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SCSL -2003 -12 -PT  
(1121 - 1127)

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**SPECIAL COURT FOR SIERRA LEONE  
TRIAL CHAMBER**

**Before:** Judge Boutet

**Registrar:** Robin Vincent

**Date:** 7 November 2003

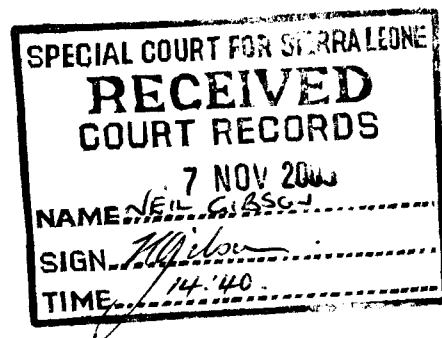
**The Prosecutor Against:** Allieu Kondewa

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

**PRELIMINARY MOTION BASED ON DEFECTS ON THE INDICTMENT  
AGAINST ALLIEU KONDEWA**

Office of the Prosecutor:  
Luc Cote, Chief of Prosecution

Defence Counsel:  
James MacGuill, MacGuill & Company  
James Evans, MacGuill & Company  
Charles Margai, Banta Chambers



The accused brings this preliminary motion for defects in the indictment pursuant to Rule 72 (B) (ii) of the Rules of Procedure and Evidence (hereafter the “Rules”).

1. On the 4<sup>th</sup> of June 2003 the accused was indicted by the Special Court for Sierra Leone and accused of Crimes against Humanity, Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II and other serious violations of international humanitarian law contrary to articles 2, 3 and 4 of the Statute of the Special Court.
2. The accused raises a number of challenges to the indictment. These are as follows:-
  - i. The Prosecution has failed to distinguish clearly and specify the alleged acts for which the accused incurs criminal responsibility under article 6(1). This failure inhibits the ability of the accused to adequately conduct his defence.
  - ii. The inclusion of the phrases “included but not limited to”, “about” and “but not limited to these events” renders the indictment vague and imprecise which impedes the accused in the proper conduct of his defence.
3. The accused relies on the guarantees set down in Article 17 of the Statute, *inter alia*, that he is entitled to a “fair hearing” as set out in Article 17(2) and the minimum guarantees as set down in Article 17(4) including the right to be informed promptly and in detail the nature and cause of the charge against him and the right to have adequate facilities for the preparation of his defence. Contrary to the rights enshrined in Article 17(2) which may be restricted in certain circumstances by the court, no such jurisdiction to restrict the exercise of the rights guaranteed by article 17(4) exists.
4. Rule 47(C) provides that

“ 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 to prove in making his case.”

5. The Special Court has recognised that to ensure that the rights outlined at article 17 are respected

“the indictment must plead with sufficient specificity or particularity the facts underpinning the specific crimes.”<sup>1</sup>

**The Prosecution has failed to distinguish and specify the alleged acts for which the accused incurs criminal responsibility under article 6(1). This failure inhibits the ability of the accused to adequately conduct his defence.**

6. Paragraph 15 of the indictment alleges individual criminal responsibility as follows

“15. ALLIEU KONDEWA by his acts or omissions is individually criminally responsible pursuant to Article 6.1 of the statute for the crimes referred to in Articles 2, 3 and 4 of the statute as alleged in this indictment, which crimes the ACCUSED planned, instigated, ordered, committed or in whose planning, preparation or execution the ACCUSED otherwise aided and abetted, or which crimes were within a common purpose, plan or design in which the accused participated or were a reasonably foreseeable consequence of the common purpose, plan or design in which the accused participated.”

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<sup>1</sup> Para. 6 Decision on the defence preliminary motion for defects in the form of the indictment in Prosecutor v. Sesay dated 13 October 2003. SCSL – 2003-05-PT.

7. Individual criminal responsibility pursuant to Article 6.1 is alleged for all counts listed in paragraphs 20 to 24 of the indictment.

8. It is submitted that where individual criminal responsibility is alleged the prosecution is under an obligation to specify in relation to each count the nature of the responsibility alleged.

9. In the case of the Prosecutor v. Tadic<sup>2</sup> it was held that

“The form of the alleged participation of the accused in a crime is a material averment which should be clearly laid out in an indictment in order to clarify it and make plain the prosecution case.”

10. This Court has held that

“it may be necessary to indicate disjunctively whether the accused ‘planned, instigated, ordered committed or otherwise aided and abetted in the planning, preparation or execution’... This may be required to ensure clarity and precision as regards the exact nature and cause of the charges against the accused and to enable him to adequately and effectively prepare his defence.”<sup>3</sup>

11. It is submitted by the defence that where the prosecutor cannot ensure the necessary clarity and precision to enable the accused to exercise his rights fully pursuant to article 17 of the statute the court must dismiss those counts in the indictment or put the prosecution on its election as to what form of participation is alleged for each count.

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<sup>2</sup> Para. 12 Prosecutor v. Tadic, ICTY, Decision on the Defence Motion on the form of the indictment 14 November 1995.

<sup>3</sup> Para. 12 Decision on the defence preliminary motion for defects in the form of the indictment in Prosecutor v. Sesay dated 13 October 2003. SCSL – 2003-05-PT.

**The inclusion of the phrases “included but not limited to”, “about” and “but not limited to these events” renders the indictment vague and imprecise which impedes the accused in the conduct of his defence.**

12. It is an established principle that “the indictment should contain the identity of the victims, the location of the crime and the approximate date of its commission as well as the means used to commit the crime.”<sup>4</sup>

13. The Court is referred to paragraphs 20, 21 and 22 of the indictment dealing with counts 1 to 5. Each paragraph commences the name of the offence followed by the phrase “included but not limited to.” The indictment then proceeds to list locations and approximate dates for the alleged offences.

14. In the Prosecutor v. Blaskic<sup>5</sup> in response to a specific objection raised by the defence on the use of the phrase “including but not limited to” in the context of location it was noted

“The Trial Chamber agrees with the defence that expressions such as *including but not limited to ...* are vague and subject to interpretation and that they do not belong in the indictment when it is issued against the accused.”<sup>6</sup>

15. In addition, each of the counts against the accused uses the general formulation

“By his acts or omissions in relation to *but not limited to these events* ALLIEU KONDEWA...is individually criminally responsible.”

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<sup>4</sup> Archbold, International criminal practice and procedure para. 6-54. See also The Prosecutor v. Dosen and Kolundzija Decision of the trial chamber dated 10 February 2000.

<sup>5</sup> Decision on the defence motion to dismiss the indictment based upon defects in the form thereof, 4 April 1997.

<sup>6</sup> *Ibid.* para. 22

16. This court has held that the phrase “but not limited to these events” used in this context is

“impermissibly broad and also objectionable in not specifying the precise allegations against the accused.”<sup>7</sup>

17. The defence submission is that the phrase should be deleted from the indictment due to its potential for ambiguity.

18. In the accused’s indictment “about” is used in paragraphs 20(a), (b), (c), (d), (e), (f) and (g); paragraph 21(a) and paragraph 22. It refers to the timeframe in which the offences are alleged to have been committed. It expands the time frame in which the offences were alleged to have been committed and inhibits the ability of the accused to properly defend the case. For this reason, the defence submits that the word “about” should be removed from the indictment.

19. In the Blaskic case the defence submitted that the use of the phrase “about” in the context of the time of commission of the alleged offences interfered with the ability of the accused to prepare his defence properly. The Trial chamber noted

“...an indictment cannot permit itself to be overly vague. The adverb ‘about’, whenever used, therefore must be stricken.”

20. Without prejudice to the other reliefs sought in the motion the defence respectfully submits that the phrase “included but not limited to”, “included but not limited to these events” and “about” as used in the indictment at the paragraphs above should not be permitted and be stricken from the indictment.

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<sup>7</sup> Para. 33, Decision on the defence preliminary motion for defects in the form of the indictment in Prosecutor v. Sesay dated 13 October 2003. SCSL – 2003-05-PT.

21. In this regard the defence also relies upon the Appeals Chamber in the Prosecutor v. Kupresic in that

“The prosecution is expected to know its case before it goes to trial. It is not acceptable for the prosecution to omit material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.”<sup>8</sup>

### **Reliefs sought**

22. The accused asks the court to dismiss all counts in the indictment based on Article 6.1 for the reasons outlined in paragraphs 8 to 13 of the defence motion or in the alternative that the prosecution elect which form of responsibility is alleged for each count.

23. Alternatively or in addition the accused asks the court to order the prosecution to delete certain words and phrases from the indictment as outlined in paragraphs 14 to 23.

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<sup>8</sup> Para. 92 Prosecutor v. Kupresic et al, Appeal Judgment October 23, 2001