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SCSL-2003-09-PT
(681-685)

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IN THE SPECIAL COURT FOR SIERRA LEONE
THE APPEAL CHAMBER

Before: Judge Robertson QC, President
Judge King, Vice-President
Judge Ayoola
Judge Winter
Fifth judge to be determined

Registrar: Mr Robin Vincent

Date filed: 30th October 2003

Case No. SCSL 2003 – 07 – PT

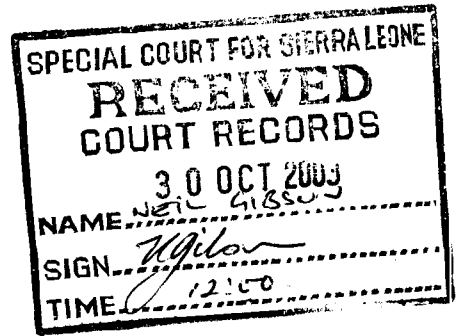
In the matter of:

THE PROSECUTOR
(Prosecution)

Against

MORRIS KALLON,
(Respondent)

AUGUSTINE BAO intervening
(Applicant)



**REPLY TO PROSECUTION RESPONSE TO
REQUEST ON BEHALF OF AUGUSTINE BAO TO INTERVENE FOR THE
PURPOSE OF REQUESTING A STAY OF THE APPEAL CHAMBER
PROCEEDINGS ON ISSUE OF LACK OF JURISDICTION AND AMNESTY AND
APPLICATION FOR A STAY OF SUCH PROCEEDINGS**

And

**ALTERNATIVE REQUEST FOR THE RESERVATION OF JUDGMENT BY THE
APPEAL CHAMBER UNTIL THE DEFENCE OF AUGUSTINE BAO HAVE BEEN
HEARD ON THE ISSUE**

And

**ALTERNATIVE REQUEST ON BEHALF OF AUGUSTINE BAO FOR LEAVE TO
INTERVENE IN THE PROCEEDINGS BEFORE THE APPEAL CHAMBER**

Office of the Prosecutor

Mr Luc Cote, Chief of Prosecutions
Mr Robert Petit
Ms Boi-Tia Stevens

For Mr Gbao, intervening

Mr Girish Thanki
Professor Andreas O'Shea
Mr Kenneth Carr

1. The Prosecution objects to the notion of intervention, submitting that it has no basis in law. It is respectfully submitted that the Appeal Chamber has correctly recognised its jurisdiction to allow intervention by interested parties in Article 5 to the Practice Direction on the Filing of Documents before the Appeal Chamber.
2. The power of the Appeal Chamber to deal with specific aspects of the procedure is set out in Rule 107 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended. This provides that:

The President may issue Practice Directions, in consultation with the Vice-President, addressing detailed aspects of the conduct of proceedings before the Appeals Chamber.

There can be little doubt that Article 5 of the Practice Direction on the Filing of Documents before the Appeal Chamber constitutes such an attempt to address a detailed aspect of the conduct of proceedings before the Appeals Chamber.

3. It is submitted that unless the Prosecution can establish that Article 5 of the Practice Direction and Rule 107 of the Rules of Procedure and Evidence are made *ultra vires* the Statute or the Special Court Agreement, or it can establish that Augustine Bao is not an interested party within the meaning of Article 5 of the Practice Direction, then it cannot sustain its submission that intervention by a co-accused has not basis in law.
4. Nothing in Article 20 to the Statute or in the Special Court Agreement dealing with Appellate Proceedings excludes the possibility of intervention or intervention by a co-accused. Indeed, Article 14 of the Statute authorises and directs the adoption of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda and gives the power to the judges to amend those rules. The Rules of Procedure and Evidence of the

International Criminal Tribunal for Rwanda equally provide for the issuing of practice directions on detailed aspects of the conduct of proceedings.

5. The Prosecution submits that there is no precedent for intervention by a co-accused. It is respectfully submitted that the proper test is not whether the intervener is a co-accused or not, but whether the person is an interested party. Once it is established that a person is an interested party in the proceedings, there is no logical basis for differentiating the position of that person simply on the basis they he or she is a co-accused. Indeed, that merely adds force to the proposition that this person is in fact an interested party.

6. It is to be noted that Rule 106 of the Rules of Procedure and Evidence provide that:

The rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply as appropriate to proceedings in the Appeals Chamber.

This is an indication that the Appeal Chamber proceedings should emulate those before a trial chamber where appropriate. In this case the Prosecution has filed a motion for joinder of the accused to which the accused, Augustine Bao, through his representatives, has no objection. In the light of that it is a relevant consideration that in the joint trial of co-accused, where one accused raises a point of law before the Trial Chamber, as a matter of practice and in the interests of justice, the counsel for the co-accused will be permitted to make representations on the point where it is in the interests of their client. Since they would be in a joint trial, there would be no need for intervention because the point could usually be made in the accused's own right. The question of intervention only arises here because of the distance in time between the pre-trial procedural aspects of the accused. Since the issues raised potentially impact upon the proceedings in a joint trial, subject only to the Trial Chamber's decision on joinder, there would seem no reasonable basis for excluding the possibility of intervention and no real difference between

that situation and the situation of one accused providing supporting arguments for a point raised by another accused in a joint trial.

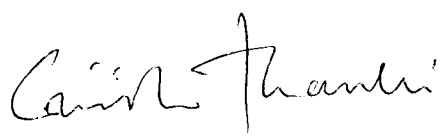
7. The Prosecution further argue that there is no precedent for the intervention of a co-accused in criminal proceedings. While intervention is a rarely used procedure, there are instances of intervention having been employed both in international criminal law proceedings before national courts¹ and in criminal law proceedings before international criminal courts,² especially in the context of proceedings before an appellate body. For the reasons stated above the status of co-accused is irrelevant in itself. The important principle is that the intervener is an interested party and an interested party might come in different forms such as a non-governmental organisation, a victim, a state or a co-accused.

8. It is noteworthy that in terms of the Rules of Procedure and Evidence of the International Criminal Court, in particular Rules 88 (c) to 91 that the Court may permit the participation in proceedings by the legal representatives of victims and that under the Rules of Procedure and Evidence of the Special Court the Government of Sierra Leone is permitted to make representations in an application for bail by the accused. In these very proceedings a non-governmental organisation is acting as an *amicus curiae*. These are instances where parties with interests, not necessarily, but often supporting those of the Prosecution are permitted to intervene in proceedings. The principle of equality of arms would, it is submitted, suggest that a co-accused, as an interested party whose interests, not necessarily, but often supporting those of an accused should be accorded equal opportunity to intervene where in the interests of justice and the development of sound jurisprudence.

¹ See e.g. *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex p Pinochet Ugarte* (Amnesty International Intervening) [1998] 4 All ER 897 (HL)

² See e.g. *Jean-Bosco Barayagwiza v The Prosecutor*, Case No ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 (Appeal Chamber) (where it is noted at paragraph 8 that the Chamber had ordered on 8 December 1999 that the Government of Rwanda might appear as *amicus curiae*)

9. The Prosecution additionally argues that the precedent created by permitting Augustine Bao to intervene in the Appellate proceedings of Morris Kallon would set a dangerous precedent and open the floodgates, causing delay. It should first of all be remembered that these are proceedings on a point of law before an appellate body. Any delay caused by additional representations from third parties will be non-existent or *de minimus* and in any event is unlikely to have any direct impact on the progress of the trial. In any event, intervention can only happen if the Appeal Chamber chooses to exercise its discretion and this is an adequate control over any possibility of excessive intervention and excessive delay and therefore the floodgates are not being opened but carefully controlled.

Girish Thanki 

Andreas O'Shea

Kenneth Carr