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SCSL-2004-14-PT
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SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995

FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 3 March 2004

PROSECUTOR **Against** Sam Hinga Norman
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-04-14-PT)

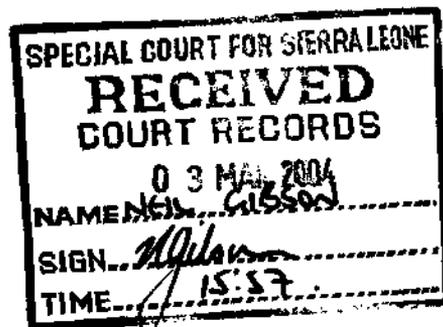
**DECISION ON THE PRELIMINARY DEFENCE MOTION ON THE LACK OF
PERSONAL JURISDICTION FILED ON BEHALF OF ACCUSED FOFANA**

Office of the Prosecutor:
Luc Côté

Defence Counsel for Samuel Hinga Norman:
James Jenkins-Johnston

Defence Counsel for Moinina Fofana:
Michiel Pestman

Defence Counsel for Allieu Kondewa:
Charles Margai



THE SPECIAL COURT FOR SIERRA LEONE ("Court" or "Special Court")

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

SEIZED of the Preliminary Defence Motion on the Lack of Personal Jurisdiction ("Motion"), filed on 17 November 2003 on behalf of Moinina Fofana ("Accused"), pursuant to Rule 72(B)(i) of the Rules of Procedure and Evidence of the Special Court ("Rules");

CONSIDERING the Prosecution's Response to the Motion, filed on 26 November 2003 ("Response") by the Office of the Prosecutor ("Prosecution");

CONSIDERING the Defence Reply thereto, filed on 8 December 2003 ("Reply");

CONSIDERING the provisions of Rule 72 of the Rules and Article 1 of the Statute of the Special Court ("Statute");

CONSIDERING THE SUBMISSIONS OF THE PARTIES:

A. The Defence Motion:

1. In the Motion, the Defence makes the following submissions based on the Special Court's lack of personal jurisdiction over the Accused:
 - a) Pursuant to Article 1(1) of its Statute, the Special Court has jurisdiction over those persons "who bear the greatest responsibility" for the serious violations of international law that are within the subject-matter jurisdiction of the Special Court. As Moinina Fofana does not belong in that category of persons the Special Court cannot exercise its jurisdiction over him.
 - b) Challenges to the personal jurisdiction of the Special Court should be dealt with in the pre-trial stage, rather than at the trial stage, as no court should try a person if it does not possess the legal capability to do so.¹ Moreover, since the Indictment does not contain the criterion of "persons who bear the greatest responsibility for serious violations of international humanitarian law", if the Prosecution could prove that the Accused had committed some or all of the crimes he is accused of, the Special Court would have to find him guilty, notwithstanding that he may not bear the greatest responsibility and this would not be available as a defence to him.²
2. The Defence contends that the Accused does not belong in the category of "persons who bear the greatest responsibility for serious violations of international humanitarian law". According to the Defence that phrase is unclear and can be interpreted in two ways, but under neither interpretation can it be said that the Accused bears "the greatest responsibility for serious violations of international humanitarian law":

¹ Motion, paras 9-11.

² Motion, para. 12.

- a) Under the interpretation that it “refers to the leader of the parties (or the states) that had the greatest responsibility for the (continuation of the) conflict and the threat to the establishment and implementation of the peace process in Sierra Leone,”³ it is argued that the Accused does not belong in this category. Furthermore, throughout the conflict the Civilian Defence Forces (“CDF”) fought on the side of the Government of President Kabbah and ECOMOG to preserve and restore peace in the country. Numerous reports expressly state that the CDF acted in concert with ECOMOG which had support from the international community.⁴
- b) Under the interpretation that it refers to those individuals who were responsible for the majority of crimes committed during the conflict in Sierra Leone, neither the Indictment or the material disclosed by the Prosecution supports the contention that the Accused belonged in that category. In addition, Mr Fofana’s name does not appear in any of the public reports on the conflict, such as the Reports of the Secretary-General of the United Nations or human rights organisations.⁵
3. The Defence rejects what it submits is the position of the Secretary-General of the United Nations, namely, that the words “persons who bear the greatest responsibility” is a guide to the Prosecutor in adopting a prosecutorial strategy.⁶ Rather, the Defence relies on Security Council Resolution 1315 (2000) to submit that “persons who bear the greatest responsibility” defines the persons over which the Special Court shall have personal jurisdiction.⁷ The Defence further submits that since the Special Court was established by the Security Council to maintain international peace and security, the Special Court “should give decisive weigh to the interpretation of the Security Counsel” when interpreting Article 1 of the Statute.⁸

B. The Prosecution Response:

4. The Prosecution submits in its Response that the Motion should be dismissed in its entirety.
5. The Prosecution contends that it is clear from the documents leading to the establishment of the Special Court⁹ that it was intended that the question of whether a person is one of the “persons who bear the greatest responsibility” for the purposes of Article 1(1) of the Statute is to be decided as a matter of prosecutorial discretion. For the matter to be decided upon by a pre-trial factual inquiry, as the Defence suggests, would be “absurd”.¹⁰ At the pre-trial stage it is impossible to know the precise scope of the criminal liability of any person who was involved in the conflict in Sierra Leone. Indeed, it is contrary to the presumption of innocence enshrined in Article 17(3) of the Statute to determine at the pre-trial stage that the Accused is one of the “persons who bear the greatest responsibility.”¹¹

³ Motion, para. 14.

⁴ Ibid.

⁵ Motion, para. 15.

⁶ Motion, para. 4, citing the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915 (“Report of the Secretary-General”).

⁷ Motion, paras 4-6.

⁸ Motion, para. 6.

⁹ *Inter alia* the Report of the Secretary-General and the Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, U.N. Doc. S/2000/1234, 22 December 2000.

¹⁰ Response, para. 7.

¹¹ See Response, paras 8-10.

6. Therefore, the only sensible interpretation of the words "those who bear the greatest responsibility" is that of Prosecutorial discretion whereby the Prosecution is called upon to decide, based upon all of the evidence it has collected in the course of its investigations, which persons it considers to bear the greatest responsibility for the crimes within the jurisdiction of the Special Court and to indict those persons.
7. The Accused in this case "has in no way established that the prosecutorial discretion was not lawfully exercised."¹² The Accused has not adduced evidence to establish that the Prosecutor's motive was improper or based on impermissible discriminatory motives. Furthermore, the Prosecution submits that the Indictment was approved by the Designated Judge who was:
- SATISFIED from the material tendered by the Prosecutor that the indictment charges the suspect with crimes within the jurisdiction of the Special Court, and that the allegations in the Prosecutor's case summary would, if proven,, amount to crimes specified and particularised in the indictment.¹³
8. Referring to the first interpretation advanced by the Defence, relating to the role of the CDF in the conflict, the Prosecution submits that this evidence does not establish that the Accused could not belong to the category of persons who bear the greatest responsibility.¹⁴
9. With regards to the second interpretation advanced by the Defence, relating to the role of the Accused, the Prosecution submits that this argument is "insubstantial and unpersuasive."¹⁵ It is only after the trial, when all the evidence has been adduced, that the Trial Chamber will be in a position to determine whether or not the Accused is responsible for those crimes. The criminal liability cannot be determined at the pre-trial stage by reference to whether or not he was named in certain reports documenting atrocities committed by the CDF, of which the Accused was a member.
10. The Prosecution contends that the Accused does indeed fulfil the criteria of "persons bearing the greatest responsibility" as described in the Report of the Secretary-General in that the Indictment clearly alleges that the Accused was in a leadership role, including allegations that:
- a) The Accused was the National Director of War of the CDF and that together with others he was one of the top leaders of the CDF;
 - b) He acted as leader of the CDF in the absence of Chief Hinga Norman and was regarded as second in command;
 - c) The Accused together with others exercised authority, command and control over all subordinate members of the CDF; and
 - d) The Accused committed the specific crimes with which he is charged.
11. In conclusion, the Prosecution submits that it has not been established by the Defence that it was in any way improper for the Prosecution to consider the Accused in the circumstances one

¹² Response, para. 14.

¹³ Response, para. 14.

¹⁴ Response, para. 15.

¹⁵ Response, para. 16.





of the persons "bearing the greatest responsibility" for crimes within the jurisdiction of the Special Court.

C. The Defence Reply:

- 12. In its Reply, the Defence disputes the Prosecution's submission that the question of whether a person is one of the persons who bear the greatest responsibility for the purposes of Article 1(1) of the Statute is to be decided as a matter of "purely" prosecutorial discretion.¹⁶
- 13. The Defence submits that Article 1 of the Statute should be interpreted on the basis of the customary international law principles of treaty interpretation as reflected in Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention").¹⁷ These principles give effect to the intention of the parties, to look at the context of the term, and in light of the object and purpose of the treaty. The primary way to determine the intention of the parties is to look at the "ordinary meaning to be given to the terms of the treaty." The ordinary meaning, contends the Defence, is that reference to "persons who bear the greatest responsibility" refers to the personal jurisdiction of the Special Court rather than to prosecutorial strategy. That meaning is confirmed when one takes into account the context of the term, as the other elements of Article 1 of the Statute refer to jurisdictional requirements. It would be "odd", concludes the Defence, if one element of Article 1 referred not to jurisdiction, but to prosecutorial discretion.¹⁸
- 14. Furthermore, the interpretation that the determination of whether a person belongs to the "persons who bear the greatest responsibility" is a jurisdictional requirement is further supported when the phrase is considered in the light of the object and purpose of the treaty. The Defence contends that the object and purpose of the Special Court Agreement clearly are to create a court for the prosecution of persons suspected of crimes connected to the armed conflict in Sierra Leone. However, it is also clear that the Security Council intended the role of the Special Court to be limited to a narrow category of suspects: only those "who bear the greatest responsibility." The Defence avers that the Security Council expressly stated, in its letter to the Secretary-General of 22 December 2000, that "persons who bear the greatest responsibility should be seen as a jurisdictional threshold to the competence of the Court."¹⁹
- 15. The Defence further contends that factual questions are not a bar to jurisdictional decisions. First, neither Article 31 nor Article 32 of the Vienna Convention or customary international law suggests that practical problems involved in the application of a treaty provision are a relevant factor in the interpretation of treaties. Second, contrary to the Prosecution's submission, it is not necessary to determine "whether at the end of the trial the Accused will be convicted on all counts with which he is charged"²⁰ or at the pre-trial stage "whether the Accused is guilty"²¹ in order to determine personal jurisdiction; the test to be applied at this stage is necessarily a *prima facie* one.²² Third, the determination of jurisdictional limitations, such as personal jurisdiction, subject-matter jurisdiction and temporal jurisdiction can involve

¹⁶ Reply, para. 2, referring to para. 6 of the Response.

¹⁷ 115 U.N.T.S 311, entered into force 27 January 1980. See Reply, paras. 5-7.

¹⁸ Reply, para. 6.

¹⁹ See Reply, paras 8-9.

²⁰ Citing Response, para. 8.

²¹ Citing Response, para. 10.

²² Response, para. 12. See also, para. 20.

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factual questions. The Defence concedes that the determination of whether a person is one of the persons who bears the greatest responsibility can be a complex factual question; however, the fact that a particular jurisdictional determination is a complex one "cannot justify an abdication of the judicial task to determine its jurisdiction."²³ Moreover, referring to jurisprudence from the International Court of Justice, the Defence avers that it is common that international courts in determining their jurisdiction need to make determinations of factual matters that are also relevant for the eventual responsibility.²⁴

AND HAVING DELIBERATED DECIDES AS FOLLOWS:

D. The Applicable Law:

16. Article 1 of the Statute prescribes the competence of the Special Court. Article 1(1) provides:

The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of an implementation of the peace process in Sierra Leone.

17. The Statute of the Special Court prescribes in Article 15 the role and function of the Prosecutor. It states in Article 15(1):

The Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.

18. Articles 2-5 of the Statute stipulate the crimes over which the Special Court has subject-matter jurisdiction. Article 6 of the Statute provides for individual criminal responsibility. It states, in part:

(1) 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.

19. Relevant to the issue to be addressed herein is Article 17 of the Statute. Article 17(4)(a) provides:

(4) In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees in full equality:
(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her.

20. Further, pursuant to Article 14 of the Statute, Rule 47 of the Rules provides for the review of indictments. Rule 47 states that:

(A) An indictment submitted in accordance with the following procedure shall be approved by the Designated Judge.

²³ Response, para.14.

²⁴ See Reply, paras 15-16.

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

E. Discussion

- 21. The issue of the competence of the Special Court received significant attention during discussions on the establishment of the Special Court and the drafting of its Statute, as discussed by the Parties. The Chamber wishes to emphasise that the competence of the Special Court is different from that of other International Tribunals: both the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") have "the power to prosecute persons responsible for serious violations of international humanitarian law"²⁵ rather than "the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law". This was done on purpose. As a consequence of this particular terminology used to describe the Court's competence, the first question to be addressed is whether "persons bearing the greatest responsibility" is a jurisdictional requirement or merely an articulation of prosecutorial discretion.
- 22. The *travaux préparatoires* show that the issue was discussed between the Secretary-General and the Security Council. However, these discussions are not fully and completely reflected in the Parties' submissions. In his Report on the establishment of a Special Court for Sierra Leone,²⁶ the Secretary-General at paragraph 30 opined that:

While those "most responsible" obviously include the political or military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct

²⁵ See Article 1 of the ICTY Statute and Article 1 of the ICTR Statute. It should be noted that both the ICTY and the ICTR Statutes provide distinct geographical and temporal limitations.

²⁶ S/2000/915, 4 October 2000.

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jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.

23. In the Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, it was noted in paragraph 1, entitled Personal jurisdiction, that:

The members of the Security Council continue to hold the view, as expressed in resolution 1315 (2000), that the Special Court for Sierra Leone should have personal jurisdiction over persons who bear the greatest responsibility for the commission of crimes, including crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. The members of the Security Council believe that, by thus limiting the focus of the Special Court to those who played a leadership role, the simpler and more general formulations suggested in the appended draft will be appropriate.²⁷

24. In the Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, at paragraph 2 it is stated:

Members of the Council expressed preference for the language contained in Security Council resolution 1315 (2000), extending the personal jurisdiction of the Court to "persons who bear the greatest responsibility", thus limiting the focus of the Special Court to those who played a leadership role. However, the wording of subparagraph (a) of article 1 of the draft Statute, as proposed by the Security Council, does not mean that the personal jurisdiction is limited to the political and military leaders only. Therefore, the determination of the meaning of the term "persons who bear the greatest responsibility" in any given case falls initially to the prosecutor and ultimately to the Special Court itself. [...]²⁸

And in paragraph 3 it further states that:

[...] It is my understanding that, following from paragraph 2 above, the words "those leaders who ... threaten the establishment of and implementation of the peace process" do not describe an element of the crime but rather provide guidance to the prosecutor in determining his or her prosecutorial strategy. Consequently, the commission of any of the statutory crimes without necessarily threatening the establishment and implementation of the peace process would not detract from the international criminal responsibility otherwise entailed for the accused.²⁹

25. In a Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary-General, the President underscores the importance of that terminology as follows:

The members of the Council share your analysis of the importance and role of the phrase "persons who bear the greatest responsibility". The members of the Council, moreover, share your view that the words beginning with "those leaders who..." are intended as guidance to the Prosecutor in determining his or her prosecutorial strategy.³⁰

²⁷ S/2000/1234. The appended draft provided, in Article 1(1) of the Agreement: "There is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. (Emphasis added).

²⁸ S/2001/40.

²⁹ S/2001/40.

³⁰ S/2001/95.

26. The Chamber finds that these letters "led to modifications in the text of both the draft Agreement with the Government of Sierra Leone and the draft Statute of the Court. The Government of Sierra Leone was consulted on these changes and by letter of 9 February 2001 to the Legal Counsel expressed its willingness to accept the texts."³¹ It is therefore the significant finding of the Chamber that the agreed text resulted in the adoption of the phrase "persons who bear the greatest responsibility" as articulated in Article 1(1) of the Special Court's Statute and that the Prosecutor's duties in this regard were prescribed by Article 15 of the Statute and by Rule 47 of the Rules, as set out above.
27. Based upon the foregoing findings, the Chamber therefore concludes that the issue of personal jurisdiction is a jurisdictional requirement, and while it does of course guide the prosecutorial strategy, it does not exclusively articulate prosecutorial discretion, as the Prosecution has submitted.
28. The second question now to be addressed by the Chamber is at what stage of the proceedings should the issue of whether an accused fulfils the necessary requirements of personal jurisdiction be determined.
29. In determining this issue the Chamber wishes to recall that the first procedural step is that upon being satisfied that "a suspect has committed a crime or crimes within the jurisdiction of the Special Court," the Prosecutor shall prepare and submit an indictment for approval by a designated Judge.³² The indictment must contain "and be sufficient if it contains", the name and particulars of the suspect, "a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence."³³ The Prosecutor must attach "a Prosecutor's case summary" which briefly sets out the allegations that the Prosecutor proposes to prove.
30. The Chamber notes that the next procedural step is that the Judge designated to review the indictment receives the "indictment and accompanying material" from the Registrar. He or she shall conduct a review of this material "to determine *whether* the indictment should be approved,"³⁴ in the Chamber's view. The final procedural step is that the Designated Judge shall approve the indictment "if" he or she is satisfied that certain conditions have been met, namely, that the indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court, and that the allegations in the Prosecutor's case summary would, if proven, amount to the crime or crimes as particularised in the indictment.³⁵ The Designated Judge may approve or dismiss each count.
31. As a matter of statutory interpretation, it is clear, therefore, from the provisions of Rule 47 that the Designated Judge has the discretion to accept or reject an indictment, in whole or in part. It is the Chamber's considered view that this review procedure of an indictment must take into

³¹ Letter dated 12 July 2001 from the Secretary-General addressed to the President of the Security Council, S/2001/693.

³² Rule 47(B) of the Rules. See also, Rule 47 (A). Rule 47(B) of the Rules of the ICTR and the ICTY contain slightly different wording, namely that the Prosecutor shall prepare an indictment "if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction" of the each Tribunal. (Emphasis added).

³³ Rule 47(C) of the Rules.

³⁴ Rule 47(E) of the Rules. (Emphasis added).

³⁵ See, Rule 47(E).

account the personal jurisdictional requirements, the temporal jurisdictional requirements and the subject-matter requirements of the Special Court, as set out in the Statute.

32. The review of an indictment is not simply a “rubber stamp” procedure; rather, it is a process during which the Designated Judge carefully reviews the contents of the proposed indictment and the Prosecutor’s case summary to determine whether there is sufficient information to establish reasonable grounds to believe that the person committed the crime charged.
33. The Chamber recalls that Rule 47 of the Rules was amended at the Plenary in March 2003: Rule 47(B) had been identical to that of the ICTR Rules.³⁶ This amendment does not mean, however, that the Chamber abandoned the general principle of criminal law that there must be a sufficient basis for each crime charged.³⁷ The Chamber notes that the decision on the first nine indictments issued by the Special Court - including one which followed the March 2003 Plenary - explicitly found that the Designated Judge was satisfied “from the material tendered by the Prosecution that there is sufficient evidence to provide reasonable grounds for believing” that the named accused “has committed crimes within the jurisdiction of the Court and that the allegations would, if proven, amount to the crimes specified and particularized in the said indictment.”³⁸
34. While the decision approving the indictment for the Accused Fofana does not contain this language, but rather reflects the language of the current Rule 47(B),³⁹ the Chamber recalls the right enshrined in the Statute, as well as international human rights instruments, that all accused shall be equal before the Special Court.⁴⁰ As has been found by Judge Alphons Orié at the ICTY, while the screening mechanisms of Prosecutors’ cases and indictments vary, the purpose remains the same: “to protect the accused against oppressive unfounded charges.”⁴¹

³⁶ The former Rule 47(B) of the Rules provided: “The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the [Special Court], shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.”

³⁷ See, e.g., Article 65(5) and (7) of the Statute of the International Criminal Court (“sufficient evidence to establish substantial grounds to believe that the person committed the crime charged”); Article 5(1)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) (“the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”). See also, The Code for Crown Prosecutors, Article 5(1) (“enough evidence to provide a ‘realistic prospect for conviction’ against each defendant on each charge”) and Article 5(2) (“a realistic prospect for conviction ... means that a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged”).

³⁸ See, e.g., *The Prosecutor against Charles Taylor*, Case No. SCSL-03-01-I, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003; *The Prosecutor against Augustine Gbao*, Case No. SCSL-03-09-I, Decision Approving the Indictment, 16 April 2003.

³⁹ *The Prosecutor against Moinina Fofana*, Case No. SCSL-03-11-I, Decision Approving the Indictment and Order for the Continued Detention of the Accused, 26 June 2003, page 2: “Being Satisfied from the material tendered by the Prosecutor that the indictment charges the suspect with crimes against the jurisdiction of the Special Court, and that the allegations in the Prosecutor’s case summary would, if proven, amount to crimes as specified and particularized in the indictment”.

⁴⁰ See, Article 17(1) of the Statute of the Special Court. See also, International Covenant on Civil and Political Rights, Article 14(1); ECHR, Article 14.

⁴¹ *Prosecutor v. Ratko Mladić*, Case No. IT-95-5/18-I, Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, 8 November 2002, para. 22. See also, paras 23-26.

- 35. Accordingly, the Designated Judge who approved the Indictment brought against Fofana satisfied himself that sufficient information to provide reasonable grounds for believing that the Accused committed the crimes charged in the Indictment and that the allegations would, if proven, amount to the crimes specified therein.
- 36. Furthermore, the Designated Judge satisfied himself that the temporal and personal jurisdictional requirements were satisfied. It is noted that there is no challenge to the temporal jurisdictional requirement having been properly pleaded.
- 37. The third issue, therefore, which must be addressed, is what test should be satisfied or standard employed at the time of the review of an indictment in determining whether the necessary personal jurisdiction requirements are fulfilled in this case.
- 38. The Trial Chamber finds that the standard employed to satisfy the personal jurisdiction requirement should be no different than the standard to satisfy the subject-matter jurisdictional requirement. The Designated Judge must therefore be satisfied that sufficient information to provide reasonable grounds for believing that the Accused is a person who bears the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.
- 39. Again, as a matter of statutory interpretation, the Chamber finds that Article 1 of the Statute mandates that the Special Court shall have jurisdiction over those persons "who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law," committed in Sierra Leone since 30 November 1996, "including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."⁴²
- 40. Based on the *travaux préparatoires* of the Statute of the Special Court for Sierra Leone, it is clear that the drafters intended that the category of persons over whom the Special Court had personal jurisdiction was limited. In expressing its preference for "persons who bear the greatest responsibility" instead of "persons most responsible", the Security Council directed that the fact that an individual held a leadership role should be the primary consideration; the severity of a crime or the massive scale of a particular crime should not be the primary consideration.⁴³
- 41. At the time that the indictment for Moinina Fofana and accompanying material was reviewed by the Designated Judge, Judge Bankole Thompson, it was found that sufficient information existed to provide reasonable grounds for believing that the Accused is a person who bears the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law, and accordingly, approved the indictment against him.
- 42. The Trial Chamber recalls the allegations in the Indictment, which include: (a) the armed factions involved in the conflict in Sierra Leone included the CDF;⁴⁴ (b) Moinina Fofana was the National Director of War of the CDF and was therefore "seen and known as one of the top

⁴² Emphasis Added.
⁴³ See, para. 23 *supra*.
⁴⁴ Indictment, para. 3.

leaders of the CDF⁴⁵; (c) Moinina Fofana acted as leader of the CDF in the absence of Samuel Hinga Norman and was regarded as second in command;⁴⁶ Moinina Fofana, individually or in concert with others, exercised authority, command and control over all subordinate members of the CDF;⁴⁷ and (d) the plan, purpose or design of the CDF, as carried out by the Accused and others, was to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone.⁴⁸ The Indictment further alleges that the Accused bears criminal responsibility under Articles 6(1) and 6(3) of the Statute of the Special Court.⁴⁹

- 43. The Defence has argued that the Accused does not belong to the category of persons who bear the greatest responsibility for the serious violations of international law which fall within the subject-matter jurisdiction of the Special Court.⁵⁰ The Defence proposes two interpretations for the phrase "persons who bear the greatest responsibility" and argues that under neither interpretation does the Accused fall within the jurisdiction of the Special Court.⁵¹ The Defence supports their arguments with *factual* assertions, namely assertions about the CDF and its role in the conflict⁵² and assertions about the role played by the Accused in the conflict.⁵³
- 44. It should be emphasised that in the ultimate analysis, whether or not in actuality the Accused is one of the persons who bears the greatest responsibility for the alleged violations of international humanitarian law and Sierra Leonean law is an evidentiary matter to be determined at the trial stage. At this procedural stage, the Chamber is essentially concerned with mere allegations.
- 45. The Accused is alleged to have held a leadership position in one of the factions involved in the armed conflict. The Defence has failed to convince the Trial Chamber that the personal jurisdiction requirements are not fulfilled in this case.
- 46. The Trial Chamber notes that trial chambers at the ICTY have similarly declined to view matters that have jurisdictional dimensions which require a factual determination as matters to be dealt with by way of preliminary motions. In numerous cases where the defence have challenged charges of grave breaches under Article 2 or violations of the laws and customs of war under Article 3 of the Statute of the ICTY on the basis that such charges require an international armed conflict and no such armed conflict existed, Trial Chambers - while finding that such charges fall within the jurisdiction of the ICTY - have consistently held that factual submissions related to the nature of the armed conflict are to be dealt with at trial.⁵⁴

⁴⁵ Indictment, para. 12.

⁴⁶ Indictment, para. 12.

⁴⁷ Indictment, para. 13.

⁴⁸ Indictment, para. 14.

⁴⁹ Indictment, paras 15 and 16.

⁵⁰ Motion, para. 2.

⁵¹ See *supra*, para. 3.

⁵² Motion, para. 14.

⁵³ Motion, para. 15.

⁵⁴ See, e.g., *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-PT, Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, 25 March 1999; *Prosecutor v. Tihomir Blaskić*, Case No. IT-95-15, Decision Rejecting a Motion of the Defence to Dismiss Counts 4, 7, 10, 14, 16 and 18 based on the Failure to Adequately Plead the Existence of an International Armed Conflict, 4 April 1997, para. 7; and *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39 & 40-PT, Decision on Motion Challenging Jurisdiction - with Reasons, 22 September 2000, para. 25.

The bottom of the page features three handwritten marks. On the left, there are initials 'RBT'. In the center, there is a large, stylized signature that appears to be 'L'. On the right, there is another stylized signature that appears to be 'B'.

47. Finally, the Trial Chamber would like to recall that while it is satisfied that a sufficient basis exists for bringing an indictment against the Accused, the Trial Chamber has made no findings about the guilt - or innocence - of the Accused. The Accused continues to enjoy the presumption of innocence, and will continue to do so until and unless a finding to the contrary is made at the conclusion of the trial proceedings against him.

F. Conclusion

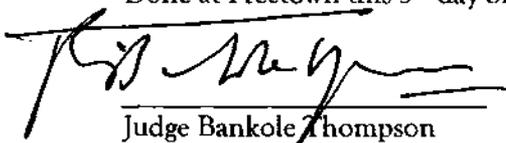
48. Having found that the Special Court has personal jurisdiction over the Accused, the Trial Chamber finds that the Motion brought pursuant to Rule 72(B)(i) must be rejected.

49. Additionally, as the Trial Chamber finds that there is no basis for the Accused's challenge to the jurisdiction of the Special Court, the Trial Chamber finds that no "serious issue relating to jurisdiction" is found in the Motion which would warrant a referral to the Appeals Chamber pursuant to Rule 72(E) of the Rules. While the issue of personal jurisdiction *itself* is an important matter, the issues put before the Chamber in the Motion were largely evidentiary and factual in nature, and do not warrant a referral to the Appeals Chamber.

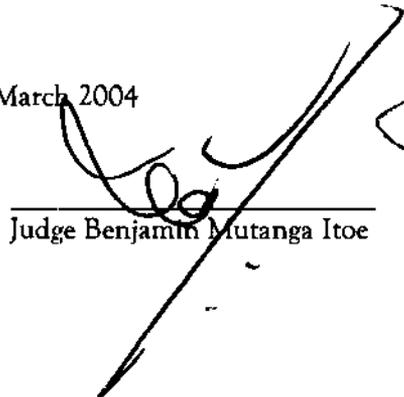
FOR THE FOREGOING REASONS, PURSUANT TO RULE 72(B)(i),

THE TRIAL CHAMBER HEREBY FINDS that the Motion lacks any merit and is therefore accordingly **DISMISSED**.

Done at Freetown this 3rd day of March 2004



Judge Bankole Thompson



Judge Benjamin Mutanga Itoe



Judge Pierre Boutet

Presiding Judge,
Trial Chamber

