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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: Mr. Herman von Hebel

Date: 10th of January 2008

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

SPECIAL COURT FOR SIERRA LEONE
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DECISION ON GBAO REQUEST FOR LEAVE TO CALL TWO ADDITIONAL WITNESSES AND FOR ORDER FOR PROTECTIVE MEASURES

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

SEIZED of the Gbao Request for Leave to Call Two Additional Witnesses and for Order for Protective Measures, with Annex A and *ex parte* Annex B filed by Defence Counsel for the Third Accused, Augustine Gbao, (“Defence”) on the 3rd of December 2007 (“Request”);

NOTING the Response to the Motion filed by the Office of the Prosecutor (“Prosecution”) on the 6th of December 2007 (“Response”);

NOTING that no Reply thereto was filed by the Defence;

MINDFUL of the Updated Witness List filed by the Defence on the 26th of October 2007;

MINDFUL of the Decisions of this Trial Chamber concerning the addition of witnesses and the granting of protective measures, including the Decision on Gbao Motion for Immediate Protective Measures and Confidential Motion for Delayed Disclosure and Related Measures for Witnesses, filed on the 1st of March 2007 (“Gbao Decision on Protective Measures”) and the Decision on Gbao Request for Leave to Call Additional Witnesses and for Order for Protective Measures, filed on the 16th October 2007 (“Gbao Decision on Additional Witnesses”) with Corrigendum filed on the 18th of October 2007;

PURSUANT to Articles 16 and 17 of the Statute of the Special Court (“Statute”) and Rules 26bis, 34, 69, 73^{ter} and 75 of the Rules of Procedure and Evidence (“Rules”);

HEREBY ISSUES THE FOLLOWING DECISION:

I. SUBMISSIONS OF THE PARTIES

1. The Request

1. The Defence seeks leave of the Trial Chamber to add two additional witnesses to its Updated Witness List.¹ In order to protect their identities the proposed witnesses have been given the pseudonyms DAG-110 and DAG-111.

2. The Defence submits that, in accordance with Rule 73ter (E) and with the jurisprudence of this Chamber, a Party wishing to call additional witnesses must satisfy two criteria: firstly, the Party must make a showing of “good cause”, providing the Chamber with a credible justification for the Party’s failure to disclose the proposed witnesses within the time limits;² secondly, the Party wishing to add witnesses to its witness list must satisfy the Chamber that addition of the new witnesses would serve “the interests of justice”.³

3. The Defence further submits that in assessing whether good cause has been shown and whether the addition of the witnesses would serve the interests of justice, 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 additional witnesses.”⁴ Other pertinent considerations include the probative value of proposed testimony, the sufficiency of time for the opposing Party to adequately prepare for cross-examination, the absence of delay and whether the Party seeking to add witnesses has exercised due diligence in its investigations.⁵

4. In relation to the Defence’s failure to include DAG-110 on its witness lists, the Defence submits that its investigators have had difficulty tracing the witness and that, when the proposed witness was located by chance, he was initially reluctant to testify before the Special Court for a variety of reasons, including the political leanings of his family and his own fear of indictment.⁶

¹ Request, para 1.

² *Ibid.*, para 7.

³ *Ibid.*

⁴ *Ibid.*, para 8.

⁵ *Ibid.*, paras 8-10.

⁶ *Ibid.*, paras 12-15.

DAG-110 eventually agreed to testify for the Third Accused, and a statement was taken from him on the 24th of November 2007.⁷

5. The Defence submits that DAG-110 was a high level individual working within the RUF and was closely involved with the trading and business activities of the RUF at the Guinea-Sierra Leone border.⁸ The Defence further states that DAG-110 will give “unique and relevant” exculpatory evidence, particularly in relation to paragraphs 29-30, 34, 37, 39, 43, 49 and 74 of the Indictment and including the charges proffered in Counts 3-5 (Unlawful Killings) and Count 13 (Abductions and Forced Labour).⁹

6. The Defence submits that the non-inclusion of DAG-111 in the witnesses lists filed by the Defence can be explained by the fact that the proposed witness was very difficult to locate because of his occupation as a poda-poda driver.¹⁰ When unexpectedly traced by an investigator in Freetown, DAG-111 informed the Defence that he was unwilling to appear as a witness before the Special Court because of his concerns that he might himself be the subject of criminal proceedings and that there might be political ramifications to his giving evidence that could affect his employment.¹¹ However, DAG-111 recently expressed his willingness to testify, and will give a statement to the Defence investigator shortly.¹²

7. The Defence also contends that DAG-111 was close to the Third Accused at the time of the abduction of UNAMSIL personnel and will give “unique and relevant” exculpatory evidence in relation to paragraphs 29, 33 and 41 of the Indictment, including the allegations contained in Counts 15-18 (Attacks on UNAMSIL Personnel).¹³

8. The Defence avers that it is unlikely that the Defence case for the Third Accused will open before the Summer of 2008 and that the addition of the two proposed witnesses will not impair

⁷ *Ibid.*, para 16.

⁸ *Ibid.*, para 23 and Annexes A and B.

⁹ *Ibid.*, para 26 and Annex A.

¹⁰ *Ibid.*, para 17. See the Updated Witness List filed by the Defence on the 26th of October 2007.

¹¹ *Ibid.*, paras 18-20.

¹² *Ibid.*, paras 21-22.

¹³ *Ibid.*, paras 24 and 26 and Annexes A and B.

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the ability of the Prosecution or the other Defence teams to adequately prepare for the cross-examination of DAG-110 and DAG-111.¹⁴

9. The Defence also requests that the pre-existing protective measures previously granted to witnesses scheduled to testify for the Third Accused be extended to the proposed additional witnesses.¹⁵ The Defence states that the situation in Sierra Leone warrants the grant of protective measures for witnesses resident in the State and reiterates that because the Defence case for the Third Accused is unlikely to start before the Summer of 2008, disclosure of the identity and location of the proposed witnesses would place the Gbao Defence case in “unnecessary jeopardy.”¹⁶ The Defence further submits that the important role played by DAG-110 and DAG-111 in the conflict increases their vulnerability and 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.”¹⁷

2. The Response

10. The Prosecution accepts the law on the addition of new witnesses as set out by the Defence, and agrees that paragraphs 12, 14-18, 20, 23-24 and 26 of the Request provide credible justification for the Defence’s failure to disclose the new witnesses within the time limits and demonstrate that the addition of DAG-110 and DAG-111 to the Defence witness list would serve the interests of justice.¹⁸ Further, the Prosecution submits that “based upon a review of the Gbao request that it has no objection to the addition of the witnesses sought or their being granted protective measures.”¹⁹

¹⁴ *Ibid.*, paras 27-28.

¹⁵ *Ibid.*, para 30.

¹⁶ *Ibid.*, paras 31-32.

¹⁷ *Ibid.*, paras 33-24.

¹⁸ Response, para 3-4. The Prosecution argues that paragraphs 13 and 19 of the Request do not meet the requirements as set down in the Request and the Response for the late addition of witnesses. Paragraph 13 of the Request states “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”. Paragraph 19 of the Request states that “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.”

¹⁹ *Ibid.*, para 6.

II. APPLICABLE LAW

1. Addition of Witnesses

11. Rule 73ter (E) of the Rules of this Court sets out the criteria for variation of a Defence witness list during the Defence phase of the trial. The Rule provides that:

After the 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 witnesses or to vary its decision as to which witnesses are to be called.

12. As to the application of this Rule, the Chamber recalls that in the Gbao Decision on Additional Witnesses rendered on the 16th of October 2007 it held that in order to ground a case for variation of its witness list in accordance with Rule 73ter (E), the Defence must show “good cause” and that such variation is “in the interests of justice”.²⁰ We held further, based on our own previous decisions and relying on jurisprudence of the ICTR, that the submissions of the Party seeking to modify its Witness List should be examined in the light of such factors as, *inter alia*, the materiality of the testimony, the complexity of the case, the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictments; the ability of the opposition to make an effective cross-examination of the proposed testimony, and the justification offered for the addition of the witness.²¹

2. Protective Measures

13. On the issue of protective measures, the Chamber has consistently affirmed that it possesses a discretion under Rule 75 to order appropriate measures to safeguard the privacy and

²⁰ Gbao Decision on Additional Witnesses, paras 11 and 14.

²¹ *Ibid.*, para 14. See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Request to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005, para 26, quoting *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis(E), 26 June 2003, para 14. See too *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July 2004, paras 28-32, *Prosecutor v. Nahimana, Ngeze and Barayagwiza*, ICTR-99-52-I, Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001, para 20 and *Prosecutor v. Nahimana, Ngeze and Barayagwiza*, ICTR-99-52-I, Decision on the Prosecutor’s Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, para 5.

security of victims and witnesses, provided that the measures are consistent with the rights of the Accused. However, we have also held that a condition precedent for exercising this discretion is that the party seeking protective measures must “provide evidence from sources other than its witnesses indicating an objective basis for assessing whether a threat to the witnesses’ security exists.”²²

III. DELIBERATIONS

1. Addition of Witnesses

14. Guided by the foregoing principles, the Chamber reiterates its view that it considers that the complexity of a trial may affect the ease with which material witnesses can be identified and their cooperation secured, and that in trials of this magnitude and complexity, some potential witnesses may be expected to manifest a reluctance to cooperate with investigators and to testify before the Court.²³ The Chamber accepts the reasons proffered by the Defence to justify the late addition of DAG-110 and DAG-111 to the Third Accused’s witness list and is satisfied that the Defence has shown good cause.

15. Having carefully considered the summaries of the proposed testimony of DAG-110 and DAG-111 provided by the Defence, the Chamber is satisfied that these witnesses may give relevant and material testimony as to the role of the Third Accused in relation to multiple counts of the Indictment, and particularly in relation to the abduction of UNAMSIL personnel.

16. Further, the Chamber recognises that the late addition of witnesses can potentially endanger the right of the opposing Party to make an effective cross-examination.²⁴ However, in the instant case we are persuaded that sufficient time is available to allow the other Parties to adequately prepare for cross-examination of the proposed witnesses. Accordingly, the Chamber is of the view that the addition of the proposed witnesses is in the interests of justice.

²² *Ibid.*, para 13. See also the Gbao Decision on Protective Measures, para 31.

²³ *Ibid.*, para 16.

²⁴ *Ibid.*, para 18.

2. Protective Measures

17. With regard to protective measures, the Chamber recalls its own previous stand that the security situation in Sierra Leone and West Africa warrants the granting of protective measures to victims residing within West Africa. For this reason, the Chamber has ordered blanket protective measures for all Defence witnesses in this category. Since both proposed witnesses fall within this category, and since the security situation has not changed so as to make such measures unnecessary, the Prosecution has made no objection to the grant of such measures. The Chamber therefore grants the measures solicited in respect of the proposed witnesses.

IV. DISPOSITION

FOR THESE REASONS, THE CHAMBER

GRANTS leave to call additional witnesses DAG-110 and DAG-111; and

CONSEQUENTIALLY ORDERS

- 1) that the existing protective measures ordered in this case for the Defence witnesses be extended to the aforementioned witnesses; and
- 2) that within 15 days of the present Decision the Defence file with the Court, with redactions as necessary, a “core” and a “back-up” Modified Witness List of all the witnesses that it intends to call, including:
 - (a) the pseudonym of each witness;
 - (b) a detailed summary of each witness’ testimony. The summary should, subject to any protective measures that have been ordered by the Chamber, be sufficiently descriptive to allow the Prosecution and the Chamber to fully appreciate and understand the nature and content of the proposed testimony;
 - (c) the points of the Indictment about which each witness will testify, including the exact paragraph/s and the specific count/s;

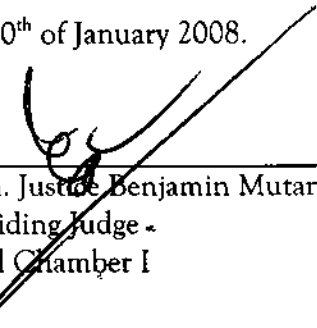
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- (d) the estimated length of time for each witness to testify and the language in which the testimony is expected to be given; and
- (e) an indication of whether the witness will testify in person or pursuant to Rule 92bis, 92ter or 92quater of the Rules.

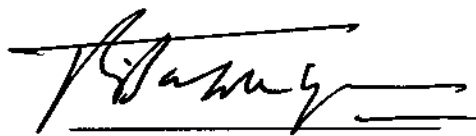
Done at Freetown, Sierra Leone, this 10th of January 2008.



Hon. Justice Pierre Boutet



Hon. Justice Benjamin Mutanga Itoe
Presiding Judge -
Trial Chamber I



Hon. Justice Bankole Thompson



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