

IN THE SPECIAL COURT FOR SIERRA LEONE

Before: Judge Bankole Thompson

SCSL-2003-09-Pt-028
(271-280)

Registrar: Mr Robin Vincent

Date filed: 26th May 2003

Case No. SCSL 2003 - 09 - I

THE PROSECUTOR

Against

AUGUSTINE GBAO also known as AUGUSTINE BAO

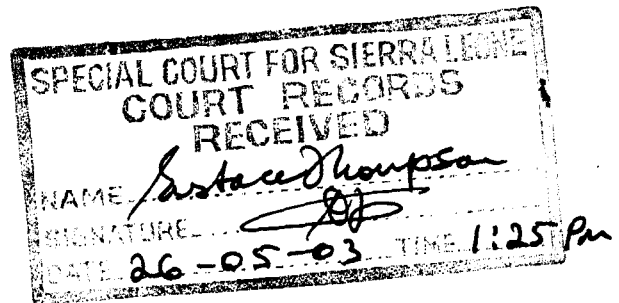
**RESPONSE TO PROSECUTION MOTION TO ALLOW DISCLOSURE TO
THE REGISTRY AND TO KEEP DISCLOSED MATERIAL UNDER SEAL
UNTIL APPROPRIATE PROTECTIVE MEASURES ARE IN PLACE**

Office of the Prosecutor

Mr Luc Cote, Chief of Prosecutions
Mr Brenda J. Hollis, Senior Trial Counsel

Counsel for Mr Gbao

Mr Girish Thanki, TNT solicitors
Professor Andreas O'Shea
Mr Kenneth Carr, TNT solicitors



Procedural background

1. In a motion filed on 7 May 2003 and received as a hard copy by defence counsel in Brussels on Tuesday 13 May 2003, having been served on his legal assistant in Freetown on Thursday 8 May 2003, the Prosecution requests an order allowing the Prosecution to make its initial Rule 66(A)(i) disclosure to the Registry and to order the Registry to keep the disclosed material under seal until the Designated Judge or the Trial Chamber has issued orders for the appropriate protective measures for witnesses, victims and non-public documents.
2. On 16th May 2003, an Order was made by His Honour Judge Bankole Thompson, granting Counsel for the Mr Gbao 7 days from the moment of receipt of the Order for the filing of his submissions in relation to two Prosecution motions including the one in question, such period expiring on Monday 26th May 2003. It is noted with some regret that the learned judge, on Friday 23rd May 2003, issued a Scheduling Order and Order on Disclosure to the Registry, while 'taking into account' his previous Order granting an extension of time and noting that the response is therefore still pending. It is respectfully submitted that, notwithstanding the fact that the final date for Prosecution disclosure to the Defence is Monday 26th April 2003, and Counsel for Mr Gbao understands the apparent predicament facing His Honour, the more appropriate course would have been to grant an extension of time to the Prosecution (see submissions below in this regard), rather than prejudicing Mr Gbao's right to be heard. Mr Gbao, through his counsel, is now in the very difficult position of trying to persuade the learned Judge on a matter on which His Honour's mind is apparently made up. This notwithstanding, it is respectfully requested, and without in any way meaning to offend, that the learned Judge nonetheless consider the following submissions with a view to varying His Honour's Order of 23rd May 2003, even to the extent of contradicting findings in His Honour's previous Order where it seems fitting with the benefit of the submissions of Counsel for Mr Bao. It is humbly suggested that in the circumstances this should be done in association with His Honour's learned colleagues, sitting as the Trial Chamber.

The notion of 'disclosure'

3. Rule 66(A)(i) of the Rules of Procedure and Evidence reads:

(A) Subject to the provisions of Rules 53, 69 and 75, the Prosecution shall:

(i) Within 30 days of the initial appearance of the accused, *disclose to the Defence* copies of the statements of all witnesses which the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 bis at trial. Upon good cause shown to the judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the Defence within a prescribed time.

This Rule requires disclosure *to the Defence*. The rules correctly do not provide for disclosure to the Registry. It is respectfully submitted that lodging evidence with the Registry cannot in any sense be construed as disclosure, let alone disclosure to the defence. The purpose of disclosure is in order to allow the defence to prepare for trial. 'The accused's right to fair disclosure is an inseparable right to a fair trial.' This is an essential ingredient to the right to a fair trial. ('The accused's right to fair disclosure is an inseparable right to a fair trial.': *R v Brown (Winston)* [1995] 1 Cr App R 1, at 67). Rule 66(A)(i) is designed to give effect to that right. It is therefore submitted that the prosecution's obligation of disclosure to the defence cannot be complied with in the manner suggested by the prosecution.

Possible prejudice to the Defence

4. Quite apart from the proper interpretation of Rule 66(A)(i), it is respectfully submitted that a ruling to the effect that the prosecution has complied with its obligation of disclosure in terms of Rule 66(A)(i) might have the effect of prejudicing the defence case. In particular, it is arguable that this would mean that time would begin to run for the purpose of the filing of preliminary motions by the defence in terms of Rule 72 of the Rules of Procedure and

Evidence, when such motions cannot be properly considered or filed by the Defence until it has seen the prosecution evidence. This is implicit in the fact that Rule 72 links the time limit for preliminary motions to the prosecution's disclosure obligation. It is respectfully submitted that in reality it is impossible to speculate with any degree of accuracy how disclosure of the prosecution evidence might impact upon the shape and development of the defence case even on preliminary issues of fundamental importance. Arguments on preliminary issues such as jurisdiction, defects in the form of the indictment and abuse of process, while often identifiable independently of prosecution evidence, may nevertheless be initiated or improved as a result of the examination of the prosecution evidence, which ultimately forms the foundation of the indictment and prosecution case. As noted in *R v Ward* (1993) 96 Cr App R 1, at 22, per Glidewell LJ:

Non-disclosure is a potent form of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence...

5. Further and or in the alternative, a finding of compliance with disclosure obligations might open the door for the prosecution to put itself in a better position to argue the issue of disclosure at a later stage, when in fact it has not, merely by placing evidence with the Registry, done anything which allows the advancement of the preparation of the defence, which it is submitted in line with paragraph 3 above is the fundamental purpose of disclosure obligations.

Implications for the Registry

6. The Prosecution does not clarify how the Registry can be protected from compromising its mandate, or what duties of disclosure to the Defence it possesses in terms of the Rules of Procedure and Evidence, or how those duties are to be enforced otherwise than through judicial orders, the Registry not being subject to the same general ethical or legal disclosure obligations. It is submitted that in the absence of such duties on the Registry, the onus to

ensure disclosure to the Defence then shifts to the defence, and has arguably been at least partially removed from the Prosecution.

7. The mandate of the Registry is set out in Article 16 of the Statute of the Special Court and Rule 33(A) of the Rules of Procedure and Evidence. According to Article 16(1):

The Registry shall be responsible for the administration and servicing of the Special Court.

8. While in an administrative capacity it assists in the implementation of protective measures. It cannot be placed in a position where it replaces the responsibilities and the rights of the parties. In particular, it is submitted that it cannot assume the position of the Defence by accepting disclosure on its behalf, especially without the consent of the Defence, and arguably even with such consent. Further, it cannot take on the responsibilities that normally belong to the Prosecution or lighten that burden. Nothing in the Statute or Rules requires the Registry to take responsibility in matters of disclosure or in matters of the preservation, storage and security of evidence. In contrast, the Prosecutor is given the exclusive responsibility for the preservation of evidence. Thus, Rule 41 of the Rules of Procedure and Evidence provides that:

The Prosecutor shall be responsible for the preservation, storage and security of information and physical evidence obtained in the course of his investigations.

9. The Registry is mandated to set up a Victims and Witnesses Unit within it. Thus, Article 16(1) of the Statute of the Special Court provides that:

The Registrar shall set up a Victim's and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, consulting and other appropriate assistance to witnesses, victims who appear before the Special Court and others who are at risk of on account of testimony provided by such

witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

It is submitted that this provision requires that there be a Victims and Witnesses unit to deal with matters involving the administration of protective measures. It is further submitted that its role is intended to be of a largely administrative nature, with a specific mandate of victim support. It is not intended that it should become a guardian of prosecution evidence or an object or subject of disclosure, let alone a replacement for one of the parties. This provision must be read in the light of the general provision on the mandate of the Registry as being of an administrative and servicing nature as opposed to sharing the responsibilities with regard to evidence as between the Prosecution and the Defence. The provision must further be understood in the context of the general responsibilities of the prosecution and rights of the Defence as set out above.

10. In the alternative, if, which is not admitted, the Registry's functions go beyond those of an administrative nature and are capable of encompassing the provision of security for evidence and the incumbent responsibilities which follow from that, it is nevertheless submitted that this must have absolutely no bearing on whether the Prosecution has fulfilled its obligations of fairness and disclosure in terms of the Statute and Rules or whether the rights of the accused in this respect and in particular the right to a fair and public hearing (Article 17(2) of the Statute of the Special Court), the right to adequate time and facilities to prepare for trial (Article 17(4)(b) of the Statute of the Special Court) and the right to examine witnesses (Article 17(4)(e) of the Statute of the Special Court), have been respected.

Lack of authority

11. It is noteworthy that the Prosecution produces no judicial authority for the proposition that it asserts. While it is recognised that a practice has developed in the International Criminal Tribunal for the Former Yugoslavia, to which the Prosecution has not referred, of placing evidence under seal with the Registry, it is suggested that this is not done with a view to permitting the prosecution to say that it has fulfilled its disclosure obligations to the defence, but rather merely as a means of protecting evidence in appropriate circumstances, and in so far as it could be suggested otherwise, a proposition which the Prosecution has not asserted and for which it has not produced any examples, such practice is, it is respectfully submitted, wrong for the reasons outlined in paragraphs 2-4 above.

The more appropriate way forward for the Prosecution

12. Rule 66(A)(i) is in any event expressly subject to the Rule 69 and 75 on measures for the protection of victims and witnesses, which are themselves evolved from Articles 17(4) and 16(2) of the Statute of the Special Court for Sierra Leone, and the possibility of the Judge providing for protective measures for witnesses under Rules 54 and 69. The Prosecution should therefore rather have requested the judge to order the temporary non-disclosure of names and identity of witnesses to the Defence, while requiring the Prosecution to otherwise comply with its disclosure obligations in terms of Rule 66(A)(i), until such time as the issue of protective measures has been fully argued and ruled upon.

13. Further and/or in the alternative, if the prosecution was not ready to disclose evidence in a manner which does not reveal the identity of witnesses, and Defence counsel appreciates that this might and should have involved a fair amount of work in order for it to be done in a proper manner which does not unnecessarily deprive the Defence of parts of witness statements or other documents, the proper course in our submission would have been to request an extension of time for the disclosure of evidence in terms of Rule 66(A)(i).

That the judge has the power to grant such an extension of time is implicit in both the cross-reference to Rule 69 and permitted under Rule 54.

14. The Defence for Mr Gbao would not object to an extension of time with regard to the Prosecution's disclosure obligations if kept within the strict bounds of the time necessary to have the issue of protective measures resolved by the Court, and without prejudice to the Defence's right to be accorded proper time and facilities to examine the prosecution evidence in order to prepare its Defence, as provided for in Article 17(4)(B) of the Statute of the Special Court.
15. It is further noted that the Prosecution has wrongly redacted witness statements without Order (see Response to Motion on Protective Measures)

Prosecution arguments for orders against the Defence

16. The Prosecution further requests an order:
 - a. prohibiting the Defence from sharing, discussing or revealing, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in such documents, to any person or entity other than the Defence;
 - b. ensuring that the Defence does not interview Prosecution witnesses without the consent of the Chamber and reasonable prior notice to the Prosecution.

In so far as these matters are directed at Defence counsel, they already form part of the professional obligations of defence counsel under his national code of conduct and that of the Special Court and do not therefore require a Court order unless there is sound reason to believe that counsel will behave unethically. Defence counsel voluntarily consents to comply with the requests of the Prosecution, save that he understands the word 'Defence' to include the accused with whom he will discuss any matter necessary for the preparation of

the Defence, and the Defence could, if it wished, equally note that it expects Prosecution counsel to respect their ethical obligations, and in particular that of independence and acting fairly towards the accused, but the Defence fully trusts in the professionalism of their learned friends. This may be noted for the record if so desired by the Prosecution without the need for a court order.

17. Where matters are appropriately dealt with in the national and international ethical obligations of counsel, it is submitted that it is not conducive to the cooperative conduct of proceedings, nor is it mindful of the limited funds available to the Court to encourage counsel for the prosecution and defence to seek orders against each other to ensure compliance with their existing ethical obligations, in the absence of any indication of a propensity to breach such obligations. Counsel can in any event be called to answer for such breaches by virtue of their duty to respect such obligations in terms of Rule 44(B) of the Rules of Procedure and Evidence.

IT IS HEREBY REQUESTED THAT IT BE ORDERED BY THE TRIAL CHAMBER:

1. That the Prosecution is not deemed to have complied with its disclosure obligations in terms of Rule 66(A)(i), simply because it has lodged documents with the Registry, and before there has been disclosure on the Defence, as required by the Rule;
2. That the Prosecution be granted a limited extension of time for disclosure to the Defence in terms of Rule 66(A)(i), until such time as the Court has made its ruling on protective measures and the Prosecution is in a position to implement such measures in a fair manner that does not prejudice the accused pursuant to an Order from the Court, rather than on its own initiative;
3. That the Prosecution destroy any copies of redacted witness statements and or remove redaction from witness statements, until such time as there is an Order for protective measures permitting redaction and specifying how it should be done;

4. That the Prosecution call back any material that has been placed with the Registry, having been redacted without prior order, and that disclosure which may have been placed with the Registry not be treated as disclosure material until such time as an Order on protective measures has been made and the Prosecution has complied with the terms of that Order.

IN THE ALTERNATIVE IT IS HEREBY REQUESTED THAT LEAVE TO APPEAL TO THE APPEAL CHAMBER BE GRANTED ON THE GROUNDS THAT THE LEARNED JUDGE ERRED IN HIS HONOUR'S ORDER OF 23rd MAY 2003 FOR THE REASONS SET OUT ABOVE

Professor Andreas O'Shea
Counsel for Mr Gbao

SIGNED

DATED 26th May 2003, at Freetown

