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:	1 April 2004	
PROSECUTOR	Against	**Alex Tamba Brima** **Brima Bazzy Kamara** **Santigie Borbor Kanu** (Case No. SCSL-04-16-PT)

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

Office of the Prosecutor:

Luc Côté
Robert Petit

Defence Counsel for Alex Tamba Brima:

Terence Terry

Defence Counsel for Brima Bazzy Kamara:

Ken Fleming

Defence Counsel for Santigie Borbor Kanu:

Geert-Jan Alexander Knoops

THE TRIAL CHAMBER ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

SEIZED of the "Brief in Support of Preliminary Motion on Defects in the Form of the Indictment," dated 23 December 2003 and filed on 7 January 2004 ("Motion")[1] as well as the "Relief for the Motion on Defects in the Form of the Indictment" filed on the same day ("Relief Request") on behalf of Brima Bazzy Kamara ("Accused") pursuant to Rule 72(B)(ii) of the Rules of Procedure and Evidence of the Special Court ("Rules");[2]

NOTING that the several challenges raised by the Motion are as to alleged formal defects in the Indictment against Brima Bazzy Kamara approved by Judge Pierre Boutet on the 28 May 2003 sitting as Designated Judge of the Trial Chamber pursuant to Rules 28 and 47 of the Rules;

CONSIDERING Article 17(4)(a) and (b) of the Statute of the Special Court ("Statute");

CONSIDERING the paramount importance of the right of the Accused to object preliminarily to the form of the Indictment, as distinct from 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 Office of the Prosecutor ("Prosecution") on 19 January 2004 to the Motion ("Response");

CONSIDERING ALSO the Reply filed by the Defence on 22 January 2004 to the Prosecution's Response ("Reply");

WHEREAS acting on the Trial Chamber's Instructions, the Court Management Section advised the parties on 6 February 2004 that the Motion, the Response and the Reply would be considered and determined on the basis of the written submissions of the Parties only, pursuant to Rule 73(A) of the Rules;

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[1] The Trial Chamber notes that the Motion was not filed in conformity with the "Practice Direction on Filing Documents before the Special Court for Sierra Leone" of 27 February 2003. Article 9(3)(c) of the Practice Direction specifies that motions shall not exceed 10 pages or 3,000 words, whichever is greater. The Motion is 16 pages. Furthermore, the font and spacing used in the Motion are not in compliance with the Practice Direction. Despite this deficiency, the Trial Chamber will consider the Motion and takes this opportunity to remind counsel to comply with the Practice Direction for all future filings.

[2] The Trial Chamber notes that the Defence submits that the Motion is filed pursuant to Rule 72(C) of the Rules; the Trial Chamber considers Rule 72(B)(ii) to be the appropriate provision and considers the Motion pursuant to Rule 72(D) of the Rules. The Trial Chamber notes that the Rules of Procedure and Evidence were amended at the 5th Plenary Session held 11-14 March 2004. The Rules in place at the time of the filing of the Motion shall be applicable to the Motion in order to ensure that the rights of the accused are not adversely affected by any amendments to the Rules.

WHEREAS pursuant to an Order by this Trial Chamber,[3] the Prosecution filed a consolidated Indictment on 5 February 2004 ("Consolidated Indictment") against the Accused, Alex Tamba Brima and Santigie Borbor Kanu under the case number SCSL-04-16-PT;

CONSIDERING that due to the filing of the Consolidated Indictment, certain of the submissions of the Parties are now rendered moot and will be identified as such in this Decision, as is necessary or appropriate;

NOTING that the Prosecution has filed a motion for leave to amend the Consolidated Indictment, the merits and implications of which do not impact the Trial Chamber's findings on the present Motion;

HEREBY RENDERS ITS DECISION.

I. SUBMISSIONS OF THE PARTIES

A. The Defence Motion

1. By the instant Motion and Relief Request, the Defence seeks an Order:

(i) that the Indictment, herein be set aside on the basis of the submissions thus set forth, such relief not being precluded by virtue of the fact that the Indictment was reviewed and approved by the Designated Judge under Rule 47. The role of the Designated Judge is to approve the Indictment on the basis that the crimes charged are within the jurisdiction of the Court and that the allegations, if proven, would amount to the crimes as particularised in the Indictment; (b) that this function therefore involves the examination of the sufficiency of the evidence rather than a concern with the form of the Indictment; and (c) that this Trial Chamber's review of the *form* of the Indictment is a distinct and separate function from that of the Designated Judge approving the Indictment; or in the alternative

(ii) that the Trial Chamber to order the Prosecution to file an Amended Indictment and accompanying case summary, which provides the material facts necessary to establish the substantive elements charged and to indicate precisely the nature of the responsibility alleged in relation to each individual count and to strike out from the Indictment such vague terms as "*between about*" and "*included but not limited to*"; or in the alternative

(iii) that the Trial Chamber order the Prosecution to provide additional facts to resolve the ambiguities referred to above.

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[3] *Prosecutor v. Brima Bazzy Kamara*, Case No. SCSL-03-10-PT, Decision and Order on Prosecution Motions for Joinder, dated 27 January 2004 and filed on 28 January 2004 ("Joinder Decision").

2. The Defence, likewise, seeks an order from the Trial Chamber authorising the Prosecution to make a complete disclosure as required by the Rules, upon the provision of the relief set out in paragraph 1(i), (ii) and (iii) above.

3. In support of the Motion, the Defence submitted a list of thirty case-law authorities from the jurisprudence of International Criminal Tribunal for Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR") on the issue of defects in the form of the indictment. Based on the jurisprudence of the ICTY and ICTR, the Defence outlines what it submits are the general principles which must be followed in drafting an indictment,[4] which will be addressed below in more detail under the specific alleged defect in the form of the indictment.

4. The Defence submits *inter alia* that the Indictment is not sufficiently clear or precise with respect to the factual and legal constituent elements so as to enable the Accused to understand the nature and cause of the charges brought against him. Specifically, the Defence asserts that the indictment must contain the material facts upon which the Prosecution relies, and not the evidence by which those material facts will be proved; the Indictment in this case is defective in various instances as it does not satisfy that requirement.

5. The Motion sets out five categories of challenges and submissions: (i) Failure to comply with Rule 47(C) and Article 17(4)(a) of the Statute; (ii) lack of precision in the form of the indictment including *inter alia* failure to provide any or sufficient particulars and vagueness of the indictment; (iii) failure to particularise mode of participation under Article 6(1) – individual responsibility; (iv) lack of specificity for joint criminal enterprise; and (v) failure to particularise responsibility as a superior.

B. The Prosecution Response

6. In response, the Prosecution first submits that the Defence Motion must be rejected as it is time barred on the grounds that pursuant to Rule 72, the time for filing such a motion in this case expired on 27 November 2003, 21 days after the Prosecution disclosure to the Defence on 6 November 2003, and that subsequent disclosure made by the Prosecution pursuant to its continuing disclosure obligations does not extend the time for filing preliminary motions under Rule 72(A).

[4] Motion, paras 3-11.

7. In further response, the Prosecution submits that the Defence argument as to the non-compliance with Rule 47(C) must be rejected on the grounds that the Prosecution did submit a Case Summary along with the Indictment for approval; and also that (without prejudice to its position) lack of a Case Summary does not vitiate the Indictment.

8. On the issue of dates, locations, names and numbers of victims, the Prosecution submits that this Trial Chamber in Decisions in the cases of both *Sesay*[5] and *Kanu*[6] has held that the degree of specificity required in an indictment depends upon these variables, to wit, "the nature of the allegations", "the nature of specific crimes accused", and "the scale or magnitude on which the acts or events allegedly took place", and that in the instant case the crimes charged are war crimes.[7]

9. The Prosecution also submits that more specifically, and contrary to the assertion of the Defence, the phrase "*between about*" to denote a time period of the commission of an offence is permissible in the context of such widespread alleged attacks and that *Kondewa* is authority for that proposition.[8]

10. Another Prosecution submission is that the phrase "at all times relevant in this indictment" as used in paragraphs 44, 50, 51 and 56 of the Indictment is not vague or unreasonable and that the *Sesay* Decision supports this submission.[9] A further submission put forward, in response by the Prosecution, is that the Defence's complaint about paragraph 57 of the Indictment is untenable, and that what is important is that the Indictment specifically sets out the relevant dates as "between 6 January 1999 and 31 January 1999" and thus puts the Accused on sufficient notice as to the time period that the offences were committed.

11. It is also submitted by the Prosecution that the locations referred to in the Indictment are sufficiently precise, given the nature of the case against the Accused, and that specifically it is sufficiently precise as to the geographic quadrants, districts, and villages alleged therein.

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[5] *Prosecutor v. Issa Hassan Sesay*, Case No. SCSL-03-05-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 October 2003 ("*Sesay* Decision").
[6] *Prosecutor v. Santigie Borbor Kanu*, Case No. SCSL-03-13-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 19 November 2003 ("*Kanu* Decision").
[7] Response, paras 8-16.
[8] Response, para. 9 citing *Prosecutor v. Allieu Kondewa*, Case No. SCSL-03-12-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 27 November 2003 ("*Kondewa* Decision").
[9] Response, para. 8 citing *Sesay* Decision, paras 21-22.

12. It is further submitted by the Prosecution that under the circumstance, it has no obligation to identify the names and numbers of victims as requested by the Defence on the grounds that this Trial Chamber and ICTY and ICTR have held that it is permissible to identify victims by reference to their group or category.

13. On the issue of the mode of participation under Article 6(1) of the Statute, the Prosecution submits that the Indictment is indeed specific as to the modes of responsibility with which the Accused is charged under Article 6(1).

14. On the issue of specificity for joint criminal enterprise, the Prosecution's Reply is that the allegation that the Accused participated in a joint criminal enterprise is specific to each of the counts in the Indictment, and that paragraph 24 expressly states that the crimes alleged in the Indictment were a result of the joint criminal enterprise, thereby linking each of the crimes charged to the joint criminal enterprise. It is also contended that there is sufficient particularity as to the nature of the alleged joint criminal enterprise and the nature of the Accused's participation in it, and that a ruling on this point in the *Sesay* Decision supports this position.

15. On the related issue of state of mind of the Accused when pleading joint criminal enterprise, the Prosecution submits that it is under no obligation to plead such state of mind, though in the context of the instant Indictment, the said state of mind is sufficiently pleaded. It is also argued in response, that the Prosecution is not required to plead the voluntariness of the Accused's conduct.

16. The answer of the Prosecution to the issue of defect in the Indictment in respect of responsibility as required under Article 6(3) of the Statute is that it has set out with sufficient particularity the Accused's criminal responsibility under Article 6(3) as illustrated by paragraphs 18-20; 8, 9, 18, 20, 21 and 28, 21 and 26, 28-64. The Prosecution also argues that in a similar attack on the sufficiency of the particulars of the subordinates of the Accused in the *Sesay* case, the Trial Chamber stated that "it is clear from the Indictment that the AFRC/RUF were alleged perpetrators" and that "it is sufficient and permissible in law to identify the subordinates of the Accused by reference to their group or category" namely the AFRC/RUF."[10]

[10] Response, para. 29 citing *Sesay* Decision, paras 16-17.

C. The Defence Reply

17. In its Reply, the Defence seeks to rebut the Prosecution's assertion that the Motion is time-barred under Rule 72(A) of the Rules. The Defence asserts that it received 112 documents "purportedly pursuant to Rule 66(A)(i)" on 6 November 2003,[11] which was two days before the time period for filing preliminary motions based on the first disclosure delivery on 6 November 2003.[12] The Defence submits that the documents, which included statements, were filed pursuant to Rule 66(A)(i), and thereby triggered Rule 72.[13] Citing the Prosecution's continuing disclosure, the Defence asserts that it is entitled to file the Motion based not only on "about 50% of the material upon which [the Prosecution] intend[s] to rely" but rather after all materials have been disclosed.[14]

18. In reply to the Prosecution's Response on the merits, the Defence reinforces the submissions and contentions put forward in the Motion and submits that in the interest of fairness and expedition, if particularity cannot be provided, the Indictment must be discharged. The Defence highlights the particular difficulty of providing details of alibi or preparing a Defence Case Statement, pursuant to Rule 67(C), without further particulars.[15]

II. PRELIMINARY ISSUES

A. Applicable Jurisprudence

19. In the first of its major decisions so far on the subject of defects in the form of the indictment,[16] the Trial Chamber articulated, firstly, the specific principles on the framing of indictments deducible from the evolving jurisprudence of ICTY and ICTR,[17] as will be briefly repeated below, and secondly, spelled out, for the purposes of the administration of justice in the Special Court for Sierra Leone, the variables upon which, in framing an indictment, the required degree of specificity must necessarily depend.[18] For the purpose of the instant Motion, and in the

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[11] Reply, para. 1. Defence Counsel asserts that he was served with the documents at 4:00pm on 25 November 2003, "which the Prosecutor said was 'pursuant to the Prosecution's disclosure obligations'." Reply, para. 2.
[12] Reply, paras 1-3.
[13] Reply, para. 8, citing Rule 72(A).
[14] Reply, para. 9.
[15] Reply, para. 14: "Unless there is that particularity the Rules provide a meaningless and fruitless exercise. The purpose of the Rules is to expedite the hearing of matters and to ensure fairness. Fairness cannot be achieved, not can expedition, if the accused does not know with specificity where he was supposed to have been on a particular day, what he was supposed to have done on a particular day, and to whom he was supposed to have done it."
[16] *Sesay* Decision.
[17] Id. para. 7.
[18] Id. para. 8 where it was stated *per* Judge Thompson that: "... 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

light of the several challenges to the indictment raised by the Defence, this Trial Chamber deems it necessary to recall, with emphasis, its major judicial focus as regards defects in the form of indictments in the context of international criminality. The Trial Chamber's focus is 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.[19]

20. The Trial Chamber wishes to observe that the same general judicial focus is shared by our sister tribunals ICTY and ICTR. Admittedly, how each tribunal applies this judicial approach to individual cases of alleged defects in the form of the indictment must, and will, necessarily vary with the particular context, specific parameters of the criminal activities forming the substrata of the allegations charged in the indictment, and the totality of the circumstances as alleged.

21. Given the frequent citation before the Trial Chamber of ICTY and ICTR case-law authorities for the Chamber's guidance as the interpretation of general principles of law in the context of international criminal adjudication, largely due to the nascent character of the Special Court's evolving jurisprudence, this Trial Chamber deems it necessary to comment on this forensic trend.

22. In this connection, the Trial Chamber emphasises that its application of the ICTY and ICTR jurisprudence is not due to a statutory imperative predicated upon a binding relationship of these UN Security Council-established International Criminal Tribunals on the Special Court; indeed, the Statute of the Special Court specifies that the Appeals Chamber of the Special Court shall be "guided" by, and not bound by, decisions of the Appeals Chamber of the two International Tribunals.[20] There is, however, a special relationship envisioned between the Special Court and the

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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."

[19] *Sesay* Decision, para. 9.

[20] Article 20(3) of the Statute of the Special Court. See also, Report of the Secretary-general on the establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000 ("Report of the Secretary-General on Special Court"), paras 40-46 (on the proposal of sharing one Appeals Chamber between the International Tribunals and the Special Court). Paragraph 41 is particularly instructive: "While in theory the establishment of an overarching Appeals Chamber as the ultimate judicial authority in matters of interpretation and application of international humanitarian law offers a guarantee of developing a coherent body of law, in practice, the same result may be achieved by linking the jurisprudence of the Special Court to that of the International Tribunals, without imposing on the shared Appeals Chamber the financial and administrative constraints of formal institutional link."

International Tribunals, as each institution is established to permit prosecutions for *inter alia* "serious violations of international humanitarian law". As such, the International Tribunals, the Special Court and the International Criminal Court belong to a unique, and still emerging, system of international criminal justice.

23. This special relationship is reflected not only in Article 20 of the Statute but also through the fact that, under the Statute of the Special Court, the Rules of Procedure and Evidence of the ICTR applied mutatis mutandis to the conduct of legal proceedings before this Court.[21] It can therefore be concluded that the drafters of the Statute of the Special Court not only envisioned that this Court would follow the procedures established by the ICTR - with necessary modifications - but furthermore, that the Rules of Procedure and Evidence of the ICTR can be construed as reflective of the general principles of law applicable to criminal proceedings in which the principles of international criminal law and international humanitarian law are applied.

24. Like the Special Court,[22] the ICTY and the ICTR are bound to apply customary international law,[23] and their decisions do, as a matter of principle, apply customary international law. It is for this reason that this Court applies persuasively decisions taken at the ICTY and ICTR. While noting that the obligations upon the ICTY and ICTR, as well as the Special Court, in relation to the application of customary international law and respect for the principle of *nullum crimen sine lege* are specifically related to the subject-matter of these institutions, the Trial Chamber finds that the two Tribunals also apply general principles of law on matters related to evidence and procedure.[24] The Trial Chamber

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[21] See, Article 14 of the Statute of the Special Court.

[22] See Report of the Secretary-General on Special Court, para. 12: "In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have the character of customary international law at the time of the alleged commission of the crime."

[23] See, Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808(1993). S/25704, 3 May 1993 (on the Statute of the ICTY), para. 34 (on subject-matter jurisdiction): In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law; and Report of the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955(1994), S/1995/134, 13 February 1995 (on the Statute of the ICTR), para. 12 (on subject-matter jurisdiction): "...the Security Council has elected to take a more expansive approach to the choice of the applicable law that than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they are considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. [...]"

[24] The Trial Chamber notes that Rule 89 of the Rules of Procedure and Evidence of both the ICTR and the ICTY provides, in relevant part: "(A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence. (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules

observes that decisions of both Tribunals are based on recognised sources of law consistent with Article 38 of the Statute of the International Court of Justice.[25]

25. Accordingly, as stated in some of its major decisions so far,[26] the Special Court will apply the decisions of the ICTY and ICTR for their persuasive value, with necessary modifications and adaptations, taking into account the particular circumstances of the Special Court.[27] The Trial Chamber will, however, where it finds it necessary or particularly instructive, conduct its own independent analysis of the state of customary international law or a general principle of law on matters related to *inter alia* evidence or procedure. Additionally, in cases where the Trial Chamber finds that its analysis of a certain point or principles of law may differ from that of either the ICTY or ICTR, it shall base its decisions on its own reasoned analysis.

26. It is against the background of this preliminary analysis as to the applicable jurisprudence that the several challenges advanced by the Defence would be examined on their merits. Before embarking on that exercise, however, it is necessary to dispose at this stage of the preliminary issue raised by the Prosecution, which is that the Motion, in accordance with Rule 72(A), is time-barred.

B. On the Time Limits for Filing the Motion

27. The records show that the Prosecution made disclosures of witness statements or summaries to the Defence in November 2003 and February 2004, on various dates. Based on the facts and circumstances, the Trial Chamber finds that disclosure was done pursuant to Rule 66(A)(i).

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of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."

[25] Article 38(1) of the Statute of the International Court of Justice states: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

[26] See, e.g., *Prosecutor v. Issa Hassan Sesay*, Case No. SCSL-03-05-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, paras 11-12. See also, Joinder Decision, paras 26-28.

[27] The Trial Chamber is cognisant of the fact that the temporal jurisdiction of each of the International Criminal Tribunals may impact upon the applicability of certain of their findings of the state of customary international law at the time relevant to those Tribunals, as opposed to the temporal jurisdiction of the Special Court.

28. Interestingly the Prosecution seeks to make a distinction here between "Preliminary Disclosure" and "Subsequent Disclosure",[28] a distinction which in the Trial Chamber's view is not supported by Rule 66(A)(i) which stated at the time applicable to this Motion that:

> Subject to the provisions of Rules 53, 69 and 75, the Prosecutor shall:
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> Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 *bis* at trial. Upon good cause being shown, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within the prescribed time.

We observe that Rule 72(A) does not envisage such a distinction.[29] The Trial Chamber finds therefore that the Prosecution's objection that the Motion is time-barred lacks merit on the grounds that it seeks to preclude the Accused from exercising his right to challenge the formal validity of the Indictment based on new disclosure material, where the Prosecution complies with its disclosure obligation in stages, a position which, in our opinion, violates the doctrine of fundamental fairness.

III. APPLICABLE LAW

29. Of relevance here is Article 17(4) ("Rights of the Accused") of the Statute, which prescribes certain minimum guarantees that must be afforded to each accused. Article 17(4) provides that:

> 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:
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> 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;
>
> b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
>
> [...]

30. Rule 47(C) ("Review of Indictment") specifies what information must be contained in an indictment. It provides:

> 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 proposed to prove in making his case.

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[28] See Response, para. 1.

[29] Rule 72(A) provides: Preliminary motions by either party shall be brought within 21 days following disclosure by the Prosecutor to the Defence of all material envisaged by Rule 66(A)(i).

31. Preliminary motions alleging defects in the form of the indictment are brought pursuant to Rule 72(A), (B)(i) and (D).

32. The Trial Chamber has held that the purpose of ensuring that an indictment is in the correct form 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."[30] An indictment therefore "must embody a concise statement of the facts specifying the crime or crimes preferred against the accused" and "must plead with sufficient specificity or particularity the facts underpinning the specific crimes."[31]

33. The Trial Chamber has also identified the following principles, *inter alia*, that must be adhered to when framing an indictment, which are to be read in the context of its comments in paragraph 19 above on the factors to be considered when determining the required specificity of pleadings, in the sphere of international criminality:[32]

(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.

(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.

(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.

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

(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.

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[30] *Sesay* Decision, para. 6.

[31] Id.

[32] Contrastingly, the regime of rules governing the framing of indictments within the national law of Sierra Leone in so far as national crimes are concerned is very strict indeed. For example, in the treason case of *Lansana and Eleven Others v. Reginam*, ALR.SL.186 (1970-71), the Sierra Leone Court of Appeal laid down a strict general rule on the issue of uplicity in indictments, namely that for each separate count in an indictment there should be one act set out which constitutes the offence. If two or more offences are set out in the same count separated by the disjunctive "or" the count is bad for duplicity and the conviction should be quashed. This decision is extensively discussed by Bankole Thompson in his book, *The Criminal Law of Sierra Leone*, (University Press of America, Inc. 1999) pp. 178-206. It is of interest to note that one of the Counsel who argued the issue of duplicity in the *Lansana* case was Appeals Chamber Judge, Justice George Gelaga King.

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

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

(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".

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

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

(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.

(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.[33]

IV. ON THE MERITS OF THE MOTION

34. It may be recalled that the challenges to the Indictment raised by the Defence fall into five main categories:

(a) failure to comply with Rule 47(C) and Article 17 (4)(a) of the Statute;

(b) lack of precision in the form of the indictment;

(c) failure to particularise mode of participation under Article 6(1), individual criminal responsibility;

(d) lack of specificity for joint criminal enterprise; and

(e) failure to particularise responsibility as a superior.

A. Failure to Comply with Rule 47(C) and Article (17)(4)(a) of the Statute

35. In respect of this category of challenges, the Defence submission is twofold:

1. that the Prosecution failed to provide a case summary pursuant to Rule 47(C); and

[33] See, *Sesay* Decision, para. 7, citations omitted.

2. that the Indictment does not contain "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".[34]

36. As regards the first arm of this challenge, the Trial Chamber finds on the available court records, as follows:

i. At the time of its submission by the Prosecution for approval pursuant to Rule 47, the original Indictment against the Accused was accompanied by an *ex parte* "Prosecutor Memorandum to Accompany Indictment", Draft Orders for the Approval Decision and Warrant of Arrest and, in particular, by a Prosecutor's Case Summary, comprising of one Investigator's Statement Regarding the Accused and Individual Criminal Responsibility and one Investigator's Statement Regarding the Charges against the Accused.

ii. The Indictment and the accompanying materials referenced herein were submitted on 26 May 2003. A Decision approving the Indictment was subsequently rendered on 28 May 2003, together with the relevant Warrant of Arrest. The Decision, the Warrant, the Indictment and "all documents pertaining to the Indictment" were subject of an Order for non-disclosure pursuant to Rule 53 and upon request of the Prosecution.

iii. On the execution of the Warrant of Arrest, the Accused was served, in conformity with the established practice of the Special Court and pursuant to the provisions of Rules 52 and 55 of the Rules, with the Indictment, the Warrant, the Decision Approving the Indictment and a set of basic legal instruments pertaining to the Special Court, *but was not served, either directly or through his Counsel, with the Case Summary accompanying the Indictment.*

Accordingly, the Trial Chamber upholds the first arm of the Defence objection and hereby orders the Prosecution to serve on the Defence, a certified true copy of the Case Summary accompanying the Indictment when it was submitted for approval, within three days of the date of service of this Decision. In granting this request, the Trial Chamber notes that the filing of the Case Summary does not *per se* have an impact on alleged defects in the form of the Indictment.

37. As regards the second arm of the said objection, after a close examination of the Indictment, the Trial Chamber finds that it sufficiently particularises the name and related personal details of the

[34] See, Motion, paras 2-5.

Accused and identifies the crimes preferred against him.[35] This specific contention is, therefore, rejected.[36]

B. Lack of Precision in the Form of The Indictment

38. Under the second category of challenges, Counsel for the Defence began by setting out ten (10) basic principles extracted from the jurisprudence of ICTY and ICTR as to what an indictment must contain, and then proceeded to deal with the theme "Vagueness of the Indictment", asserting that this objection applies to the Indictment in its entirety. Specifically, it is contended that, as regards dates, the phrase "*between about*" and "*about*" used in paragraphs 28, 34, 35, 36, 38, 41, 42, 47, 48, 52, 53, 54, 55, 60, 61 and 64 of the Indictment are "overly vague and ambiguous". Consistent with its three prior decisions[37] on the subject of defects in the form of the indictment, the Trial Chamber wishes to reiterate that it is trite to state that an indictment must be construed in its totality, and not as isolated and separate individual paragraphs or as a mere conjunction of words and phrases. The Trial Chamber further states that there is clear persuasive authority for the view that the words "*between about*" and "*about*" to denote a time frame of the commission of the alleged crimes are permissible in the context of alleged widespread and mass criminality especially where dates or times are not material elements of the alleged offences[38].

39. In the Trial Chamber's view, such time frames, as alleged in the Indictment, do not legally impede the Accused from properly preparing his defence particularly regarding establishing an *alibi*, as the Defence asserts. As a matter of law, the defence of *alibi* does not carry a separate burden of proof; it is for the Prosecution to prove beyond any reasonable doubt that the accused was present and committed the crimes for which he is charged and thereby discredit the defence of *alibi*.[39] It is worth observing that even though Rule 67(A)(ii)(a) of the Rules requires the Defence to notify the

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[35] In this regard, the Trial Chamber recalls that the requirements for approval of an indictment under Rule 47(C) are distinct from the requirements for the form of the pleadings of an indictment, recognising the rights of the accused on this matter enshrined in Article 17(4)(a) and (b) of the Statute.

[36] The Trial Chamber observes that while the Defence specifically cited Article 17(4)(a) of the Statute in relation to this challenge, its invocation of a violation of Article 17(4)(a) applies to its other challenges as well.

[37] *Sesay* Decision; *Kanu* Decision; and *Kondewa* Decision.

[38] *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T-21, Judgment 21 May, 1999, paras 81 and 85-86.

[39] See *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002, para. 15: "When a 'defence' of alibi is raised by an accused person, the accused bears no onus of establishing that alibi. The onus is on the Prosecution to eliminate any reasonable possibility that the evidence of alibi is true" and footnote 7: "It is not sufficient for the Prosecution merely to establish beyond reasonable doubt that the alibi is false in order to conclude that his guilt has been established beyond reasonable doubt. Acceptance by the Trial Chamber of the falsity of an alibi cannot establish the opposite to what it asserts. The Prosecution must also establish that the facts alleged in the Indictment are true beyond a

Prosecution of its intent to enter a defence of *alibi* as early as reasonably practicable, *failure to fulfil that obligation shall not limit the right of the accused to rely on the said defence*. On the issue of alleged vagueness of the phrase "*At all times relevant to this Indictment*", the Trial Chamber takes the liberty of reproducing below its findings on this issue in a recent Decision, to wit:

> 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.[40]

In this case, the time frame is determinable, as indicated under each count in relation to each allegation. Hence, the Trial Chamber does not find the phrase prejudicial as to its effect on the ability of the Accused to properly prepare his defence. The Defence challenges on this aspect of the Indictment are, therefore, untenable.

40. The next specific challenge concerns locations. Set out below are the relevant contentions by the Defence:

(a) that paragraphs 32, 40, 46, 51, 58, and 64 all contain the expression "*included but not limited to*" the following locations, and that it should be deleted for vagueness;

(b) that the assertion in paragraph 20 that the Accused was a commander of AFRC/RUF forces which conducted armed operations throughout the month, eastern and central areas of the Republic of Sierra Leone is vague and does not provide sufficient detail for the Defence to prepare its case on superior responsibility;

(c) that paragraph 50 of the Indictment fails to particularise any locations, using the blanket location of the entire Republic of Sierra Leone;

(d) that each count fails to identify with great precision the exact locations of the crimes.

41. As regards (a) above, in the *Sesay* Decision, the Trial Chamber ruled as follows:

> the Chamber is satisfied that the phrase "*but not limited to these 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.[41]

42. At the Status Conference held in this case on 8 March 2004, the Trial Chamber invited Counsel for the Accused to consider whether this Motion was overtaken by events, including *inter alia* the Joinder Decision issued on 27 January 2004 and the filing of the Consolidated Indictment, and

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reasonable doubt before a finding of guilt can be made against the accused." See also, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgement, 27 January 2000, para. 108.

[40] *Sesay* Decision, para. 22.

[41] Id. para 33 (citations omitted).

therefore possibly rendered moot. Counsel declined the Trial Chamber's invitation and accordingly the Trial Chamber has considered the Motion on the merits. In doing so, however, the Trial Chamber cannot simply disregard the facts and the record as they now stand; to do otherwise would result in a meaningless exercise. Thus, while the Trial Chamber applies the reasoning found in the *Sesay* Decision to the objections raised, and finds that the objections have merit, the Trial Chamber concludes that a remedy has already been provided by the Prosecution. The offending language, namely "*included but not limited to*" and "*but not limited to these events*" has been removed from the paragraphs cited by Counsel, namely paragraphs 32, 40, 46, 51, 58, and 64 in the former Indictment, which have been renumbered as paragraphs 42, 51, 58, 66 and 80, respectively, in the Consolidated Indictment.[42] These changes were done in conformity with the Joinder Decision, in which it was ordered that the Prosecution file a Consolidated Indictment for Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, the latter of whom had already received a Bill of Particulars from the Prosecution following an earlier Trial Chamber Order to that effect.[43]

43. Accordingly, the Trial Chamber declares objection (a) in paragraph 33 moot and thereby dismisses the objection.

44. In the case of contention (b), it is abundantly clear to the Trial Chamber that by no stretch of the legal imagination, taking the Indictment as a whole, can it be reasonably inferred that it is doubtful as to what role the Accused is here being charged with. His alleged role is that of "a commander of the AFRC/RUF forces" not that of a "foot soldier". There is, likewise, nothing vague or imprecise about the assertion that he, allegedly, "conducted armed operations throughout the north, eastern and central areas of the Republic of Sierra Leone". The Defence submission on this point is rejected.

45. By parity of reasoning, the Defence submissions, as set out in (c), that "paragraph 50 fails to particularise any locations and that the Indictment fails to identify with great precision the exact locations of the crimes" are unsustainable.

46. The next Defence challenge under this category, found in (d), relates to alleged vagueness and lack of specificity as to the names and number of victims. The Trial Chamber has examined the

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[42] See, Indication of Specific Changes to Indictments, 1 March 2004.

[43] See, *Prosecutor v. Santigie Borbor Kanu*, Case No. SCSL-03-13-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 19 November 2003, para. 17, and *Prosecutor v. Santigie Borbor Kanu*, Case No. SCSL-03-13-PT, Bill of Particulars, 25 November 2003.

allegedly offending paragraphs, to wit, 33-34, 36-39, 41-44, 47-49, 52, 54-56, 59-60, 61, 64 and 50, and finds no merit in the allegations for the following reasons. Firstly, that, as an exception to the general rule, that where it is alleged that an accused personally committed criminal acts, the indictment must plead with particularity the identity of the victims, in cases of mass criminality the sheer scale of the offences may make it impossible to identify the victims.[44] Secondly, that there is no applicable magical formula as to the degree of specificity required for the purposes of pleading "an indictment alleging criminality in the international domain as distinct from criminality in the domestic sphere".[45] It is precisely a matter of common sense and what is reasonable, having regard to "the scale or magnitude on which the acts or events allegedly took place" and "the totality of the circumstances surrounding the commission of the alleged crimes"[46] Thirdly, that whether the phrases complained of, for example, "*an unknown number*", are permissible or not "depends primarily upon the context," and that they would be " 'clearly permissible in situations where the alleged criminality was of what seems to be cataclysmic dimensions' and where statistics are hard to come by."[47]

C. Failure to Particularise Mode of Participation under Article 6(1) on Individual Responsibility

47. Under this category of challenges, the Defence contentions are as follows:

(a) Failure by the Prosecution to identify in paragraph 25 of the Indictment the Accused's mode of participation under Article 6(1) of the Statute

(b) Ambiguity in pleading the several modes of participation as basis of individual responsibility under Article 6(1)

(c) Lack of precision in relation to the material facts relating to acts of other persons in the context of the alleged superior responsibility on the part of the Accused

(d) Failure of Prosecution to indicate as regards Article 6(1) responsibility "in relation to each individual count precisely and expressly in the particular nature of the responsibility alleged"

(e) Lack of clarity as to whether the Accused "planned and/or instigated and/or ordered and/or aided and abetted" in the crimes which he is charged"

(f) Lack of specificity as to which particular acts of the Accused constitute the alleged course of conduct in the context of individual responsibility

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[44] See, *The Prosecutor v. Laurent Semanza*, Case No ICTR-97-20-T, 15 May 2003 and also *Sesay* Decision, para. 20.

[45] See, *Kanu* Decision, para. 19. The Trial Chamber recalls that guideline, however, do exist. See fn. 18 *surpa*. See also, *Prosecutor v. Zoran Kupreškić et al*, Case No. IT-95-16-A, Judgement, 23 October 2001, para. 89: "the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution 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. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail."

[46] Id.

[47] Id, citing *Sesay* Decision, para. 23.

(g) Failure of Prosecution to indicate in respect of each count (especially as regards paragraphs 31, 39, 45, 50, 57, 63 and 64) the nature of the Accused's responsibility under Article 6(1).

48. Article 6(1) of the Statute provides:

> 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.

49. Dealing with challenges (a), (b), (d), (e), and (f) in paragraph 39 above together, the Trial Chamber takes the liberty of recalling its exposition of the law in the case of *Kondewa*, applying the *Sesay* Decision, that:

> 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.' 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).[48]

Noting that paragraph 15 of the Indictment upon which the decision in *Kondewa* was rendered is *ipssissma verba* with paragraph 25 of the Indictment herein which is the subject matter of the instant Motion, and consistent with the Trial Chamber's rulings in *Kondewa* and *Sesay*, the Trial Chamber holds that 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 Accused is in no way prejudiced by the present state of the pleadings."[49] Where the Prosecution opts to plead all the different heads of responsibility under Article 6(1) consistent with its discretion, it will carry the burden of proving the existence of each at the trial.[50] Therefore, "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 matter, the key determinant of the

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[48] *Kondewa* Decision, para. 9.

[49] Id. para. 10

[50] The Trial Chamber recalls that the Prosecution must intend to rely upon every head of responsibility that is pleaded. See *Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 10: "It was appropriate for the indictment to define individual responsibility in such extensive terms only if the prosecution intended to rely upon each of the different ways pleaded. If the prosecution did not have that intention, then the irrelevant material should not have been pleaded because of the ambiguity it creates, and the prosecution should have made its intention clear. It has firmly been stated that pleading individual responsibility by reference merely to all the terms of Article 7.1 is likely to cause ambiguity."

success or failure of the Prosecution's case."[51] The submissions on these challenges are, therefore, rejected.

50. In respect of the challenges by the Defence cited in paragraph 47(c) above, which relates to superior responsibility on the part of the Accused, based on a careful review of the relevant paragraphs and the Indictment as a whole, the Trial Chamber finds the allegations on this theme pleaded with sufficient particularity to enable the Accused to prepare adequately his defence to the said allegations. The Chamber's finding is reinforced by, for example, the following specific material facts as pleaded:

(i) that at all times relevant to the Indictment, the Accused was a senior member of the AFRC Junta and AFRC/RUF forces (paragraph 18);

(ii) that the Accused was a member of the group which staged the coup and ousted the government of President Kabbah; that Johnny Paul Koroma, Chairman and leader of the AFRC, appointed the Accused as Public Liaison Officer within the AFRC; and that he, Accused, was a member of Junta governing body (paragraph 19);and

(iii) that between about mid-February 1998 and 30 April 1998, the Accused was a commander of the AFRC/RUF forces based in Kono District; that he was a commander of the AFRC/RUF forces which conducted armed operations throughout the north, eastern and central areas of the Republic of Sierra Leone, and that he was a commander of the AFRC/RUF forces which attacked Freetown on 6 July 1999 (paragraph 20).

To a similar effect as to specificity are paragraphs 8, 9, 21, 26, 28-64 of the Indictment. It is difficult to fathom what more specificity can be required without risking, contrary to the basic tenets of our adversarial system, imposing an undue burden on the Prosecution to disclose or incorporate in an indictment evidence in the guise of underlying material facts. Premised on the foregoing analysis, therefore, the Chamber finds the Defence challenge to be meretricious.

D. Lack of Specificity for Joint Criminal Enterprise

51. Under this head of challenge, the Defence contends as follows:

(a) that the Prosecution failed in paragraphs 23-24 of the Indictment to provide sufficient particulars regarding the criminal nature of the purpose of the alleged joint criminal enterprise, and of any individuals engaged in the enterprise, or the identity of those persons outside Sierra Leone who were allegedly provided with natural resources in return for assistance in carrying out the joint criminal enterprise;

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[51] *Kondewa* Decision, para. 10.

(b) that the Prosecution failed to specify the nature of the participation by the Accused in the alleged common plan and no indication of the time frame over which the common plan is alleged to have existed;

(c) that the Indictment did not plead the state of mind of the Accused in relation to joint criminal enterprise sufficiently;

(d) that the Indictment provides no definition of the "unlawful means" through which the joint criminal enterprise was effected.

52. Considering the merits of (a), (b), (c), and (d) above cumulatively under the broad theme of the requirement of specificity for pleading the doctrine of joint criminal enterprise, the Trial Chamber, on reviewing the Indictment as a whole and particularly paragraphs 23-24, makes these findings:

(i) that the Indictment, in its entirety, is predicated upon the notion of a joint criminal enterprise, and that paragraph 24 reinforces this finding in these terms:

> The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise;

(ii) that the nature of the alleged joint criminal enterprise, the nature of the Accused's participation in it, the identity of those involved in the same, and the time frame of the alleged joint criminal enterprise are all pleaded with the degree of particularity as the factual parameters of the case admits. For example, paragraph 23 alleges:

> The AFRC, including the Accused, and the RUF 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.

53. As to the Defence contention that the Prosecution must disclose the names of persons outside Sierra Leone to whom diamonds were to be provided in return for assistance in carrying out the joint criminal enterprise, the Trial Chamber reiterates that this is an evidentiary matter. Equally pertinent to dispelling this Defence misconception, is that the time frame of the joint criminal enterprise is sufficiently pleaded as "*All times relevant to this Indictment.*" By parity of reasoning, the Trial Chamber notes that the nature of the Accused's participation is pleaded in paragraphs 18-23, and that the identity of those involved in the joint criminal enterprise is sufficiently pleaded in paragraphs 8, 19, 21, and 22. In respect of the related contentions that the Prosecution must plead the Accused's state of mind in relation to the joint criminal enterprise, that the voluntariness of the Accused must also be pleaded, and that there is no definition of the "unlawful means" in the context

of joint criminal enterprise, the Trial Chamber makes shortshrift of these contentions with two brief observations. Firstly, that they are essentially evidentiary matters and secondly, that there is some degree of specificity in respect of these allegations in so far as the factual context of the case, as alleged, admits. The Trial Chamber, accordingly, rejects these challenges as ill-conceived.

E. Failure to Particularise: Responsibility as a Superior

54. The pith of the objections taken to the form of the Indictment by the Defence in respect of the Accused's superior responsibility under Article 6(3) of the Special Court's Statute, as alleged, in the hostilities forming the basis of the charges in the Indictment, is threefold. First, that the information provided by the Prosecution in paragraphs 18-20 of the Indictment lacks sufficient particularity. Second, that paragraph 19 fails to identify the group that staged the *coup*. Third that paragraph 20 fails to specify the identities of the forces that conducted armed attacks, of which the Accused was allegedly commander, and their areas of responsibility.[52]

55. Taking these kindred challenges together, the Trial Chamber, after reviewing the allegedly offending paragraphs, finds as follows:

(i) that paragraphs 18-20 of the Indictment plead with sufficient particularity the relationship between the Accused and the alleged perpetrators in the superior-subordinate context;[53]

(ii) that the identities of subordinates are sufficiently pleaded in paragraphs 8, 9, 18, 20-21 and 28 as members of the AFRC, Junta, RUF and AFRC/RUF forces;

(iii) that paragraphs 21 and 26 set out with reasonable particularity the allegation that the Accused was a superior, together with other superiors, "exercised authority, command and control over all subordinate members of AFRC, Junta and AFRC/RUF forces";

(iv) that paragraphs 28-64 set out *in extenso* the acts or crimes of the subordinates for which the Accused, in his superior capacity, is alleged to be responsible, for example, armed attacks on civilians and humanitarian assistance personnel and peacekeepers assigned to UNAMSIL, terrorizing of the civilian population (to

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[52] Motion, para. 10.

[53] For example, paragraph 20 alleges: "Between about mid-February 1998 and 30 April 1998 BRIMA BAZZY KAMARA was a commander of AFRC/RUF forces based in Kono District. In addition, the ACCUSED was a commander of AFRC/RUF forces which conducted armed operations throughout the work, eastern and central areas of the Republic of Sierra Leone, including, but not limited to, attacks on civilians in Koinadugu and Bombali Districts between about mid February 1998 and 31 December 1998. The ACCUSED was a commander of AFRC/RUF forces which attacked Freetown on 6 January 1999."

wit, unlawful killings, physical and sexual violence against civilian men, women and children, abductions, looting and destruction of civilian property); and

(v) that the Indictment alleges in paragraph 26 that 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 that the **ACCUSED** failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrator thereof."

Without further articulation of the law in Article 6(3) beyond this Chamber's exposition in *Sesay*,[54] it is the Chamber's considered opinion that the Defence contentions under this final category of challenges do lack substance.

56. In conclusion, based on the analysis in the foregoing paragraphs herein and a thorough review of requirements for an indictment under international criminal law,[55] the Trial 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.

[54] See, *Sesay* Decision, paras 13-15.

[55] In addition to reviewing Indictments issued in the international sphere, the Trial Chamber has reviewed, *inter alia*, the Sample Indictments and Charges contained in Appendix H of *Archbold*, International Criminal Courts, Practice, Procedure and Evidence, Sweet & Maxwell, London, 2003 pages 1409-81.

V. DISPOSITION

BASED ON THE FOREGOING ANALYSIS AND DELIBERATIONS,

PURSUANT TO Article 17 of the Statute and Rule 72(B)(ii) of the Rules,

THE TRIAL CHAMBER UPHOLDS the Motion in part, and **RULES AS FOLLOWS:**

1. The Prosecution shall serve on the Defence, a certified true copy of the Case Summary accompanying the Indictment when it was submitted for approval, within three days of the date of service of this Decision; and

2. The form of the Indictment was defective in that it contained the phrases "included but not limited to" and "but not limited to these events." While dismissing the current objections as moot,[56] the Prosecution shall review the Consolidated Indictment to ensure that such phrases are not present therein. In the event that such phrases are in the Consolidated Indictment, the Prosecution shall either delete these phrases or provide in a Bill of Particulars specific additional allegations against the Accused which shall state in the full extent of the charges against the Accused in detail.

AND THE TRIAL CHAMBER FURTHER REJECTS AND DISMISSES ALL OTHER DEFENCE OBJECTIONS.

Done at Freetown this 1st day of April 2004.

Judge Bankole Thompson
Presiding Judge,
Trial Chamber

Judge Benjamin Mutanga Itoe

Judge Pierre Boutet

[Seal of the Special Court for Sierra Leone]

[56] See, *Sesay* Decision, paras 35-36.