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SCSL-04-15-T
(25988-26032)

25988

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: 16 May 2008

THE PROSECUTOR

against

ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL-2004-15-T

PUBLIC

GBAC-REQUEST FOR LEAVE TO ADD TWO DOCUMENTS TO ITS EXHIBIT LIST AND TO
ADMIT THEM AS EVIDENCE, WITH CONFIDENTIAL ANNEXES

Office of the Prosecutor

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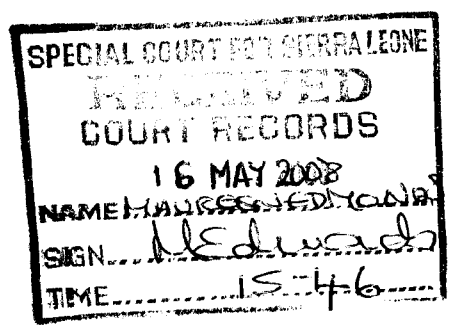
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I. Introduction

1. On 30 October 2006, the Trial Chamber ordered each of the Defence teams to file an exhibit list by 16 February 2007.¹ On 7 February 2007, the Trial Chamber granted an extension of time and ordered the above mentioned materials to be filed no later than 5 March 2007.² On that date the Defence for the Third Accused filed its exhibit list.³
2. In accordance with order 1(e) of the Trial Chamber's Scheduling Order of 30 October 2006, the Defence for the Third Accused hereby requests the Trial Chamber's authorisation to add two exhibits to its exhibit list.
3. The first proposed exhibit is a request to 'unredact' one sentence of Prosecution Exhibit 190, the UNAMSIL Board of Inquiry Report of 20 September 2000 (00/19). ('First Proposed Exhibit').⁴ The second proposed exhibit is contained in Annex Q of the above mentioned Board of Inquiry Report. It is a statement from TF1-042 detailing his abduction of May 2000. ('Second Proposed Exhibit').⁵
4. Should the leave to add the two exhibits be granted, Defence Counsel requests that the two exhibits be admitted into evidence.

¹ *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-659, Scheduling Order Concerning the Preparation and the Commencement of the Defence Case, 30 October 2006, Order 1. (Hereinafter 'Scheduling Order of 30 October 2006').

² *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-705, Decision and Order on Defence Applications for an Adjournment of the 16th of February Deadline for Filing Defence Materials, 7 February 2007.

³ *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-724, Gbao-Filing of Defence Materials, 5 March 2007.

⁴ See Confidential Annex A of the present filing.

⁵ See Confidential Annex B of the present filing.

II. Applicable Law

A. Addition of Exhibits

5. The process for adding exhibits is not expressly mentioned in the Rules of Procedure and Evidence of the Special Court ('RPE').⁶ The parties are guided instead by this Court's 30 October 2006 Scheduling Order, where the Trial Chamber held that should the parties seek to add an exhibit beyond those listed in their original Exhibit List it may be permitted to do so only upon a showing of good cause.⁷
6. In understanding what constitutes "good cause", there is no prescribed definition, at least in regards to adding exhibits. The closest analogy relates to when parties request for leave to call additional witnesses. In these circumstances, the Trial Chamber has defined 'good cause' as 'a credible justification for failing to disclose the new witness at an earlier stage.'⁸ This standard should apply to the addition of documents onto exhibit list.
7. The Trial Chamber in the CDF case also assisted the Tribunal in more fully understanding the necessary considerations that must be taken into account before admitting a document. It suggested that two other factors be considered:
 - i. The possible prejudice to the other parties;⁹ and
 - ii. Relevance and materiality of the proposed exhibits.¹⁰
8. According to rule 54 of the RPE, the Trial Chamber may issue such orders as may be necessary for the conduct of the trial.

⁶ Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 19 November 2007.

⁷ Scheduling Order of 30 October 2006, Order 1(e).

⁸ *Prosecutor against Sesay, Kallon, Gbao*, Case No. SCSL-04-15-T, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005, para.34.

⁹ *Prosecutor v. Norman, Fofana and Kondewa*, Doc. No. SCSL-04-14-T-667, Decision on First Accused's Motion for Leave to Add Two Exhibits to the Exhibit List, 31 July 2006, p.4, para.2. ('CDF Decision on Additional Exhibits').

¹⁰ *Ibid*, p.4 para.4.

B. A Flexible Standard Exists for Admitting Documents into Evidence

9. Rule 89 states that the Trial Chamber may admit **any relevant evidence**. Relevant evidence is any evidence that could have a bearing on the guilt or innocence of the Accused for the crimes charged under the Indictment.¹¹ It also states that in cases not provided for in the Rules, a Chamber may apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and general principles of law.
10. The Trial Chamber has consistently favoured a flexible approach to the issue of admitting evidence, leaving the issue of its evidentiary weight to be determined when assessing the totality of the evidence.¹² Assessing the weight of evidence is usually left for final deliberations.¹³ This approach is consonant with established international criminal procedure.¹⁴

III. The Proposed Exhibits

11. The first Proposed Exhibit is the UNAMSIL Headquarters Board of Inquiry Report 00/19 dated 20 September 2000. The document is already filed as Prosecution Exhibit 190. However, at that time, the document had 2 paragraphs redacted. Defence for the Third Accused is interested in “unredacting” part of paragraph 14 for the limited purpose of exonerating the Third Accused. Specifically, we request that the words read “[RUF COMMANDER took an action] and [as] he was about to leave the camp, the OC of A Coy, Major Maroa, approached the RUF commander in an attempt to negotiate the release of the MILOB. Both UNAMSIL personnel were taken hostages by the RUF and driven away”.¹⁵

¹¹ See *Prosecutor v. Norman, Kondewa and Fofana*, Doc. No. SCSL-04-14-T-785, Trial Chamber Judgment, 2 August 2007, para.253. (‘CDF Trial Judgment’).

¹² Trial Chamber Decision on the UNAMSIL Board of Inquiry, p.3 para.2. See also CDF Trial Judgment, para.253 and *Prosecutor v Brima, Kamara and Kanu*, Doc. No. SCSL-04-16-T, Trial Chamber Judgment, 20 June 2007, para.99.

¹³ See *Prosecutor v. Sesay, Kallon, Gbao*, Doc. No. SCSL-04-15-T-620, Decision on Prosecution Motion to Admit into Evidence a Document Referred to in Cross Examination, 2 August 2006, p.3, para.3. (hereinafter ‘Trial Chamber Decision on the UNAMSIL Board of Inquiry’). See also *Prosecutor v. Norman, Kondewa and Fofana*, Doc. No. SCSL-04-14-T-785, Trial Chamber Judgment, 2 August 2007, para.253; *Prosecutor v Brima, Kamara and Kanu*, Doc. No. SCSL-04-16-T, Trial Chamber Judgment, 20 June 2007, para.99.

¹⁴ *Ibid.*

¹⁵ Counsel admits to the lack of clarity above. This is not intended to obfuscate or mislead the Court; instead, it is

12. The second proposed exhibit is a statement from Major Ganase (TF1-042) entitled 'Summary of Account of my Detention by the RUF'.¹⁶ It is contained in Annex Q of the UNAMSIL Board of Inquiry Report dated 15 September 2000. The document is undated but one can deduce that it was done between mid-May (when the incident took place) and 15 September 2000, the date of the Report. Defence counsel intends to rely primarily on paragraphs 3, 4, 5, 8, 9 and 10.
13. Defence counsel submits that these documents should be exhibited and admitted into evidence to support the Defence concerning Augustine Gbao's alleged involvement in the abduction of Major Maroa. Inclusion of these documents could exonerate him from certain counts contained in the indictment against him.
14. Major Ganase's statement in Annex Q conflicts directly with his in-court testimony on 20 & 21 June 2006. At material points in his statement, he diverges from his testimony concerning the abduction of Major Maroa. In June 2006, for example, Major Ganase testified that when he saw Major Maroa at Teko Barracks, Augustine Gbao was escorting him into the camp.¹⁷ However, in his statement to the Board of Inquiry (made close in time after the event), Major Ganase states that he met Major Maroa¹⁸ in Makump village, where he was later escorted by certain RUF soldiers (other than Augustine Gbao) to Teko Barracks. He states that Major Maroa was then subsequently disarmed.¹⁹ Augustine Gbao is not mentioned at all with regards to Major Maroa.
15. Additionally, Ganase testifies that, upon arrival to the camp, an RUF soldier [not Augustine Gbao] announces that the UN had attacked the RUF's position, and that he had *one* of the UN soldiers.²⁰ Notably, in his statement to the Board of Inquiry, he describes the same scenario but that the same RUF soldier claims to have *five* UN soldiers (which included one MILOB).²¹

out of an abundance of caution and respect towards the various rights that are involved and need to be respected in this trial. The process of requesting that a document be "unredacted" is novel to Defence Counsel, and thus a lack of experience leads one to this somewhat awkward presentation.

¹⁶ 'Proposed Exhibit 2'.

¹⁷ TF1-042, RUF Transcript 20 June 2006, p.31.

¹⁸ In his statement Major Maroa is spelled 'Marwah'.

¹⁹ Proposed Exhibit 2, para.8.

²⁰ TF1-042, RUF Transcript 20 June 2006, p.31.

²¹ Second Proposed Exhibit, para. 9.

16. Considering these two discrepancies, one obtains a clearer picture on the individual culpability of Augustine Gbao regarding the abduction of Major Maroa. If the Court carefully reads the statement, the necessary inference one must draw, in our submission, is that the five UN soldiers who were announced by the RUF soldier at the Teko Barracks communication centre includes Major Maroa, who was not being escorted by Augustine Gbao. The failure to mention Augustine Gbao's name - a well-known figure to the Major Ganase - is a glaring omission that serves to exonerate the Third Accused.

IV. Submissions

A. Good Cause Exists to Introduce the Documents at this Stage in the Trial

17. The two proposed exhibits were originally in the custody of the Prosecution and were disclosed to the Defence teams as part of its rule 68 obligations on 17 May 2006. The first proposed exhibit is already in the custody of the Court as Prosecution Exhibit 190. While disclosed to the Defence before Major Ganase testified on 20 & 21 June 2006, the statement of Major Ganase (Proposed Exhibit 2) was not referred to in the courtroom by Defence counsel until 17 April 2008.²²
18. Thus, Defence Counsel acknowledges that the statement of Major Ganase was available to Defence Counsel when he testified and could have, prior to 7 March 2007, been put onto the original exhibit list. At that time, it was not part of the team strategy to include this document. Nonetheless, it is submitted that the interests of justice, keeping particularly in mind the oft-cited doctrine of fundamental fairness and a flexible policy in admitting documents into evidence, demand that the admission of the document be considered. To disregard the statement and its contents at this point, however, could effectively deny the Chamber the opportunity to avail itself of all material available to it to rule on the responsibility of the Third Accused.
19. Additionally, the Defence submits that this material is exculpatory towards the Third Accused, which serves to underscore the high value it should be accorded. This point is buttressed given that the Board of Inquiry was served on the Defence Counsel as Rule 68 material.

²² RUF Transcripts of 17 April 2008, p.66.

20. Defence for the Third Accused submits that to satisfy the good cause criterion to add an exhibit onto its exhibit list (and simultaneously introduce it into evidence) after 7 March 2007, the contemplation of whether 'good cause' exists should be a multi-faceted one requiring thorough consideration. It is anticipated that other parties to the case may object that the statement of Major Ganase should have been put to the witness while he was on the witness stand. While not disagreeing with this position in theory, good cause, it is suggested, should not strictly be a time-based calculation incapable of satisfaction once Major Ganase testified and the original deadline for submitting an exhibit list has passed. It is submitted that late introduction of these documents, particularly the statement of Major Ganase, is supported by additional good cause.
21. Good cause exists to delay the introduction of these documents, especially the statement of Major Ganase, for reasons other than timing. Due to the sensitive nature of these documents, the Defence Team had to carefully consider whether or not using the document as an exhibit was a wise strategy. Additionally, Defence for the Third Accused had to undertake a careful analysis of the entire UNAMSIL Board of Inquiry Report,²³ and to compare it with the allegations of the Prosecution's witnesses on counts 15 to 18.
22. Defence counsel was also waiting for conclusion of the Defence case for the First and especially the Second Accused in regards to the UNAMSIL incident. As stated in Court, Defence Counsel expected the Second Accused to testify to the non-involvement of Augustine Gbao in the events of 1st and 2nd May.²⁴ This was not the case. To remedy this situation, Defence Counsel sought to use the second proposed exhibit in court as soon as it was clear that the Second Accused would not support Augustine Gbao's non-involvement on 1 & 2 May 2000. However, after substantial discussion between the Bench and counsel for the Third Accused, he was not allowed to do so.²⁵

²³ The Board of Inquiry report is about 375 pages long.

²⁴ RUF Transcripts of 17 April 2008, p.52, *et seq.*

²⁵ *Ibid.*, p.86.

i. Other Timing Considerations Regarding the Request to Add a Document Have Been Met

23. Defence for the Third Accused wishes to emphasise that it would not gain any tactical advantage by seeking to rely on the two proposed exhibits at such a late stage. Matters might be different if this application were made during, or worse, after the close of the Gbao Defence case. However, to the contrary, the case is yet to commence. The Prosecution, or any other party, will remain unfettered in its ability to put its case to Gbao Defence witnesses comprehensively should this application succeed.
24. The principle underlying late addition to the exhibit list primarily concerns itself with disclosure and notice to the parties. As stated above, the two proposed exhibits are already known to both the Prosecution and the other Defence teams. The intent to introduce the documents should not be a surprise to any parties since it was extensively discussed on 11 April 2008. Thus, none of the parties would suffer any prejudice from the addition of the two proposed exhibits into the exhibit list of the Third Accused. Beyond this, the Gbao Defence intends to utilise only 12 exhibits. Thus, the parties have sufficient time to prepare.
25. It is submitted that in view of their relevance to the case, fundamental fairness urges the court to add the two proposed exhibits on Third Accused's exhibit list. Also, if leave is granted to add them on the exhibit list, they should be admitted as evidence before the Court.

B. Possible Prejudice to Other Parties

26. The proposed exhibits need to be considered for the sole purpose of determining the individual criminal responsibility of the Third Accused. Defence for the Third Accused will use this evidence solely to exonerate himself.
27. There is no intention to prejudice the First or Second Accused. Should there be any interest by any of the parties in wanting to redact certain paragraphs that have not been discussed above, counsel for the Third Accused would not object. If there are conflicts with the paragraphs other parties want redacted and the paragraphs suggested for inclusion, Defence counsel would exert good faith efforts to accommodate all parties involved.

28. One possibility, if there is objection to the introduction of these documents, is introducing the document into evidence for the limited purpose of exonerating the Third Accused and prohibiting its use for any other purpose. There is precedent in this exercise, as admitting an exhibit into evidence for limited purposes has already been accepted by the Trial Chamber earlier in this case, when it accepted the redacted version of the UNAMSIL Board of Inquiry Report.²⁶

C. Relevance and Overall Materiality of the Documents

29. The Board of Inquiry Report and the statement made by Major Ganase should be given serious consideration for two reasons: firstly, both were recorded within a few months of the events of May 2000. A witness is far more likely to remember events with greater specificity 6 months after an event than 6 years later. Secondly, the document is an official one, originating from the UNAMSIL itself. As a result, it is of high reliability.²⁷

30. Both proposed exhibits relate to the abduction of one Major Maroa, a KENBATT officer at the Makump DDR camp on 1 May 2000. Major Ganase testified that, while other RUF abducted Maroa, Augustine Gbao assisted them by escorting Major Maroa to the Teko Barracks.²⁸

31. The two proposed exhibits, however, fail to describe Augustine Gbao's involvement in any UNAMSIL abductions. The case of the Third Accused is that he was not there at that time. Thus, it is supremely relevant to consider Major Ganase's failure to discuss Augustine Gbao's presence at the time he gave the statement to the Board of Inquiry.

32. In addition to potentially exonerate Augustine Gbao from any personal involvement in the abduction of the UNAMSIL peacekeepers, by not mentioning Augustine Gbao, the two proposed exhibits also potentially negate the alleged responsibility of the Third Accused under the Prosecution's theory of Joint Criminal Enterprise. Had the Third Accused played a substantial role in the confrontation between UNAMSIL peacekeepers and the RUF, one would surmise that it would have been mentioned in the UNAMSIL Board of Inquiry Report, which it was not.

²⁶ Trial Chamber Decision on the UNAMSIL Board of Inquiry, p.4 para.7.

²⁷ See *Prosecutor v. Blagojevic and Jokic*, Case No. IC-02-60-T, Decision on the Admission Into Evidence of Intercepted-Related Materials, 18 December 2003, para.15.

²⁸ RUF transcripts of 20 June 2006, p.31.

33. It is submitted that, in view of their strong probative value, the admission of the two proposed additional exhibits into evidence would materially advance the proceedings and would assist the Trial Chamber in determining the truth as far as the individual criminal responsibility of the Third Accused is concerned.

34. Defence Counsel therefore requests the Trial Chamber to admit the two proposed exhibits into evidence, for the strictly limited purposes of assessing the individual criminal responsibility of the Third Accused in relation to counts 15 to 18 of the RUF Indictment.

V. Conclusion

35. Defence Counsel requests leave from the Trial Chamber to add the partially unredacted version of the UNAMSIL Board of Inquiry Report 00/19 of 20 September 2000, and the statement of Major Ganase contained in Annex Q of the Board of Inquiry Report to its exhibit list.

36. Should leave be granted, the Defence for the Third Accused requests the Trial Chamber to admit the two documents into evidence.

Done at Freetown, Friday 16 May 2008.



Defence Counsel for Augustine Gbao

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pp Scott Martin

Table of Authorities

I. Special Court for Sierra Leone

A. Basic Documents

Rules of Procedure and Evidence of the Special Court for Sierra Leone as amended at the Tenth Plenary on 19 November 2007.

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

1. Filings and Decisions

Doc. No. SCSL-04-15-T-320, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005 Paragraph 34.

Doc. No. SCSL-04-15-T-620, Decision on Prosecution Motion to Admit into Evidence a Document Referred to in Cross Examination, 2 August 2006. Page 3 paragraphs 2 and 3, page 5, page 4 paragraph 7.

Doc. No. SCSL-04-15-T-659, Scheduling Order Concerning the Preparation and the Commencement of the Defence Case, 30 October 2006. Paragraph 1; Order 2(e).

Doc. No. SCSL-04-15-T-705, Decision and Order on Defence Applications for an Adjournment of the 16th of February Deadline for Filing Defence Materials, 7 February 2007.

Doc. No. SCSL-04-15-T-724, Gbao-Filing of Defence Materials, 5 March 2007.

2. Transcripts

RUF Transcripts of 20 June 2006. Pages 31 and 32.

RUF Transcripts of 17 April 2008. Paged 52, 66, 75 and 86.

C. *Prosecutor v Sam Hinga Norman, Moinana Fofana, Allieu Kondewa, Case No. SCSL-2004-14-T (CDF case)*

Doc. No. SCSL-04-14-T-657, Decision on First Accused's Motion for Leave to Add Two Exhibits to the Exhibit List, 31 July 2006. Page 3 paragraphs 5 and 10, page 4 paragraphs 2, 4 and 8.

Doc. No. SCSL-04-14-T-785, Trial Chamber Judgment, 2 August 2007. Paragraph.253.

D. *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Bobor Kanu, Case No. SCSL-2004-16-T (AFRC Case)*

Doc. No. SCSL-04-16-T, Trial Chamber Judgment. Paragraph 99.

II. 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.

Prosecutor v. Blagojevic and Jokic, Case No. IC-02-60-T, Decision on the Admission into Evidence of Intercepted-Related Materials, 18 December 2003. Paragraph 15.



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Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the *Confidential* Case File.

Case Name: The Prosecutor – v- Sesay, Kallon & Gbao
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Document Type: -

- Affidavit
- Indictment
- Motion
- Order
- Other**
- Decision
- Response
- Application

Document Title: **Confidential Annexes A & B to Gbao Request for Leave to Add Two Documents to it's Exhibit List & to Admit them as Evidence**

Name of Officer:

Maureen Edmonds

Signed:

MEduards.