SCSL-2004-14-T 11231

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(11231 - 11274)

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE APPEALS CHAMBER

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

Registrar: Mr Robin Vincent

Date filed: 12 January 2005

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN
MOINA FOFANA
ALLIEU KONDEWA

CASE NO. SCSL – 2004 – 14 – T

PROSECUTION NOTICE OF APPEAL AGAINST THE TRIAL CHAMBER'S DECISION OF 29 NOVEMBER 2004 AND PROSECUTION SUBMISSIONS ON APPEAL

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NOTICE OF APPEAL

I. DETAILS OF THE APPEALED DECISION

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (the "**Rules**"), and pursuant to paragraph 10 of the Practice Direction for Certain Appeals Before the Special Court dated 30 September 2004 (the "**Practice Direction**"),[1] the Prosecution files this Notice of Appeal against the Trial Chamber's interlocutory *Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment* dated 29 November 2004 (the "**Norman Decision**").[2]

2. The Norman Decision was given by majority. Judge Bankole Thompson appended a separate concurring opinion to that decision ("**Judge Bankole Thompson's**

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[1] Registry Pages ("**RP**") 5944 - 5949.

[2] *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment," 29 November 2004 (RP 10888-10894) ("***Norman Decision***").

Separate Opinion").[3] Judge Itoe, the Presiding Judge, appended a dissenting opinion ("**Judge Itoe's Dissenting Opinion**").[4]

II. DETAILS OF THE DECISION GIVING LEAVE TO APPEAL

3. The Trial Chamber gave leave to the Prosecution to bring this interlocutory appeal against the Norman Decision, pursuant to Rule 73(B), in its *Decision on Prosecution Application for Leave to Appeal "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment"*, dated 15 December 2004 ("**Decision on Leave to Appeal**").[5]

III. SUMMARY OF PROCEEDINGS RELATING TO THE APPEALED DECISION

4. On 7 March 2003, Judge Bankole Thompson approved the indictment against the First Accused ("**Norman**"), charging him with 8 counts of crimes against humanity and war crimes (the "**Original Norman Indictment**"). He was arraigned on 15, 17, and 21 March 2003 and pleaded not guilty to all 8 counts.

5. On 26 June 2003, Judge Bankole Thompson approved separate indictments against the Second Accused ("**Fofana**") and Third Accused ("**Kondewa**") respectively, charging them with the same 8 counts of crimes against humanity and war crimes (the "**Original Fofana Indictment**" and the "**Original Kondewa Indictment**" respectively). The Original Fofana Indictment and the Original Kondewa Indictment were similar to the Original Norman Indictment, except for the inclusion of certain specific additional factual allegations that were not contained in the Original Norman Indictment. Fofana and Kondewa were arraigned on 30 June 2003 and pleaded not guilty to all 8 counts.

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[3] *Prosecutor v. Norman, Fofana and Kondewa,* Case No. SCSL-2004-14-T, "Separate Concurring Opinion of Judge Bankole Thompson on Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment," 8 December 2004 (RP 11 131-11 135) (***"Judge Bankole Thompson's Separate Opinion"***).

[4] *Prosecutor v. Norman, Fofana and Kondewa,* Case No. SCSL-2004-14-T, "Dissenting Opinion of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision Supported by Hon. Judge Bankole Thompson's Separate but Concurring Opinion, on the Motion filed by the First Accused, Samuuel Hinga Norman for Service and Arraignment on the Second Indictment," 13 November 2004 (RP 11 149-11 175) (***"Judge Itoe's Dissenting Opinion"***).

[5] *Prosecutor v. Norman, Fofana and Kondewa,* Case No. SCSL-2004-14-T, 'Decision on Prosecution Application for Leave to Appeal "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment"', dated 15 December 2004 (***"Decision on Leave to Appeal"***).RP 11204-11207.

6. On 7 November 2003, Kondewa filed a motion alleging defects in the form of the Original Kondewa Indictment.[6] In that motion, Kondewa objected, amongst other matters, to the inclusion in the indictment in various places of the expressions "including but not limited to", "about" and "but not limited to these events". According to this motion, these expressions rendered the indictment vague and imprecise, and impeded Kondewa in the conduct of his defence. In its decision on this motion (the "***Kondewa Decision on Form of Indictment***"),[7] the Trial Chamber rejected Kondewa's objection in relation to the expression "about",[8] but upheld Kondewa's objections in relation to the expressions "including but not limited to", and "but not limited to these events".[9] In that Decision, the Trial Chamber ordered the Prosecution ***either*** to delete the phrases "including but not limited to", and "but not limited to these events" wherever they appeared in the indictment against Kondewa, ***or*** to provide a Bill of Particulars setting out specific additional events alleged against Kondewa in each count.[10] Pursuant to this Decision, the Prosecution filed a Bill of Particulars on 5 December 2003[11] that provided additional factual allegations against Kondewa. Kondewa did not challenge this Bill of Particulars.

7. Although the expression "but not limited to" was similarly used in various places in the original Norman Indictment and the Original Fofana Indictment, neither Norman nor Fofana filed any motion objecting to the use of these expressions in the original indictments against them.

8. On 9 October 2003, the Prosecution filed a motion for the joint trial of the three Accused (the "**Prosecution Joinder Motion**").[12] In that motion, the Prosecution further requested that it be permitted to file a Consolidated Indictment. On 27 January 2004, in its *Decision and Order on Prosecution Motions for Joinder* (the

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6 *Prosecutor v. Kondewa*, Case No. SCSL-2003-12-PT, "Preliminary Motion Based on Defects in the Form of the Indictment Against Kondewa", filed on behalf of Kondewa on 7 November 2003 (RP 1121 - 1127).

7 *Prosecutor v. Kondewa,* Case No. SCSL-2004-12-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment," 27 November 2003 (RP 1533-1542) (the "***Kondewa Decision on Form of Indictment***").

8 *Kondewa Decision on Form of Indictment, supra* note 7 at para. 12.

9 *Ibid*, para. 11.

10 *Ibid.*

11 *Prosecutor v. Kondewa*, Case No. SCSL-2003-12-PT, "Bill of Particulars", filed by the Prosecution on 5 December 2003 (RP 1547-1550).

12 *Prosecutor v. Norman,* Case No. SCSL-2003-08-PT*; Prosecutor v. Fofana;* Case No. SCSL-2003-12-PT, *Prosecutorv. Kondewa,* Case No. SCSL-2003-11-PT, "Prosecution Motion for Joinder", filed by the Prosecution on 9 October 2003 (RP 2324-2483) ("***Prosecution Joinder Motion***").

"***Joinder Decision***"),[13] the Trial Chamber ordered a joint trial of the three accused and further ordered that a single consolidated indictment be prepared as the indictment on which the trial would proceed. Based on this Decision, the Prosecution filed the Consolidated Indictment in this case on 5 February 2004. This Consolidated Indictment combined all three of the original indictments into a single indictment. It included all the allegations contained in the Original Norman Indictment, the Original Fofana Indictment, and the Original Kondewa Indictments, as well as the allegations contained in the Bill of Particulars filed by the Prosecution in the *Kondewa* case. The phrase "but not limited to" was removed from the Consolidated Indictment in various places in which that phrase had appeared in the original indictments against each of the Accused. In paragraphs in which that expression had appeared in the original indictments, the Consolidated Indictment specified particular events, locations, times or incidents that had not been specified in the original indictments.

9. The Registry served the Consolidated Indictment on all Defence teams but not personally on each of the Accused. None of the Defence teams objected to the Consolidated Indictment at the time that it was so served.

10. The trial (first session) of the three Accused on the Consolidated Indictment commenced on 3 June 2004. During a period of some three months that followed, the trial proceeded, without any objection to the Consolidated Indictment being taken by any of the Accused. Nor was any issue in relation to the Consolidated Indictment raised by the Trial Chamber of its own motion.

11. Over 3 months after the commencement of the trial, on 21 September 2004, Norman filed a motion raising certain objections to the Consolidated Indictment (the "**Norman Motion**"[14]). A month later, on 21 October 2004, a similar motion objecting to the Consolidated Indictment was filed by Fofana (the "**Fofana Motion**"[15]). About 2 weeks later, on 4 November 2004, a similar motion was filed

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[13] *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2003-08-PT, "Decision and Order on Prosecution Motions for Joinder," (RP 6547-6569) (the "***Joinder Decision***"),

[14] *Prosecutor v. Norman, Fofana and Kondewa*, "Motion for Service and Arraignment on Second Indictment", filed on behalf of Norman on 21 September 2004 (RP 9572-9577) ("***Norman Motion***").

[15] *Prosecutor v. Norman, Fofana and Kondewa* "Moinina Fofana Motion for Service of Consolidated Indictment and a Further Appearance", filed on behalf of Fofana on 21 October 2004 (RP 9807-9810) ("***Fofana Motion***").

by Kondewa (the "**Kondewa Motion**").[16] In three separate decisions (the "**Norman Decision**",[17] the "**Fofana Decision**"[18] and the "**Kondewa Decision**"[19] respectively), the Trial Chamber ruled on each of these three motions.

12. Each of these three Defence motions raised essentially the same two objections in relation to the Consolidated Indictment.

13. The first objection in these Defence motions was that the Consolidated Indictment had not been personally served on each of the Accused, as required by Rule 52 of the Rules, but instead had only been served on counsel for each of the Accused. The Trial Chamber rejected this complaint in the Fofana Motion and the Kondewa Motion. The Trial Chamber found that although failure to serve the Consolidated Indictment on each of the Accused personally did constitute a procedural error, this error did not in all of the circumstances of this case unfairly prejudice the Accused's right to a fair trial, given for instance that they had been personally served with the original indictment, that the Consolidated Indictment had been served on their counsel, that the Accused had not previously objected to the fact that the Consolidated Indictment had not been served personally and had been responding to the charges in the Consolidated Indictment at the trial.[20] In relation to the Norman Motion, the Trial Chamber also observed that similar circumstances pertained in relation to Norman.[21]

14. The second objection in these Defence motions was that the Consolidated Indictment allegedly contained new allegations that had not been included in the original indictments against the Accused. The three Defence motions did not argue that the alleged new charges should be deleted from the indictment or stayed. Rather, the Defence motions merely argued that as the Consolidated Indictment contained additional allegations, the Accused should be arraigned on the

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[16] *Prosecutor v. Norman, Fofana and Kondewa* "Allieu Kondewa Motion for Service of Consolidated Indictment and a Further Appearance", filed on behalf of Kondewa on 4 November 2004 (RP 10531-10533) ("***Kondewa Motion***").

[17] *Norman Decision, supra* note 2.

[18] *Prosecutor v. Norman, Fofana and Kondewa, Decision on the Second Accused's Motion for Service and Arraignment on the Consolidated Indictment*, 6 December 2004 (RP 11068-11082) ("**Fofana Decision**").

[19] *Prosecutor v. Norman, Fofana and Kondewa, Decision on Third Accused Motion for Service of the Consolidated Indictment and Further Appearance*, 8 December 2004 (RP 11090-11099) ("**Kondewa Decision**").

[20] *Fofana Decision, supra* note 18 at paras. 12-15 and 36; *Kondewa Decision, supra* note 19 at paras. 12-17 and 27.

[21] *Norman Decision, supra note* 2 at paras. 10-15, especially para. 14.

Consolidated Indictment, and that it was not sufficient that the Accused had been arraigned on the original indictments.

15. The Trial Chamber rejected this second objection in relation to the Fofana Motion and the Kondewa Motion. In relation to the Fofana Motion, the Trial Chamber noted that the Consolidated Indictment contained references to locations that had not been included in the Original Fofana Indictment. However, the Trial Chamber noted that the Original Fofana Indictment had stated that the offences charged in the indictment were "not limited to" the locations specified in that indictment, that the additional locations in the Consolidated Indictment were in the same regions as the locations referred to in the Original Fofana Indictment, and that the Consolidated Indictment had not extended the timeframe for the commission of the offences with which Fofana was charged. The Trial Chamber concluded that in the case of Fofana, the additions made to the Consolidated Indictment were of no materiality as they simply provided details for greater specificity to the factual allegations included in the Original Fofana Indictment, and did not include new charges or crimes against Fofana. In the circumstances, the Trial Chamber held that there were no requirements in the Rules or in the interests of justice to afford Fofana the opportunity to make a plea on the Consolidated Indictment, and that a further arraignment was therefore unnecessary.[22] In relation to the Kondewa Motion, the Trial Chamber found that the Consolidated Indictment contained no additions or changes when compared to the Original Kondewa Indictment amended with the Bill of Particulars,[23] and that there was accordingly no need for a further arraignment on the Consolidated Indictment.[24]

16. However, in relation to the Norman Motion, the Trial Chamber reached a different conclusion. In the Norman Decision, the Trial Chamber considered that the Consolidated Indictment expanded and elaborated upon some of the factual allegations contained in the Original Norman Indictment, and that some substantive elements of the charges had been added.[25] The Trial Chamber said that:

> "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

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22 *Fofana Decision, supra* note 18 at paras. 32-35.

23 *Kondewa Decision, supra* note 19 at paras. 18-24, especially paras. 23-24.

24 *Ibid*, paras. 25-26.

25 *Norman Decision, supra* note 2 at paras. 16-21, especially para. 20.

> 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 rather are material to the Indictment. While some of the differences between the two Indictments simply provide greater specificity, and provide background facts, many of the changes are, however, material to the Indictment".[26]

The Trial Chamber considered that unfair prejudice may result to Norman if the indictment was not amended and if Norman was not served with the new indictment and arraigned on the material changes to the indictment.[27] The Trial Chamber ordered that identified portions of the Consolidated Indictment were to be stayed, and that the Prosecution was put to its election whether to expunge such portions completely from the record or to seek an amendment to the Consolidated Indictment with respect to those portions.

17. The Prosecution now appeals against the Norman Decision.

IV. THE GROUNDS ON WHICH THE APPEAL IS MADE

18. The Prosecution's first ground of appeal is that the Trial Chamber erred when it found in the Norman Decision that the Consolidated Indictment contained changes from the Original Norman Indictment that were material to the case against Norman.

19. The Prosecution position is that to the extent that the language of the Consolidated Indictment differs from the language of the Original Norman Indictment, these differences in the Consolidated Indictment do no more than spell out with greater precision and specificity the charges against Norman that were contained in the Original Norman Indictment, or are otherwise not material to the charges against Norman. The Prosecution position is that the Consolidated Indictment contains no charge against Norman that was not included within the language of the Original Norman Indictment.

20. The Prosecution's second ground of appeal is that the Trial Chamber erred when it found in the Norman Decision that any additions to the Consolidated Indictment, without any amendments to the Counts against the Accused, could prejudice the

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[26] *Ibid,* para. 30. In his dissenting opinion (at para. 64), Judge Itoe said that "An analysis of the contents of the Consolidated Indictment and those of the Initial Indictment of the Applicant, the First Accused, reveals that the particulars of the offences and the time frames have been expanded and that new offences have been added".

[27] *Norman Decision, supra* note 2, especially para. 32.

Accused's right to a fair trial.[28] The Prosecution position is that if the Consolidated Indictment does contain anything additional in relation to the charges against Norman that was not included in the Original Norman Indictment, any additions were not of such a quality, in the light of the Prosecution case against Norman, which required the Prosecution to seek separately permission to amend the indictment against Norman.

V. THE RELIEF SOUGHT

21. The Prosecution requests the Appeals Chamber to reverse the Norman Decision to the extent that it allowed the Norman Motion, and to hold that the Norman Motion is rejected in its entirety.

VI. OTHER MATTERS

22. Pursuant to paragraph 11 of the Practice Direction, the Prosecution's submissions in relation to this interlocutory appeal are set out below, in paragraphs 24 to 91.

23. Pursuant to paragraph 11 of the Practice Direction, annexed to this Notice of Appeal is an index of the documents believed by the Prosecution to be necessary for the decision in this interlocutory appeal.

PROSECUTION'S SUBMISSIONS ON APPEAL

I. INTRODUCTION

24. The Trial Chamber considered that this interlocutory appeal "raises serious issues that concern the charges against the Accused contained in the Consolidated Indictment and that may impact on the Accused right to a fair trial and the presentation of the Prosecution case".[29] The Trial Chamber also considered that this interlocutory appeal "raises issues of fundamental importance to the Special

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28 *Ibid*, para 30.

29 *Decision on Leave to Appeal*, *supra* note 5 (RP 11206).

Court and to international criminal law generally",[30] and that the law on these issues of fundamental importance are at present "unsettled and in a state of uncertainty".[31]

25. For the reasons given below, the Prosecution submits that the Appeals Chamber should resolve these issues in the manner proposed by the Prosecution, and should allow the present interlocutory appeal.

II. THE ORIGINAL NORMAN INDICTMENT AND THE CONSOLIDATED INDICTMENT COMPARED

26. The Norman Decision is premised on the Trial Chamber's conclusion that the Consolidated Indictment contains material additions to the charges that were contained in the Original Norman Indictment. The parts of the Consolidated Indictment that were held by the Trial Chamber to constitute such material additions are set out in paragraph 38 of the Norman Decision. The Prosecution submits, for the reasons given in paragraphs 27-77 below, that these portions of the Consolidated Indictment do not constitute material additions.

(1) Paragraph 23 of the Consolidated Indictment (see para. 38(a) of the Norman Decision)

27. The first sentence of paragraph 23 of the Consolidated Indictment states:

> "The CDF, largely Kamajors, engaged the combined RUF/AFRC forces in armed conflict in various parts of Sierra Leone - to include Tongo Field, Kenema, Bo, and Koribondo and surrounding areas and the Districts of Moyamba and Bonthe."

28. The corresponding paragraph of the Original Norman Indictment (the first sentence of paragraph 18) stated that:

> "The Kamajors engaged the combined RUF/AFRC forces in armed conflict in various parts of Sierra Leone - to include, but not limited to Tongo Field, Kenema, Bo, and Koribondo and the surrounding areas".

29. The Trial Chamber found in the Norman Decision that the words "and surrounding areas and the Districts of Moyamba and Bonthe" in paragraph 23 of the

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30 *Ibid.*

31 *Ibid.*

Consolidated Indictment constituted a material change to the indictment. The Prosecution submits that this is not the case.

30. The words "and surrounding areas" were already included in the corresponding paragraph of the Original Norman Indictment. The inclusion of these words in the Consolidated Indictment was therefore not an addition at all.

31. Although the words "and the Districts of Moyamba and Bonthe" were not contained in the corresponding paragraph of the Original Norman Indictment, the relevant paragraph of the Original Norman Indictment stated expressly that the places in which the alleged armed conflict occurred *included* but were "not limited to" the places specified in that paragraph. In paragraph 23 of the Consolidated Indictment, the words "but not limited to" have been deleted, and the words "and the Districts of Moyamba and Bonthe" have been added. In other words, paragraph 23 of the Consolidated Indictment (unlike the corresponding paragraph of the Original Norman Indictment) now specifies by name other places in which the armed conflict is alleged to have been engaged in. This paragraph of the Consolidated Indictment states what was previously included within more general language in the Original Norman Indictment. It does not add something new that was not included at all in the Original Norman Indictment.

(2) Paragraph 24 of the Consolidated Indictment—opening words (see para. 38(b) of the Trial Chamber Decision)

32. The first sentence of paragraph 24 of the Consolidated Indictment states:

> "These actions by the CDF, largely Kamajors, which also included looting, destruction of private property, personal injury and the extorting of money from civilians, were intended to threaten and terrorize the civilian population".

33. The corresponding paragraph of the Original Norman Indictment (the first sentence of paragraph 19) stated that:

> "These actions by the Kamajors, which also included looting and destruction of private property, were intended to threaten and terrorize the civilian population".

34. The Trial Chamber found in the Norman Decision that the words "personal injury and the extorting of money from civilians" in paragraph 24 of the Consolidated

Indictment constituted a material change to the indictment. The Prosecution submits that this is not the case.

35. The words "personal injury" appear in the opening part of paragraph 24 of the Consolidated Indictment. Although these words did not appear in the opening words of the corresponding paragraph of the Original Norman Indictment (paragraph 19), they are clearly not a material addition. This paragraph of the Consolidated Indictment goes on to specify (as did paragraph 19 of the Original Norman Indictment) a number of specific examples of actions of the CDF. Sub-paragraphs (a), (b) and (c) of paragraph 19 of the Original Norman Indictment referred to various instances in which the CDF "inflicted serious bodily harm and serious physical suffering on an unknown number of civilians and [captured] enemy combatants". (Sub-paragraphs (a), (b) and (c) of paragraph 24 of the Consolidated Indictment continues to refer to these instances). In other words, paragraph 19 of the Original Norman Indictment expressly alleged that the Kamajors unlawfully inflicted personal injuries on certain persons. The inclusion of the words "personal injury" in the opening words of paragraph 24 of the Consolidated Indictment therefore adds nothing of substance. It is merely an editorial amendment, to make the opening sentence more accurately correspond with the substance of what follows.

36. For the same reason, the words "extorting of money from civilians" in the opening words of paragraph 24 of the Consolidated Indictment is not a material addition. The corresponding paragraph of the Original Norman Indictment (paragraph 19) contained references to the CDF "looting" private property.[32] The expression "private property" is an expression that can encompass also money. The expression "looting" is apt to include not only situations in which private property is unlawfully taken while the owner is not present, but also situations where a perpetrator uses force or threats to require the owner of property to part with possession of it. Extortion of money from civilians is therefore a particular form or example of looting of private property. The words "extorting of money from civilians" is thus not a new allegation in the Consolidated Indictment, but a more specific description of one type of looting, which was already alleged in the Original Norman Indictment.

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[32] This reference is contained in the opening words of paragraph 19 of the Original Norman Indictment. A further reference to looting is contained in the opening words of paragraph 19 of the Original Norman Indictment, and another in paragraph 19(c).

(3) Paragraph 24(b) of the Consolidated Indictment (see para. 38(b) of the Trial Chamber Decision)

37. Paragraph 24(b) of the Consolidated Indictment states that:

> "On or about 15 February 1998 Kamajors attacked and took control of Kenema" (emphasis added).

38. The corresponding paragraph of the Original Norman Indictment (paragraph 19 b)) stated that:

> "On or about 15 February 1998 Kamajors attacked and occupied Kenema" (emphasis added).

39. The Trial Chamber found in the Norman Decision that the use of the expression "took control of" in the Consolidated Indictment (as opposed to the expression "occupied" in the Original Norman Indictment) constitutes a material change to the indictment. The Prosecution submits that this is not the case.

40. In the context of the Indictment as a whole, there is no material or significant difference between an armed force "occupying" a town or "taking control of" a town. Even if there were arguably some semantic difference between the Kamajors "occupying" Kenema and the Kamajors "taking control of" Kenema, it is submitted that any such distinction is not material or significant to the charges specified in the Indictment. This particular change in the wording of the Consolidated Indictment does not constitute the addition of any new charge or new criminal liability, but merely a change in the way that the existing charge was expressed. At most it is a clarification of a background fact.

(4) Paragraph 24(c) of the Consolidated Indictment (see para. 38(b) of the Trial Chamber Decision)

41. Paragraph 24(c) of the Consolidated Indictment states that:

> "In or about January and February 1998, the Kamajors attacked and took control of Bo, Koribondo, and the surrounding areas" (emphasis added).

42. Paragraph 19(c) of the Original Norman Indictment stated that:

> "In or about January and February 1998, the Kamajors attacked Bo, Koribondo, and the surrounding areas".

43. The Trial Chamber found in the Norman Decision that the use of the expression "took control of" in this part of the Consolidated Indictment, in circumstances where it had not been included in the corresponding passage of the Original Norman Indictment, constitutes a material change to the indictment. The Prosecution submits that this is not the case. The Prosecution submits that it is immaterial to the alleged crimes to which these words relate whether or not the Kamajors took control of the areas in question after attacking them. What is material is that the crimes were committed during or following an attack on the areas in question, regardless of whether or not the Kamajors took or retained control of all of these areas after the attacks. To state in the Consolidated Indictment that the Kamajors took control of these areas is thus merely to state general facts in greater detail, and does not constitute the addition of a new fact that is material to the indictment.

44. Paragraph 24(c) of the Consolidated Indictment states that:

> "Kamajors unlawfully destroyed and looted an unknown number of civilian owned and occupied houses, buildings and businesses" (emphasis added).

45. Paragraph 19(c) of the Original Norman Indictment stated that:

> "Kamajors destroyed and looted an unknown number of civilian owned and occupied houses, buildings and businesses".

46. The Trial Chamber found in the Norman Decision that the use of the expression "unlawfully" in this part of the Consolidated Indictment, in circumstances where it had not been included in the corresponding passage of the Original Norman Indictment, constitutes a material change to the indictment. The Prosecution submits that this is not the case. It is manifest from its context that this sentence in the Original Norman Indictment is referring to conduct that the Prosecution alleges to have been unlawful. To add the word "unlawfully" to the corresponding sentence of the Consolidated Indictment is merely to state expressly what was necessarily implicit in the Original Norman Indictment, and does not constitute the addition of a new fact that is material to the indictment.

(5) Paragraph 24(d) and (e) of the Consolidated Indictment (see para. 38(b) of the Trial Chamber Decision)

47. Paragraph 24 of the Consolidated Indictment contains two sub-paragraphs (sub-paragraphs (d) and (e) of paragraph 24) that were not included in the corresponding paragraph (paragraph 19) of the Original Norman Indictment. The Trial Chamber found in the Norman Decision that the inclusion of these two new sub-paragraphs constitutes a material change to the indictment. The Prosecution submits that this is not the case.

48. Sub-paragraphs (d) and (e) of paragraph 24 of the Consolidated Indictment add nothing to the substance of the wording of the Original Norman Indictment, but merely state relevant allegations with greater precision. Paragraph 18 of the Original Norman Indictment stated that:

> "The Kamajors engaged the combined RUF/AFRC forces in armed conflict in various parts of Sierra Leone - to include, but not limited to Tongo Field, Kenema, Bo, and Koribondo and the surrounding areas. Civilians, including women and children, who were suspected to have supported, sympathized with, or simply failed to actively resist the combined RUF/AFRC forces were termed "**Collaborators**" and specifically targeted by the Kamajors. Once so identified, these "**Collaborators**" and any captured enemy combatants were unlawfully killed. Victims were often shot, hacked to death, or burnt to death. Other practices included human sacrifices and cannibalism".

49. In the Consolidated Indictment, this allegation relating to collaborators is made more precise in a number of ways. First, the paragraph of the Consolidated Indictment that corresponds to this paragraph (paragraph 23) has been made more precise in the way referred to in paragraphs 27-31 above. Secondly, the additional sub-paragraphs (d) and (e) of paragraph 24 of the Consolidated Indictment spell out in more precise detail illegal conduct taken in respect of perceived "Collaborators". Paragraph 24(d) and (e) thus merely contains more specific details of some of the alleged conduct falling within the general language of paragraph 18 of the Original Norman Indictment. These new sub-paragraphs do not contain new facts constituting an additional charge.

(6) Paragraph 25 of the Consolidated Indictment (see para. 38(c) of the Trial Chamber Decision)

50. Paragraph 25 of the Consolidated Indictment contains two additional subparagraphs setting out details of instances of unlawful killings (paragraph 25(e) and (f)), that

were not included in paragraph 20 of the Original Norman Indictment. Additionally, in one of the subparagraphs of paragraph 25 of the Consolidated Indictment that was in the Original Norman Indictment, the timeframe has been expanded.[33]

51. The corresponding paragraph (paragraph 20) of the Original Norman Indictment stated that "Unlawful killings included, but were not limited to, the following" (emphasis added). There then followed five subparagraphs setting out details of instances of unlawful killings.

52. The Trial Chamber found in the Norman Decision that the inclusion of these two new subparagraphs, in the Consolidated Indictment, and the extension of the timeframe in one of the existing subparagraphs, constitutes a material change to the indictment. The Prosecution submits that this is not the case.

53. The opening sentence of paragraph 20 of the Original Norman Indictment stated clearly that "Unlawful killings included, but were not limited to, the following" (emphasis added). In the corresponding paragraph 25 of the Consolidated Indictment, the phrase "but were not limited to" has been deleted from the opening words, and the two new sub-paragraphs have been added, and the timeframe of one of the existing subparagraphs has been extended. In other words, paragraph 25 of the Consolidated Indictment (unlike the corresponding paragraph of the Original Norman Indictment) now specifies other instances of unlawful killings that were previously unspecified, but included within the general wording "not limited to". The new language of paragraph 25 of the Consolidated Indictment thus states specifically what was previously included within more general language in the Original Norman Indictment. It does not add something new that was not included at all in the Original Norman Indictment.

54. Paragraph 20(e) of the Original Norman Indictment stated that:

> "20. Unlawful killings included, but were not limited to, the following:
>
> ...
>
> e. between about 1 November 1997 and about 1 February 1998, as part of Operation Black December in the southern and eastern Provinces of Sierra Leone, an unknown number of civilians and captured enemy combatants".

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[33] Paragraph 25(a) of the Consolidated Indictment refers to unlawful killings "between about 1 November 1997 and about 30 April 1998" when the corresponding paragraph 20(a) of the Original Norman Indictment referred to unlawful killings "between about 1 November 1997 and about 1 February 1998".

55. The corresponding paragraph of the Consolidated Indictment (paragraph 25 (g)) states that:

> "between about 1 November 1997 and about 1 February 1998, as part of Operation Black December in the southern and eastern Provinces of Sierra Leone, the CDF unlawfully killed an unknown number of civilians and captured enemy combatants in road ambushes at Gumahun, Gerihun, Jembeh and the Bo-Matotoka Highway" (emphasis added).

56. The Trial Chamber found in the Norman Decision that the addition of the underlined words in the above quote in this part of the Consolidated Indictment constitutes a material change to the indictment. The Prosecution submits that this is not the case. The underlined words in the above quote from the Consolidated Indictment do not add any additional charges, but merely state with greater precision what was already alleged in the corresponding paragraph of the Original Norman Indictment. The words "at Gumahun, Gerihun, Jembeh and the Bo-Matotoka Highway" are clearly more precise than the words "in the southern and eastern Provinces of Sierra Leone", which were contained in the Original Norman Indictment. Although the relevant subparagraph of the Original Norman Indictment did not include the words "the CDF unlawfully killed", it is clear from the context and the title appearing above paragraph 20 of the Original Norman Indictment that this sub-paragraph contained details of unlawful killings. These words therefore merely state what was already necessarily implicit in the Original Norman Indictment.

(7) Paragraph 26 of the Consolidated Indictment (see para. 38(d) of the Trial Chamber Decision)

57. In paragraph 26 of the Consolidated Indictment, references have been added in the two subparagraphs to certain additional locations, and the alleged timeframes have been expanded. The Trial Chamber found in the Norman Decision that the inclusion of these new locations, and the extension of the timeframes, constitutes a material change to the indictment.

58. The corresponding paragraph of the Original Norman Indictment stated that "Acts of physical violence and infliction of mental harm or suffering included, but were not limited to, the following" (emphasis added). There then followed two

subparagraphs setting out details of instances of acts of physical violence and infliction of mental harm or suffering.

59. The Prosecution submits that this is not the case, for the same reasons given in paragraphs 51-52 above. Paragraph 26 of the Consolidated Indictment is now more specific that paragraph 21 of the Original Norman Indictment, in that it no longer includes the words "but not limited to", but instead specifies in greater detail the particular acts of physical violence and infliction of mental harm or suffering alleged. The additional locations and timeframes in this paragraph of the Consolidated Indictment clearly fall within the generality of the wording of the corresponding paragraph of the Original Norman Indictment. The wording of this paragraph of the Consolidated Indictment thus adds nothing that was not already included within the general language of the Original Norman Indictment, but merely states the allegations with greater specificity.

Paragraph 26(b) of the Consolidated Indictment, refers to actions of the CDF:

> "including screening for "**Collaborators**", unlawfully killing of suspected "**Collaborators**", ... illegal arrest and unlawful imprisonment of "**Collaborators**"" (emphasis added).

60. The corresponding paragraph of the Original Norman Indictment (paragraph 21 (b)) referred to actions of the Kamajors:

> "including, but not limited to, screening for "**Collaborators**," unlawfully killing of suspected "**Collaborators**," ...".

61. The Trial Chamber found in the Norman Decision that the inclusion of the words "illegal arrest and unlawful imprisonment of "**Collaborators**"" in this sub-paragraph of the Consolidated Indictment constitutes a material change to the indictment. The Prosecution submits that this is not the case, again for the same reasons given in paragraphs 51-52 above. Paragraph 26(b) of the Consolidated Indictment is now more specific than paragraph 21(b) of the Original Norman Indictment, in that it no longer includes the words "but not limited to", but instead specifies in greater detail the particular additional acts alleged.

(8) Paragraph 27 of the Consolidated Indictment (see para. 38(e) of the Trial Chamber Decision)

62. Paragraph 27 of the Consolidated Indictment, states that:

> "Looting and burning included, between about 1 November 1997 and about 1 April 1998, at various locations including Bo District, the towns of Bo, Koribondo, and the surrounding areas, in Moyamba district, the towns of Sembehun, Gbangbatoke and the surrounding areas, and in Bonthe District, the towns of Talia (Base Zero), Bonthe Town, Mobayeh, and surrounding areas, the unlawful taking and destruction by burning of civilian owned property".

63. The corresponding paragraph of the Original Norman Indictment (paragraph 22) stated that:

> "Looting and burning included, but were not limited to, between about 1 November 1997 and about 1 April 1998, at various locations to include Bo, Koribondo and the surrounding areas, the unlawful taking and destruction by burning of private property" (emphasis added).

64. The Trial Chamber found in the Norman Decision that the inclusion of these new locations in this part of the Consolidated Indictment constitutes a material change to the indictment. The Prosecution submits that this is not the case, for similar reasons to those given above in relation to other paragraphs of the Consolidated Indictment. The words "but not limited to", which were contained in the corresponding paragraph of the Original Norman Indictment, have been omitted from the Consolidated Indictment. Instead, a number of additional specific locations have been expressly identified in this paragraph of the Consolidated Indictment. The additional locations and timeframes in this paragraph of the Consolidated Indictment clearly fall within the generality of the wording of the corresponding paragraph of the Original Norman Indictment. The wording of this paragraph of the Consolidated Indictment thus adds nothing that was not already included within the generality of the language of the Original Norman Indictment, but merely states the allegations with greater specificity.

65. The Trial Chamber also noted in the Norman Decision that paragraph 27 of the Consolidated Indictment refers to "civilian owned property", in contrast to the corresponding paragraph 22 of the Original Norman Indictment, which referred instead to "private property". The Trial Chamber in the Norman Decision suggests that this variation in wording also constitutes a material change to the indictment. The Prosecution submits that this is not the case, for similar reasons to those given in paragraphs 40 and 43 above. Even if there were arguably some semantic difference between "civilian owned property" and "private property", it is submitted that any such distinction is not material to the charges specified in the Indictment. This

particular change in the wording of the Consolidated Indictment does not constitute the addition of any new charge, but merely a change in the way that the existing charge was expressed.

(9) Paragraph 29 of the Consolidated Indictment (see para. 38(f) of the Trial Chamber Decision)

66. Paragraph 29 of the Consolidated Indictment, states that:

> "At all time relevant to this Indictment, The Civil Defense Forces did, throughout the Republic of Sierra Leone, initiate or enlist children under the age of 15 years into armed forces or groups, and in addition, or in the alternative, use them to participate actively in hostilities" (emphasis added).

67. The corresponding paragraph of the Original Norman Indictment stated that:

> "At all time relevant to this Indictment, The Civil Defense Forces did, in the Republic of Sierra Leone, conscript or enlist children under the age of 15 years into armed forces or groups, and in addition, or in the alternative, use them to participate actively in hostilities" (emphasis added).

68. The Trial Chamber noted in the Norman Decision that this variation in wording in paragraph 29 of the Consolidated Indictment to "initiate or enlist", in contrast to the corresponding paragraph of the Original Norman Indictment, which used the expression "conscript or enlist", constitutes a material change to the indictment.

69. The Prosecution submits that this is not the case. Indeed, the Prosecution submits that the contrary is the case, and that the wording of paragraph 29 of the Consolidated Indictment is in fact narrower than the corresponding paragraph of the Original Norman Indictment. This is evident from the wording of Count 8 itself. Count 8 in the Original Norman Indictment was worded as follows:

> "**Count 8**: Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities ..." (emphasis added).

70. In contrast, Count 8 in the Consolidated Indictment is worded as follows:

> "**Count 8**: Enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities ..." (emphasis added).

71. In other words, Count 8 no longer includes a charge of "conscripting or enlisting" child soldiers, but only a charge of "enlisting" child soldiers. This is clearly a narrower charge than that contained in Count 8 of the Original Norman Indictment. The amendment to the wording of paragraph 29 of the Consolidated Indictment reflects this narrowing of the charge in Count 8.

(10) General references to "CDF, largely Kamajors" (see para. 38(g) of the Trial Chamber Decision)

72. The Original Norman Indictment contained various references to actions taken by "Kamajors". In the corresponding paragraphs of the Consolidated Indictment, various of these references have been reworded as "the CDF, largely Kamajors". The Trial Chamber considered in the Norman Decision that this variation in wording constitutes a material change to the indictment.

73. The Prosecution submits that this change in wording does not constitute a new charge against the Accused, nor does it broaden the scope of any charge against the Accused that was contained in the previous Norman Indictment.

74. Paragraph 5 of the Original Norman Indictment alleged, and paragraph 6 of the Consolidated Indictment continues to allege, that the Kamajors were the predominant group within the CDF, but that there were also other groups within the CDF playing a less dominant role.

75. It is therefore conceded that the expression "Kamajors" has a slightly different meaning to the expression "the CDF, largely Kamajors". The former expression indicates that all of the person referred to were Kamajors. The latter expression indicates that some of the persons referred to were not Kamajors, but were nonetheless members of the CDF.

76. However, the difference between the two is not material to the alleged criminal liability of the Accused. Paragraph 12 of the Original Norman Indictment alleged that Norman was the National Coordinator of the CDF, and that as such he was the principal force in establishing, organizing, supporting, providing logistical support, and promoting the CDF. Paragraph 15 of the Original Norman Indictment alleged that members of the CDF were subordinate to Norman, and paragraph 14 alleged that Norman was individually responsible pursuant to Article 6.3 of the Statute for acts of his subordinates. The Original Norman Indictment thus contained the allegation that

Norman was criminally responsible (either pursuant to Article 6.1 or Article 6.3 of the Statute) for acts of subordinate members of the CDF, and not merely for the acts of those members of the CDF who happened to be Kamajors. The same allegation is made in the Consolidated Indictment (see paragraphs 13, 14, 17 and 18). Indeed, paragraph 24 of the Original Norman Indictment (Count 8) expressly alleged that Norman was criminally liable for certain conduct of the CDF, without specifying whether the relevant members of the CDF engaging in the conduct were Kamajors or not.

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

(11) Conclusion

78. For the reasons given above, the Prosecution submits that none of the differences in language between the Original Norman Indictment and the Consolidated Indictment referred to in paragraph 38 of the Norman Decision constitute new or additional charges, or new factual allegations in support of any of the counts in the indictment. Rather the differences in language identified by the Trial Chamber are either the result of factual allegations in the Consolidated Indictment being expressed with greater precision or particularity than in the Original Norman Indictment, or the consequence of the narrowing of a charge against the Accused (see paragraphs 65-70 above) or, in one instance, a correction to a particular (see paragraphs 71-76 above),

or were otherwise mere stylistic, editorial or other changes that were not material to the charges against the Accused (see for instance paragraphs 35, 39-40, 43 and 45-46 above). The changes did not lead to the raising of new charges against the Accused. The number of charges facing the Accused remain unaltered. Nor did the changes add "new substantive elements of the charges" – that is, the elements of the respective offences have not changed, nor have the number of charges. However, changes in language in the Consolidated Indictment have resulted in additional particulars being provided to the Accused.

II. THE PERMISSIBILITY OF THE AMENDMENTS TO THE WORDING IN THE CONSOLIDATED INDICTMENT

79. In the present case, there were originally three separate indictments against each of the three Accused respectively. As is the normal practice in other international criminal tribunals where the Trial Chamber orders the joint trial of persons who have been separately indicted pursuant to Rule 48 of the Rules, the Trial Chamber in this case ordered in the *Joinder Decision* that there should be a single consolidated indictment on which the joint trial would proceed.

80. In cases where the Prosecution seeks the joint trial of accused who have been indicted separately, it has been the practice in some cases before other international criminal tribunals for the Prosecution to annex a draft consolidated indictment to the motion for joinder, for the approval of the Trial Chamber in the event that it grants the motion. However, nothing in the Rules requires this procedure to be followed. In this case, the Trial Chamber expressly considered (correctly, it is submitted) that it was not necessary for the Prosecution to exhibit an anticipated consolidated indictment as a condition precedent to establish a basis for joinder.[34] Instead, in the *Joinder Decision* in this case the Trial Chamber ordered that the three accused be tried jointly, and ordered the Prosecution subsequently to prepare and file a Consolidated Indictment within a specified time-limit.[35]

81. The Prosecution submits that the consolidation of three separate indictments into one single consolidated indictment can never be a purely mechanical exercise. If two people were independently to undertake such a consolidation exercise, it would be

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34 *Joinder Decision*, *supra* note 13 at para. 11.

35 See the operative part of the *Joinder Decision*, *ibid.*

most surprising if they were both to produce an absolutely identically worded consolidated indictment. The preparation of a consolidated indictment requires a degree of professional skill and judgment, and it was therefore necessarily inherent in the order made by the Trial Chamber in the *Joinder Decision* that the Prosecution had a certain discretion in the form of wording of the Consolidated Indictment.

82. It is conceded that this was a limited discretion, and that the Trial Chamber in the *Joinder Decision* did not grant to the Prosecution permission to make amendments of substance to the separate indictments. It is also conceded by the Prosecution that if the Prosecution exceeded its discretion in the preparation of the Consolidated Indictment, it would have been open to the Trial Chamber, of its own motion, to intervene. Thus, in its pleadings in relation to its Joinder Motion, the Prosecution indicated that if there were any concerns about possible amendment or inconsistencies between the three original indictments and the Consolidated Indictment, the Prosecution would abide by any order of the Chamber.[36] The Prosecution also concedes that if it exceeded its discretion in the preparation of the Consolidated Indictment, it would be open to the Defence to file motions challenging the form of the Consolidated Indictment. That is in fact what each of the three Accused in this case did, but only some months after the commencement of the trial in this case. The Trial Chamber rejected the motions of Fofana and Kondewa. The question in this appeal is whether it should also have rejected the motion of Norman.

83. The Norman Decision (like the Fofana Decision and the Kondewa Decision) deals at some length with the general principles concerning the requirements of an indictment. However, with respect to the Trial Chamber, those general principles were not relevant to the determination of the Norman Motion. For the reasons given in paragraphs 24-77 above, the language of the Consolidated Indictment is less general, and more specific, than the Original Norman Indictment. Thus, the Consolidated Indictment gives better effect to the general principles governing the form of an indictment than did the Original Norman Indictment. The issue in this case is not whether the Consolidated Indictment is consistent with general principles relating to the form of an indictment. Rather, the question is whether the Prosecution was entitled in the circumstances of the present case to make the relevant amendments to the wording of the original indictments in the course of consolidating them into a single indictment.

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36 *Ibid*, para. 10.

84. The Prosecution submits that in all of the circumstances of this case, it was entitled to make these amendments to the wording of the indictment. The contrary conclusion of the Trial Chamber in the Norman Decision was premised on the Trial Chamber's view that the amendments in question to the language of the Consolidated Indictment constituted material changes to the indictment. For the reasons given in paragraphs 24-77 above, that view of the Trial Chamber was, with respect, incorrect.

85. The Prosecution submits that the amendments to the language of the Consolidated Indictment were justified, in view of the following circumstances. The Original Norman Indictment (like the Original Fofana Indictment and the Original Kondewa Indictment) included in certain places the expression "not limited to". In the *Kondewa Decision on Form of Indictment*, the Trial Chamber ruled that the inclusion of this expression in the Original Kondewa Indictment was inappropriately vague (see paragraph 6 above). It followed from this decision that it would have been inappropriately vague to have included the very same language in the Consolidated Indictment, in so far as it related to Kondewa. If the same language had been included in the Consolidated Indictment, it would have become necessary to serve an additional Bill of Particulars on Kondewa in relation to the Consolidated Indictment, since the Bill of Particulars filed by the Prosecution in the Kondewa case related to the Original Kondewa Indictment and not to the Consolidated Indictment. This would have been artificial and created an unnecessary amount of documentation in the case. It was obviously justifiable, and indeed highly desirable, for the information contained in the Bill of Particulars in relation to the Kondewa case to be included in the Consolidated Indictment, thereby correcting the deficiency which the Trial Chamber had found to exist in the Original Kondewa Indictment, and at the same time obviating the need for a separate Bill of Particulars.

86. Although the *Kondewa Decision on Form of Indictment* technically related to the Original Kondewa Indictment only, its reasoning was equally applicable in principle to the Original Norman Indictment and the Original Fofana Indictment. Furthermore, in a Consolidated Indictment, it was not possible to change the language of the Original Kondewa Indictment, while leaving intact the wording of the Original Norman Indictment and the Original Fofana Indictment. This is because the Consolidated Indictment contains text which applies simultaneously to all three Accused. In preparing the Consolidated Indictment, it was therefore necessary to use forms of wording which avoided the deficiency identified by the Trial Chamber in the *Kondewa Decision on Form of Indictment*, and which would provide the necessary

degree of particularity and specificity in relation to all three of the Accused. This is what the Consolidated Indictment does, in relation to Norman as much as in relation to Fofana and Kondewa. **Ultimately, the practical effect of the Consolidated Indictment is the same as if the Prosecution had provided a Bill of Particulars to Norman and to Fofana in addition to the Bill of Particular provided to Kondewa, notwithstanding that Norman and Fofana, unlike Kondewa, never challenged the form of their original indictments.** The greater degree of particularity and specificity in the Consolidated Indictment is to Norman's benefit, rather than to his prejudice.

87. In its pleadings in relation to its Joinder Motion, the Prosecution stated that the Consolidated Indictment would not involve any change in the substance of the three original indictments.[37] For the reasons given above, that is the case. **To the extent that the wording of the Consolidated Indictment differs from the wording of the original indictments, the changes have generally been made to provide greater particularity, and not to change the substance.** Other changes in the wording have either been immaterial to the charges against the Accused, or have reflected a narrowing in the scope of a charge against the Accused (see paragraph 77 above).

88. The Trial Chamber accordingly erred in finding that the Consolidated Indictment contains material changes to the indictment.

III. ABSENCE OF DEMONSTRATED PREJUDICE TO THE ACCUSED

89. The Prosecution submits, as an additional ground of appeal, that the Trial Chamber erred when it considered that additions to the Consolidated Indictment, without any amendments to the Counts against the Accused, could prejudice the Accused's right to a fair trial.[38]

90. None of the Accused filed any objection to the Consolidated Indictment at the time that it was served on their Defence counsel. Indeed, all three Accused continued to participate in the trial on the Consolidated Indictment for over three months after the commencement of that trial.[39] As the Trial Chamber noted in the Norman Decision, Norman "responded to the charges against him" (as laid out in the Consolidated Indictment) in his Pre-Trial Brief filed on 31 May 2004, and has defended the charges

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37 *Ibid*, para. 10.
38 *Norman Decision, supra* note 2 at para 30.
39 See paragraph 11 above.

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against him in the first and second session of the CDF trial.[40] This delay is raising this issue is indicative of the absence of prejudice. Indeed, the Prosecution submits that the Statute and Rules impose on counsel for the parties a requirement to exercise due diligence,[41] and where a party is not diligent in raising an objection, this in itself may be a reason for denying any relief in relation to that objection.[42]

91. In any event, it is submitted that there has been no demonstrated prejudice to the Accused, nor has any particular potential prejudice been identified. There has been no suggestion, for instance, that the amendments might prejudice the right of the Accused to be tried without undue delay, or that the Prosecution has sought some improper tactical advantage by making the amendments, or that the amendments otherwise in any way unfairly prejudice the Accused in the preparation of their defence.[43] The Prosecution submits that it has not been demonstrated how it can be to the prejudice of the Accused to be informed at an earlier stage of additional particulars of the Prosecution case against the Accused.

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40 *Norman Decision, supra* note 2 at para. 14.

41 *Prosecutor v. Tadic,* Case No. IT-94-1-A, Appeals Chamber, "Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence," 15 October 1998, paras. 44, 38, 47-48.

42 The Prosecution submits that it is a general principle that where an objection is made before a Chamber, relief may be denied if it is not raised in a timely manner. See, e.g., *Prosecutor v. Kayishema and Ruzindana,* "Judgement," Case No. ICTR-95-1-T, T. Ch. II, 21 May 1999, para. 64. Defence counsel in this case suggested in closing argument before the Trial Chamber that the time granted to the Defence to prepare the closing argument had been inequitable. The Trial Chamber said in its judgement (at para. 64) that "were any particular issues of dispute or dissatisfaction to have arisen, the Trial Chamber should have been seized of these concerns in the appropriate manner and at the appropriate time. A cursory reference in the closing brief, and a desultory allusion in Counsel's closing remarks is not an acceptable mode of raising the issue before the Chamber."

43 Compare *Prosecutor v. Ljubicic,* Case No. IT-00-41-PT, ICTY Trial Chamber "Decision on Motion for Leave to Amend the Indictment," 2 August 2002, p. 2.

CONCLUSION

92. For the reasons given above, the Prosecution requests the Appeals Chamber to reverse the Norman Decision to the extent that it allowed the Norman Motion, and to hold that the Norman Motion is rejected in its entirety.

Freetown, 12 January 2005.

For the Prosecution,

Desmond de Silva, QC

Luc Côté

James C. Johnson

Christopher Staker

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ANNEX I

INDEX OF DOCUMENTS BELIEVED BY THE PROSECUTION TO BE NECESSARY FOR THE DECISION IN THIS INTERLOCUTORY APPEAL

1. *Prosecutor v. Norman*, Case No. SCSL-2003-08-I-001, "Indictment," filed by the Prosecution on 7 March 2003 (RP 4 - 12).

2. *Prosecutor v. Kondewa*, Case No. SCSL-2003-12-I, "Indictment," filed by the Prosecution on 24 June 2003 (RP 545 – 554).

3. *Prosecutor v. Fofana*, Case No. SCSL-2003-11 – I, "Indictment," filed by the Prosecution on 24 June 2003 (RP 547-556).

4. *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, "Indictment," filed by the Prosecution 5 February 2004 (RP 11 – 21).

5. *Prosecutor v. Kondewa*, Case No. SCSL-2003-12-PT, "Preliminary Motion Based on Defects in the Form of the Indictment Against Kondewa", filed on behalf of Kondewa on 7 November 2003 (RP 1121).

6. *Prosecutor v. Kondewa,* Case No. SCSL-2004-12-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment," 27 November 2003 (RP 1533-1542).

7. *Prosecutor v. Kondewa*, Case No. SCSL-2003-12-PT, "Bill of Particulars", filed by the Prosecution on 5 December 2003 (RP 1547 - 1550).

8. *Prosecutor v. Norman, Fofana and Kondewa,* Case No. SCSL-2003-08-PT, "Decision and Order on Prosecution Motions for Joinder," 27 January 2004 (RP 6547-6569).

9. *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, "Motion for Service and Arraignment on Second Indictment", filed on behalf of Norman on 21 September 2004 (RP 9572-9577).

10. *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, "Moinina Fofana Motion for Service of Consolidated Indictment and a Further Appearance," filed on behalf of Fofana on 21 October 2004 (RP 9807-9810).

11. *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, "Allieu Kondewa Motion for Service of Consolidated Indictment and a Further Appearance," filed on behalf of Kondewa on 4 November 2004 (RP 10531-10533).

12. *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment," 29 November 2004 (RP 10888-10894).

13. *Prosecutor v. Norman, Fofana and Kondewa,* Case No. SCSL-2004-14-T, "Decision on the Second Accused's Motion for Service and Arraignment on the Consolidated Indictment," 6 December 2004 (RP 11068-11082).

14. *Prosecutor v. Norman, Fofana and Kondewa,* Case No. SCSL-2004-14-T, "Separate Concurring Opinion of Judge Bankole Thompson on Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment," 8 December 2004 (RP 11 131-11 135).

15. *Prosecutor v. Norman, Fofana and Kondewa,* Case No. SCSL-2004-14-T, "Decision on Third Accused Motion for Service of the Consolidated Indictment and Further Appearance," 8 December 2004 (RP 11090-11099).

16. *Prosecutor v. Norman, Fofana and Kondewa,* Case No. SCSL-2004-14-T, "Dissenting Opinion of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision Supported by Hon. Judge Bankole Thompson's Separate but Concurring Opinion, on the Motion filed by the First Accused, Samuuel Hinga Norman for Service and Arraignment on the Second Indictment," 13 December 2004 (RP 11 149-11 175).

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17. *Prosecutor v. Norman, Fofana and Kondewa,* Case No. SCSL-2004-14-T, Decision on Prosecution Application for Leave to Appeal "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment"', 15 December 2004 (RP 11204-11207).

18. *Prosecutor v. Tadic,* Case No. IT-94-1-A, ICTY Appeals Chamber, "Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence,"15 October 1998. [http://www.un.org/icty/tadic/appeal/decision-e/81015EV36285.htm]

19. *Prosecutor v. Ljubicic*, Case No. IT-00-41-PT, ICTY Trial Chamber, "Decision on Motion for Leave to Amend the Indictment," 2 August 2002. [http://www.un.org/icty/ljubicic/trialc1/decision-e/06104513.htm]

20. *Prosecutor v. Kayishema and Ruzindana,* "Judgement," Case No. ICTR-95-1-T, 21 May 1999.

    [http://www.ictr.org/ENGLISH/cases/KayRuz/judgement/3.htm]

    This authority exceeds 30 pages. Pursuant to the Practice Direction on Filing Documents before the Special Court for Sierra Leone, the first page and relevant section of the case are appended.

ANNEX I

Prosecutor v. Kayishema and Ruzindana, "Judgement," Case No. ICTR-95-1-T, 21 May 1999.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

Before:
Judge William H. Sekule, Presiding
Judge Yakov A. Ostrovsky
Judge Tafazzal Hossain Khan

Registrar:
Mr. Agwu U. Okali

Decision of: 21 May 1999

THE PROSECUTOR
versus
CLÉMENT KAYISHEMA
and
OBED RUZINDANA

Case No. ICTR-95-1-T

JUDGEMENT

The Office of the Prosecutor:
Mr. Jonah Rahetlah
Ms. Brenda Sue Thornton
Ms. Holo Makwaia

Counsel for Clément Kayishema:
Mr. André Ferran
Mr. Philippe Moriceau

Counsel for Obed Ruzindana:
Mr. Pascal Besnier
Mr. Willem Van der Griend

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III. EVIDENTIARY MATTERS

3.1 Equality of Arms

55. The notion of equality of arms is laid down in Article 20 of the Statute. Specifically, Article 20 2) states, ". . . the accused shall be entitled to a fair and public hearing. . . ." Article 20(4) also provides, ". . . the accused shall be entitled to the following minimum guarantees, in full equality. . . ," here then follows a list of rights that must be respected, including the right to a legal counsel and the right to have adequate time and facilities to prepare his or her defence.

56. Counsel for Kayishema filed a Motion, on 13 March 1997, calling for the application of Rule 20 (2) and 20(4).[1] The Defence submitted that in order to conduct a fair trial, full equality should exist between the Prosecution and the Defence in terms of the means and facilities placed at their disposal. To this end, the Defence requested the Chamber to order the disclosure of the number of lawyers, consultants, assistants and investigators that had been at the disposal of the Prosecution since the beginning of the case. The Motion also requested the Chamber to order the Prosecutor to indicate the amount of time spent on the case and the various expenditures made. Finally, the Motion called upon the Chamber to restrict the number of assistants utilised by the Prosecution during trial to the same number as those authorised for the Defence.

57. On the first two points raised by the Defence (request for information on the Prosecutor's resources), the Prosecution submitted that the information requested by Defence was not public and was intrinsically linked to the exercise of the Prosecutor's mandate, in accordance with Article 15 of the Statute.[2]

58. On the third point (request to limit the number of assistants to the Prosecutor), the Prosecution submitted that Article 20 of the Statute establishes an equality of *rights*, rather than an equality of *means and resources*.

59. The Chamber considered that the Defence did not prove any violation of the rights of the accused as laid down in Article 20(2) and 20(4).[3] The Chamber considered that the Defence should have

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addressed these issues under Article 17(C) of the Directive on Assignment of Defence Counsel (Defence Counsel Directive). This provision clearly states

> the costs and expenses of legal representation of the suspect or accused necessarily and reasonably incurred shall be covered by the Tribunal *to the extent that such expenses cannot be borne by the suspect or the accused because of his financial situation.* [emphasis added]

60. This provision should be read in conjunction with Article 20(4)(d) of the Statute which stipulates that legal assistance shall be provided by the Tribunal, ". . . *if* he or she does not have sufficient means to pay for it." [emphasis added]. Therefore, at this juncture, the Trial Chamber would reiterate its earlier ruling on this Motion that the rights of the accused should not be interpreted to mean that the Defence is entitled to same means and resources as the Prosecution. Any other position would be contrary to the *status quo* that exists within jurisdictions throughout the world and would clearly not reflect the intentions of the drafters of this Tribunal's Statute.

61. The question of equality of arms was verbally raised on other occasions. The Defence Counsel complained, for example, of the impossibility to verify the technical and material data about Kibuye *Prefecture* submitted by the Prosecution.[4] However, the Trial Chamber is aware that investigators, paid for by the Tribunal, was put at the disposal of the Defence. Furthermore, Article 17(C) establishes that any expenses incurred in the preparation of the Defence case relating, *inter alia*, to investigative costs are to be met by the Tribunal. The Trial Chamber is satisfied that all of the necessary provisions for the preparation of a comprehensive defence were available, and were afforded to all Defence Counsel in this case. The utilisation of those resources is not a matter for the Trial Chamber.

62. Counsel for Kayishema also raised the issue of lack of time afforded to the Defence for the preparation of its case.[5] In this regard the Trial Chamber notes that Kayishema made his initial appearance before the Tribunal on 31 May1996, Counsel having been assigned two days prior. The trial began on 11 April 1997 and the Defence did not commence its case until 11 May 1998, almost two years after the accused's initial appearance. As such, the Trial Chamber is satisfied that sufficient time was accorded to both Parties for the preparation of their respective cases.

63. Specifically, on the time designated for the preparation of the closing arguments, the Defence expressed further dissatisfaction.[6] Having expressed his opinion that "the trial has been fair," Counsel for Kayishema however went on to submit that the eight days allowed him to prepare for his closing arguments was inequitable in light of the one month time frame afforded to the Prosecution. However, the Chamber pronounced itself on this issue from the bench when it was declared,

> . . . for the record, I think the parties . . . agreed that the presentation of oral argument and filing of the relevant documents will be done within a time frame . . . So the concept of either one party being given one month does not arise . . [I]t was discussed openly with the understanding that

each and every respective party had some work to do . . . That is the defence could prepare its own case . . . right from the word go . . . (President of the Chamber)[7]

64. Moreover, were any particular issues of dispute or dissatisfaction to have arisen, the Trial Chamber should have been seized of these concerns in the appropriate manner and at the appropriate time. A cursory reference in the closing brief, and a desultory allusion in Counsel's closing remarks is not an acceptable mode of raising the issue before the Chamber.

3.2 Reliability of Eyewitnesses

65. Unlike the leaders of Nazi Germany, who meticulously documented their acts during World War II, the organisers and perpetrators of the massacres that occurred in Rwanda in 1994 left little documentation behind. Thus, both Parties relied predominantly upon the testimony of witnesses brought before this Chamber in order to establish their respective cases.

66. A majority of the Prosecution witnesses were Tutsis who had survived attacks in Kibuye *Prefecture* (survivor witnesses), in which both accused allegedly participated. As such the Defence presented Dr. Régis Pouget to address the Trial Chamber on the credibility of eyewitness testimonies generally and, more specifically, upon the reliability of testimony from persons who had survived attacks having witnessed violent acts committed against their families, friends and neighbours. [8]

67. The Prosecution contested the submission of the report, submitting that it was unnecessary and without probative value.[9] Nevertheless, the Trial Chamber, in exercising its discretion on this issue, received the report and heard the testimony of Dr. Pouget between 29 June and 2 July 1998.

Eyewitness Testimonies Generally

68. The issue of identification is particularly pertinent in light of the defence of alibi advanced by the accused. The report prepared by Dr. Pouget and submitted on behalf of the Defence suggests that eyewitnesses often are not a reliable source of information.

69. In order to support such a conclusion, Dr. Pouget proffered a number of reasons. It was his opinion, for example, that people do not pay attention to what they see yet, when uncertain about the answer to a question, they often give a definite answer nonetheless. He went on to describe various other, common-place factors that may affect the reliability of witness testimony generally. He observed, *inter alia*, that the passage of time often reduces the accuracy of recollection, and how this recollection may then be influenced either by the individual's own imperfect mental process of reconstructing past events, or by other external factors such as media reports or numerous conversations about the events.

70. The Chamber does not consider that such general observations are in dispute. Equally, the

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Chamber concurs with Dr. Pouget's assertion that the corroboration of events, even by many witnesses, does not necessarily make the event and/or its details correct. However, the Trial Chamber is equally cognisant that, notwithstanding the foregoing analysis, all eyewitness testimony cannot be simply disregarded out-of-hand on the premise that it *may* not be an exact recollection. Accordingly, it is for the Trial Chamber to decide upon the reliability of the witness' testimony in light of its presentation in court and after its subjection to cross-examination. Thus, whilst corroboration of such testimony is not a guarantee of its accuracy, it is a factor that the Trial Chamber has taken into account when considering the testimonies.

71. Similarly, prior knowledge of those identified is another factor that the Trial Chamber may take into account in considering the reliability of witness testimonies. For example, in the Tanzanian case of *Waziri Amani v. Republic*[10] the accused called into question his identification by witnesses. The Court of Appeals held that,

> if at the end of his (the witness') examination the judge is satisfied that the quality of identification is good, for example, when the identification was made by a witness after a long period of observation or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, we think, he could in those circumstances safely convict on the evidence of identification.

The case of *United States v. Telafaire*[11] also offers persuasive guidance on the other factors which may be taken into account. Firstly, the court in *Telafaire* held that the trier of fact must be convinced that the witness had the capacity and an adequate opportunity to observe the offender. Secondly, the identification of the accused by the witness should be the product of his own recollection and, thirdly, the trier of fact should take into consideration any inconsistency in the witness's identification of the accused at trial. Finally, it was held that the general credibility of the witness – his truthfulness and opportunity to make reliable observations – should also be borne in mind by the trier of fact.

72. The Trial Chamber, in its examination of the evidence, has been alive to these various approaches and, where appropriate, has specifically delineated the salient considerations pertinent to its findings.

Survivors as Witnesses

73. The report of Dr. Pouget, an expert in the field of psychology, address the reliability of testimony from those who have witnessed traumatic events. It was his opinion that strong emotions experienced at the time of the events have a negative effect upon the quality of recollection. During traumatic events, he expounded, the natural defensive system either prevents the retention of those incidents or buries their memories so deep that they are not easily, if at all, accessible.

74. This is the view of the expert Defence witness. However, as the Prosecutor highlighted, other

views do exist. She produced, for example, other academic views which stated that stressful conditions lead to an especially vivid and detailed recollection of events.[12] What is apparent to the Trial Chamber is that different witnesses, like different academics, think differently.

75. The Chamber is aware of the impact of trauma on the testimony of witnesses. However, the testimonies cannot be simply disregarded because they describe traumatic and horrific realities. Some inconsistencies and imprecision in the testimonies are expected and were carefully considered in light of the circumstances faced by the witnesses.

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3.3 Witness Statements

76. The Parties raised apparent discrepancies or omissions that arose with regard to certain evidence when the witnesses' written statements were juxtaposed with their testimony given orally in Court. These written statements were drafted after the witnesses were interviewed by Prosecution investigators as part of the investigative process. Alleged inconsistencies were raised in relation to both Prosecution and Defence witnesses. The procedure adopted by the Trial Chamber for dealing with apparent inconsistencies was expounded during the hearing of evidence by Prosecution witness A. There, the Trial Chamber ordered that an alleged inconsistency be put to the witness and the witness be offered an opportunity to explain. In light of this explanation, if Counsel asserted that the inconsistency remained, the Counsel would mark the relevant portion of the witness statement and submit it as an exhibit for consideration by the Trial Chamber. Both Prosecution and Defence Counsel submitted such exhibits. [13]

77. The witness statements are not automatically evidence before the Trial Chamber *per se*. However, the statements may be used to impeach a witness. Where the relevant portion of the statement has been submitted as an exhibit, this portion will be considered by the Trial Chamber in light of the oral evidence and explanation offered by the witness. The Chamber is mindful that there was generally a considerable time lapse between the events to which the witnesses testified, the making of their prior statements, and their testimony before the Trial Chamber. However, notwithstanding the above, inconsistencies may raise doubt in relation to the particular piece of evidence in question or, where such inconsistencies are found to be material, to the witnesses' evidence as a whole.

78. Whether or not the explanation by the witness is enough to remove the doubt is determined on a case-by-case basis considering the circumstances surrounding the inconsistency and the subsequent explanation. However, to be released from doubt the Trial Chamber generally demands an explanation of substance rather than mere procedure. For example, a common explanation provided by witnesses was that the interviewing investigator did not accurately reflect in the written statement what the witness said. Although such an explanation may well be true, particularly considering the translation difficulties, in the absence of evidence that corroborates the explanation, it is generally not enough to remove doubt. Indeed, it is not for the Trial Chamber to search for reasons to excuse inadequacies in the Prosecution's investigative process.

79. Conversely, where the witness provides a convincing explanation of substance, perhaps relating to the substance of the investigator's question, then this may be sufficient to remove the doubt raised.

80. Doubts about a testimony can be removed with the corroboration of other testimonies. However,

corroboration of evidence is not a legal requirement to accept a testimony. This Chamber is nevertheless aware of the importance of corroboration and considered the testimonies in this light. This notion has been emphasised in the Factual Findings of this Judgement.

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3.4 Specificity of the Indictment

Introduction

81. The Indictment, in setting out the particulars of the charges against the accused, refers to events "around" and "about" a specific date, or between two specified dates. Kayishema is charged separately for massacres at the sites of the Catholic Church and Home St. Jean, the Stadium in Kibuye and Mubuga Church. Paragraphs 28, 35 and 41 of the Indictment detail these massacres as occurring on or about the 17, 18 and 14 April 1994 respectively. The fourth crime site for which both Kayishema and Ruzindana are charged is the Bisesero area between 9 April and 30 June. The question arises, therefore, as to whether sufficient certainty exists to enable an adequate defence to be advanced, thus to ensure the right of the accused to a fair trial.

The Allegations in Relation to the Massacres in the Bisesero Area

82. The Trial Chamber considers it appropriate to distinguish between the first three sites in the Indictment, and the charges raised in respect of the Bisesero area. The exact dates on which massacres occurred at the Catholic Church and Home St. Jean, the Stadium and Mubuga Church were identified in the course of the trial by the Prosecution's case-in-chief. Accordingly, the findings made by this Chamber are set out below in the Factual Findings Part.

83. The Chamber is aware of the difficulties of raising a defence where all of the elements of the offence are not precisely detailed in the Indictment. The difficulties are compounded because the alibi defence advanced by both accused persons does not remove them from the Bisesero vicinity at the time in question. The accused in the *Tadic* case faced similar difficulties.[14] In that instance the Trial Chamber observed the near impossibility of providing a 24-hour, day-by-day, and week-by-week account of the accused's whereabouts for an alibi defence which covers a duration of several months. The Trial Chamber is of the opinion that this is a substantive issue.

84. Nevertheless, it is important to note here that throughout the trial the burden of proving each material element of the offence, beyond a reasonable doubt, has remained firmly on the Prosecution. Whilst, *prima facie*, the accused should be informed in as greater detail as possible of the elements of the offence against them, such details will necessarily depend on the nature of the alleged crimes. The Trial Chamber finds that during its case-in-chief the Prosecution did focus upon various sites throughout the Bisesero region, but because of the wide-ranging nature of the attacks no further specificity was possible in the Indictment.

85. It is unnecessary, however, for the Prosecution to prove an exact date of an offence where the date or time is not also a material element of the offence. Whilst it would be preferable to allege and

prove an exact date of each offence, this can clearly not be demanded as a prerequisite for conviction where the time is not an essential element of that offence.[15] Furthermore, even where the date of the offence is an essential element, it is necessary to consider with what precision the timing of the offence must be detailed. It is not always possible to be precise as to exact events; this is especially true in light of the events that occurred in Rwanda in 1994 and in light of the evidence we have heard from witnesses. Consequently, the Chamber recognises that it has balanced the necessary practical considerations to enable the Prosecution to present its case, with the need to ensure sufficient specificity of location and matter of offence in order to allow a comprehensive defence to be raised.

86. However, because of the foregoing observations, the Trial Chamber opines that where timing is of material importance to the charges, then the wording of the count should lift the offence from the general to the particular.[16] In this respect, the Trial Chamber notes that the *ratione temporis* of this Tribunal extends from 1 January 1994 to 31 December 1994, and the Indictment only refers only to events that occurred in the Bisesero area between the 9 April and 30 June. In fact, during its case-in-chief, and with the more precise definition of massacre sites within the Bisesero area, the Prosecution was able to pinpoint specific periods during which the alleged events occurred. Therefore, the date need only be identified where it is a material element of the offence and, where it is such a necessary element, the precision with which such dates need be identified varies from case to case. In light of this, the Trial Chamber opines that the lack of specificity does not have a bearing upon the otherwise proper and complete counts, and it did not prejudice the right of the accused to a fair trial.

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[1] Motion by the Defence Counsel for Kayishema Calling for the Application by the Prosecutor of Article 20(2) and 20(4) (b) of the Statute. Filed with the Registry, 13 March 1997. The issue was raised again by Mr. Ferran in his closing arguments, Trans., 3 Nov 1998, from p. 30.

[2] The Prosecution's response to the Motion was filed with the Registry on 29 April 1997 and additional information was filed on 5 May 1997.

[3] Order on the Motion by the Defence Counsel for Application of Article 20(2) and (4)(b) of the Statute, 5 May 1997.

[4] Defence Closing Brief for Kayishema, 16 Oct. 1998, p. 3.

[5] *Ibid.*, p. 2-3.

[6] See Mr. Ferran's closing arguments, Trans., 3 Nov. 1998, pp. 54-55.

[7] Trans., 3 Nov. 1998, pp. 55-56.

[8] Def. exh. 59, Report on the Crowd Psychology. Dr. Pouget has been , *inter alia*, Professor of Psychiatry and Psychology, Director of Education, Montpellier University, France; and the appointed expert in psychology for Nimes and Montepellier Courts of Appeal, France.

[9] Motion by the Prosecutor that Evidence of a Defence Expert Witness, Dr. Pouget, be Ruled Inadmissible Pursuant to Article 19(1) of the Statute and Rules 54 and 89 of the Rules.

[10] 1980 TLR 250, 252.

[11] 469 F.2d 552 (D.C. Cir. 1972).

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[12] An article by Ann Maass and Gautier Kohnken, in the Law and Human Behaviour Journal, vol. 13, no. 4, 1989, was shown to the witness and discussed in cross-examination. Trans., 2 Jul. 1998, p. 104.

[13] See Pros. exh. 350A, 350B and 350C.

[14] *Prosecutor v. Dusko Tadic*, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-T, 7 May 1997, para. 533. (*Tadic* Judgement.)

[15] See, the *Tadic* Judgement, para. 534 and the cases cited therein.

[16] See, for example, the Canadian cases of, *G.B., A.B. and C.S. v. R* (1990) 2 S.C.R. 30, and *R v. Colgan* (1986) 30 C.C.C. (3d) 193 (Court of Appeal), where Monnin C.J.M. found an offence specified as occurring at some point within a six year period to be sufficiently precise.