

THE TRIAL CHAMBER of the Special Court for Sierra Leone composed of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Hon. Judge Bankole Thompson, Hon. Judge Pierre Boutet;

RECALLING that Augustine Gbao, Third Accused in the RUF group of indictees refused to attend Court for his trial on 7 July 2004;

AFTER DELIBERATIONS


ISSUES THE FOLLOWING RULING

1. This is the unanimous Ruling of the Trial Chamber of the Special Court for Sierra Leone on the issue of the refusal by Augustine Gbao, the Third Accused, to attend Court on 7 July 2004 for the purpose of his trial.
2. It will be recalled that when the Trial Chamber of the Special Court for Sierra Leone resumed sitting on the morning of 7 July 2004 to continue the trial of the RUF case involving Issa Hassan Sesay, First Accused, Morris Kallon, Second Accused, and Augustine Gbao, Third Accused, the Court was informed by Learned Counsel, Mr. John Cammegh, on behalf of the Third Accused that the Third Accused had indicated in the form of a written declaration that he would not be in attendance at the hearing of the Court on 7 July 2004 and on succeeding days because, as he stated, he did not recognise the Special Court.
3. It will further be recalled that based upon the aforementioned communication, records available to the Court and the sworn testimony of Johannes Wagenaar, International Supervisor of the Special Court Detention Facility, this Chamber gave a brief oral Ruling on this issue with the notation that a reasoned written Ruling will be filed subsequently. In its brief oral Ruling the Chamber ruled *inter alia* as follows:

“In the light of the foregoing evidence, this Court is satisfied that the Third Accused has expressly waived his right to be present at his trial and that the Court has no other option but to permit the joint trial of three Accused persons to proceed in the absence of the Third Accused pursuant to Rule 60(A)(i) of the Rules and it is so Ordered.”

4. Consistent with its brief Ruling of 7 July 2004, the Chamber now sets out below its reasons for the order to proceed with the joint trial of the RUF Accused persons in this case in the absence from court of the Third Accused.

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5. As a matter of law, Article 17(4)(d) of the Statute of the Special Court for Sierra Leone pre-eminently governs the issue at hand.

Article 17(4)(d) 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:

To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it” (emphasis added).

In effect, Article 17(4)(d) makes it a mandatory requirement for every person accused of crime within the jurisdiction of the Special Court for Sierra Leone to be tried in his or her presence.

6. Restating the general principle embodied in Article 17(4)(d), Rule 60 of the Rules of Procedure and Evidence of the Court provides thus:

“(A) An accused may not be tried in his absence unless:

(i) the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses so to do; or

(ii) the accused, having made his initial appearance, is at large and refuses to appear in Court.

(B) In either case the accused may be represented by counsel of his choice, or as directed by a Judge or Trial Chamber. The matter may be permitted to proceed if the Judge or Trial Chamber is satisfied that the accused has, expressly or impliedly waived his right to be present.”

7. In the Chamber’s opinion, Rule 60 provides that, as a matter of law, the right of an accused person to be tried in his or her presence can be derogated from in two clearly-defined circumstances, to wit, (i) where he has made his initial appearance and has been afforded the

right to appear at his trial but refuses to do so, or (ii) where, having made his initial appearance, he is at large and refuses to appear in court.

8. Interestingly, the law also provides that a trial can lawfully be continued in the absence of an accused person whose conduct at his trial has been disruptive. To this effect is Rule 80(B) of the Rules, which is in these terms:

“The Trial Chamber may order the removal of an accused from the proceedings and continue the proceedings in his absence if he has persisted in disruptive conduct following a warning that he may be removed.”

The Chamber, therefore, finds that, though in essence trial in the absence of an accused person is an extraordinary mode of trial, yet it is clearly permissible and lawful in very limited circumstances. The Chamber opines that it is a clear indication that it is not the policy of the criminal law to allow the absence of an accused person or his disruptive conduct to impede the administration of justice or frustrate the ends of justice. To allow such an eventuality to prevail is tantamount to judicial abdication of the principle of legality and a capitulation to a frustration of the ends of justice without justification.

9. Consistent with this reasoning, the Chamber also notes that in most national law systems, and especially in the common law jurisdiction, the general rule is that an accused person should be tried in his or her presence, but that exceptionally, courts of justice can have recourse to trial of an accused person in his absence where such an option becomes imperative but in limited circumstances. For example, in Canada it is open to a court to continue to try an accused person in his or her absence where he or she was present at the start of the trial, a situation that is on all fours with the instant situation with which this Chamber is confronted as a result of the Third Accused's refusal to appear for his trial. The Chamber further notes that in civil law systems, the practice is widespread for accused persons to be tried in their absence subject to certain procedural and due process safeguards, for example, proof of service of actual notice to attend.
10. From the Chamber's perspective, it is particularly noteworthy that the international law practice is on two levels: (i) the practice at the European Court of Human Rights (“ECHR”) level and (ii) the practice at the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”) level. At the ECHR level, there is

nothing in the jurisprudence of that Court to indicate that Articles 6(1) and 6(3)(c) of the European Convention on Human Rights providing basic legal guarantees for a person charged with crime have been construed in a manner suggesting the impermissibility of trial *in absentia*.¹ At the level of the ICTY and ICTR, the Chamber finds that the statutory provisions of these tribunals on the subject are akin to those of this Court, and that in so far as ICTY is concerned, to date no trial in the absence of an accused has been conducted. However, the ICTR has conducted one trial in the absence of an accused in the case of *Prosecutor v. Jean Bosco Barayagizwa*.² In that case, the Accused boycotted his trial on the grounds that he “challenged the ability of the ICTR to render and [sic] independent and impartial justice due, notably, to the fact that it is so dependent on the dictatorial anti-hutu regime of Kigali.”³ It is perhaps instructive to note that the similarity here evidences a trend in the sense that the Third Accused herein, Augustine Gbao, is boycotting the Special Court because he does not “recognize the Special Court” and due to, as he alleges, “its political nature”.

11. It is abundantly clear to the Chamber that the jurisprudence, evolving or past, points to the legal sustainability of trial *in absentia* in certain circumstances. Hence the Chamber’s Orders which are based on our significant findings establishing the legal foundation for invoking Rule 60(A)(i) of the Rules, which we take the liberty of reproducing *in extenso*, here, to wit:

- (i) the Third Accused made his initial appearance on the Indictment upon which he is charged before the Court pursuant to Rule 61 of the Rules on 26 April 2003;
- (ii) the Third Accused did appear for his trial on 5 and 6 July 2004;
- (iii) the Third Accused has been afforded the right to appear at his trial;
- (iv) the Third Accused was present in Court on 6 July 2004 when the matter was adjourned to 7 July 2004;
- (v) the Third Accused was fully notified on the morning of 7 July 2004 by Johannes Wagenaar that he should attend court for the purpose of his trial but refused to do so;

¹ See *Ali Maleki v. Italy*, Communication No 699/1996 U.N. doc CCPR/C/667/669/1996 (27 July 1979) of the UN Human Rights Committee and *F. C. B. v. Italy*, European Court of Human Rights, 40/1990/231/297 (26 June 1991).

² Decision on Defence Counsel Motion to Withdraw, Case No ICTR-97-19-T, 2 November 2000.

³ *Id.* para 5.


(vi) the Third Accused appeared to Mr. Wagner on the morning of 7 July 2004 to be in good health.

12. For the purposes of this Ruling, we reiterate our ORDERS given on 7 July 2004 on this issue, as follows:

1. In the light of the foregoing evidence, this Court is satisfied that the Third Accused has expressly waived his right to be present at his trial and this Court has no other option but to permit the joint trial of all the three Accused persons to proceed in the absence of the Third Accused pursuant to Rule 60(A)(i) of the Rules and it is so ordered;
2. Pursuant to Rule 60(B) of the Rules, the Chamber also directs that Mr. Andreas O'Shea and other Members of his team will continue to represent the Third Accused in accordance with the Chamber's Decision of 6 July 2004 on his Application to Withdraw his Counsel;
3. The Chief of the Detention Facility of the Special Court shall maintain on a daily basis a record of the waiver of the Third Accused to appear in court, during each trial session of the RUF group of indictees.

Done at Freetown this 12th day of July 2004


 Hon. Judge Pierre Boutet


 Hon. Judge Benjamin Mutanga Itoe


 Hon. Judge Bankole Thompson

Presiding Judge, Trial Chamber

