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SCSL-2003-11-PT-
(1027-103)

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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.
MORRIS KALLON
CASE NO. SCSL-2003-07-PT
MOININA FOFANA intervening

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|--------------------------------|--------------------|
| SPECIAL COURT FOR SIERRA LEONE | |
| RECEIVED | |
| COURT RECORDS | |
| 21 OCT 2003 | |
| NAME | NEIL GIBSON |
| SIGN | <i>Neil Gibson</i> |
| TIME | 12:24 |

**MOTION ON BEHALF OF MOININA FOFANA FOR LEAVE TO INTERVENE AS
AN INTERESTED PARTY IN THE PRELIMINARY MOTION FILED BY MR.
KALLON BASED ON A LACK OF JURISDICTION/ABUSE OF PROCESS:
AMNESTY PROVIDED BY LOMÉ ACCORD**

Office of the Prosecutor:

Mr. Luc Côté, Chief of Prosecutions

Defence Office:

Mr. Sylvain Roy, Acting Chief

Counsel for Mr. Kallon

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 a motion challenging the jurisdiction of the Special Court based on the amnesty that has been granted to him by the Lomé Agreement 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 a motion filed by Mr. Kallon pertaining to the same legal issues. The outcome of these proceedings may 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. Morris Kallon* (SCSL-2003-07-PT) pertaining to the Preliminary Motion Based on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord, filed by the Defence for Mr. Kallon on 16 June 2003 (the "Motion"). 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. The validity of the Lomé Agreement amnesty is as significant to Mr. Fofana as to Mr.

Kallon, as both are charged with crimes covered by the amnesty. A judgement by the Appeals Chamber on the Motion will have the same implications for Mr. Fofana as for Mr Kallon. 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 Motion filed by Mr. Kallon and the response by the Prosecutor. It has noted that a number of fundamental points pertaining to the issue of amnesties have not or not fully been identified in the Motion and the response. Mr. Fofana has several arguments, supported by case law and scholarly writings, to add to the arguments raised in the Motion. While Mr Fofana will have the possibility to file his own motion on the issue of amnesty, it is respectfully submitted that the judgment to be handed down by the Appeals Chamber in the proceedings opened by Mr. Kallon 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 relationship between the jurisdiction of the Special Court and the amnesties granted by the Lomé Agreement. 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 Motion as an interested party pursuant to Article 5. If granted permission to intervene, the Defence of Mr. Fofana would seek to make oral submissions, and is also in a position to file additional 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

8. In addition to the arguments raised in the Motion, two critical arguments support the position that the amnesties given under the Lomé Agreement are valid, that they cannot be affected by the subsequent agreement between the United Nations and Sierra Leone that established the Special Court (hereafter: the “Special Court Agreement”) and that therefore the Special Court has no jurisdiction over events governed by the amnesties.
9. First, the Lomé Agreement is an agreement under international law. It is signed by two entities having international legal personality: the Republic of Sierra Leone and the RUF. The capacity to conclude treaties under international law is not limited to states. It also extends to *de facto* authorities. At the time of the signature of the Lomé Agreement, the RUF was a *de facto* authority, exercising effective control over significant parts of the country. International law recognises that such *de facto* authorities possess limited international personality and that agreements concluded by them can be regarded as agreements under international law. The conclusion that the Lomé Agreement is an agreement under international law is further supported by the fact that it was co-signed by, among other parties, the United Nations. In addition, it was implemented, as any other treaty, by a national act in the national legal order of Sierra Leone.
10. The Lomé Agreement thus has legal status and force equal to the Special Court Agreement. It follows that rights of parties under the Lomé Agreement cannot be affected or altered by the Special Court Agreement. The principle contained in Article 34 of the Vienna Convention on the Law of Treaties to the effect that a treaty cannot create rights or obligations for third parties applies equally to agreements to which other entities than states are a party. The rights accorded by the Lomé Agreement thus remain valid and the Court cannot exercise jurisdiction over individuals belonging to any other party than the government of Sierra Leone itself, without the consent of that party. The Special Court thus is prevented from exercising jurisdiction over crimes committed in the period governed by the amnesty under the Lomé Agreement.
11. Second, customary international law does not prohibit the granting of amnesties for crimes under international law. On the contrary, an amnesty is an accepted legal instrument and an important means for achieving peace and reconciliation at the end of an armed conflict.

The amnesty under the Lomé Agreement thus is valid under international law. The denial of amnesty in the Statute of the Special Court thus cannot be justified by any alleged invalidity of the amnesty under the Lomé Agreement.

12. It is recognised that certain conditions need to be satisfied before an amnesty is accepted under international law. Blanket pardons and impunity are invalid. However, the Lomé Agreement does provide for proper guarantees. The Lomé Agreement is self-contained, and provides, *inter alia* by establishing the Truth and Reconciliation Commission, for adequate responses to human rights violations and violations of international humanitarian law.

Alternative request

13. 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 by the Lomé Agreement, 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.

14. 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 Motion until it has heard Mr. Fofana's own motions challenging jurisdiction, or it could postpone the oral hearing on the Motion 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.

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COUNSEL FOR THE ACCUSED

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Mr. Michiel Pestman

Prof. André Nollkaemper

Dr. Liesbeth Zegveld