

SPECIAL COURT FOR SIERRA LEONE

Trial Chamber 1

Before: Judge Benjamin Mutanga Itoe, Presiding Judge
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Robin Vincent

Date: 16 May 2005

The Prosecutor Against Sam Hinga Norman
Moinina Fofana
Allieu Kondewa
Case No. SCSL -04-14-T

DEFENCE REPLY
To the Prosecution Response to the Defence Request for Leave
To Appeal Against the Decision on First Accused's
MOTION ON ABUSE OF PROCESS

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I. PROCEDURAL BACKGROUND

1. Pursuant to Rule 7(B) and (C) of the Rules of Procedure and Evidence (**theRPE**) of the Special Court for Sierra Leone (**SCSL**) and to the relevant stipulations of Articles 4 to 7 inclusive of the Practice Direction on Filing Documents Before the Special Court for Sierra Leone dated 27 February 2003 and amended 1 June 2004 (**the Practice Direction**; #144, RP. 7041-7049) and of Part II of the Practice Direction for Certain Appeals Before the Special Court dated 30 September 2004 (**the Appeals Practice Direction**; #221, RP. 9665-9670), and in furtherance of the Rule 73(B) caveat of **SCSL/RPE**, the Court Appointed Counsel (**the CAC**) who personally drafted or settled and signed the **Founding Motion** or the **Abuse of Process Motion** by First Accused for Stay of Trial Proceedings dated 8 February 2005 (#340, RP. 11972-11989), hereby (together with the First Accused) files this Reply to the **Prosecution Response** to the Defence Request for Leave to Appeal Against the Decision on First Accused's Motion on Abuse of Process dated 11 May 2005 (#393, RP. 12620-12626). The said Decision on First Accused's Motion on Abuse of Process dated 28 April 2005 (#385, RP. 12525-12531) was made by the now Trial Chamber 1 of the Special Court (**the Main Decision**);and the said **Defence Request for Leave to Appeal** or **Leave Application** was filed 2 May 2005 (#390, RP. 12561-12566). The Annex hereto contains full citations for all references herein, among others.

2. The aforesaid Trial Chamber 1's **Decision on First Accused's Motion on Abuse of Process** was accompanied by two Separate Concurring Opinions respectively from the other two learned Judges, to wit, #386 at RP. 12531-12534 and #387 at RP. 12535-12537, both of which are broadly similar and consensual in content and tone not only as between themselves but also as regards **the Main Decision** of the Chamber (#385, RP. 12525-12531, though of course not without one or two crucial differences of legal opinion. The **Prosecution Response** faithfully takes over and recites, as its own, the main areas of the consensus of decision and opinion by the learned Judges, even though (or probably perhaps because) the said **Main Decision** and Concurring Opinions do "not expressly or specifically advert to any submissions by the Prosecution as such" from its earlier Response to the First Accused's Abuse of Process Motion of 25 February

2005 (#346, RP. 12113-12118). (For the foregoing quote, see #390, para. 4 at RP. 12562 of the **Defence Request for Leave to Appeal**).

II. CRITICISMS AND DEFENCE REACTIONS

a). Frivolity, Processual Abuse, Inchoate Contempt, Etc.

3. Obviously taking its cue from para. 20 of **the Main Decision**, where a brief observation on the language of the **Abuse of Process Motion** itself attracts mention of Rule 46(C) of **SCSL/RPE** concerning activities by Counsel which “are either frivolous or constitute abuse of process”, **the Prosecution Response** then proceeds to characterise the **Defence Request for Leave to Appeal**, rather than **the Abuse of Process Motion** as such, as follows in the final sentence of its concluding para. 16, viz: “It is an impertinent application of a kind that deserves to have Rule 46 forcefully brought into play” (Emphasis added). The case for the “forceful” invocation or application of any Rule of **SCSL/RPE** in any circumstances whatsoever is lost upon one here. And it is certainly a misplaced sentiment to refer here, in the circumstances, to **the Leave Application**, rather than to **the Founding Motion**, as “impertinent”.
4. The final sentence of **the Prosecution Motion** obviously adverts to the perceptions of the content, language and tone of **the Founding Motion** by the learned Judges of Trial Chamber 1 in the Main Decision and the respective Separate Concurring Opinions as variously frivolous, vexations, obscurantist, inchoately contemptuous of the judicial process, even sophistical, and so an abuse of process, (see paras. 20, 22 of #385 at RP. 12531; para. 11 of #386 at RP. 12534; and paras. 1, 6, 7, 8 of # 387 at RP. 12536 and 12537). The most succinct and indicative of these perceptions by the Judges occurs in the concluding para. 11 of # 386 at RP. 12534, as follows:

“This application, by raising issues that are clearly res judicata with this court and by relitigating matters with this Chamber which are now pending in the Appeals Chamber, constitute, in these circumstances, an abuse of process. Furthermore, the nature of this application and the language used therein borders on contempt of court”.

More generally, as to the **Abuse of Process Motion** itself, the perceived abuses of process presumably emanated from the following allegations variously levelled by the three learned Judges, to wit: that it raises issues as to which the Chamber is functus officio, or which are now res judicata; or that it severally contravenes either Rule 72 or Rule 73(C) of **SCSL/RPE**. or that counsel's language therein is "unprofessional" (para. 20 of #385 at RP. 12531) or obscurantist, sophistical and "intemperate" (paras. 6, 7 of #387 at RP. 12537). The several submissions of the Defence Response are reproductions of these judicial perceptions.

5. In so far as the language of the **Founding Motion** is concerned, it is admittedly forthright, highly compressed, even unflattering towards any sacred cow, and severely economical of the usual explicit verbal indices of expressed deference or diffidence. The point is that the **Founding Motion** deals with large issues of great importance and complexity within a severely restricted space prescription of at the most "10 pages or 3,000 words, whichever is greater" under Article 6 (C) of the **Practice Direction** (#114 at RP. 7045). Nonetheless, with the greatest respect and humility, the concerned **CAC** for the First Accused, on detailed re-examination of the language of the said **Founding Motion**, has not found it easy to trace in it any elements of either intemperance or unprofessionalism. As for obscurantism and sophistry, their tendency to be functions of levels of intellectual insight and conceptual sophistication, in perceiver and perceived alike, must never be lost sight of. All said and done, however, the concerned **CAC** hereby gives honest and complete assurance that in drafting the **Abuse of Process Motion**, such perceptions were never consciously contemplated, and certainly neither deliberately nor intentionally induced. Any impressions to the contrary are deeply regretted, with sincere apologies.

b). Jurisdiction and Rule 72

6. For the purposes of seeking leave to appeal in this instance, paragraphs 7 and 8 of the current **Leave Application** are herein adopted and repeated. It should also be noted that, in terms of Rule 72 *bis* (iii) of **SCSL/RPE**, it is a "general principle of law derived from national laws of [common law] systems of the world" that objections as to jurisdiction may be raised at any stage of trial

proceedings, indeed even after judgment, as long as it does not, in the particular instance, violate the doctrine of res judicata to do so. It is submitted that the issues of jurisdiction raised in paras. 2 to 7 inclusive in the **Founding Motion** as bases for the alleged abuse of process were never raised in that form in previous decisions by the Trial Chamber in question, which can be amply demonstrated in the more generous space available for an appeal.

c). “Functus Officio” and “Res Judicata”

7. The Separate Concurring Opinion in #386 raises crucial issues in respect of the doctrines of both functus officio and res judicata which indeed justify the issues raised in the **Founding Motion** and at which objections have been levelled on these grounds. It says categorically in para. 1 thereof that the doctrine of functus officio invoked in paras. 13, 16 and 17 of the **Main Decision** is not applicable to the **Founding Motion** “at this stage of the trial” where the Court still continues to be seized of the case (at RP. 12532). This difference of opinion between the Judges in one and the same decision warrants consideration on appeal of the issue on which the difference obtains. The same Separate Concurring Opinion in #386 also differs from the other two Judges by emphasising in its para. 8 that there is an “established exception” to the doctrine of res judicata, whereby the court “may review a decision where there is new evidence or information that refers specifically to the issue that has been determined and that may change the circumstances surrounding the initial decision” (at RP. 12533). The reference in the **Founding Motion** to the “hard and fast rule of regular practice” (paras 4 at RP. 11974) and the ample jurisprudential evidence adduced in respect thereof in Annex 5 to the said application (at RP. 11982) would both come within the exception to res judicata.

d). Rule 73(C)

8. It is submitted that this Rule does not apply in the particular case here of the **Founding Motion**, in that given more space than available here it can easily be shown that the issues raised in it are not the ones in the two appeals at present before the Appeals Chamber in respect of the Trial Chamber’s Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment of 29 November 2004 (#282, RP. 10888-10894). In any case, granting without conceding its application here, it will be seen that neither the

judicial pronouncements nor the **Prosecution Response** have specified the issues or elements in the **Founding Motion** to which it would apply. And if there are any such issues or elements, Trial Chamber 1 does not stay proceedings either on those issues or indeed on the **Founding Motion** as a whole until the said issues are determined by the Appeals Chamber, as stipulated by Rule 73(C) itself. On the contrary, both the **Main Decision** and the two Separate Concurring Opinions variously and unanimously “DENY and DISMISS” the **Founding Motion** “in its entirety” (#386 at RP. 12534 and #387 at RP. 12537 respectively; see also #385 at RP. 12531). The alleged non-applicability of Rule 73(C) to the said Motion and Trial Chamber 1’s ultimate non-compliance with it after invoking it would warrant grant of leave to appeal in this case.

III. RIGHTS VIOLATIONS AS ABUSES OF PROCESS.

9. Neither the judicial pronouncements under scrutiny here nor the **Prosecution Response** deal significantly or at all, as the case may be, with the most crucial issue raised in paras. 9 to 30 inclusive in the **Founding Motion**, though seemingly a relatively undeveloped area of international criminal jurisprudence, to wit, the fundamental human rights nature of both the substantive and (by intermediative incorporation of Rule 26 *bis*, for instance, in the **SCSL/RPE**) procedural rights as well of an accused person standing trial before an international criminal tribunal, and the effect upon his/her trial of the violation or non-observance of such right(s); in particular, to what extent such a violation may be said to be necessarily and automatically prejudicial to the rights owner in question and/or perforce an abuse of process, if at all. This oversight may be said to be both an “exceptional circumstance” and capable of prejudice to the First Accused that must be avoided, within the provisions of Rule 73(B) of **SCSL/RPE** as a basis for granting leave to appeal, especially also considering the undoubtedly crucial importance of the area of legal status and inquiry.

IV. MANDATE OF COURT APPOINTED COUNSEL

10. It perhaps should also be emphasised here that, in all that the concerned **CAC** has done in the Special Court in his representation so far of the First Accused, he

has endeavoured as best he may to comply with and supremely fulfil the mandate of Court Appointed Counsel in respect of their assigned clients, as stipulated by the Trial Chamber itself in its Consequential Order on the Role of Court Appointed Counsel, 1 October 2004, #216, RP.9643-9644, viz.

“ORDERS that the duty of Court Appointed Counsel will be to represent the case of the First, Second and Third Accused, and in particular, shall:

.....

.....

c. make all submissions on fact and law that they deem it appropriate to make in the form of oral and written motions before the court;

d. seek from the Trial Chamber such orders as they consider necessary to enable them to present the Accused’s case properly, including the issuance of subpoenas;

e. discuss with the Accused the conduct of the case, endeavour to obtain his instructions thereon and take account of views expressed by the Accused, while retaining the right to determine what course to follow; and

f. act throughout in the best interests of the Accused”

V. CONCLUSION

10. In view of the considerations canvassed in both the **Leave Application** and this Reply, the First Accused and his Court Appointed Counsel hereby urge Trial Chamber 1, in the interests of developing the relevant jurisprudence and also of justice, to grant leave to them to appeal the Decision on First Accused’s Motion on Abuse of Process.

Done in Freetown on 16 May 2005.

DR. BU-BUAKEI JABBI


COURT APPOINTED COUNSEL

SAM HINGA NORMAN


FIRST ACCUSED

ANNEX

INDEX OF AUTHORITIES

(NB: Apart from items 1 & 2, all are from P. v. Norman, Fofana, Kondewa, SCSL-2004—14-T

1. P.V. Norman, SCSL-2003-8-PT,
“Prosecution Motion for Joinder”, 9 October 2003, #87, RP. 2324-2337
2. P.V. Norman, Fofana, Kondewa, SCSL-2003-8-PT,
SCSL-2003-11PT, SCSL-2003-12-PT;
“Decision and Order on Prosecution Motions for Joinder”, 27th
January 2004, RP. 6547-6569
3. “Motion for Service and Arraignment on Second Indictment”, 21 September
2004, # 202, RP. 9572-9577.
4. “Prosecution Response to Norman Motion for Service and Arraignment on
Second Indictment”, 1 October 2004, #211, RP. 9616-9624
5. “Consequential Order on the role of court Appointed counsel”, 1 October
2004, #216, RP. 9643-9644
6. “Ruling on the issue of Non-Appearance of the First Accused Samuel Hinga
Norman, the Second Accused Moinina Fofana, and the Third
Accused Allieu Kondew, at the Trial Proceedings”, 1 October
2004, # 217, RP. 9645-9652
7. “Defence Reply to Prosecution Response to Norman Motion for Service and
Arraignment on Second Indictment”, 6 October 2004, #222, RP.
9671-9673
8. “Decision on the first Accused’s Motion for Service and Arraignment on the
consolidated Indictment”, Arraignment on the Consolidated
Indictment”, 29 November 2004, # 282, RP. 10888-10894.
9. “Separate concurring Opinion of Judge Bankole Thompson on Decision on first
Accused’s Motion for Service and Arraignment on the
Consolidated Indictment,” 29 November 2004, #285, RP.
10899-10909
10. “Application By First Accused for Leave to Make Interlocutory Appeal Against
the Decision on the First Accused’s Motion for Service and
Arraignment on the Consolidated Indictment”, 2 December
2004, #291, RP. 10933-10940.
11. “Dissenting Opinion of Honorabe Judge Benjamin Mutanga itoe, Presiding
Judge, on the chamber Majority Decision..... on the Motion

Filed by the first Accused.....for Service and Arraignment on the Second Indictment”, 29 November 2004 #293, RP. 10971-11011

12. “Prosecution Application for Leave to Appeal ‘Decision on the First Accused’s Motion for Service and Arraignment on the consolidated Indictment”, 6 December 2004, #297, RP. 11023-11060
13. “Prosecution response to Application by first Accused for leave to Make Interlocutory Appeal Against the Decision on the first Accused’s Motion for Service and Arraignment on the consolidated Indictment”, 8 December 2004, #303, RP. 11100-11104.
14. “Request for Leave to Amend the Indictment Against Norman”, 8 December 2004, #305, RP. 11108-11130
15. “First Accused Response to Prosecution Application for Leave to Appeal Decision on the First Accused’s Motion for Service and Arraignment on the consolidated Indictment, 8 December 2004, #307,RP. 11136-11143
16. “Reply to First Accused’s Response to Prosecution Application for Leave to Appeal decision on the First Accused’s Motion for Service and Arraignment on the consolidated Indictment”, 10 December 2004, #308, RP. 11144-11148.
17. “Decision on Prosecution Application for Leave to Appeal Decision on the first Accused’s Motion for Service and Arraignment on the Consolidated Indictment 15 December 2004, #312, RP. 11205-11207.
18. “Decision on Application by first Accused for Leave to Make Interlocutory Appeal Against the Decision on the First Accused’s Motion for Service Arraignment on the consolidated Indictment”, 16 December 2004, #313, RP. 11208-11211.
19. “First Accused Response to Prosecution’s Request for leave to amend the Indictment Against Norman”, 17 December 2004, #315, RP. 11214-11230
20. “Prosecution Notice of Appeal Against the Trial Chamber’s Decision of 29 November 204 and Prosecution Submissions on Appeal”, 12 January 2005, #318, RP. 11232-11259
21. “Reply to Defence Response to Prosecution’s Request for Leave to amend the Indictment Against Norman”, 14 January 2005, #317, RP. 11275-11296.

22. "Interlocutory Appeal by First Accused Against the Trial Chamber's Decision on the first Accused's Motion for Service and Arraignment on the consolidated Indictment of 29 November 2004", 17 January 2005, #318, RP. 11297-11325.
23. "Prosecution Response to Interlocutory Appeal by First Accused Against the Trial Chamber's Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment of 29 November 2004 2004", 24 January 2005, #320, RP. 11446-11461.
24. "Defence Response to Prosecution Notice of Appeal Against the Trial Chamber's Decision of 29 November 2004 and Prosecution submissions on appeal, 26 January 2005, #322, RP. 11605-11617
25. "Defence Reply to Prosecution Response to Interlocutory Appeal by First Accused Against the Trial Chamber's decision on the first Accused's Motion for Service and Arraignment on the consolidated Indictment of 29 November 2004", 28 January 2005, #325, RP. 11622-11625.
26. "Prosecution Reply to the Defence Response to the prosecution Notice of Appeal Against the Trial chamber's Decision of 29 November 2004 and prosecution Submissions on Appeal", 31 January 2005, #326, RP. 11616-11636.
27. "Abuse of Process Motion by First Accused for Stay of Trial Proceedings", 8 February 2005, ~340, RP. 11972-11989.
28. "Prosecution Response to the first Accused's Abuse of Process Motion ", 25 January 2005, #346, RP. 12113-12118.
29. "Defence Reply to Prosecution Response to the First Accused's Abuse of Process Motion for Stay of Trial Proceedings", 28 February 2005, #349, RP> 12205-12211.
30. "Decision of First Accused's Motion on Abuse of Process", 28 April 2005, #385, RP. 12525-12531
31. "Separate and concurring Opinion of Justice Pierre Boutet on the Decision on First Accused's Motion on Abuse of Process", 28 April 2005, 386, RP. 12531-12534.
32. "Separate concurring Opinion of Justice Banikole Thompson on decision on Motion of first Accused for Abuse of Process", 28 April 2005, #387, RP. 12535-12537.

33. "Defence Request for Leave to Appeal Against the Decision on First Accused's Motion on Abuse of Process", 2 May 2005, #390, RP. 12561-12566.
34. "Prosecution response to the Defence Request for Leave to Appeal against the Decision on First Accused's Motion on Abuse of Process", 11 May 2005, #393, RP. 12620-12626