

SCSL-04-15-T (32090-32085)

SPECIAL COURT FOR SIERRA LEONE

Freetown -- Sierra Leone

TRIAL CHAMBER I

Before:

Hon. Justice Benjamin Itoe, Presiding

Hon. Justice Bankole Thompson

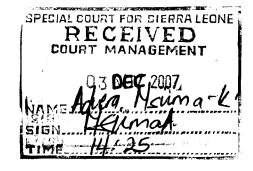
Hon. Justice Pierre Boutet

Registrar:

Mr. Herman von Hebel

Date filed:

3 December 2007



THE PROSECUTOR

v.

Issa Hassan Sesay Morris Kallon Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

GBAO-REQUEST FOR LEAVE TO CALL TWO ADDITIONAL WITNESSES AND FOR ORDER FOR PROTECTIVE MEASURES, WITH ANNEX A AND EX PARTE ANNEX B

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1. Pursuant to Rule 73ter(E) of the Rules of Procedure and Evidence (RPE), Defence counsel for Augustine Gbao hereby files an application for leave to add two witnesses on its witness list, to testify on behalf of the Third Accused. A summary of the evidence to be given by the proposed additional witnesses can be found in Annex A of the present filing. A description of the role and position of the proposed additional witnesses can be found in Ex Parte Annex $B.^2$

Procedural History

- 2. On 5 March 2007 the Defence for the Third Accused filed its first witness list.³ It contained 66 core witnesses (including one 92bis) and 13 back-up witnesses.
- 3. On 28 March 2007 the Trial Chamber ordered each of the Defence teams to file any reviewed and reduced witness list. 4 On 16 April 2007 a reduced witness list was filed by the Defence team for Augustine Gbao, which contained 55 core witnesses (including one 92bis) and 13 back-up witnesses.5
- 4. On 4 July 2007 the Defence team for Augustine Gbao filed a request for leave to call six additional witnesses and for an order extending the existing protective measures to those new witnesses.⁶ On 16 October 2007 the Trial Chamber granted the requests and ordered the

¹ Rules of Procedure and Evidence of the Special Court for Sierra Leone as amended at the tenth Plenary on 19

² The role and position of the proposed witnesses during the conflict in Sierra Leone will substantially assist the Trial Chamber in deciding as to whether to allow the Defence to call them. However, since DAG 110 and DAG 111 were high ranking RUF, a description of their position will lead to their identification. As a result, the above mentioned information is filed Ex Parte.

Prosecutor v. Sesay, Kallon and Ghao, Doc. No. SCSL-2004-15-T-724, Gbao-Filing of Defence Materials, 5 March 2007. This was done following the order of the Trial Chamber on 30 October 2006. (Doc. No. SCSL-2004-15-T-659, Scheduling Order Concerning the Preparation and Commencement of the Defence Case of 30 October 2006, paragraph 1). The original deadline of 16 February 2007 was then extended to 5 March 2007 (Doc. No. SCSL-2004-15-T-705, Decision and Order on Defence Applications for an Adjournment of 16th February Deadline for Filing of Defence Materials, 7 February 2007).

Prosecutor v. Sesay, Kallon and Gbao, Doc. No. SCSL-2004-15-T-746, Consequential Orders Concerning the Preparation and the Commencement of the Defence Case, 28 March 2007.

⁵ Prosecutor v. Sesay, Kallon and Gbao, Doc. No. SCSL-2004-15-T-753, Gbao – Filing of Revised Witness List and Revised Indictment Chart in Accordance with Court Order of 28 March 2007, 16 April 2007.

⁶ Prosecutor v. Sesay, Kallon and Gbao, Doc. No. SCSL-2004-15-T-805, 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.

Defence to file a core and a back-up updated witness list. 7

5. On 26 October 2007 the Defence for the Third Accused filed its updated and reduced witness list, as well as an updated indictment chart.8 The current witness list contains 20 core witnesses as well as 6 back-up witnesses. Amongst those 26 witnesses, two will testify under rule 92bis.

Applicable Law

6. The rule applicable to the addition of witnesses to the witness list is rule 73ter(E) RPE, which reads as follow:

After commencement of the defence case the defence may, if it considers it to be in the interests of justice, move the trial chamber for leave to reinstate the list of witness or to vary its decision as to which witness will be called.

- 7. An analysis of case law reveals that two principles should be taken into account when deciding upon the admission of new witnesses. Firstly, good cause has to be shown by the requesting party: a credible justification for failing to disclose the new witnesses within the time limits has to be provided.9 Secondly, it has to be demonstrated that acceptance of the additional witnesses would serve the interests of justice. 10
- 8. Case law also shows that several elements can be taken into account when deciding upon whether to grant a request for additional witnesses. In assessing the 'interests of justice' and

Prosecutor v. Sesay, Kallon and Gbao, Doc. No. SCSL-2004-15-T-841, Decision on Gbao Request for Leave to Call Additional Witnesses and for Order for Protective Measures, 16 October 2007, Dispositions. ('RUF Decision of 16 October 2007').

⁸ Prosecutor v. Sesay, Kallon and Gbao, Doc. No. SCSL-2004-15-T-854, Gbao-Filing of Updated and Reduced Witness List, 26 October 2007.

Prosecutor v. Sesay, Kallon and Gbao, Doc. No. SCSL-2004-15-T-320, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005, para.34. ('RUF Decision of 11 February 2005').

Rule 73ter(E) RPE. See also Prosecutor v. Ferdinand Nahimana, Hassan Ngeze, Jean Bosco Barayagwiza, Case No. ICTR-99-52-I, Decision on the Prosecutor Oral Motion for Leave to Amend the List of Selected Witnesses. 26 June 2001 ('Nahimina Decision of 26 June 2001'), paras. 17 and 19. Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Case No. ICTR-98-41-T, Decision on Bagosora Motion to Present Additional Witnesses and to Vary its Witness List, 17 November 2006, para.2.

'good cause' the Chamber should consider the materiality of the testimony, the complexity of the case, the possible prejudice to the Defence/Prosecution resulting from the addition of the witnesses (including the element of surprise), on-going investigations as well as replacements and corroboration of evidence by the additional witnesses.11

- 9. In other words, the Chamber has to be satisfied that:
 - i. The circumstances why the leave for additional witness is sought are directly related and material to the fact in issue;
 - ii. The facts to be testified upon by the new witnesses are relevant to determine the issue at stake and would contribute to serving the overall interest of law and justice;
 - iii. That granting the leave would not prejudice the right of the Accused to a fair and expeditious trial;
 - iv. That the evidence could not have been discovered or made available at a point earlier in time notwithstanding the exercise of due diligence. 12
 - 10. Additional factors include sufficiency and time of disclosure of the witness information, as well as the probative value of the proposed testimony. 13 The absence of delay in the trial proceedings also contributes to a finding of 'good cause'. 14
 - 11. In sum, the consideration for additional witnesses requires a close analysis of each witness, the Defence/Prosecution ability to make an effective cross-examination and of the justification given for the addition of witnesses.

¹¹ Nahimina Decision of 26 June 2001, para. 20; See also Prosecutor v Sam Hinga Norman, Moinana Fofana, Allieu Kondewa, Case No. SCSL-04-14-T, 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'), and RUF decision of 11 February 2005, para. 25.

¹² RUF Decision of 11 February 2005, para.35.

¹³ CDF Decision of 29 July 2004, para.17.

¹⁴ Nahimana case, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, ('Nahimina Decision of 14 September 2001'), para.19.

SUBMISSIONS

Good Cause

- 12. DAG 110 was named by Augustine Gbao as well as by other Defence witnesses. It was very difficult for the team investigator to trace him. Each time he went upcountry and looked for DAG 110, the investigator was told that DAG 110 was in Freetown, and when he was in Freetown he was told that DAG 110 was upcountry.
- 13. The investigator met DAG 110 randomly in the streets of Freetown in May 2007, and was told by the witness that he needed some time for consideration as to whether or not he will testify for Augustine Gbao.
- 14. DAG 110 informed the investigator that his family members prevented him from testifying before the Special Court. They were strong SLPP supporters and had warned him not to have anything to do with the RUF.
- 15. In addition, due to his high and responsible position within the RUF, DAG 110 feared that if he were to come to testify before the Special Court in the RUF case he would be indicted too.
- 16. DAG 110 eventually accepted to testify for Augustine Gbao and a statement was taken from him on the 24th of November 2007.
- 17. DAG 111 was mentioned by the client and other Defence witnesses; however the investigator could not find his address and contact number. He only got to know that DAG 111 was living in Freetown in October 2007. At that time, the team investigator was told about the exact address of DAG 111 and went there several times but could not meet with the witness as he was not present. The witness is a poda poda driver and it was therefore very difficult for the investigator to find him.
- 18. The investigator unexpectedly saw DAG 111 in November 2007 on the streets of Freetown,

and DAG 111 gave the investigator his phone number.

- 19. However, DAG 111 was unwilling to appear as a Defence witness before the Special Court. Since he was a first line spectator during the UNAMSIL abduction, the witness feared that criminal proceedings would be instigated against him by the Special Court.
- 20. DAG 111 felt that testifying for the Defence in the RUF trial while the SLPP was still in power could have made it difficult for him to be employed.
- 21. The investigator is still in the process of obtaining a statement from DAG 111, which should be done in the coming week.
- 22. Since DAG 111 recently expressed his willingness to testify, Defence counsel for the Third Accused feels it necessary to disclose his existence and appeal for leave to call him as a Defence witness for the Third Accused, while disclosing a summary of the evidence expected to be given in court.15

Interests of Justice

- 23. DAG 110 was a high level individual working with the RUF. He was working in close relation with the RUF business/trade programmes and will therefore be able to provide first hand information on the issue. He will be able to describe the trading system of the RUF at the Guinean border. 16
- 24. DAG 111 was very close to Augustine Gbao during the war, especially during the time he was in Makeni. DAG 111 will be able to provide detailed evidence as to Augustine Gbao's alleged involvement in the UNAMSIL abduction.17

¹⁵ A detailed summary will be filed once a statement is being taken from the witness.

¹⁶ See Annex A for a detailed summary of DAG 110 evidence.
¹⁷ Id.

25. Both DAG 110 and DAG 111 will testify on the role of Augustine Gbao during the conflict.

26. Due to their particular position during the conflict, DAG 110 and DAG 111 will provide the court with unique and relevant evidence. In addition to corroborate evidence to be provided by other Defence witnesses, the evidence to be provided by DAG 110 and DAG 111 relate to several counts of the indictment and counter allegations by several Prosecution's witnesses. It is further submitted, due to their position during the conflict that took place in Sierra Leone, the evidence to be provided by DAG 110 and DAG 111 is of high probative value, which has been recognised as relevant when deciding upon a request to call additional witnesses.18

27. 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.19

28. Taking into account the time estimate provided by the first and second accused for the presentation of their respective cases, it is likely that the presentation of the Defence case for the Third Accused will not start before summer 2008.20 Therefore, having two additional witnesses testifying for the Third Accused will not impair the ability of the Prosecution and of the other Defence teams to prepare for the cross examination of DAG 110 and DAG 111 and should therefore be allowed.

29. It is submitted that allowing DAG 110 and DAG 111 to testify in the case of the Third Accused, with regards to the quality of evidence they could provide, would serve the interests

¹⁸ RUF Decision of 16 October 2007, para. 17. 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.

para.7.

20 According to the estimates provided during the status conference of 27 November 2007, the case of the Third

According to the estimates provided during the status conference of 27 November 2007, pp. 4, 16, 22 Accused would not start before, at best, the 2008 summer. RUF Transcripts of 27 November 2007, pp. 4, 16, 22 and 26-27.

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of justice and would assist the Chamber in deciding upon the individual criminal responsibility of the Third Accused. Their addition to the witness list for Augustine Gbao should therefore be allowed.

PROTECTIVE MEASURES

- 30. The Defence counsel also requests the pre-existing protective measures previously granted to witnesses that are testifying for Augustine Gbao, as listed in paragraph 43 of the Trial Chamber's Decision of 1 March 2007, ²¹ to be extended to the proposed additional witnesses.
- 31. It was recognised that the situation in Sierra Leone warrants the grant of protective measures for witnesses residing in Sierra Leone.²² DAG 110 and DAG 111 fall within the category of witnesses to whom the Trial Chamber has granted 'blanket protective measures'. 23
- 32. Defence counsel reiterates it previous argument that, as the presentation of the Defence case for the Third Accused is not likely to start before summer 2008, the disclosure of the identity and location of the witnesses and the potential for fear being generated from investigation by the Prosecution or other Defence teams places the witnesses and the Gbao Defence case in unnecessary jeopardy.
- 33. In addition, the important role played by DAG 110 and DAG 111 during the conflict in Sierra Leone increases their vulnerability to be identified and possibly to have their safety endangered.²⁴
- 34. It is submitted that if their identity is revealed the witnesses could refuse to testify, which would also impair the right of the accused to have witnesses testifying on his behalf.²⁵

²¹ Prosecutor v. Sesay, Kallon and Gbao, Doc. No. SCSL-2004-15-T-716, Decision on Gbao Defence Motion for Immediate Protective Measures and Confidential Motion for Delayed Disclosure and Related Measures for Witnesses, trial chamber I, 1 March 2007, para. 43.

²² *Id*, para. 32. See also RUF Decision of 16 October 2007, para. 21.

Prosecutor v. Sesay, Kallon and Ghao, Doc. No. SCSL-2004-15-T-316, Ruling on the Prosecution's Application for the Entire Testimony of Witness TF1 362 to be Heard in Closed Session, Trial Chamber I, 11 May 2005, para. 8

CONCLUSION

35. Defence Counsel requests the leave of the Court to add DAG 110 and DAG 111 to its list of Defence witnesses. It is submitted that the Defence showed that it exercised good cause in attempting to secure the participation of DAG 110 and DAG 111. It is further submitted that allowing these two witnesses to testify for the Third Accused would serve the interests of justice.

Done at Freetown on Monday the 3rd of December 2007

John Camrhegh,

Defence Counsel for Augustine Gbao.

²⁵ Article 17(4) (e) of the Statute of the Special Court of Sierra Leone.

List of Authorities

1. Special Court for Sierra Leone

A. Basic Documents

Statute of the Special Court of Sierra Leone.

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

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

Doc. No. SCSL-2004-15-T-320, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005, paragraphs 4, 25 and 35.

Doc. No. SCSL-2004-15-T-316. Ruling on the Prosecution's Application for the Entire Testimony of Witness TF1 362 to be Heard in Closed Session, Trial Chamber I, 11 May 2005, paragraph 4.

Doc. No. SCSL-2004-15-T-659. Scheduling Order Concerning the Preparation and Commencement of the Defence Case of 30 October 2006, paragraph 1.

Doc. No. SCSL-2004-15-T-705. Decision and Order on Defence Applications for an Adjournment of 16th February Deadline for Filing of Defence Materials, 7 February 2007.

Doc. No. SCSL-2004-15-T-716, Decision on Gbao Defence Motion for Immediate Protective Measures and Confidential Motion for Delayed Disclosure and Related Measures for Witnesses, trial chamber I, 1 March 2007, paragraph 43.

Doc. No. SCSL-2004-15-T-724, Gbao-Filing of Defence Materials, 5 March 2007.

Doc. No. SCSL-2004-15-T-746, Consequential Orders Concerning the Preparation and the Commencement of the Defence Case, 28 March 2007.

Doc. No. SCSL-2004-15-T-753, Gbao - Filing of Revised Witness List and Revised Indictment Chart in Accordance with Court Order of 28 March 2007, 16 April 2007.

Doc. No. SCSL-2004-15-T-805, 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.

Doc. No. SCSL-2004-15-T-841, Decision on Gbao Request for Leave to Call Additional Witnesses and for Order for Protective Measures. 16 October 2007, Dispositions, paragraphs 17 and 21.



Doc. No. SCSL-2004-15-T-854, Gbao-Filing of Updated and Reduced Witness List, 26 October 2007. RUF Transcripts of 27 November 2007, pp. 4, 16, 22 and 26-27.

C. 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 1, 29 July 2004, paragraph 16.

II. International Criminal Tribunal for Rwanda

Prosecutor v. Ferdinand Nahimana, Hassan Ngeze, Jean Bosco Barayagwiza, Case No. ICTR-99-52-l, Decision on the Prosecutor Oral Motion for Leave to Amend the List of Selected Witnesses, Trial Chamber I, 26 June 2001. paragraphs 17, 19 and 20.

Prosecutor v. Ferdinand Nahimana, Hassan Ngeze, Jean Bosco Barayagwiza, Case No. ICTR-99-52-I, 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, paragraph 19.

Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Case No. ICTR-98-41-T, Decision on Bagosora Motion to Present Additional Witnesses and to Vary its Witness List, 17 November 2006, paragraph 2.

III. International Criminal Tribunal for the Former Yugoslavia

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, paragraph 7.

PUBLIC

ANNEX A

Summary of Expected Testimony of the Proposed Additional Witnesses

DAG 110

Kailahun Crime Base

The witness was closely involved with trade at the Guinean-Sierra Leonean Border. As such, he will be able to give evidence as to the functioning of the trading and business activities of the RUF. DAG 110 will testify that the civilians were free to trade or barter for themselves; they were not forced by the RUF. The witness will also be able to give evidence on the Agricultural Unit, its role and functioning.

The witness will testify that Augustine Gbao was not involved in the collection of food items from civilians to be given to the government. He will testify that Augustine Gbao was strongly against the use of civilians as forced labour.

DAG 110 testimony will respond to the allegations of forced labour by the Prosecution's witnesses, especially TF1 108, TF1 141, TF1 330 and TF1 371, who testified that civilians were forced to carry loads to the trading site.

The witness will also talk about the purchase of ammunitions from the Guinean and the Liberians, and will also testify on the sale of diamonds, and will explain that Augustine Gbao had no control over these activities.

The witness knew Augustine Gbao as the overall IDU commander. He was investigating alleged criminals, whether soldiers or civilians. Augustine Gbao made recommendations to the higher authorities once he had finished his investigation. The witness will give evidence that Augustine Gbao did not have an important role in the RUF.

The evidence to be provided by DAG 110 relates to paragraphs 29, 30, 34, 37, 39, 43, counts 3-5 (paragraph 49), count 13 (paragraph 74) of the Indictment.

DAG 111

Makeni Crime Base

The witness was very close to Augustine Gbao and will be able to provide direct evidence of the events that led to the UNAMSIL Abduction as well as on the activities of Augustine Gbao during the incident. The witness will testify that Ishmael informed Augustine Gbao that the UNAMSIL had forcefully disarmed 5 of his RUF soldiers. Augustine Gbao and Ishmael then went to the UNAMSIL headquarters at Makinneh in order to discuss the situation with Colonel Ngondi. As this latter was not found, they drove to the DDR camp at Makumb to meet the commander there. DAG 111 will be able to describe what happened when Augustine Gbao came to the DDR camp and had a discussion with the DDR camp commander. He will also confirm that Augustine Gbao wanted to solve the issue diplomatically but that Kailondo (battlefront inspector), Col. John Peters. Col. Lion. Col. Komba Gbundema. Col. Momoh Aka alias Col. Mo were the ones responsible for the UNAMSIL abduction.

DAG 111 will also prove that Augustine Gbao was not in support of the arrest of the international workers who were brought to his house. They were arrested by Kailondo. DAG 111 will testify that when he saw them in his house, Augustine Gbao talked to them and explained to them that he was not involved in their arrest and that they should go to the people that arrested them. He sent them to Kailondo's house.

The evidence to be provided by DAG 111 relates to paragraphs 29, 33, 41, counts 15-18 of the Indictment.