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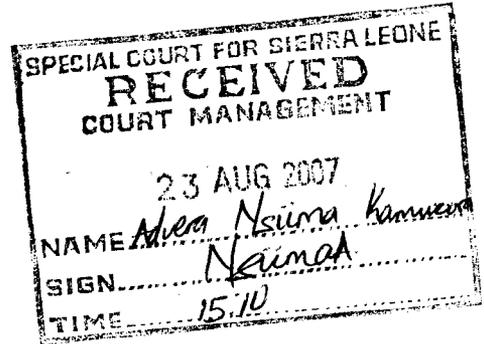
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SPECIAL COURT FOR SIERRA LEONE  
TRIAL CHAMBER I

Before: Hon. Justice Benjamin Mutanga Itoe, Presiding  
Hon. Justice Bankole Thompson  
Hon. Justice Pierre Boutet

Registrar: Mr. Herman Von Hebel

Date filed: 23 August 2007



THE PROSECUTOR

against

ISSA HASSAN SESAY  
MORRIS KALLON  
AUGUSTINE GBAO

Case No. SCSL -2004-15-T

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PUBLIC

GBAO - REQUEST FOR LEAVE TO RAISE OBJECTIONS TO THE FORM OF  
INDICTMENT

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Office of the Prosecutor

Peter Harrison  
Reginald Fynn

Defence Counsel for Issa Sesay

Wayne Jordash  
Sareta Ashraph

Defence Counsel for Morris Kallon

Shekou Touray  
Charles Taku  
Melron Nicol-Wilson

Defence Counsel for Augustine  
Gbao

John Cammegh

## PROCEDURAL HISTORY

1. On 20 June 2007, Trial Chamber II rendered its judgment in the case of the AFRC accused.<sup>1</sup>
2. On 3 August 2007, the Prosecution filed a notice titled “Prosecution Notice Concerning Joint Criminal Enterprise and Raising Defects in the Indictment” (hereinafter ‘the Prosecution’s Notice’).
3. Defence counsel hereby acknowledges receipt of the Prosecution’s Notice, and wishes to make clear that he does not consider it to be a motion, and therefore the 10-day time limit as prescribed by rule 7 (C) of the Rules of Procedure and Evidence (‘RPE’) does not apply.
4. In addition, defence counsel would like to request leave of the Trial Chamber to allow him to file a motion challenging defects in the form of the indictment, following the findings of Trial Chamber II in the AFRC judgment. It is defence counsel’s opinion that the recent findings of Trial Chamber II concerning the form of the indictment creates a new jurisprudence upon which Counsel for Augustine Gbao would like to raise objections to the form of the indictment of the RUF accused.<sup>2</sup>

## APPLICABLE LAW

5. Under Rule 72 of the RPE, any objection based on defects in the form of the indictment should be done by way of preliminary motion, within 21 days of the disclosure of the indictment.
6. Rule 72(C) particularly makes clear that defects in the form of the indictment can be raised only in one motion, unless otherwise allowed by the Trial Chamber.
7. Rule 26bis provides *inter alia* that the Trial Chamber and Appeals Chamber shall ensure that “...a trial is fair and expeditious and that proceedings before the Special Court are conducted with full respect to the rights of the accused ...”

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<sup>1</sup> *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-04-16-T-613, Judgment, Trial Chamber II, 20 June 2007. (‘AFRC Judgment’)

## SUBMISSIONS

8. Defence counsel for Augustine Gbao has not filed any motion objecting to the form of the indictment. While defence counsel is aware that the time limit for raising objections to the form of the indictment has expired, it is submitted that the Trial Chamber should allow him to file objections to the form of the indictment, following the findings of Trial Chamber II in the AFRC judgment. Allowing defence counsel for the third accused to do so is necessary to ensure integrity of proceedings and to safeguard the rights of the accused as provided for in Rule 26*bis* of the RPE. In the CDF judgment,<sup>3</sup> Your Honours relied upon this rule to consider objections to the form of the indictment that the Counsel for Fofana had raised, even though he had done so for the first time in his final brief. Defence counsel respectfully requests the same reasoning to be applied in the present situation. It is in the interests of justice to allow defence counsel to raise defects to the form of the indictment following the AFRC judgment, since it creates a new environment in the light of which the form of the RUF indictment should be reviewed.
9. In addition, even though the Trial Chamber has already rendered a decision concerning defects in the form of the indictment following a motion raised by the first accused, Issa Sesay,<sup>4</sup> it is the submission of defence counsel that the elements that defence counsel for the third accused intends to challenge have not been dealt with in the decision.<sup>5</sup>
10. It is the submission of Counsel for Augustine Gbao that it be granted leave to file the motion following the ruling in the AFRC judgment on four points that are of direct relevance and importance to the case of Augustine Gbao and the other RUF accused.
11. Firstly, the Trial Chamber ruled that the joint criminal enterprise ('JCE') had not been correctly pleaded in that the common purpose alleged ('take any action to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas') is not a crime recognised by the statute of the Court.<sup>6</sup> Furthermore, the Trial Chamber found that the Prosecution wrongly pleaded two categories of JCE at the same time (basic form and extended

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<sup>2</sup> Corrected Amended Consolidated Indictment, 2 August 2006.

<sup>3</sup> *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-T, Judgment, Trial Chamber I, 2 August 2007, para. 29 ('CDF Judgment').

<sup>4</sup> Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, Trial Chamber I, 13 October 2003.

<sup>5</sup> *Cf.* below, para. 20 of the present filing.

<sup>6</sup> AFRC Judgment, paras.67, 76 and 85.

form) while they logically exclude each other.<sup>7</sup> A comparison of the AFRC and RUF indictment shows that the JCE is expressed in exactly the same terms in both indictments.<sup>8</sup> Counsel therefore submits that the reasoning applied in the AFRC case applies to the present case and that in the interest of justice counsel should be allowed to argue that JCE has been defeatedly pleaded in the indictment.

12. Secondly, Trial Chamber II dismissed count 7 of the AFRC indictment, entitled 'Sexual Slavery and Any Other Form of Sexual Violence', for charging two offences (sexual slavery and sexual violence) under the same count and therefore violating the prohibition of duplicity. Defence counsel notes that the wording of count 7 is exactly the same in the RUF indictment, and that defence counsel should be allowed to raise an objection as to that count.
13. Thirdly, Trial Chamber II held that the Prosecution failed to plead that acts were personally committed by the Accused, failing to provide particulars regarding time, location and identity of victims in relation to the crimes personally committed by the Accused.
14. Lastly, Trial Chamber II held that the offences of a continuous nature, especially concerning child soldiers, sexual slavery and enslavement, had not been pleaded with enough particularity. Allegations concerning child soldiers in the RUF and AFRC indictment are of exactly the same wording.<sup>9</sup> The same goes for the allegations concerning sexual slavery and enslavement in both indictments.<sup>10</sup>
15. For the above mentioned reasons, defence counsel respectfully submits that, due to the similarity between the indictments in the RUF and in the AFRC case, the findings in the AFRC judgment which relate to the indictment should lead to a 're-opening' of submissions relating to defects in the form of the indictment. Contrary to what the Prosecution alleges in its notice,<sup>11</sup> the reasoning of Trial Chamber II is in no way different from the RUF case, since the parts of the indictments where it has been found that the Prosecution failed in the pleading are exactly the same in both indictments.

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<sup>7</sup> *Ibid*, para.71.

<sup>8</sup> Paragraph 34, 35, 36 and 37 of the RUF indictment are formulated in the exact same wording as paragraph 31, 32, 33 and 34 of the AFRC indictment.

<sup>9</sup> *Cf.* para.68 of the RUF indictment and para.65 AFRC indictment.

<sup>10</sup> *Cf.* paras.54-60 and paras. 69-76 of the RUF indictment; paras. 51-57 and paras. 66 to 73 AFRC indictment.

16. Defence counsel respectfully submits that a resolution on the form of the indictment at the present stage instead of later would materially advance the proceedings and would also save time. Indeed, allowing defence counsel for the third accused to file a motion raising defects in the form of the indictment and the decision thereto would have an impact on the preparation and presentation of the defence case. In addition, not allowing defence counsel to raise defects in the indictment at this stage would prejudice the right of the accused to a fair trial, therefore impairing the integrity of the proceedings.

17. Though a decision was previously rendered by the Trial Chamber, counsel for Augustine Gbao relies upon the AFRC judgment,<sup>12</sup> as well as on the *Kajelijeli* appeal judgment<sup>13</sup> and *Cyangugu* appeal judgment,<sup>14</sup> to request the leave to file a motion raising defects in the form of the RUF indictment. The above mentioned judgments all set precedent that a Trial Chamber may review a decision previously made if it is necessary to prevent an injustice.

#### **LIST OF DEFECTS THAT THE DEFENCE COUNSEL INTENDS TO RAISE IN THE MOTION**

18. More specifically, Counsel wishes to raise the following defects in the indictment:

- (i) The Prosecution failed to plead JCE because the common purpose alleged is not inherently criminal.
- (ii) The Prosecution failed in distinguishing the category of JCE alleged, by simultaneously pleading two forms of JCE that to exclude each other (basic and extended form). In addition, the Prosecution failed to detail, for each alleged offence, which one was committed within the JCE (basic form) or which one was a reasonably foreseeable consequence of the JCE (extended form).
- (iii) Count 7 ‘Sexual slavery and other offences of a sexual nature’ violates the prohibition of duplicity by charging two different offences under the same count (sexual slavery and sexual violence).

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<sup>11</sup> Para. 4 of the Prosecution’s Notice of 3 August 2007.

<sup>12</sup> Para.24.

<sup>13</sup> *Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, 1 December 2003, paras. 203 and 204.

<sup>14</sup> *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe*, Case No. ICTR-99-46-T, Judgment, 25 February 2004, paras 28-70.

- (iv) The Prosecution failed to plead that acts were *committed* by the Accused. No particulars regarding time, location and identity of victims have been given in relation to the crimes personally committed by the Accused.
- (v) The Prosecution also failed to provide locations when arguing continuous crimes such as child soldiers, sexual slavery and enslavement.

## RELIEF SOUGHT

19. Counsel for Gbao hereby requests the leave of the Trial Chamber to file a motion, raising objections to the form of the indictment.

Thursday 23 August 2007,



Defence Counsel for Augustine Gbao,  
John Cammegh.