. Please, go ahead.
A. I was in my house when I saw a group of Kamajors.
Q. Did these Kamajors come to your house?
A. Yes, sir.
Q. For what purpose did they come to your house?
A. They said they will come and search for arms and ammunitions.
Q. So did they search your house?
A. They entered, yes.
Q. And did they conduct a search?
A. They entered -- they allowed me to enter. I opened all the doors; they entered.
Q. When being in your house did the Kamajors find anything, like ammunition and weapons?
A. No, sir.
Q. What did they do after the search was concluded?
A. During the search when -- when they searched, they were looking out for ammunition. Whatever valuable they found in my house, they picked there. So whatever they said

they will carry, they took it and carried it away.
Q. Could you please tell the Court what they were carrying away from your belongings?
A. A lot. And during the time of the war we used to pack for any problem. If we had to run away we put our bundles on standby. So we have some boys that carried them, took them, to go away.
Q. And did they take away some bundles you had prepared?
A. They took them away.
Q. And after that they left?
PRESIDING JUDGE: No, after that what happened?
MR SAUTER:
Q. Mr Witness, what happened after they had taken the bundles away?
A. Well, when they came I had my brother who was 25 years old. I told him to report the matter to ECOMOG. He went and reported.
Q. Do you know what was the outcome of this report to ECOMOG?
A. Yes, sir.
Q. Please tell the Court.
A. The soldier whom my brother met, my 25 years old brother, he went to this ECOMOG soldier and told him -- they came over to my house and they met these Kamajors and they stopped them.
JUDGE THOMPSON: Learned counsel, they stopped them from doing what?
MR SAUTER: I'm about to ask.
Q. You said the soldiers came and stopped them. Stopped

them from what?
PRESIDING JUDGE: Which soldiers? ECOMOG soldiers?
MR SAUTER: Yes.
THE WITNESS: Yes, sir.
MR SAUTER:
Q. So, Mr Witness, the ECOMOG soldiers stopped the Kamajors from doing what?
A. They stopped them first when they come -- when they came they asked them, "What are you looking for here?" They said, "We came here to search for arms and ammunition." Then the ECOMOG soldier told them, "Then why are you taking the people's property now? Is this ammunition?"
Q. And what was the reaction of the Kamajors?
A. Well, the Kamajors, other things which the ECOMOG soldiers met in their hands, they dropped them. So the ECOMOG soliders had to force them out from there.
Q. So am I right that only part of your property was looted and the Kamajors were stopped by the ECOMOG soldiers to loot everything; is this right?
A. Yes, sir.
Q. After this, did the Kamajors stay at your house, or went away?
A. No, sir.
Q. What do you mean when you say "No, Sir"?
A. They did not stay. They were forced out there. All of them went away.
Q. Did you have any other encounter with the Kamajors?
A. Yes, sir.
Q. Please tell the Court when this was?

A. When they were forced out by the ECOMOG soldiers and they went away, about two or three hours later another group of Kamajors came back and told me that I was invited to their headquarters.
Q. Did you follow these Kamajors to their headquarters?
A. Yes, sir.
Q. Which headquarter are you speaking of?
A. 88 Mahei Boima Road in Bo.
JUDGE BOUTET: What is the name of the road?
MR SAUTER: Mahei Boima. M-A-I B-O-I-M-A. Mahei Boima.
MR MARGAI: It's M-A-H-E-I. Mahei Boima. B-O-I-M-A
JUDGE BOUTET: Thank you.
MR SAUTER: I'm sorry.
PRESIDING JUDGE: Mr Sauter, it is not your fault.
MR SAUTER: No, I was very keen on getting the right writing but unfortunately I was unsuccessful. I will know that next time I will ask Mr Margai. [Overlapping speakers].
[HN291104E 5.10 p.m.]
MR SAUTER:
Q. Did you go by yourself to the headquarters?
A. Yes, they threatened me and took me there.
Q. What happened when you reached the headquarters?
A. When we arrived there, my small brother, who is 25 years old, and I, as we arrive at the headquarters at 88 Mahei Boima Road.
Q. Mr Witness, let's go a step back. If I've got you right you've just told us that you were accompanied by a brother of yours?
A. Yes, sir, my brother and I, both of us went there.

MR YILLAH: May it please you, My Lords, I don't follow this line of evidence. I don't see a nexus between the first piece and the second one, because he said another group of Kamajors came and invited him to headquarters, he followed them. I don't see any foundation of the boy coming in at that stage. I don't know at what stage.

JUDGE BOUTET: I understood his evidence to say that he went there with his brother. In other words, he is at 88 --

MR YILLAH: The point I'm making, My Lords, is that another group of Kamajors came and invited him.

JUDGE BOUTET: Yes.

MR YILLAH: Him.

JUDGE BOUTET: Him, but he did go with his brother.

MR YILLAH: At that poing no mention was made of his brother.

JUDGE THOMPSON: But let's get the thing in context, Mr Yillah. He virtually said that "they threatened me and took me there." He just didn't go there voluntarily. And, "On arrival my younger brother, who is aged 25" -- then I lost that.

PRESIDING JUDGE: [Microphone not activated].

JUDGE THOMPSON: I see. I got that "they threatened me and took me there." Let's get that clear, because I remember when you put it to him, he virtually did not say he followed them; he emphasised that they threatened him and they took him there. I don't know whether they took him with his brother.

MR SAUTER: It was in fact confusing and I'll try to clarify this point.

Q. Mr Witness, you said you were accompanied by your

20-year-old brother?
JUDGE THOMPSON: 25, he's being very careful about that age.
MR SAUTER: Yes, 25.
THE WITNESS: Okay, let me make it clear. When the other group came and invited me, my younger brother and I, who is 25 years, was there and they asked me if I am the only one that was there. I said no, I'm there with my brother. They said that I was invited at Mahei Boima Road. They said I should walk and go there, so they push me and took me to the place.
MR SAUTER:
Q. What about your brother, was he also invited to come to Mahei Boima Road?
A. That was what I have said. I said my younger brother and I. Both of us, they took us together. He is 25 years old.
PRESIDING JUDGE: We know, we know he's 25 years old. But they took -- pushed you and took you there. You're not mentioning -- how does your brother come in? That's what Mr Yillah is complaining about.
THE WITNESS: The place where they met us, that is at the house, they ask me whom I with in this house. I said, "I am with my brother here, he is 25 years of age." He said, "We're going to take both of you." So they push me and took me to the place. So they told us to walk on foot and they threaten us.
JUDGE THOMPSON: I think it's clear now. It's both of them who were threatened and taken away, and also the emphasise on the 25-year-old younger brother.

PRESIDING JUDGE: They were put on marching orders to move.
Yes, we are now clear. Mr Yillah, is the point taken?
MR YILLAH: Very well, My Lord.
PRESIDING JUDGE: Right, okay.
MR SAUTER:
Q. So, Mr Witness, what happened when you and your brother had reached Mahei Boima Road, the headquarters?
A. When we arrive at the office, they told us to sit on the ground, so we sat on the ground.
Q. And after that?
A. So I saw Moinina Fofana. He stood by us.
Q. Are you saying that you and Moinina Fofana were in the same room?
A. The same room? I do not get you, sir.
Q. You said you were sitting on the ground?
A. They made us sit on the ground -- my younger brother and I. And I saw Moinina Fofana. He came from the verandah and he stood by us. And one of the Kamajors met him and told him that we'll come with them.
Q. How did you know that the person you called Moinina Fofana was, in fact, Moinina Fofana? Did you know him?
A. Well, I knew him for a long time.
Q. Where did you meet him before?
A. Well, I knew Moinina Fofana during the time they were calling -- convening meetings with Hinga Norman at Coronation Field in Bo.
Q. In which year did this happen?
A. I knew him from 1993, 1994, 1994. I was in Bo when they

were calling -- convening several meetings and I attended those meetings.
Q. Please repeat how you called these meetings?
A. Well, Sam Hinga Norman was convening meetings and told us how he brought fighters to fight the war.
Q. And had Moinina Fofana been present at those meetings?
A. Yes, he was present. They introduced him -- Hinga Norman introduced him. He said that he was the Director of War and we applauded him.
Q. So when you met Moinina Fofana in the Kamajor headquarters in Bo, what did he say if he said anything?
A. Well, when he arrived, when he came out, one of his junior Kamajor informed him that Pa, we'll come with him, and he asked, "What type of people are this?"
Q. Did the junior Kamajor answer this question, "what type of people are this?"
A. He answered the question. He said they were Temne people.
JUDGE THOMPSON: Learned counsel, was this in reference to them?
MR SAUTER: Yes.
JUDGE THOMPSON: They were Temne people. Was this in reference to --
MR SAUTER: This is what I understood.
JUDGE THOMPSON: Him and his brother --
MR SAUTER: Moinina Fofana asked the junior Kamajor what kind of people are these, or who are these people? And the junior Kamajor answered, "These are Temne people."
JUDGE THOMPSON: That is to say, in reference to the witness

and his brother?
MR SAUTER: Yes.
JUDGE THOMPSON: All right.
MR SAUTER: This is what I understood.
JUDGE THOMPSON: Yes, I'm just trying to clear it up.
MR SAUTER:
Q. Did Moinina Fofana say or doing anything after he was informed that you were -- or after he was told that you were Temne people?
A. When the junior man told him that, he said now, he did not have any business with the Temne people, because --
Q. Because what, please?
A. He said because they're brother, Foday Sankoh, brought a war in this country, so he did not have any business with a Temne man.
Q. Do you know who he was referring to when he said Foday Sankoh was a Temne man? In other words, do you know who Foday Sankoh was?
A. Foday Sankoh was the former RUF leader.
Q. What happened to your brother and you?
PRESIDING JUDGE: Sorry, Foday Sankoh is from what area? Was, rather, from what area?
THE WITNESS: Foday Sankoh came from Tonkolili District. Foday Sankoh is a Temne, sir.
MR SAUTER:
Q. By the way, are you belonging to the Temne tribe?
A. Yes, sir.
Q. So what happened to your brother and you after that?
A. When he has said this, he went into his office, so the

Kamajor took us and place us in one of the places where they call a cell. It was there that they locked us up.

Q. Did you meet anyone else in this cell?

A. We met four people in that cell.

Q. Did you know these people?

A. I don't know them.

PRESIDING JUDGE: Mr Sauter, we are in the cell where he met four people who he does not know. Do you intend to wrap up that chapter in five minutes or you are entering new grounds which may keep us here beyond 5.30?

MR SAUTER: I will not be able to finish this chapter within five minutes. It will take at least 15 minutes.

PRESIDING JUDGE: Let us remain in the cell where they are.

MR SAUTER: All this chapter deals with is his stay in the cell.

PRESIDING JUDGE: That is all right, we shall remain in the cell where he is. After that, we'll see whether he is released from the cell tomorrow or not.

MR SAUTER: I can tell you right now he is.

PRESIDING JUDGE: My brothers, they will revisit the cell tomorrow to find out if he's released or not. This said, Mr Sauter, we'll continue with your examination-in-chief tomorrow morning at 9.30.

MR SAUTER: Thank you.

PRESIDING JUDGE: Learned counsel, the Court will rise and will resume tomorrow at 9.30.

[Whereupon the hearing adjourned at 5.27 p.m., to be reconvened on Tuesday, the 30th day of November 2004, at 9.30 a.m.]

WITNESSES FOR THE PROSECUTION:

C E R T I F I C A T E

We Roni Kerekes, Ella K Drury and Joanne Mankow, Official Court Reporters for the Special Court for Sierra Leone, do hereby certify that the foregoing proceedings in the above-entitled cause were taken at the time and place as stated; that it was taken in shorthand (machine writer) and thereafter transcribed by computer, that the foregoing pages contain a true and correct transcription of said proceedings to the best of our ability and understanding.

We further certify that we are not of counsel nor related to any of the parties to this cause and that we are in nowise interested in the result of said cause.

Roni Kerekes

Ella K Drury

Joanne Mankow