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SCSL-04-15-T
(31415-31515)

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SPECIAL COURT FOR SIERRA LEONE
APPEALS CHAMBER

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: 29 October 2007

THE PROSECUTOR

v.

ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL-04-15-T

PUBLIC

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

Office of the prosecutor:
Mr. Peter Harrison
Mr. Reginald Fynn
Mr. Charles Hardaway
Mr. Vincent Wagona

Defence Counsel for Issa Sesay:
Mr. Wayne Jordash
Ms. Sareta Ashraph

Defence Counsel for Morris Kallon:
Mr. Shekou Touray
Mr. Charles Taku
Mr. Ogetto Kennedy

Defence Counsel for Augustine Gbao:
Mr. John Cammegh

I. PROCEDURAL HISTORY

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1. Defence hereby files this Response to Prosecution's Appeal Prosecution Notice of Appeal and Submissions Regarding the Objection to the Admissibility of Portions of the Evidence of Witness TF1 371 with Confidential Appendices', filed on the 22 October 2007.[1]

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).

3. On 24 July 2006, the Defence Counsel for Augustine Gbao objected to the evidence by TF1-371. There was evidence '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.'

4. 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.

5. 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 TF1-371.'

6. 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

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[1] *Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Doc. No. SCSL-2004-15-T-845, Prosecution Notice of Appeal and Submissions Regarding the Objection to the Admissibility of Portions of the Evidence of Witness TF1 371 with Confidential Appendices, 22 October 2007, paras.9 and 10. (Hereinafter 'Prosecution Appeal').

TF1-371'. 31417

7. On 15 October 2007, the Trial Chamber granted the Prosecution application for leave to appeal the Majority Decision.

8. On 22 October 2007, Prosecution filed a Notice of Appeal and Submissions Regarding the Objection to the Admissibility of Portions of Evidence of Witness TF1 371 With Confidential Appendices.

II. INTRODUCTION

9. Defence counsel for the third Accused opposes the appeal by the Prosecution. Contrarily to what is alleged by the Prosecution, defence counsel respectfully submits that, in deciding to exclude the evidence of TF1 371 implicating Augustine Gbao with the alleged unlawful killings in Kono District and in deciding to expunge and delete them from the transcripts, the Trial Chamber acted within the boundaries of its discretion, in full respects of the rights of the Accused and the overall fairness of the trial as embodied in the Statute and in the Rules of Procedure and Evidence of the court.

10. The Prosecution appeals the decision of the Trial Chamber on the following grounds:[2]

GROUND 1: The Majority erred in excluding relevant portions of the testimony of TF1 371.

GROUND 2: The Majority erred in ordering the excluded evidence to be expunged and deleted from the transcripts.

III. PRELIMINARY COMMENTS

Lack of Clarity of the Appeal

[2] *Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Doc. No. SCSL-2004-15-T-845, Prosecution Notice of Appeal and Submissions Regarding the Objection to the Admissibility of Portions of the Evidence of Witness TF1 371 with Confidential Appendices, 22 October 2007, paras.9 and 10. (Hereinafter 'Prosecution Appeal').

11. Defence counsel has read with the utmost attention the submissions of appeal by the Prosecution. Even in doing so, it is difficult for defence counsel to clearly understand what arguments the prosecution uses to challenge the decision of the Trial Chamber. As a result and in order to gain some clarity, defence counsel makes reference to the arguments presented by the Prosecution in its request for leave to appeal[3] to assist in the structure of its response.

The Present Issue is not one of Disclosure pursuant to Rule 66 and 68

12. More importantly, defence counsel would like to stress that the issue of inadmissibility of portions of evidence by TF1 371 is not an issue of breach of rule 66 disclosure obligation by the Prosecution, as made clear in the Trial Chamber's decision,[4] but one of fairness of the trial and fundamental rights of the Accused.

13. Even though it was briefly mentioned during the oral arguments,[5] the issue here is not that defence counsel for the third Accused was not given enough time to prepare for the cross examination of TF1 371. Since completely new evidence was adduced at the very end of the Prosecution case,[6] the third Accused was effectively prevented from assessing the new evidence against him by virtue of the fact that defence counsel had not felt it necessary or professionally wise to cross examine the witnesses who had previously testified as to the Kono Crime Base. As put by defence counsel in court, 'the fundamental basis of a fair criminal trial is the right of the defendant to test the veracity of Prosecution evidence by way of cross-examination'.[7]

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[3] *Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Doc. No. SCSL-2004-15-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 Evidence of Witness TF1 371, Trial Chamber, 21 August 2006, paras. 13-18. (Hereinafter 'Prosecution Leave to Appeal').

[4] *Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Doc. No. SCSL-2004-15-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, Trial Chamber 1, 2 August 2006, para.13. ('Trial Chamber Decision')

[5] RUF transcripts of 21 July 2006, p.14. (Closed session).

[6] The Prosecution case started on the 5 July 2004. TF1 371 testified for the first time on 20 July 2006, two years later.

[7] RUF Transcripts of 21 July 2006, p.7. (Closed session).

14. However, TF1 371 was called 12 months after the last Kono crime base witness, TF1 360. 17 of the 19 Kono witnesses referred to by the Prosecution Appeal[8] had testified by February 2005. None of the 19 referred to the Accused's involvement in, or knowledge of, the particular killings referred to by TF1 371, and were consequently not cross examined by defence counsel on the issue as it had simply not been introduced.

15. Defence counsel accepts the Prosecution's account of disclosure as mentioned is paragraphs 13 to 18 of its Appeal. However defence counsel would like to stress the fact that in the statement disclosed on 8 May 2006, Augustine Gbao is mentioned as being the chief of the IO while in the proofing notes of 10 July 2006 and in court there is no mention of IDU. It should also be stated that the redacted disclosure of the 11 April 2006 contained no legible reference to the Accused.

16. By repeatedly referring to rules, case law and arguments relating to disclosure,[9] it seems that the Prosecution tries to minimize the significance of the issue of fundamental fairness to the Accused that is at stake in this appeal.

IV. SUBMISSIONS

GROUND 1

The Trial Chamber did not Err in Excluding Portions of TF1 371 Testimony

A. Defence Counsel was not Put on Notice of the Allegations against Augustine Gbao before TF1 371

Indictment, PT brief and Supplemental PT Brief and OTP Opening Statement

17. The Prosecution submits that Defence counsel had been put on notice of the allegations of Augustine Gbao being involved with mass killings in Kono through the Indictment, Pre-trial brief, supplemental pre-trial brief and its opening statement.

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[8] Prosecution Appeal, para.32.
[9] Ibid, see for instance paras. 25, 26, 28, 41, 42 and 43.

18. The Indictment, pre-trial brief, supplemental pre-trial brief and its opening statement are supposed to inform the Accused of the allegations against him. However they are all characterized by vagueness, whether with regards to the time frame, the locations or the specific crimes alleged. Through these documents, it is simply impossible for an Accused to gain a clear understanding of the charges against him. Just as an example, the crimes alleged in the indictment extend over a period of more than three years, in more than seven different districts throughout Sierra Leone. In addition to not giving any particulars of crimes, the indictment consistently refers to an 'unknown number' of victims[10] even though rule 47(c) RPE states that an indictment shall contain a statement of **each specific offence** of which the named suspect is charged and **a short description of the particulars of the offence.** In defence counsel's opinion these documents do not, in any case, provide sufficient notice that Augustine Gbao was aware of killings going on in Kono district.

19. According to rule 84 of the RPE, an opening statement should be confined to the evidence the party intends to present to support his case; as the Prosecution failed to mention Augustine Gbao's involvement with alleged crimes in Kono,[11] defence counsel legitimately understood that there was no allegation of unlawful killings in Kono against Augustine Gbao.

20. The whole issue of notice by way of the Indictment, pre-trial brief, supplemental pre-trial brief and opening statement, according to the defence, is well illustrated by the observation of the then lead counsel for Augustine Gbao, Andreas O'Shea, during the oral arguments on TF1 371:

> 'at the time the indictment was drafted, and at the time the pre-trial brief was drafted, the Prosecution had no indication whatsoever that this type of evidence was going to be alleged against Gbao.'[12]

21. Defence counsel adopts the same reasoning and submits that the Prosecution failed to provide notice that evidence against Augustine Gbao being involved in unlawful killings

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[10] Amended Consolidated Indictment, 13 May 2004. See the counts 3 to 5, on Unlawful Killings paras.46, 49, 50, 51 and 53. ('RUF Indictment')
[11] RUF Transcripts of 5 July 2004, p.46.
[12] RUF Transcripts of 24 July 2006, p.30. (Closed session).

in Kono would be called. The inclusion of new evidence at the very end of the trial is a clear example of the Prosecution moulding its case as the trial goes along.

22. Finally, defence counsel would like to stress the fact that, while the indictment, pre-trial brief, supplemental pre-trial brief and opening statement contain the charges against the Accused, it is the **oral** testimony of the witnesses in court that comprise the evidence to prove such charges. The present issue, the effective denial of the right to cross examine witnesses, concerns the **evidence**, not the charges.

Command Responsibility

23. The Prosecution relies on the fact that it alleged command responsibility as a mode of responsibility for Augustine Gbao as providing sufficient notice that allegations of unlawful killings in Kono will be brought against the third Accused.[13] However, the mere allegation of the senior position of an individual is not sufficient to put into play the doctrine of command responsibility. Under article 6(3) of the statute, command responsibility can be established if the Accused knew or had reason to know that the subordinate was about to commit crimes or had done so, and that the Accused had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

24. Defence counsel submits that mere evidence relating to Augustine Gbao being a senior commander in the RUF does **not** provide any notice that he was in any case related to unlawful killings in Kono. In order to warn the defence, the Prosecution should have demonstrated that first, Augustine Gbao knew or had reasons to know about crimes in Kono by his alleged subordinates, and second, that he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

Joint Criminal Enterprise [14]

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[13] Prosecution Appeal, para.30.

[14] Defence counsel would like to inform the Appeals Chamber that he filed a request for leave to raise objections to the form of the indictment following the AFRC Judgement. Defence counsel intends to argue that the Joint Criminal Enterprise as a mode of responsibility should be dismissed from the indictment. See *Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-2004-15-T-813, Gbao-Request for Lease to Raise Objections to the Form of the Indictment, 23 August 2007, para. 18.

25. The Prosecution also argues that the allegations of Joint Criminal Enterprise in the Indictment provided sufficient notice for the third Accused that evidence of unlawful killings in Kono would be used against him.

26. On the 21 July 2006, the Prosecution recognized that Joint Criminal Enterprise is the mode of liability that applies to the Kono crime base in its entirety.[15] However, whether in the indictment, pre-trial brief and supplemental pre-trial brief or in the opening statement, the alleged Joint Criminal Enterprise does not mention Kono district but **the whole territory of Sierra Leone**.[16] How then can the Accused be expected to know that he is charged with committing specific crimes within the Joint Criminal Enterprise in Kono District?

27. Joint Criminal Enterprise is defined as a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise. There needs to be a link, even indirect, between the Accused and the crimes committed within the Joint Criminal Enterprise. There was absolutely no evidence of Augustine Gbao being involved with crimes in Kono district before TF1 371 testified.

28. Joint Criminal Enterprise as a mode of responsibility should not be used as a cover blanket by the Prosecution to include each and every crime committed in the territory on Sierra Leone during the war into its case, in the absence of exhaustive oral testimony to the contrary. Joint Criminal Enterprise, especially the form alleged by the Prosecution, has such wide ranging consequences as a mode of responsibility that its doctrine should be carefully employed, and the defence should be safeguarded from its arbitrary application.

29. The mere fact that Augustine Gbao was alleged to have taken part in a Joint Criminal Enterprise was not sufficient to put him on notice that witnesses would come and testify about his involvement in alleged unlawful killings in Kono District. As put by defence counsel John Cammegh during the oral arguments,

'The logical extension of Joint Criminal Enterprise [...] is that I would have had to cross examination every witness on every incident averred in those documents (Indictment and

[15] RUF Transcripts of 21 July 2004, p.26. (Closed session).
[16] RUF Indictment, para.36.

Pre-Trial Brief), regardless of the evidence that we've heard in court and, more specifically, regardless of Gbao's knowledge of those events, his whereabouts at the time, his place in the command structure at that time, et cetera et cetera'.[17]

Evidence of Previous Kono Witnesses

30. The Prosecution called 19 witnesses who testified about Kono District. 17 of them testified before February 2005, within 6 months of the beginning of the trial and two others, TF1 361 and TF1 360, were called in July 2005, which was still **one year** before TF1 371 came to testify.

31. **None** of them implicated Augustine Gbao,[18] whether directly or indirectly in the Kono crime base; hence, the Prosecution is now desperately trying to have the evidence of TF1 371 on Augustine Gbao admitted. This is a last ditch effort to implicate Augustine Gbao, at the very end of the Prosecution case. It is, in effect, an 'ambush'. Had Augustine Gbao been as important as the Prosecution is trying to allege, all the other Kono witnesses would have been able to testify on it, which they did not.

32. The Prosecution refers to TF1 361's evidence within the text of its appeal,[19] although without apparently explaining why. In July 2005, TF1 361 testified that Augustine Gbao was the overall security commander, reporting directly to the high command and that, in that capacity, he was ultimately responsible for all the intelligence information received from the RUF in RUF Occupied zones and from the various units under his control.

33. If it was the Prosecution's purpose, defence counsel submits that the above mentioned testimony by TF1 361 cannot be interpreted to mean that the Defence was on notice of evidence alleging knowledge of unlawful killings by Augustine Gbao as implied by TF1 371. Merely saying that he received information from the RUF occupied zones is not evidence that Augustine Gbao received specific information from Kono District. If no witness amongst the 19 who testified about Kono district testified that Augustine Gbao was receiving reports from the events taking place in Kono, then there is no evidence

[17] RUF transcripts of 24 July 2007, p.22. (Closed session).
[18] See also RUF transcripts of 21 July 2006, p. 32. (Closed session).
[19] Prosecution Appeal, para.34-36.

against Augustine Gbao on this point, and no need for defence counsel, acting in accordance with basic professional standards, to cross examine the witnesses on this issue.[20]

34. The present situation is another blatant example of the Prosecution moulding their case as they go along. It would be quite pernicious for a party to an international criminal trial to be allowed to add a completely new allegation at the end of its case, especially when none of the 19 witnesses that testified on the same event have mentioned Augustine Gbao as being involved with alleged unlawful killings in Kono district.

35. While defence counsel understands the difficulties faced by the Prosecution in gathering evidence and in preparing its indictment, it is submitted that the liberty of the Prosecution has to be curtailed once it reaches the point where it endangers the fairness of the trial and the fundamental rights of the Accused.[21]

Evidence Provided by TF1 371

36. As noted earlier, TF1 371, possibly one of the most important Prosecution Insider witnesses, was called at the end of the Prosecution case. The first time that defence counsel was informed that the witness would provide evidence of Augustine Gbao receiving reports of events in Kono was in March 2006, one and a half year after the start of the trial.[22]

37. Even the Prosecution recognized that TF1 371 was the only witness providing evidence on Augustine Gbao's involvement in Kono District.[23] They also concede that the reason for the defence's decision not to cross examine the witnesses from Kono on unlawful

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[20] The first time that TF1 361 mentioned Augustine Gbao was during the cross examination by defence counsel for Issa Sesay, on the 14 of July 2005, p. 28. The name of Augustine Gbao came out in relation to a document purportedly sent to Foday Sankoh bypassing the other members of the high command, referring to Augustine Gbao as the overall security commander. Before that, there was not any reference to Augustine Gbao during the witness' examination in chief on the 11, 12 and 13 July 2005. (Closed session).

[21] See Rule 37 (A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, which states 'The Prosecutor shall perform all the functions provided for in the Statute in accordance with the Rules and with such Regulations, consistent with the Agreement and the Statute ant the Rules, as may be framed by him.' It is submitted that this rule encompasses the obligation for the Prosecution to respect the fundamental rights of the Accused.

[22] Indeed, the prosecution started its case on 5 July 2004.

[23] RUF Transcripts of 24 July 2006, p.29. (Closed session).

killings 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'.[24]

38. Defence counsel wishes to argue that the presentation of new evidence at the very end of the trial is disingenuous. On this point, defence counsel adopts what has been said by the Judges of the Trial Chamber of the ICTY, that 'there should be a point where accusation ends and answering the allegations begins.'[25]

The Absence of Cross Examination of Kono Witnesses

39. First of all, defence counsel would like to stress that the most fundamental principle of international criminal law is the presumption of innocence.[26] One of its implications is that the Prosecution bears the burden to prove that the Accused is guilty.[27] It is not for the Defence to demonstrate that the Accused is innocent by putting questions to the Prosecution witnesses on issues that have not been mentioned during examination in chief (whether by the current witness or by previous witnesses).

40. Suggesting that defence counsel should have cross examined all the Prosecution witnesses on all charges of the indictment simply disregards this principle.[28] The Prosecution appears to misunderstand the true purpose of cross-examination, and the logical extension of their stance is tantamount to a practical reversal of the burden of proof.

41. It is a rule of international law [29] that cross examination should be limited to the subject matter of the evidence in chief. If there is no evidence against an Accused person, then, strictly speaking, there is nothing for the defence to challenge. Cross examination is a

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[24] Prosecution Appeal, para.33.

[25] *Prosecutor against Delalic et al.* Case No. ICTY- IT-96-21, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, Trial Chamber, 19 August 1998, para.20. ('Celebici Decision').

[26] Article 17 SCSL Statute. See also Article 14(3)(e) of the International Covenant on Civil and Political Rights, Article 6(3)(d) of the European Convention on Human Rights, Article 8(2)(f) of the American Convention on Human Rights.

[27] See for instance ICTY, Celebici decision, para.20: 'It must be appreciated that the onus of proof of the guilt of the accused rests on the Prosecution throughout the case. This is exemplified in the presumption of innocence which the accused enjoy by virtue of Article 21(3) of the [ICTY] Statute.'

[28] See RUF transcripts of 21 July 2007 p.26 and 27. (Closed session).

[29] See rule 90 ICTY and ICTR: Testimony of Witnesses (G) (i) ***Cross-examination shall be limited to the subject- matter of the evidence- in-chief*** and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject matter of the case. (Emphasis added).

matter for defence counsel's discretion, based on his professional judgment and according to his client's best interests. As a general rule of professional practice, and depending on individual circumstances, it may be reckless and damaging for defence counsel to ask questions about a subject that the witness has not testified about, as defence counsel would run the risk of the witness providing unexpected or detrimental testimony not led by the Prosecution that could later be used against the Accused.[30] Cross examination in such case would have been superfluous, unprofessional and dangerous, leaving the client potentially vulnerable to allegations as yet not put in chief. It is not defence counsel's practice to act in such a negligent and, potentially unethical manner, and nor should he be implicitly criticized for it.

42. Cross examining all Prosecution witnesses on all the allegations contained in the indictment would also be in breach of the Accused's right to an expeditious trial,[31] and would have surely triggered the Trial Chamber's involvement, as part of its duty to exercise control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and the presentation effective for the ascertainment of truth and avoid the wasting of time.[32]

43. Defence counsel further submits, in order to emphasis the extreme importance of cross examination, that at the time of the judgements, the court may base its decision only on evidence submitted and discussed before it at trial.[33] If there is no evidence in court then there is nothing to respond to for the Accused.

44. Contrarily to what the Prosecution alleges, whether or not the Accused was present in court during the cross examination of the Kono witnesses does not affect in any case the decision and ability of defence counsel concerning cross examination.

B. Exclusion of Evidence

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[30] Article 8 of the code of conduct of defence counsel holds that counsel has a duty to act in the interests of justice and must assist the court in the administration of justice. Article 14 B (iii) of the same code states that court appointed counsel must act throughout in the best interests of the client. See also article 15 (conflicts of interests) 'defence counsel shall at all times act in the best interests of his client.'

[31] Rule 17(4) (c) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ('RPE').

[32] Rule 90 (F) RPE.

[33] *Prosecutor v. Ntagerura, Bagambiki and Imanishimwe*, Case N.ICTR-99-46-T, Decision on Defence Motion to Exclude Evidence, Trial Chamber, 25 March 2002, para.5.

The Trial Chamber did not Exceed Its Discretion

45. The Prosecutor claims that the Trial Chamber erred in law by failing to provide a legal basis for its decision to admit portions of TF1 371 testimony.

46. It is the submission of defence counsel that, in excluding the evidence of TF1 371 that implicated Augustine Gbao in unlawful killings in Kono District, the Trial Chamber simply fulfilled its role of protector of the fairness of the trial as provided for by the RPE.

47. First of all, rule 95 of the RPE clearly allows the Trial Chamber to exclude evidence when its admission would 'bring the administration of justice into serious disrepute.' In other words, the Trial Chamber has the discretion to exclude evidence whose probative value is manifestly outweighed by its prejudicial effect.[34] Deciding to exclude from the transcripts a completely new piece of evidence, presented at the end of the Prosecution case, and which is clearly prejudicial to the Accused (as he has not been given the opportunity to cross examine earlier witnesses on this issue, is an action completely within the boundaries of that discretion.) It is submitted that this rule alone provides a legal basis for the Trial Chamber to order the inadmissibility of certain parts of TF1 371 testimony. In the present situation, any probative value of TF1 371's evidence was outweighed by the necessity for the Trial Chamber to ensure the fairness of the trial and especially the rights of the Accused.

48. The reading of Rule 89B RPE further demonstrates that, in dealing with admissibility of evidence, the Trial Chamber has to pay the utmost attention to the **fairness of the trial.** Rule 89B RPE provides a general framework for the court to act in dealing with evidence, stating that in cases not provided for in the RPE, the Trial Chamber should apply the rules

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[34] *Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-2004-15-T-616, Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible, Trial Chamber, 1 August 2006, para.12. ('Moulding Decision'). See also *Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-2004-15-T-391, Ruling on Gbao Application to exclude evidence of prosecution witness M. Koker, Trial Chamber, 23 May 2005, paras.6-8. ('Koker Decision').
See also the Police and Criminal Evidence Act 1984 (Ch 60), part IV, article 78 'Exclusion of unfair evidence' (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse affect on the fairness of the proceedings that the court ought not to admit it. (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.' Available at http://www.swarb.co.uk/acts/1984PoliceandCriminalEvidenceAct.shtml.

of evidence which best favour ***the fair determination of the matter*** and which are ***consonant with spirit of the statute and general principles of law.*** (Emphasis added).

49. The Trial Chamber, in its decision, makes clear that it puts a 'high premium on the necessity for the proceedings to be conducted fairly and expeditiously', with full respect for the rights of the Accused.[35] On several occasions it referred to its duty to ensure the fairness of the proceedings.[36]

50. More specifically the Trial Chamber held

'It is our duty, therefore, as a Chamber, to hold the balance properly and to ensure that all these principles are adhered to and applied at all levels of the proceedings, depending of course on the prevailing circumstances and the stage at which we are with the trial. Indeed, this Chamber is vested with the jurisdictional prerogative to make decisions on issues before it provided that such decisions are in consonance with these principles and to ensure that how they accord with established principles of law and of fundamental fairness.'[37]

51. The Trial Chamber further stated that:

'In this regard, it is our duty to control the admission of evidence and the mechanisms that govern the process and to ensure that only evidence of facts which are relevant and are not prejudicial to the due process rights of any of the parties is admitted on the record.'[38]

52. One of the Prosecution's arguments is that, according to rule 89C RPE, the Trial Chamber should admit any evidence as long as it is relevant.[39] However, this results from an incorrect reading of the rules, as the text of rule 89C reads 'the Trial Chamber ***may*** admit any relevant evidence' (emphasis added). There is absolutely no obligation for the Trial Chamber to admit into any evidence that is relevant, but merely a discretionary power to

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[35] Trial Chamber Decision, para. 26.
[36] Trial Chamber Decision, paras. 15, 16, 18, 23 and 31.
[37] Trial Chamber Decision, para.27.
[38] *Ibid*, para.26.
[39] *Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-2004-15-T-636, Prosecution Application for Leave, para.13.

admit or reject evidence. By deciding not to admit evidence found to be prejudicial to the due process right of the Accused,[40] the Trial Chamber did not violate the rule.

53. In addition, the allegation that the Trial Chamber acted within its discretion in refusing to admit evidence that could damage the integrity of the proceedings finds its confirmation in case law.

54. As the judges of the Trial Chamber previously held, 'that it is crucial in any such determination, where it is alleged that the probative value of the evidence under scrutiny is outweighed by its prejudicial effect, whether admitting the evidence will ***impact adversely and unfairly on the integrity of the proceedings before the Court.***'[41] The adverse and unfair impact of the proceedings will sometimes require evidence to be excluded. [42]

55. The judges of the trial chamber similarly held that, based on a combined reading and interpretation of Rule 89 and Rule 95, it is absolutely clear that no evidence shall be admissible if obtained by methods which could subsequently cast a substantial doubt on the evaluation of its reliability or if its admission could seriously damage the integrity of the proceedings.'[43]

56. Finally, even though there was no express rule or article justifying the action of the Trial chamber in deciding to exclude the evidence, rule 26*bis* RPE clearly allows the trial chamber to take the measures necessary to protect the fairness of the trial.[44]

57. In addition to the RPE, the Trial Chamber also referred to article 17 of the statute, which contains the rights of the Accused.[45] More specifically, the trial chamber noted the right of the Accused to have witnesses cross examined, which is the underlying principle under

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[40] Trial Chamber Decision, para.27.
[41] Koker Decision, para.8.
[42] Trial Chamber Decision, para.29.
[43] Moulding Decision, para.17.
[44] *Prosecutor v. Bagasora*, Case No. ICTR-96-7, Decision on Aloys Ntabakuze's Interlocutary Appeal on Question of Law Raised, Trial Chamber I, 29 June 2006, para.18 states 'When the Defence is of the view that the Prosecution introduces evidence of material facts of which it had no notice, it can make an objection to the admission of such evidence for lack of notice If the Trial Chamber agrees with the Defence that insufficient notice has been given, it should exclude the challenged evidence in relation to the unpleaded material facts, require the Prosecution to amend the indictment, grant an adjournment to allow the Defence adequate time to respond to the additional allegations or **take other measures to preserve the rights of the accused to a fair trial**.' (Emphasis added)
[45] Trial Chamber Decision, para. 16.

the whole process of excluding the evidence of TF1 371. Taken alone or in conjunction with the above mentioned rule, this article clearly provides a legal basis for the Trial chamber to take measures, within its discretion, aiming at protecting those rights.

The Trial Chamber did not fail to Inquire as to Whether Good Cause was Shown for the Recall of Witnesses

58. In its appeal, the Prosecution submits that the Trial Chamber merely 'assumed that the defence was entitled to recall witnesses without inquiring as to whether the Defence had provided good cause to do so.[46]

59. The defence showed good cause for the recall of witnesses. On the 21 July 2006,[47] defence counsel explained that the evidence was heard for the first time in the RUF trial, and the result of it being called at such a late stage is that the Accused has been denied the opportunity to cross examine witnesses who had testified on Tombodu, and more generally on Kono District. Finally defence counsel stated that the doctrine of fundamental fairness had been seriously violated,[48] and reiterated that the defence for the third Accused had been 'effectively denied the opportunity to lay the ground for [the] contest to this evidence in previous sessions, because there has never been, (until March 2006. one year and a half after the start of the Prosecution case,) a hint of Augustine Gbao's knowledge or control over what was going on in Kono'.[49] During the presentation of his oral arguments, defence counsel made clear that one of the remedies for the late disclosure of such incriminatory evidence at the very end of the prosecution case would be 'the recalling of all the witnesses from the Kono crime base who alleged unlawful killing'.[50]

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[46] Prosecution Appeal, para. 39.
[47] RUF Transcripts of 21 July 2006, p.10-11. (Closed session).
[48] *Ibid.* p.14. (Closed session).
[49] RUF Transcripts of 21 July 2006, p. 15. (Closed session).
[50] RUF Transcripts of 21 July 2006, p. 17. (Closed session).

60. Even if not formally formulated, the oral argument referred to above clearly established good cause for the recall of witnesses, showing that it would be in the interests of justice.[51]

The Accused was Effectively Denied the Right to Cross Examine Previous Kono Witnesses

61. As a result of the fact that none of the Kono witnesses incriminated Augustine Gbao as being involved in unlawful killings in Kono District, defence counsel did not bring up the subject in cross examination. With the testimony of TF1 371, completely new evidence appeared in court. It is submitted that, due to the late presentation of an additional allegation implicating Augustine Gbao with unlawful killings in Kono, Augustine Gbao was effectively denied the right to cross examine witnesses, to which he was entitled to under article 17(4)(e) of the Statute.

62. The right to cross examination is one of the most fundamental rights of an Accused;[52] Within the Court RPE, Rule 85B holds that cross examination should be allowed in each case. It is the right of the Accused to challenge the evidence provided against him, and to present argument to the court.

63. As stated by defence counsel during the oral arguments, 'The fundamental basis of a fair criminal trial is the right of the defendant to test the veracity of Prosecution evidence by way of cross-examination'.[53]

64. In the present case, Augustine Gbao has been denied the opportunity to cross examine witnesses who have testified on Tombodu and on Kono District. In other words, he has been denied the opportunity to lay the ground for his contest of his alleged involvement in Kono, since this was never alleged in court until TF1 371, the 84th of 85th witnesses who testified for the Prosecution, gave evidence.

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[51] However it is true that defence counsel noted that the mere recall of witness would not cure the fundamental prejudice that affected the accused, since it would impair another of his fundamental rights: the right to be tried without undue delay. RUF Transcripts of 21 July 2006, p.16 and 17. (Closed session).
[52] Art. 17(4) (e) Statute and Rule 85 (b) RPE: Cross X shall be allowed in each case. See also Article 14(3)(e) of the International Covenant on Civil and Political Rights, Article 6(3)(d) of the European Convention on Human Rights, Article 8(2)(f) of the American Convention on Human Rights.
[53] RUF Transcripts of 21 July 2007, p.7. (Closed session).

65. The Prosecution itself recognizes that the third Accused was prevented from cross examining Kono district witnesses on unlawful killings was the consequence of the fact that most Kono witnesses testified before the Prosecution applied to add TF1 371 to its witness list.[54]

66. The defence has in four main ways suffered serious prejudice with the late addition of new evidence into the Prosecution case in four main ways. Firstly, throughout the Prosecution case from July 2004 until March 2006, Defence Counsel for Augustine Gbao acted without any knowledge that there was to be an allegation that Augustine Gbao was involved with the alleged unlawful killings that occurred in Kono. Up to the time of the evidence by TF1 371, there was no causal link between Augustine Gbao and the events that took place in Kono. Not a single Kono witness suggested any link between the Accused and the killings in Kono whatsoever.

67. Secondly, and by virtue of the above, whilst defence counsel advisably chose not to cross examine Kono witnesses, the decision may well have been different had counsel known that (a) TF1 371 was going to testify, and (b) that TF1 371 was going to testify to a link between the Accused and the Kono killings. He may well have taken the opportunity to cross examine many, if not all of the 19 Kono witnesses in order to establish exculpatory evidence that may serve to contradict subsequent inculpatory evidence from TF1 371 on the issue. However, short of skills of clairvoyance, counsel had no reasons to expect Tf1 371 would testify until March 2006. The prejudice suffered as a result is, we submit, loud and clear and will be irredeemably reinforced should this appeal succeed.

68. Thirdly, since the new evidence was declared inadmissible, on the 24 July 2006,[55] defence counsel has been working on the basis that the evidence was excluded. As a result, during the cross examination of the defence witnesses for the first Accused Issa Sesay, defence counsel for the third Accused has not ventured any cross examination regarding the involvement of Augustine Gbao in Kono District.

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[54] Prosecution Appeal, para.33. 'It was not Prosecution conduct or late disclosure of information that prevented the Third Accused from cross-examining Kono witnesses in unlawful killings, 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.'

[55] RUF Transcripts of 24 July 2006, p.34 and p. 47. (Closed session).

69. Fourthly and lastly, in the preparation of the presentation of its defence case, defence counsel did not consider responding to the allegations of unlawful killings in Kono since there had been no evidence of it demonstrated by the Prosecution. Consistent with the burden of proof, if the prosecution has not provided any evidence that Augustine Gbao was involved with unlawful killings in Kono there is no need for the defence to call witnesses that would testify that Augustine Gbao was not involved in such killings.

Principle of Orality

70. In its appeal, the Prosecution refers to the principle of orality[56] to submit that the evidence should not have been excluded but instead that the defence should have been allowed time to prepare for the cross examination of the witness. This is another example of the Prosecution trying to minimize the issue by reducing it to one of disclosure.

71. Defence counsel made clear that the issue at stake was not that he did not have enough time to prepare for the cross examination of TF1 371, but that the induction of his evidence against Augustine Gbao at the very end of the Prosecution case violates the fundamental rights of the Accused to be informed of the charges against him and to cross examine witnesses.

72. If the principle of orality has any application here, it is to support the notion that, should the appeal be upheld, defence counsel should be allowed to recall previous witnesses in order to cross examine them about Augustine Gbao in Kono District. Indeed, the principle of orality requires that, in a common law system, witnesses would give evidence in court orally, before the judges and the jury.[57] The principle of orality places primacy upon the direct evidence afforded by the oral testimony of witnesses, and therefore supports the defence's point that if there was no evidence against Augustine Gbao's alleged involvement in unlawful killings in Kono District, there is nothing to respond to.

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[56] Prosecution Appeal, paras.25-27.

[57] See SCSL-2004-15-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, Trial Chamber, 2 August 2006.

Admitting the Evidence would be Extremely Detrimental to the Rights of the Accused and would Fundamentally Affect the Fairness of the Trial

73. As mentioned earlier in this response, TF1 371 is a very important Prosecution witness. The evidence presently is issue implies that Augustine Gbao knew about crimes committed in Kono. If that is accepted, then the third Accused can be held responsible for the crimes, both under the doctrine of command responsibility and of Joint Criminal Enterprise. Even Judge Thompson, in his concurring opinion, states that 'to infer that an Accused person had knowledge of unlawful killings [...] amounts to an attribution of guilt to that person'.[58]

74. The evidence at stake is of fundamental importance as it the **ONLY** evidence linking Augustine Gbao with the mass killings that occurred in Kono District, and this ought to be taken into account when deciding whether or not to exclude it. The Trial Chamber took it into consideration when taking its decision.[59] The present issue is simply one of a fair trial, especially the right for an Accused to know the charges against him[60] and his right to cross examine witnesses. As put by defence counsel during the oral argument, this is an issue of fundamental fairness.[61]

75. In such conditions, we submit that it is hard to conclude that the Trial Chamber has abused its discretion when it just rendered a decision based in law and in favour of the rights of the Accused.

GROUND 2

The Trial Chamber did not Err in Ordering the Excluded Evidence to be Expunged from the Transcripts

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[58] 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, paras.18-19, Trial Chamber Decision.
[59] Trial Chamber Decision, para.21.
[60] Article 17(4) (a) of the Court Statute.
[61] RUF Transcripts of 21 July 2006, p.14. (Closed session).

76. The Prosecution alleges that the Trial chamber exceeded its discretion in expunging parts of the transcripts.[62]

77. In order to support its assertion that the Trial Chamber had no authority to expunge part of the evidence from the record, the Prosecution quotes the ICTR Trial Chamber decision in the *Ntagerura case*.[63] However it is clear from the quoted paragraph that the decision concerns the exclusion of evidence for reasons of relevancy[64] and not for reasons, as is the case here, of violation of the Accused's right to a fair trial. While irrelevant information could be left on the transcripts (as the Prosecution cannot make any use of it) relevant incriminatory information that violates the rights of the Accused should be removed from the transcripts in order to ensure that the Prosecution will not try to use it at a later stage in an indirect way.

78. While it is true that the expunging of transcripts is only prescribed by the rules in situations where the security or confidentiality of witnesses needs to be protected, it is surely one of the means that the Trial Chamber could use as part of its duty to ensure the fairness of the trial. Under rule 54 RPE the Trial Chamber has the 'power to issue orders, subpoenas...as maybe necessary for the [...] conduct of the trial.' Read in conjunction with rule 26bis RPE and rule 95 RPE, it is clear that the Trial Chamber has discretion to issue an order of expunging the transcripts when it affects the fundamental fairness of the trial.

79. It is submitted that expunging the portions of the transcripts that implicate Augustine Gbao was one of the remedy that the Trial Chamber could use when deciding on the admissibility of evidence.

80. In addition the expunging of incriminatory evidence not on the indictment was ordered on the 8 August 2005,[65] in a similar situation where the rights of an Accused had been violated. In this same decision, Judge Itoe made a comment that the Prosecution was

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[62] Prosecution Appeal, para.52.
[63] *Ibid*, para.53.
[64] *Prosecutor against Ntagerura, Bagambiki and Imanishimwe*, Case No. ICTR-99-46-T, Decision on Defence Motion to Exclude Evidence, Trial Chamber 3, 25 March 2002.

[65] RUF Transcripts of 8 August 2005, p. 98. (Closed session). The transcripts were expunged following responses from the witness in cross examination by the third accused implicating the first Accused.

opposing the expunging of transcripts 'because the responses [...] favour the Prosecution'.[66]

81. It is defence counsel's submission that the impugned evidence so fundamentally violates the Accused's rights that only the only fair and reasonable remedy was to expunge it from the transcripts.

82. Defence counsel wishes to reiterate that the evidence provided by TF1 371 are the only evidence on Augustine Gbao being involved with unlawful killings in Kono District. With the removal of the evidence from the transcripts there would simply be no evidence linking Augustine Gbao with the killings that are alleged to have been taking place in Kono by the Prosecution. Even though defence counsel has no doubts into the Judges' ability to exclude the concerned portion of evidence from their mind, we submit that, especially in these circumstances when the offending evidence is of such unique, isolated and fundamental importance, there is a need, should the defence be successful in this appeal for 'justice to be seen being done', and that the client's fears should be assuaged by removal of the offending testimony in full.

83. Remedy for breach of disclosure is additional time, not exclusion. It is submitted that the breach of disclosure so fundamental that the adjournment would be impairing right of the Accused to have a fair and expeditious trial.

RELIEF SOUGHT

84. Defence counsel respectfully submits that the only reasonable solution to the present dispute would be to uphold the decision of the trial chamber. This is the ONLY solution that would be consistent with the right of a fair trial and which would respect the rights of the Accused.

85. Granting the Prosecution's relief would result in a substantial delay in the proceedings and in a total disorganisation of both the OTP and the Defence case, which would

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[66] *Ibid*, page. 94. (Closed session).

clearly violate the rights of the Accused (who has already spend 3 years in detention) to have an expeditious trial. This would go against the interests of justice.

86. Should the Appeals Chamber uphold the Prosecution's appeal, the following measures should be ordered:

a. All the Prosecution's witnesses who testified about Kono District should be recalled, so that defence counsel can assess the veracity of TF1 371 allegations;

b. Issa Sesay (and other Sesay witnesses who testified about Kono) should be recalled, so that defence counsel can put the allegations to them and obtain their evidence on it.

c. The proceedings should be adjourned in order to allow defence counsel for the third Accused to prepare for the cross examination of such witnesses and to investigate the allegations, as well as to allow defence counsel to investigate potential witnesses who could testify against the allegations provided by Tfl 371.

d. That Defence counsel should be allowed to call additional witnesses to contradict the allegations made by TF1 371.

87. Defence counsel submits that, whether or not its appeal is granted, the Prosecution should not be allowed to recall TF1 371. The recalling of such important witness would substantially impact on the proceedings, and by consequence on the rights of the Accused to have an expeditious trial.

88. In addition, the recall of TF1 371 would inevitably import chaos into defence case presentation generally. Were TF1 371 to be recalled, it would necessitate unfair disruption to the flow of the defence case currently being heard, not to mention the related behind-the-scenes organisation. Further, should TF1 371 be recalled AFTER the defence case, further complications would arise since defence teams will have presented their cases prior to TF1 371 recall, not knowing what he might yet say in evidence.

89. The Prosecution failed to demonstrate that:

a. Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion.

b. That the Trial Chamber gave weight to extraneous or irrelevant considerations, 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.

c. That its 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.

CONCLUSION

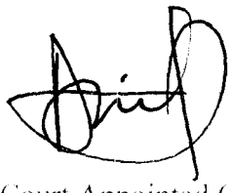
90. The Appeal should be dismissed. The prosecution has failed to demonstrate that the Trial Chamber misdirected itself as to the principle to be applied or as to the relevant law, gave weight to irrelevant considerations or failed to give weight to relevant considerations, or that it made an error of fact. The Trial Chamber has not failed to exercise its discretion properly.

91. Trial Chamber did not abuse its discretion nor did it committed a discernible error in the exercise of its discretion. The Trial Chamber correctly articulated or correctly applied the legal rules and principles regarding: the admissibility of evidence, acting in accordance with the rules of procedure and evidence of the Special Court. In addition, the Trial Chamber was right in placing the fair trial rights of the Accused on the first stage for its decision.

92. It is submitted that the Trial Chamber did not err in providing for the expunging of transcripts but instead acted in full accordance with the statute and the rules of procedure and evidence of the Special Court. Due to the fundamental fairness issue which was at stake, the expunging of the transcripts was the logical remedy to the prejudice faced by the third Accused.

93. As a final Defence counsel wishes to stress the fact that it is the first time that the disclosure of new evidence during the course of the trial goes to the Appeals Chamber. It is an opportunity for the Appeals Chamber to make available overreach discretion for the Trial Chamber to rule evidence inadmissible when its prejudicial effect on the fundamental rights of the Accused to receive a fair trial necessarily outweighed its probative value.

Done at Freetown on Monday the 29 October 2007,



Court Appointed Counsel for Augustine Gbao,

PJ John Cammegh.

TABLE OF AUTHORITIES

List of Authorities

I. Orders, Decisions and Judgements

1. *Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Doc. No. SCSL-2004-15-T-845, Prosecution Notice of Appeal and Submissions Regarding the Objection to the Admissibility of Portions of the Evidence of Witness TF1 371 with Confidential Appendices, 22 October 2007.

2. *Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Doc. No. SCSL-2004-15-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 Evidence of Witness TF1 371, Trial Chamber, 21 August 2006.

3. *Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Doc. No. SCSL-2004-15-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, Trial Chamber 1, 2 August 2006.

4. *Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-2004-15-T-813, Gbao-Request for Lease to Raise Objections to the Form of the Indictment, 23 August 2007.

5. *Prosecutor against Delalic et al*, Case No. ICTY- IT-96-21, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, Trial Chamber, 19 August 1998.

6. *Prosecutor v. Ntagerura, Bagambiki and Imanishimwe*, Case N.ICTR-99-46-T, Decision on Defence Motion to Exclude Evidence, Trial Chamber, 25 March 2002.

7. *Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-2004-15-T-616, Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible, Trial Chamber, 1 August 2006.

8. *Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-2004-15-T-391, Ruling on Gbao Application to exclude evidence of prosecution witness M. Koker, Trial Chamber, 23 May 2005.

9. *Prosecutor v. Bagasora*, Case No. ICTR-96-7, Decision on Aloys Ntabakuze's Interlocutary Appeal on Question of Law Raised, Trial Chamber 1, 29 June 2006.

II. Statute and Rules

1. Rules of Procedure and Evidence of the Special Court for Sierra Leone.

2. Statute of the SCSL.

3. International Covenant on Civil and Political Rights.

4. European Convention on Human Rights.

5. American Convention on Human Rights.

6. ICTY Statute.

7. ICTR Statute.

III. Transcripts

1. RUF Transcript of 21 July 2006, p.7, 10-11, 14-17, 32 (closed session).

2. RUF Transcript of 5 July 2004, p.46.

3. RUF Transcripts of 21 July 2004, p.26 (closed session).

4. RUF Transcript of 24 July 2006, p.29, 30, 34, 47 (closed session).

5. RUF Transcript of 21 July 2007, p.26 and 27 (closed session).

6. RUF Transcript of 24 July 2007, p.22 (closed session).

7. RUF Transcripts of 8 August 2005, p. 98 (closed session.

8. Police and Criminal Evidence Act 1984 (Ch 60), part IV, article 78 'Exclusion of unfair evidence'

IV. Other Documents

1. Amended Consolidated Indictment, 13 May 2004 (Counts 3 to 5 on Unlawful; paras. 46, 49, 50, 51 and 53.

2. Code of conduct of defence counsel.

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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: 858
Document Date 29 October, 2007
Filing Date: 29 October, 2007
Number of Pages: 100 **Page Numbers: 31443-31515**
Document Type:- **Confidential Appendices**
☐ Affidavit
☐ Indictment
☐ Correspondence
☐ Order
☒ **Response**

Document Title **Gbao – Response to Prosecution Notice of Appeal and Submissions Regarding the Objection to the Admissibility of Portions of the Evidence of Witness TF1-371 with Confidential Appendices**

Name of Officer:

Advera Nsiima K

Signed Nsiima K.