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SCSL-04-14-A
(045 - 048)

SPECIAL COURT FOR SIERRA LEONE

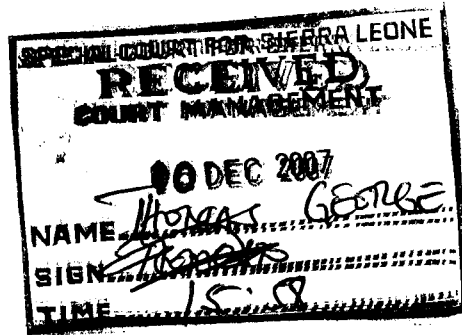
APPEALS CHAMBER

045

Before: Hon. Justice George Gelaga King, President
Hon. Justice Emmanuel Ayoola
Hon. Justice Renate Winter
Hon. Justice A. Raja N. Fernando
Hon. Justice Jon Kamanda

Registrar: Herman von Hebel, Registrar

Date: 10th December 2007



The Prosecutor Against Moinina Fofana
Allieu Kondewa

Case No. SCSL -04-14-A

Public Document

FOFANA RESPONSE TO REQUEST FOR LEAVE TO APPEAR AS *AMICUS CURIAE* PURSUANT TO RULE 74 BY HUMAN RIGHTS WATCH

Office of the Prosecutor
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INTRODUCTION

1. On the 2nd of August 2007, Trial Chamber 1 delivered its Judgement and found Moinina Fofana guilty on counts 2, 4, 5, and 7 and Allieu Kondewa guilty on Counts 2, 4, 5, 7 and 8 of the indictment. In the same breath, the Trial Chamber found Moinina Fofana not guilty on Counts 1, 3, 6 and 8 and Allieu Kondewa not guilty on Counts 1, 3 and 6 and were acquitted on those Counts.
2. On the 9th of October the Trial Chamber issued its Sentencing Judgement based on those Counts for which the Accused persons were found guilty after the Sentencing hearing where oral submissions were made by the Prosecution and the Defence for both Accused Persons.
3. Both the Prosecution and Counsel for the Allieu Kondewa filed Notice and Grounds of Appeal on the 23rd of October 2007.
4. On the 6th of December 2007, Human Rights Watch filed a Request for leave to appear as *amicus curiae* pursuant to Rule 74 of the Rules of Procedure and Evidence.

SUBMISSIONS

5. Counsel for the Respondent submits firstly that for the purposes of this application, he does not agree with the Applicant, Human Rights Watch, that they are not affiliated with any party to this appeal. As noted in its application for leave, the Applicant has worked with the Prosecution throughout the Trial process and in particular, a Human Rights Watch researcher, Corinne Dufka, provided assistance to the Office of the Prosecutor and served as an investigator/researcher of the Office of the Prosecutor for one year.¹ Counsel notes that any assistance provided by the applicant to the Defence Office was administrative and therefore did not impact the work of the respective Defence Teams.
6. Secondly, the application is not accompanied by a description of the submissions which the applicant wishes to make in accordance with the *Practice Direction on Filing Amicus Curiae* applications, nor will the reasons for believing that the submissions would aid in the proper determination of the appeal.² Furthermore, as required by the said Practice Direction, the applicant failed to file "a statement identifying and explaining any contact or relationship [they] had, or has, with any party to case."³
7. Counsel for the Respondent submits that Applicants' request should have been accompanied by the proposed written *amicus curiae* submission⁴ to ascertain the Applicant's grounds for the submission⁵, the nature of the information or analysis the

¹ SCSL-04-14-A-806 The Prosecutor v. Moinina Fofana, Allieu Kondewa, Request for Leave to Appear as Amicus Curiae, para. 3

² Practice Direction on Filing Amicus Curiae applications pursuant to Rule 74 of the Rules and Evidence, Article 2©, (d), (e)

³ Ibid, Article 2(1)(f)

⁴ Ibid, Article 4

⁵ Ibid, Article 2©

applicant proposes to submit⁶ in order to save the court and the parties the time following the tight schedule parties are already working on.

8. Thirdly, and more especially, Counsel for the Respondent submits that the Applicant's application gravely interferes with the right of appeal of the Respondent in view of the fact that it takes issue with, and strongly objects to, a finding of the Trial Chamber to wit, that 'the Respondent's motivation to restore a democratically elected government was a mitigating circumstance for sentencing'. Essentially, the applicant's statement that "[they] believe that the Trial Chamber's reliance upon the relative legitimacy of the political and ideological goals for which defendants fought as a mitigating circumstance *is wholly inconsistent with* international humanitarian law *and must be set aside*"⁷ is not only highly prejudicial but amounts to a ground of appeal mandating the Appeal Chamber to set aside the Trial Chamber's Decision. (Emphasis added).

9. Counsel for the Respondent submits that the Appeals Chamber is fully equipped to handle issues of sentencing if raised on appeal and that neither the Statute nor the Rules define the factors which may be considered as mitigating factors. Once a Trial Chamber determines that certain evidence constitutes a mitigating circumstance, the decision as to weight to be accorded to that mitigating circumstance also lies within the wide discretion afforded to the Trial Chamber at Sentencing⁸; and this is the position of various Appeals Chambers both in the *ICTR* and *ICTY*.⁹

10. Besides, the applicant further submitted that it has valuable information regarding the nature and enforcement of international humanitarian law as well as the practice of national and international tribunals in adjudicating war crimes that will assist the Appeals Chamber in reviewing the Sentencing Judgement.¹⁰ Whilst respecting the experience of the applicant in the field of international law research, Counsel for the Respondent submits that, should the need arise, the Court can, when confronted with new or complex points of law, have an inherent power to permit or invite submissions from an *amicus* – a "friend of the Court".¹¹ *Amici Curiae* are not parties to the proceedings, and therefore do not, for instance, have the right to appeal against decisions given by a Trial Chamber before which they appear¹², their experience or research skills notwithstanding.

11. Counsel for the Respondent also submits that the Applicant has not demonstrated any interest, direct or indirect, in showing that the Judgement will create a precedent affecting them in the future or how it wish to have the law clarified or declared or developed in a particular way.¹³ Counsel does not see how desirable or essential the Applicant's submissions would be to the Court. Since there is an overriding need to

⁶ Ibid, Article (d)

⁷ SCSL-04-14-A-806, para. 6

⁸ Niyitegeka Appeal Judgement, para. 266

⁹ Statute of Special Court, Article 19(2), Kajelijeli Appeal Judgement, para. 294

¹⁰ SCSL-04-14-A-806 Request for Leave to Appear as Amicus Curiae, para. 6

¹¹ SCSL-03-07, The Prosecutor v. Morris Kallon, Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and International Commission of Jurists for Leave to File Amicus Curiae Brief and to Present Oral Submissions, para. 4

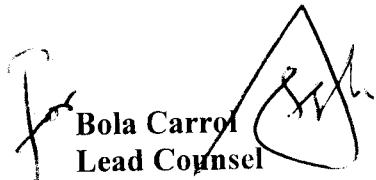
¹² Archbold International Criminal Courts, Practice, Procedure & Evidence, (2003 Ed.), p. 222, para. 8-42

¹³ SCSL-03-07, The Prosecutor v. Morris Kallon, para. 4

get on with the appeal as quickly as possible without any disruption since the Court's mandate has already been over stretched, if the Applicant has any material or information regarding the nature and enforcement of international law, it should convey it to the Prosecutor and the Defence Teams respectively.

CONCLUSION

12. In view of the foregoing, Counsel for the Respondent concludes that the application should be refused as the applicant has already taken a legal position as an interested party. Additionally, the Respondent submits that granting the applicant's request for leave to file an *amicus curiae* brief will substantially delay the trial process and grossly interfere with the fair trial rights of the Respondent as well.¹⁴


Bola Carroll
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¹⁴ Statute of the Special Court, Article 17(4)©