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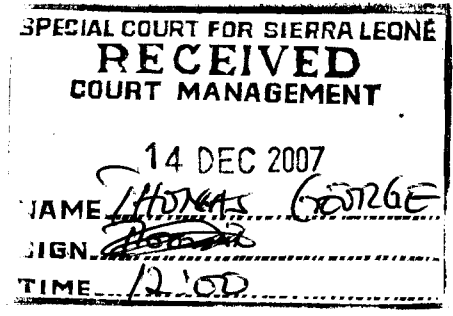
SPECIAL COURT FOR SIERRA LEONE
Freetown - Sierra Leone

IN THE APPEALS CHAMBER

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: Mr. Herman Von Hebel

Date filed: 14 December 2007



THE PROSECUTOR

Against

**Moinina Fofana
Allieu Kondewa**

Case No. SCSL-04-14-A

PUBLIC

PROSECUTION SUBMISSIONS ON THE REQUEST FOR LEAVE TO APPEAR AS *AMICUS CURIAE* PURSUANT TO RULE 74, FILED BY HUMAN RIGHTS WATCH ON 6 DECEMBER 2007

Office of the Prosecutor:
Dr. Christopher Staker
Mr. Karim Agha

Counsel for Moinina Fofana:
Mr. Wilfred Davidson Bola Carol

Counsel for Allieu Kondewa:
Mr. Yada Williams

1. On 6 December 2007, Human Rights Watch (“**HRW**”) filed an application for leave to file a written submission as *amicus curiae* in this appeal, pursuant to Rule 74 of the Rules of Procedure and Evidence (the “**HRW Application**”).¹
2. On 10 December 2007, the Defence for Fofana filed a response to the HRW Application (the “**Fofana Response**”).²
3. Applications for leave to make submissions as *amicus curiae* are governed by Rule 74 of the Rules of Procedure and Evidence (the “**Rules**”), and by the Practice Direction on filing Amicus Curiae applications pursuant to Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, adopted 20 October 2004 (the “**Practice Direction**”).
4. Neither Rule 74 nor the Practice Direction provide that the parties to a case may file a response to a Rule 74 application by a person seeking to make submissions as *amicus curiae*. However, the Prosecution submits that this is possible, in accordance with the general legal principle that decisions should not be taken by a Chamber in a case that may potentially adversely affect the interests of a party without first affording that party an opportunity to be heard.³ The Prosecution therefore takes no issue with the filing of the Defence Response, and submits that in the circumstances the Prosecution is also entitled to file a response.
5. The Prosecution does not oppose the HRW Application, and submits that it would be desirable for the proper determination of the case that the HRW Application be granted.
6. The Prosecution makes the following submission in respect of the submissions made in the Defence Response.
7. Paragraph 5 of the Defence Response suggests that there is an affiliation between HRW and the Office of the Prosecutor (OTP) on the ground that HRW has “worked

¹ “Request for Leave to Appear as *Amicus Curiae* Pursuant to Rule 74”, filed by Human Rights Watch on 6 December 2007, SCSL-04-14-A-806, Registry page nos. 035-039.

² “Fofana Response to Request for Leave to Appear as *Amicus Curiae* Pursuant to Rule 74 by Human Rights Watch”, filed on behalf of Fofana on 10 December 2007, SCSL-04-14-A-809, Registry page nos. 045-048.

³ *Prosecutor v. Jelisić*, IT-95-10-A, “Judgement”, Appeals Chamber, 5 July 2001, para. 27.

with the Prosecution throughout the trial process” and on the ground that one HRW researcher, Corinne Dufka, provided assistance to the OTP and worked as an investigator/researcher for the OTP for a period of one year.

8. It is not the case that HRW has “worked with the Prosecution throughout the trial process”. HRW’s relationship with the Special Court is correctly reflected in the 3rd paragraph of the HRW Application. The OTP however has been in contact with Ms Dufka since around October 2006 with a view to her testifying as either an expert or overview witness in the Charles Taylor case. Ms Dufka’s expert report was filed as a Public Document on 15th May 2007 pursuant to rule 94 Bis under SCSL-03-01-PT. Neither Ms Dufka’s report nor her proposed evidence relate to the particular issue which HRW wishes to file submissions on pursuant to the HRW Application. Should Ms Dufka give evidence as a prosecution witness it will be in her personal capacity and not on behalf of HRW.
9. It is true that Ms Corinne Dufka, who presently works with HRW (at the HRW office in Dakar) was a former employee of the OTP for a period of a year from around September or October 2002. Prior to working for the OTP Ms Dufka had worked for HRW for whom she returned to work sometime after leaving the OTP. However, at the time that she was working with the OTP, she was neither an employee of HRW nor was she reporting to HRW. It is submitted that the mere fact that a person who formerly worked for the OTP now works for another organization cannot have the result that that organization is automatically barred from ever being an amicus curiae before the Special Court. There is no indication that Ms Dufka is involved in the present HRW Application.
10. It is also pertinent to note in respect of HRW’s impartiality that, HRW has published reports on the Special Court which included comments critical of the OTP.⁴ It is submitted that there is no basis for the suggestion that HRW is an organization that is closely associated with the OTP or that it lacks independence from the OTP.


⁴ In the '04 Report, HRW criticized the OTP for not going after more lower level commanders, and for limited interpretation of ‘Those who bear the greatest responsibility’ (See page 19): <http://www.hrw.org/reports/2004/sierraleone0904/sierraleone0904.pdf>
In HRW’s '05 Report, HRW criticized the OTP’s relationship with the Witness Management Unit

11. HRW contacted the OTP and requested information on the procedure for applying to make submissions as an *amicus curiae*. The Special Assistant to the Prosecutor provided HRW with the relevant Rule, and provided HRW with copies of some of the relevant public case documents at HRW's request. HRW has not provided the OTP with information as to the content of the submissions that HRW would make if granted leave to be *amicus curiae*.
12. As to paragraphs 6 and 7 of the Defence Response, the Prosecution submits that the HRW Application sufficiently complies with the Practice Direction. The Practice Direction does not require a Rule 74 application to be accompanied by the proposed *amicus curiae* submission. Article 3 of the Practice Direction merely states that a Rule 74 Application *may* do so. Nor does the Practice Direction require that a statement be filed separately identifying and explaining any contact or relationship that the applicant has had with any party to the case. Article 2(i)(f) of the Practice Direction indicates that such a statement should be included in the body of the Rule 74 application.
13. As to paragraph 8 of the Defence Response, it is submitted that the fact that the submissions of an *amicus curiae* may be adverse to the arguments of a party to the appeal does not mean that to allow the application would interfere with that party's right of appeal. The submissions of an *amicus curiae* are usually likely to be adverse to the arguments of one or other of the parties to the case, and if the argument in the Defence Response were accepted, *amicus curiae* generally would not be permitted in appeals before the Special Court. Contrary to what paragraph 8 of the Defence Response appears to suggest, but as paragraph 10 of the Defence Response expressly states, an *amicus curiae* is not a party to the case and cannot raise new grounds of appeal or new issues in the case, but can merely make submissions to the Chamber on matters that are existing issues in the case.
14. As to paragraphs 9 and 10 of the Defence Response, it is submitted that it is a matter for the Appeals Chamber to determine whether it would be assisted by receiving submissions of an *amicus curiae* in this case. The sixth paragraph of the HRW Application indicates that HRW intends to provide *general* information on

international humanitarian law and the practice of national and international tribunals, that is relevant to the determination of this ground of appeal. The Prosecution would agree that an *amicus curiae* should not address the merits of a particular case. However, the issue that HRW seeks to address is whether “reliance upon the relative legitimacy of the political or ideological goals for which defendants fought” can be taken into account as a mitigating factor in sentencing.⁵ The Prosecution submits that is an important issue of general principle.

15. As to paragraph 11 of the Defence Response, the Prosecution submits that granting the HRW Application need not cause delay in the proceedings, if an appropriate deadline for the filing of an *amicus curiae* brief is set.

Filed in Freetown,
14 December 2007



Christopher Staker
Deputy Prosecutor

⁵ HRW Application, sixth paragraph.