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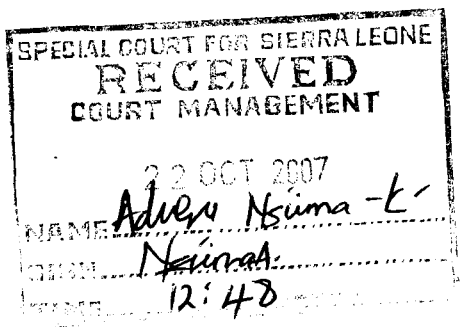
SCSL-04-15-T
(30963-30997)

**SPECIAL COURT FOR SIERRA LEONE**
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Hon. Justice George Gelaga King, Presiding
Hon. Justice Emmanuel Ayoola
Hon. Justice Raja Fernando
Hon. Justice Renate Winter

Registrar: Mr. Herman Von Hebel

Date filed: 22 October 2007




**THE PROSECUTOR** **Against** **Issa Hassan Sesay**
**Morris Kallon**
**Augustine Gbao**

Case No. SCSL-04-15-T

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**PUBLIC**
**PROSECUTION NOTICE OF APPEAL**
**AND SUBMISSIONS REGARDING THE OBJECTION TO THE ADMISSIBILITY OF PORTIONS OF THE EVIDENCE OF WITNESS TF1-371**
**WITH CONFIDENTIAL APPENDICES**

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Mr. Wayne Jordash
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Mr. Shekou Touray
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## I. TITLE AND DATE OF FILING OF APPEALED DECISION

1. The Prosecution files this Notice of Appeal pursuant to Rules 73(B) and 108 (C),[1] and the Practice Direction of 30 September 2004,[2] to appeal the "Majority Decision on Oral Objection Taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371," ("Majority Decision") dated 2 August 2006.[3] The Majority Decision was filed after an oral ruling on 24 July 2006[4] granting the Defence objection.

## II. SUMMARY OF PROCEEDINGS RELATING TO APPEALED DECISION

2. TF1-371 was called as a Prosecution witness and testified in closed session on 20, 21, 24, 28, 31 July 2006 and 1 and 2 August 2006. On 21 July 2006, counsel for the Third Accused objected to the admission of evidence led by the Prosecution that the Third Accused knew about alleged killings in Kono District. The Third Accused argued that the evidence in question was being adduced for the first time through TF1-371, at the end of the Prosecution case, and when the Third Accused had opted not to cross-examine earlier witnesses who gave evidence about the events that took place in Kono District. On 24 July 2006, the majority held that the objection was premature (Mr. Justice Itoe dissenting).[5]
3. On 24 July 2006, further evidence was heard, the objection was restated and the majority (Mr. Justice Boutet dissenting) ordered that evidence from TF1-371 "which directly or inferentially states or suggests that the 3rd Accused, Augustine Gbao, had knowledge of the alleged unlawful killings in Kono District be expunged and deleted from the records."[6]

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[1] Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended ("Rules")
[2] Practice Direction for Certain Appeals Before the Special Court, 30 September 2004.
[3] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-623, "Written Reasons on Majority Decision on Oral Objection Taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371," **("Majority Decision")** 2 August 2006. See also "Separate and Concurring Written Reasons of Hon. Justice Bankole Thompson on Majority Decision on Oral Objection Taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371," **("Concurring Reasons")** 2 August 2006, and "Dissenting Written Reasons of Hon. Justice Pierre Boutet on Majority Decision on Oral Decision on Objection Taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371," **("Dissenting Reasons")** 2 August 2006.
[4] Transcript of 24 July 2006, at pp. 34-47.
[5] Transcript of 24 July 2006, at p. 2.
[6] Majority Decision, p. 9.

4. The Majority Decision reasoned that in the circumstances, the doctrine of fundamental fairness would require the Trial Chamber to adjourn the proceedings to allow the Defence to investigate the alleged killings in Kono District and to recall Prosecution witnesses for further cross-examination. The Majority Decision further reasoned that granting an adjournment may be a violation of Article 17 of the Statute[7] and Rule 26*bis* of the Rules[8] by causing undue delay in the trial and by postponing the closing of the Prosecution case during that session.
5. On 21 August 2006, the Prosecution filed a "Prosecution Application for Leave to Appeal Majority Decision on Oral Objection Taken by Counsel for the Third Accused to the Admissibility of Portions of the Evidence of Witness TF1-371."[9]
6. On 4 September 2006, the Defence for the Third Accused filed a "Reply to Prosecution Application for Leave to Appeal Decision on Admissibility of Portions of the Evidence of Witness TF1-371."[10]

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[7] Article 17 of the *Statute of the Special Court for Sierra Leone,* states:

1. All accused shall be equal before the Special Court.
2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. 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:
   a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
   b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
   c. To be tried without undue delay;
   d. 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;
   e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
   f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
   g. Not to be compelled to testify against himself or herself or to confess guilt.

[8] Rule 26*bis* states: "The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that the proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

[9] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-636, "Prosecution Application for Leave to Appeal Majority Decision on Oral Objection Taken by Counsel for the Third Accused to the Admissibility of Portions of the Evidence of Witness TF1-371," 21 August 2006.

[10] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-639, "Reply to Prosecution Application for Leave to Appeal Decision on Admissibility of Portions of the Evidence of Witness TF1-371," 4 September 2006.

7. On 11 September 2006, the Prosecution filed a "Reply to Defence Response to Prosecution Application for Leave to Appeal Majority Decision on Objection Taken by Counsel for the Third Accused to the Admissibility of Portions of the Evidence of Witness TF1-371."[11]
8. On 15 October 2007, the Trial Chamber granted the Prosecution application for leave to appeal the Majority Decision.[12]

## III. GROUNDS OF APPEAL

9. Ground One: The majority erred in excluding relevant portions of the testimony of TF1-371.
10. Ground Two: The majority erred in ordering that the excluded evidence be expunged and deleted from the transcript.

## IV. RELIEF SOUGHT

11. The Majority Decision should be set aside, the evidence on record of TF1-371 should be held to be admissible, and the Prosecution should be given leave to recall TF1-371 to give further evidence on Gbao's knowledge of events in Kono District with a right of cross-examination to the Defence on that particular topic of evidence.
12. Whether or not Ground One of the appeal is granted, the decision to expunge evidence from the transcript should be set aside.

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[11] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-640, "Prosecution Reply to Defence Response to Prosecution Application for Leave to Appeal Majority Decision on Objection Taken by Counsel for the Third Accused to the Admissibility of Portions of the Evidence of Witness TF1-371," 11 September 2006.
[12] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-839, "Decision on Prosecution's Application for Leave to Appeal Majority Decision Regarding the Objection to the Admissibility of Portions of the Evidence of Witness TF1-371," 15 October 2007.

## SUBMISSIONS ON THE GROUNDS OF APPEAL

### PART A. STATEMENT OF FACTS

13. On 10 March 2006, the Prosecution applied to add TF1-371 to the Prosecution witness list ("Motion").[13] A confidential annex to the motion contained excerpts from statements by the witness.

14. The Motion stated that the Prosecution anticipated that TF1-357 would testify, *inter alia*, about the following:

> g) reports of the killings of civilians in Kono District (Tombodu) in 1998 by Morris Kallon and Savage;
>
> h) Augustine Gbao as the Overall Chief Security of the RUF and the head of the Military Police, Internal Defence Unit and Intelligence Office. The Intelligence Officer in Kono reported directly to Gbao and Mosquito about events taking place on the ground.[14]

15. Trial Chamber I granted the motion to add TF1-371 to the Prosecution witness list on 6 April 2006,[15] ordering immediate disclosure of redacted statements of TF1-371 and that TF1-371 be called at the end of the Prosecution case unless otherwise agreed to by the Defence. A comprehensive written decision was issued on 15 June 2006.[16]

16. Redacted statements of TF1-371 were disclosed on 11 April 2006 and unredacted statements were disclosed on 8 May 2006. Subsequent proofing notes[17] were disclosed in unredacted form on 10, 13 and 14 July 2006.

17. The statement of TF1-371 of 17 February 2006, was disclosed to the Defence in redacted form on 11 April 2006 and in unredacted form on 8 May 2006. Excerpts from this statement are attached as Confidential Appendix "A" in order to protect the witness's identity.

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[13] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-513, "Confidential, with Ex Parte Under Seal Annex, Prosecution Request for Leave to Call Additional Witness and for Order for Protective Measures Pursuant to Rules 69 and 73bis(E)," 10 March 2006.
[14] *Ibid*, para. 12.
[15] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-537, "Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for protective Measures," 6 April 2006.
[16] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-579, "Written Reasons for the Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for Protective Measures," 15 June 2006.
[17] Proofing notes are records of new information provided to counsel for the Prosecution in the course of interviewing a witness.

18. The proofing note dated 2, 3 and 5 July 2006, disclosed to the Defence in unredacted form on 10 July 2006, states at para. 5:

> I heard that Kallon and his boys killed civilians and burned them in houses around Koidu. It was reported to both Sesay and Mosquito. Kallon was told to report to Buedu, then after a couple of weeks he was told to go back to Kono. Nothing happened to him. CO Rocky, Emmanuel Johnson, was under the command of Kallon in Kono. Rocky was involved in killing civilians in Kono and he was called to report to Buedu. The report about what Rocky did was sent to Bockarie and Augustine Gbao. Rocky stayed a short time in Buedu and then went back to Kono. Kallon and Savage both killed civilians around Tombodu, they are separate incidents. The IDU reported these killings to Gbao and they reported to Mosquito and Sesay.[18]

19. On 21 and 24 July 2006, the Third Accused objected to evidence of TF1-371 that the Third Accused knew of the alleged killings in Kono District. The relevant passages from 21 July 2006 are attached as Confidential Appendix "B" to protect the identity of the witness (the entirety of the evidence of TF1-371 was given in closed session).
20. Submissions were made following the objection, then the Trial Chamber directed that the Prosecution pursue other areas of direct-examination, and upon completion of those topics the trial was adjourned to 24 July 2006. At the commencement of the proceedings on 24 July 2006, the Trial Chamber ruled (Mr. Justice Itoe dissenting) that the objection was premature and that further evidence should be heard.[19]
21. The direct examination of TF1-371 continued on 24 July 2006, and the relevant excerpts are attached as Confidential Appendix "C". To provide further context to some of the excerpted testimony from 24 July 2006, on 21 July 2006, TF1-371 testified that Augustine Gbao was the security commander of the RUF.[20]

## PART B. STANDARD OF REVIEW

22. The Prosecution submits that the majority of the Trial Chamber committed a procedural error in the Majority Decision, in that the majority, in exercising its discretion to exclude the impugned evidence "misdirected itself either as to the

[18] TF1-371 statement dated 2, 3 and 5 July 2006, Court Management pages 24031-24032.
[19] Transcript, 24 July 2006, p. 2.
[20] Transcript, 21 July 2006, p. 6.

principle to be applied, or as to the law which is relevant to the exercise of the discretion, or ... [gave] weight to extraneous or irrelevant considerations, or ... has failed to give weight or sufficient weight to relevant considerations, or ... made an error as to the facts upon which it has exercised its discretion".[21] The exercise of the discretion was one that was not "reasonably open" to the Trial Chamber,[22] and the majority of the Trial Chamber "abused its discretion",[23] or "erred and exceeded its discretion",[24] and committed a "discernible error" in the exercise of its discretion,[25] and that the Majority Decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[26]

23. For the reasons given below, the Prosecution also submits that the Majority Decision erred in law, in that it failed to correctly articulate or to correctly apply the legal rules and principles regarding the admissibility of evidence, the fair trial rights of the Accused, the remedies to be granted where insufficient notice has been given to the Defence, and the course to be adopted where evidence found to be inadmissible has been included in the trial record.

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[21] *Prosecutor v. Norman, Fofana, Kondewa,* SCSL-04-14-688, "Decision on Interlocutory Appeals on Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone," 11 September 2006, para. 6; *Prosecutor v Milosevic,* IT-99-37-AR73, "Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder", Appeals Chamber, 18 April 2002, para. 5. See also *Prosecutor v Milosevic,* Case No. IT-02-54-AR73.6, "Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case", Appeals Chamber, 20 January 2004, para. 7; *Prosecutor v Bizimungu,* ICTR-99-50-AR50, "Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment", Appeals Chamber, 12 Feb. 2004, para. 11; *Prosecutor v Karemera,* ICTR-98-44-AR73, "Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File Amended Indictment", Appeals Chamber, 19 December 2003, para. 9.

[22] *Prosecutor v. Delalic et al,* IT-96-21-A, Appeals Chamber, "Judgement", ("*Celebici* Appeal Judgement"), 20 February 2001, paras. 274–275 (see also para. 292, finding that the decision of the Trial Chamber not to exercise its discretion to grant an application was "open" to the Trial Chamber).

[23] *Ibid.*, para. 533 ("... the Appeals Chamber recalls that it also has the authority to intervene to exclude evidence, in circumstances where it finds that the Trial Chamber abused its discretion in admitting it"), and see also at para. 564 (finding that there was no abuse of discretion by the Trial Chamber in refusing to admit certain evidence, and in refusing to issue a subpoena that had been requested by a party at trial).

[24] *Ibid.*, para. 533.

[25] *Prosecutor v. .Naletilic and Martinovic,* Case No. IT-98-34-A, Appeals Chamber, "Judgement," 3 May 2006, paras. 257-259; *Prosecutor v. Mejakic et al.*, Case No. IT-02-65-AR11*bis*.1, "Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11*bis*," Appeals Chamber, 7 April 2006 ("*Mejakic* Rule 11*bis* Appeal Decision"), para. 10.

[26] Compare *Mejakic* Rule 11*bis* Appeal Decision, para. 10.

## PART C. GROUNDS OF APPEAL

### i) Ground One - The majority erred in excluding relevant portions of the testimony of TF1-371

24. Rule 89(C) provides that a Trial Chamber may admit relevant evidence,[27] and the law recognizes that a flexible approach should be taken to questions of admissibility of evidence.[28] This Appeals Chamber held that: "Rule 89(c) ensures that the administration of justice will not be brought into disrepute by artificial or technical rules, often devised for a jury trial, which prevent judges from having access to information which is relevant."[29]

25. Although the Majority Decision noted that counsel for the Third Accused "has not premised his objection to the admissibility of the contested evidence on the grounds of a breach by the Prosecution, of disclosure obligations under Rule 66 of the Rules of Procedure and Evidence,"[30] disclosure cases share principles that can assist in understanding the Majority Decision. Trial Chambers in deciding cases on the Prosecution disclosure obligation under Rules 66 to 68 have held that: it may not be possible to include every matter in a witness statement and based on the principle of orality evidence shall be heard in open court; the Indictment, Pre-Trial and Supplemental Pre-Trial Briefs provide notice to an Accused; and proofing of witnesses prior to their testimony in court is a legitimate practice that serves the interests of justice.[31]

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[27] Rule 89 (C) states: "A Chamber may admit any relevant evidence."
[28] *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgement 3 March 2000, para. 34; *Prosecutor v. Sesa, Kallon, Gbao*, SCSL-04-15-T-578, "Written Reasoned Ruling on Defence Evidentiary Objections Concerning Witness TF1-108," 15 June 2006, para. 9; *Prosecutor v. Ndindiliyimana* et al, ICTR-00-56-T, "Decision on Bizimungo's Motion to Exclude the Testimony of Witness TN," 28 October 2005, para. 7.
[29] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-371, "Fofana – Appeal Against Decision Refusing Bail," 11 March 2005.
[30] Majority Decision, para. 13.
[31] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-211, "Ruling on Oral Application for the Exclusion of 'Additional' Statement for Witness TF1-060", 23 July 2004; *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-212, "Ruling on the Oral Application for the Exclusion of Part of the Testimony of Witness TF1-199", 26 July 2004; *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-314, "Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 dated respectively 9th of October, 2004, 19th and 20th of October, 2004 and 10th of January, 2005", 3 February 2005; *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-396, "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122", 1 June 2005; *Prosecutor v Barayagwiza*, ICTR-97-19-I, "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", Trial Chamber, 11 April 2000; see also *Prosecutor v. Niyitigeka*, ICTR-96-14-I, "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", Trial Chamber, 21 June 2000, para. 27.

26. The Trial Chamber has also said that it retains a discretionary power to grant a remedy where a breach of disclosure obligations has been shown, but as a general rule, the preferred remedy for a Prosecution breach of disclosure obligations is an extension of time to allow the Defence to prepare.[32] An inquiry into the evidence in question is required to demonstrate the breach of the disclosure obligation.[33]
27. The impugned evidence is relevant and the anomaly of the current decision is that had there been no proofing note advising the Defence that the witness would give evidence of Gbao having knowledge of killings in Kono District, and the witness simply gave such evidence in court, pursuant to the principle of orality that evidence would be admissible. Whereas here, where the Prosecution gave notice of the evidence in question 11 days before the testimony was given in court, the evidence became inadmissible.[34]
28. The objection should have been dismissed, but if the Third Accused was entitled to a remedy it should have been a short adjournment. In *Bagosora* the Trial Chamber ruled that the Prosecution evidence objected to was in fact new, but determined that two days was a sufficient period of notice for the Defence to be prepared to confront the new testimony.[35] The *Blagojevic* Trial Chamber, in circumstances where the Prosecution disclosed proofing notes the day before the witness was due to testify, said that such new information was admissible but granted an adjournment of three

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[32] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-396, "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122", 1 June 2005, para. 4 and 24. See also the oral decision in *Prosecutor v. Mrksic, Radic, Sljivancanin*, Case No. IT-95-13/1-T, Transcript of 8 November 2005, pp. 1333-1334:

> It is clearly potentially a difficulty for the Defence if that notice of any change is given at the last moment. Because of that, this Chamber would reiterate what it has said in the past to the Office of the Prosecutor in other trials; that is, that every effort should be made to identify such changes at a time which enables the Defence to be given adequate time to investigate and prepare to deal with the change. There are times when the issues are relatively straightforward and Defence counsel are able to deal with them almost on the spot without any difficulty or injustice. There are other times where the change is of such significance, perhaps it raises some entirely new version of fact, which does require further investigation. When that occurs, this Chamber certainly holds the view that it would enable a delay, allow a delay in the cross-examination, so that the Defence has time necessary to deal with the change.

[33] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-211, "Ruling on Oral Application for the Exclusion of 'Additional' Statement for Witness TF1-060", 23 July 2004, paras. 2-3; *Prosecutor v. Bagosora et al.*, ICTR-41-T, "Decision on Certification of Appeal Concerning Will-Say Statements of Witness DBQ, DP and DA," 5 December 2003, paras. 7 and 10.

[34] See the Dissenting Opinion, para. 16.

[35] *Prosecutor v Bagosora*, ICTR-98-41-T, "Decision on the Admissibility of Evidence of Witness DP", 18 November 2003, para. 8.

days to permit Defence preparation.[36]

29. The point taken by the Third Accused on this objection is the same as that made in its Response to the Prosecution application to add TF1-371 as a witness. The Response claimed that the Defence would suffer prejudice if the application was granted at a late stage in the trial to hear wide-ranging evidence without having had the opportunity to assess such evidence through the cross-examination of earlier witnesses.[37] This argument was rejected by the Trial Chamber in its decision granting leave to add TF1-371 to the Prosecution witness list. The same decision ordered the Prosecution to call TF1-371 at the end of the Prosecution case.[38]

30. The allegations against the Third Accused include allegations that he was a member of joint criminal enterprise and that he held command responsibility in the RUF, the indictment further alleged unlawful killings in Kono District.[39] The Prosecution called several witnesses earlier in its case who gave evidence of Gbao's senior command position in the RUF.[40]

31. The objection to the impugned evidence claimed that it would be unfair to the Third Accused to permit the Prosecution to tender evidence of knowledge on the part of the Third Accused of killings in Kono District when such knowledge had not been lead earlier and the Third Accused did not cross-examine witnesses from Kono District. The Dissenting Opinion to the Majority Decision rejected this argument:

> ...various Prosecution witnesses previously testified at trial, and were indeed cross-examined by Court Appointed Counsel for the Third Accused, on the alleged Command Structure of the RUF and to the alleged role of the Third Accused as Overall Security Commander for the RUF during the timeframe relevant to the evidence in questions and about the nature of this role. In this respect, the Court Records, in my view, not only

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[36] *Prosecutor v Blagojevic and Jokic*, IT-02-60-T, "Decision on Prosecution's Unopposed Motion for Two Day Continuance for the Testimony of Momir Nikolic", Trial Chamber, 16 September 2003, p. 2.
[37] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-520, "Confidential Gbao Response to the Prosecution Motion to Add Witness," 20 March 2006, paras. 1,4 and 7.
[38] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-579, "Written Reasons for the Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for Protective Measures," 15 June 2006, paras. 18-19, and Order 4) at p. 10.
[39] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-619, "Corrected Amended Consolidated Indictment," 2 August 2006, paras. 29-39, 40, 41, 45 and 48.
[40] See evidence of TF1-036 (Transcript 3 August 2005, p. 92; 27 July 2005, p. 36; 28 July 2005, p. 27), TF1-071 (Transcript 21 January 2005, p. 8, 13-14), Dennis Koker witness TF1-114 (Transcript 28 April 2005, pp. 48-50), TF1-045 (Transcript, 21 November 2005, p. 43); TF1-366 (Transcript 7 November 2005, p.70); TF1-041 (Transcript 10 July 2006, pp. 64, 80-81).

> do not support the representation made by Court Appointed Counsel for the Third Accused about cross-examination of previous witnesses called by the Prosecution but contradicts their assertion about their decision not to cross-examine previous witnesses about the role of the Third Accused to use their words, whether he "either partook in such killings, or could be said to have had any knowledge or control over that." Before pursuing with the reason for my dissent I would like to observe that it [*sic*] I find it to be disingenuous for Court Appointed Counsel for the Third Accused to affirm that they never had a "hint of Augustine Gbao's knowledge or control over what was going on in Kono" before they received the Witness last statement from the Prosecution.[41]

32. The Third Accused did cross-examine TF1-074,[42] TF1-064,[43] TF1-016,[44] TF1-078,[45] TF1-304,[46] TF1-071,[47] TF1-015,[48] TF1-012,[49] TF1-263,[50] TF1-141,[51] TF1-361,[52] TF1-360,[53] and TF1-366,[54] all of whom gave evidence about events in Kono District, including unlawful killings. These witnesses testified before the Prosecution had applied to add TF1-371 as a witness. The witnesses from Kono District the Third Accused did not cross-examine were TF1-077,[55] TF1-217[56] and TF1-197[57] (none of whom were cross-examined by the Second Accused either), TF1-195,[58] and TF1-192[59] and TF1-218[60] (the last two were not cross-examined by any Accused).

33. It was not Prosecution conduct or late disclosure of information that prevented the Third Accused from cross-examining Kono District witnesses on unlawful killings,

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[41] Dissenting Reasons, para. 14, quoting in part RUF Transcript, 21 July 2006, pp. 7 and 15.
[42] Transcript 12 July 2004, pp. 55-66.
[43] Transcript 20 July 2004, pp. 2-9.
[44] Transcript 21 October 2004, pp. 45-50.
[45] Transcript 27 October 2004, 4-25.
[46] Transcript 17 January 2005, pp. 34-83.
[47] Transcript 26 January 2005, pp. 46-61; 27 January 2005, pp. 1-72.
[48] Counsel for the Third Accused advised the court with respect to TF1-015 that "I formally adopt the cross-examination by learned friend, Mr. Jordash, so far as Mr. Gbao's position is concerned and therefore ask no questions." (Transcript 31 January 2006, p. 102)
[49] Transcript 4 February 2005, pp. 27-64.
[50] Transcript 11 April 2005, pp. 42-47.
[51] Transcript 19 April 2005, pp. 15-73.
[52] Transcript 19 July 2005, pp. 29-84.
[53] Transcript 26 July 2005, pp. 77-115.
[54] Transcript 17 November 2005, pp. 23-116; 18 November 2005, pp. 2-45.
[55] Transcript 20 and 21 July 2004.
[56] Transcript 22 July 2004.
[57] Transcript 21 and 22 October 2004.
[58] Transcript 1 February 2005.
[59] Transcript 1 February 2005.
[60] Transcript 1 February 2005.

with reference to whether or not the Third Accused had knowledge of those killings. That was the consequence of the fact that most witnesses from Kono District testified before the Prosecution applied to add TF1-371 to its witness list. Leave to appeal that decision was never sought by the Third Accused even though the motion clearly asserted that the proposed testimony of TF1-371 included evidence of reports of killings in Kono District and that the Intelligence Officer in Kono reported to the Third Accused about events taking place on the ground. The objection made in court is a belated attempt to revisit the decision granting leave to add TF1-371 as a Prosecution witness.

34. The Majority Decision summarized an allegation made by the Third Accused that he was ambushed by the Prosecution. The facts say otherwise. On 19 July 2005, counsel for the Third Accused while cross-examining TF1-361[61] asked about the Third Accused's role in the RUF and was told that he was the Chief Security Officer of the RUF.[62]

35. Further cross-examination of TF1-361 on Gbao's position and role in the RUF was pursued by counsel for the Third Accused:

> Q. Is what you're saying this: Was it Gbao's job to try to impose the ideology of Foday Sankoh in areas occupied by the RUF, the political ideology?
> A. No, he was a security person. He never exposed himself, but he would be around to observe what was going on, whether it was good or bad. So, as such, he would give advice and inform the appropriate authorities so that the situation would be brought under control immediately.
> Q. So do you mean this then: That it was his job to ensure that rules and regulations were maintained in areas occupied by the RUF -- rules of conduct between individuals?
> A. Yes, sir.
> PRESIDING JUDGE: May I ask you to just repeat that question, Mr Cammegh? I missed the first part of your question. It was his responsibility?
> MR CAMMEGH: Responsibility to enforce, I think I said, rules of conduct between individuals within RUF occupied areas.
> PRESIDING JUDGE: Thank you.
> MR CAMMEGH:
> Q. In other words, Mr Witness, to ensure that people behaved properly to one another. Would that be right?
> A. Exactly.

[61] This witness testified in closed session.
[62] Transcript 19 July 2005, pp. 32, 43.

3 Q. To ensure that RUF forces treated civilians with respect
4 and that the civilians treated the RUF forces with respect in
5 return. Would that be fair?
6 A. Yes, sir.
7 Q. Okay. And, should there have been occasions when
8 misconduct took place, was it Colonel Gbao's ultimate
9 responsibility or was he ultimately responsible for imposing law
10 and order on those individuals?
11 A. Yes, sir.
12 Q. And by imposing law and order, [name deleted], would that include
13 imposing punishment on individuals who fell foul of the law as
14 imposed by the RUF?
15 A. Yes, sir.[63]

36. Cross-examination of TF1-361 by the Third Accused continued and elicited further evidence of the role and function of the Third Accused:

23 Q. Now, [name], going back to Augustine Gbao, would I be
24 right to suggest to you that in 1997 -- all of 1997 and all of
25 1998, in fact until early 1999, he was stationed and living in
26 Kailahun Town?
27 A. It was after everything had settled in Makeni. That was
28 the time he was asked to come to Makeni. But during the fighting
29 Augustine Gbao wasn't in Makeni. He was in Kailahun.

1 Q. So would you agree with me that that covers the period
2 1997, '98, until early '99 when he was invited to come to Makeni?
3 Am I right on the dates?
4 A. Yes, sir.
5 Q. During that period he was in charge of - am I right - both
6 the military police and the IDU, the Internal Defence Unit?
7 A. Yes, sir.
8 Q. But not the G5?
9 A. He oversee over them but he concentrated mostly on the MPs,
10 the IOs, then the other security agencies.[64]

37. Similar cross-examination by the Third Accused of Gbao's role in the RUF was carried out during the testimony of TF1-366.[65]

38. The Majority Decision understood that the objection was based on the ground that to admit the evidence would violate the doctrine of fundamental fairness.[66] The Majority Decision added that in relation to the expeditiousness of a trial, an Accused

[63] TF1-361,Transcript 19 July 2005, pp. 45-46.
[64] TF1-361, Transcript 19 July 2005, pp. 60-61.
[65] TF1-366, Transcript 17 November 2005, pp. 31-35. This witness also testified in closed session.
[66] Majority Decision, paras. 15-18.

is entitled to be tried without undue delay.[67] The Majority Decision then held that the "doctrine of fundamental fairness obliges us as a Chamber, not only to allow the Defence to recall the witnesses who have testified on this incident, but also to adjourn the proceedings so that the Defence can conduct their own investigations prior to the recall of those witnesses in order to enable them to be fully equipped and prepared to properly conduct the said cross-examination."[68]

39. The procedure for recalling witnesses turns in large part on the factual circumstances and argument must be advanced on whether the evidence in question was canvassed on an earlier occasion with the witness whose recall sought. The party seeking to have a witness recalled must establish good cause.[69] If the evidence was canvassed there is no principled basis to permit further recall. Even if it was not canvassed the significance of the facts and their degree of prejudice must be considered, along with the reasons for not putting them in issue, in determining whether to permit the recall of witnesses. This inquiry was not undertaken in the Majority Decision, no application was even before the Trial Chamber to recall witneses, and it was simply assumed that the Defence was entitled to recall witnesses. Accused may apply to recall witnesses, but they bear the burden of demonstrating that it is in the interests of justice that witnesses be recalled.

40. The Prosecution is not privy to specific information but counsel for the Third Accused did make references in court to a failure to obtain instructions from the Third Accused, and the Third Accused did not attend the trial for several months.[70] A number of the witnesses testifying about Kono District gave their evidence while the

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[67] Majority Decision, para. 19.

[68] Majority Decision, para. 23.

[69] *See Prosecutor v. Bagosora et al*, ICTR-98-41-T, "Decision on the Prosecution Motion to Recall Witness Nyanjwa," Trial Chamber, 29 September 2004, para. 6; *Prosecutor v. Simba*, ICTR-01-76-T, "Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination," Trial Chamber, 28 October 2004, para. 5; *Prosecutor v. Bagosora et al*, ICTR-98-41-T, "Decision on the Defence Motion to Recall Prosecution Witness OAB for Cross-Examination," Trial Chamber, 19 September 2005, para. 2; and *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, "Decision on the Defence Motion for the Re-Examination of Witness DE," Trial Chamber, 19 August 1998, para. 14.

[70] The transcripts record that it was not until 7th Trial Session, which ran from 2 March 2006 to 6 April 2006, that Gbao began regularly attending court. The transcripts show that prior to the 7th Trial Session occasionally attended court. See also comments in a written submission by counsel for the Third Accused where he "invited the Court to be mindful of the fact that their defence team is operation without instructions ....": *Prosecutor v. Sesay, Kallon, Gbao*, SCST-04-15-T-314, "Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 Dated Respectively 9th of October 2004, 19th and 20th of October 2004, and 10th of January 2005," 3 February 2005, para. 14.

Third Accused was not attending court. Part of the inquiry into whether a witness could be recalled would be whether the Third Accused's refusal to instruct counsel influenced a decision on whether or not a witness was cross-examined.

41. The Majority Decision also took the view that an adjournment was necessary. It was open to the Trial Chamber to grant an adjournment, but an adjournment was not warranted in the circumstances. The Defence had notice since 10 March 2006, the filing date of the Prosecution motion to add TF1-371 as a witness, that TF1-371 would testify to reports of killings of civilians in Kono District and that the Intelligence Officer in Kono reported directly to Gbao and Mosquito about events taking place on the ground.[71] Redacted statements were served on the Defence on 11 April 2006 and unredacted ones on 8 May 2006, which stated killings took place in Kono District; Gbao was chief of the IO; Gbao should have known what his people were reporting; an IO report referred to killings by CO Rocky; IO's reported directly to Gbao as well as to Bockarie; and Gbao came to Beudu on a regular basis to brief Mosquito on reports made by his IO's.[72]

42. The Third Accused had three months to investigate the above information. The proofing note disclosed on 10 July 2006 amended the above information by asserting that killings in Kono District were reported to Gbao and others.[73] The Third Accused did not commence his cross-examination of TF1-371 until 3 weeks later on 1 August 2006. That delay was sufficient time for the Third Accused to prepare, particularly in light of the disclosure that had been made in 11 April 2006.

43. The Majority Decision observed that an adjournment would also "necessarily occasion an undue delay to the proceedings and more importantly, put on hold, the decision by the Prosecution to close its case during this current session of the trial."[74] In previous decisions related to disclosure obligations, the Trial Chamber said that the preferred remedy for any breach of such obligations is an adjournment.[75] While the

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[71] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-513, "Confidential, with Ex Parte Under Seal Annex, Prosecution Request for Leave to Call Additional Witness and for Order for Protective Measures Pursuant to Rules 69 and 73bis(E)," 10 March 2006, para. 12.
[72] TF1-371 statement dated 17 February 2006, Court Management pages 23810-23811.
[73] TF1-371 statement dated 2, 3 and 5 July 2006, Court Management pages 24031-24032.
[74] Majority Decision, para. 24. The trial session referred to was scheduled to end on 3 August 2006.
[75] For example see *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-396, "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122," 1 June 2005,

Majority Decision states that Prosecution disclosure obligations were not in issue, the Majority Decision did take into account the time the Third Accused would need to prepare. Three weeks from the date of the last disclosure to the date the Third Accused's cross-examination began is considerable time to prepare. Even if it were not, a delay of a further four weeks, could not have transformed the trial from one within the bounds of lawfulness established by Article 17 and Rule 26*bis*, to a trial in violation of an accused's right to fair and expeditious trial.

44. Remedies of recalling witnesses or an adjournment could have been considered, but that ought to have been done alongside of whether it was sufficient to permit counsel for the Third Accused to cross-examine TF1-371 to discredit his evidence, in view of other witnesses who in counsel's view may not have incriminated the Third Accused.

45. The evidence of TF1-371 could demonstrate that reports and information were conveyed to the Third Accused about unlawful killings in Kono District. The Concurring Reasons interpret TF1-371's evidence as an attempt to opine, infer or make deductions with regard to an element of the charged offence.[76] The evidence led was based on observations not inferences, and to the extent the Trial Chamber has reservations about the quality of the observations, that is a matter of the weight to be accorded to the evidence and should not render it inadmissible. The evidence in question does not offend the ultimate issue rule,[77] as suggested in the Concurring Reasons,[78] any more than would evidence that a witness saw X enter a store, point a gun at the clerk, and order the clerk to deliver the proceeds from the cash register. TF1-371's evidence is evidence that Gbao was told about killings in Kailahun, whether the killings occurred, who committed them, Gbao's responsibility for them, all must be proved and determined by the Trial Chamber.

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para. 24: "As regards the appropriate remedy for the Defence when supplemental statements are found to contain new evidence, this Chamber had earlier held that, as a general rule, the judicially preferred remedy for a breach of disclosure obligations by the Prosecution is an extension of time to enable the Defence to prepare adequately its case rather than the exclusion of the evidence."

[76] Concurring Reasons, para. 20.

[77] Defined in May and Wierda, *International Criminal Evidence*, 2002, at para. 6.85 as: "...whether an expert may be permitted to give an opinion on the ultimate issue n the case, i.e., to give an opinion on the very issue that the court has to determine."

[78] Concurring Reasons, para. 20.

46. The Trial Chamber erred in its analysis of the objection. The evidence is relevant and admissible. Whether witnesses can be recalled is a separate issue to be determined on the facts pleaded by the parties, it cannot be assumed, and it is not a foregone conclusion that a party is entitled to recall a witness for further cross-examination.[79]
47. In the event the Trial Chamber determined that a remedy should be granted the appropriate remedy was a short adjournment.

**ii) Ground Two: The majority erred in ordering that the excluded evidence be expunged and deleted from the transcript.**

48. The Order granted by the Trial Chamber was that the evidence of TF1-371, "which directly or inferentially states or suggests that the 3rd Accused, Augustine Gbao, had knowledge of the alleged unlawful killings in Kono District be expunged and deleted from the Records."[80] The Trial Chamber further ordered that no reference should be made to the evidence and that a Consequential Order would be filed "that will specify the exact portions of the transcripts that will be expunged."[81]
49. The Trial Chamber asked for and heard oral submissions on 2 August 2006 on those portions of the transcript that should be expunged from the transcript.[82] There was little agreement between the Prosecution and the Defence on the portions that fell within the scope of the Trial Chamber's Order for expungement.
50. To date no Consequential Order has been issued and the Leave To Appeal Decision ordered that as an interim measure "the issuing of its Consequential Order be stayed until a Decision is issued by the Appeals Chamber."[83]
51. Rule 75(B)(i)(a) permits a judge to take such measures as are appropriate for the protection of victims and witnesses to prevent disclosure to the public or the media of

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[79] An example of a failed Prosecution attempt to recall a witness is *Prosecutor v. Bagosora et al*, ICTR-98-41-T, "Decision on the Prosecution Motion to Recall Witness Nyanjwa," Trial Chamber, 29 September 2004.
[80] Majority Decision, p. 9.
[81] Majority Decision, pp. 9-10.
[82] Transcript 2 August 2006, pp. 60-75.
[83] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-839, "Decision on Prosecution's Application for Leave to Appeal Majority Decision Regarding the Objection to the Admissibility of Portions of the Evidence of Witness TF1-371," 15 October 2007, p. 8.

the identity of a witness, including "Expunging names and identifying information from the Special Court's public records."[84]

52. The Rules do not permit expunging of the transcripts for any other purpose, nor did the Third Accused provide any authority for expunging the evidence from the transcript.[85] The Trial Chamber possesses an inherent jurisdiction, but absent concerns for confidentiality or security,[86] there is no principled reason to expunge any material from the court's transcript, which is the permanent record of the court's proceedings.

53. The ICTR Trial Chamber stated the law in *Ntagerura et al*:

> During the course of a trial, it may happen that irrelevant information is included in the record. Such information may be directly solicited by a party or may be contained in an unexpected answer from a witness. It is only after the closing arguments and during the deliberations that such evidence is evaluated. If, at that stage, a Chamber finds that certain evidence is irrelevant, it simply will not take it into account. There is no legal basis to expunge already admitted evidence from the record for reasons of relevancy during the trial. Moreover, the issue of relevance may arise during future appeal proceedings and an appeal decision on contested evidence might be impossible where the disputed parts were expunged from the record.[87]

54. The Trial Chamber in *Ntagerura et al,* was not dealing with evidence that was excluded immediately following an objection. However, the Trial Chamber alluded

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[84] Rule 75(B) states:
(B) A Judge or a Chamber may hold an *in camera* proceeding to determine whether to order:
(i) Measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as:
(a) Expunging names and identifying information from the Special Court's public records;
(b) Non-disclosure to the public of any records identifying the victim or witness;
(c) Giving of testimony through image- or voice- altering devices or closed circuit television, video link or other similar technologies; and
(d) Assignment of a pseudonym;
(ii) Closed sessions, in accordance with Rule 79;
(iii) Appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

[85] Transcript 24 July 2006, p. 23.

[86] See *Prosecutor v. Delalic et al*, IT-96-T, "Decision on the Prosecution's Motion for the Redaction of the Public Record," 5 June 1997, para. 60, where the Trial Chamber determined that it had an inherent power to order information to be expunged from the records and ordered redaction of references in the witness's testimony to an abortion on the grounds that it was irrelevant and "hurts the sensibility of a person."

[87] *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, "Decision on Defence Motion to Exclude Evidence," 25 March 2002. See also *Prosecutor v. Tadic*, IT-94-1, Appeals Chamber, "Order for Protection of Sensitive Information," 15 March 1999.

to a previous challenge that was brought at the time the evidence was adduced and there the impugned testimony was not expunged from the transcript.

55. No issue of witness protection or sensitivity exists here. The Trial Chamber is composed of professional judges who regularly are charged with disabusing their minds of evidence they have heard, but which is ruled inadmissible. Testimony remaining in the court record will not effect that capacity, and the information must remain in the court record to ensure that all appellate points can be fully argued and understood.

56. The indictment in this joint trial alleges a joint criminal enterprise. Pursuant to its ruling on the admissibility of the impugned evidence of TF1-371 the Trial Chamber was entitled to disabuse its mind of the impugned evidence as it related to the case against the Third Accused. However, the majority of the Trial Chamber for its part also accepted that such evidence was admissible as against the First and Second Accused:

> PRESIDING JUDGE: That's why we need to be very careful. The ruling is very narrow. It says that evidence -- in fact, let's go back to our ruling and read it for us. The ruling is at page 47. "This is the Chamber's ruling by two to one decision by Honourable Justice Bankole Thompson, Justice Benjamin Itoe: The Bench rules that the evidence objected to by the Defence is inadmissible and therefore should be excluded and expunged from the record. Honourable Justice Boutet dissents on the majority ruling because he's of the opinion that the said evidence is admissible and should not be excluded. Written reason rulings will be published in due course."
>
> I recall the context that counsel will object in respect of third accused. All reference to third accused in relation to alleged unlawful killings in Kono or Tombodu, and we were -- our ruling relates to third accused. Third accused.
>
> MR HARRISON: Yes, I understand that. I understand you say it relates to the third accused. I'm asking myself the question, if something is removed from the transcript physically, it can no longer be available for any other person who may be before the Court, either to assist -- whether it is inculpatory or exculpatory. I'm just asking -- the Prosecution is saying if
>
> that appears to be the effect of expunging -- the Prosecution has no problem with the Court disabusing its mind in its entirety in saying it's inadmissible, but if it's only against the third

> accused, the Prosecution is suggesting that it may be the case that the record should know what was said so that, at a later date, it may be considered, when assessing evidence against persons other than the third accused.
>
> PRESIDING JUDGE: Well, the question -- what about the remedy of an appeal, if you want to avail yourself of that.
>
> MR HARRISON: Yes, of course.
>
> PRESIDING JUDGE: Yes. Quite. Because, in other words, in this Court --
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> JUDGE ITOE: Because I'm not prepared to go the other way. You know, I don't want to travel that road. Because we have, in the interest of fairness, you know, ruled the way we have ruled, and I think it's a question of excluding and expunging. I do not see the logic of wanting to use it for some other person. This order, like the Presiding Judge has pointed out, only relates to the third accused, and evidence which is prejudicial to the third accused, that has come out in these proceedings from this witness, is what we're ordering to be expunged. I think our decision is clear on that point.[88]

57. Evidence of the way in which reports were distributed and to whom they were distributed is relevant to proving a joint criminal enterprise as against the First and Second Accused. It is an error of law to exclude such evidence as against the First and Second Accused, and it is an error of law to expunge and delete such evidence from the trial transcripts.

## PART D. RELIEF SOUGHT

58. The impugned evidence was not completely developed before the Trial Chamber, although the Prosecution believes that it would have been completed with a further 5 to 10 minutes of direct examination. As a consequence of the objection being sustained, the evidence was not visited at all during cross-examination.
59. In the event the appeal is allowed and the impugned evidence is ruled admissible, the order should require the Prosecution to make TF1-371 available for cross-examination on the impugned evidence, and grant leave to the Prosecution to continue its direct examination of TF1-371 on those matters specifically related to the impugned evidence which were not pursued as a result of the ruling of the Trial

[88] Transcript 2 August 2006, pp. 65-66.

Chamber. In the event the Prosecution elects to continue its direct examination of TF1-371, the direct examination should complete before any cross-examination takes place.

60. Whether or not the objection to the evidence is upheld on appeal, no testimony should be expunged from the transcript. The Trial Chamber may disabuse its mind of any inadmissible evidence, but nothing should be expunged or deleted from the transcript of proceedings

## PART E. CONCLUSION

61. The appeal should be allowed; the evidence of TF1-371 already heard ruled admissible; the Prosecution given leave to recall TF1-371 to complete the evidence on the specific topic that was the subject of the objection of the Third Accused; and the Accused allowed to cross-examine TF1-371 on the evidence that was the subject of the objection and such other evidence the Prosecution may offer through TF1-371 on the specific topic that was the subject of the objection.
62. The appeal should further be allowed to direct the Trial Chamber that none of the testimony of TF1-371 should be expunged from the transcript.

Filed at Freetown, on 22 October 2007

For the Prosecution,

P. H. Harrison

Pete Harrison

## RECORD ON APPEAL

1. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-623, "Written Reasons on Majority Decision on Oral Objection Taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371," 2 August 2006.

2. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-623, "Separate and Concurring Written Reasons of Hon. Justice Bankole Thompson on Majority Decision on Oral Objection Taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371," 2 August 2006.

3. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-623, "Dissenting Written Reasons of Hon. Justice Pierre Boutet on Majority Decision on Oral Decision on Objection Taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371," 2 August 2006.

4. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-636, "Prosecution Application for Leave to Appeal Majority Decision on Oral Objection Taken by Counsel for the Third Accused to the Admissibility of Portions of the Evidence of Witness TF1-371," 21 August 2006.

5. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-639, "Reply to Prosecution Application for Leave to Appeal Decision on Admissibility of Portions of the Evidence of Witness TF1-371," 4 September 2006.

6. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-640, "Prosecution Reply to Defence Response to Prosecution Application for Leave to Appeal Majority Decision on Objection Taken by Counsel for the Third Accused to the Admissibility of Portions of the Evidence of Witness TF1-371," 11 September 2006.

7. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-839, "Decision on Prosecution's Application for Leave to Appeal Majority Decision Regarding the Objection to the Admissibility of Portions of the Evidence of Witness TF1-371," 15 October 2007.

8. *Sesay et al.*, Transcript 21 July 2006, pp. 3-36 (closed session).

9. *Sesay et al.*, Transcript 24 July 2006, pp. 2-47 (closed session).

10. *Sesay et al.*, Transcript 2 August 2006, pp. 59-75 (closed session).

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### A. ORDERS, DECISIONS AND JUDGEMENTS

1. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-623, "Written Reasons on Majority Decision on Oral Objection Taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371," 2 August 2006.

2. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-623, "Separate and Concurring Written Reasons of Hon. Justice Bankole Thompson on Majority Decision on Oral Objection Taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371," 2 August 2006.

3. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-623, "Dissenting Written Reasons of Hon. Justice Pierre Boutet on Majority Decision on Oral Decision on Objection Taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371," 2 August 2006.

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8. *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-513, "Confidential, with Ex Parte Under Seal Annex, Prosecution Request for Leave to Call Additional Witness and for Order for Protective Measures Pursuant to Rules 69 and 73bis(E)," 10 March 2006.

9. *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-537, "Decision on

Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for protective Measures," 6 April 2006.

10. *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-579, "Written Reasons for the Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for Protective Measures," 15 June 2006.

11. *Prosecutor v. Sesa, Kallon, Gbao*, SCSL-04-15-T-578 , "Written Reasoned Ruling on Defence Evidentiary Objections Concerning Witness TF1-108," 15 June 2006.

12. *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-211, "Ruling on Oral Application for the Exclusion of 'Additional' Statement for Witness TF1-060", 23 July 2004.

13. *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-212, "Ruling on the Oral Application for the Exclusion of Part of the Testimony of Witness TF1-199", 26 July 2004.

14. *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-314, "Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 dated respectively 9th of October, 2004, 19th and 20th of October, 2004 and 10th of January, 2005", 3 February 2005.

15. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-396, "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122," 1 June 2005.

16. *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-619, "Corrected Amended Consolidated Indictment," 2 August 2006.

17. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-371, "Fofana – Appeal Against Decision Refusing Bail," 11 March 2005.

18. *Prosecutor v. Norman, Fofana, Kondewa,* SCSL-04-14-T-688, "Decision on Interlocutory Appeals on Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone," 11 September 2006.

19. *Prosecutor v. Bagosora et al.*, ICTR-41-T, "Decision on Certification of Appeal Concerning Will-Say Statements of Witness DBQ, DP and DA," Trial Chamber, 5 December 2003. http://69.94.11.53/default.htm

20. *Prosecutor v. Bagosora et al*, ICTR-98-41-T, "Decision on the Prosecution Motion to Recall Witness Nyanjwa," Trial Chamber, 29 September 2004. http://69.94.11.53/default.htm

21. *Prosecutor v. Bagosora et al*, ICTR-98-41-T, "Decision on the Defence Motion to Recall Prosecution Witness OAB for Cross-Examination," Trial Chamber, 19 September 2005. http://69.94.11.53/default.htm

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26. *Prosecutor v. Delalic et al*, IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001. http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf

27. *Prosecutor v Karemera,* ICTR-98-44-AR73, "Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File Amended Indictment", Appeals Chamber, 19 December 2003. http://69.94.11.53/default.htm

28. *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, "Decision on the Defence Motion for the Re-Examination of Witness DE," Trial Chamber, 19 August 1998. http://69.94.11.53/default.htm

29. *Prosecutor v. Mejakic et al.*, Case No. IT-02-65-AR11*bis*.1, "Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11*bis*," Appeals Chamber, 7 April 2006. http://www.un.org/icty/mejakic/appeal/decision-e/060407.htm

30. *Prosecutor v Milosevic,* IT-99-37-AR73, "Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder", Appeals Chamber, 18 April 2002. http://www.un.org/icty/milosevic/appeal/decision-e/020418.htm

31. *Prosecutor v Milosevic,* Case No. IT-02-54-AR73.6, "Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case", Appeals Chamber, 20 January 2004.

http://www.un.org/icty/milosevic/appeal/decision-e/040120.htm

32. *Prosecutor v. Mrksic, Radic, Sljivancanin*, Case No. IT-95-13/1-T, Oral Decision, Transcript of 8 November 2005, pp. 1333-1334. http://www.un.org/icty/transe13-1/051108ED.htm

33. *Prosecutor v. .Naletilic and Martinovic,* Case No. IT-98-34-A, Appeals Chamber, "Judgement," 3 May 2006. http://www.un.org/icty/naletilic/appeal/judgement/nal-aj060503e.pdf

34. *Prosecutor v. Ndindiliyimana* et al, ICTR-00-56-T, "Decision on Bizimungo's Motion to Exclude the Testimony of Witness TN," 28 October 2005. http://69.94.11.53/default.htm

35. *Prosecutor v. Niyitigeka*, ICTR-96-14-I, "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", Trial Chamber, 21 June 2000. http://69.94.11.53/default.htm

36. *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, "Decision on Defence Motion to Exclude Evidence," 25 March 2002. http://69.94.11.53/default.htm

37. *Prosecutor v. Tadic*, IT-94-1, Appeals Chamber, "Order for Protection of Sensitive Information," 15 March 1999. http://www.un.org/icty/tadic/appeal/order-e/90315PM36163.htm

38. *Prosecutor v. Simba*, ICTR-01-76-T, "Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination," Trial Chamber, 28 October 2004. http://69.94.11.53/default.htm

## B. RULES OF PROCEDURE AND EVIDENCE AND PRACTICE DIRECTIONS

1. Rules of Procedure and Evidence of the Special Court, 26*bis*, 73(B), 75(B), 89(C), 108(C), as amended.

2. *Statute of the Special Court for Sierra Leone*, Article 17.

3. Practice Direction for Certain Appeals Before the Special Court of 20 September 2004.

## C. OTHER DOCUMENTS

1. May and Wierda, *International Criminal Evidence*, 2002, para. 6.85.

2. TF1-371 statement of 2, 3 and 5 July 2006, Court Management pp. 24031-24032.

3. TF1-371 statement of 17 February 2006, Court Management pp. 23810-23811.

4. Transcript 12 July 2004, pp. 55-66.

5. Transcript 20 July 2004, pp. 2-9.

6. Transcript 21 July 2004, p. 34.

7. Transcript 22 July 2004.

8. Transcript 21 and 22 October 2004.

9. Transcript 21 October 2004, pp. 45-50.

10. Transcript 27 October 2004, 4-25.

11. Transcript 17 January 2005, pp. 34-83.

12. Transcript 21 January 2005, p. 8, 13-14; 26 January 2005, pp. 46-61; 27 January 2005, pp. 1-72 (closed session).

13. Transcript 1 February 2005.

14. Transcript 4 February 2005, pp. 27-64.

15. Transcript 11 April 2005, pp. 42-47.

16. Transcript 19 April 2005, pp. 15-73.

17. Transcript 28 April 2005, pp. 48-50.

18. Transcript 19 July 2005, pp. 29-84 (closed session).

19. Transcript 26 July 2005, pp. 77-115 (closed session).

20. Transcript 3 August 2005, p. 92; 27 July 2005, p. 36; 28 July 2005, p. 27 (closed session).

21. Transcript 7 November 2005, p.70; 17 November 2005, pp. 23-116; 18 November 2005, pp. 2-45 (closed session).

22. Transcript, 21 November 2005, p. 43 (closed session).

23. Transcript 31 January 2006, p. 102.

24. Transcript 10 July 2006, pp. 64, 80-81 (closed session).

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# INTERNATIONAL CRIMINAL EVIDENCE

**JUDGE RICHARD MAY**
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an expert must be impartial and that the impartiality of this witness could not be assured.[187]

**6.85** *"Ultimate issue" rule.* The next rule to be discussed is the "ultimate issue" rule, whether an expert may be permitted to give an opinion on the ultimate issue in the case, *i.e.*, to give an opinion on the very issue that the court has to determine. There has been a rule preventing this practice in some common law jurisdictions, although the rule is nowadays much modified. Thus, in England the position is that experts are allowed to express their opinion on the ultimate issue if it would be artificial for them not to do so.[188] In international criminal trials, where there is no need to protect a jury, the question is more often not whether expressions on the ultimate issue should be allowed but whether they assist the court. This question has arisen in the ICTY in relation to military experts who have sought to comment on the command responsibility of the accused. In *Kordić* the prosecution sought to call as an expert a political and military analyst of the conflict in Bosnia-Herzegovina. He had written a report, based not on his own observations but on a study of material including press reports, witness statements, documents, video and audio-tapes and evidence from other tribunal cases. The prosecution sought to introduce the report as part of the evidence in the case. In the report the witness made direct references to the accused, drawing conclusions about his responsibility as a civilian and military superior. The prosecution argued that an expert's conclusions on mixed questions of fact and law, such as command responsibility, are admissible, as they are in the case of "diminished responsibility" in domestic criminal trials. The defense submitted that the witness was "neither neutral nor an expert,"[189] and that he was drawing inferences from the circumstantial evidence which were in fact the duty of the Trial Chamber to draw. It argued that, in so doing, he was, in effect, being called as a substitute for the prosecution's closing submissions, or fulfilling the role of a "fourth judge." The Trial Chamber excluded the evidence on the basis that the witness indeed was drawing conclusions on the very matters upon which the Trial Chamber was required to decide, thus invading its province. It also found that the witness's evidence would not assist it in its task.[190]

187. *Akeyesu*, Decision on Defense Motion for Appearance of an Accused as an Expert Witness, Mar. 9, 1998.

188. *Stockwell* (1993) 97 Cr. App. R. 206.

189. *Kordić and Čerkez*, Transcript (Jan. 28, 2000), at 13289.

190. *Id.* at 13268–13306.

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## CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the ***Confidential*** Case File.

Case Name: The Prosecutor – v- Sesay, Kallon & Gbao
Case Number: SCSL-2004-15-T
Document Index Number: 845
Document Date 22 October, 2007
Filing Date: 22 October, 2007
Number of Pages: 36 **Page Numbers: 30992-30997**
Document Type:-**Confidential Appendices**

☐ Affidavit
☐ Indictment
☐ Correspondence
☐ Order
☒ **OTHER**

Document Title: **Public Prosecution Notice of Appeal and Submissions Regarding the Objection to the Admissibility of portions of the Evidence of Witness TFI-371 with confidential Appendices**

Name of Officer:

**Advera Nsiima K.**

Signed Nsiima