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SCSL-2004-14-T

(12927 – 12945)

12927

SPECIAL COURT FOR SIERRA LEONE

The Trial Chamber 1

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

Registrar: Robin Vincent

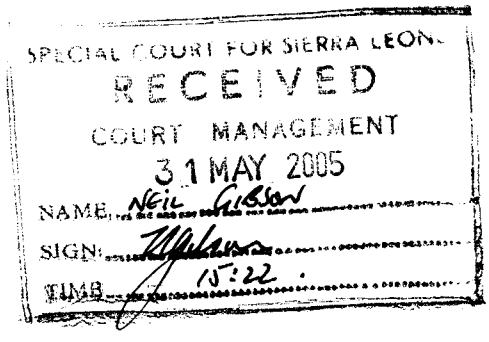
Date: 31 May 2005

PROSECUTOR **Against** **Sam Hinga Norman**
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

NORMAN COUNSEL'S REQUEST FOR LEAVE TO APPEAL UNDER RULE 46(H)

Office of the Prosecutor
Luc Cote
James C. Johnson
Kevin Tavener



Court AppointedCounsel for Sam Hinga Norman
Dr. Bu-Buakei Jabbi
John Wesley Hall Jr.

Court Appointed Counsel for Moinina Fofana
Michiel Pestman
Arrow J. Bokarie
Victor Koppe

Court Appointed Counsel for Allieu Kondewa
Charles Margai
Yada Williams
Ansu Lansana

I. THE REQUEST AND ITS BACKGROUND

1. Pursuant to **Rule 46(H)** of the Rules of Procedure and Evidence **(the RPE)** of the Special Court for Sierra Leone **(SCSL)** and to the relevant stipulations of Articles 4 to 7 inclusive and especially Article 6(D)(i)(a) and Article 12 of the Practice Direction on Filing Documents Before the Special Court for Sierra Leone dated 27 February 2003 and amended 1 June 2004 **(the General Practice Direction**, #114, RP. 7041-7049) and of Part II and especially paragraphs 7 and 18 thereof 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 contemplation of the ultimate "expeditious" proceedings provisions in Rule 117(A) of the aforesaid **RPE/SCSL**, the Court Appointed Counsel **(the CAC)** who personally drafted, settled, signed and filed the **Founding Motion** or the **Abuse of Process Motion** by First Accused for Stay of Trial Proceedings dated 8 February 2005 (#340, RP. 11973-11989), hereby on his own personal professional behalf humbly seeks the gracious and judicious discretional consent of the learned Judges of Trial Chamber 1 to grant him **LEAVE** in accordance with the said **Rule 46(H)** and the foregoing directive stipulations to appeal against the incidental or secondary decision made by the said Chamber under **Rule 46(C)** taken together with the related Order thereto **(the Impugned Sub-Decision)** made in the process of its Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on First Accused's Motion on Abuse of Process, dated 24 May 2005, the **Abuse of Process Leave Decision** (#406, RP. 12815 – 12818), and (if possible) to urgently temporarily grant him in the meantime **before further exchange** of **Response and Reply** herein and on humanitarian grounds **an immediate *interim* stay of execution of the said related Order**, pending further processes and ultimate appeal decision following **this Leave Application**.

2. To recapitulate, it will be recalled that the **Founding Motion** or the **Abuse of Process Motion** aforesaid was filed on behalf of the First Accused on 8 February 2005, the Prosecution Response thereto on 25 February 2005 (#346, RP. 12113-12183), and the relevant Defence Reply on 28 February 2005 (#349, RP. 12205-12211). Trial Chamber 1's ultimate Decision on the said **Founding**

Motion was rendered on 28 April 2005, the **Abuse of Process Decision** (#385, RP. 12525-12531). Thereafter **the CAC** concerned then decided to seek leave to appeal against the said **Abuse of Process Decision**, which leave application was filed on 2 May 2005 (#390, RP. 12561-12566), followed by the usual Prosecution Response thereto (#393, RP. 1262012626) filed on 11 May 2005 and the relevant Defence Reply filed on 16 May 2005 (#395, RP.12638-12648). Trial Chamber 1 then delivered its decision on that leave application in its **Abuse of Process Leave Decision** mentioned in paragraph 1 hereof above, part of which contains **the Impugned Sub-Decision** aforesaid against which leave is now currently being sought to appeal. Appended to the aforesaid **Abuse of Process Decision** were two Separate Concurring Opinions of the then non-presiding learned Judges of the Chamber, to wit, #386 at RP. 12531-12534 and #387 at 12535-12537 respectively. **The Impugned Sub-Decision** which is the subject of **this Leave Application** was severely mooted in #385, #386 and #387, but without any specified sanction as now in what obviously constitutes a fresh decision in that regard in #406. (See ANNEX)

II. THE FOUNDING MOTION AND ITS ALLEGED ABUSIVENESS

3. It must respectfully be emphasised here at the outset that, in all that **the CAC** concerned has done and sought to do in his representation of the First Accused since his appointment or designation as a "Court Appointed Counsel" for the First Accused, he has actively endeavoured as best he may, even if sometimes quite robustly, to distinctly comply with and supremely fulfil the mandate of Court Appointed Counsel in respect of their respective individual clients in the Civil Defence Forces trials at the Special Court, as indeed is stipulated by the said Trial Chamber itself in its Consequential Order on the Role of Court Appointed Counsel, dated 1 October 2004 (#216, RP. 9643-9644), i.e. **Order on Counsel's Role,** which stipulates as follows:

> "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"

It is submitted that the **Founding Motion** aforesaid is strongly imbued with the vital tenets of this **Order on Counsel's Role**. And it is further respectfully submitted that in compiling the said **Abuse of Process Motion**, and indeed any and all instruments of process before the Special Court that have so far been drafted and settled by **the CAC** concerned, he has consistently and hopefully both effectively and successfully sought to "act throughout in the best interests of the Accused", the First Accused.

4. The purpose and object of the **Abuse of Process Motion** (#340) were admittedly extremely radical and far-reaching, raising issues and arguments which (if upheld by the Trial Chamber) might bring the whole trial proceedings to an immediate end, even if only subject to fresh prosecution on a new foundation. The said **Founding Motion** sought to provoke, elicit and present evidence and perspectives which would show persuasively, and possibly conclusively, mainly two overarching dimensions of the entire CDF trial process, viz:

(1). That the Consolidated Indictment on which the CDF trials were and are proceeding was and is radically flawed and ultimately invalid for a number of reasons, some of which easily assume a jurisdictional guise and posture; and that it would be and was a grandiose abuse of process to continue to prosecute the CDF accused persons upon the basis of

such an invalid founding instrument (see paras. 2-7 inclusive of #340 at RP. 11973-11975).

(2). That certain guaranteed rights of the accused person in terms of Article 17(2) – (4) inclusive of the Statute of **the SCSL,** and including certain procedural rights thereof as well, had been and/or were being irreparably breached not only by the Prosecution in the pre-trial and trial stages alike but also by the very trial process itself and even by an aspect of the original legislative enactments by which **the SCSL** had been set up and mandated as an institution of international criminal litigation; and that the said rights tended to be of fundamental human rights nature and import within the framework of relevant international human rights norms and standards and such national domestic instruments as Chapter III of the Constitution of Sierra Leone 1991, and that the breach or violation or non-observance of such rights in the criminal adjudication process would necessarily be prejudicial to the rights-owning accused person and perforce abusive of the process, thereby **leaving no discretion whatsoever** to the adjudicator(s) to determine its effect otherwise on the fairness of the relevant trial (see paras. 8-30 inclusive of #340 at RP. 11975-11981).

Paragraphs 2 and 8 of #340 at RP. 11973 and 11975 respectively, against the latter of which there has been quite some judicial stick on its language, were and are highly compressed anticipative summaries of the detailed respective submissions under these two dimensions.

5. Now, such submissions are apt to arouse the sheer survival instinct of the proceedings themselves in order for the trial and its related processes to have to continue to go on up until their logical conclusion, rather than be prematurely aborted by such submissions. In any case, the said submissions obviously involve large and varied issues that cannot be fully or fairly argued within a brief compass of space as is normally allowed for interlocutory motions within the **RPE/SCSL** and related practice directions. Indeed, an earlier version thereof was disallowed precisely for non-compliance with the relevant space stipulations (#330 at RP. 11718-11811). And whereas such adequate space

compass might have availed at the interlocutory appellate stage, Trial Chamber 1's **Abuse of Process Decision** (#385, at RP. 12525-12531) has procedurally lawfully put paid to that possibility for present purposes.

6. However, it is reactively alleged by the learned Judges that (the modes of presentation of) certain aspects of the founding **Abuse of Process Motion** (#340, RP. 11972-11989) are themselves abuses of process (see #385, paras. 20-22 at RP. 12531; and #406, preambular paras. 13, 15, 18 and 19 at RP. 12817-12818). **This Leave Application** is concerned solely with this reactive or reverse boomerang effect of **the CAC's** original allegations of abuse of process in the proceedings and not with those original allegations themselves as such by **the CAC.** Preambular paragraphs 13, 15, 18 and 19 OF #406 and the **Order** in respect thereof clearly set out **the Impugned Sub-Decision** at which **this Leave Application** is directed or targeted, viz:

> "**CONSIDERING** that the Court Appointed Counsel by submitting this Motion simply seeks to relitigate issues which have been ruled upon by the Trial Chamber and already settled by the Appeals Chamber, and that the resurrection of these matters is legally impermissible and has no basis in the Statute and the rules of the Special Court;
>
> .....
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> "**CONSIDERING** that the language used by the Court Appointed Counsel in his Motion in many instances is not 'comprehensible and considered' and mindful in this regard of the admonishment not to use 'exaggerated language', already given by the Appeals Chamber of the Special Court to the Court Appointed Counsel;
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> .....
>
> ....
>
> "**NOTING** Rule 46(C) of the Rules which provides that:
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> > 'Counsel who bring motions, or conduct other activities, that in the opinion of a Chamber are either frivolous or constitute abuse of process may be sanctioned for those actions as the Chamber may direct. Sanctions may include fines upon

counsel; non-payment, in whole or in part, of fees associated with the motion or its costs, or such other sanctions as the Chamber may direct.'

"**CONSIDERING** that this motion constitutes an abuse of the process; **"THE TRIAL CHAMBER HEREBY..... ORDERS** the Principal Defender to withhold from Court Appointed Counsel for the First Accused all costs and fees associated with the Motion."

Paragraphs 20-22 inclusive of #385 at RP. 12531 are to the same effect, with para. 21 thereof in particular setting out the bases of the alleged boomerang abuses of process as follows:

"Finally we observe; firstly, the applicant has again raised in his submissions and reopened arguments on issues that have already been determined by this Chamber and for which it is now functus officio; secondly, that notwithstanding the very clear and unambiguous provisions of Rule 73(C) of the rules, he has submitted for re-litigation, the same issues which have been dealt with by this Chamber and are now pending before the Appeals Chamber; and thirdly, he has raised jurisdictional issues which have been finally litigated in the Appeals Chamber and which are now Res Judicata"

7. Closely related to the boomerang abuses of process as alleged in both the Trial Chamber triad of #385, #386 and #387 and in its subsequent #406 are the allegations by the learned Judges in respect of the language used by **the CAC** in the **Abuse of Process Motion** (#340), to the effect broadly that "the language used therein borders on contempt of court "(#386, para. 11 at RP. 12534; see also para. 20 of #385, paras. 6-8 inclusive of #387 and preambular para. 15 of #406 as cited above). In particular, the following paragraph 8 of # 340 is specifically cited in para. 6 of #387 and preambular para. 15 of #406, for example, for special comment of condemnation.

> "Dogged and calculated prosecution adamancy in the avoidance and evasion of material and/or mandatory rules of procedure, together with its ulterior reasoning and impulsion thereto, plus the consistent (even if unintended) blessing of equally determined judicial endorsements thereof, and a certain congenital constitutive anomaly, have sustained the current consolidated indictment in ways tantamount to a gross and sustained abuse of process that has, in its own turn, and from the very constituting of the Special Court and the earliest beginnings of the entire prosecution process right up until the present proceedings, repeatedly violated and egregiously prejudiced the due process rights of the accused persons, and thereby subverted the interests of justice and the integrity of the judicial process itself

8. To lay the language ghost right away, it must be noted that the **Abuse of Process Motion** dealt with large issues of great importance and complexity within the severely restrictive space prescription under Article 6(C) of the **General Practice Direction** (#114 at RP. 7045), which has tended to make the language highly compressed and spare. And, as noted at the end of paragraph 4 hereof above, paragraph 8 of #340 in particular is a compact anticipative summary of the several submissions and examples of rights violations of the subsequent paragraphs 9-30 inclusive of #340, which concern the second main set of submissions concerning the CDF trial process as a whole, just as paragraph 2 of the same #340 also is in respect of the first main set in the five related paragraphs that follow it, and just as paragraph 1 thereof as well is a highly compressed anticipative summary of the entire range of submissions in the said #340. In this way, it was possible to broadly encapsulate the large issues in compact preliminary summaries, followed by specific analyses and examples of those issues. Nonetheless, and with the greatest respect, **the CAC** concerned hereby submits, even after detailed re-examination of the language of #340 or of paragraphs 1, 2 or 8 thereof, that the said language is neither incomprehensible, nor exaggerated, nor obscurantist or sophistical, and certainly neither unprofessional nor even remotely suggestive of contempt towards either the Trial Chamber or the criminal adjudicatory process, as variously perceived in #385, #386, #387 and #406. Admittedly, however, it is forthright, even

unflattering towards any sacred cow or indeed the CDF trial process as a whole. **The CAC** concerned deeply regrets any impressions leading to the negative perceptions, with sincere apologies.

9. As for the alleged boomerang abuses of process themselves, it may be emphasised here generally that they are at least referable (not to say justifiably or effectively applicable) mainly to the analyses and submissions in paragraphs 2-7 inclusive of #340 and hardly even merely referable at all to most of the submissions and illustrated examples in paragraphs 8-30 inclusive thereof. It would thus be best here to look at individual submissions and illustrations from the two sets of paragraphs in order to determine their degree or otherwise of susceptibility to the alleged reverse abusiveness of process.

III. MODE OF GENESIS OF CONSOLIDATED INDICTMENT

10. Paragraphs 2-7 inclusive of the **Abuse of Process Motion** (#340) are concerned to demonstrate that the mode of genesis of the Consolidated Indictment upon which the CDF trial is founded and is being conducted, at any rate in so far as its joint-charging or consolidation aspect is concerned, rendered it invalid and a nullity ab initio, "thereby making it a huge abuse of process that the CDF trial was founded and is being sustained upon it" (para.3 of #340). This general point is illustrated with two specific issues:

(a). That the Trial chamber had no jurisdiction in its Decision and Order on Prosecution Motions for Joinder of 27 January 2004 (#131, RP. 6547-6569) to decide the Prosecution Motion for Joinder of 9 October 2003 (#87, RP. 2324-2483) in respect of the application therein to consolidate the previous separate individual indictments of the three CDF accused persons, when the said Prosecution Motion did not include a draft of the proposed Consolidated Indictment annexed thereto, the filing of such drafts with the relevant motions for amendment or consolidation being a

hard and fast rule of regular practice in such ad hoc international criminal tribunals as the ICTY and ICTR. The relevant authorities are cited in the submission. (see paras. 4 and 5 of #340).

(b). That the combined Prosecution application in #87 for both Rule 48(B) joinder and the consolidation of pre-existing separate individual indictments was inappropriate and incompatible, the said Rule 48(B) being strictly designed for trying together separate indictments which continue and remain throughout the trial to be distinct and separate indictments (paras. 6 and 7 of #340), thereby definitively rendering Rule 48(B) "foreclosed and unavailable for the purpose of consolidation as such" (para. 7 of #340). The application was thus a violation of the relevant joinder Rule(s) and at least suspect in its motives and its possible "ulterior reasoning and impulsion thereto" (para. 8 of #340). For the Prosecution could otherwise have made a non-consolidation application under either Rule 48(B) as strictly designed or Rule 48(C), wherein however, its desired changes in respect of the First Accused would have been impracticable or impossible. Or, in order to ensure that the said desired changes were effected, the Prosecution could have applied under either Rule 48(B) or Rule 48(C) but in either case **in combination with** Rule 50 (A) Third Limb, whereby however the said application would have to be "**subject to further prosecution obligations or further defence rights and entitlements either under subrule 50(B), as specified, or even under the primordial Rule 47 and selective combinations of its systemic progeny of processes in terms of Rules 52, 61, 66, 72 and/or 73, for instance, among others, as applicable**" (para. 7 of #340.

11. At this stage, one may well ask: In its application in #87, was the Prosecution aware of the options facing it and their respective implications and/or limitations as set out in paragraphs 6 and 7 of #340 and paragraph 10(b) hereof above? And did it, in that awareness, deliberately choose to make the application in full consciousness of the essential incompatibility between Rule 48(B) as strictly designed and consolidation? And if so, could such consistent awareness and

choice be fairly characterised, in the words of para. 8 of #340, as "dogged and calculated prosecution adamancy in the avoidance and evasion of material and/or mandatory rules of procedure"?

12. And as to the issues raised in paras.4 and 5 of #340 and summarised in para. 10(a) hereof, it is clear that no such jurisdictional issue was raised in #87 and/or decided in #131. True, the issue of annexing a draft of the proposed Consolidated Indictment was raised and it was decided that it was a "procedural technicality" and unnecessary (para. 11 of #131 at RP. 6551). And in any case, the ample jurisprudential evidence for its procedural necessity or importance or for its jurisdictional significance as recited and supplied in paras. 4 and 5 and Annex 5 of #340, were never directly mentioned in either #87 or #131, which new evidence is an "established exception" to the doctrine of res judicata (para. 8 of #386). Clearly, therefore, paras 3-5 inclusive of #340 involved no reverse abuse of process by #340 itself.

13. As to the issues raised in paras. 6 and 7 of #340 and summarised in para. 10(b) hereof, it is even clearer that neither the true nature of Rule 48(B) nor its essential incompatibility with the consolidation of indictments was an issue in the application in #87 or the decision in #131. The prosecution blandly cited the Rule with the request for consolidation in paras. 1 and 36 of #87, but then proceeded on an exquisite disquisition on general joinder criteria applicable to all the forms of joinder under Rules 48(A), 48(B), 48(C), 49 and 50; and the Trial Chamber graciously obliged in #131, following the same thrust as in the application before it. As the Appeals Chamber says in its Decision on Amendment of the Consolidated Indictment of 18 May 2005 (#397, RP. 12652-12685), the Trial Chamber decision in #131 was "**a lengthy decision on a question that was not subject of any dispute**" (#397, para. 59 at RP. 12672. Emphasis added). Clearly, the very specific issues on the definitive and distinctive individual natures and object of rules 48(A), 48(B), 48(C) and the related joinder Rules as briefly espoused in paras. 6 and 7 of #340 were never raised in #87 and #131; and no issue of either functus officio or res judicata arises in respect of them, nor the remotest suggestion of a reverse abuse of process arising therefrom.

14. With respect to the jurisdictional aspects of the submissions and analysis in paragraphs 2-7 inclusive of #340, they very simply do ***not*** include any of the grand **pre-trial** "jurisdictional issues which have been finally litigated in the Appeals Chamber" (para. 21 of # 385). And jurisdictional issues are not necessarily confined to or capable of arising only at **pre-trial** stages; they may properly arise at any ***trial*** stage as well. (See further on this, paras. 7 and 8 of #390 at RP. 12563-12565 and para. 6 of #395 at RP. 12641-12642).

IV. RIGHTS VIOLATION ALLEGATIONS AS ABUSES OF PROCESS

15. Of the various illustrations of the general issue raised in paras. 9-30 of #340 and succinctly summarised in para. 4(2) hereof above, a few were obviously involved in the application before the Trial Chamber in the First Accused's Motion for Service and Arraignment on Second Indictment of 21 September 2004 (#202, RP. 9572-9577) and its decision thereon of 29 November 2004 (#282 RP. 10888-10894): for example, the breach or otherwise of such procedural rules as Rule 50 on amendment, Rule 51 concerning withdrawal of indictments, Rule 52 concerning service of the indictment, and Rule 61 on arraignment or re-arraignment. The said illustrative issues were accordingly on appeal before the Appeals Chamber when #340 referred to them as illustrative instances and upon which the Appeals Chamber ultimately delivered a decision on 18 May 2005 (#397, RP. 12652-12685). The learned Judges of Trial Chamber 1 obviously perceived this as a breach of Rule 73(C) and a basis for an alleged boomerang abuse of process by **the CAC** concerned (see para. 21 of #385). However, it is submitted that Rule 73(C) does **not** contain an **absolute** prohibition on references in a Trial Chamber Motion to the same or similar issue or issues which may at the same time be subject of an appeal before the Appeals Chamber. In fact, the rule expressly presupposes such possibilities; and its only mandatory stipulation in such cases is for the Trial Chamber itself to "**stay proceedings on the said Motion before it until a final determination**" thereof by the Appeals Chamber (Rule 73(C) of **the RPE/SCSL**). As it happened in the alleged boomerang abuses of process in respect of the illustrative breaches of Rules 50, 51 52 and 61 in #340, Trial Chamber 1 berated **the CAC** concerned

for non-observance of Rule 73(C) but proceeded on 28 April 2005 to unanimously and categorically "DENY and DISMIS" the **Abuse of Process Motion** "in its entirety" (#386 at RP. 12534) and #387 at RP. 12537 respectively; see also #385 at RP. 12531), instead of staying the proceedings as stipulated in Rule 73(C) itself to await the Appeals Chamber decision thereon, which ultimately came on 18 May 2005. It is accordingly submitted hereby that **the CAC** concerned committed neither a breach of Rule 73(C) nor an abuse of process by using the amendment, withdrawal, service, and arraignment Rules as illustrative material in #340

16. A phenomenon which is referred to in para. 8 of #340 as "a **certain congenital constitutive anomaly**" (Emphasis added), is more explicitly revealed in paras. 11 and 28 thereof as an infringement of the presumption of innocence as a fundamental human right for accused persons before an international criminal tribunal, thus:

> "11. One of the most crucial rights of the accused is **the presumption of innocence** enshrined in Article 17(3) of the SCSL Statute, and obviously deriving force and inspiration from stipulations in that regard in Articles 11(1) UDHR, 7(1)(b) ACHPR and 14(2) ICCPR, and section 23(4) of C 1991 SL. The stipulation that the Special Court for Sierra Leone was established "**to prosecute persons who bear the greatest responsibility for**" the relevant crimes[1], seems to have serious implications for the presumption of innocence for the accused persons.
>
> "28. As was mooted above, even the enactment of the avowed purpose of establishing the Special Court as being "**to prosecute persons who bear the greatest responsibility for**" the commission of the relevant crimes is a congenital constitutive anomaly which infringes **the presumption of innocence**. Now, the phrase, "**persons who bear the greatest responsibility for**", is not an element or part of an element or the definition of any of the offences or crimes under the SCSL Statute; and

[1] See preambular para.2 and Article 1(1) of the Agreement and Articles 1(1) and 15(1) of the SCSL Statute.

> so it is not required to be proved by the prosecution beyond reasonable doubt or at all at the trial. It is at best an administrative identification of the persons or category of persons who are targeted for prosecution but are usually to be determined only by undisplayed prosecutorial discretion. But by legislatively characterising such categories in advance by non-defining epithets, any person who gets arrested for prosecution for any of the specified offences is thereby automatically characterised as "**bearing the greatest responsibility for**" the commission of some crime which has yet to be proven by the prosecution"

Now, except for the fact that the allegation of boomerang abuses of process is made in wide blanket terms in #385, #386, #387 and #406, this alleged infringement of the presumption of innocence for all the CDF accused persons seems entirely free and clear of any perceived reverse abuse of process by **the CAC** concerned. And yet if it were to be upheld in a substantive decision by a Chamber of the SCSL, it would then be truly "tantamount to a gross and sustained abuse of process..... from the very constituting of the Special Court," as compactly adumbrated in the much impugned para. 8 of the Abuse of Process Motion (#340 at RP. 11975).

17. In this vein, it should be noted that in so far as the Rules on amendment and withdrawal are concerned (Rules 50 and 51 respectively), the Appeals Chamber has ruled in effect that the Prosecution has been in breach or avoidance or neglect of one or other or both of them since the filing of the Consolidated Indictment on 5 February 2004 (See #397). Since that time, it says, Prosecution were "under a duty to apply for leave to amend" (para. 77 of #397; see also paras. 72, 74, 76 thereof); but "it remains the fact that the Prosecution made no application to amend" (para. 54 thereof), in each case in respect of the First Accused. As to double jeopardy and the need to withdraw the original individual indictments, the Appeals Chamber concluded as follows:

> "However much it may replicate, in language and content, the three original indictments, they at present remain on file in the Registry, Might they revive in the event that the trial is abandoned or stopped for abuse of process?...Although we do not think that the fears

expressed by the defendants about double jeopardy .... would ever be allowed to come to pass, we agree with them that the Prosecution should not be permitted to have it both ways. If the Prosecution declines to withdraw the old Indictments, then we must remove all apprehension from the Defence by ordering them to be marked 'not to be proceeded with'" (para. 70 of #397; see also para. 89 thereof).

Be that as it may, would the sustained failures since 5 February 2004 to either apply to amend the indictment or to formally withdraw the previous ones be fairly characterised as "dogged and calculated prosecution adamancy in the avoidance and evasion of material and/or mandatory rules of procedure, together with its ulterior reasoning and impulsion thereto", as para. 8 of #340 would have it?

V. CONCLUSION

18. In view of all the foregoing, **the CAC** concerned respectfully hereby submits that his main motivation has been as effective representation of the First Accused as the tenets of the **Order on Counsel's Role** mandate and that he has endeavoured to do so with the greatest possible professional integrity and honesty at his command. He therefore urges the learned Judges of Trial Chamber 1 to use their inherent jurisdiction and judiciousness to discharge their findings of abuse of process against him and the **Order** in #406. Alternatively, to grant him an immediate ***interim*** stay of execution of the said **Order** and **LEAVE** to appeal against the **Impugned Sub-Decision** aforesaid.

Done in Freetown this 31st day of May 2005.

DR. BU-BUAKEI JABBI

COURT APPOINTED COUNSEL.

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, #131, 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 thechamber 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 Bankole 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 respons3e to the Defence Request for Leave to Appeal against the Decision on First Accused's Motion o Abuse of Process", 11 May 2005, #393, RP. 12620-12626

35. "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", 16 May 2005, #395, RP. 12638-12648.

36. "Decision on Amendment of the Consolidated Indictment", 18 May 2005, #397, RP. 12652-12685.

37. "Decision on Request by First Accused for Leave to Appeal Against the Final Trial Chamber's Decision on First Accused's Motion on Abuse of Process", 24 May 2005, #406, RP. 12815-12818.