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SCSL-2003-12-PT
(1533-1542)

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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: 27th day of November 2003

The Prosecutor against

Allieu Kondewa
(Case No.SCSL-2003-12-PT)

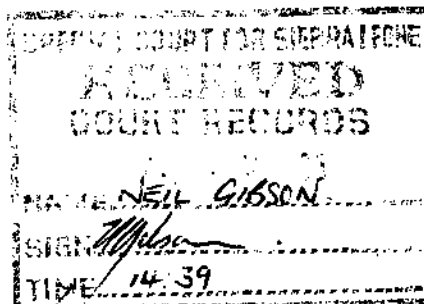
**DECISION AND ORDER ON DEFENCE PRELIMINARY MOTION FOR
DEFECTS IN THE FORM OF THE INDICTMENT**

Office of the Prosecutor:

Mr. Luc Côté, Chief of Prosecutions
James C. Johnson, Senior Trial Counsel
Mohamed A. Bangura, Associate Trial Counsel

Defence Counsel:

James McGill, Lead Counsel
James Evans, Co-Counsel
Charles Margai, 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 7th day of November 2003 on behalf of Allieu Kondewa (“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 Allieu Kondewa approved by Judge Bankole Thompson on the 26th day of June, 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 17th day of November, 2003 to the Motion (“the Response”);

CONSIDERING ALSO that no Reply was filed by the Defence;

WHEREAS acting on the Chamber’s Instructions, the Court Management Section advised the parties on the 26th day of November, 2003 that the Motion and the Response 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 Reliefs from the Court:

“The Accused asks the Court to dismiss all counts in the Indictment based on Article 6.1 for the reasons outlined in paragraphs 8-13 of the Defence Motion or in the alternative that the Prosecution elect which form of responsibility is alleged for each count.”

“Alternatively or in addition the Accused asks the Court to order the Prosecution to delete certain words and phrases from the Indictment as outlined in paragraphs 14-23.”

2. Specifically, the Defence raises several challenges to the formal validity of the Indictment set out fully in paragraph 2 of the Motion and elaborated at paragraphs 3-20 of the same, with supporting authorities;

The Prosecution's Response

3. In response, the Prosecution submits that having regard to the Statute of the Special Court for Sierra Leone, the Rules of Procedure and Evidence of the said Court and the applicable jurisprudence, the Indictment against Allieu Kondewa in its current form is sufficient to put the Accused on notice of the charges brought against him to enable him to prepare his defence, and that, therefore, the instant Motion should be dismissed. The Prosecution's submissions are fully articulated, with supporting authorities, at paragraphs 5-13 of their Response.
4. The Defence filed no Reply.

AND HAVING DELIBERATED THUS:

5. In a seminal Decision¹ on objections and challenges to the formal validity of indictment, this Court took the opportunity to expound exhaustively the principles governing the framing of indictments for the purpose of International Criminal Law, predicated upon an analysis of the evolving jurisprudence of sister international criminal tribunals on the subject. The principles applied in that case were also followed, with necessary adaptations and modifications, in the more recent Decision of *The Prosecutor Against Santigie Borbor Kanu*² of the Court. Conscious of the need to preserve logical coherence and consistency in developing the Court's jurisprudence, the Chamber now proceeds to examine, as to their merit, the several challenges and objections raised by the Defence to the formal validity of the Indictment herein in the light of the aforesaid principles.
6. In addressing the issue of the formal validity of the Indictment, the Chamber, by way of precedent, must begin with two fundamental principles. First, “that an indictment must embody a concise statement of the facts specifying the crime or crimes preferred against the accused”.³ Second, that “to enable the accused to adequately and effectively prepare his defence, the indictment must plead with

¹ *The Prosecutor v. Hassan Issa Sesay* (Case No. SCSL-2003-05-PT), Decision and Order on Defence Preliminary Motion for Defects In the Form of the Indictment, 13 October, 2003.

² (Case No. SCSL- 2003 -13- Pt) Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 19 November, 2003.

³ See Decision on the *Sesay* Case, *supra* note 1 para 6; see also Article 17 (4) (a) of the Statute of the Special Court for Sierra Leone and Rule 47 (C) of the Court's Rules of Procedure and Evidence; and *The Prosecutor v. Santigie Borbor Kanu*, *supra* note 2 (footnote 2). p3.

sufficient specificity or particularity the facts underpinning the specific crimes”.⁴ Sesay also laid down that:

“ in framing the 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 committed (v) the duration of the 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, and (vii) the totality of the circumstances surrounding the commission of the alleged crime.”⁵

7. Furthermore, in *Sesay*, the Court was at pains to emphasize that whichever régime of rules is being developed by the Courts in framing indictments, the law could not, as “a matter of logical necessity, commonsense, and due regard to the practical realities”, fail to distinguish between rules governing the framing of indictments where allegations relate to criminality in the domestic law context and those applicable to the framing of indictments in the international criminal law sphere. In effect, that the “degree of specificity required in indictments before the International Tribunal is different from and perhaps not as high as, the particularity required in domestic criminal law jurisdictions.” It was from the foregoing conceptual and doctrinal perspectives that the Chamber in the Preliminary Motions brought on behalf of Issa Sesay and Santigie Borbor Kanu respectively examined the formal validity of the indictments in those cases in response to the several objections raised by the Defence.
8. The challenges in question here fall under two heads, namely:
 - i) *The Prosecution failed to distinguish clearly and specify the alleged acts for which the Accused incurs criminal responsibility under Article 6 (1). Such failure inhibits the ability of the Accused to adequately conduct his defence.*
 - ii) *The inclusion of the phrases “included but not limited to”, “about” and “but not limited to those events” renders the Indictment vague and imprecise thereby impeding the Accused in the proper conduct of his defence.*
9. In considering *the first head of challenges*, it is necessary to reproduce herein the text of Article 6 (1) of the Statute of the Court. It reads 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 individually responsible for the crime.”

⁴ Id.

⁵ Id. para 8.

In the Chamber's opinion, as a matter of statutory interpretation, Article 6 (1) "sets out the parameters of personal criminal responsibility under the Statute. Any act falling under one of the five categories contained in the provision may entail the criminal responsibility of the perpetrator or whoever has participated in the crime in one of the ways specified in the same provision of the Statute."⁶ On the basis of this analysis, it follows that the Indictment, at paragraph 15, sufficiently specifies the various modes of criminal responsibility with which the Accused is charged pursuant to Article 6 (1). Consistent with this reasoning, the Court in *Sesay*⁷, stated that:

"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."

But the Court qualified this general proposition by noting that:

"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."

10. What factors did the Chamber articulate? They are:

*"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."*⁸

Given the international character and dimension of the crimes alleged in the Indictment herein and the totality of the circumstances surrounding the commission of the alleged crimes gathered, from a review of the Indictment, as a whole, the Chamber finds that the Accused is in no way prejudiced by the present state of the pleadings in relation to Article 6 (1) in the context of paragraphs 15, and 20-24. As a matter of law, the Chamber wishes to stress that the Prosecution is not obliged to elect between the different heads of responsibility under Article 6 (1). In the instant case, it has chosen to plead all the different heads of responsibility, consistent with its discretion. Having adopted that course of pleading, the Prosecution will carry the burden of proving the existence of each

⁶ *The Prosecutor v. Dusko Tadic*, Judgment of Appeals Chamber (Case No IT-94-1-A) 15 July 1999 para. 186.

⁷ *Supra*, note 1 para. 12.

⁸ *Id. Supra*, note 1 para. 8., See also *The Prosecutor v. Santigie Borbor Kanu*, *supra* note 2 at para. 19 per Judge Thompson.

at the trial.⁹ Moreover, the Chamber notes that, despite the fact that the law governing the framing of indictments bristles with technicalities, yet it must be emphasized “that the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution’s case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused.”¹⁰ The Defence challenge relating to Article 6 (1), therefore, fails. Whether the Accused, for example “planned”, or “instigated”, or “ordered”, the commission of any of the crimes specified in Articles 2 to 4 of the Statute is, in the Chamber’s view, pre-eminently an evidentiary matter¹¹, the key determinant of the success or failure of the Prosecution’s case.

11. The *other head of challenges* brought by the Defence against the Indictment concerns the inclusion of the phrases “included but not limited to”, “about”, and “but not limited to these events”. In this connection, the Defence submits that the use of these phrases renders the Indictment vague and imprecise thereby impeding the Accused in the conduct of his defence. After a careful review of paragraphs 19-24 of the Indictment, the Chamber agrees with the Defence that the expressions “but not limited to these events” and “included but not limited to”, except in so far as the phrase “included but not limited to” relates only to dates and locations *simpliciter* are, consistent with the principle in *Sesay*, “impermissibly broad and also objectionable in not specifying the precise allegations against the Accused.”¹² The Chamber, therefore, upholds the Defence challenge on this issue. The Prosecution is, accordingly, put to its election: either to delete the said phrases in every count or wherever they appear in the Indictment or provide in a Bill of Particulars specific additional events alleged against the Accused in each count. The Amended Indictment or Bill of Particulars should be filed within 7 (seven) days of the date of service of this Decision; and also served on the Accused in accordance with Rule 52 of the Rules.
12. In respect of the use of the word “about”, after a careful review of the Indictment and the specific paragraphs referenced by the Defence, the Chamber does not find the word “about” problematic at all in so far as the formulation of the Prosecution’s charges goes in the context of the Indictment herein. The Defence contention as to the use of the word is, therefore, untenable.
13. In conclusion, based on the analysis in paragraphs 5-12 herein and a thorough examination of the Sample Indictments and Charges contained in Appendix H of *Archbold*¹³, the Chamber finds the Indictment in substantial compliance with

⁹ See *Prosecutor v. Mile Mrksic*, Case No. IT-95-13/1-PT, Decision On Form of the Indictment, TC III, 19 June 2003. at para. 89.

¹⁰ *Kupreskic et al. Appeals Judgment*, para 89.

¹¹ See *The Prosecutor v. Santigie Borbor Kanu*, *supra*, note 2 para 21 where the Chamber observed that “the Prosecution must stand or fall by their own charges”, *per* Judge Thompson.

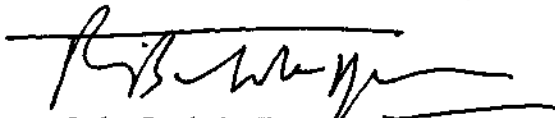
¹² *Id.* para. 33.

¹³ *International Criminal Courts, Practice, Procedure and Evidence*, London: Sweet and Maxwell Ltd, 2003, pages 1409-1481.

Article 17 (4) 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 (paragraph 11) 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 in Freetown on the 27th day of November 2003.



Judge Bankole Thompson
Presiding Judge, Trial Chamber

Seal of the Court

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Judge Benjamin Mutanga Itoe
Judge Pierre Boutet

Registrar: Robin Vincent

Date: 27th day of November 2003

The Prosecutor against

Allieu Kondewa
(Case No.SCSL-2003-12-PT)

**ANNEXURE TO 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
James C. Johnson, Senior Trial Counsel
Mohamed A. Bangura, Associate Trial Counsel

Defence Counsel:
James McGill, Lead Counsel
James Evans, Co-Counsel
Charles Margai, 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 7th day of November, 2003 on behalf of Allieu Kondewa ("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 Allieu Kondewa approved by Judge Bankole Thompson on the 26th day of June, 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;

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;

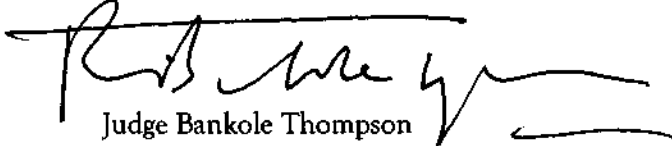
CONVINCED that several challenges raised by the Defense as to the formal validity of the Indictment, except in respect of two impermissible phrases, are devoid of merit; and having so ruled in the Decision herein;

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 7th day of November 2003 on behalf of Allieu Kondewa is denied in so far it relates to all challenges except those found to be meritorious and upheld in paragraph 17 of the Decision;
- (ii) that consistent with the qualification to (i) above the Prosecution elect either to delete in every count and wherever they appear in the Indictment the phrases "*but not limited to those events*", and "*including but not limited to*", 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 7 days of the date of 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
On the 27th day of November 2003



Judge Bankole Thompson
Presiding Judge

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