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SCSL-2003-05-PT
(1602 – 1619)

SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 13th day of October 2003

The Prosecutor against

Issa Hassan Sesay
(Case No.SCSL-2003-05-PT)

DECISION AND ORDER ON DEFENCE PRELIMINARY MOTION FOR DEFECTS IN THE FORM OF THE INDICTMENT

Office of the Prosecutor:
Mr. Luc Côté, Chief of Prosecutions
Robert Petit, Senior Trial Counsel

Defence Counsel:
Mr. William Hartzog, Lead Counsel
Alexandria Marcil, Co-Counsel

THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court"),

SITTING as Trial Chamber ("the Trial Chamber") composed of the Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet and Judge Benjamin Mutanga Itoe;

BEING SEIZED of the Defence Preliminary Motion for Defects in the Form of the Indictment filed on the 24th day of June 2003 on behalf of Issa Hassan Sesay ("the Motion") pursuant to Rule 72 (B) (ii) and (D) of the Rules of the Special Court ("the Rules");

CONSIDERING that the said Motion is one which, according to Rule 72 (B) (ii), falls within the jurisdiction of the Trial Chamber for determination;

NOTING that the several challenges raised by the Defence in the Motion are as to alleged formal defects in the Indictment against Issa Hassan Sesay approved by Judge Bankole Thompson on the 7th day of March, 2003 sitting as designated Judge of the Trial Chamber pursuant to Rules 28 and 47 of the Rules;

CONSIDERING ALSO the paramount importance of the right of the Accused to object preliminarily to the formal validity of the Indictment and not the substantive issue as to whether the criteria for approving the Indictment were satisfied, and the need to keep the two issues separate and distinct;

CONSIDERING the Response filed by the Prosecution on the 18th day of July, 2003 to the Motion ("the Response");

CONSIDERING ALSO the Reply filed by the Defence on the 28th day of July, 2003 to the Prosecution's Response ("the Reply");

WHEREAS acting on the Chamber's Instructions, the Court Management Section advised the parties on the 17th day of September, 2003 that the Motion, the Response and the Reply would be considered and determined on the basis of the "Briefs" (Written Submissions) of the Parties **ONLY** pursuant to Rule 73 (A) of the Rules;

NOTING THE SUBMISSIONS OF THE PARTIES

The Defence Motion:

1. By the instant Motion, the Defence seeks the following ORDER:

> "It is hereby requested that the Trial Chamber:
>
> Dismiss the Indictment;
> Alternatively, if the extension of time requested in his separate motion is granted, permit the Defence for Mr. Sesay to file a complete and substantial Preliminary Motion on the Form of the Indictment pursuant to Rule 72;

> Alternatively, orders the Prosecutor to clarify this Indictment, and directs the Prosecutor to file the amended Indictment within 30 days from the date of this decision"

2. Specifically, the Defence raises several challenges to the form of the Indictment. They may be categorised as follows:

> (i) Failure to distinguish clearly the alleged acts for which the Accused incurs criminal responsibility under Article (1) of the Statute from those in respect of which it is alleged he incurs criminal responsibility under Article 6 (3) of the Statute (paras. 4-5 of the Motion);
>
> (ii) Vague and imprecise nature of the counts in the indictment (paras. 6-15 of the Motion);
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> (iii) General formulation of counts exemplified by use of phrases like "*including but not limited to*" and the like (paras. 16-23 of the Motion).

The Prosecution's Response

3. In response, the Prosecution seeks to have the Motion dismissed in its entirety; or that, alternatively should the Trial Chamber request any additional particulars, the Prosecution be required to submit the same in the form of a Bill of Particulars and not an Amended Indictment.

The Defence Reply

4. In reply to the Prosecution's Response, the Defence reinforces the submissions and contentions made in the Motion.

AND HAVING DELIBERATED AS FOLLOWS:

5. The fundamental requirement of an indictment in international law as a basis for criminal responsibility underscores its importance and nexus with the principle of *nullum crimen sine lege* as a *sine qua non* of international criminal responsibility. Therefore, as the foundational instrument of criminal adjudication, the requirements of due process demand adherence, within the limits of reasonable practicability, to the régime of rules governing the framing of indictments. The Chamber notes that the rules governing the framing of indictments within the jurisdiction of the Special Court are embodied in the Founding Instruments of the Court. Firstly, according to Article 17 (4) (a) of the Court's Statute, the accused is entitled to be informed "promptly" and "in detail" of the nature of the charges

against him. Secondly, Rule 47 (C) of the Rules of Procedure and Evidence of the Special Court expressly provides that:

> The indictment shall contain, and be sufficient of 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.

6. The cumulative effect of the above provisions is to ensure the integrity of the proceedings against an accused person and to guarantee that there are no undue procedural constraints or burdens on his ability to adequately and effectively prepare his defence. Predicated upon these statutory provisions, the Chamber deems it necessary, at this stage, to articulate briefly the general applicable principles from the evolving jurisprudence on the framing of indictments in the sphere of international criminality. One cardinal principle is that an indictment must embody a concise statement of the facts specifying the crime or crimes preferred against the accused. A second basic principle is that to enable the accused to adequately and effectively prepare his defence, the indictment must plead with sufficient specificity or particularity the facts underpinning the specific crimes. Judicial support for these principles abound in both national legal systems and the international legal system.

7. As to the specific principles on the framing of indictments deducible from the evolving jurisprudence of sister international criminal tribunals, the Chamber finds that the following propositions seem to represent the main body of the law:

(i) Allegations in an indictment are defective in form if they are not sufficiently clear and precise so as to enable the accused to fully understand the nature of the charges brought against him.[1]

(ii) The fundamental question in determining whether an indictment was pleaded with sufficient particularity is whether an accused had enough detail to prepare his defence. [2]

(iii) The indictment must state the material facts underpinning the charges, but need not elaborate on the evidence by which such material facts are to be proved.[3]

(iv) The degree of specificity required in an indictment is dependent upon whether it sets out material facts of the Prosecution's case with enough

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[1] *The Prosecutor v. Karemera* ICTR -98-44-T, Decision on the Defence Motion pursuant to Rule 72 of the Rules of Procedure and Evidence, pertaining to, *inter alia*, lack of jurisdiction and defects in the form of the Indictment, ICTR, Trial Chamber, April 25, 2001, para 16. See also *Prosecutor v. Kanyabashi*, ICTR -96-15-I, Decision in Defence Preliminary Motion for Defects in the Form of the Indictment, 31 May 2000, para 5.1.

[2] *Kupreskic* , Judgement AC, para 88, see also *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, 15 May, 2003.

[3] *Kupreskic*, Judgement AC, para 88.

detail to inform the accused clearly of the charges against him so he may prepare his defence.[4]

(v) The nature of the alleged criminal conduct with which the accused is charged, including the proximity of the accused to the relevant events is a decisive factor in determining the degree of specificity in the indictment.[5]

(vi) The indictment must be construed as a whole and not as isolated and separate individual paragraphs.[6]

(vii) The practice of identifying perpetrators of alleged crimes by reference to their category or group is permissible in law.[7]

(viii) Where an indictment charges the commission of crimes on the part of the accused with "other superiors", the Prosecutor is not obliged to provide an exhaustive list of such "other superiors".[8]

(ix) In cases of mass criminality the sheer scale of the offences makes it impossible to give identity of the victims.[9]

(x) Identification of victims in indictments by reference to their group or category is permissible in law.[10]

(xi) The sheer scale of the alleged crimes make it "impracticable" to require a high degree of specificity in such matters as the identity of the victims and the time and place of the events.[11]

(xii) Individual criminal responsibility under Article 6(1) and criminal responsibility as a superior under Article 6(3) of the Statute are not mutually exclusive and can be properly charged both cumulatively and alternatively based on the same set of facts.[12]

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[4] *Prosecutor v. Elizaphan and Gerald Ntakirutimana*, Judgement and Sentence, Case No ICTR -96-10 and ICTR 96-17-T, TCI, 2 February, 2003.

[5] *Prosecutor v. Meakic, Gruban, Fustar, Banovic, Knezevic*, "Decision on Dusan Fustar's Preliminary Motion on the Form of the Indictment"; IT-02-65-PT, 4 April, 2003.

[6] *Prosecutor v. Krnojelac*, "Decision on the Defence Preliminary Motion on the Form of the Indictment.". IT-97-25, 24 February, 1999, para 7.

[7] *Prosecutor v.Kvocka et al*, IT-98-30-PT, "Decision on Defence Preliminary Motion on Form of Indictment" TC III, 12 April 1999, para 22.

[8] *Prosecutor v. Nahimana*, ICTR-96-11-T " Decision on the Defence Motion on Defects in the Form of the Amended Indictment, 17 November, 1998, paras 3-4.

[9] *Kvocka et al*, supra 6, paras 16-17.

[10] *Krnojelac, supra 6.*

[11] *Ntakirutimana, supra 4.*

[12] *Kvocka, supra 9* para 50; see also *Prosecutor v. Musema*, ICTR-96-13-T, Judgement, TCI, 27, Jaunuary 2001, para 884-974; para 891-895, and *Prosecutor v. Delalic* et al, Judgement IT-96-21-T, 16 November 1998.

8. Based generally on the evolving jurisprudence of sister international tribunals, and having particular regard to the object and purpose of Rule 47 (C) of the Special Court Rules of Procedure and Evidence which, *in its plain and ordinary meaning*, does not require an unduly burdensome or exacting degree of specificity in pleading an indictment, but is logically consistent with the foregoing propositions of law, the Chamber considers it necessary to state that in framing an indictment, the degree of specificity required must necessarily depend upon such variables as (i) the nature of the allegations, (ii) the nature of the specific crimes charged, (iii) the scale or magnitude on which the acts or events allegedly took place, (iv) the circumstances under which the crimes were allegedly committed, (v) the duration of time over which the said acts or events constituting the crimes occurred, (vi) the time span between the occurrence of the events and the filing of the indictment (vii) the totality of the circumstances surrounding the commission of the alleged crimes.

9. In this regard, it must be emphasized that where the allegations relate to ordinary or conventional crimes within the setting of domestic or national criminality, the degree of specificity required for pleading the indictment may be much greater than it would be where the allegations relate to unconventional or extraordinary crimes for example, mass killings, mass rapes and wanton and widespread destruction of property (in the context of crimes against humanity and grave violations of international humanitarian law) within the setting of international criminality. This distinction, recently clearly articulated in the jurisprudence[13], follows as a matter of logical necessity, common sense, and due regard to the practical realities. To apply different but logically sound rules and criteria for framing indictments based on the peculiarities of the crimogenic setting in which the crimes charged in an indictment allegedly took place is not tantamount to applying less than minimum judicial guarantees for accused persons appearing before the Special Court. The Defence suggestion that it does, though theoretically attractive, is not a legally compelling argument.

10. The Chamber recalls that the challenges to the Indictment raised by the Defence fall into three main categories, namely: (i) failure to distinguish clearly the alleged acts for which the Accused incurs criminal responsibility under Article 6(1) of the Statute from those in respect of which, it is alleged, he incurs criminal responsibility under Article 6(3) of the Statute; (ii) the vague and imprecise nature of the counts in the Indictment; (iii) general formulation of counts exemplified by use of allegedly impermissible phrases such as "*including but not limited*". In respect of category (i) challenges, one aspect of the Defence complaint is that the Indictment does not differentiate between the acts, allegedly for which the accused incurs criminal responsibility under Article 6(1) of the Statute from those for which criminal responsibility is incurred under Article 6(3). The other is that the same set of facts cannot give rise to both forms of responsibility. Hence, it is contended, the Prosecution must be put to its election. (paras. 4-5 of the Motion).

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[13] See *Archbold International Criminal Courts, Practice, Procedure and Evidence*, Sweet & Maxwell Ltd., London, 2003 at para 6-45 where it is stated: In examining the position of indictments in national law and the degree of specificity required, the Trial Chamber in *Prosecutor v. Kvocka*, Decision on Defence Preliminary Motions on the form of the Indictment, April 12, 1999, paras 14-18, recognized that although a minimum amount of information must be provided in an indictment for it to be valid in form, the "degree of particularity required in indictments before the International Tribunal is different from, and perhaps not as high as, the particularity required in domestic criminal law jurisdictions. The Trial Chamber at para17, stipulated that this difference is partly due to the massive scale of the crimes falling within the Tribunal's jurisdiction, which might make it impossible to identify all the victims, the perpetrators and the means employed to carry out the crimes.

Paragraph 25 of the Indictment alleges:

> "**ISSA HASSAN SESAY**, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1 of the Statute for the crimes referred to in Articles 2, 3, and 4 of the Statute as alleged in this Indictment, which crimes the **ACCUSED** planned, instigated, ordered, committed or in whose planning, preparation or execution the **ACCUSED** otherwise aided and abetted, or which crimes were within a joint criminal enterprise in which the **ACCUSED** participated or were reasonably foreseeable consequence of the joint criminal enterprise in which the **ACCUSED** participated.

Paragraph 26 of the Indictment alleges:

> "In addition, or alternatively, pursuant to Article 6.3 of the Statute, **ISSA HASSAN SESAY,** while holding positions of superior responsibility and exercising command and control over his subordinates, is individually criminally responsible for the crimes referred in Articles 2, 3, and 4 of the Statute. The **ACCUSED** is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and the **ACCUSED** failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

11. Article 6 (1) of the Statute provides thus:

> "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be indirectly responsible for the crime."

Article 6 (3) provides as follows:

> "The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrator thereof."

12. Predicated upon the reasoning in the foregoing paragraphs herein, and relying *persuasively* on the decisions of the ICTY in *Prosecutor v. Kvocka et al,*[14] and *Prosecutor v. Mile Mrksic*[15] and that of the ICTR in *Prosecutor v. Musema*[16] and a considered analysis of Article 6(1)

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[14] *Supra 11.*

[15] Case No ICTY- 95-13- PT. Decision on the Form of the Indictment, 19 June 2003.

and 6(3), it is the view of the Chamber that depending on the circumstances of the case, it may be required that with respect to an Article 6(1) case against an accused, the Prosecution is under an obligation to "indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged," in other words, that the particular head or heads of liability should be indicated.[17] For example, it may be necessary to indicate disjunctively whether the accused "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation, or execution" of the particular crime against humanity, or violation of Article 3 common to the Geneva Convention and of Additional Protocol II, or other serious violation of international humanitarian law, as alleged. This may be required to ensure clarity and precision as regards the exact nature and cause of the charges against the accused and to enable him to adequately and effectively prepare his defence. Such a methodology would also have the advantage of showing that each count is neither duplicitous nor multiplicitous. However, the Chamber must emphasize that the material facts to be pleaded in an indictment may vary with the specific head of Article (6) (1) responsibility, and the specificity with which they must be pleaded will necessarily depend upon any or some or all of the factors articulated in paragraph 8 herein especially where the crimes in question are of an international character and dimension. For example, the material facts relating to "planning" the particular crime may be different from those supporting an allegation that the accused "ordered" the commission of the crime depending on the factors set out in paragraph 8.

13. Further, in a case based on superior responsibility pursuant to Article 6(3), the minimum material facts to be pleaded in the indictment are as follows:

(a) (i) that the accused held a superior position;

(ii) in relation to subordinates, sufficiently identified;

(iii) that the accused had effective control over the said subordinates;

(iv) that he allegedly bears responsibility for their criminal acts;

(b) (i) that accused knew or had reason to know that the crimes were about to be or had been committed by his subordinates;

(ii) the related conduct of those subordinates for whom he is alleged to be responsible;

(iii) the accused failed to take the necessary and reasonable means to prevent such crimes or to punish the persons who committed them.

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[16] *Supra 11.*

[17] *The Prosecutor v. Delalic and Others*, Case ICTY-96-21-A, Judgement, 20 February, 2001.

14. With regard to the nature of the material facts to be pleaded in a case under Article 6(3) it follows, in the Chamber's view, that certain facts will necessarily be pleaded with a far lesser degree of specificity than in one under Article 6(1). It would seem, therefore, that in some situations under Article 6(3), given the peculiar features and circumstances of the case and the extraordinary nature of the crimes, it may be sufficient merely to plead as material facts the legal prerequisites to the offences charged as noted in paragraph 13 herein. Further, based on the foregoing reasoning and a close examination of paragraphs 25 and 26 of the Indictment, the Chamber finds the Defence submission that the Prosecution must clearly distinguish the acts for which the Accused incurs criminal responsibility under Article 6 (1) of the Statute from those for which he incurs criminal responsibility under Article 6 (3) to be legally unsustainable. The Chamber also finds that it may be sufficient to plead the legal prerequisites embodied in the statutory provisions. The Defence contention that the same facts cannot give rise to both heads of liability is, likewise, meritricious. The implication that they are mutually exclusive also flies in the face of the law.[18]

15. It is also contended by the Defence that each count charging superior responsibility under Article 6 (3) of the Statute should include "the relationship between the accused and the perpetrators as well as the conduct of the accused by which he may be found (a) to have known or had reason to know that the acts were about to be done, or had been done, by those others, and (b) to have failed to take necessary and reasonable measures to prevent such acts or to punish the persons who did them" (para. 8 of the Motion). In response, the Prosecution submits that the Indictment sufficiently pleads the relationship between the Accused and the perpetrators for purposes of superior responsibility at paragraphs 17-19.

16. In this regard, paragraphs 17 -19 allege that:

> 17. At all times relevant to this Indictment, **ISSA HASSAN SESAY** was a senior officer and commander in the RUF, Junta and AFRC/RUF forces.
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> 18. Between early 1993 and early 1997 the **ACCUSED** occupied the position of RUF Area Commander. Between about April 1997 and December 1999, the **ACCUSED** held the position of the Battled Group commander of the RUF, subordinate only to the RUF Battle Field Commander, SAM BOCKARIE aka MOSQUITO aka MASKITA, the leader of the RUF, FODAY SAYBANA SANKOH and the leader of the AFRC, JOHNNY PAUL KOROMA.
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> 19. During the Junta regime, the **ACCUSED** was a member of the Junta governing body. From early 2000 to about August 2000, the **ACCUSED** served as the Battle Field Commander of the RUF, subordinate only to the leader of the RUF, FODAY

[18] See *Kvocka, supra* 12.

SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.

The Chamber finds that the Indictment sufficiently pleads the relationship between the Accused and the perpetrators in question as "subordinate members of the RUF and AFRC/RUF forces" and the different superior positions that he held at various times, it being sufficient in certain cases under Article 6 (3) to identify the persons who committed the alleged crimes by means of the category or group to which they belong. It is clear from the Indictment that the AFRC/RUF forces were the alleged perpetrators. The Chamber further emphasizes that whether or not the Accused exercised actual control over the subordinate members of the RUF and AFRC/RUF forces is an evidentiary matter that must be determined at the trial. Given such detailed pleading, it is disingenuous to suggest that the Accused does not know precisely his role in the alleged criminality. By no stretch of the legal imagination, taking the indictment as a whole, can it be reasonably inferred that the Accused has been charged for playing the role of a "foot soldier". The Indictment, in various parts, does specify the conduct for which it is being alleged that he must bear responsibility for the acts of his subordinates, for example, paragraphs 31-37.

17. In a more general challenge, the Defence submits that all the counts are vague and imprecise, and that the Prosecution failed to specify the identity or identities of the subordinates with whom the Accused is alleged to be involved in respect of each crime. The Defence submits that it is not enough to identify the alleged subordinates by their group name as " Members of the AFRC/RUF subordinate to or acting in concert with Issa Hassan Sesay" and that such a formulation "does not enable the Accused to understand the nature and the cause of the charges against him" (paras. 6-11 of the Motion). It is noteworthy that in *Prosecutor v. Karemera,* an authority relied upon by the Defence, the order of the Trial Chamber to the Prosecution to specify certain allegations was much qualified. It used the phrase "to the extent possible" and the order was "with regard to the actual crimes allegedly committed that entail his command responsibility, in which capacity, and with regard to which accused's subordinates are concerned". Applying relevant case-law authorities[19] *persuasively*, the Chamber finds that the Indictment herein is pleaded, as far as is practicable, with reasonable particularity, and that it is sufficient and permissible in law to identify the subordinates of the Accused by reference to their group or category, namely, AFRC/RUF.[20]

18. A further Defence submission is that in respect of each and every count, the Prosecution should be ordered to specify , to the extent possible, any further information the Prosecution is in a position to disclose at this stage concerning the identity of the co-accused or co-perpetrator and the involvement of the accused with them. The Defence further submitted that the formulation *"Members of the AFRC/RUF subordinate to or acting in concert with Issa Hassan Sesay..."* is not sufficient (para. 12 of the Motion). The Chamber finds no merit in these submissions, and fails to see how much more detailed information is required in respect of the identities of the co-accused and co-perpetrators and their involvement with the accused, given the scale and level of hostilities, widespread disorder and terrorizing of the population and the

[19] eg. *Kvocka, supra 17.*
[20] *Musema , supra 12.*

routine nature of the crimes, as alleged, in the Indictment as a whole. The Chamber is also mindful that it is trite law that an indictment must plead facts not evidence.

19. Another position taken by Defence is that the Indictment should be more precise as to the formulation *"other superiorss in the RUF"* in paragraph 21 (para. 13 of the Motion). The Chamber disagrees with this submission and notes that where an indictment charges the commission of crimes on the part of the accused with *"other superiors"*, the prosecution is under no obligation to provide an exhaustive list of such *"other superiors"*[21].

20. The Defence further submits that the Indictment should also include the identity of the victims (if not protected) and the precise location of the crimes(para. 14 of the Motion). The Chamber's response to this submission is that generally in cases where the Prosecution alleges that an accused personally committed the criminal acts, an indictment generally must plead with particularity the identity of the victims and the time and place of the events. Exceptionally, however, the law is that in cases of mass criminality (as can be gathered from the whole of the Indictment herein) the sheer scale of the offences may make it impossible to identify the victims.[22] Further, the Chamber wishes to emphasize that even where mass criminality is not being alleged, the specificity required to plead these kinds of facts is not necessarily as high where criminal responsibility is predicated upon superior or command responsibility[23] (as is the case in respect of the Accused herein). The Defence submission is, accordingly, rejected.

21. The next Defence challenge focuses on paragraph 51 of the Indictment. It is contended that the paragraph should be more precise and should include the appropriate date of commission of the offence and that the entire paragraph is too vague and should be set aside (para. 15 of the Motion). Paragraph 51 of the Indictment specifically charges the Accused, as a member of the AFRC/RUF, with abductions and forced labour under Count 12. It alleges that *"at all times relevant to this Indictment, AFRC/RUF engaged in widespread and large scale abductions of civilians and use of civilians as forced labour"*. The count goes on to detail the alleged forms of forced labour and abductions engaged in by the AFRC/RUF in diverse places, including Kailahun District where, it is again alleged that *"at all times relevant to this Indictment, captured civilian men, women and children were brought to various locations within the District and used as forced labour"* by the AFRC/RUF. The Chamber does not find the formulation "at *all times relevant to the this Indictment"* problematic in terms of adequate notice of the alleged abductions and forced labour thereby making it difficult for the Accused to prepare his defence. It is, likewise, not vague.

22. The Chamber agrees with the Prosecution that the use of the said formulation is with reference to a determinable time frame. It presupposes that the alleged criminal activities took place over that time frame and with much regularity, a presupposition that can only be refuted by evidence. Given the brutal nature of the specific crimes alleged, the alleged massive and widespread nature of the criminality involved, and the peculiar circumstances in which they

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[21] See *Prosecutor v. Nahimana, supra 8.*
[22] *The Prosecutor v. Laurent Semanza, supra 2.*
[23] Id.

allegedly took place, the date range specified in the Indictment is not too broad or inconsistent with the latitude of prosecutorial discretion allowed the Prosecution in such matters. In addition, the Chamber notes that the said paragraph is specific as to the victims of the alleged forced labour and that the place of the events is patently restrictive, to wit, "*at various locations in the District*" in contrast to, for example, "*at various locations in Sierra Leone,*" or "*at various places in West Africa*". The Defence submission, therefore, fails.

23. Under category (iii) challenges, the Defence takes objection to the general formulation of the counts in certain particular respects. The main submission is that general formulations like "*such as*" or "*various locations*", or "*various areas....including*" do not specify or limit the reading of the counts but expand the Indictment without concretely identifying precise allegations against the Accused. The pith of the Defence submission is that these phrases are imprecise and non-restrictive. The Chamber's response to this submission is that it is inaccurate to suggest that the phrases "*various locations*" and "*various areas including*" in the relevant counts are completely devoid of details as to what is being alleged. Whether they are permissible or not depends primarily upon the context. For example, paragraphs 41, 44, 45 and 51 allege that the acts took place in various locations within those districts, a much narrower geographical unit than, for example "*within the Southern or Eastern Province*" or "*within Sierra Leone*" This is clearly permissible in situations where the alleged criminality was of what seems to be cataclysmic dimensions. By parity of reasoning, the phrases "*such as*" and "*including but not limited to*" would, in similar situations, be acceptable if the reference is, likewise, to locations but not otherwise. It is, therefore, the Chamber's thinking that taking the Indictment in its entirety, it is difficult to fathom how the Accused is unfairly prejudiced by the use of the said phrases in the context herein. In the ultimate analysis, having regard to the cardinal principle of the criminal law that the Prosecution must prove the case against an accused beyond reasonable doubt, the onus is on the Prosecution to adduce evidence at the trial to support the charges, however formulated. The Chamber finds that even though, as a general rule, phrases of the kind should be avoided in framing indictments, yet in the specific context of paragraphs 23 and 24 they do not unfairly prejudice the Accused or burden the preparation of his defence. The Defence protestation, is therefore, untenable.

24. Another complaint of the Defence is that paragraphs 28, 32, 37, 38, 40, 41 as to the location of the sexual violence as well as the location of the camps, paragraph 42 as to the Freetown area, paragraphs 43, 44, 45, 46, 47, 49 as to the location of the abductions as well as the location of the camps and paragraphs 51, 52, 53, 55, 56 etc are not pleaded with specificity. It is also contended that the Prosecution should be ordered to specify in each count, whether the Accused is charged with having committed the acts solely in specific locations (para. 17 of the Motion). In the alternative, the Defence requests that the general formulation be deleted. After a careful review, *seriatim*, of the paragraphs listed in the Defence Motion, the Chamber's response is that, given the magnitude, scale, frequency and widespread nature of the alleged criminal acts, it is unrealistic to expect the perpetrators of such conduct, as alleged, to leave visible and open clues of the locations and of their partners in crime thereby providing incontestible factual bases of the said crimes. The Chamber finds that the submission is without merit. The Chamber, again, reiterates that it is rudimentary law that an indictment must plead facts not evidence.

25. The next Defence submission is that the description of the offences (or crimes alleged) should be precise and not expressed vaguely, for example, as in paragraph 45 relating to counts 9 and 10 as to physical violence, i.e. "*The mutilations included*", and "*Forced labour included*" in paragraph 47 relating to count 12. Based on the reasoning in paragraph 23 above on the issue of prejudice to the Accused, the Chamber rejects this submission as untenable.

26. Another specific Defence challenge revolves around the description of a common plan. It is that the Prosecutor should be ordered to be more specific regarding the nature or purpose of the common plan. The law on this issue where it is alleged (as in the instant Indictment) that the specific international crimes with which an accused is charged involved numerous perpetrators acting in concert, is that the degree of particularity required in pleading the underlying facts is not as high as in case of domestic criminal courts.[24] This principle notwithstanding, the Chamber finds more than sufficient the pleadings in question based on an examination of paragraph 23 and also paragraphs 8, 20, 21 and 22 of the Indictment. Paragraph 23 alleges:

> The RUF, including the Accused, and the AFRC shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.

27. It is evident from paragraph 23 that the Indictment sets out with much particularity the nature of the alleged joint criminal enterprise, namely "*to take actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond areas*". As to the specific identities of those alleged to have been involved in the joint criminal enterprise, the Indictment sets these out with a reasonable measure of specificity in paragraphs 8, 20,21 and 22. The Indictment also details in paragraph 24 the crimes alleged to have been within the scope of the joint criminal enterprise. The nature of the participation of the Accused in the said joint criminal enterprise is likewise set out with much specificity in paragraphs 17-23. Based on the foregoing analysis, the Chamber finds the challenges of the Defence on these matters completely devoid of merit.

28. Based on the reasoning in paragraph 23 above on the issue of prejudice to the Accused, the Chamber also rejects the submission of the Defence that the words "*in particular*" and "*included*" in paragraphs 23 and 24 of the Indictment should be deleted (para. 20 of the Motion).

29. For the reasons stated in paragraph 27 above, the Chamber likewise finds no merit in the Defence submission that paragraph 24 of the Indictment should be more precise and that the word "*included*" should not be used in describing the joint criminal enterprise (para. 21 of the Motion).

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[24] See *Archbold*, supra 12 at para.6-45.

30. The next submission by the Defence is that when charging joint criminal enterprise, the indictment should include precisely the nature of the accused's participation in the criminal enterprise. Specifically, the Defence contends that the Indictment against the Accused does not satisfy the criteria of an indictment charging joint criminal enterprise as stated *in Archbold, para 6-57* and should, therefore, be dismissed (para. 22 of the Motion). *Archbold, para 6-57* sets out the criteria for charging joint criminal enterprise in these terms:

> An indictment charging joint criminal enterprise is required to include the nature of the enterprise, the time periods involved, and the nature of the accused's participation in the criminal enterprise (*Krnojelac, Decision on Form of Amended Indictment, May 11, 2000)*

Upon a close examination of the paragraphs of the Indictment herein charging and alluding to joint criminal enterprise, the Chamber is satisfied that the Indictment fulfils the above criteria, and accordingly rejects the Defence submission.

31. The final challenge put forward by the Defence to the Indictment is in relation to each and every count (in particular paragraphs 31, 37, 42, 45, 46, 52, 57, 58).The main submission in this regard is that the Prosecutor should be ordered to delete the general formulation "*By his acts of omissions in relation, but not limited to those events...Issa Hassan Sesay...is individually criminally responsible...*". The pith of the objection here is that the general formulation chosen by the Prosecutor expands the Indictment without concretely identifying precise allegations against the Accused. Accordingly the Defence requests that the Indictment be dismissed, or alternatively that each count should mention the specific allegation against the Accused. (para. 23 of the Motion).

32. The Prosecution's Response is noteworthy for its candour. The Prosecution submit that "while there may be events not specifically alleged in the Indictment, the Statute and Rules provide sufficient safeguards against attempts to unfairly introduce evidence or events outside the framework of the Indictment" (para. 23 of the Response).

33. After meticulously reviewing each count and paragraphs 31, 37, 42, 45, 46, 52, 57 and 58 in particular, the Chamber is satisfied that the phrase "*but not limited to those events*" is impermissibly broad and also objectionable in not specifying the precise allegations against the Accused. It creates a potential for ambiguity. Where there is such potential, the Chamber is entitled to speculate that may be the omission of the additional material facts was done with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[25] It is trite law that the Prosecutor should not plead what he does not intend to prove. In the Chamber's considered view, the use of such a formulation is tantamount to pleading by ambush. The doctrine of fundamental fairness precludes judicial endorsement of such a practice. It is, however, not an insuperable procedural difficulty warranting dismissing the Indictment. The Defence submission, in this respect, therefore succeeds. Prosecution is accordingly put to its election: either to delete the said phrase in every count or wherever it appears in the Indictment or provide in a Bill of Particulars specific

[25] *Kupreskic, supra 2.*

additional events alleged against the Accused in each count. The Amended Indictment or Bill of Particulars should be filed within 21 days of the date of service of this Decision; and also served on the Accused in accordance with Rule 52 of the Rules.

34. In conclusion, based on the analysis in paragraphs 5-33 herein and a thorough examination of the Sample Indictments and Charges contained in Appendix H of *Archbold*[26], the Chamber finds the Indictment in substantial compliance with Article 17 (4) (a) of the Court's Statute and Rule 47 (C) of the Rules as to its formal validity.

AND BASED ON THE FOREGOING DELIBERATION, THE CHAMBER HEREBY DENIES THE DEFENCE MOTION in respect of the several challenges raised as to the form of the Indictment except as regards the challenge hereinbefore (paragraphs 31-33) found to be meritorious and upheld, an ORDER to which effect is set out *in extenso* in the annexure hereto for the sake of completeness.

Done at Freetown on the 13th day of October 2003

Judge Bankole Thompson
Presiding Judge, Trial Chamber

[26] Pages 1409 -1481.

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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 13th day of October 2003

The Prosecutor against

Issa Hassan Sesay
(Case No.SCSL-2003-05-PT)

ANNEXURE TO THE DECISION AND ORDER ON DEFENCE PRELIMINARY MOTION FOR DEFECTS IN THE FORM OF THE INDICTMENT

Office of the Prosecutor:
Mr. Luc Côté, Chief of Prosecutions
Robert Petit, Senior Trial Counsel

Defence Counsel:
Mr. William Hartzog, Lead Counsel
Alexandria Marcil, Co-Counsel

THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court);

SITTING as Trial Chamber ("the Trial Chamber") composed of Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet and Judge Benjamin Mutanga Itoe;

BEING SEIZED of the Defence Preliminary Motion for Defects in the Form of the Indictment filed on the 24th day of June, 2003 on behalf of Issa Hassan Sesay ("the Motion") pursuant to Rule 72 (B) (ii) and (D) of the Rules;

CONSIDERING that the said Motion is one which, according to Rule 72 (B) (ii), falls within the jurisdiction of the Trial Chamber for determination;

NOTING that the several challenges raised by the Defence in the Motion are as to alleged defects in the form of the Indictment against Issa Hassan Sesay approved by Judge Bankole Thompson on the 7th day of March, 2003 sitting as designated Judge of the Trial Chamber pursuant to Rules 28 and 47 of the Rules;

CONSIDERING ALSO the paramount importance of the right of the Accused to object preliminarily to the formal validity of the Indictment as distinct from raising the substantive issue as to whether the criteria for approving the Indictment were satisfied, and the need to keep the two issues separate and distinct;

HAVING METICULOUSLY EXAMINED the merits of the challenges and submissions by the Defence in support of the Motion alongside those contained in the Prosecution's Response, and those of the Defence in their Reply;

CONVINCED that the several challenges raised by the Defence as to the formal validity of the Indictment, except one, are devoid of merit; and having so ruled in the Decision herein;

HEREBY DENIES THE SAID MOTION AND ORDER as follows:

(i) that the Defence Preliminary Motion for Defects in the Form of the Indictment filed on the 24th day of June, 2003 on behalf of Issa Hassan Sesay is denied in so far it relates to all challenges except that found to be meritorious and upheld in paragraphs 31-33 of the Decision;

(ii) that consistent with the qualification to (i) above the Prosecution elect either to delete in every count and wherever it appears in the Indictment the phrase *"but not limited to those events"* or provide in a Bill of Particulars specific additional events alleged against the Accused in each count;

(iii) that the aforesaid Amended Indictment or Bill of Particulars be filed within 21days of the date of the service of this Decision and also on the Accused according to Rule 50 of the Rules;

(iv) that this Annexure is deemed to form part of the Decision herein.

Done at Freetown

13th day of October 2003

Judge Bankole Thompson
Presiding Judge

Seal of the Special Court