

**SPECIAL COURT FOR SIERRA LEONE****The Trial Chamber**

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

Registrar: Robin Vincent

Date: 28 February 2005

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

**DEFENCE REPLY**

To Prosecution Response to  
 the First Accused's Abuse of Process Motion  
 for Stay of Trial Proceedings.

**Office of the Prosecutor**

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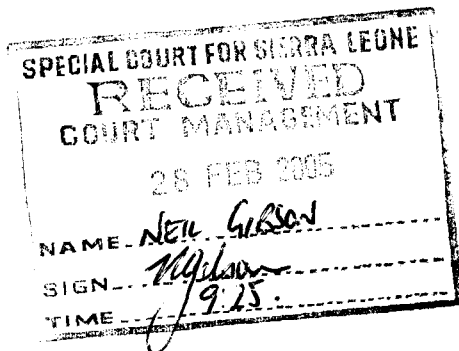
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**I. INTRODUCTION: PROSECUTION'S RESPONSE**

1. In reacting to the Abuse of Process Motion of the First Accused (**the Motion**)<sup>1</sup>, the Prosecution Response thereto (**the Response**)<sup>2</sup> adopts some five or six approaches: That the alleged abuses of process "occurred **after** the pre-trial investigatory stage" of the case (para. 8; emphasis in original; see also paras. 1-2, 7-9, inclusive thereof); that the issues raised in the Motion have either already been decided or ruled upon by the Trial Chamber (paras. 3-5), or are currently before one or other of the two Chambers of the Special Court for resolution (paras. 3, 6), or are only being raised for the first time (para. 14); and that in any case no violations of the Accused's rights have been demonstrated (paras. 10-13).
2. A sixth approach of the Response is its assertion that, in view of the Motion's "somewhat convoluted" submissions, certain "contents" thereof are **not** addressed in the Response (paras. 1, 9).

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<sup>1</sup> *Prosecutor v. Norman, Fofana and Kondewa, Case No. SCSL-04-14-T*, "Abuse of Process Motion by First Accused for Stay of Trial Proceedings", 15 February 2005, Doc. 340 (RPp. 11972-11984).

<sup>2</sup> *Ibid*, "Prosecution Response to the First Accused's Abuse of Process Motion", 25 February 2005, Doc. 346 (RPp. 12113-12118).

## II. DISCRETE REPLIES

### (i). Whether Issues Already Resolved

3. In its paragraphs 3 to 5 inclusive, the Response observes that the alleged violations of standard practice and joinder rules by the Prosecution, as illustrated in paragraphs 3 to 7 inclusive of the Motion, were “conclusively resolved” in **the Joinder Decision**<sup>3</sup> of 27<sup>th</sup> January 2004. But it is to be noted that the Motion recites these violations **as manifesting a jurisdictional issue** founding “a huge abuse of process” (para. 3 thereof). The two violations had not been raised **as matters of jurisdiction** in either the original **Joinder Motions**<sup>4</sup> or the Joinder Decision thereon, and so were not and could not have been resolved **as jurisdictional issues** in the latter. It is only now they are raised **as a jurisdictional issue** by the Motion. Nonetheless, the Prosecution Response chooses to be indifferent and unresponsive to them as such. It is submitted, however, that jurisdictional issues in litigation remain potentially alive, even if only latently, throughout the proceedings; and so may be raised at any stage thereof, nay, even after judgment. The said violations are accordingly perfectly legitimately raised in the Motion as bases of a jurisdictional issue.

### (ii). Issues Currently Before Appeals Chamber.

4. In its paragraphs 3 and 6, the Response specifically refers to separate appeals by the Prosecution and the First Accused at present pending before the Appeals Chamber against the 29<sup>th</sup> November 2004 Decision of the Trial Chamber<sup>5</sup>, which presumably include certain issues raised in the Abuse of Process Motion as well, according to the Response. But the Response does not specifically itemise or further respond to any such issue. It is submitted that there is no rule or law against the same or similar or related issue(s) being simultaneously or concurrently raised before the two Chambers of the Special Court. And, in any

<sup>3</sup> *Prosecutor v. Norman*, SCSL-03-08-PT; *Prosecutor v. Fofana*, SCSL-03-11-PT; *Prosecutor v. Kondewa*, SCSL-03-12-PT: “Decision and Order on Prosecution Motions for Joinder”, 27 January 2004, Doc. 131 (RPP. 6547-6562).

<sup>4</sup> *Ibid.*, “Prosecution Motions for Joinder”, 9 October 2003, Doc.087 (RPP. 2324-2337).

<sup>5</sup> *Prosecutor v. Norman, Fofana, and Kondewa*, SCSL-04-14-T: “Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment”, 29 November 2004, Doc. 282 (RPP. 10888-10894).

case, sub-rule 73(C) of the Court's Rules of Procedure and Evidence specifically provides for and satisfactorily deals with any situation whereby the two Chambers "are seized of the same Motion raising the same or similar issue or issues"(Emphasis added). It is submitted furthermore that the said appeals before the Appeals Chamber are by no means "the same Motion" as the current Motion before the Trial Chamber in terms of sub-rule 73(C), whatever the shared issue(s) between them may be.

(iii). Issues Raised for the First Time.

5. In its concluding paragraph 14, the Response alleges that "new issues are now being raised" in the Motion, which ideally "should have been raised prior to the commencement of the trial". But again it fails to specify any such issue, and so it makes no further response in respect thereof, nor need any further reply thereto be made here.

(iv). Confining Abuse of Process to Pre-Trial Misconduct.

6. The Response argues in its paragraphs 1, 2, 7, 8 and 9 that the doctrine of abuse of process is inappropriately invoked by the Motion because, according to the Prosecution, all the alleged abuses "occurred **after** the pre-trial investigatory stage" and "within the trial"(paras. 8,9; emphasis in original). "Where delay is not at issue", so the Prosecution argument goes, "the doctrine of abuse of process is triggered by misconduct during the pre-trial investigatory stage of the case..... The conduct complained of in the Motion simply does not fall within the definition of a pre-trial event" (paras 8, 9). That is to say, that the said doctrine is applicable only to conduct occurring **outside and before** the trial process proper and **never to one within** the trial.
7. Firstly, it is factually incorrect and untrue that **all** the alleged abuses fall outside "the definition of a pre-trial event". For quite a few major alleged abuses obtain at the pre-trial stage or commence therefrom and overarch into the trial proper. For example, the "congenital constitutive anomaly" referred to in paragraphs 8,

11, 27 and 28 of the Motion as infringing the presumption of innocence, took place at the earliest stages of mandating, legislating and setting up the Special Court itself. And both the actual and constructive violations of standard practice and the joinder rules, as recited in paragraphs 3 to 8 inclusive of the Motion, could only have taken place at the stage of the coming into being of the consolidated indictment **before** the trial proper was to commence thereupon. As for the alleged violations by the Prosecution of Rules 51 and 52 and possibly 61, as cited in paragraphs 12 and 13 of the Motion, they derive from the pre-trial stage and survive and continue into the entire trial process so far.

8. Secondly, it is a total misrepresentation and travesty of the law to argue that the doctrine of abuse of process is applicable only in cases of delay and other forms of pre-trial conduct or misconduct. Surely, **the process of the Court** which the doctrine is designed to protect and preserve clearly transcends the pre-trial stage and extends into the trial stage proper. Take Lord Devlin's references to it, for instance, in Connelly v. DPP as

“**the court's duty to conduct their proceedings** so as to command the respect and confidence of the public ..... one of great constitutional importance ..... **to protect their process from abuse** ..... an inescapable duty to secure fair treatment for those who come or are brought before them ..... **the responsibility for seeing that the process of law is not abused**”(at (1964) 2 All E.R. p.442A, H-I; all emphases added).

As Woodhouse J emphasised in Moevao v. Dept of Trade(1980) 1 NZLR 464 at pp.475-476:

“**It is the function and purpose of the Courts** as a separate part of the constitutional machinery **that must be protected from abuse** rather than the particular processes that are used within the machine. It may be that the shorthand phrase ‘abuse of process’ by itself does not give sufficient emphasis to **the principle that in this context the Court must react** not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as **against the much wider and more serious abuse of the criminal jurisdiction in general**”

(cited in Bennett (1993) 3 All E.R 138 at p. 155 c-d; all emphases added)

Indeed, delay and the other pre-trial processes or conduct are only part, and a small part at that, of either “the criminal jurisdiction in general” or “the process of law” which the doctrine of abuse of process is designed to protect.

(v). No Violation of the Accused’s Rights.

9. The Response also argues in its paragraphs 10 to 13 inclusive that the Motion fails to explain how any of the Accused’s rights have been violated and that no such rights have in fact been violated. This obviously overlooks both the allegations as to infringement of the presumption of innocence, for example, in paragraphs 8, 11, 27 and 28 of the Motion or as to double jeopardy in paragraphs 12 and 29 thereof, and also the framing summaries in paragraphs 8, 27 and 30 thereof alleging that the substantive and procedural rights of the Accused recited in-between have been repeatedly violated before and during the on-going trial process. Apparently, the Response is also indifferent to and unconcerned with the projected conception of the Accused’s rights as fundamental human rights whose violations are perforce egregious and prejudicial, in terms of the usual operational parameters of the relevant applicable international and national domestic human rights norms and standards, as argued in paragraphs 9 to 30 inclusive of the Motion, especially paragraphs 10, 17, 18 and 30 thereof.

(vi). Unaddressed Issues.

- 10 As mooted in paragraph 2 above hereof, the Response unashamedly admits that it has chosen to leave unaddressed certain aspects of the Motion, blaming the latter for what it dubs as its “somewhat convoluted” submissions. Some of these aspects could well be those which we have suggested above that the Response has ignored, overlooked, or failed to properly or clearly respond to. But the Response does not even merely identify or specify any such aspects. Surely, within the framework and terms of Article 6(C) of the Practice Direction for Filing Documents before the Special Court for Sierra Leone, as amended 1 June 2004, for instance, it is obviously inexcusable for the Response to ignore aspects

of a Motion it purports to be responding to when it deliberately leaves unutilised nearly half of the total number of pages permitted to it for the purpose.

### III. CONCLUSION

- 11 It is clear from the foregoing discrete replies that the Prosecution Response to the Abuse of Process Motion is farnished from embarrassment at the variety and force of the gaping abuses with which the entire prosecution mandate and process are infested in the current trial of the Accused. The First Accused accordingly urges the Trial Chamber to grant all the reliefs as prayed in the Motion.

Done in Freetown this 28<sup>th</sup> day of February 2005.

DR. BU-BUAKEI JABBI

  
COURT APPOINTED COUNSEL

Sam Hinga Norman

  
First Accused.