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SCSL-04-15-T
(25914 - 25924)

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SPECIAL COURT FOR SIERRA LEONE
TRIAL CHAMBER I

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

Registrar: Mr. Herman von Hebel

Date filed: 9 May 2008

THE PROSECUTOR

against

ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL -2004-15-T

PUBLIC

GBAO-REPLY TO PROSECUTION RESPONSE ON REQUEST FOR LEAVE TO CALL FOUR
ADDITIONAL WITNESSES AND FOR ORDER FOR PROTECTIVE MEASURES

Office of the Prosecutor

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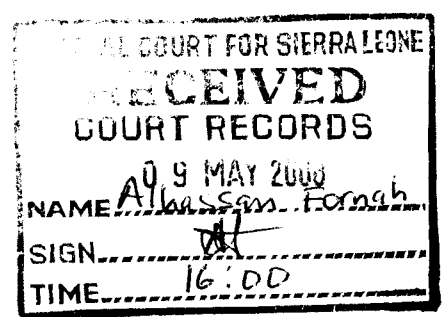
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Procedural History

1. On 30 April 2008, the Defence for the Third Accused, Augustine Gbao, filed a Request for leave to call four additional witnesses (DAG 047, DAG 063, DAG 112 and DAG 113) and for protective measures to be granted to three of them.¹
2. On 6 May 2008 the Trial Chamber ordered that any response should be filed no later than Thursday 8 May 2008, 4pm, and any reply no later than Friday 9 May 2008, 4pm.²
3. On 8 May 2008 the Prosecution filed its response, asking that the request be dismissed.³
4. The Defence maintains that leave to call the four additional witnesses and to grant them protective measures should be granted.

The Prosecution's Response

5. In its Response the Prosecution claims that the application should be dismissed on the basis that the evidence of the proposed witnesses could have been made available earlier.⁴
6. With regards to DAG 047 and DAG 063, the Prosecution argues that the Defence failed to provide any explanation for the delay between the time it removed DAG 047 and DAG 063 from its witness list and the time it requested for them to be reinstated. It also argues that the witnesses' names could have been made available earlier and that it has suffered prejudice by not having been able to investigate these witnesses at an earlier stage.⁵

¹ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL doc. N. SCSL-04-15-T-1107, Gbao Request for Leave to Call Four Additional Witnesses and for Order for Protective Measures, With Annex A, 30 April 2008. (Hereinafter 'The Request').

² *Prosecutor v. Sesay, Kallon and Gbao*, SCSL doc. N. SCSL-04-15-T-1115, Order for Expedited Filing, 6 May 2008.

³ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL doc. N. SCSL-04-15-T-1120, Prosecution Response to Gbao Request for Leave to Call Four Additional Witnesses and for Order for Protective Measures, 8 May 2008. ('Prosecution Response').

⁴ *Ibid.*, para.7.

⁵ *Ibid.*, para.8.

7. With regards to the expert witness, Johan Hederstedt, the Prosecution argues that the expert could have been retained earlier and the expert report already disclosed. Furthermore, the Prosecution claims that it has been denied the ability to investigate the expert witness and is therefore prejudiced.⁶
8. Finally, the Prosecution claims that the Defence for the Third Accused should have used DAG 113 as a common witness with the Defence for the First Accused, Issa Sesay. It further alleges that the Defence for the Third Accused might have made a tactical decision not to add DAG 113 as a common witness in order to be allowed to ask him leading questions during cross examination.⁷
9. In the event leave is granted, the Prosecution does not oppose the granting of protective measures for DAG 043, DAG 067 and DAG 113.⁸

SUBMISSIONS

Prejudice to the Prosecution

10. The Defence would like to emphasise the small number of witnesses it is going to call: on 12 March 2008 it was announced in Court that the Third Accused was going to call 12 core witnesses. This included the four additional witnesses.⁹
11. On 21 April 2008, the Prosecution was disclosed the names of all the witnesses the Third Accused intends to call.¹⁰ The list contained 8 core witnesses. As a result, the Prosecution has been able to investigate these witnesses and prepare for their cross examination from that time forward.

⁶ *Ibid.*, para. 11

⁷ *Ibid.*, para. 12.

⁸ *Ibid.*, para. 15.

⁹ RUF Transcripts of 12 March 2008, p.40.

¹⁰ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL doc. N. SCSL-04-15-T-1097, Gbao- Compliance with Trial Chamber Order of 1 March 2007, Confidential Annex A, 21 April 2008.

12. The case of the Third Accused has been scheduled to start on 2 June 2008.¹¹ In view of the development of the case of the Second Accused, it was agreed that the Third Accused is not to start until the 26 May 2008 *at the earliest*.¹²
13. In addition, it seems likely that the case for the Second Accused would close around half May. Yesterday, the Kallon Defence stated that it has two more local witnesses, as well as two international witnesses to testify.¹³ If this were the case, it is likely that the Court would not be sitting until the start of the case of the Third Accused, which would then leave the Prosecution about 10 entire days to prepare for the four additional witnesses. The Defence is convinced that the Prosecution has the necessary resources to do so within the time available with relative ease.
14. The Defence submits that the Prosecution's allegation that it would be prejudiced by the late addition of witnesses is unfounded. Should the four proposed witnesses be added to the witness list of the Third Accused, the Prosecution would be able to be fully prepared for their cross examination.

Good Cause

15. It is submitted that the Trial Chamber should favour a flexible approach in the exercise of its discretion relating to the matter of adding witnesses to a witness list.¹⁴ It is submitted that 'good cause' is a concept that is to be understood broadly, and that consideration should be given to the fact that the Defence acted in good faith. The Defence could not have made a reasoned and informed decision to add the proposed witnesses before the time it did so.

¹¹ RUF Transcripts of 12 March 2008, p.45.

¹² RUF Transcripts of 1 May 2008, p.12, l.19-28.

¹³ Defence for the Third Accused has two local witnesses and two international witnesses remaining to testify as of 9 May 2008. See RUF Transcripts of 8 May 2008, p.37 (Draft Version. At the time the present reply was written, no final draft for the 8 May 2008 was available), and *Prosecutor v. Sesay, Kallon and Gbao*, SCSL doc. N. SCSL-04-15-T-1117, Kallon Notice Regarding the Testimony of UNAMSIL Witnesses, 7 May 2008, para.10.

¹⁴ See *Prosecutor v. Nindiliyimana, Bizimungu, Nzuwonemeye, Sagahutu*, Case No. ICTR-2000-56-T, Decision on Prosecution Motion to Vary its List of Witnesses: Rule 73 bis (E) of The Rules, 11 February 2005, para. 21. See also *Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46T, Decision on Defence for Ntagerura's Motion to Amend Its Witness List Pursuant to Rule 73ter (E), 4 June 2002, para 10.

16. It is Defence counsel's understanding that the main rationale behind requesting a party to show good cause in order to add witnesses to its witness list is to allow sufficient time for the opposite party to prepare for the new witness. It aims to prevent a situation where the requesting party would surprise the other party and call the new witness late for tactical reasons.¹⁵
17. Taking into consideration the timing of proceedings and the small number of witnesses to be called by the Third Accused, Defence Counsel submits that the Prosecution is not going to be surprised and/or prejudiced by the addition of DAG 047, DAG 063, Johan Hederstedt and DAG 113 on the witness list for the Third Accused. It is submitted that the Prosecution will not suffer any prejudice should the Request to add the witnesses be granted.
18. Finally, the Defence for the Third Accused would like to re-emphasise the quality of the evidence to be provided by the four proposed additional witnesses. All of them would testify on several counts of the indictment, while focusing on specific aspects/events. It is submitted that calling these four additional witnesses would ensure that the best available evidence would be presented to the Court.

DAG 047 and DAG 063

19. Contrary to what is alleged by the Prosecution, the Defence provided reasons for the time elapsed between the time DAG 047 and DAG 063 were removed from the witness list and the time the Request was made to reinstate them. The Defence Request made it clear that the Request was made following the presentation of evidence for the First and Second Accused and (in part) a re-assessment of the overall evidence to be provided by the witnesses for the Third Accused.¹⁶ This prompted Counsel for Gbao to assess what is needed to prepare a proper presentation on behalf of Mr. Gbao. DAG 047 and DAG 063 satisfy this need and were thus chosen to be added back to the list of witnesses.

¹⁵ See *Prosecutor v. Zejnir Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo*, Case No. IT-96-21, ('Delalic case'), Decision on Confidential Motion to Seek Leave to Call Additional Witnesses, Trial Chamber, 4 September 1997, para.7.

¹⁶ Request, para. 13.

20. Defence counsel submits that indeed, evidence from DAG 047 and DAG 063 could not have been made available earlier to the Prosecution and the Trial Chamber. Defence counsel has been (and still is) acting in due diligence and in good faith. It has sought leave to call DAG 047 and DAG 063 as soon as its decision to have them as witnesses was taken.
21. The Prosecution's claim that it was prevented from investigating these witnesses can be cured by the time it has available from now until the date where DAG 047 and DAG 063 are expected to testify, especially since these two witnesses are hardly the type of witnesses that will cover the entire scope of the Indictment. For the reasons mentioned earlier,¹⁷ it is submitted the Prosecution would be perfectly able to properly investigate these witnesses. The Prosecution failed to demonstrate why leave to add these two witnesses on the witness list for the Third Accused should not be granted.

DAG 112 (Johan Hederstedt)

22. Defence counsel apologizes for confusing the Prosecution as to the status of the expert witness. As stated in paragraph 25 of its Request, no protective measures are Requested for him. Defence counsel will therefore refer to DAG 112 by his name: Johan Hederstedt. Defence counsel apologizes for any inconvenience caused to the Prosecution.
23. The Prosecution's argument that the expert witness could have been retained earlier and the expert report already disclosed should be dismissed.
24. First and foremost, financial issues that are beyond the control of the defence teams have been seriously impairing the defence teams' ability to secure the services of an expert witness.¹⁸
25. Secondly, Defence counsel wishes to emphasise that according to the Rule which governs the testimony of expert witnesses, rule 94*bis*, 'the full statement of any expert witness

¹⁷ See above paras. 10-14.

¹⁸ See Request, para. 14.

called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber no later than twenty-one days prior to the date on which the expert is expected to testify.¹⁹

26. The Expert Witness is still in the process of compiling his report. The Defence will provide the Prosecution with an expert report as soon as a final version is ready, and in any case at least twenty-one days before he testifies. The Defence also takes the opportunity to inform the parties and the Court that the expert witness will be the last witness to be heard.

27. In view of rule 94*bis*, the argument of the Prosecution that it was denied the opportunity to investigate the expert witness²⁰ lacks any foundations. John Hederstedt should be added as a witness for the Third Accused.

DAG 113

28. In its Response, the Prosecution states that the Defence failed to disclose the pseudonym given to DAG 113 by the Defence of the First Accused.²¹ This is incorrect. In its Request, the Defence made clear that DAG 113 was known as DIS 292 at the time he was to be called by the First Accused.²² The name and pseudonym of this witness had been disclosed to the Prosecution on 29 November 2007 by the Defence for the First Accused.

29. The Prosecution also suggests that the Defence should have used DAG 113 as a common witness with the First Accused. Defence counsel stresses that it is not for the Prosecution to determine how the Third Accused should put his Defence, nor is it for the Prosecution to speculate on the reasons why DAG 113 was not called as a witness common with the First Accused. Defence counsel also wishes to re-emphasise that there is no common defence

¹⁹ Rule 94*bis* of the Rules of Procedure and Evidence as amended on 19 November 2007.

²⁰ Prosecution Response, para. 11.

²¹ Prosecution Response, para. 12.

²² Request, para. 15 footnote 20.

strategy, and that neither the Sesay nor the Gbao Defence team favoured calling common witnesses.²³

30. Defence Counsel became aware that DAG 113 was going to testify for the First Accused at the same time than the Prosecution, on 29 November 2007. At that time, it was not found necessary to have DAG 113 as a witness since other witnesses were already under investigation as potential witnesses on the issue. However, following re-examination of these Defence witnesses, it was found that the Third Accused would materially benefit from evidence of someone who was directly involved in relation to the events that led to the killing of the alleged 65 Kamajors in Kailahun town.²⁴ Following discussions with the Defence for the First Accused it was found that they did not intend to call DAG 113 anymore. As a result, and as explained in the Request, the Defence team met with him. It was then decided that DAG 113 should be added to the Third Accused's witness list. The Request to add DAG 113 to the witness list was done as soon as the decision was taken.
31. The Prosecution alleges that the Defence team for the Third Accused was aware that DAG 113 was going to testify for Issa Sesay and deliberately decided not to have him as a common witness so that leading questions could be put to him. This is an entirely speculative and baseless comment.
32. Finally the Prosecution alleges that it would be prejudiced by the late addition of DAG 113 on the witness list.²⁵ The Prosecution's claim that it has been prejudiced is unsubstantiated and unrealistic. As stated earlier, the Prosecution only has to prepare for 12 witnesses, and should the Request be granted, would have more than two weeks (including at least 10 days, perhaps as much as 20 days, without sitting in the Courtroom) to prepare until DAG 113 testifies.

²³ RUF Transcripts of 20 March 2007, p.21, RUF Transcripts of 2 May 2007 (Status Conference), p.19 and p.23;

²⁴ As stated in its summary contained in Annex A of the Request, DAG 113 was part of the Joint Security Board of Investigation who was created to investigate the arrest of the alleged Kamajors.

²⁵ Prosecution Response, para. 12.

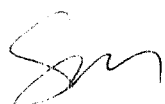
33. The Prosecution's argument that it would suffer prejudice should the Request to call DAG 113 be granted is without merit and should be dismissed. DAG 113 should be added to the witness list of the Third Accused.

CONCLUSION

34. Defence Counsel submits that the Prosecution is not going to be prejudiced by the addition of DAG 047, DAG 063, Johan Hederstedt and DAG 113 on the witness list for the Third Accused. Taking into account the timing of proceedings and the small number of witnesses to be called by the Third Accused, it is submitted that the Prosecution will not suffer any prejudice should the Request to add the witnesses be granted.

35. The protective measures requested for DAG 047, DAG 063 and DAG 113 in the Request should be granted.²⁶

Done at Freetown, Friday 9 May 2008



Counsels for Augustine Gbao

John Cammegh

Scott Martin

²⁶ Request, paras. 23 and 24.

TABLE OF AUTHORITIES

I. Special Court for Sierra Leone

Rules of Procedure and Evidence as amended on 19 November 2007. Rule 94*bis*.

A. **RUF Case** (*Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao, Case No. SCSL -2004-15-T*)

Decisions

SCSL doc. N. SCSL-04-15-T-1097, Gbao- Compliance with Trial Chamber Order of 1 March 2007. Confidential Annex A, 21 April 2008.

SCSL doc. N. SCSL-04-15-T-1107, Gbao Request for Leave to Call Four Additional Witnesses and for Order for Protective Measures, With Annex A, 30 April 2008. Paragraphs 13, 14, 15, 20, 23 and 24.

SCSL doc. N. SCSL-04-15-T-1115, Order for Expedited Filing, 6 May 2008.

SCSL doc. N. SCSL-04-15-T-1117, Kallon Notice Regarding the Testimony of UNAMSIL Witnesses, 7 May 2008. Paragraph 10.

SCSL doc. N. SCSL-04-15-T-1120, Prosecution Response to Gbao Request for Leave to Call Four Additional Witnesses and for Order for Protective Measures, 8 May 2008. Paragraphs 7, 8, 11 and 12.

Transcripts

RUF Transcripts of 20 March 2007. Page 21.

RUF Transcripts of 2 May 2007 (Status Conference). Pages 19 and 23.

RUF Transcripts of 12 March 2008. Pages 40 and 45.R

RUF Transcripts of 1 May 2008. Page 12.

RUF Transcripts of 8 May 2008. (Draft Version). Page 37.

II. International Criminal Tribunal for Rwanda

Prosecutor v. Nindiliyimana, Bizimungu, Nzuwonemeye, Sagahutu, Case No. ICTR-2000-56-T, Decision on Prosecution Motion to Vary its List of Witnesses: Rule 73 bis (E) of The Rules, 11 February 2005. Paragraph 21.

Prosecutor v. André Ntagerura et al, Case No. ICTR-99-46T, Decision on Defence for Ntagerura's Motion to Amend Its Witness List Pursuant to Rule 73ter (E), 4 June 2002. Paragraph 10.

III. International Criminal Tribunal for the Former Yugoslavia

Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo, Case No. IT-96-21, Decision on Confidential Motion to Seek Leave to Call Additional Witnesses, Trial Chamber, 4 September 1997. paragraph 7.