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Summary

This week's proceedings touched on several important legal and procedural issues, particularly concerning representation for the third accused. The matter of representation was not seen in isolation: the issue invoked a debate in front of the Trial Chamber regarding the legal propriety of actions taken by the Principal Defender and his Office, as well as regarding the proper role of the Defence Office. The Principal Defender advocated for the addition of a competent Sierra Leonean counsel to the defence team in question, which is, at the present moment, composed entirely of international counsel. However, the relationship between lead counsel and the accused has seemingly been irreparably damaged, something that, according to Mr. O'Shea, was brought about by the actions of the Defence Office. Not only did these proceedings highlight tensions inherent in the accused's right to choose counsel, they also publicly exposed perceived fractures within the Defence Office, a lack of communication between the Office and assigned counsel and confusion over the actual role of the Office, all of which are likely to impact the quality of the defence.

The 5th week of the RUF trial session was also marked by the testimony of three prosecution witnesses. Two of the witnesses gave their evidence entirely in closed session, while Brigadier Ngondi of Kenya testified about the capture and killing of UNAMSIL troops in Makeni by RUF combatants in open session. He faced an extensive cross-examination by the three defence teams. Questions focused on the nature of the reports Ngondi relied on for his testimony as he himself was not an eyewitness to the events and on the UN forces' own adherence to the rules of combat.

Witness Profiles at a Glance

Witness TF1-174 continued testifying from the previous week. The witness' testimony was heard in its entirety in closed session and was completed on 28th March. The testimony focused on the Makeni crime base.

Witness TF1-165, Brigadier Leonard Ngondi, testified in open session in English. The 46 year-old General in the Kenyan Armed Forces has served with the army for the past 28 years. In 2000 he participated in a tour of duty in Sierra Leone and arrived in the country in February of that year. During the tour of duty he held the position of the Commanding Officer of his Kenyan battalion, which was part of UN mission in Sierra Leone (UNAMSIL). He testified about the alleged capture and subsequent killing of members of his battalion by the RUF in Makeni.

Witness TF1-168, the 68th witness called by the Prosecution, testified entirely in closed session beginning on March 31st. The insider witness' evidence related to both the general organization and command structure of the RUF as well as to specific crimes contained in the Indictment¹. The Bench noted that there was a seemingly excessive amount of background information provided by the witness, however testimony did become more relevant to the specific charges during the afternoon session. The cross-examination of the witness by the first accused is set to commence on Monday.

Representation of the Third Accused

On Monday morning Mr. Andreas O'Shea addressed the court and presented the reasons behind his application to withdraw as counsel for the third accused, Augustine Gbao. He explained that his application, submitted under rule 45(E) of the Rules of Evidence and Procedure², was a result of the difficult ethical position in which he found himself regarding his relationship with his client. He iterated a brief history of events that led him to his current application and he noted that Gbao had initially attempted to withdraw his entire legal team on the grounds that he did not recognize the legitimacy of the Special Court.³ More recently, the issue of Gbao's representation had once again come to a head, due to outside interference of which O'Shea had no knowledge and which he found greatly embarrassing.

The judges intervened at this point in the proceedings, asking that O'Shea clarify his position: given the advanced stage of the trial, the need to protect the rights of the accused and the need to avoid any undue delay in proceedings the nature of the application necessitated the utmost clarity. O'Shea thus proceeded to outline the series of events that had unfolded over the past few weeks, which had led him to his current application. He stated that, prior to his arrival in Freetown for the current RUF trial session, his client had been visited by two Sierra Leonean lawyers without his knowledge or consent. Upon arrival in Freetown he learnt that these visits had been facilitated by the Defence Office. He added that Gbao had indicated to him in a letter he received upon his return to Freetown that he wished to replace his legal team, although he stated that he did not take particular issue with John Cammegh, another member of the team. O'Shea also discovered that meetings he had seemingly had in confidence with staff from the Defence Office had subsequently been reported back to Gbao, in a manner in which he felt misrepresented his views. As a result, O'Shea claimed that his relationship with Gbao completely dissolved, due to the distrust generated, and he felt under an ethical obligation to withdraw from the case.

O'Shea further indicated that he felt excluded from correspondence between the Trial Chamber and the Principal Defender regarding his client's representation. He was only made aware of this correspondence a few minutes prior to the RUF Status Conference on 27 February 2006.

¹ Amended Consolidated Indictment, The Prosecutor vs. Issa Hassan Sesay et al., SCSL-2004-15-PT, 13 May 2004, available at <<http://www.sc-sl.org/Documents/SCSL-04-15-PT-122-6181-6191.pdf>>

² Available at <<http://www.sc-sl.org/rulesofprocedureandevidence.pdf>>

³ Trial Chamber I had subsequently rejected Gbao's application and the Appeals Chamber upheld this decision. Trial Chamber I, Decision on Application to Withdraw Counsel, SCSL-04-15-T, 6 July 2004, available at <http://www.sc-sl.org/Documents/SCSL-04-15-PT-182.pdf>. Appeals Chamber decision, Gbao – Decision on Appeal Against Decision on Withdrawal of Counsel, SCSL-04-14-T, 23 November 2004, available at <http://www.sc-sl.org/Documents/SCSL-04-15-T-285.pdf>. Chambers found that the exceptional circumstances required by Rule 45(E) had not been met.

The bench determined that the Principal Defender should make submissions on the matter, given his extensive involvement in the process. In his submission the following morning Mr. Nmehielle indicated that he was concerned about how the Defence Office, and the actions of its employees, were being presented in court and was thus thankful for the opportunity to dispel some of these misconceptions. He added that not only had counsel for Gbao undergone enormous stress during the period in question but that the Principal Defender and his staff had also suffered in their attempts to protect O'Shea from Gbao's anger and accusations.

The Principal Defender argued that the origins of the issue of Gbao seeking to withdraw his counsel preceded his tenure and accordingly, his office could neither have created the situation nor precipitated it. He further argued that losing counsel at this stage of the trial would not be in the best interests of the court or his Office. He therefore reiterated his suggestion to the Trial Chamber that a competent Sierra Leonean lawyer be added to the Gbao defence team, which is currently composed solely of international counsel

The Principal Defender then proceeded to give a chronological listing of events with supporting documentation. Nmehielle noted that after corresponding with the Presiding Judge he communicated to Gbao his recommendation that a local lawyer be appointed to the team, possibly as co-lead counsel, given the domestic dimensions of the case. He also indicated that neither he nor the Trial Chamber could withdraw and replace counsel themselves given the earlier decision by Trial Chamber I⁴, which was confirmed in the Appellate Chamber's decision on the same matter.

Justice Thompson sought to redirect the Principal Defender's submission by itemizing what he found to be the four key issues of judicial concern, which the Trial Chamber wanted addressed from the perspective of legal propriety. He asked the Principal Defender specifically to address (i) the allegation that the Defence Office had authorized visits to the third accused by outside counsel without the consent of assigned counsel; (ii) the allegation that the Defence Office communicated details of a privileged and confidential discussion with O'Shea to his client without his consent; (iii) the possibility that a Sierra Leonean lawyer selected for addition to the team was to become lead counsel despite the fact that the Principal Defender was privy to the Bench's disinclination to this arrangement; and (iv) the legal misconception as to the institutional role of the Office of the Principal Defender within the court system.

In addressing the first issue of judicial concern, Mr. Nmehielle stated that when assigned counsel are not in town, and requests are made for visitation, it is current practice for Duty Counsel to evaluate the request on counsel's behalf. On the 16th of February Gbao had requested the visit of a Sierra Leonean lawyer, Shears Moses, and Mr. Nmehielle indicated that Duty Counsel subsequently evaluated and approved the request. At the time of the visit the Principal Defender claimed that neither he nor duty counsel were aware that Moses was visiting in his legal capacity. It was after this visit that Mr. Nmehielle received a letter from Gbao in which he named Moses as his desired counsel. The Bench, however, seemed dissatisfied with this explanation and Justice Itoe remarked that, as it was not a family visit, the Defence Office should have further inquired as to why this person was visiting the accused. In addition, it appears there was a subsequent visit by Moses to the detention center, after the Defence Office had become aware that he was a lawyer.

In terms of the second issue raised, the Principal Defender denied ever having communicated any sort of privileged information (or mis-information) to Gbao. He indicated that Duty Counsel was in a better position to address this point. With respect to the institutional role of the Defence Office, an issue previously raised by O'Shea, Justice Boutet stated that he had asked both the previous Principal Defender, as well as the current one, for a submission on their interpretation of

⁴ Trial Chamber I, Decision on Application to Withdraw Counsel, SCSL-04-15-T, 6 July 2004, available at <http://www.sc-sl.org/Documents/SCSL-04-15-PT-182.pdf>

the Office's role. The Bench indicated that despite this ongoing request, and despite Mr. Nmehielle's insistence that he had filed such a document with the court, the Trial Chamber was still waiting for the report. Mr. Nmehielle then stated that he considered the Defence Office to represent the 'fourth pillar' of the court, alongside the Registry, Chambers and the Office of the Prosecutor.⁵

Duty Counsel for the RUF trial, Haddijatou Kah-Jallo, also had an opportunity to address the Trial Chamber with respect to her involvement in the events leading up to O'Shea's application to withdraw as counsel. She addressed the alleged incident of the disclosure of a privileged conversation between herself and O'Shea to O'Shea's client Gbao. She indicated that O'Shea had spoken to her about his concern that Gbao was interested in having Moses as counsel so that he could engage in fee splitting.⁶ However, Ms Kah-Jallo indicated that when she spoke to Gbao about concerns of fee splitting she did so without reference to her conversation with O'Shea. She added that she had spoken to defendants about fee splitting on previous occasions and it had already come up with Gbao with respect to the appointment of an investigator to his team. Duty Counsel also indicated that she had suffered significant verbal abuse from Gbao in the Defence Office's attempts to shield O'Shea from his client's anger as the Office firmly supported him being retained as counsel. She maintained that it was due to these efforts of the Office that Gbao had recently begun to cooperate with the court and his counsel. Mr Cammegh took offence to this point and indicated that his own efforts in this area had greatly contributed to Gbao's cooperative attitude. While the Trial Chamber attempted to keep proceedings focused on the legal issues involved, the submissions took on distinctively political overtones and often seemed to represent a battle of egos between the various actors.

Mr. O'Shea subsequently took the opportunity to rebut some of the Principal Defender's and Duty Counsel's comments. He asked a series of questions which went to the heart of the matter, including "why would a lawyer come to the detention center with a legal assistant if his purpose was not a legal one?"⁷ and "Why was I not informed?"⁸ He questioned why there was not a more extensive inquiry into the nature of the visit. Furthermore, O'Shea questioned how, in such a sensitive environment, a discussion that revolved around the delicate issue of fee-splitting be communicated back to the client and without the knowledge of assigned counsel.

It was obvious from O'Shea's series of questions that the appearance of the Principal Defender and Duty Counsel had not clarified the issues of legal propriety which had led O'Shea to make his application to withdraw as counsel. Indeed the presence of the Defence Office pointed to many underlying defence issues: the Office's proper role within the court structure, the nature of the relationship between Duty Counsel and the defendants as well as the Defence Office's relationship with counsel have been cause for concern throughout the trial and are yet to be resolved. These are all significant areas that are quite obviously having an impact on the work of

⁵ This view of the Defence Office, as an independent organ, is controversial given the earlier ruling made by the Appeals Chamber in which it was iterated that the Defence Office operates under the authority of the Registrar. Appeals Chamber Decision, *Decision on Brima-Kamara Defence appeal motion against Trial Chamber II majority decision on extremely urgent confidential joint motion for the re-appointment of Kevin Metzger and Wilbert Harris as lead counsel for Alex Tamba Brima and Brima Bazzy Kamara*. SCSL-04-16-AR730441, 8 December 2005.

⁶ Fee-splitting is a phenomenon that has been noted at several of the international criminal tribunals and investigations into it have been conducted at both the ICTY and ICTR. It occurs when counsel or an investigator enters into an agreement with the accused to give a percentage of their pay to the client or their family in return for employing them. This practice represents a severely unethical position that goes against the Rules of the Special Court and is specifically forbidden in Article 22 of the Code of Professional Conduct for Counsel With the Right of Audience Before the Special Court for Sierra Leone. While there are plenty of rumors that certain counsel and investigators engage in such an arrangement at the Special Court there is little concrete evidence.

⁷ Transcript, 28 March 2006, pg 54, lines 21-23

⁸ Transcript, 28 March 2006, pg 55, lines 6-7

the Defence Office, the welfare of the accused and their right to a fair trial. While the Defence Office has generally been recognized as an innovative aspect of the Special Court, it seemed clear from these court proceedings that the Office is mired in problems.

The Trial Chamber indicated that it will issue a decision on the representation of the third accused as quickly as possible.

Protective Measures

Before Witness TF1-165 began his testimony the Prosecution indicated that the witness would be testifying without protective measures, despite an earlier application to have these in place. However, Justice Boutet, in agreement with the Defence, stated that as the Trial Chamber had granted protective measures at the Prosecution's request, a submission that they had justified, it would be proper to make an application that effectively demonstrates that these grounds may not exist anymore. Upon hearing this instruction from the Bench, Mr. Bangura, counsel for the Prosecution, then reneged and stated that the Prosecution would prefer to keep the protective measures in place. The bench voiced their frustration with this attempt by the Prosecution to evade such a formal application by treating protective measures flippantly. Justice Itoe insisted that the principle of a public hearing must be upheld while Justice Boutet angrily admonished the Prosecution for making the use of protective measures into what he described as a game.

Mr. Bangura then, in accordance with the Trial Chamber's wishes, made an oral application for the testimony of Witness TF1-165 to be heard in open session. He justified this by arguing that as the witness is currently residing outside of Sierra Leone, protective measures were unnecessary. The Bench again admonished the Prosecution and stated that protective measures were not simply utilized because a witness lives in the country but rather that they are designed to protect a person's identity due to threats to self and to family. Jordash, counsel for the first accused, also weighed into the debate and asked for the Prosecution to review their witness list and make these kinds of decisions, regarding the use or removal of protective measures, before the witness is to testify. He noted that if such an application had been made in a timely manner the Defence could have properly investigated this witness by going to Kenya, where he is based, but that this was impossible as they were only privy to the identity of the next witness two days beforehand. Justice Boutet agreed with the necessity of a review and Judge Thompson further indicated that periodic mass reviews by the Prosecution were required so as not to prejudice the Defence. Jordash asked that all the UNAMSIL witnesses be reviewed overnight as access to their un-redacted statements could facilitate the cross-examination of both the current witness as well as subsequent witnesses. While the Prosecution's application was eventually granted by the Trial Chamber, thereby allowing the witness to testify publicly, they also stipulated that the Prosecution must immediately review its witness list, particularly witnesses of fact (which include victims of sexual assault and gender crimes). An Order to Review Current Protective Measures was subsequently issued by the Trial Chamber.⁹

While protective measures are invaluable in cases of true need, when used inappropriately protective measures can violate the principle of a public trial and acts to undermine both their importance as well as extraordinariness in this context. It also prejudices the ability of the opposing party to effectively cross-examine a witness and question their evidence in court. As such, it was critical that the Trial Chamber recognized the seriousness of the Prosecution's attempt to treat such measures without due regard.

Witness TF1-165

Brigadier Leonard Ngondi, the 67th witness called by the Prosecution in the RUF trial, testified in open session in English. The 46 year-old General has served in the Kenyan Armed Forces for the past 28 years. In February of 2000 he arrived in Sierra Leone on a tour of duty, for which he acted as the Commanding Officer of the Kenyan battalion that formed part of the UN Mission in

⁹ Order to Review Current Protective Measures, SCSL-04-15-T, 29 March 2006.

Sierra Leone (UNAMSIL). His evidence focused on the alleged capture and subsequent killing of members of his battalion by RUF forces in Makeni.¹⁰

Mr. Ngondi testified that his battalion's main tasks involved the implementation of the disarmament, demobilization and reintegration (DDR) of all parties to the conflict. The General stated that his responsibilities included assisting the DDR program through the provision of security for the reception centers established in the Makeni and Makumb camps and the facilitation of humanitarian operations carried out in the Bombali and Tonkolili districts.

Mr. Ngondi testified that as part of his work he met regularly with members of the RUF, including Sesay and Kallon, the first and second accused, and most frequently with Gbao, the third accused. The witness indicated that during such meetings with RUF commanders, they stated their unwillingness to have child combatants moved out of Makeni. Brigadier Ngondi then stated that the DDR program in Makeni did not commence on 17 April 2000, as planned. He testified that the RUF commanders organized the combatants into a large demonstration, during which they were armed, in order to show their discontent with the perceived lack of implementation of the Lomé Peace Accord. According to Ngondi, they also claimed that the political appointments the RUF had been promised had still not been allocated and that Foday Sankoh, the group's leader, was not given the respect he deserved. While some combatants began to report to the reception centers, where they were processed, disarmed and paid their dues, in early May there were subsequent troubles. The witness testified that Gbao and other RUF combatants showed up at the reception center angrily demanding that ten combatants and ten weapons be handed over as they claimed it was an RUF controlled area. This was reported to Ngondi by a member of his battalion who was present at the scene, who also indicated that Gbao was threatening to call in more combatants and close down the reception center. As the situation worsened Kallon arrived from Makeni and was reported to be wildly firing shots.

Brigadier Ngondi testified that during this crisis with the RUF at Makumb DDR camp in early May, several members of his battalion were taken captive by RUF forces, two members were killed and 7 injured. He further alleged that RUF combatants fired on the helicopter that had come to evacuate the injured men and continued to pursue UNAMSIL troops, which resulted in further casualties.

During the detailed cross-examination by Mr. Jordash, counsel for the first accused, questions focused on the secondhand nature of the accounts upon which Brigadier Ngondi was relying for his testimony. Jordash repeatedly pointed out that the witness had not seen the events in question himself and was dependent on hearsay accounts. Ngondi, however, disputed this assessment of his evidence and stated that he saw some of the events himself, received numerous reports from various sources and utilized the established military chain of command in order to gather as much reliable information as possible. He did admit however that he had never spoken to some of the soldiers involved in these attacks on UNAMSIL personnel after hostage situation had been resolved. Jordash also questioned the witness about whether any of the UNAMSIL troops had violated the mission's mandate, as based on UN Security Council Resolution 1289. Jordash iterated that the mandate only allowed for the use of force in instances of self-defence and suggested that this mandate was breached by members of UNAMSIL. The witness dismissed this suggestion and stated that all soldiers operated under the rules of conflict, which if breached would be met with serious consequences, and he further indicated that he was not aware of any incident where a Kenyan soldier had breached a UN mandate or any of the rules of engagement. Jordash also subsequently questioned the witness' claim that Issa Sesay was the 'leader of all combatants' as the witness only had contact with him starting in April, after operating in the area for several months. Jordash suggested that he would have had to first have contact with Foday Sankoh in order to get the required permission to operate in the this RUF-

¹⁰ The charge of 'Attacks on UNAMSIL Personnel' is contained in Counts 15-18 of the Consolidated Indictment. Available at < <http://www.sc-sl.org/Documents/SCSL-04-15-PT-12-6192-6202.pdf>>

controlled territory. Furthermore, Jordash clearly took issue with Brigadier Ngondi's suggestion that Sankoh was the political leader of the RUF while Sesay was in charge of the combatants.

The cross-examination of the witness by counsel for the second accused, Mr. Touray, followed along similar lines to Jordash's cross. Mr. Touray accused the witness of willfully disobeying RUF orders, while fully aware of the consequences, when the Brigadier proceeded with the DDR program without the consent of the RUF leaders. Mr. Touray went so far as to suggest that UNAMSIL headquarters was attempting to provoke a situation with the RUF given the increased movement of troops into the area, which he suggested only knowingly enflamed the situation. Touray also claimed that Kallon had informed Ngondi of Sankoh's desire not to disarm. Brigadier Ngondi denied such an intent to provoke and reiterated his mandate, which involved the facilitation of DDR programs through the provision of security. With respect to his client, Mr. Touray suggested that the witness was mistaken in having identified Kallon as involved in a dispute with a member of the military observers group. Touray claimed that this incident had actually involved the overall commander of the military police in Makeni who also had the last name Kallon. The witness, however, again identified the accused, Morris Kallon, as the individual involved in the fight and he further indicated that he was second in command to Sesay in the RUF hierarchy.

Counsel for the third accused began his cross-examination of the witness on the morning of the 31st. Questions focused on the witness' contact with Gbao and their regular weekly meetings in Makeni in 2000. Ngondi identified Gbao as the overall security commander of the RUF and testified that Gbao had often facilitated the movement of NGOs in the area and had also attempted to calm fellow commander, Morris Kallon, during the hostage taking situation. Cammegh again focused on the fact that Ngondi's testimony relied on the hearsay accounts of other UNAMSIL soldiers rather than first-person reporting.