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SPECIAL COURT FOR SIERRA LEONE

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THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Presiding Judge Designated Pursuant To The Practice Direction On The Procedure Following a Request By a State, the Truth and Reconciliation Commission, Or Other Legitimate Authority To Take A Statement From A Person In The Custody of the Special Court for Sierra Leone.

Registrar: Robin Vincent

Date: 3rd day of November, 2003

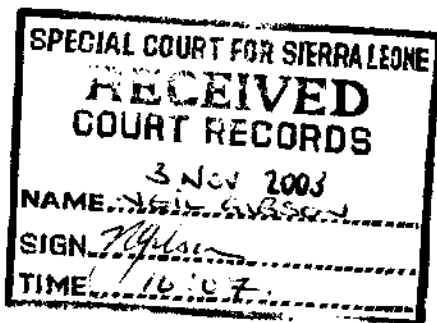
The Prosecutor Against: Augustine Gbao
(Case No. SCSL-2003-09-PT)

DECISION ON THE REQUEST BY THE TRUTH AND RECONCILIATION COMMISSION OF SIERRA LEONE TO CONDUCT A PUBLIC HEARING WITH AUGUSTINE GBAO

Office of the Prosecutor:
Desmond De Silva, QC
Boi-Tia Stephens

Truth and Reconciliation Commission:
Franklyn B. Kargbo
Executive Secretary

Defence Counsel:
Mr. Girish Thanki, QC
Professor Andreas O'shea
Mr. Kenneth Carr
Miss Glenna Thompson
Mr. Ben Holden



THE SPECIAL COURT FOR SIERRA LEONE ("the Court")

SITTING AS, Judge Bankole Thompson, Presiding Judge and designated pursuant to the Practice Direction on the Procedure Following a Request by a State, The Truth and Reconciliation Commission, or other Legitimate Authority to take a statement from a Person in the Custody of the Special Court for Sierra Leone adopted on the 9th day of September, 2003 as amended on the 4th day October, 2003 pursuant to Rule 33 (D) of the Rules of Procedure and Evidence of the Special Court ("the Rules");

BEING SEIZED of the Truth and Reconciliation Commission for Sierra Leone "Request to conduct a public hearing with Augustine Gbao" filed on the 13th day of October 2003 pursuant to the aforementioned Practice Direction (the "TRC");

NOTING that the aforesaid Request concerns Augustine Gbao, a person presently in the custody of the Special Court pursuant to a seventeen (17) count Indictment preferred against him on the 7th day of March, 2003 with approval of the Special Court for various offences falling within the jurisdiction of the said Court;

CONSIDERING that the said Request is one which, according to the Practice Direction, falls within the jurisdiction of the Presiding Judge of the Trial Chamber for determination, and subject to appeal to the President of the Special Court;

NOTING that the purpose of the Request is to facilitate the object and functions of the Commission contained in Sections 6 and 7 of the Truth and Reconciliation Commission Act, 2000 which include "holding sessions, some of which may be public, to hear from the victims and perpetrators of any abuses of violations from other interested parties";

CONSIDERING that the Truth and Reconciliation Commission "perceives Augustine Gbao," an Accused presently indicted before the Special Court "to have played a key role in the conflict in Sierra Leone";

CONSIDERING ALSO that the Special Court being seized of an indictment charging the Accused with seventeen (17) counts of various offences within the jurisdiction of the Special Court as hereinbefore stated, but that the Court is, in law, obliged **NOT** to draw any conclusions about his role in the said conflict until the issue has been properly adjudicated before the said Court and therefore **CANNOT** at this stage form any perception as that entertained by the **TRC**; and upon which the aforementioned Request is premised.;

EMPHASIZING that the jurisdiction to try the Accused for offences falling within the jurisdiction of the Court is exclusive to the Court and not shared concurrently with any other institution, national or international, and that the Court as, an International Criminal Tribunal, cannot properly, in law, delegate this exclusive jurisdiction to any other entity or institution; and that any purported delegation of such authority would compromise its autonomy and the integrity of the trial of the Accused;

CONSIDERING FURTHER the paramount need of the Special Court in protecting the procedural and substantive due process rights of the Accused, as long as he remains in the custody (actual or constructive) of the Special Court; and has not been adjudged guilty;

NOTING the Response of the Defence to the Request of the TRC, filed on the 12th day of October, 2003;

ALSO NOTING the Response of the Prosecution to the Request of the TRC, filed on the 24th day of October, 2003;

WHEREAS acting on the Designated Judge's Instructions, the Chamber advised the parties on the 24th day of October, 2003 of a brief oral hearing preceding the determination of the merits of the Request;

NOTING THE SPECIFIC SUBMISSIONS OF THE PARTIES

The TRC Request

1. (a) By the instant Request, the TRC seeks an Order of the Special Court "to conduct a public hearing with Mr. Augustine Ato Gbao, currently held as an awaiting trial prisoner at the detention facility of the Special Court".

(b) At the oral hearing on the 29th day of October, 2003, Mr. Varney for the TRC handed out written submissions in response to the Prosecutor's written representations and highlighted several main points. He noted that the position of the TRC was largely the same as presented in the matter of *Sam Hinga Norman*. He noted the urgency of the situation as the TRC is approaching the end of its lifespan in December 2003 and that the Defence and TRC had adopted a unified position on the TRC's request. He first responded to the Prosecution's objection that a public hearing would be contrary to the interests of justice, noting that any claim that a hearing would be *sub judice* was without factual basis and jurisprudential support, and that the professionalism of the judges of the Special Court renders such a claim irrelevant. Furthermore, the Prosecutor's claim that to allow a hearing would be contrary to public policy and the interests of justice ignored the role of the courts as guardians thereof, by which a proportional assessment could be made of the right of all Sierra Leoneans to participate in the TRC process without discrimination. Mr. Varney also submitted that in assessing what constituted "in the interests of justice", a broad interpretation was needed, including an assessment of the Sierra Leonean context. Counsel noted that principles of international law supported this contention, and that there was a presumption in favour of a public hearing. To deny the TRC request would impose a cost to Mr Gbao that would outweigh the Prosecutor's concerns. He also submitted that there was no basis to the Prosecution's claim that the institution of justice would be weakened by a TRC hearing and that no objections were raised at the time the Practice Direction was issued by the Special Court.

(c) Second, responding to the Prosecution's objection that the integrity of the proceedings before the Special Court would be compromised by providing Mr Gbao with a public

forum in which to stir up public sentiment and intimidate witnesses, Counsel noted that there are already strict protective measures in place for witnesses and there is no basis for suggesting that Mr Gbao would disclose their identities in a public hearing, nor that he possesses the knowledge of their identities at all. Furthermore, similar orders have been made in relation to several other detainees of the Special Court. These orders have been based on the situation at large in Sierra Leone, not the threat posed by any single detainee.

(d) Finally, Counsel submitted that although the Prosecutor made no allegation that a TRC hearing would threaten the fragile peace in Sierra Leone, it should be noted that the denial of Mr Gbao's right to testify before such a hearing may itself have adverse implications on national security and public sentiment. He stated that the TRC objected to all of the conditions suggested by the Prosecutor as alternative measures in the event that the hearings was to proceed, on the basis that they were contrary to the essential purpose and spirit of its work which is founded on transparency and accountability. Access by the press and public broadcasts are essential to this purpose and spirit. In conclusion, the Counsel argued that national practice now recognises a right to testify before the TRC, and that at the international level Truth and Reconciliation Commissions have become an important part of the right of victims to an effective remedy.

The Defence Response

2. In their Response, the Defence Counsel stated:

"It is our instructions to permit Mr. Gbao to give testimony before the Truth and Reconciliation Commission. We have therefore consented to this on certain conditions designated to ensure that the minimum of prejudices to Mr. Gbao's trial before the Special Court for Sierra Leone."

(See paragraph 4 (i) - (xii) and paragraphs 5-8 of Agreement for Conditions).

In his oral submission, Mr Thanki for the Defence adopted the TRC's submissions and noted that the TRC's request was proper and supported by Mr Gbao. He submitted that the TRC had a vital role to play in the aftermath of the war in Sierra Leone, particularly in contributing to a broad understanding of the underlying political and social causes of the development of the RUF. A public hearing would deepen knowledge of the conflict. Counsel also submitted that the request should only be denied if the conditions contained in paragraph 5 of the Practice Direction as amended on 4 October 2003 were satisfied. If these conditions were not satisfied, suitable conditions could still be imposed. With regard to the Prosecutor's reservation that any statements made by Mr Gbao to the TRC could be later used by the Prosecutor, Mr Thanki referred to publicly recorded statements of the Prosecutor and Chief Investigator in which it was asserted that no evidence from statements to the TRC would be used by the Prosecutor's office. In support, he submitted several extracts of news articles from the internet.

The Prosecution's Response

3. Amplifying and highlighting key aspects of their written submissions, Ms Stevens, Counsel for the Prosecution, noted at the outset that the Prosecution was anxious for the TRC to fulfil

its mandate and had always supported the TRC since the TRC and the Special Court are pursuing the same goal of a sustainable peace in Sierra Leone. Nevertheless, the Prosecution has a duty to ensure the integrity of the judicial process is preserved, as well as the perception thereof. She contended that the request for a public hearing puts at risk the interests of justice and the integrity of the proceedings before the Special Court, and that checks and balances were necessary to ensure that the proper place for litigating Mr Gbao's liability remained in the Court. Counsel submitted that the rule against *sub judice* exists to protect the public from misinformation; especially on issues of high national importance where it is necessary to avoid sensationalist journalism and one-sided information. She contended that the alternative conditions proposed by the Prosecution would balance this consideration without diminishing the ability of the TRC to fulfil its mandate and that where witnesses fear reprisal attacks against themselves and their families, it is the Prosecution's duty to protect them against such reprisals and that this is recognised in the Statute of the Special Court. She further submitted that if Mr Gbao was to testify before the TRC it would send an adverse message that detainees are still given the means to influence people. Furthermore, she stated, it could jeopardise the security of the Special Court. Regarding the possible use of any statements made by Mr Gbao before the TRC, counsel noted that the Prosecution's earlier comments must be viewed in their proper context. They were made at a time when there was concern that perpetrators would not come forward out of fear of exposing themselves to prosecution. This situation must be distinguished from that early stage, as it relates to a person already indicted by the Court.

TRC Reply

4. The TRC was granted leave by Judge Thompson to make a brief reply on the Prosecutor's comments regarding the *sub judice* rule. To this end, Mr. Varney contended that it is not the role of the Court to protect the public from misinformation or sensationalist journalism.

AND HAVING DELIBERATED THUS

5. Paragraph 5 of the Practice Direction on the procedure following a request by a State, the Truth and Reconciliation Commission, or other legitimate authority to take a statement from a person in custody of the Special Court for Sierra Leone provides as follows:

" In the event that the detainee agrees to the questioning (such agreement having been signed in writing by the detainee and confirmed by the detainee's counsel) the Registrar shall inform the parties and place the request before the Presiding Judge. The Presiding Judge shall instruct the parties and the detainee's counsel on the procedures to be followed on making representations concerning the request. After such representations are made, the Presiding Judge shall grant approval (conditional or otherwise) if the said judge is satisfied that the detainee agrees to the questioning and has been fully advised in terms of paragraph 4 above. In such circumstances, the request for questioning will only be rejected if the Presiding Judge is satisfied that a refusal is necessary in the interests of justice or to maintain the integrity of the proceedings of the Special Court. An appeal against rejection shall be decided by the President if it is made expeditiously and jointly by the detainee and the requesting authority."

The aforesaid Practice Direction was adopted pursuant to Rule 33 (D) of the Rules of Procedure and Evidence of the Special Court which is in these terms:

“The Registrar may, in consultation with the President of the Special Court, issue Practice Directions addressing particular aspects of the practice and procedure in the Registry of the Special Court and in respect of other matters within the powers of the Registrar.”

6. In conformity with the letter and spirit of the above Direction, as Presiding Judge of the Trial Chamber, I became seized of the instant Request following a reference to me of the said Request by the Registrar on the 13th day of October, 2003, and later of the agreement in writing of Augustine Gbao, the detainee in question, signed by his Counsel, Glenn Thompson filed on the 12th day of October, 2003 (though the records reveal the existence of an earlier agreement not signed by the Accused); and also of the Prosecution’s Response filed on the 24th day of October, 2003.

7. In further conformity with the said Practice Direction, the parties were advised to attend an oral hearing before me in Chambers on the 29th day of October, 2003 at 10:30 a.m. for the purpose of making brief representations in support of their respective positions. The oral hearing did take place on the scheduled date. At the said hearing, the parties argued strenuously in support of their respective positions as reflected in paragraphs 1, 2, 3 and 4 above.

8. Having meticulously examined both the written submissions and oral representations of the parties, I am strongly inclined to the view that the Accused herein is uncertain as to whether to testify before the Commission. In effect, I entertain serious judicial doubts on the issue. Being so doubtful, I have sufficiently and diligently applied my mind to the available judicial options under the Practice Direction in responding to the instant Request: (i) to approve the Request, and (ii) to refuse it if “*satisfied that a refusal is necessary in the interests of justice or to maintain the integrity of the proceedings of the Special Court*”; the Decision being subject to appeal.

9. My doubts being thus reinforced by the state of the records and the oral representations, I have decided to adopt the second option available to me, pre-eminently aware of the paramount need to protect the procedural and substantive due process rights of the Accused. I lean strongly to this alternative option primarily out of the conviction that it is the undeniable expectation of the international community that Judges of the Special Court should discharge their judicial functions independently and impartially free from pressures (institutional, societal, political or otherwise) (Article 1.3 (1) of the Court Statute).

10. Adopting, therefore, my reasoning *mutatis mutandis* on the Request by the Truth and Reconciliation Commission of Sierra Leone to conduct a public hearing with Samuel Hinga Norman¹, I articulate in the succeeding paragraphs (11 - 17) the major reasons for adopting the second option.

¹ SCSL-2003-08-Pt dated 29 October, 2003.

11. The first main reason is that the Request of the Commission to conduct a public hearing with the Accused on, as the Request indicates, the key role in the conflict that took place in Sierra Leone a decade ago *clashes fundamentally with, and has grave ramifications for, the cardinal principle that a person accused of crime is presumed innocent until convicted.*²

12. This fundamental tension is brought into sharp focus by the nature and effect of Condition (i) being sought by the Accused. By stipulating for this Condition the Accused is, (using a familiar legal metaphor) seeking a judicial shield to protect him from any injurious effects of the sword which, by his agreement, he would be placing in the hands of the Commission. In my considered judgment, such a stipulation will be devoid of legal efficacy for the reason that the Accused, by testifying, will be admitting that he was “a perpetrator of abuses and violations” during the conflict, and will be accepting the Commission’s perception that he did play a key role in the conflict, despite the fact that he has pleaded not guilty to each of the 13 counts in the indictment against him. It is crystal-clear that the Commission’s statutory mandate is to interview, among others, *perpetrators of abuses and violations*. Condition (i) is only meaningful and feasible within the context of the adversarial framework of the Special Court in that, at this point in time, the alleged key role of the Accused in the conflict is a highly contentious, and as yet, unsubstantiated issue³ as evidenced by the pleas of not guilty to the indictment. Is the Accused, after *reprobating* in one forum, seeking a judicial license to *approve* in another? Evidently, he is.

13. The second reason is that Condition (ii) is extremely problematical. Here, the Accused is seeking a fiat from the Court to be “permitted to retain his right to silence at all times and that he be permitted to withdraw from the proceedings at anytime” before the Commission. This is intriguing. A brief analysis will suffice to demonstrate what I mean. In one sense, it seems like it is an invitation to the Court *to give approval with one hand and take it away with the other*. In a related sense, it is tantamount to the Accused asserting: “*I have come before you for permission to TESTIFY before the Commission but I am, simultaneously, seeking your leave to stand MUTE before the said Commission.*”

14. Another reason is that all of the other Conditions, taken individually and cumulatively, are hedged with qualifications and reservations antithetical to the notion of free-will, the essence of a consent voluntarily and knowingly given. These, like Conditions (i) and (ii), confirm strongly my doubts as to whether the interests of justice would be best served by granting the Accused approval to testify before the Commission based on the material on which I have had to apply my mind.

15. Recalling one observation in my previous Decision under reference, to wit:

“.....that on a contextual reading of the whole of the Truth and Reconciliation Commission Act, 2000, the inference is irresistible that the word “perpetrator” has a restrictive connotation with reference only to persons who committed abuses and violations during the conflict and are willing to confess their guilt. The word, therefore, cannot properly be applied to an “indictee” who has

² Id. Para. 10

³ Id. para. 12

pleaded not guilty to each of the 13 counts in the indictment for which is awaiting trial before the Special Court”⁴,

I find that, as an “indicttee”, the Accused does not fall within the statutory ambit of the Act. He is also not a *self-confessed perpetrator*⁵ as evidenced by his pleas to the thirteen (13) count indictment preferred against him.

16. Significant, too, for the purposes of the instant Request is that there where there is a conflict between two legitimate and equally valid societal interests, one of them being the interest of society in ensuring that persons accused of crime be guaranteed their right to a fair and public trial, the consistent and accepted judicial trend, nationally and internationally, is to resolve the conflict in favour of the latter.⁶ In my considered judgement, therefore, to allow the institutional interest of the Commission to prevail in the face of the extremely entangled web of equivocations, qualifications and reservations exemplified by Conditions (i) – (xii) of the purported Agreement of the Accused and the elaborate and complicated set of restrictions sought to be placed on the nature and scope of the subject areas for questioning, would jeopardize the Accused’s right to a fair and impartial public trial in due course and undermine the integrity of the proceedings in the Special Court.

17. A further reason is that it does not seem right, from a judicial as distinct from a non-judicial perspective, for a tribunal before which an accused stands indicted for international crimes to which he has pleaded not guilty to afford him easy recourse to another tribunal or institution for the purpose of incriminating himself as to the general subject areas forming the substrata of the charges for which he is indicted. To facilitate such recourse especially in the light of the accused’s own doubts, equivocations and reservations will unquestionably, in my considered judgment, jeopardize not only his right to be presumed innocent but more so his right “*not to be compelled to testify against himself or not to confess his guilt*” guaranteed by Article 14 (3) of the International Covenant of Civil and Political Rights, 1966.

18. Finally based on the reasoning and the supporting judicial considerations in the foregoing paragraphs, it is my conclusive finding that the purported agreement of the Accused to testify before the Commission is heavily punctuated by an intricate web of qualifications and reservations, the cumulative effect of which is to deprive the said agreement of that core element upon which a consent voluntarily and knowingly given is predicated, namely, free-will. *This finding (as noted in paragraph 13) is buttressed by the request for the leave of the Court to testify before the Commission and at the same time, for the judicial indulgence to be able to stand mute before the Commission when he appears.* In these circumstances, it is the absolute duty of the Court, as custodian of the Accused’s procedural and substantive due process rights, to refrain from endorsing what is, by any objective reckoning, an ill-conceived decision, on his part, to *reprobate* in a judicial forum by pleas of not guilty to a 13-count indictment and seek to *approve* in another forum on the same cause. Judicially, therefore, I see no other reasonable approach but to preclude the Accused from embarking upon the intended course of action in the interests of justice and to preserve the integrity of the proceedings in the Special Court, thereby upholding firmly his right to a fair and impartial trial, the gravity of the *allegations* against him notwithstanding.

⁴ Id. para. 12.

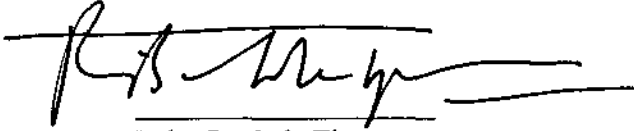
⁵ Id. para. 12.

⁶ Id. para. 14.

THE REQUEST IS ACCORDINGLY DENIED.

Done at Freetown

3rd day of November 2003



Judge Bankole Thompson
Presiding Judge, Trial Chamber
Designated under Practice Direction
Adopted on the 9th day of September, 2003
As amended on the 4th day of October, 2003

