

044

SCSL-2003-11-PT
(1022-1026)

1022

THE APPEALS CHAMBER

Before: Judge Geoffrey Robertson, President
Judge Emmanuel Ayoola
Judge George Gelaga King
Judge Renate Winter
Fifth Judge to be determined
Registrar: Mr. Robin Vincent
Date: 20 October 2003

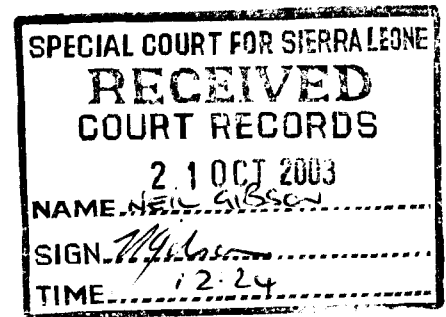
THE PROSECUTOR

v.

SAM HINGA NORMAN

CASE NO. SCSL-2003-08-PT

MOININA FOFANA intervening



**MOTION ON BEHALF OF MOININA FOFANA FOR LEAVE TO INTERVENE AS
AN INTERESTED PARTY IN THE PRELIMINARY MOTIONS FILED BY MR.
NORMAN BASED ON A LACK OF JURISDICTION: JUDICIAL INDEPENDENCE
AND CHILD RECRUITMENT**

Office of the Prosecutor:

Mr. Luc Côté, Chief of Prosecutions

Counsel for Mr. Norman

Defence Office:

Mr. Sylvain Roy, Acting Chief

For Mr. Fofana, intervening:

Mr. Michiel Pestman

Mr. Victor Koppe

Mr. Arrow John Bockarie

Prof. André Nollkaemper

Dr. Liesbeth Zegveld

1. Mr. Fofana intends to file several motions challenging the jurisdiction of the Special Court as soon as he receives the material supporting his indictment pursuant to Rule 66(A) of the Rules of Procedure and Evidence. This disclosure has not yet taken place. Before Mr. Fofana will be able to submit the necessary legal arguments to the Appeals Chamber, proceedings will take place before the Appeals Chamber on two motions filed by Mr. Norman partly pertaining to the same legal issues that Mr. Fofana intends to raise in his preliminary motions. The outcome of these proceedings may thus affect the interests and legal position of Mr. Fofana.

Request

2. The Defence of Mr. Fofana therefore seeks the permission of the Court to intervene as an interested party in the proceedings before the Appeals Chamber in the case of *Prosecutor v. Sam Hinga Norman* (SCSL-2003-08-PT) pertaining to the Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence) and to the Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), both filed by the Defence for Mr. Norman on 26th June 2003 (together the "Motions"). Permission is sought pursuant to Article 5 of the Practice Direction on Filing Documents under Rule 72 of the Rules of Procedure and Evidence before the Appeals Chamber of the Special Court for Sierra Leone (hereafter "Article 5").

3. Article 5 reads as follows:

"The Appeals Chamber, the President or the Pre-Hearing Judge, may give permission for an interested party to intervene by way of filing a written submission and/or by making an oral submission and may appoint a legal expert to act as *amicus curiae*. Written arguments by intervenors and *amicus curiae* must be filed more than 7 days before the hearing, and will be circulated forthwith to the parties."

4. The Defence of Mr. Fofana submits that he is an interested party in the terms of Article 5 for the following reasons. First, subject to the submissions below, if the Court decides to hear argument on its independence, this is clearly equally relevant to all those accused before it. Second, the validity of the arguments raised in the Motions are as significant to Mr. Fofana as to Mr. Norman, as both are charged with the same crimes. Third, the Prosecution has recently applied to join the trial of Mr. Norman and Mr. Fofana¹. If this motion is successful, not only will Mr. Fofana be charged with crimes similar to Mr. Norman, but they will be prosecuted in the same trial. A judgement by the Appeals Chamber on the Motions will have the same implications for Mr. Fofana as for Mr. Norman. Mr. Fofana thus has a clear interest in the outcome of these proceedings.

5. The Defence for Mr. Fofana has had the opportunity to read the Motions filed by Mr. Norman. It has noted that a number of fundamental points have not or not fully been identified in the Motions. Mr. Fofana has several arguments, supported by case law and scholarly writings, to add to the arguments raised in the Motions. While Mr. Fofana will have the possibility to file his own motions on the issues raised by Mr. Norman, it is respectfully submitted that the judgement to be handed down by the Appeals Chamber in the proceedings opened by Mr. Norman will determine any future proceedings relating to the same points of law. It would be unjust to Mr. Fofana as an interested party and a breach of his rights as an accused if a final decision were taken on these questions without him being heard.

6. It is respectfully submitted that it is in fact in the interest of all parties before the Court and of the Court itself that the present proceedings are as comprehensive as possible and consider all points relevant to the issues raised in the Motions. The consistency of judicial decision-making, as well as the efficient running of the Court, are best served by all potential arguments being available to the judges before a decision is taken.

7. The Defence of Mr. Fofana therefore submits that it should be granted permission to intervene in the Motions as an interested party pursuant to Article 5. If granted permission

¹“Prosecution Motion for Joinder”, filed on 9 October 2003.

to intervene, the Defence of Mr. Fofana would seek to make oral submissions, and is also in a position to file written submissions and supporting authorities developing the following arguments, with a view to assisting the Court in a comprehensive consideration of all relevant issues.

Outline of supplementary arguments Mr. Fofana would wish to raise

Judicial independence

8. Mr. Norman has formulated this challenge to the independence of the Special Court in the form of a motion on the lack of jurisdiction. Pursuant to Rule 72, this motion now will be heard by the Appeals Chamber. The Defence of Mr. Fofana supports the challenge to the independence of the Special Court. However, it is respectfully submitted that that challenge is not a challenge to the jurisdiction of the Court.
9. In international law there is a clear distinction between the jurisdiction of a Court and the organisation of the composition of the Court. The former defines the power of a court to decide a case or issue a decree. The answer to the question whether the Court is organised in such a manner that its independence is properly guaranteed is relevant to whether the Court can lawfully exercise its jurisdiction, but does not determine the jurisdiction itself.
10. The Defence for Mr. Fofana reserves its position on the legality of the amendment of the Rules of Procedure and Evidence that have given the Appeals Chamber the right to act as court of first instance. However, under the amended Rules, the power of the Appeals Chamber to hear legal arguments in first instance under Rule 72 is limited to challenges that raise a serious issue relating to jurisdiction. The Rules do not grant the Appeals Chamber the right to extend that power to other challenges. A challenge to the independence of the Court is not a challenge raising a serious issue of jurisdiction and thus does not fall within the scope of Rule 72(E).

Child recruitment

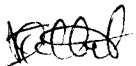
11. Mr. Fofana wishes to supplement and clarify the argument raised in the Motion filed by the Defence for Mr. Norman that the crime of recruiting child soldiers was not part of

customary international law at any time relevant to the indictments. It is submitted that the crime was not clearly and unequivocally recognised in international law; there was no or not sufficient state practice indicating an intention to criminalise child recruitment; there were no or only a limited number of statements of government officials or international government concerning criminalization, and there was no or only a limited practice of international courts or military tribunals punishing violations of the prohibition of recruitment of child soldiers.

Alternative request

12. The Defence of Mr. Fofana submits that Article 5 provides the means to satisfy the interests of justice in this matter. Intervention does not provide him with a full opportunity to deal with issues raised in the Motions, and the request to intervene is without prejudice to the right of Mr. Fofana to file his own preliminary motions on the above points. However, intervention will provide Mr. Fofana with at least a limited opportunity to address the relevant issues and contribute to a comprehensive discussion on the points of law that may affect his rights and interests.
13. If the Court is not minded to allow the intervention, however, two alternative procedures suggest themselves. As Mr. Fofana intends to file his own motions challenging jurisdiction, the Appeals Chamber, it is suggested, could either postpone ruling on the Motions until it has heard Mr. Fofana's own motions challenging jurisdiction, or it could postpone the oral hearing on the Motions until this could be joined with a hearing on Mr. Fofana's motions challenging jurisdiction. In this way the Appeals Chamber would have the benefit of all arguments, and all interested parties would be heard, before a decision is rendered.

COUNSEL FOR THE ACCUSED



PP: Mr. Michiel Pestman

Prof. André Nollkaemper

Dr. Liesbeth Zegveld