

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

1. **SEIZED** of the Gbao Request for Leave to Add Two Documents to its Exhibit List and to Admit them in Evidence, with Confidential Annexes, filed by Court-Appointed Counsel for the Third Accused, Augustine Gbao (the "Gbao Defence") on the 16th of May, 2008 (the "Defence Request");
2. **NOTING** the Order for Expedited Filing, issued by This Trial Chamber on the 19th of May, 2008;
3. **MINDFUL** of the Response filed by the Office of the Prosecutor ("Prosecution") on the 21st of May, 2008 ("Prosecution Response");
4. **MINDFUL** of the Response filed by the Kallon Defence Team on the 21st of May, 2008 ("Kallon Response");
5. **NOTING** the Gbao Defence Reply to the Prosecution and Kallon Responses to the Gbao Request for leave to add two documents to its Exhibit List and have them admitted in Evidence, filed on the 23rd of May, 2008 (the "Gbao Defence Reply");
6. **MINDFUL** of The Chamber's Scheduling Order Concerning the Preparation and the Commencement of the Defence Case;¹ and our Decision on Prosecution Motion to Admit into Evidence a Document Referred to in Cross-Examination;²
7. **OBSERVING** that the first new Exhibit proposed by the Gbao Defence is a partially un-redacted version of paragraph 14 of Exhibit 190, which is the UNAMSIL Headquarters Board of Inquiry Report of the 20th of September, 2000 (00/19), exclusive of the Annexes thereto;³

¹ *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Scheduling Order Concerning the Preparation and the Commencement of the Defence Case (TC), 30 October 2006, paras 1-2 ["Scheduling Order"].

² *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Decision on Prosecution Motion to Admit into Evidence a Document Referred to in Cross-Examination (TC), 2 August 2006 ["Decision to Admit Exhibit 190"].

³ Exhibit 190, "UNAMSIL Headquarters Board of Inquiry Report", (UNAMSIL, 20 September 2000), SCSL Registry p. 24047 ["Exhibit 190"]. The Annexes to the Report do not form part of Exhibit 190. Request found in *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Gbao - Request for Leave to Add Two Documents to Its Exhibit List and to Admit them as Evidence, with Confidential Annexes, 16 May 2008, para 3 ["Gbao Defence Request"] and Gbao Reply to Prosecution and Kallon Responses to Gbao Request for Leave to Add Two Exhibits to its Exhibit List and to Have them Admitted as Evidence, 23 May 2008, para 17 ["Gbao Defence Reply"].

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8. **RECALLING** that when it was first admitted into evidence, paragraphs 13 and 14 of Exhibit 190 were redacted by The Chamber and the remainder of the Exhibit was admitted "for the sole purpose of understanding the full context of the Defence cross-examination" of Major Jaganathan Ganese;⁴

9. **NOTING** that the second new Exhibit proposed by the Gbao Defence is a Statement made by Major Jaganathan Ganese, entitled "Summary of Account of My Detention by the RUF", which appears as Annex Q to the UNAMSIL Board of Inquiry Report;

10. **NOTING** that the Gbao Defence seeks leave to add the documents to its Exhibit List, and although it does not propose to introduce the documents into evidence through the testimony of *viva voce* witnesses, but rather seeks to have the documents admitted in evidence under Rule 89(C);

11. **RECALLING** that Major Jaganathan testified in this case on the 20th and 21st of June 2006 and that the UNAMSIL Headquarters Board of Inquiry Report, as well as Major Jaganathan's Statement, were disclosed to the Gbao Defence prior to his testimony;

12. **RECALLING** that although Major Jaganathan was specifically questioned by the former Court-Appointed Counsel for the Third Accused on the subject of the Board of Inquiry Report, as well as on his statement to the Board of Inquiry, neither the Report nor the statement was shown to him, and he was not directed to any purported inconsistencies between his testimony and the statement;

13. **NOTING** the Gbao Defence did not seek to introduce these documents into evidence through Major Jaganathan;⁵

14. **OBSERVING** that the Gbao Defence considers that the statement of Major Jaganathan which it seeks to exhibit contradicts the Witnesses' oral testimony, and that the Gbao Defence wishes to use the statement to raise doubts as to the credibility of the Witnesses' testimony for the purpose of exculpating the Third Accused;⁶

⁴ Decision to Admit Exhibit 190, *supra* note 2, p. 4. Ganese is the Witness' given name and Jaganathan is his family name: Transcript of 20 June 2006, Jaganathan Ganese, p. 5, lines 8-9.

⁵ Transcript of 20 June 2006, Major Jaganathan Ganese, p. 106, line 7 - p. 108, line 16.

⁶ Gbao Defence Request, *supra* note 3, paras 15-16.

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15. MINDFUL of the fact that it is a fundamental right of an accused person to examine, or to have examined, the witnesses against him,⁷ and also cognisant that in joint trials, each accused shall be afforded the same rights as if he were being tried separately;⁸

16. CONSIDERING that Rule 89 of Rules of Procedure and Evidence of the Special Court for Sierra Leone (the "Rules") provides a general framework governing the admissibility of evidence;

17. MINDFUL that the Rules "favour a flexible approach to the issue of admissibility of evidence, leaving the issue of weight to be determined when assessing the probative value of the totality of the evidence";⁹

18. RECALLING, however, that The Chamber set out the proper procedure for cross-examining a witness on a prior inconsistent statement in its Decision on Disclosure of Witness Statements and Cross-Examination in the case of *Prosecutor v. Norman et al.*, which states, *inter alia*:

That a witness may be cross-examined as to previous statements made by him or her, relative to the subject matter of the case, without the statement being shown to him or her. However, where it is intended to contradict such witness with the statement, his or her attention must, before the contradictory proof can be given, be directed to those parts of the statement alleged to be contradictory;¹⁰

19. CONSIDERING that it would be contrary to the principles and the standards of reasonableness and fairness required by Rules 89(B) and 90(7)(i), as well as the settled jurisprudence of this Chamber, to admit into evidence, a purported prior inconsistent statement that was never put to the Witness who made that statement while this Witness was testifying before the Court;

20. CONSIDERING that Rule 89(C) lays out a general standard governing the admissibility of all evidence, but that Rules 92bis, 92ter and 92quarter provide specific, substantive instructions that regulate and control the admission of documentary evidence going to the proof of facts;

⁷ Amended Statute of the Special Court for Sierra Leone, Art. 17(4)(e) [the "Statute"]; International Covenant on Civil and Political Rights, 16 December 1966, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976, Art. 14(3)(d).

⁸ Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 82(A).

⁹ *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Decision on Prosecution Motion to Admit into Evidence a Document Referred to in Cross-Examination (TC), 2 August 2006, p. 3.

¹⁰ *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-PT, Decision on Disclosure of Witness Statements and Cross-Examination (TC), 16 July 2004, para 21.

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21. **CONSIDERING**, therefore, that the *maxim lex speculius derogate generali* applies, and that as a result, documentary evidence going to the proof of facts may only be admitted if it meets the criteria set out in one of these specific Rules;¹¹

22. **CONSIDERING** that the redacted portion of the UNAMSIL Board of Inquiry Report sought to be admitted by the Gbao Defence goes to proof of the acts and conduct of the accused(s) and that for this reason, it is inadmissible under Rule 92bis;¹²

23. **CONSIDERING** that the UNAMSIL Headquarters Board of Inquiry Report is not the evidence of a witness in the form of a statement or a transcript, and therefore, is inadmissible under Rule 92ter;

24. **CONSIDERING** that even if it were permissible to admit into evidence, a prior inconsistent statement not put to the declarant during oral testimony, the statement in question made by Major Jagannathan would be inadmissible under Rule 92bis because it goes to proof of the acts and conduct of the accused, and furthermore, that it is equally inadmissible under Rule 92ter because both the Kallon Defence and the Prosecution object to its admission;¹³

25. **CONSIDERING** that Rule 92quarter has no applicability in the present circumstances;

26. **DECIDING**, in light of the Gbao Defence Reply¹⁴ and the Kallon Response,¹⁵ that the unredacted version of Exhibit 190, the UNAMSIL Headquarters Board of Inquiry Report, shall not be admitted for the purposes of the trial generally;

27. **CONSIDERING** also that the Gbao Defence has not shown "good cause" why it should be allowed to add these Exhibits at this late stage of the trial;¹⁶

¹¹ *Prosecutor v. Kupreskic, Kupreskic, Kupreskic, Josipovic and Santic*, Case No. IT-95-16-T, Judgement (TC), 14 January 2000, paras 683-684.

¹² See *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements under Rule 92bis (TC), 15 May 2008, paras 25, 32-35 ["Sesay 92bis Decision"].

¹³ *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Decision on Defence Application for the Admission of the Witness Statement of DIS-129 under Rule 92bis or, in the Alternative, under Rule 92ter (TC), 12 March 2008; *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15- (TC), 15 February 2008, Decision on Defence Motion for Admission of Written Evidence pursuant to Rule 92ter (TC); *Prosecutor v. Taylor*, SCSL-04-16-T, Decision on Prosecution Motion for Admission of Part of the Prior Evidence of TF1-362 and TF1-371 Pursuant to Rule 92ter (TC), 25 January 2008.

¹⁴ Gbao Defence Reply, *supra* note 3, para 2.

¹⁵ *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Kallon Response to Gbao Request for Leave to Add Two Documents to Its Exhibit List and to Admit them as Evidence, 21 May 2008, para 23.

¹⁶ Scheduling Order, *supra* note 1, para 2(e). See also *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements (TC), 11

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28. RECALLING the principles and propositions enunciated in our recent seminal decision on Rule 92bis, to wit, Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements under Rule 92bis;¹⁷

29. RECALLING also that on the 17th of April, 2008, The Chamber, in the course of the trial proceedings, ruled out two questions put to the Second Accused by Learned Counsel for the Third Accused, Mr. Cammegh, on the basis that the questions would cause undue prejudice to the Second Accused in a joint trial because they constitute an attempt to impeach the credibility of, and to incriminate, the Second Accused by eliciting inadmissible evidence that is prejudicial to the Second Accused but exculpatory of the Third Accused in respect of the crimes charged in Count 15, and this, notwithstanding the fact that the Second Accused did not, in any way in his testimony, ever seek to, nor did he in fact, incriminate the Third Accused;¹⁸

30. MINDFUL of the fact that had The Chamber then allowed such questions from Learned Counsel for the Third Accused to the Second Accused it would have, in these circumstances, amounted to a violation of the right of the Accused not to be compelled to testify against himself or to confess guilt, as enshrined in the provisions of Article 17(4)(g) of the Statute of the Special Court;¹⁹

31. RECALLING further that on the 13th of May, 2008, The Chamber, consistent with its foregoing Ruling, again ruled that Learned Counsel for the Third Accused could not attempt to impeach the credibility of a Witness called by the Second Accused, where the evidence elicited would tend to incriminate the Second Accused, who, in his testimony, neither sought to nor did he in any way, incriminate the Third Accused;²⁰

32. CONSIDERING that the documents that the Gbao Defence seeks to have admitted in its Request are precisely the same documents which The Chamber ruled inadmissible on the 17th of

February 2005, paras 25, 34-35; *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL04-15-T, Written Reasons for the Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for Protective Measures (TC), 15 June 2006, paras 8-9; *Prosecutor v. Norman, Fofana and Kordewa*, Case No. SCSL04-14-T, Decision on First Accused's Motion for Leave to Add Two Exhibits to the Exhibit List (TC), 31 July 2006, pp. 3-4; *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL04-15-T, Decision on Gbao Request for Leave to Call Four Additional Witnesses and for Order for Protective Measures, with Annex A (TC), p. 3.

¹⁷ Sesay 92bis Decision, *supra* note 13.

¹⁸ Transcript of 17 April 2008, Oral Rulings, pp. 65-66 and p. 113. See also the related arguments on the same date, pp. 55 - 66 and pp. 94-113.

¹⁹ Transcript of 17 April 2008, Arguments, pp. 55 - 66 and pp. 94-113.

²⁰ Transcript of 13 May 2008, Oral Ruling, p. 59. See also the related arguments on the same date, pp. 44-58.

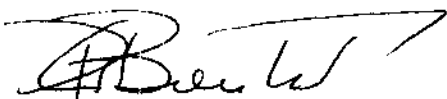
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April, 2008, and that to admit them at this stage in evidence would be tantamount to approbation and reprobation, on the part of the Chamber;²¹

33. In the light of the foregoing considerations, and pursuant to the provisions of Article 17(4) of the Statute and Rules 26bis, 54, 73ter, 89(C), 90(F)(i), 92bis and 92ter of the Rules of Procedure and Evidence:

THE CHAMBER HEREBY DISMISSES the Gbao Defence Request in its entirety.

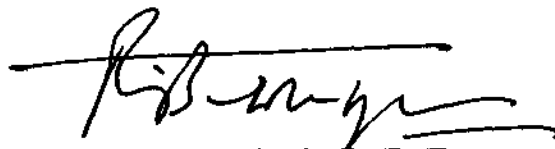
Done at Freetown, Sierra Leone, this 28th day of May 2008



Hon. Justice Pierre Boutet

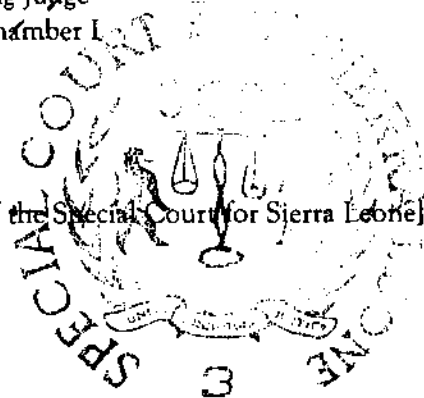


Hon. Justice Benjamin Mutanga Itoe
Presiding Judge
Trial Chamber I



Hon. Bankole Thompson

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²¹ Transcript of 17 April 2008, Oral Ruling, p. 89. See also the related arguments on the same date, pp. 66 - 89.