IN THE SPECIAL COURT FOR SIERRA LEONE

THE TRIAL CHAMBER

Before: The Trial Chamber
Judge Benjamin Itoe, presiding
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr Robin Vincent

Date filed: 3rd December 2004

Case No. SCSL 2004 – 15 – T

In the matter of:

THE PROSECUTOR

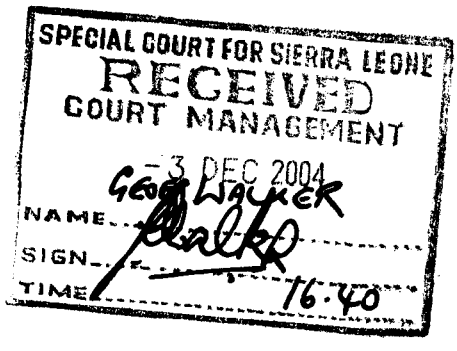
Against

ISSA SESAY
MORRIS KALLON
AUGUSTINE BAO

BAO RESPONSE TO PROSECUTION REQUEST FOR LEAVE TO CALL ADDITIONAL WITNESSES AND DISCLOSE ADDITIONAL WITNESS STATEMENTS, PURSUANT TO RULES 66(A)(ii) and 73*bis*

Office of the Prosecutor

Luc Cote, Chief of Prosecutions
Lesley Taylor
Pete Harrison
Sharan Palmer



Counsel for Augustine Bao

Girish Thanki,
Andreas O'Shea
John Cammegh
Kenneth Carr

Counsel for co-accused

Wayne Jordash, Sery Kamal, and Sareta Ashraph for Issa Sessay
Shekou Touray and Melron Nicol-Wilson for Morris Kallon

A. Timeliness of the prosecution application and diligence of the prosecutor

1. The prosecution seeks leave to add three new witnesses to its renewed witness list pursuant to Rules 66 and 73bis(E) of the Rules of Procedure and Evidence. These witnesses are, according to the prosecution, to testify in support of paragraphs 34, 36, 37, 38 and 39 of the Indictment. These paragraphs address the charges of command responsibility and joint criminal enterprise. It is respectfully submitted that the prosecution have not shown good cause as to why the three witnesses should be added at this late stage of the proceedings. In its Decision on ..., the Trial Chamber observed that in deciding such an issue it would have regard to:

> 'The principle of law that the prosecution should not be allowed to surprise the defence with additional witnesses and should fulfil in good faith its disclosure obligations' (par 31)

2. It is submitted that in the circumstances of a progressing trial and having regard to the particular nature of the evidence that these witnesses are to touch on, there is an element of surprise. This element of surprise can only be partially cured since the defence cross-examination of prosecution witnesses on issues raised by these new witnesses has proceeded on the basis of an understanding of the prosecution case which excludes these witnesses. The defence would have been placed in a fairer position had these statements been disclosed prior to the last trial session and the prosecution has been placed in an advantaged position by not doing so without just excuse. The reasons for this will be elaborated upon below under the heading of each prospective proposed witness. In its former decision on the question of the additional calling of witnesses, this Chamber noted:

> 'The Chamber will approach the determination of this issue with due regard for the principle of 'equality of arms' (par 32)

3. Further and or in the alternative, it is respectfully submitted that the prosecution has not fulfilled its disclosure obligations in good faith by

concealing these statements from the defence for so long and still, without sufficient justification having regard to the accused right to a fair trial and his right in principle to have all witness statements upon which the prosecution intend to rely served on him at least 60 days prior to trial. It is submitted that the latter right necessarily places a heavy onus on the prosecution to disclose the existence of and therefore impliedly the contents or a summary of the contents of statements of any *proposed* new witnesses upon which it intends to rely, but which it has only just discovered, promptly and without delay, without prejudice to its obligation to seek leave to add new witnesses and formally disclose as its case the evidence of confirmed new witnesses. Thus, Rule 66 (D) provides that:

> If either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials.

4. It is submitted that for the intended purpose of the above rule to be given effect, the expression 'should have been produced' must be interpreted not to be confined to situations where the parties have actually violated the rules, but extends to situations where even in the absence of a technical violation due to lack of knowledge, the party ought to have disclosed such evidence earlier, but for the fact that it has only just been discovered by that party. This in any event necessarily follows from the reference to *discovery of additional evidence*, since a party that did not know of, and consequently could not have intended to use evidence, could not be in breach of disclosure obligations under Rule 66 for not disclosing it.

5. It is submitted that where the prosecution has failed to promptly disclose the existence of witness evidence under Rule 66(D) it would generally not be in the interests of justice to permit the calling of the witness. In the alternative, this is an important consideration to be weighed in the balance and where there are other factors militating against the interests of the defence and a fair

trial, as in the circumstances of this application, should in fairness and justice lead to the refusal of leave.

Witness TF1-366

6. In relation to witness TF1-366, no satisfactory explanation has been offered as to why the statements of this witnesses could not have been disclosed on the defence in September, when the prosecution say that the witnesses first agreed to testify. These statements have still not been disclosed to the defence. This is a significant delay in the light the fact that the trial has started and that during the October session some of the issues to which this witness is to testify (joint operation of AFRC and RUF, command responsibility and joint criminal enterprise) were the subject of cross-examination of other witnesses.

7. Furthermore and in any event, it is clear that the prosecution formed the intention to call this witness well before September and hoped that the witness would eventually agree to testify, making efforts to secure this position. Statements were obtained on 5 February and 30 August 2004 and there is no good reason why these statements could not have been disclosed in redacted form on the defence at a much earlier stage, permitting the defence to weigh this potential evidence in their pre-trial and trial assessment of the case. The willingness of a witness to testify is a potentially constantly changeable factor which should have no bearing on the prosecution's obligation of disclosure of statements actually procured, where the prosecution has deemed it appropriate to seek to secure that witness's testimony. It will be noted that defence strategy on the issue of AFRC/RUF, command responsibility and joint criminal enterprise were formed and pursued in cross-examination of prosecution witnesses in the first and second session of the trial, and may have been affected by the knowledge of the contents of the statements of this additional witness. Of course, still not having seen these statements it is difficult for the defence to form a clear idea as to how this might have affected their approach to the case and to cross-examination.

8. In the alternative, it is respectfully submitted that the prosecution is in breach of its continual disclosure obligations under Rule 66(E) by failing to promptly disclose the existence of evidence it has discovered. Since, particularly in the light of the October trial session and the issues canvassed during that session, this failure has placed the prosecution in a more advantaged position it is respectfully submitted that the prosecution should not be permitted to call witness TF1-366 as an additional witness.

Witness TF1-367

9. The prosecution states that the statement of this witness was disclosed on the defence on 9th November 2004. We take this statement in good faith although we are not able to verify this in sufficient time for the purposes of this response, due to the physical location of counsel, no fault of the prosecution of course. This illustrates quite clearly how the prosecution can, without prejudice, disclose a redacted statement before it is sure of securing the witness's testimony for whatever reason, such as fear of the witness or the need to seek leave from the Chamber. However, here again this is a statement which the prosecution has had possession of since 20 August 2004. It is respectfully submitted that given that the basic principle is disclosure 60 days before trial, where the prosecution obtains the statement of a new witness during trial, which it intends to call, it is under an obligation to disclose that statement on the defence promptly. This is especially so where the trial is in actual progress. It is submitted that the Prosecution has offered no satisfactory explanation or explanation at all as to why it could not serve the said witness statement shortly after 20 August, before the October trial session and in any event well before 9 November 2004.

10. The effect of having postponed the serving of this statement on the defence until after the October trial session has been to deprive the defence of the ability to weigh the potential impact on the case of this statement on the issues it addresses. It addresses command responsibility and joint criminal enterprise, with particular reference, inter alia, to alleged joint operation of AFRC/RUF,

diamond mining, 6 January 1999 attack on Freetown and UN peacekeepers. These are all issues which were the subject of defence cross-examination in the October session. The defence might have approached the issue differently with foreknowledge of this forthcoming witness or may have been able to make inroads into challenging the reliability of the testimony of witness TF1-367 through its questions to October prosecution witnesses dealing with identical, similar or related issues.

11. It is therefore respectfully submitted that leave in relation to this witness should be refused for lack of timeliness in disclosure, as well as for an element of surprise and advantage which at least in relation to the defence approach to the October trial session is irredeemable.

12. In the alternative, it is respectfully submitted that the prosecution is in breach of its continual disclosure obligations under Rule 66(E) by failing to promptly disclose the existence of evidence it has discovered. Since, particularly in the light of the October trial session and the issues canvassed during that session, this failure has placed the prosecution in a more advantaged position it is respectfully submitted that the prosecution should not be permitted to call witness TF1-367 as an additional witness.

TF1-368

13. This witness statement was obtained by the prosecution on 4 September 2004 and has never been disclosed on the defence. Even while responding to this motion on 3 December 2004, some two months later with the passing of one trial session and on the eve of the next, the defence has not seen the contents of this statement.

14. It is submitted that the Prosecution has offered no satisfactory explanation or offered any explanation at all as to why it could not serve the said witness statement shortly after 4th September 2004, before the October trial session and in any event well before now.

15. This witness addresses command responsibility and joint criminal enterprise, in particular in relation to mining, forced labour, diamond operations and an alleged joint criminal enterprise with Charles Taylor. These are all matters which were the subject of testimony and cross-examination from the defence in the October trial session. The defence might of benefited from knowledge of this testimony when putting questions to previous prosecution witnesses to affect their reliability or that of proposed witness TF1-368.

16. It is therefore respectfully submitted that leave in relation to this witness should be refused for lack of timeliness in disclosure, as well as for an element of surprise and advantage which at least in relation to the defence approach to the October trial session is irredeemable.

17. In the alternative, it is respectfully submitted that the prosecution is in breach of its continual disclosure obligations under Rule 66(E) by failing to promptly disclose the existence of evidence it has discovered. Since, particularly in the light of the October trial session and the issues canvassed during that session, this failure has placed the prosecution in a more advantaged position it is respectfully submitted that the prosecution should not be permitted to call witness TF1-368 as an additional witness.

B. Essential nature of the evidence in the context of the total number of witnesses and other witnesses testifying to the same issues

18. In its former decision on the addition of witnesses this Chamber held that it would weigh the timing of the application against the materiality of the evidence (par 36). It is respectfully submitted that the question of materiality must be viewed in the context of the nature of the evidence as compared to the nature of the evidence meant to be proffered by other prosecution witnesses of which the defence does have notice, as well as in the context of the total

number of witnesses which the prosecution intends to call. Thus, this Chamber also noted in its previous decision on this aspect of the law in that instance that the witness testimony was:

> 'distinguishable from corroborative or cumulative evidence and appears not to be repetition of evidence of witnesses on the modified witness list.' (par 34)

In this instance the prosecution submits that:

> 'The testimony of each witness outlined above presents evidence that is new and does not duplicate the evidence of those witnesses already on the renewed witness list. More broadly speaking their evidence is not merely corroborative or cumulative but presents direct evidence that is important to the prosecution's case against each accused.'

19. The Defence contests this assertion. It is submitted that when assessing whether evidence gives an independent contribution to the prosecution's case, the question is not whether there are some factual distinctions in the proposed to evidence. Otherwise, almost any testimony could be argued to be 'distinguishable' from cumulative or corroborative evidence. It is not the factual details that count in assessing the essential materiality and importance to the prosecution case, but the extent to which the evidence go to prove the same elements of the same charges in the indictment as other evidence. It is submitted that this is the most sensible approach to examining the fairness of the late admission of evidence.

20. It is noteworthy that in the case of two of the proposed witnesses neither the Defence nor the Chamber is properly placed in a position to assess the direct nature of the evidence or the extent of its similarity or essential difference from other evidence, not having seen the statements themselves.

21. However, based on the prosecution's summaries of these witnesses statements and its own references to the indictment it is clear that the prosecution proposes to use these witnesses to establish the elements of command responsibility and joint criminal enterprise. More particularly the statements go to a number of areas within these two criminal arenas which are addressed in a number of other witness statements in its renewed witness list, whether from the core or back up witnesses. It is also pertinent

to refer to the backup witnesses, since the Defence has proper notice of the contents of these.

22. Thus, by way of example, Bao's command responsibility in Kailahun is addressed in the statements of TF1-313 and TF1-330 in the back up list. The joint operation of RUF and AFRC is addressed in the statements of TF1-036, TF1-217 and TF1-235 of the renewed list, and in statement of TF1-227 on the back up list. Joint criminal enterprise with Charles Taylor is addressed in the statements of John Tarnue and TF1-355. Abduction of UN peacekeepers is addressed in the statements of TF1-165, TF1-174 and TF1-199 of the renewed witness list, and in statements TF1-288, TF1-294, TF1-187 and TF1-271 of the backup list. RUF involvement in 6 January 1999 attack on Freetown is addressed in the statements of TF1-235 of the renewed witness list and in statements TF1-188, TF1-233, TF1-234 and TF1-240 of the backup list. Diamond mining is addressed in the statements of TF1-177 and TF1-211 of the backup list.

23. As to arms shipments there is nothing criminal in the fact of arms shipments and the presence of commanders at such shipments, which are perfectly normal during the course of a civil war. This evidence in itself and without other incriminating details from this witness as to a criminal purpose for the use of such arms (such as for example the fact that they were chemical weapons) therefore adds nothing and has no probative value in establishing command responsibility or joint criminal enterprise in terms of the said paragraphs of the indictment. There is no suggestion that the witness will testify to anything else other than the fact of presence at arms shipments. If the only purpose of this evidence is to establish a link between the RUF and Charles Taylor, which is not suggested in the prosecution's summary, this evidence is and has been given by other prosecution witnesses.

24. It is therefore submitted that the proposed evidence is indeed cumulative in nature going to prove the same elements in paragraphs 34, 36, 37, 38 and 39 of the Indictment as a number of other witness statements. The finer factual distinctions do not detract from this and if the Chamber weighs the insignificance of what these witnesses add to already disclosed witness statements, this against the already large number of witnesses and the inappropriate timing of the application, it is respectfully submitted that the prosecution request in relation to all three witnesses ought in justice to be refused.

It is therefore respectfully requested that the prosecution application be dismissed.

Girish Thanki

Andreas O'Shea

John Cammegh

3 December 2004