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SCSL-04-15-T
(27106-27118)

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SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

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

Registrar: Herman von Hebel

Date: 26th of June 2008

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

Public Document

DECISION ON KALLON MOTION TO EXCLUDE EVIDENCE OUTSIDE THE SCOPE OF THE INDICTMENT

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

SEIZED of the Kallon Motion to Exclude Evidence Outside the Scope of the Indictment with Confidential Annex A, filed by the Second Accused, Morris Kallon ("Kallon Defence") on the 14th of March 2008 ("Kallon Defence Motion" and "Kallon Defence Motion Annex");

NOTING the Prosecution Response with Confidential Annex A to Kallon Motion to Exclude Evidence Outside the Scope of the Indictment with Confidential Annex A, filed by the Office of the Prosecutor ("Prosecution") on the 31st of March 2008 ("Prosecution Response");

NOTING the Reply with confidential Annex A to Prosecution Response to Kallon Motion to Exclude Evidence Outside the Scope of the Indictment, filed by the Kallon Defence on the 7th of April 2008 ("Kallon Defence Reply" and "Kallon Defence Reply Annex");

MINDFUL of the Chamber's Oral Decision on RUF Motions for Acquittal Pursuant to Rule 98, rendered on the 25th of October 2006 concerning the making of objections to the form of the Indictment;

RECALLING the Chamber's Decision on Gbao Request for Leave to Raise Objections to the Form of the Indictment, filed on the 17th of January 2008 ("Decision on Gbao Request for Leave – Form of Indictment");

RECALLING the Chamber's Decision on Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing Sanctions, filed on the 6th of March 2008 ("Decision on Kallon Challenges to the Indictment and Request for Reconsideration");

HAVING REGARD to the Chamber's Decision on Kallon Application for Leave to Make a Motion in Excess of the Page Limit, filed on the 10th of March 2008;

PURSUANT TO Rules 26*bis* and 54, 89, 93 and 95 of the Rules of Procedure and Evidence ("Rules");

HEREBY ISSUES THE FOLLOWING DECISION:

I. BACKGROUND

1. The present Kallon Defence Motion is their fourth in a series of motions objecting to the form of the Indictment or the scope of the evidence admitted there under.[1] The first motion, challenging the form of the Indictment directly, was dismissed on procedural grounds.[2] The second Motion, requesting reconsideration of the Trial Chamber's initial decision, was also dismissed.[3] The third Motion requested leave to bring a motion to exclude evidence in excess of the page-limit.[4] The Chamber dismissed the Motion and suggested that a request to exclude evidence could have been more clearly presented in an appendix to a motion of ordinary length.[5] Following this Decision, the Kallon Defence filed the present Motion.

II. SUBMISSIONS OF THE PARTIES

1. Kallon Defence Motion

2. The Kallon Defence Motion argues that the Chamber should exclude 104 grouped portions of testimony from 23 different Prosecution witnesses. The Kallon Defence submits that evidence outside the scope of the indictment may be excluded if its admission would prejudice the accused, even when the motion is made at a point in time much later than when the evidence was originally tendered.[6]

3. The Defence advances four grounds upon which it argues that the impugned evidence ought to be excluded: Ground 1, "the allegation cannot be reasonably related to the Indictment";[7] Ground

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[1] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Motion Challenging Defects in the Form of the Indictment and Annexes A, B and C, 28 January 2008; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing Sanctions, 7 February 2008 ["Decision on Kallon Challenges to the Indictment and Request for Reconsideration"]; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Kallon Application for Leave to Make a Motion in Excess of the Page Limit, 14 February 2008 ["Kallon Application for Leave to Make a Motion in Excess of the Page Limit"].

[2] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Order Relating to Kallon Motion Challenging Defects in the Form of the Indictment and Annexes A, B and C, 31 January 2008 ["Order on Kallon Challenges to Indictment"].

[3] Decision on Kallon Challenges to the Indictment and Request for Reconsideration.

[4] Kallon Application for Leave to Make a Motion in Excess of the Page Limit, 14 February 2008.

[5] Decision on Kallon Application for Leave to Make a Motion in Excess of the Page Limit, p. 5.

[6] Kallon Defence Motion, paras 4-9. See also *Prosecutor v. Bagosora, Kabiligigi, Ntabakuze and Nsengiyumva*, ICTR-98-41-AR73 Decision on Alloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006 ["*Ntabakuze* Decision"].

[7] Kallon Defence Motion, p. 4.

2, "an allegation of physical perpetration by the Accused is not pleaded in the Indictment";[8] Ground 3, "insufficient pre-trial notice of material facts pertaining to all other allegations";[9] and, Ground 4, "the evidence is not relevant to any charge in the Indictment".[10]

4. The Kallon Defence submits that although objections were not raised, in most cases, when the impugned evidence was admitted, the Second Accused has not waived his right to object to the admission of the impugned evidence.[11] The Kallon Defence submits that it brought the present Motion at the earliest opportunity, because the full impact of the evidence was only discernable at the end of the Prosecution case.[12] The Kallon Defence argues that its Motion has not been brought so long after the admission of the evidence, without proper explanation for the delay, that the burden should shift to the Second Accused to prove that he has been prejudiced in the preparation of his defence by the admission of the impugned evidence.[13]

2. Prosecution Response

5. The Prosecution responds that the Kallon Defence Motion should be dismissed because it raises objections to the form of the Indictment, which the Chamber has already indicated will be considered only at the close of the trial.[14] In the alternative, the Prosecution responds that the impugned evidence is relevant and admissible,[15] and that the Indictment informs the Accused in sufficient detail of the charges he must meet.[16]

6. The Prosecution points out that the Kallon Defence has never sought an adjournment to prepare for the testimony of any witness, and had the opportunity to cross-examine Prosecution witnesses in relation to all allegations.[17] The evidence of Witnesses TF1-360, TF1-361, TF1-366, TF1-367 and TF1-371 was called following Prosecution motions, granted by the Chamber, for their addition as witnesses. The Prosecution submits that these motions gave notice of the material facts on which the witnesses would testify in sufficient time for the Accused to prepare his defence.[18]

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[8] Kallon Defence Motion, p. 5.
[9] Kallon Defence Motion, p. 6.
[10] Kallon Defence Motion, p. 8.
[11] Kallon Defence Motion, para 4.
[12] Kallon Defence Motion, para 9.
[13] Kallon Defence Motion, paras 4 - 8, relying on the *Ntabakuze* Decision, paras 42-47.
[14] Prosecution Response, paras 1, 5-8.
[15] Prosecution Response, para 1.
[16] Prosecution Response, paras 10-13.
[17] Prosecution Response, paras 3, 16-17.
[18] Prosecution Motion, para 16.

3. Kallon Reply

7. The Kallon Defence replies that its Motion does not seek the dismissal of the Indictment on the basis of defects therein.[19]

8. Regarding the Prosecution's submissions on the scope of relevant evidence in international criminal law, the Kallon Defence replies that evidence which serves only to give context has no probative value because it cannot form for the basis for any conviction. As such, the prejudicial effect of such evidence outweighs its probative value.[20] In respect of Ground 3, the Kallon Defence asserts that the material facts in the impugned evidence were not contained in the Witness Statements of TF1-360, TF1-361, TF1-366, TF1-367 and TF1-371.[21] In relation to the Prosecution's response on Ground 4, the Kallon Defence replies that "where the particulars of an allegation are not provided by each witness, the Chamber is in no position to find two pieces of evidence corroboratory."[22] The Kallon Defence submits that it did, in fact, raise contemporaneous objections to some of the impugned portions of the testimony of Witness TF1-015,[23] and that it also raised objections during the Rule 98 oral submissions to portions of the impugned evidence.[24]

III. APPLICABLE LAW

1. The Relevance of the Impugned Testimony and its Relationship to the Indictment

9. This Chamber has consistently observed that under Rule 89(C), relevance is the sole criterion for the admissibility of evidence at this Tribunal.[25] Rule 89(C) vests the Chamber with discretionary power to admit any relevant evidence and to exclude evidence that is not relevant. We have also emphasised that in contrast to Rule 89(C) of the ICTY and the ICTR Rules, Rule 89(C) of the

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[19] Defence Reply, para 4.
[20] Defence Reply, para 21.
[21] Defence Reply, para 19.
[22] Defence Reply, para 26.
[23] Defence Reply, para 9 and Annex A.
[24] Defence Reply, Annex A, Witnesses TF1-371, TF1-360, TF1-263, TF1-141. See Transcript, 16 October 2006, Oral Submissions on Rule 98 by Charles Taku, pp. 21 ff.
[25] See e.g.: *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker (TC), 23 May 2005, para 6 ["Gbao - Koker Ruling"]; Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-T, Decision on Prosecution's Request to admit into Evidence Certain Documents Pursuant to

Special Court's Rules "does not require as a condition for admissibility of evidence an evaluation of the probative value of the evidence in question."[26] Where the Chamber considers that the prejudicial effect of evidence so outweighs its probative value that "admitting the evidence will impact adversely and unfairly on the integrity of the proceedings before the Court," the Chamber may exclude such evidence under Rule 95.[27]

10. In the Chamber's opinion, the threshold of probity required under Rule 89(C) before an individual piece of evidence may be admitted is low. In this regard, the Appeals Chamber has held that while the "probative value of particular items in isolation may be minimal, the very fact that they have some relevance means that they must be available" for consideration by the Chamber.[28] In our Ruling on the Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, we opined that "individual pieces of evidence that may at first appear to have little probative value may later be of greater probative value when assessed in conjunction with all of the other evidence before the Court."[29]

11. We again opine that evidence is admissible if it bears on facts in issue,[30] such as the role of the Accused in the RUF,[31] the existence of a joint criminal enterprise, the RUF command structure, or the existence of *de facto* authority or control over subordinates. Evidence which provides the Chamber with background and context in which to understand the conflict or the testimony of a Witness is also admissible.[32] Of course, it is trite law that evidence is admissible if it is relevant to any Count in the Indictment.

Rules 92bis and 89(C), 14 July 2005, p. 3. See also: *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-AR65, Fofana - Appeal against Decision Refusing Bail (AC), 11 March 2005 para 24 ["*Fofana* Bail Appeal"].

[26] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04015-T, Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122, 1 June 2005, para 18 ["TF1-361 and TF1-122 Decision"]. C.f. Kallon Defence Reply, para 21.

[27] Gbao - Koker Ruling, para 8.

[28] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on the Admission of Command Structure Chart as an Exhibit (AC), 4 February 2005, para 23; *Fofana* Bail Appeal, para 23. On the issue of flexible approach to the admissibility of evidence, see also *Prosecutor v Blaskic*, IT-95-14-T, Judgement (TC), 3 March 2000, para 34.

[29] Gbao - Koker Ruling, para 9; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Written Reasoned Ruling on Defence Evidentiary Objections Concerning Witness TF1-108 (TC), 15 June 2006, para 9 ["TF1-108 Ruling"].

[30] See e.g., *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-T, Decision on the Defence Motion to Exclude the Testimony of Witness SGM Rule 89(C) of the Rules of Procedure and Evidence, 7 April 2006, para 9.

[31] See e.g.: Gbao - Koker Ruling, para 10.

[32] See, e.g.: TF1-108 Ruling, para 13.

[33] See, e.g., *Prosecutor v. Bagosora, Kabiligi, Ntabakuze, Nsengiyumva*, ICTR-98-91-T, Decision on Bagosora Motion for Exclusion of Evidence Outside the Scope of the Indictment, 11 May 2007, para 31; *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, Decision to Unseal Confidential Decision on the Admissibility of Certain Challenged Documents and Documents for Identification, paras 35-37; *R. v. Sawoniuk*, [2000] Cr. App. R. 230 at 234, per Lord Bingham C.J., as

12. Furthermore, it is settled law that in order to obtain a conviction on any Count alleging a crime against humanity, the Prosecution must prove beyond a reasonable doubt that the conduct in question was part of a widespread or systematic attack on a civilian population.[33] In addition, Rule 93 allows the admission of evidence tending to prove a consistent pattern of conduct relevant to serious violations of international humanitarian law.[34] Therefore, such evidence is admissible, even if no conviction may lie in respect of the underlying conduct itself.[35]

2. Exclusion of Evidence for Lack of Notice

13. This Chamber acknowledges that it is now settled law that in addition to pleading the charges against an Accused in the Indictment, the Prosecutor must "state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven."[36] We also take it for granted that the requirement that an Accused receive adequate notice of the allegations against him in order to prepare his defence is a component of the Accused's right to a fair trial.[37] Hence it is mandatory that the Prosecution must plead material facts with a sufficient degree of specificity. The degree of specificity required, however, will depend on the context of each case.[38]

14. This is the first time a Motion for the exclusion of testimonial evidence on the ground of lack of notice to the Accused of the material facts underpinning the charges laid in the Indictment has come before this Chamber for consideration. The Chamber has, however, considered and disposed of applications for the exclusion of evidence on the basis that it contained new allegations of which the Accused, allegedly, did not have notice.[39] In this regard, the overriding principle that has

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he then was; Richard May and Marieke Wierda, *International Criminal Evidence* (Adsley, New York: Transnational Publishers, 2002), p. 102-103, paras 4.23-4.24.

[33] Statute of the Special Court for Sierra Leone, Art. 2.

[34] Such evidence must be disclosed by the Prosecution under Rule 66.

[35] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Judgement, para 37 ["AFRC Trial Judgement"]; *Prosecutor v. Brdjanin*, IT-99-36-T, Judgement (TC), 1 September 2004, para 397; *Prosecutor v. Kvocka, Kos, Radic, Zigic, Prcac*, IT-98-30/1, Judgement (TC), 20 November 2001, para 652.

[36] *Prosecutor v. Kupreskic et al.*, IT-95-16-A, Appeal Judgement (AC), 23 October 2001, para 88 ["*Kupreskic* Appeal Judgement"]; *Prosecutor v. Blaskic*, IT-95-14-A, Judgement (AC), 29 July 2004, para 20; *Prosecutor v. Naletilic and Martinovic*, IT-98-34-A, Judgement (AC), 3 May 2006, para 23.

[37] *Prosecutor v. Kvocka et al.*, IT-98-30/1-A, Judgement (AC), 28 February 2005, para 28.

[38] AFRC Appeal Judgement, para 37.

[39] See, e.g.: TF1-108 Ruling; TF1-316 and TF1-122 Decision; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on the Oral Application for the Exclusion of Part of the Testimony of Witness TF1-199, 26 July 2004 ["TF1-199 Ruling"]; Gbao - Koker Ruling; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on Oral Application for the Exclusion of "Additional" Statement for Witness TF1-060, 23 July 2004 (TC) ["TF1-060 Ruling"]; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Defence Motion, 15 July 2004, paras 21-22 ["Sesay Decision of 15 July 2004"]; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on Oral Application for Respect of Disclosure Obligations, 9 July 2004 ["Sesay Ruling on Disclosure Obligations"]; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on Disclosure

consistently applied by this Chamber is that the Defence shall establish a *prima facie* case that the impugned evidence contained new allegations in respect of which the Accused had not previously been put on notice, either in the Indictment, in the Prosecution Pre-Trial Brief, Supplemental Pre-Trial Brief, or in other disclosure materials.[40] In the Chamber's view, a bare allegation by an Accused that the Indictment itself is defective will not suffice. A *prima facie* case must first be made out by the Defence and then it will become incumbent upon the Prosecution to respond to the allegation and demonstrate conclusively that the Accused did receive adequate notice of the allegations against him.

15. Where the Chamber finds *prima facie* that the impugned evidence contains material facts of which the Accused did not receive adequate notice, the Chamber will then proceed to a determination of whether the Accused's ability to prepare his defence has been materially impaired as a result of this failure. In order to protect the right of the Accused to a fair trial, where the defence did not have adequate notice of impugned evidence, the Chamber may, in its discretion, grant an adjournment or exclude the evidence in question.[41]

3. The Difference between Evidence which will be Excluded and Evidence which cannot found a Conviction

16. From the preceding analysis, it is clearly the law that evidence may be excluded, in the Chamber's discretion, if it is not relevant or if the accused lacked sufficient notice of the material facts underlying the allegations thereby impairing his ability to prepare his defence. A conviction, on the other hand, may only be entered where the Prosecution has proven beyond a reasonable doubt that the Accused has committed a specific criminal act as charged in the Indictment. While a lack of

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Regarding Witness TF1-195, 4 February 2005; *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Decision On The Defence Motion For The Exclusion of Certain Portions of Supplemental Statements of Witnesses TF1-117, 27 February 2006 ["TF1-117 Decision"]; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision On The Defence Motion For the Exclusion of Evidence Arising From the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288, 27 February 2006 ["TF1-113, TF1-108, TF1-330, TF1-041 & TF1-288 Decision"]; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, 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. See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL–04-15-T, Decision on the Prosecution Motion Regarding the Objection to the Admissibility of Portions of Evidence of Witness TF1-371 (AC), 13 December 2007 ["TF1-371 Appeals Chamber Decision"].

[40] See TF1-371 Appeals Chamber Decision, paras. 14-15, 19-21, 26. See also *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004, para 7 ("*Norman* Decision"); and Sesay Decision of 15 July 2004, paras 21-22; TF1-117 Decision, paras 10-11 and 13; TF1-113, TF1-108, TF1-330, TF1-041 & TF1-288 Decision, paras 9, 11 and 13.

[41] See TF1-195 Ruling; TF1-371 Appeals Chamber Decision. See also TF1-108 Ruling, para 7; TF1-199 Ruling; Sesay Ruling on Disclosure Obligations; *Norman* Decision; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Defence Motion for Disclosure Pursuant to Rule 66 and 68 of the Rules, 9 July 2004.

notice may preclude the Chamber from entering a conviction on an un-pleaded allegation, it is our considered view that evidence which may go to proving an un-pleaded allegation remains admissible if it is relevant under Rule 89(C) to the proof of other allegations in the Indictment or to facts at issue in the proceedings; to the proof of the chapeau requirements for crimes against humanity or the existence of a consistent pattern of conduct relevant to serious violations of international humanitarian law; or, where it provides the Chamber with useful background or contextual information.[42]

IV. DELIBERATIONS

1. Challenges to the Indictment

17. At the outset, the Chamber wishes to emphasise that the key issue for determination is whether the impugned evidence ought to be excluded from the record. The Chamber is not concerned with a determination of, and makes no finding in that regard, whether a particular piece of impugned testimony would be capable of supporting a conviction for any allegation contained in the Indictment, as pleaded. The Chamber also reiterates that it is trite law that the question of admissibility is distinct from the question of the weight to be accorded to a particular piece of evidence at the judgement phase.[43]

18. The Chamber considers that the second ground advanced by the Kallon Defence for the exclusion of the impugned evidence is, in fact, an objection to the form of the Indictment. By parity of reasoning, so is the Kallon Defence submission in Grounds 1 and 4 that evidence must be excluded where it goes to proof of an allegation which occurred in a location not specifically listed in the Indictment, but which the Prosecution submits is included in the Indictment by the phrase "locations including".[44] Consistent with our holding in the Decision on Gbao Request for Leave –

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[42] See *Prosecutor v. Ntahobali and Nyiramasuhuko*, ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyriamasuhuko and Arsène Shalom Ntahobali on the 'Decision on Defence Urgent Motion to Declare Parts of the evidence of Witnesses RV and QBZ Inadmissible' (AC), 2 July 2004, paras14-15; *Prosecutor v. Ndindiliyimana, Bizimungu, Nzuwonemeye, Sagahutu*, ICTR-00-56-T, Decision on Bizimungu's Motion to Exclude the Testimony of Witness AP, 28 October 2005, para 32; TF1-108 Ruling, para 13.

[43] See, for example, *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-AR65, Fofana – Appeal Against Decision Refusing Bail, 11 March 2005, paras 22-24; Gbao – Koker Ruling, para 3.

[44] Prosecution Response, para 20.

Form of Indictment,[45] the Chamber is precluded from considering the merits of challenges to the form of the Indictment at this stage and will not exclude evidence on this basis.[46]

2. Kallon Defence Grounds 1 and 4 – Relationship to the Indictment and Relevance

19. The Kallon Defence argues that certain evidence is not admissible because it cannot be reasonably related to the Indictment for the following reasons: the conduct alleged is not criminal according to the Statute; a particular location or District is not pleaded in the Indictment as a place where criminal conduct occurred; the Second Accused does not stand charged with a particular Count in the location and/or at the time given by the witness; and, the witness' testimony does not provide a date for the allegation.

20. The Chamber has considered all of the other evidence under Ground 1 that the Kallon Defence submits ought to be excluded as falling outside the scope of the indictment. It is the Chamber's considered opinion that the Kallon Defence objections are misconceived. Without addressing the issue of whether the impugned evidence is capable or not of founding a conviction for one the allegations contained in the Indictment, we find that the impugned portions of testimony, without exception, are relevant under Rule 89(C) for at least one of the following reasons, and are admissible on that basis: (i) the evidence relates to another charge in the Indictment or facts at issue in the proceedings;[47] (ii) the evidence is relevant to the proof of a widespread and systematic attack on a civilian population or the proof of the existence of a consistent pattern of conduct relevant to serious violations of international humanitarian law;[48] or (iii), the evidence is relevant because it provides the Chamber with useful background or contextual information.[49]

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[45] See also, Decision on Kallon Challenges to the Indictment and Request for Reconsideration, p. 2 and Rule 72 of the Rules.

[46] See, e.g., Kallon Defence Motion, para 20, arguing that the Indictment is defective because it fails to plead certain particulars.

[47] See, e.g., the impugned evidence of TF1-035, Kallon Defence Motion Annex, Unlawful Killings, Item (q), may be probative of the RUF command structure in a certain time and place; and, the impugned evidence of TF1-044, Kallon Defence Motion Annex, Allegations of Looting and Burning, Item (e), which evidence is clearly related to Counts 15-18 of the Indictment. See also Prosecution Response, para 19.

[48] See e.g., the impugned evidence of TF1-045, Kallon Defence Annex, Unlawful Killings, Item (e). See also Prosecution Response, para 21.

[49] See e.g., the impugned evidence of TF1-360, Kallon Defence Annex, Allegations of Looting and Burning, Item (e), which provides relevant context for understanding allegations related to Operation Pay Yourself, in addition possibly being relevant to the existence of a consistent pattern of conduct relevant to serious violations of international humanitarian law. See also the impugned evidence of TF1-366, Kallon Defence Motion Annex, Allegations of Sexual and Physical Violence, Item (a), p. 8, which is objected to under Ground 4 because the Witness gives a timeframe for certain

21. In Ground 4, the Kallon Defence also submits that certain evidence should be excluded from the record because it is not relevant for these reasons: the conduct is not criminal according to the Statute; timeframes, locations and the identities of victims and/or physical perpetrators were not provided by the Witness in his or her testimony, or were not provided with sufficient particularity; details such as timeframes, names of victims and physical perpetrators are not pleaded in the Indictment; a certain location named by a particular Witness does not exist; and, according to an agreed statement of fact between the Prosecution and the Kallon Defence, the Second Accused was not in a particular location, and had no authority in that location, during a particular time period.[50]

22. The Chamber has reviewed in detail all of the evidence impugned under Ground 4. It is the Chamber's considered view that the testimony of individual witnesses must be weighed and considered in light of the totality of the evidence.[51] It is our view of the law that a witness is not required to establish every element of an offence, nor is a witness required to testify to the identity of victims and perpetrators or dates and locations, in order for that testimony to be admissible. The Chamber observes that where the testimony of an individual witness lacks details such as a timeframe, a location or completely fails to identify victims or perpetrators, this issue will go to the matter of weight.[52] In this regard, the Chamber opines, however, that the specific circumstances of any factual allegation will have to be factored in the determination of the degree of specificity required before according weight to any piece of evidence.

23. Under Ground 4, the Kallon Defence submits that a certain portion of the testimony of Witness TF1-141 should be excluded because the location in which the allegation is said to have occurred does not exist.[53] This submission raises a factual issue which can only be determined at the judgement phase.

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conduct by the Second Accused beginning in 1992, but ending within the Indictment period. Although no conviction may lie for conduct outside the Indictment period, the impugned evidence will not be excluded because it forms part of the narrative flow of the Witnesses' testimony. See, Prosecution Response, para 19 and see *contra*, Kallon Defence Reply, para 21.

[50] Kallon Defence Motion Annex.

[51] See Prosecution Response, paras 23-24 and Kallon Defence Reply, para 26.

[52] See Prosecution Response, para 23. A careful review of the impugned evidence and the surrounding testimony indicates that Witnesses who gave the impugned testimony, in many instances, in fact, did provide a time-frame or an indication of the location or names of the individuals involved. See e.g.: impugned testimony of TF1-045, Kallon Defence Motion Annex, Allegations of Unlawful Killings, Item (e); impugned testimony of TF1-071, Kallon Defence Motion Annex, Allegations of Unlawful Killings, Item (j); impugned testimony of TF1-114, Kallon Defence Motion Annex, Allegations of Abductions and Forced Labour, Item (a).

[53] Kallon Defence Motion Annex, Allegations of Unlawful Killings, Item (r), p. 7.

24. Finally, as to the submission of the Kallon Defence that certain evidence should be excluded on the basis that the Prosecution has agreed that the Second Accused was not present in a certain location, nor did he have any authority in that location, at a certain time, the Chamber finds that all of the impugned evidence is relevant under Rule 89(C), as it may be relevant to the proof of other allegations in the Indictment[54] or to the proof of the existence of a widespread and systematic attack against a civilian population, or is admissible under Rule 93.[55]

3. Ground 3 – Lack of Notice

25. As we have already observed, we are of the opinion that the party bringing a motion seeking the exclusion of evidence for lack of notice must make out a *prima facie* case that the material facts underlying the allegations to which it objects have not previously been disclosed in the Indictment, Pre-Trial briefs, Opening Statement or in other disclosure materials or communications. It is our view that a bare allegation to the effect that the Indictment is defective on the basis that it purportedly does not contain the material facts underlying an allegation in the impugned evidence is legally untenable as a ground for the exclusion of evidence.

26. On the issue of notice, the Chamber finds that the Kallon Defence has failed to demonstrate that it did not receive adequate notice of the material facts underlying the allegations contained in the impugned evidence in the Prosecution's Pre-Trial Briefs, Opening Statement, disclosure materials or in other communications. Nor has it advanced any cogent reasons to support its contention that it did not have adequate notice of the material facts underpinning the allegations made by Witnesses TF1-360, TF1-361, TF1-366, TF1-367 and TF1-371,[56] who were added as Prosecution Witnesses following Prosecution Motions granted by the Chamber.[57] The issue of disclosure is raised for the first time in the Kallon Defence Reply Annex. The Chamber will accordingly not consider this issue, since the opposing party did not have the opportunity to respond. Moreover, the Chamber reiterates

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[54] See e.g., the impugned testimony of TF1-041, Kallon Defence Motion Annex, Allegations of Abduction and Forced Labour, item (f), which may be relevant to joint criminal enterprise charges and or the RUF command structure,

[55] See e.g., the impugned testimony of TF1-117, Kallon Defence Motion Annex, Allegations of Looting and Burning, Item (e).

[56] See Prosecution Response paras 3, 16-17; Defence Reply, para 9 and Defence Reply Annex.

[57] The Chamber added these witnesses in the following decisions: *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July 2004; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Written Reasons for Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for Protective Measures, 15 June 2006.

that it will not consider legal submissions, such as those contained in the Kallon Defence Reply Annex, which do not conform to the Practice Direction.[58]

27. Based on the foregoing considerations, and especially that of the failure of the Kallon Defence to make out a *prima facie* case that the Second Accused did not have adequate notice of the allegations against him, we decline to exclude the impugned evidence. Consequently, it is unnecessary for The Chamber to consider whether a lack of notice has materially prejudiced the ability of the Second Accused to prepare his defence.

V. DISPOSITION

28. Pursuant to Rules 26*bis* and 54, 89, 93 and 95 of the Rules:

DECLINES to exercise its discretion to exclude the impugned evidence contained in the Annex to the Kallon Defence Motion; and

HEREBY DISMISSES the Kallon Defence Motion.

Done at Freetown, Sierra Leone, this 26th day of June 2008.

Hon. Justice Pierre Boutet

Hon. Justice Benjamin Mutanga Itoe
Presiding Judge
Trial Chamber I

Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

[58] Decision on Kallon Challenges to the Indictment and Request for Reconsideration