SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before: Hon. Justice Bankole Thompson, Presiding Judge
Hon. Justice Pierre Boutet
Hon. Justice Benjamin Mutanga Itoe

Registrar: Mr. Lovemore G. Munlo SC

Date: 2nd of August 2006

PROSECUTOR Against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

Public Document

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

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

SEIZED of the objection by Defence Counsel for the 3rd Accused, Augustine Gbao, made orally on the 21st and 24th of July, 2006 during the testimony at trial of protected Witness TF1-371;

MINDFUL of the Prosecution's oral response thereto;

NOTING that on the 24th of July, 2006, the Hon. Justice Thompson delivered two oral rulings in which the majority of the Chamber comprising of Hon. Justice Bankole Thompson and Hon. Justice Benjamin Mutanga Itoe granted the Defence objection and ordered that the evidence in question was inadmissible and should be expunged and excluded from the records;[1]

MINDFUL of the fact that Hon. Justice Pierre Boutet issued a Dissenting Opinion to the Chamber Majority Decision;

NOTING that the Chamber indicated at that time that a reasoned written Ruling on this matter would be delivered in due course;

PURSUANT to Article 17 of the Statute of the Special Court for Sierra Leone and Rules 26bis and 89 of the Rules of Procedure and Evidence of the Court ("Rules");

THE TRIAL CHAMBER HEREBY ISSUES ITS REASONED WRITTEN RULING:

I. BACKGROUND

In the objection whose merits are under review, it is pertinent to note that Counts 3 to 5 of the Indictment against the three Accused, charges them for alleged unlawful killings[2] and with particular reference to those that took place in Kono.

On the 20th of July, 2006, Learned Counsel, Mr. Cammegh for the 3rd Accused, in the course of the examination-in-chief of this witness, TF1-371, indicated that he was flagging for a possible objection, which, was an option he was leaving open, on the trend of evidence which tended to show that his Client, Augustine Gbao, knew about the alleged killings in Kono District.

We observe that this witness is the last to testify before the Prosecution proceeds to close its case during this trial of the RUF case which ends on Wednesday, the 2nd of August, 2006.

In the course of his testimony on the 21st and on the 24th of July, 2006, this witness positively alleged that Issa Sesay, Morris Kallon and Augustine Gbao knew about the killings in Kono District.

II. THE BASIS FOR THE OBJECTION

Learned Counsel, Mr. Cammegh, on the 21st of July, and further, on the 24th of July 2006, objected to the admission of the evidence led by the Prosecution to the effect that his Client, Augustine Gbao, knew about the alleged killings in Kono District. He premised his objection on the following grounds:

That this was the very first time that this witness was affirmative that his Client, Augustine Gbao, knew of the alleged unlawful killings in Kono District.

In this regard, Learned Counsel argued that in an earlier statement to the Investigators on this issue, this witness was not that affirmative of Gbao's knowledge of the killings in Kono

District and that he merely stated, and rather speculatively, that Gbao may have had knowledge of the said killings in Kono District.

That since the case for the prosecution opened in 2004, evidence has been led by the Prosecution to establish the killings in Kono District but that no evidence has been adduced to establish that his client either partook in these killings or had knowledge and control over them.

Learned Counsel explained that in the absence of any evidence implicating his Client in these unlawful killings, he advised himself professionally, and for strategic reasons, not to cross-examine the witnesses who had testified about the said killings and who, in any event, had not incriminated his Client in relation thereto. Mr. Cammegh stated that it would have been professionally risky and reckless for him to cross-examine witnesses who had not testified against his Client as this would have put him in jeopardy of a possible incrimination during his own cross examination which, to him, having regard to the state of the evidence at that stage, was unnecessary.

Learned Counsel, Mr. Cammegh, argued that his client is now confronted with evidence of an incriminating nature and rather belatedly, not only at the verge of the close of the case for the Prosecution, but also from the last witness before the Prosecution's case is closed.

He argues that admitting this piece of evidence at this stage would violate the principle of fundamental fairness in that his Client would have been ambushed by the Prosecution to face a new and incriminating allegation for which he forfeited his right to cross-examine for reasons indicated earlier, and for which he has had no opportunity of investigating for the purposes of cross-examining this witness at this belated stage of the proceedings.

As a remedy, Learned Counsel, Mr. Cammegh, makes three proposals:

That in conformity with the jurisprudence of This Chamber, he is entitled to an adjournment to investigate these new allegations made by this witness against his client. He however adds that this would occasion an undue delay to the proceedings.

That in the process, he will need to recall and cross-examine the witnesses who have already testified for the Prosecution on the alleged killings in Kono and who, for professional and strategic reasons, he abstained from cross-examining. Here again, Mr. Cammegh argues that even this option will occasion an undue delay in these proceedings.

That the Chamber excludes all the evidence that this witness has given and which tends to incriminate his client in relation to the alleged unlawful killings in Kono.

Learned Counsel, as far as these three options are concerned, submits that the 3rd proposal is more in consonance with the doctrine of fundamental fairness and of ensuring the expeditiousness of the Trial and that the first and second alternatives will occasion an undue delay of the proceedings.

III. SUBMISSIONS BY THE PROSECUTION

The Prosecution moves that the objection be dismissed and submits that the evidence is admissible pursuant to the principle of orality and in the interest of justice.[3] They submit

that this Witness, TF1-371, was added to the Witness List only on 6 April 2006, following a Decision of this Court. Thereafter, his original redacted and unredacted witness statements were disclosed to the Defence. Similarly, any subsequent statement by this witness has been promptly disclosed. They argue that there has been no breach of disclosure obligations by the Prosecution.[4]

The Prosecution concedes that the subsequent witness statement of this Witness, as indicated by the Defence, contains more than a simple amplification of what is contained in the previous statement of this Witness concerning the alleged involvement of the 3rd Accused in the allegations of unlawful killings in the Kono District.[5]

However, the Prosecution indicates that the Witness was the only insider witness who was in possession of this particular piece of evidence that is contested by Counsel for the Gbao Defence.[6] In addition, the Prosecution indicates that as early as January, 2005, other witnesses, citing in particular protected Witness TF1-071, testified on the role of the 3rd Accused as the Overall Security Commander and that he was, i) a senior commander reporting directly to the high command and, ii) that in that capacity, was directly responsible for all intelligence information received from the RUF in RUF-occupied zones and from the various Units under his control.[7]

The Prosecution submits that the 3rd Accused is therefore criminally responsible for the allegations of unlawful killing in the Kono District pursuant to the doctrine of joint criminal enterprise and that of superior responsibility. The Prosecution also indicates that the 3rd Accused is charged in the Amended Consolidated Indictment under these modes of liability and, in particular, refers to para. 32 of the said Indictment for further reference on the 3rd Accused's role as Overall Security Commander. [8]

IV. DELIBERATION

We would like to say here, that contrary to the emphasis laid by the Prosecution on its having fulfilled disclosure obligations, Learned Counsel for the 3rd 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.

In addition, we do not consider it appropriate at this stage to delve into determining the issues of joint criminal enterprise and of superior responsibility as the Prosecution urges us to, because, we are of the opinion that it would be premature, in a dispute that is centred on the admissibility of a particular piece of evidence without more, for us to embark on examining and determining the substantive and core issue of criminal responsibility that, in our judgement, should be reserved for a later stage.

The objection is based mainly and principally, as Counsel argued, on the grounds that if the evidence that is being earmarked for exclusion were admitted, this would be in violation of the doctrine of fundamental fairness, which all parties are entitled to in any proceeding.

As far as the Accused is concerned, the Statute lays out his right to a fair trial in its Article 17(2) which provides as follows:

The Accused shall be entitled to a fair and public hearing.

In this regard, the fairness of a trial is determined, inter alia, by the opportunity given to the accused, as stipulated in Article 17 (4) (e) of the Statute, "to examine or have examined the witnesses against him or her ...".

Rule 26bis of the Rules of Procedure and Evidence, still on the issue of fairness, also provides as follows:

The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules with full respect of the rights of the Accused and due regard for the protection of victims and witnesses.

Moreover, Article 17(4)(c) of the Statute, in relation to the element of expeditiousness of the trial, provides that the Accused is entitled to be tried "without undue delay".

The Prosecution advances the argument that the 3rd Accused, from the content of the Indictment, is aware of the killings that are alleged against him in the Kono District and should be deemed to have known about them within the context of command or superior responsibility for which he is also charged. We reject this argument because it is infact trite law that a fact in issue is not considered proven because it is alleged in the indictment. We take the traditional legal position that evidence must be adduced by the Prosecution to prove whatever it alleges in the Indictment including of course, the allegation of unlawful killings in Kono District against the 3rd Accused.

In determining the application of these legal provisions to the arguments raised by the Defence and the Prosecution to sustain their respective thesis, we would like to observe, as the Prosecution indeed concedes, that the evidence of the 3rd Accused's knowledge of the alleged unlawful killings in Kono, even though alleged in the indictment, is being adduced for the very first time through this witness at the verge of the closure of the case for the Prosecution when the Defence, for the professional and strategic reasons, was put in a position by the Prosecution where it deliberately abstained from cross-examining in previous proceedings, the Kono crime based witnesses who in any event, did not incriminate the 3rd Accused in their testimony.

One of the procedural tenets that is encapsulated in the doctrine of fundamental fairness in a trial is the imperative necessity for a party to be given or allowed the opportunity to examine or to cross-examine witnesses that have been called for or against him and this, with a view to testing the veracity of the evidence so adduced.

If at this late stage of the trial, this Chamber were to admit the evidence now proffered by this witness and which now incriminates the 3rd Accused, 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.

We do observe, however, that if we were to grant this apparently credible alternative, this Chamber could be seen to be in violation not only of the provisions of Article 17 of the Statute, but also those of Rule 26bis of the Rules of Procedure and Evidence since such a decision would 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.

This Chamber is enjoined by Rule 26bis of the Rules of Procedure and Evidence to conduct our proceedings in accordance with the provisions of the Agreement, the Statute and the Rules all of which, as the controlling and guiding Instruments of this Court, place a very high premium on the necessity for the proceedings to be conducted fairly and expeditiously, with full respect for the rights of the Accused and due regard for the protection of victims and witnesses.

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.

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.

We agree that in the exercise of these functions, the Chamber enjoys the latitude to grant an adjournment if it deems it appropriate for the proper and fair determination of the case. The Chamber could also, if it deems it necessary and appropriate, to reject the admission of a particular piece of evidence, or order its exclusion from the records if the Chamber satisfies itself that it already forms part of the record of proceedings.

The jurisprudence of this Chamber has already enunciated the principles on how to treat some evidence adduced by the Prosecution where it is considered that it is new and that its admission will be prejudicial to the rights of the Accused under any of the rubrics of Article 17 of the Statute of the Court, and that its exclusion is one of the remedies. In our Decision granting the exclusion of certain portions of the evidence of Witness TF1-195, We had this to say:

in the particular circumstances at hand, this Chamber finds that the Prosecution has failed to promptly exercise due diligence that is required in discharging its duty to disclose to the Defence all of the information in its possession in accordance with Rule 66 of the Rules, and given the gravity of the allegations, is satisfied that this is a proper case in which to apply the remedy of exclusion.[9]

In this case, the Chamber, from the records, knows that evidence of the 3rd Accused being aware of the alleged unlawful killings in Kono as testified to by Witness TF1-371 who the Prosecution admits, is the only insider witness who was in possession of this particular piece of evidence, is already in the records.

It is our considered view that given the fact that the closure of the case for the Prosecution is imminent, granting an adjournment to the Defence to investigate their case further on the alleged killings in Kono and to adjourn the case for the Defence to fulfil these objectives and recall witnesses for the Prosecution who have already testified, would, in our opinion, be in violation of the provisions of Article 17 of the Statute and of Rule 26bis of the Rules of

Procedure and Evidence, as this option will certainly occasion an undue delay of the trial process as well as it would impair the principle of expeditiousness of the proceedings.

In the case of the Prosecutor v. Zejnil Delalic et al., the Trial Chamber of the ICTY had this to say:

It is part of the duties of the Trial Chamber... to ensure that a trial is fair and expeditious. It is, therefore, within the competence of the Trial Chamber to exclude any piece of evidence sought to be introduced by the Prosecution, if indeed it seeks to do so, without having given the Defence the opportunity to examine that piece of evidence beforehand and thereby enable it to prepare a proper defence.... It is also within its inherent power to control the conduct of proceedings that the Trial Chamber may grant or reject an objection made by the Defence to the admission of any piece of evidence which it claims it has not had sufficient time to examine.[10]

In the light of the preceding, we are of the opinion that the only credible remedy available to us is to uphold the submissions and objection raised by Learned Counsel, Mr. Cammegh.

WE ACCORDINGLY DO ORDER AS FOLLOWS:

THAT all the evidence that is on the record emanating from Witness 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;

THAT no reference should be made, in whatever circumstance, to such evidence;

THAT pursuant to our Oral Ruling delivered on the 2nd of August, 2006, This Chamber will file a Consequential Order that will specify the exact portions of the transcripts that will be expunged.

Hon. Justice Bankole Thompson, Presiding Judge appends a Separate and Concurring Opinion to this Chamber Majority Decision; and

Hon. Justice Pierre Boutet appends a Dissenting Opinion to this Chamber Majority Decision.Done at Freetown, Sierra Leone, this 2nd day of August 2006

Hon. Justice Benjamin Mutanga Itoe

Hon. Justice Bankole Thompson

Presiding Judge

Trial Chamber I

[Seal of the Special Court for Sierra Leone]

[1] Transcripts of 24th of July 2006, pages 34 and 47.

[2] Counts 3 to 5 of the Indictment are grouped under the heading of unlawful killings and refer specifically to: Count 3, extermination, a crime against humanity; Count 4, Murder, a crime against humanity, and Count 5, Murder, a war crime.

[3] Transcripts, 24 July 2006, p. 26-27.

[4] Transcripts, 21 July 2006, 21-22.

[5] Transcripts, 21 July 2006, p. 21.

[6] Transcripts, 24 July 2006, p. 29, 32.

[7] Transcripts, 21 July 2006, p. 23-24.

[8] Transcripts, 21 July 2006, p. 26-27, 29.

[9] Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-T, Ruling on Disclosure Regarding Witness TF1-195, 4 February 2005, para. 7. See also Id., Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible, 1 August 2006, para. 15.

[10] Prosecutor v. Delalic et al., IT-96-21-T, Decision on Motion by the Defendants on the Prosecution of Evidence by the Prosecution, 8 September 1997, para. 9.

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 ADMISSIBILTY OF PORTIONS OF THE EVIDENCE OF WITNESS TF1-371

I. Introduction

1. On Friday 21st of July, 2006 Counsel, for the Third Accused, John Cammegh, with whom Counsel for other Accused associated, objected to the admission of the evidence of Witness TF1-371 on the alleged involvement of the Third Accused in unlawful killings in the Kono District.

2. After hearing the Prosecution's response and the reply of the Defence, the Trial Chamber decided to take the matter on advisement and come up with a Ruling in the course of the week beginning the 24th of July, 2006.

3. On the 24th of July, 2006, the Bench ruled by a 2 - 1 Decision (Hon. Justice Bankole Thompson, Presiding Judge and Hon Justice Pierre Boutet), Hon. Justice Benjamin Mutanga Itoe, dissenting, that the objection was premature and that further probing of the issue was necessary in the course of examination-in-chief.

4. After further probing of the issue in the course of examination-in-chief, Counsel for the Third Accused renewed his objection on essentially the same grounds, and reinforced his

earlier submissions. After a response by the Prosecution and a reply by Counsel for the Third Accused, the Bench retired for deliberation. The Bench then ruled by a 2 - 1 Decision (Hon Justice Bankole Thompson, Presiding Judge and Hon. Justice Benjamin Mutanga Itoe) that the evidence objected to is inadmissible and should be excluded and expunged from the records. Hon. Justice Pierre Boutet dissented on the grounds that the evidence is admissible and should not be excluded.

5. The Bench further indicated that Written Reasoned Rulings will be published in due course. It is pursuant to that indication that I here provide separate reasons in support of the Majority Decision.

II. Objection

6. In concise terms, the Defence Objection is that the evidence of Witness TF1-371, that the Third Accused knew of the alleged unlawful killings in the Kono District as alleged, is inadmissible and should be excluded.

III. Defence Submissions

7. Arguing in support of the objection, Mr Cammegh strenuously contended that the fundamental basis of a fair criminal trial is the right of an accused person to test the veracity of the Prosecution's evidence by way of cross-examination.[1] Counsel further argued that the Third Accused has suffered prejudice in that most of the evidence concerning allegations of unlawful killings allegedly committed in the Kono District has deliberately not been challenged by the Third Accused for the specific reason that no evidence had been led by the Prosecution that the said Accused either partook in such crimes or could be said to have had any knowledge or control over them.[2]

8. Arguing further, Counsel stated that several witnesses have already testified before the Court between July 2004 and January 2005 concerning allegations of unlawful killings in the Kono District and that the Defence decided not to cross-examine these witnesses on the basis that the Third Accused was never implicated in their testimonies.[3]

9. Counsel then pointed out that on 8th of May, 2006, the Defence received the unredacted witness statement of Witness TF1-371 and that at page 23811 of the said statement, Witness TF1-371 states that the Third Accused was the chief of the Intelligence Office and therefore he "should have known" about incoming reports from his office on killings committed in the Kono District. Counsel also stated a subsequent statement from the same Witness was disclosed to the Defence on 10th of July, 2006 wherein the Witness states, at page 24032, that the Third Accused received specific reports from the Intelligence Office concerning various incidents of killing of civilians in the Kono District.[4]

10. Furthermore, the Defence submitted that, even though no mala fides was being alleged against the Prosecution, yet in the circumstances there has been extreme unfairness to the Defence in that the Accused has been effectively denied the opportunity to cross-examine various witnesses, either crime base or insider, that testified on the allegations of unlawful killings concerning the Kono District in relation to any personal involvement of the Third Accused in the said allegations.[5]

11. On the issue of available remedies for the alleged violation, Mr Cammegh argued that there were three possible options in the circumstances: extension of time to investigate by way of an adjournment of the proceedings, recalling of all of the witnesses from the Kono crime base who allege unlawful killings, and the exclusion of the evidence in question. Finally, Counsel contended that the doctrine of fundamental fairness has been offended, and that the first and second remedies will occasion undue delay in the proceedings and, that the only reasonable remedy in the circumstances is that of exclusion.[6]

IV. The Prosecution's Response

12. Responding, the Prosecution opposed the objection and submitted that the evidence is admissible pursuant to the principle of orality and in the interest of justice.[7] It stated that Witness TF1-371 was added to the Witness List only on 6 April 2006, following a Decision of this Court and that thereafter, his original redacted and unredacted witness statements were disclosed to the Defence as soon as possible. The Prosecution, however, stated that similarly, any subsequent statement by this witness was promptly disclosed, and therefore there has been no breach of disclosure obligation on its part.[8]

13. The Prosecution, however, conceded that the subsequent witness statement of Witness TF1-371, as indicated by the Defence, contains more than a simple amplification of what was contained in the Witness's previous statement concerning the alleged involvement of the Third Accused in the allegations of unlawful killings in the Kono District.[9]

14. In addition, the Prosecution indicated that Witness TF1-371 was the only insider witness in possession of the particular evidence in question,[10] and that as early as January 2005 various other witnesses, in particular protected Witness TF1-071, testified on the role of the Third Accused as the Overall Security Commander and that, as such, he was i) a senior commander reporting directly to the High Command and ii) he was directly responsible for all intelligence information received from the RUF occupied zones from the various Units under his control.[11]

15. The Prosecution, finally, submitted that the Third Accused is therefore criminally responsible for the allegations of unlawful killing in the Kono District in pursuance of the doctrine of joint criminal enterprise and that of superior responsibility. Citing paragraph 32, the Prosecution submitted that the Third Accused is charged in the Amended Consolidated Indictment under these modes of liability in respect of his role as Overall Security Commander. [12]

V. The Defence Reply

16. Reinforcing the main thrust of the objection in reply to the Prosecution's submissions, the Defence submitted that i) even if a witness already testified on the role and function of the Third Accused within the RUF, it will not be possible even through a broad interpretation of the doctrine of joint and superior criminal responsibility to take a quantum leap of leadership in order to conclude that the Third Accused had any knowledge of certain particular circumstance and had any command or control over Kono District;[13] ii) no direct evidence had been previously presented at trial concerning the Third Accused's functions and role in Kono District;[14] iii) the Defence exercised a deliberate professional judgment not to cross-examine any crime base or insider witness who testified on allegations of unlawful killings in the Kono District as, in the circumstances, it would have been an irrelevant line of inquiry

and a waste of the Court's time as well as it would have been against the interest of the Third Accused,[15] and, finally iv) Article 17 of the Statute of the Special Court, as well as Rule 26bis of the Rules, dictates that the trials should proceed fairly.[16]

Reasons In Support of the Majority Decision

I opine that, as a matter of law, the issue of whether an accused person knew or did not have knowledge of the commission of the crimes alleged in an indictment is an essential ingredient of the alleged crimes, and goes to the very core of the ultimate question of guilt or innocence. In the context of the existing Indictment pursuant to which the Accused herein are charged and being tried, knowledge of the commission of the crimes alleged alongside the actual commission is precisely what this tribunal is called upon to decide. It is trite law that ultimately it is the exclusive prerogative of the adjudicating tribunal to determine such an issue.

The objection, in my judicial comprehension, raises or involves the question whether it is legally proper for the witness, in examination-in-chief, to be allowed to proffer evidence on the legally complex and delicate question whether the Third Accused knew or did not know of the alleged killings in the Kono District as charged in the Indictment. I characterize the issue as "legally complex and delicate" advisedly for two reasons. The first is, as I have already opined, that it is a matter of inference and one of a significant finding of fact whether the Third Accused knew or lacked knowledge of the alleged killings. The second is that it goes to the core of the mental element of the crime against humanity of murder, to wit, that "the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread and systematic attack against a civilian population".[17] This issue, in my considered judgement, is pre-eminently one within the exclusive domain of the Trial Chamber. It is integrally part of the mental element required for the commission of the crime against humanity of murder, a point which this Trial Chamber underscored in a recent Decision in these terms:

This Chamber takes due cognisance of the fact that Murder as a Crime Against Humanity has consistently been defined as the death of the victim resulting from an act or omission of the accused committed with the intent either to kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death. It must also be shown that the victims were persons taking no active part in the hostilities.[18]

To infer that an Accused person had knowledge of unlawful killings in the context of an indictment charging him with individual criminal responsibility, joint criminal responsibility, and command responsibility for such alleged unlawful killings amounts to an attribution of guilt to that person, a task falling within the adjudicatory function of a tribunal assigned the exclusive responsibility to try such an Accused person. A witness cannot make such a determination. The question resolves itself into this inquiry: is an ordinary witness entitled to draw an inference on an issue upon which the Tribunal must also draw a conclusion based upon the found facts?

Consistent with the foregoing reasoning, I take it for granted that the object of examination-in-chief is to obtain testimony in support of the version of the facts in issue or the facts relevant to the issue (the facta probanda), for which the party calling the witness contends. The testimony must be based on personal knowledge, on what the witness saw or heard or

perceived in any other way. It must be testimony as to facts, not as to inferences or conjectures or theories.[19] In effect, a witness may speak only to facts, and not to inferences.

This legal dichotomy rests on the fundamental distinction between the role of a court as the trier of fact and law, and the role of a witness in testifying as to what he or she saw or heard in respect of the crimes charged. In this regard, all a witness can legitimately do is to testify as to what he or she saw or heard or otherwise perceived as to the alleged incidents. When a witness goes beyond that, and attempts to opine, infer, or make deductions in respect of the existence of a key ingredient of the offence charged, such would amount to a usurpation of the Tribunal's function as the trier of fact and law.[20]

Hence, it is my considered view that Witness TF1-371, having regard to the Ultimate Issue Rule, cannot legitimately draw any inference on the issue of the Third Accused's knowledge or lack of knowledge in respect of the alleged Kono District killings.

I accordingly sustain the objection and rule that the evidence is inadmissible and should be excluded and expunged from the records.Done at Freetown, Sierra Leone, this 2nd day of August, 2006

Hon. Justice Bankole Thompson

Presiding Judge

Trial Chamber I

[Seal of the Special Court for Sierra Leone]

[1] Transcripts, 21 July 2006, p.7. transcripts, 24 July 2006, p.22.

[2] Transcripts, 21 July 2006, p. 7-8.

[3] Transcripts, 21 July 2006 p. 8.

[4] Transcripts, 21 July 2006, p. 9-10, 12

[5] Transcripts, 21 July 2006, p. 11, 13-14. The Defence also submitted that it is arguable whether in the circumstances there has been any breach of disclosure obligations by the Prosecution. See Id., page 14.

[6] Transcripts, 21 July 2006, p. 15-20; Transcripts, 24 July 2006, p. 23-24, 28

[7] Transcripts, 24 July 2006, p. 26-27.

[8] Transcripts, 21 July 2006, 21-22.

[9] Transcripts, 21 July 2006, p. 21.

[10] Transcripts, 24 July 2006, p. 29, 32.

[11] Transcripts, 21 July 2006, p. 23-24.

[12] Transcripts, 21 July 2006, p. 26-27, 29.

[13] Transcripts, 21 July 2006, p. 30-32; Transcripts, 24 July 2006, p. 21.

[14] Transcripts, 21 July 2006, p. 32; Transcripts, 24 July 2006, p. 21.

[15] Transcripts, 21 July 2006, p. 32-33; Transcripts, 24 July 2006, p. 21-22.

[16] Transcripts, 21 July 2006, p. 34; Transcripts, 24 July 2006, p. 22-23, 28.

[17] See Dixon, Rodney and Karim Khan (eds.) Archbold International Criminal Court, Practice, Procedure and Evidence, London: Sweet and Maxwell, 2003, at page 365.

[18] Prosecutor v. Norman, Fofana and Kondewa, Case No. SCSL-04-14-T, Decision on Motions for Judgement of Acquittal, 21 October 2005, para. 72. See also Prosecutor v. Tadic, Appeals Chamber, ICTY Decision 15th of July, 1999, at pages 248 and 257.

[19] See Howard, M.N. et al (eds.) Phipson on Evidence, 15th ed. London: Sweet and Maxwell, 2000 at page 245; See also Byrne, David and J. Heydon (eds.) Cross on Evidence, Third Australian edition, Sydney: Butterworths, 1986 , at page 720.

[20] For the application of the Ultimate Issue Rule in the context of expert testimony, see White, Robert B., The Art of Using Expert Evidence, Ontario: Canada Law Book Inc., 1997 at pages 69-70.

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

With due respect for my Learned Brothers, Justice Bankole Thompson, Presiding Judge and Justice Benjamin Mutanga Itoe, I cannot agree with their respective analysis nor can I agree with their findings and disposition of this Objection and therefore append this Dissenting Opinion.

The Objection raised by Mr. Cammegh, one of the Court Appointed Counsel for the Third Accused, Augustine Gbao, according to his submissions, goes to the fundamental fairness of the process with respect to the Third Accused and the statutory right of the Accused to adequately prepare for his defence. The Defence also raised a secondary issue, although this point has not been really developed, about the Prosecution's duty to promptly disclose to the Defence any relevant information in its possession. In particular, a breach of Rule 66 was alleged although it was conceded by the Defence that it was done without any mala fide on the part of the Prosecution.[1]

The Defence submitted, more particularly, that it will suffer prejudice if this evidence that the Prosecution is attempting to introduce "in relation to the allegations of unlawful killings allegedly committed in the Kono District" is admitted, because most of that evidence has deliberately not been challenged by the Third Accused for the specific reason that there had never been any evidence led by the Prosecution that the said Accused "either partook in such crimes or could be said to have had any knowledge or control over that".[2] The Third Accused, according to the Defence, was "simply never implicated, even taking the law in relation to joint criminal enterprise, or command responsibility, to its widest definition".[3] The Defence claims further that they were alerted to the evidence on unlawful killings only recently. The Defence argues that this prejudice has been caused by a violation of Rule 66 with the service on the 10th of July 2006 of the supplemental statement of Witness TF1-371,[4] statement containing the evidence complained of.

On the basis of this alleged prejudice, the Defence seeks as remedy the exclusion of the evidence related to the alleged involvement of the Third Accused in the unlawful killings in the Kono District because they submit this evidence of Witness TF1-371, if admitted, would unfairly prejudice the Defence in that it could not proceed to adequately prepare for the cross-examination of this Witness about these events in the Kono District and to recall previous witnesses to allow their cross-examination would delay the proceedings.

Applications about disclosure and remedies applicable for breaches that may have occurred are generally governed by Rule 66, 89 and 95. The relevant jurisprudence of this Chamber on this issue, especially in the RUF case, is extensive and exhaustive.[5] In particular, I would like to recall here the following applicable principles:

In the evaluation of the possible novelty of evidence presented during a witness testimony, it may not be possible to include every matter that a witness will testify upon at trial in a witness statement regardless of its nature. Based on the principle of orality, witnesses shall ideally be heard directly in open court. [6]

As the primary charging instrument, the indictment itself, together with the Prosecution Pre-Trial Brief and Supplemental Pre-Trial Brief, has already served notice on the Accused as to the material facts alleged in the charges against him.[7]

Proofing witnesses prior to their testimony in court is a legitimate practice that serves the interest of justice. This is especially so given the particular circumstances of many of the witnesses in this trial who are testifying about traumatic events in an environment that can be entirely foreign and intimidating for them.[8]

The Prosecution has an obligation to continuously disclose witness statements obtained from a witness prior to his testimony at trial in accordance with Rule 66 of the Rules.[9] In order to establish that the Prosecution has breached its disclosure obligations under the said Rule, the Defence must make a prima facie showing of materiality and that the requested evidence is in the custody or control of the Prosecution.[10] Alleged breaches of disclosure obligations should normally be addressed promptly and expeditiously.[11]

The obligation of disclosure by the Prosecution of the evidence in its custody which it intends to introduce to establish material facts of the charges and the allegations contained in the indictment does differ from, and should not be confused with its obligation to state the material facts constituting the charges against the accused persons in the indictment and as to the form and contents of the indictment.[12]

Rule 89(C) vests the Trial Chamber with discretionary power to admit any relevant evidence and to exclude evidence that is not relevant. The Appeals Chamber has noted that the Rules favour a flexible approach to the issue of admissibility of evidence, leaving the issue of weight to be determined when assessing probative value of the totality of the evidence.[13]

The Chamber may pursuant to Rule 95 exclude evidence where its admission would bring the administration of justice into disrepute. Under this Rule and in pursuance of its inherent jurisdiction, the Chamber may exclude evidence whose probative value is manifestly outweighed by its prejudicial effect.[14]

The Trial Chamber has a discretionary power as regards the assessment of which is the appropriate remedy in case of breach of disclosure obligations. This assessment involves an exercise of discretion by the Chamber and requires a particular factual inquiry into the evidence in question.[15] As a general rule, the judicially preferred remedy for a breach of disclosure obligations by the Prosecution, if proven, is an extension of time to enable the Defence to adequately prepare rather than the direct exclusion of the evidence concerned.[16]

Guided by the aforementioned applicable principles and consistent with previous Decisions of this Chamber on these matters, I am of the opinion that the Objection should be overruled in that:

a) the evidence in question is relevant, and therefore admissible; and,

b) the Defence had sufficient notice of the nature of the evidence in question in order to prepare for its case.

I find consequently that no unfairness to the Third Accused could have resulted from the disclosure process for the reasons further amplified hereafter.

A review of the record shows that Witness TF1-371 has been added to the existing Prosecution witness list by a unanimous Decision of this Trial Chamber on the 6th of April, 2006 and, consequently, his original unredacted witness statements have been disclosed to the Defence as early as the 8th of May 2006. It has to be noted that, in the relevant Prosecution application to add Witness TF1-371 to its list, filed confidentially on the 10th of March 2006, the Prosecution indicated that it anticipated that this Witness would testify, inter alia, about the following:

g) Reports of the killings of civilians in Kono District (Tombudu) 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.[17]

In its confidential Response, the Defence already argued against the addition of Witness TF1-371 to the Witness List on the grounds, inter alia, at this late stage of the trial proceedings, the wide-ranging nature of the evidence of this Witness and the resulting prejudice suffered by the Defence in not having had the opportunity to properly assess this evidence by cross-examination of other witnesses who had previously testified at trial.[18] An argument essentially of the same nature as the one submitted now in support of the objection to the admissibility of these portions of the evidence of this same Witness TF1-371.

In our unanimous Decision on this application, we ordered that Witness TF1-371 be added to the Prosecution witness list at this late stage of the proceeding on the grounds that his evidence was material and admissible, and it contributes to the overall interest of justice and it will not prejudice the Defence.[19]

On the 19th of June, 2006, during the Status Conference that preceded the 8th Trial Session in this Case, the list of witnesses scheduled to testify at trial as well as the disclosure to the Defence of their statements, including those of Witness TF1-371, were discussed with the Parties. In those circumstances, having been given the opportunity to do so, Court Appointed Counsel for the Third Accused, did not make any comments.[20]

The Amended Consolidated Indictment charges the Third Accused, inter alia, with allegation of unlawful killings committed in the Kono District. In addition, paragraph 32 of the Amended Consolidated Indictment reads as follows:

Between about mid 1998 and about January 2002, AUGUSTINE GBAO was Overall Security Commander in the AFRC/RUF forces, in which position he was in command of all Intelligence and Security units within the AFRC/RUF forces. In this position, AUGUSTINE GBAO was subordinate only to the leader of of the RUF, FODAY SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.

References to the Third Accused alleged involvement concerning allegations of unlawful killings in Kono District are also contained in the Prosecution Pre-Trial Brief and, in particular, in paragraphs 601-607 of the Prosecution Supplemental Pre-Trial Brief.[21] All

such matters that were found to be appropriate for consideration in making determination about issues of a similar nature and substance by this Trial Chamber as previously discussed.

In my view, the evidence in question could, therefore, be relevant in relation the Amended Consolidated Indictment, and in particular to the joint and superior criminal responsibility of the Third Accused. This is, in my opinion, evidence that goes to specific allegations contained in the Indictment and is clearly relevant.

I should add that 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.[22] In this respect, the Court Records, in my view, not only 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".[23] Before pursuing with the reason for my dissent I would like to observe that it 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"[24] before they received the Witness last statement from the Prosecution.

I therefore find, contrary to the what has been stated by Court Appointed Counsel for the Third Accused, that there is no evidence to support his claim that the said Accused has been ambushed and, consistent with our prior Decisions about disclosure, that the Defence had sufficient notice from the Prosecution application to add Witness TF1-371 to the Witness List and from the written statements of this Witness of allegations concerning unlawful killings in the Kono District and involving the Third Accused.

Furthermore, I fail to see how this evidence can be ruled to be inadmissible in the circumstances described whilst this same evidence, if uttered for the first time by the Witness while testifying in court would in all likelihood be ruled admissible based upon our previous Decisions on the principle of orality. It maybe, that a request for adjournment of the cross-examination might have to be considered but nevertheless such evidence would be admissible. The sole remedy available to the Defence, if necessary here, could have been an extension of time in order to prepare for the cross-examination of this Witness TF1-371 and such extension of time would not have occasioned any undue delay.

Consequently, and based on the foregoing review and analysis, I am of the opinion that the possible prejudicial effect, if any, of the admission of the said evidence does not outweigh its probative value. Such evidence is therefore admissible and should have been admitted. Done at Freetown, Sierra Leone, this 2nd day of August, 2006

Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]

[1] Transcripts, 21 July 2006, p. 14.
[2] Transcripts, 21 July 2006, p. 7-8.

[3] Transcripts, 21 July 2006, p. 8.
[4] Transcripts, 21 July 2006, p. 14.
[5] See, for example: Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122, 1 June 2005 ("Ruling on Witnesses TF1-361 and TF1-122"); Id., 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 ("Ruling on Witness TF1-141"); Id., Ruling on Oral Application for the Exclusion of "Additional" Statement for Witness TF1-060, 23 July 2004 ("Ruling on Witness TF1-060"); Id., Ruling on the Oral Application of the Exclusion of Part of the Testimony of Witness TF1-199, 26 July 2004; Id., Ruling on Disclosure Regarding Witness TF1-015, 28 January 2005; and Id., Ruling on Disclosure Regarding Witness TF1-195, 4 February 2005 ("Ruling on Witness TF1-195"). See also Prosecutor v. Norman et al., Case No SCSL-04-14-T, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004 ("Norman Disclosure Decision"); Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004 ("Decision on Disclosure Pursuant to Rules 66 and 68").
[6] Norman Disclosure Decision, supra note 5, para. 25.
[7] Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, Decision on the Defence Motion Requesting the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-168, TF1-165 and TF1-041, 20 March 2006, ("Decision on Witnesses TF1-168, TF1-165 and TF1-041"), para. 10; see also id., Decision On The Defence Motion For The Exclusion of Certain Portions of Supplemental Statements of Witnesses TF1-117, 27 February 2006, paras 10-11 and 13; Id., Decision On The Defence Motion For the Exclusion of Evidence Arising From the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-288, 27 February 2006, paras 9, 11 and 13.
[8] Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, para. 33.
[9] Norman Disclosure Decision, supra note 5, paras 22-23. See also, for instance, Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005, para. 19; id., Ruling on Witness TF1-141, supra note 5;
[10] See Decision on Disclosure Pursuant to Rules 66 and 68, supra note 5, para. 27.
[11] Ruling on Witnesses TF1-361 and TF1-122, supra note 5, para. 32. See also Prosecutor v. Bizimungu et al., Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Appropriate Relief for Violation of Rule 66, 4 February 2005, paras 9 and 10.

[12] Decision on Witnesses TF1-168, TF1-165 and TF1-041, supra note 7, para. 11; See also id., Decision on Defence Motion for an Order Directing the Prosecution to Effect Reasonably Consistent Disclosure, 18 May 2006. For a general guidance on the form and contents of an indictment, see Prosecutor v. Norman et al., Case No. SCSL-04-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005.
[13] Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, Written Reasoned Ruling on Defence Evidentiary Objections Concerning Witness TF1-108, 15 June 2006, para. 9; Prosecutor v. Norman et al., Case No. SCSL-04-14-AR65, Fofana – Appeal Against Decision Refusing Bail, 11 March 2005, paras 22-24. See also Prosecutor v. Ndindiliyimana et al., Case No. ICTR-00-56-T, Decision on Bizimungo's Motion to Exclude the Testimony of Witness TN, 28 October 2005, para. 7. On the issue of flexible approach to the admissibility of evidence, see also Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 34.

[14] Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, Ruling on Gbao Application to Exclude Evidence of Prosecutor Witness Mr. Koker, 23 May 2005., para. 7.
[15] Ruling on Witness TF1-060, supra note 5, paras 2-3. See also Prosecutor v. Bagosora et a.l, Case No. 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.
[16] See, for instance, Ruling on Witnesses TF1-361 and TF1-122, supra note 4, para. 24. In certain instances, it has to be noted, the Chamber has also ruled for the exclusion of evidence not properly disclosed by the Prosecution. See Ruling on Witness TF1-195, supra note 5, para. 7.
[17] Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, 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.
[18] Id., Confidential Gbao Response to the Prosecution Motion to Add Witness, 20 March 2006, paras 1, 4 and 7.
[19] Id., 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.
[20] Transcripts, Status Conference, 19 June 2006, p. 16.
[21] See Prosecution Supplemental Pre-Trial Brief pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 30 March 2004 as Amended by Order to Extend the Time for Filing of the Prosecution Supplemental Pre-Trial Brief of 2 April 2004, 21 April 2004.
[22] See, for example, Witness TF1-036; Witness TF1-071; Witness Dennis Koker (TF1-114).
[23] Transcripts, 21 July 2006, p. 7, l. 11-12.
[24] Transcripts, 21 July 2006, p. 15, l. 4-8.