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SCSL-04-15-T  
(30231-30242)

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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: 5 September 2007

SPECIAL COURT FOR SIERRA LEONE	
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NAME	Advera Nsiima Kamuzora
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THE PROSECUTOR

against

ISSA HASSAN SESAY  
MORRIS KALLON  
AUGUSTINE GBAO

Case No. SCSL -2004-15-T

PUBLIC

GBAO -REPLY TO THE PROSECUTION RESPONSE TO GBAO – REQUEST FOR LEAVE TO  
RAISE OBJECTIONS TO THE FORM OF THE INDICTMENT

Office of the Prosecutor

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Defence Counsel for Augustine Gbao

John Cammegh

## I. PROCEDURAL HISTORY

1. On 20 June 2007, Trial Chamber II rendered its judgement 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”.<sup>2</sup>
3. On 23 August 2007, the Defence for the third Accused (hereinafter ‘the Defence’), Augustine Gbao, filed a motion requesting the Court for leave to raise objections to the form of the indictment,<sup>3</sup> following the recent filings in the AFRC Judgement.<sup>4</sup> (‘Gbao’s Request’).
4. On 31 August 2007, the Prosecution filed its response to the request for leave.<sup>5</sup> (‘Prosecution’s Response’).

## II. SUBMISSIONS

5. The Defence for the third Accused is confused by the Prosecution’s Response. In this response, it is stated that the Defence should raise objections to the Indictment now and should not be allowed to raise objections to the Indictment at the end of the case, unless exceptional circumstances are shown.<sup>6</sup> However, in the past, the Prosecution supported the argument that objections to the Indictment should be raised at the end of the case.
6. On 16 October 2006,<sup>7</sup> during discussions concerning the request of the Defence for a judgement for acquittal (rule 98 of the Rules of Procedure and Evidence (‘RPE’)), to the question asked by Judge

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

<sup>2</sup> *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-16-T-812, Prosecution Notice Concerning Joint Criminal Enterprise and Raising Defects in the Indictment, 3 August 2007. (‘Prosecution’s Notice’).

<sup>3</sup> *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-16-T-619, Corrected Consolidated Amended Indictment, 2 August 2006. (‘the Indictment’).

<sup>4</sup> *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T-813, Gbao-Request for Leave to Raise Objections to the Form of the Indictment, 23 August 2007.

<sup>5</sup> *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T-814, Prosecution Response to Gbao-Request for Leave to Raise Objections to the Form of the Indictment, 31 August 2007.

<sup>6</sup> Prosecution’s Response, para.7.

<sup>7</sup> RUF Transcripts of 16 October 2006, p.113 and 114.

Itoe ‘Are you saying counsel cannot raise issues relating to the defects of an indictment at this stage?’<sup>8</sup> the Prosecution responded in the affirmative.<sup>9</sup> Counsel for the Prosecution submitted that ‘it is wholly unacceptable to raise such matters halfway through the trial’. Furthermore, the Prosecution stated that there was no objection with the Defence complaining about a defective indictment at the end of the case.<sup>10</sup>

7. Judge Thompson, the presiding judge at that time, supported the Prosecution’s statement, by saying ‘[...] Clearly there is authority for them to do that. They can revisit jurisdictional issues and particularly issues of that nature [...]’.<sup>11</sup>
8. Following the Prosecution’s own contradictions, Defence counsel is confused as to whether objections to the indictment should be raised now or at the end of the trial and requests clarification from the Trial Chamber on this issue.
9. In the event such objections should be raised at the present stage, the Defence’s Reply follows.
10. The Prosecution does not object to Gbao’s Request.<sup>12</sup> However, in its Response, the Prosecution submits that:

- (i) The Defence for Augustine Gbao should have filed a preliminary motion raising objections to the form of the Indictment pursuant to rule 72.<sup>13</sup>
- (ii) In case Gbao’s Request is granted, the burden of proof that the Accused’s ability to defend himself has been materially impaired by the alleged defects in the Indictment shifts from the Prosecution to the Defence.<sup>14</sup>

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<sup>8</sup> *Ibid*, p.113 l.11-12.

<sup>9</sup> *Ibid*, l.13.

<sup>10</sup> RUF Transcripts of 16 October 2006, p.114, l.16-19.

<sup>11</sup> *Ibid*, l.19-22.

<sup>12</sup> *Ibid*, para. 5.

<sup>13</sup> *Ibid*, para. 4.

<sup>14</sup> *Ibid*, para. 5.

- (iii) If leave is granted, the motion should be limited to raising objections relating to the findings in the AFRC case.<sup>15</sup>
- (iv) In the interests of fairness, objections to the Indictment should be dealt with in a consolidated manner.<sup>16</sup> The Prosecution requests the judges, in case the request is granted, to grant similar leave to the other accused, *sui motu*.<sup>17</sup>
- (v) In the event the leave is granted, the Prosecution requests the Court to direct all accused that, if they wish to object, they have to do it within a time frame directed by the Trial Chamber.<sup>18</sup> The Prosecution proposes 14 days to object to the form of the Indictment following the Trial Chamber's decision on Gbao's request for leave.<sup>19</sup>
- (vi) Objections to the Indictment should be allowed at a later stage only in exceptional circumstances.<sup>20</sup>

(i) *The Defence Should Have Filed a Preliminary Motion*

11. The Defence submits that it could not have filed a preliminary motion on this issue following rule 72(B) of the RPE since the findings it intends to rely upon were rendered only recently in the AFRC judgement on the 20<sup>th</sup> June 2007. This has been made clear in the Gbao Request.<sup>21</sup> Moreover there would have been little point given that the issue had been judicially determined in the 13<sup>th</sup> October 2003 Decision on the Defence Motion regarding challenges put forward by the Sesay Defence concerning alleged defects in the Indictment.<sup>22</sup> The Prosecution's attempt to distinguish the various accused in the context of challenges to the Form of the Indictment is wholly artificial. The arguments advanced by one accused give rise to rulings of general application. It is to

<sup>15</sup> *Ibid*, para. 6.

<sup>16</sup> *Ibid*, para. 7.

<sup>17</sup> *Ibid*, para. 10.

<sup>18</sup> *Ibid*, para. 7.

<sup>19</sup> *Ibid*, para. 10.

<sup>20</sup> *Ibid*, para. 7.

<sup>21</sup> Gbao's Request, para. 8.

<sup>22</sup> *Prosecutor v Sesay*, SCSL-2003-05-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 October 2003.

be assumed that attempts by one accused to raise identical or similar challenges on matters previously ruled upon would not be logical or in the interests of judicial economy.

12. Additionally until the 3<sup>rd</sup> August 2007 the Prosecution has always maintained (i) that the JCE was correctly pleaded and that the Defence had adequate notice of the object and purpose of the enterprise and (ii) that the Defence were prohibited from raising any further challenges to the form of the indictment until the end of the trial.<sup>23</sup> Notwithstanding, on the 3<sup>rd</sup> August 2007 in response to the AFRC judgment of the 20<sup>th</sup> June 2007, in an extraordinary JCE saving exercise, the Prosecution filed a “Prosecution Notice Concerning Joint Criminal Enterprise and Raising Defects in the Indictment” (“Notice”), purporting to give further notice of the joint criminal enterprise in the Indictment.
13. At the same time in an equally surprising development the Prosecution, in contradistinction to their previously held position that the Defence were barred from raising further challenges to the indictment, asserted that “justice requires that any objection they may now advance based on the recently filed AFRC Judgement, should be brought at this time”.<sup>24</sup> In other words, for the first time in the proceedings, the Prosecution has implicitly conceded that the notice previously provided concerning the joint criminal enterprise in “the indictment, pre-trial brief, supplemental pre-trial brief, opening statement, pre-trial disclosure including witness summaries and oral submissions during the presentation of evidence” was inadequate and secondly that the issue remains justiciable.<sup>25</sup> It is submitted that the contents of this aforementioned notice (the concession) and the new approach by the Prosecution in conjunction with the ruling in the AFRC judgment on the 20<sup>th</sup> June 2007 raise entirely new circumstances relating to JCE. These new issues must be resolved.
14. The Defence reiterates the arguments made in Gbao’s Request in order to support the timing of raising these objections.<sup>26</sup>

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<sup>23</sup> Cf. RUF Transcripts of 16 October 2006, p.113 and 114, mentioned in paras. 5 to 7.

<sup>24</sup> Prosecution’s Notice, para.12.

<sup>25</sup> Prosecution Response, Paras. 5 and 12.

<sup>26</sup> *Ibid*, paras. 8, 10, 15-16.

(ii) *The Burden of Proof Shifts to the Defence*

15. The Prosecution relies upon the CDF judgement, as well as the fact that it closed its case 13 months ago, to argue that the burden of proving that the Accused's ability to defend himself has been materially impaired by the alleged defects should shift from Prosecution to Defence.<sup>27</sup>

16. In the CDF Judgement, paragraph 27 addresses the question of which party has the burden of proof in demonstrating defects in the indictment:

“Generally, if defects in the indictment are alleged, the OTP has the burden of demonstrating that the Accused's ability to prepare his case has not been materially impaired. However, where the Defence has raised no objection during the course of the trial, and raises the matter only in its closing brief, the burden shifts to the Defence to demonstrate that the Accused's ability to defend himself has been materially impaired, unless it can give a reasonable explanation for its failure to raise the objection at trial”.<sup>28</sup>

17. As this paragraph makes clear, the burden shifts to the Defence if it “has raised no objection during the course of the trial” and “raises the matter only in its final brief”. These preconditions to shifting the burden—where no objection has been raised and the objection occurs at the end of the case—are not present in the case at hand. The Defence for Gbao is objecting *during* the course of the trial and *before* the final brief.<sup>29</sup>

18. The Prosecution was also concerned that the Gbao motion was brought 13 months after close of its case. However, it cannot be said that objections based upon the AFRC judgement should have been brought within the time limit prescribed by Rule 72 of the Rules of Procedure, as the decision (with its consequent dismissal of JCE as a form of liability) was made only recently, and well after the

<sup>27</sup> Prosecution's Response, para.5. It refers to *Prosecutor v Fofana and Kondewa*, SCSL-04-14-T-785, Judgement, Trial Chamber I, 2 August 2007. ('CDF Judgement').

<sup>28</sup> CDF Judgement, para.27.

<sup>29</sup> There is a wealth of support for the general principle outlined in paragraph 27 of the CDF Judgement. See eg. *Prosecutor v Niyitegeka*, ICTR-96-14-A, Judgement, Appeals Chamber, 9 July 2004, para. 199, 200. See also *Prosecutor v Gacumbitsi*, ICTR-01-64-A, Judgement, Appeals Chamber, 7 July 2006, para. 54; *Prosecutor v Bagosura et al.*, ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006, para. 42; *Prosecutor v Ntagerura et al.*, ICTR-99-46-A, 7 July 2006, Judgement, Appeals Chamber, para. 138.

close of the Prosecution's case. Defence for Gbao has acted in good faith to address this matter after the AFRC judgement was rendered.

*(iii) The Objections to the Indictment Should be Limited to the Findings in the AFRC Case*

19. At this stage, the Defence has made clear in its request that objections are in response to findings in the AFRC Judgement.<sup>30</sup>

*(iv) Objections to the Indictment should be Dealt with in a Consolidated Way within a Time Frame Set Up by the Trial Chamber*

20. The Defence does not object with the setting of a time frame to file the motion objecting to the indictment. However he does not agree with the Prosecution's proposition of 14 days.<sup>31</sup>

21. In response to the Prosecution's argument that the objections to the Indictment should be dealt with in a consolidated manner, the Defence wishes to make clear that the present request was filed on behalf of the third Accused only, and that the Defence for Augustine Gbao had no intention to involve the other two accused.

*(v) Time Frame of 14 Days Following the Trial Chamber's Decision on the Request for Leave*

22. The Defence notes the importance of judicial economy, and therefore the relevance of setting a time frame for the motion objecting to the Indictment to be filed. However, the Defence wishes to emphasise that, while it is the duty of the Court to ensure that the trial is fair and expeditious, this has to be done 'with full respect for the rights of the Accused'.<sup>32</sup> Taking into account the substantial amount involved in the preparation of a motion objecting to the indictment,<sup>33</sup> it would be contrary to the interests of fairness to allow only 14 days to the Defence for the filing of the motion.

<sup>30</sup> Gbao's Request, paras. 10 and 18.

<sup>31</sup> Cf. below para. 16 of the present filing.

<sup>32</sup> Rule 26bis RPE. The Defence submits that it is the right of the Accused to have adequate time for the preparation of its defence; Cf. Art. 17(4)(b) of the Statute of the Special Court.

<sup>33</sup> The Defence wishes to stress that the above-mentioned motion will object to the pleading of the Joint Criminal Enterprise in the Indictment. Such an issue, when decided upon, could have extremely important and far-reaching effects on case of the third Accused.

23. The Defence submits that, if leave is granted, Your Honours should allow a 30 day time frame for filing of the motion objecting to the indictment.

*(vi) Only in Exceptional Circumstances Should Objections to the Indictment be Allowed at a Later Stage*

24. Defence counsel does not support the Prosecution's argument that objections to the Indictment should not be allowed at a later stage in the proceedings, unless exceptional circumstances are shown. This allegation is not supported by any case law.<sup>34</sup> While the Defence agrees that judicial efficiency requires objections to the indictment be dealt with as expeditiously as possible, it would be contrary to the interests of justice not to allow objections to the indictment to be raised in the final brief, especially (but not only) if such objections had been raised during the course of the trial as well.

25. The reason why the Defence should be limited in raising objections to the Indictment at a late stage in the proceedings is to avoid the Defence doing it for tactical reasons.<sup>35</sup> It is clear that this concerns a situation when the objection has been raised *only* in at the end of the case, in the final submissions, and does not apply when objections to the Indictment have been raised during the course of the trial.

26. In the AFRC Judgement, the Trial Chamber takes note that the Defence has been constantly complaining about the vagueness of the Indictment throughout the trial, to finally find that it is not precluded from reviewing whether shortcomings in the form of the Indictment have resulted in prejudice to the rights of the Accused.<sup>36</sup> Similarly it must be noted that the Defence in the RUF case has raised the issue of the vagueness of the Indictment on many occasions and have specifically complained about the ill-conceived JCE and the inability (or unwillingness) of the Prosecution to describe it consistently and/or clearly. The Prosecution has always chosen to ignore the complaint and/or to insist that the complaint should not be considered at this later stage of the

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<sup>34</sup> Prosecution's Response, para.7.

<sup>35</sup> AFRC Judgement, para.24; CDF Judgement para.28.

<sup>36</sup> AFRC Judgement, para.24.



proceedings. It follows that the Defence have raised objections to the Indictment and is entitled at any stage of the proceedings (now or at the end of the case) to continue to raise the same and further consequential complaints.

27. In the CDF Judgement, the Trial Chamber considered the objections made by the Defence for Fofana, even though it had not raised objections to the indictment at an earlier stage, as being necessary to ensure the integrity of the proceedings and to safeguard the rights of the Accused.<sup>37</sup>
28. Even though it is clear from the two above-mentioned Judgements that a Defence team should raise objections to the Indictment during the course of the trial, it is also established that, in the interests of justice, objections to the indictment can be raised at the end of the case.
29. By raising objections to the Indictment during the course of the trial, it is thus clear that the Defence for the third Accused does not intend to merely gain a tactical advantage. Moreover, at the end of the case and irrespective of the challenges mounted by the Defence during the course of the trial, a Trial Chamber must consider all issues which relate to the integrity of the proceedings and the overall fairness of the trial. Not allowing the Defence to raise objections to the indictment (if necessary in light of the proceedings) would be contrary to the interests of justice, especially if those objections identified a fundamental breach of Article 17(4)(a) (the right to be informed promptly and in detail of the nature and cause of the charge against him).
30. For the avoidance of doubt the Defence will submit, either at this stage or at the end of the trial, that the pleading of the JCE is fundamentally flawed. The Prosecution have rightly conceded that the notice of the object, purpose and nature of the JCE previously provided was inadequate. The belated attempt to remedy this situation creates more confusion not less. The unfairness to the accused raised by the pleading, the lack of notice and the ruling in the AFRC cannot be remedied at this late stage of the proceedings.

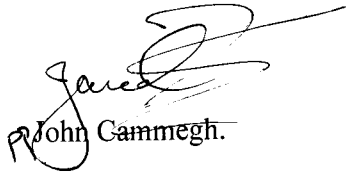
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<sup>37</sup> CDF Judgement, para. 29. *See also Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement, 15 May 2003, para. 42 'The Chamber emphasises that allegations of vagueness should normally be dealt with in the pre-trial stage. The Defence has not offered any explanation for its delay in raising many of its specific challenges to the Indictment until its Closing Brief. Nonetheless, the Chamber finds that its duty to ensure the integrity of the proceedings and safeguard the rights of the Accused warrants full consideration of the arguments of the Defence.'

### III. CONCLUSION

31. The Defence reasserts the arguments made in its request. The leave of the trial chamber is requested, to enable the Defence for the accused to file a motion raising objections to the indictment, in the interests of justice and in respect with the right of the accused to a fair trial as expressed in rule 26*bis* of the Rules of Procedure and Evidence of the Court.

Done on Wednesday 5<sup>th</sup> September 2007,  
Defence Counsel for Augustine Gbao,

  
John Cammegh.

## List of Authorities

### I. Special Court for Sierra Leone

- *Prosecutor v Sesay*, SCSL-2003-05-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 October 2003.
- *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-16-T-619, Corrected Consolidated Amended Indictment, 2 August 2006.
- *Prosecutor v Sesay, Kallon and Gbao*, Transcripts of 16 October 2006.
- *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-T-613, Judgement, Trial Chamber II, 20 June 2007.
- *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-16-T-812, Prosecution Notice Concerning Joint Criminal Enterprise and Raising Defects in the Indictment, 3 August 2007.
- *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T-813, Gbao-Request for Leave to Raise Objections to the Form of the Indictment, 23 August 2007.
- *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T-814, Prosecution Response to Gbao-Request for Leave to Raise Objections to the Form of the Indictment, 31 August 2007.
- Rules of Procedure and Evidence of the Special Court for Sierra Leone as amended on 14 May 2007.

### II. International Criminal Tribunal for Rwanda

- *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement, Trial Chamber, 15 May 2003
- *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Judgement, Appeals Chamber, 9 July 2004.
- *Prosecutor v. Gacumbitsi*, Case No. ICTR-01-64-A, Judgement, Appeals Chamber, 7 July 2006.
- *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, Appeals Chamber, 7 July 2006.
- *Prosecutor v. Bagosura et al*, ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, ICTR-98-41-AR73, 18 September 2006.