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SCSL-04-15-T
(30192-30205)

30192

**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 July 2007

THE PROSECUTOR

against

**ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO**

Case No. SCSL -2004-15-T

PUBLIC

**GBAO – REPLY TO PROSECUTION RESPONSE TO GBAO REQUEST FOR LEAVE TO CALL
ADDITIONAL WITNESSES AND FOR ORDER FOR PROTECTIVE MEASURES, WITH ANNEX A**

Office of the Prosecutor

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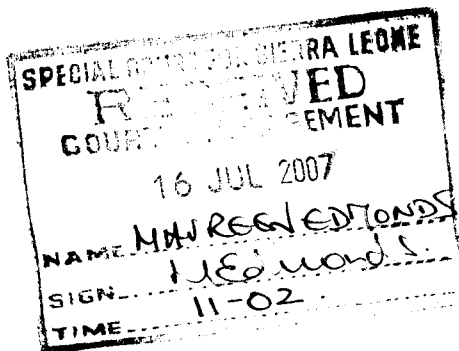
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1. On 4 July 2007, the defence team for Augustine Gbao filed a request for leave to call six additional witnesses and for order on protective measures.¹ On 11 July 2007 the prosecution filed a response, calling for the dismissal of the application.² Defence counsel hereby files his reply.
2. In its response, the prosecution argues that the defence team for the third accused has not exercised due diligence in the search of witnesses. More specifically, the prosecution submits that the late disclosure of the witnesses was caused by the previous non cooperation of the Accused and therefore that defence counsel has not demonstrated good cause. In addition, it is argued by the prosecution that the relevance of the proposed evidence to be given by DAG 103 and DAG 104 cannot be assessed by the Trial Chamber in the absence of summaries of their statements.

Due Diligence

3. In its response, the prosecution states that the defence advanced the argument that 'because Gbao refused to recognize the Court or cooperate with Defence counsel, so that investigations of witnesses did not start until the spring of 2006, he should be excused from having to exercise due diligence.'³ This has never been argued by defence counsel. At no time defence counsel claimed that the team was excused from having to exercise due diligence. To the contrary nearly half of the motion aims to establish that the team members have exercised due diligence and that good cause justifies the admission of the new witnesses.⁴ The steps taken by the investigator and the reasons why he could not secure their participation in the proceedings until May 2007 are all described in the defence motion.
4. The Prosecution focuses on stating that the late disclosure of the witnesses is due to Augustine Gbao's refusal to instruct defence counsel. The prosecution's response states 'There can be no suggestion that the late addition of witnesses was caused by anything other than Gbao's rejection of the court's authority'.⁵ Defence counsel reiterates that all due diligence has been exercised in order to secure the participation of

¹ Gbao - Request for Leave to Call Additional Witnesses and for Order for Protective Measures, with Annex A and Ex Parte Annex B, 4 July 2007. (Hereinafter 'The Defence Motion').

² Prosecution Response to Gbao Request for Leave to Call Additional Witnesses and for Order for Protective Measures, with Annex A and Ex Parte Annex B, 11 July 2007. ('The Prosecution's Response').

³ Prosecution's Response, para.7.

⁴ Defence Motion, paras.17-24.

⁵ Prosecution's Response, para.16.

the witnesses in the defence case. Contrary to what the prosecution claims,⁶ the reason why the witnesses could not have been added on the witness list earlier was that because some of them were unwilling to testify, while others could not be located, as explained in the motion.⁷

5. It was never the intention of counsel to use the non cooperation of the accused as a 'good cause' for the late disclosure of witnesses. This is clear from the language of the motion:⁸ the non cooperation of the Accused was raised as a preliminary issue, in a part separated from the arguments demonstrating good cause. However it was the intention of defence counsel to explain the particular situation to the court, i.e. that its ability to identify fundamental insider witnesses was impaired by the non cooperation of the Accused.
6. Investigations by defence counsel have started before May 2006, even though the previous lead counsel refused to appoint an investigator before that date. Defence counsel went to Makeni in July and October 2004 for the purposes of investigations. In January and April 2005 defence counsel visited Kailahun as well, and went again in October 2005.
7. Defence counsel traveled with the investigators in early May 2006 to Kailahun District. The team interviewed around eight witnesses from a list advised by the accused, four of whom gave statement. The investigator remained working in Kailahun after defence counsel left, until June 2006. In July 2006, defence counsel went to Makeni. Several witnesses were interviewed and three were taken statements from. In August, September and October 2006 the investigator went on investigations, meet several witnesses and took the statements of twenty witnesses. For the rest of the year 2006 the investigator traveled back and forth to Makeni and Kailahun. In January 2007 defence counsel traveled to Makeni and Kailahun with the investigator and met with several witnesses. The investigator was also given the names of other potential witnesses to meet. In February 2007 defence counsel went to Makeni and met with witnesses, some of them were taken statements/additional statements from.⁹

⁶ Prosecution's Response, paras. 7, 8, 14, 16 and 18.

⁷ Defence Motion, paras. 18-23.

⁸ See Defence Motion p.5, paras. 15, 16 and 38.

⁹ Defence counsel wishes to make clear that any references to specific numbers within this paragraph are made strictly without prejudice to the defendant's case.

8. The prosecution's claim that the evidence was available at the time of the witness list is incorrect,¹⁰ since the witnesses could either not be located or were unwilling to testify. As stated in the Motion, DAG 089, DAG 099, DAG 101 and DAG 103 were unwilling to testify as they feared they too would be indicted. Despite the efforts made by the investigator to secure their testimony, they refused to give a statement until recently.¹¹ DAG 104 could not be located by the investigator, despite steps taken to this aim.¹² These circumstances have nothing to do with the non cooperation of the Accused but rendered the evidence unavailable at the time of filing of the witness list.
9. It is true that the defence team knew about DAG 084 at the time of the filing of the witness list. He was not included because the team had decided not to call him. However after that date the defence team, for reasons pertaining to the defence strategy, reconsidered their position.
10. Prosecution argues that the team investigator, due to his role within the RUF, was in a good position to know about the RUF insider witnesses. This is true. As mentioned in the defence motion, the investigator got hired in April 2006¹³ and started right away to look for potential witnesses, including the ones concerned by the present request. Contrary to what the Prosecution implies,¹⁴ it has never been argued that the team did not know about the existence and the necessity of the proposed witnesses. It has been made clear in the motion that the unwillingness to testify of DAG 089, DAG 099, DAG 101 and DAG 103 and the difficulties in locating DAG 084 and DAG 104 prevented the defence team from securing their participation in the defence case. Defence counsel would like to emphasis that he has never had cause to doubt the proficiency and zeal of the team's investigator, in whom his confidence has never been in question.
11. It is also submitted that adding them on the witness list while they were unwilling to testify would have been seen as a betrayal of their confidence and would have endangered the chances the team would have to have them testifying in the future.

¹⁰ Prosecution's Response, para.16.

¹¹ Defence Motion, paras. 19, 20, 22 and 23.

¹² Defence Motion, para. 21.

¹³ Defence Motion, para. 15, footnote 17.

¹⁴ Prosecution's Response, para.17.

12. Showing good cause implies that the party requesting the addition of new witnesses provides a credible justification for failing its obligation to disclose.¹⁵ It is submitted that the unwillingness to testify of some of the witnesses and the difficulties in locating others demonstrate the unavailability of the evidence at the time of filing of the witness list, notwithstanding the exercise of due diligence by the defence team, thereby providing a credible justification allowing for the call of additional witnesses.¹⁶
13. Finally, defence counsel would like to note that the exercise of due diligence is one of the factors to be taken into account when deciding upon a request to call additional witnesses, but not the only one. The materiality of the testimony, the potential prejudice to the opposite party and the replacement and corroboration of evidence by the proposed evidence have also to be taken into account.¹⁷

Assessment of the Materiality of the Evidence Proposed

14. As a preliminary matter, defence counsel would like to inform the court that statements have been taken from DAG 103 and DAG 104 on 13 July 2007. Their summaries are included in Annex A of the present filing. As mentioned in the motion investigations regarding those two witnesses were going on,¹⁸ and in between the time of the filing of the motion and the deadline for the filing of this reply, statements had been taken from them. As a result, the Prosecution's argument that the Trial Chamber would be able to assess the relevance of a proposed witness' evidence only after a statement is taken from the witness became moot. However defence counsel feels that it is in the interests of justice to reply to the prosecution's argument.
15. Prosecution counsel, talking about DAG 103 and DAG 104, argues that 'the Trial Chamber's assessment of the relevance of a proposed witness' evidence can only be done after a statement is taken from the witness and the substance of the statement is put before the court'. There is no legal basis for this

¹⁵ Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, Trial Chamber I, 11 February 2005, para.34. ('RUF Decision 11 February 2005')

¹⁶ In addition, the unwillingness of a witness to testify has been accepted as a justification for the lateness of the presentation of the witness. *Nahimana case*, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, Trial Chamber I, 14 September 2001. ('Nahimana Decision of 14 September 2001')

¹⁷ Nahimana Decision of 26 June 2001, para.20. Repeated in the Prosecution's Response para.5.

¹⁸ Defence Motion, paras. 23 and 24.

argument. It is submitted that for the purpose of deciding upon the relevance of a witness in a decision on additional witnesses, a description of the evidence to be given is sufficient. In addition, the summary provided in the defence Motion,¹⁹ read in conjunction with the role of the DAG 103 and DAG 104 as described in the *Ex Parte* Annex B of the Motion, is sufficient for the purpose of allowing the court to assess the relevance of the evidence to be given by the proposed witnesses. Furthermore, parts of the indictment to which the evidence relate have been indicated and provide further details.

16. It was estimated necessary by defence counsel to inform the other party and the Court of its intent to call DAG 103 and DAG 104 despite the fact that statements had not been taken yet, since it was known that they were willing to testify. Defence counsel saw this as part of his duty of due diligence.
17. Contrary to what the Prosecution alleges, the evidence proposed is not unfounded nor is it unreliable. The summary of evidence for DAG 103 had been prepared following meetings between the investigator and the witness. The summary of evidence of DAG 104 was prepared taking into account the role and location of DAG 104 during the war. The reliability of both summaries results from the position of these two witnesses during the war, and contained in the *Ex Parte* Annex B of the defence motion. In addition defence counsel made clear that as soon as a statement would be taken, a detailed summary would be provided.
18. Defence counsel repeats that the proposed evidence meets the criteria of distinctiveness, uniqueness and directness established in case law.²⁰ Furthermore, special attention has been given to the fact that the proposed additional evidence is key evidence,²¹ which is the case for all of the six proposed additional witnesses.²²

¹⁹ Defence Motion, Annex A, paras. 13-18.

²⁰ *Prosecutor v. Ferdinand Nahimana, Hassan Ngeze, Jean Bosco Barayagwiza* ('Nahimana case'), Case No. ICTR-99-52-I, Decision on the Prosecutor Oral Motion for Leave to Amend the List of Selected Witnesses, Trial Chamber I, 26 June 2001, para.20. ('Nahimana Decision of 26 June 2001'); Decision on Prosecution Request for Leave to Call Additional Witnesses, Trial Chamber I, 29 July 2004, para.34. ('CDF decision of 29 July 2004')

²¹ Nahimana Decision of 14 September 2001, para.12.

²² See Annex A of the Defence motion.

Interests of Justice

19. It is the submission of defence counsel that the underlying reason why good cause has to be shown when applying for the new admission of witnesses is to avoid surprising the opposite party by calling witnesses who were previously available.²³ Indeed, the opposite party has to be given adequate time to prepare for the cross examination of the additional witnesses,²⁴ and any delay in the proceedings should be avoided.
20. In the present case, the presentation of the case for the third Accused will not start before the end of the year. The prosecution would have more than enough time to prepare for the cross examination of the witnesses.
21. Furthermore defence counsel has demonstrated the efforts made to substantially reduce the witness list.²⁵ In addition, defence counsel would like to emphasize that the proposed addition of these six witnesses will not have any negative effect of the proceedings. To the contrary, the calling of these important witnesses would assist in reducing the number of witnesses to be heard for the third Accused. Defence counsel would like to highlight that the absence of delay in the proceedings has been found to contribute to a finding of good cause.²⁶
22. Article 17 of the statute states that an Accused is entitled, as a minimum guarantee, 'to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.'²⁷ It is counsel's submission that refusing to allow for the addition of the above mentioned witnesses into the Gbao witness list would be contrary to this article and therefore contrary to

²³ *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo*, ('Delalic case'), Case No. IT-96-21, Decision on Confidential Motion to Seek Leave to Call Additional Witnesses, Trial Chamber, 4 September 1997, para.10. ('Delalic Decision of 4 September 1997')

²⁴ CDF decision of 29 July 2004, para.36; RUF decision of 11 February 2005, para.42; Nahimana Decision of 14 September 2001, para.17.

²⁵ Defence Motion, paras. 8 and 25. This has been considered in case law in the RUF decision of 11 February 2005, para.41; CDF- Decision on the First Accused's Urgent Motion for Leave to File Additional Witnesses and Exhibit Lists, Trial Chamber I, 6 April 2006, p.4, ('CDF Decision of 6 April 2006'); Decision on Fofana Application for Leave to Call Additional Witnesses, Trial Chamber I, 17 July 2006, p.3, ('CDF Decision of 17 July 2006'); Decision on Kondewa Application for Leave to Call One Additional Witness, Trial Chamber I, 3 October 2006, p.4. ('CDF Decision of 3 October 2006'); Nahimana Decision of 14 September 2001, para.18.

²⁶ See Defence Motion para.14, footnote 16. See also Nahimana Decision of 14 September 2001, para.19.

²⁷ Article 17 SCSL Statute.


the interests of justice. The proposed witnesses are of utmost importance for the defence case, and their acceptance would not impact the proceedings or the preparation of the prosecution.

23. Defence counsel also wishes to emphasize the importance for the Court to use a flexible approach when dealing with the management of witnesses, and to adapt its decision to the particular circumstances of the case.²⁸

Conclusion

24. Defence counsel submits that there is no reason for the court to refuse the granting of the motion. It has been demonstrated that due diligence was exercised in the search for witnesses and that the witnesses are of extreme relevance to the case. It is submitted that the interests of justice require the chamber to allow the calling of DAG 084, DAG 089, DAG 099, DAG 101, DAG 103 and DAG 104. Taking into account the fundamental importance of the proposed witnesses for the defence of the third accused, and in the absence of any impact on the proceedings if the motion is granted, it is submitted that refusing to grant the present request would violate the rights of the Accused and would be contrary to the interests of justice.
25. Defence counsel also reiterates his request for extension of the previously granted protective measures to the proposed additional witnesses.

Defence Counsel for Augustine Gbao, 16 July 2007

lea Kulincuski 

PP John Cammegh

²⁸ The ICTY noted the importance to use a flexible approach when dealing with the management of witnesses. Delalic Decision of 4 September 1997, para.7.

List of Authorities

I. Special Court for Sierra Leone

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

- Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, Trial Chamber I, 11 February 2005.
- Gbao- Request for Leave to Call Additional Witnesses and for Order for Protective Measures, with Annex A and Ex Parte Annex B, 4 July 2007. (Hereinafter ‘The Motion’).
- Prosecution Response to Gbao- Request for Leave to Call Additional Witnesses and for Order for Protective Measures, with Annex A and Ex Parte Annex B, 11 July 2007. (‘The Prosecution’s Response’).

B. **CDF case** (*Prosecutor v Sam Hinga Norman, Moinana Fofana, Allieu Kondewa, Case No. SCSL-04-14-T*)

- Decision on Prosecution Request for Leave to Call Additional Witnesses, Trial Chamber I, 29 July 2004. (‘CDF decision of 29 July 2004’)
- Decision on the First Accused’s Urgent Motion for Leave to File Additional Witnesses and Exhibit Lists, Trial Chamber I, 6 April 2006. (‘CDF Decision of 6 April 2006’)
- Decision on Fofana Application for Leave to Call Additional Witnesses, Trial Chamber I, 17 July 2006. (‘CDF Decision of 17 July 2006’)

- Decision on Kondewa Application for Leave to Call One Additional Witness, Trial Chamber I, 3 October 2006. ('CDF Decision of 3 October 2006')

II. International Criminal Tribunal for Rwanda

- *Prosecutor v. Ferdinand Nahimana, Hassan Ngeze, Jean Bosco Barayagwiza* ('Nahimana case'), Case No. ICTR-99-52-I, Decision on the Prosecutor Oral Motion for Leave to Amend the List of Selected Witnesses, Trial Chamber I, 26 June 2001. ('Nahimana Decision of 26 June 2001')
- *Nahimana case*, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, Trial Chamber I, 14 September 2001. ('Nahimana Decision of 14 September 2001')

III. International Criminal Tribunal for the Former Yugoslavia

- *Prosecutor v. Zejnil 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, ('Delalic Decision of 4 September 1997').

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ANNEX A

Summary of Expected Testimony of DAG 103 and DAG 104

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DAG 103

1. The witness will testify about the area of Kailahun District.

2. The witness was a high ranking RUF. He was within the Military Police ('MP') until the end of the war, and can testify that Augustine Gbao was never a MP. Augustine Gbao was first the secretary to Foday Sankoh in Kailahun. He was later promoted overall IDU commander and then overall security commander. His role was to investigate and recommend punishments for war criminals.
The witness will explain that the role of the MPs was to arrest and detain the suspect, and to hand them over to the IDU for investigations. The witness will explain that sometimes a Joint Security Board of investigations would be created, comprising the IDU, the MP, the IO, the G5 and others. It investigated cases and made reports to Augustine Gbao, as he was the overall IDU/Security commander. These reports were transmitted to the relevant authorities for necessary action. In some cases the MP and the G5 would only copy Augustine Gbao when they sent reports to the higher authorities like Foday Sankoh or Mosquito. Every order was coming from them. Even as the chairman of the JSB, Augustine Gbao did not have any control over the MP unit.
According to the witness Augustine Gbao did not have any power as overall commander. He was placed in this position because the higher authorities did not want someone that could be challenging their actions. The witness will also be describing and explaining the individual units operations in the RUF, attesting that Augustine Gbao was nothing within the RUF hierarchy.

3. The evidence to be given by DAG 103 relates to paragraphs 29, 32 and 39 of the indictment. The witness testimony also relates to all the counts contained in the indictment, since his testimony concerns command responsibility.

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DAG 104

4. The witness will testify about the area of Kailahun District.
5. The witness was in Kailahun when the rebels entered the city. At one point the RUF was looking for educated people who knew to read and write, and so the witness presented himself. The witness was within the MP unit until the end of the war.

The witness knows Augustine Gbao since 1996. He was introduced to him as overall IDU commander and was later promoted chairman to the Joint Security Board. However Augustine Gbao was not in command of the security units within the RUF. They all had their own representatives into the JSB and reported to their own individual commanders. All the individual overall commanders (MP, IO, G5, IDU...) did not send their reports to Augustine Gbao but to Foday Sankoh (and later Sam Bockarie).

The role of Augustine Gbao was only to investigate and recommend punishment for war criminals. He worked hand in hand with the G5 to make sure that civilians were not harassed or molested. Augustine Gbao was also against the use of civilians against their wishes. Especially, he was against using civilians to work on the air stripe in Buedu.

Augustine Gbao did not agree with the execution of the 65 alleged Kamajors in Kailahun. Mosquito did not like that he opposed to the execution and decided to send him to Buedu. The witness was the one to whom Mosquito gave the instruction to send men to watch Augustine Gbao working on the Bunumbu-Kono highway. The witness was even threatened by Mosquito that if Augustine Gbao did not do the kind of hard labour he was supposed to, he (the witness) would be killed.

The witness will testify that when he came back at Kailahun after being at the Guinea- Sierra Leone border he saw a lot of people in the MP headquarters. He was told that they were Kamajors suspects who were there for investigations. 45 of them were released because they came from upper Bambara chiefdom. After the investigations by the JSB and recommendation by Augustine Gbao, it was recommended that the others would also be released and could go back to their villages.

Soon after, Augustine Gbao called the witness and asked him to escort him to Buedu, where Augustine Gbao met with Mosquito. When he came back from the meeting Augustine Gbao told the witness that Mosquito had said he would execute the balance 65 people in Kailahun. When Mosquito heard Augustine Gbao and the witness saying that this was wrong, Mosquito threatened the witness that he would be killed if he did not execute his orders.

The following morning the 65 Kamajors suspects were gathered because Mosquito said he would kill them at 10am. Ten of them were brought to Mosquito, who shot two of them and gave the order to his men to kill the remaining eight. He then gave the order to Vandi Kosia and Samuel Kpulleh (Sankulleh) to execute the balance 55 left. The witness did not see Augustine Gbao there.

The witness will also testify that Augustine Gbao was very insignificant within the RUF movement. He has never been a MP Commander. He never had any control over the RUF units like the MP, G5, IO and blackguards. All these units had their own commanders and they reported directly to the leader.

The witness will also testify on the dictatorial rule of Mosquito (Sam Bockarie) in Kailahun and will describe the arguments that occurred between Sam Bockarie and Augustine Gbao, following Augustine Gbao's investigation of certain suspects. .

6. The evidence to be given by DAG 104 relates to paragraphs 17, 29, 31- 32, 38- 39 and 41-43 of the indictment, as well as to counts 3-4 para. 49 and to count 13 para.74.