

TRIAL CHAMBER I (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”) composed of Hon. Justice Bankole Thompson, Presiding Judge, Hon. Justice Pierre Boutet, and Hon. Justice Benjamin Mutanga Itoe;

SEIZED OF the Request for the Gbao Opening Statement to be Given at the Beginning of the Presentation of Evidence for the Third Accused filed by the Defence for the Third Accused, Augustine Gbao (“Gbao Defence”) on the 16th of April 2007 and served on the 17th of April 2007 (“Motion”);

MINDFUL OF this Chamber’s Order for Expedited Filings issued on the 18th of April 2007;

NOTING the Response to the Motion filed by Office of the Prosecutor (“Prosecution”), on the 20th of April 2007 (“Response”);

NOTING that Gbao Defence did not file any reply to the Prosecution Response within the prescribed time limits;

HAVING HEARD additional submissions made with regards to the Motion by the Gbao Defence on the Status Conference held on the 2nd of May 2007;

RECALLING that on the 3rd of May 2007, this Chamber delivered an oral Decision granting the Motion;

PURSUANT TO Article 17 of the Statute of the Special Court (“Statute”) and Rules 26bis, 54, and 84 of the Rules of Procedure and Evidence (“Rules”);

NOW HEREBY ISSUES THE FOLLOWING REASONED DECISION:

I. SUMMARY OF PARTIES SUBMISSIONS

A. *The Motion*

1. The Gbao Defence submits that under the ordinary meaning of Rule 84 of the Rules, a party may make an opening statement at the beginning of the presentation of evidence for that party.¹ Alternatively, the Gbao Defence submits that under Rules 54 and 84, the Chamber has the discretion to defer a party’s opening statement in the interests of justice.² The Gbao Defence argues that if its opening statement is given prior to

¹ Motion, para 2.

² *Ibid.*, para 4.

the presentation of the defence case for the First Accused, "there is likely to be a significant space of time between the statement being given and the evidence for the third Accused starting."³

2. On these grounds, the *Gbao* Defence seeks to defer its opening statement until immediately prior to the opening of its own case.⁴

B. The Response

3. The Prosecution submits that on the 20th of March 2007, the Chamber stated that the Defence phase of the trial would begin with the opening statement of the First Accused, followed by that of the Third Accused.⁵ The Prosecution further submits that this Chamber adopted a similar ruling in the CDF case, deciding that the opening statement of the Second Accused in that case would be immediately followed by that of the Third Accused; similarly, all three Accused gave an opening statement at the commencement of the AFRC case.⁶ By contrast, in the case of *Delalic et al*, each of the Accused was permitted to give an opening statement prior to calling their own witnesses, after the previous accused finished submitting their evidence.⁷

4. The Prosecution submits that one of the reasons cited by the Trial Chambers for their decisions in the CDF and AFRC cases was a concern that the Accused would make use of common witnesses, and that such witnesses should not be called until each party had opened its case.⁸ The Prosecution further submits that the *Gbao* Defence has stated it may rely upon the military expert called by the First Accused, and that if the *Gbao* Defence chooses to do this, the Defence must make its opening statement prior to the presentation of evidence.⁹

II. THE APPLICABLE LAW

5. Rule 84 states that "At the opening of his case, each party may make an opening statement confined to the evidence he intends to present in support of his case. The Trial Chamber may limit the length of those statements in the interests of justice."¹⁰

³ *Ibid.*, para 4.

⁴ *Ibid.* The *Gbao* Defence reiterated the main thrust of its submissions during the Status Conference held on the 2nd of May 2007.

⁵ Response, para 3.

⁶ *Ibid.*, paras 5-6.

⁷ *Ibid.*, para 4.

⁸ *Ibid.*, paras 5-6.

⁹ *Ibid.*, paras 7-8.

¹⁰ The text of Rule 84 differs somewhat in the Rules of Procedure and Evidence for the ICTY and ICTR, reading as follows:

6. This Chamber recalls that at the Pre-Defence Conference for the CDF case, mindful of the possibility, and on representations to that effect, that the Defence Teams may be calling witnesses that were common to one or more parties, stipulated with the concurrence of the Prosecution and of the Defence Teams, that upon commencement of the defence phase of that trial, the Second Accused would be required to make an opening statement, followed by an opening statement by the Third Accused.¹¹ This stipulation, thereupon, became the accepted practice of this Chamber pursuant to the aforesaid Rule 84.

7. This Chamber, therefore, holds that subject to its discretion to vary a practice or procedure where the interests of justice demand, the law as to the application of Rule 84 particularly where the Defence Teams have indicated that they are calling common witnesses is that in joint trials opening statements on behalf of or by the Accused are to be made at the commencement of the defence phase of the trial.

8. The Chamber however, is of the opinion and accordingly holds and directs, that in a normal situation, where in joint trial, the parties do not intend to call or to rely on common witnesses, the procedure as clearly set out in Rule 84 is that each Defence Team is expected to make its opening statement only at the opening of its case if it so desires.

III. DELIBERATIONS

9. Guided by the applicable law as stated herein, the Chamber has considered the grounds on which Court Appointed Counsel for the Third Accused seeks a variation or modification of the laid down procedure under Rule 84 by way of postponement of the opening statement of the Third Accused until the time for the presentation of the evidence for the said Accused. The Chamber finds that, in the present circumstances, it would be in the interests of justice to exercise, on an exceptional basis, its discretion to Order on the grounds put forward by the *Gbao* Defence, a postponement of the opening statement by the said Defence.

10. Elucidating this finding, the Chamber recalls that it ordered protective measures to be implemented for Defence witnesses. Amongst these measures, the Chamber has allowed Defence teams to withhold the names and other identifying data of witnesses from the other parties until 42 days prior to the witnesses'

Before presentation of evidence by the Prosecutor, each party may make an opening statement. The defence may, however, elect to make its statement after the conclusion of the Prosecutor's presentation of evidence and before the presentation of evidence for the defence.

¹¹ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T, Transcripts, 11 January 2006, p. 44.

testimony.¹² This rolling disclosure period generally hinders the ability of the Defence teams to identify potential common witnesses prior to the commencement of the defence phase.¹³

11. For the sake of clarity, the Chamber emphasizes that in the CDF case, it took the view that any witnesses who appear on multiple defendants' witness lists are to be considered common witnesses, without regard as to the scope of the witness's testimony or as to the existence or absence of a common legal defence on the part of the defendants.¹⁴ At the Pre-Defence Conference in the instant case, this Chamber indicated that it would follow the CDF precedent *vis a vis* common witnesses.¹⁵

12. However, the Chamber notes that the *Gbao* Defence has recently stated it does not intend to share common witnesses with the other Accused.¹⁶ In particular, the *Gbao* Defence declared that "those witnesses identified as common with other accused are no longer common, and this defence team has no intention of sharing any other defence witness unless the situation becomes unavoidable".¹⁷ Furthermore, during the Status Conference held on the 2nd of May 2007, the *Gbao* Defence significantly shifted ground, indicating unequivocally that it is not interested in the concept of common witnesses and that it will not be calling or proceeding with any common witness in support of its case. In these circumstances, the Chamber is of the view that these averments foreclose the *Gbao* Defence from calling at any time in the course of the presentation of their evidence, any of the witnesses who have been already called and led in evidence by other Defence Teams.

13. The procedure for calling and for eliciting evidence from persons who are deemed to be and are accepted as common witnesses was set out in detail by this Chamber during the Pre-Defence Conference proceedings in this case on the 20th of March 2007. This procedure was patterned in order to ensure the expeditiousness of these proceedings and for purposes of judicial economy since we consider that the repetitious calling of the same witnesses by each Accused in the trial would be counterproductive and would defeat the cardinal objective of ensuring a speedy trial in the interests of the Accused Persons, of the witnesses, of the victims, and of the efficient Court's management of the proceedings.

14. Predicated upon the representation and unqualified undertaking by the *Gbao* Defence which now categorically and unequivocally indicates that it does not want to associate itself with the notion of common witnesses and intends to call none, the Chamber holds, in these circumstances, that it is in the interest of

¹² See for instance *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T, Decision on *Gbao* Defence Motion for Immediate Protective Measures and Confidential Motion for Delayed Disclosure and Related Measures for Witnesses, 1 March 2007, para 43(c).

¹³ See for instance *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T, Consequential Orders Concerning the Preparation and the Commencement of the Defence Case, 28 March 2007, Order No. 11.

¹⁴ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T, Transcripts, 18 January 2006, pp. 35-36.

¹⁵ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T, Transcripts, 20 March 2007, p. 45-49 and 81-82.

¹⁶ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T, *Gbao* - Notice Regarding Common Witnesses, 23 April 2007, paras 1-2.

¹⁷ *Ibid.*

justice to exercise its discretionary power under Rule 54 of the Rules to depart from the practice adopted in the CDF case and, consequently, to permit the *Gbao* Defence to deliver its opening statement only prior to the presentation of evidence on behalf of the Third Accused.

15. However, we find it necessary to append to this Ruling, the condition that the *Gbao* Defence will not subsequently be allowed to renege on its undertaking with reference to common witnesses and that no leave will be granted to it in the course of these proceedings to call any witnesses who have been called by other Defence Teams.

16. We also wish it to be noted that any application by the *Gbao* Defence to vary its declared position or to call such witnesses will be deemed to be an abuse of the Court's process.

FOR THE ABOVE REASONS, THE CHAMBER

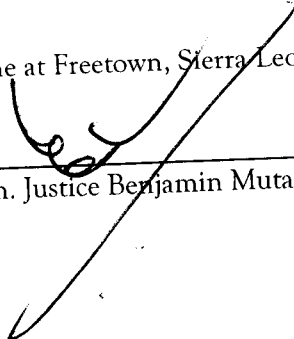
GRANTS the *Gbao* Defence Motion; and consequentially

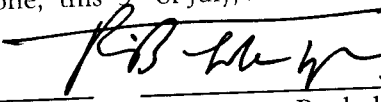
ORDERS that the *Gbao* Defence shall deliver its opening statement, if it intends to do so, immediately prior to the presentation of evidence on behalf of the Third Accused, Augustine Gbao and further,

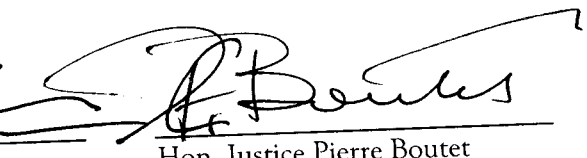
THAT Any subsequent application by the *Gbao* Defence to retract from this Order or to vary the conditions posed by this Chamber as to the calling of common witnesses will be deemed to be an abuse of process.

Justice Pierre Boutet appends a partially Dissenting Opinion to these Written Reasons.

Done at Freetown, Sierra Leone, this 3rd of July, 2007


Hon. Justice Benjamin Mutanga Itoe


Hon. Justice Bankole
Thompson
Presiding Judge
Trial Chamber I


Hon. Justice Pierre Boutet

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1. With due respect for my Learned Brothers, Justice Bankole Thompson, Presiding Judge and Justice Benjamin Mutanga Itoe, while I am in agreement and concur with their reasons and findings in the specific circumstances of the Decision, I cannot agree with their analysis of the law with regards to Rule 84 of the Rules and hence append this partially Dissenting Opinion.

2. Paragraph 8 of the Decision reads as follows with regards to the applicable law to Rule 84 of the Rules of Procedure and Evidence pertaining to opening statements:

The Chamber however, is of the opinion and accordingly holds and directs, that in a normal situation, where in joint trial, the parties do not intend to call or to rely on common witnesses, the procedure as clearly set out in Rule 84 is that each Defence Team is expected to make its opening statement only at the opening of its case if it so desires.

3. Rule 84 states that "At the opening of his case, each party may make an opening statement confined to the evidence he intends to present in support of his case. The Trial Chamber may limit the length of those statements in the interests of justice."

4. This is a general provision that does not contain any particular measure or provide any specific procedure for joint trials where as in the case of the RUF trial we are dealing with multiple accused.

5. I am of the view that the sole fact that a case proceeds as a joint trial with multiple accused persons rather than a single defendant trial does not, on its own, alter or modify the general nature of Rule 84 that each Defence Team be allowed, if they so desire, to give its opening statement prior to the commencement of the presentation of the evidence.

6. For the purposes of this Decision, I wish to note that in our Decision disposing of the joinder of the RUF Trial, while we reiterated our obligation to proceed with each accused person as if he was being tried separately, this Chamber concluded, *inter alia*, that the alleged crimes "arise from a number of acts or omissions, allegedly, occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan."¹

7. The fact that two or more Defence Teams intend to rely on any so called "Common Witness" to present evidence on behalf of two or more accused is not, in my view, the only factor mandating under Rule 84 these Teams to give their respective opening statements at the commencement of the Defence case in such joint trial.

¹ See, for instance, *Prosecutor v. Issa Hassan Sesay*, SCSL-03-05-PT, Decision and Order on Prosecution Motions for Joinder, 28 January 2004, paras 35 and 40.

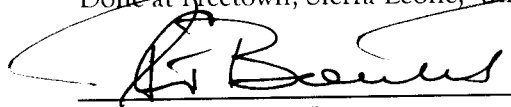


8. Indeed, the purpose of an opening statement is to outline for the benefit of the Court and the other parties the essence of the case to be presented. Opening Statements are fundamentally intended to assist a Trial Chamber to understand the evidence which is subsequently to be placed before it during the course of the Trial. The party making an opening statement can, for instance, present the nature of its case, the challenges it intends to make to specific charges alleged against that accused person as well as a resume of the evidence that it intends to bring before the court in support of its respective case.² In a joint trial for an opening statement to be meaningful and of assistance it can only be done before the opening of the Defence case and not before each and every individual case.

9. Hence, it is my view that, according to Rule 84, opening statements, if any, in either single or joint trials shall normally be held at the opening of each party's respective case, that is the Prosecution case and the Defence case. In this regard, with particular reference to joint trials, I would like to refer to the case of *Prosecutor v. Brima, Kamara and Kanu*, wherein each Defence Team gave its respective opening statement pursuant to Rule 84 on the initial day of the Defence Case. Worthy of note is also that these separate opening statements were preceded by a joint opening statement focusing on factual and legal issues common to all the Defence Teams.³

10. Therefore, contrary to the opinion expressed in the Decision by my Learned Brothers, Justice Bankole Thompson, Presiding Judge and Justice Benjamin Mutanga Itoe, I am of the opinion that, pursuant to Rule 84, while each Defence Team will, if it intends to do so, give its opening statement with regards to the case against each of the respective accused and independently from the other co-accused, the opening statements by all the Defence Teams ought to be given, in the absence of any exceptional circumstance that could justify the exercise of this Court's judicial discretion to order a departure from the provisions of Rule 84, at the overall commencement of the Defence phase of the trial, prompt.

Done at Freetown, Sierra Leone, this 3rd day of July 2007



Hon. Justice Pierre Boutet

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² In addition, see for instance *Prosecutor v. Charles Taylor*, SCSL-03-01-PT, Interim Order in Respect of the Urgent and Public Prosecution's Motion for Admission of Material Pursuant to Rules 89(C) and 92bis for Use During Opening Statement, 31 May 2007.

³ See *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Transcripts, 17 May 2006, p. 2; *Ibid.*, 5 June 2006, p. 3ff.