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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN-SIERRA LEONE

SCSL-2003-09-PT-1P-030

Before: Judge Bankole Thompson (301-306)
Designated Judge

Registrar: Robin Vincent

Date filed: 29 May 2003

THE PROSECUTOR

Against

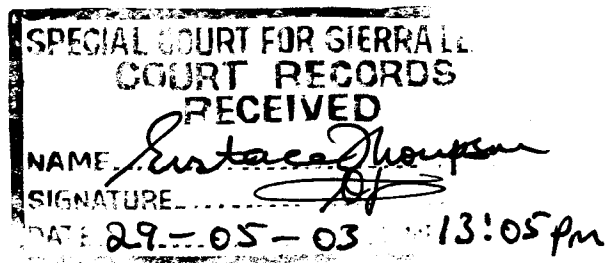
AUGUSTINE GBAO aka AUGUSTINE BAO

CASE NO. SCSL 2003-09-PT

**PROSECUTION REPLY TO THE DEFENSE RESPONSE TO THE
PROSECUTION MOTION TO ALLOW DISCLOSURE TO THE REGISTRY
AND TO KEEP DISCLOSED MATERIAL UNDER SEAL UNTIL
APPROPRIATE PROTECTIVE MEASURES ARE IN PLACE**

The Office of the Prosecutor:
Mr. Luc Cote, Chief of Prosecutions
Mr. Nicholas Browne-Marke, Ass. Trial Counsel

Defence Counsel:
Mr. Girish Thanki, TNT solicitors
Prof. Andreas Gordon O'Shea
Mr. Kenneth Carr, TNT solicitors



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I. INTRODUCTION

1. The arguments raised in the “Defence Response to the Prosecution’s Motion to allow Disclosure to the Registry and to keep disclosed material under seal until appropriate measures are in place” should be rejected. In its response, the Defence asks that the full Trial Chamber modify or “vary” the Scheduling Order and Order on Disclosure to the Registry dated 23 May 2003. The Defence argues that the more appropriate course would have been to grant an extension of time to the Prosecution, rather than prejudicing Mr. Gbao’s right to be heard.

2. The Prosecution now submits that the Learned Defence Counsel has misinterpreted the intent of both the Prosecution’s “Motion to allow disclosure to the Registry and to keep disclosed material under seal until appropriate measures are in place” and the Court’s “Scheduling Order and Order on Disclosure to the Registry,” dated 23 May 2003. Furthermore, the Prosecution submits that the measures asked for in its Motion and provided for in the Court’s Order dated 23 May 2003 enhance, rather than prejudice, the rights of the Accused.

II. ARGUMENTS

A. Disclosure

3. In its “Motion to allow Disclosure to the Registry and to keep disclosed material under seal until appropriate measures are in place,” the Prosecution sought interim protective measures with respect to its witnesses while at the same time ensuring that there was full compliance with the mandatory requirements of Rule 66 (A)(i) of the Rules of Procedure and Evidence of the Special Court (the Rules), until a final decision by the Court on the Prosecution’s “Motion for immediate protective measures for witnesses and victims and for non-public disclosure.”

4. The Defence, however, maintains that because the Rules provide for disclosure to the Defence, lodging the evidence with the Registry cannot in any sense be construed as disclosure. In this regard, the Prosecutor notes that the “Scheduling Order and Order on Disclosure to the Registry,” (the Order) dated 23 May 2003, orders:

1. the Prosecution, on or before Monday the 26th May to ***transmit the disclosure*** pursuant to Rule 66(A)(i) and Rule 68(B) to the Registry; (Emphasis added.)

2. the Registry to keep the disclosed material under seal until orders for appropriate measures for witnesses, victims and non-public materials have been issued.

5. Clearly, by the language of the Order, this is merely a transmittal of the disclosure to the Registry and therefore does not effectuate actual disclosure to the Defence. It by no means is a suggestion or implication that the Registry is qualified to accept disclosure on behalf of the Accused. The Learned Judge so aptly points out in the Order “the necessity to guarantee that the fulfilment of the Prosecution’s obligations to disclose shall encompass appropriate ***interim measures*** for the protection of witnesses and victims as well as for the confidentiality of all non-public materials subject to disclosure by the Prosecution.” (Emphasis added.) Therefore, by and through its motion, the Prosecution is merely requesting an interim measure that allows for the Prosecution to meet its disclosure timelines under Rule 66(A)(i), until such time that the Court can render a decision on the Prosecution’s motion for witness protective measures. There has been no

prejudice to the Accused, in fact, the Order has enhanced the rights of the accused by freezing the disclosure in place at the 30 day point.

B. Rule 72 Time Limits

6. The stated concerns made by the defense regarding the impact of the transmittal of disclosure to the Registry on the time limits for the filing of preliminary motions under Rule 72 are unfounded. As provided for in the decisions on the “Prosecution motion to allow disclosure to the Registry and to keep disclosed materials under seal until appropriate protective measures are in place” in the cases of the Prosecutor vs. Issa Hassan Sesay, Case No. SCSL-2003-05-PT, Alex Tamba Brima, Kallon, Case No. SCSL-2003-06-PT, Morris Kallon, Case No. SCSL-2003-07-PT, and Samuel Hinga Norman, Case No. SCSL-2003-08-PT, while asking for additional clarification from the Registry on the Practice Direction concerning the relevant procedures for transmission of the disclosed materials to the defence, the Court clearly affirmed that the 21 day time period contained within Rule 72 will not start until the disclosure is unsealed by relevant [defence] counsel. The Prosecution wholly agrees with this position. Again, there has been no prejudice to the accused.

C. Leave to Appeal

7. Finally, with regard to the request by the Defence that leave to appeal to the Appeal Chamber be granted on the grounds that the Learned Judge erred in his order of 23rd May 2003, the Prosecution strongly believes that it is improper to file a leave to appeal within a response to a motion as an alternative if the Learned Judge does not accept to grant the orders requested by the Defence. The proper procedure for the Defence is to file a Motion seeking leave apart from the response to the Prosecution motion and after a decision on the motion, in accordance with Rule 73 of the Rules and Article 9, Paragraph 3.D., of the “Practice Direction on Filing Documents before the Special Court for Sierra Leone,” which provides for specific rules regarding the filing of a motion seeking leave to pursue an interlocutory appeal. These Rules were completely disregarded by the Defence.

8. Furthermore, the Prosecution submits that the said Order of 23 May 2003 is in fact an interim order and therefore, not subject to appeal. Rule 73(B) provides that “**Decisions** rendered on such motions are without interlocutory appeals save where leave is granted by the Trial Chamber on the grounds that a decision would be in the interest of a fair and expeditious trial.” (Emphasis added.) In this case, the said Order of 23 May 2003 states:

“TAKING INTO ACCOUNT the Order of the Urgent Request for direction on Time and Respond to and/ or an Extension of time for the filing of a Response to the Prosecution Motion of the 16th May 2003 which, *inter alia*, granted the Defence an extension of the time to file the response to the above mentioned Motions, and that therefore *such a response is still pending.*” (Emphasis added.)

and


“CONSIDERING . . . that the 30 days period for the disclosures . . . should run from the date of conclusion of the initial appearance . . . all matters pertaining to the initial appearance were exhausted and being therefore identified as 25th April 2003.”

In this Order, the Court is acknowledging that the Defence may be filing a response to the Prosecution motion. However, due to the fact that the date for disclosure was rapidly approaching the Learned Judge clearly found that an interim order was required. It is interesting to note that on the 17 April 2003 in the cases of Prosecutor vs. Issa Hassan Sesay, Case No. SCSL-2003-05-PT, Morris Kallon, Case No. SCSL-2003-07-PT, and Samuel Hinga Norman, Case No. SCSL-2003-08-PT, the Court issued **decisions** on the Prosecution motions when all procedural filings were completed. Whereas, on the same date, in the case of the Prosecutor vs. Alex Tamba Brima, Case No. SCSL-2003-06-PT, the Court issued an **order** when procedural filings were not completed because the time limit for the defence to file a response was still pending.


III. CONCLUSION

9. Prosecution submits that the Trial Chamber should **GRANT** the Orders prayed for in its Motion dated 7 May 2003 and **REJECT** the Orders sought by the Defence in its Response.

Freetown 29 May 2003.
For the Prosecution,



Luc Côté
Chief of Prosecutions



Nicholas Browne-Marke
Associate Trial Counsel