431) SCSL-04-14-T (13016-13025) 13016

SPECIAL COURT FOR SIERRA LEONE

Trial Chamber 1

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

Registrar: Robin Vincent

Date: 13 June 2005

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

DEFENCE REQUEST FOR LEAVE TO APPEAL AGAINST THE CONSEQUENTIAL NON-ARRAIGNMENT ORDER OF TRIAL CHAMBER 1, 18 MAY 2005

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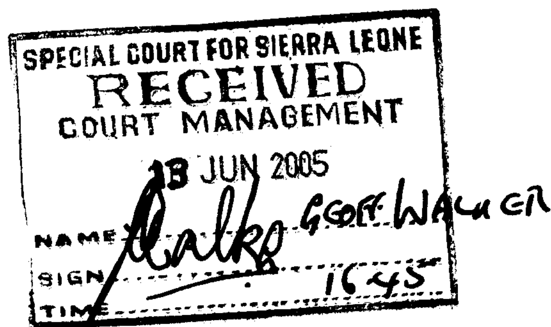

I. THE REQUEST AND ITS BACKGROUND

1. This request or application is made pursuant to Rule 54 and Rule 73(B) 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 at RP. 7041-7049) and of Part II and especially paragraphs 7 and 18 of the Practice Direction for Certain Appeals Before the Special Court dated 30 September 2004 (**the Appeals Practice Direction**, #221 at RP. 9665-9670), and in contemplation of the ultimate "expeditious" proceedings provisions in Rule 117(A) of the aforesaid **RPE/SCSL**

2. The request or application herein is by or on behalf of the First Accused in the current trials of the three accused persons of the Civil Defence Forces **(the CDF)** and is for Leave to Appeal against the non-arraignment order by Trial Chamber 1 in its Consequential Order on Amendment of the Consolidated Indictment filed on 25 May 2005, #408 at RP. 12899-12902 **(the Majority Consequential Order)**, with the Minority Dissenting Order of the Presiding Judge thereon having been filed on 8 June 2005, #428 at TP. 12988-13009 **(the Minority Dissenting Order)**, the said two Orders having been made on the instructions of the Appeals chamber in respect of its 18 May 2005 Decision on Amendment of the consolidated Indictment, #397 at RP. 12652-12685 (the Appeals Amendment Decision). Alternatively, this is an application pursuant to Rule 54 for Trial Chamber 1 to make an order with the utmost urgency and immediacy in its inherent jurisdiction and judiciousness discharging or annulling the said consequential non-arraignment order and installing in its place an order to the effect that the First Accused be immediately arraigned on "all the amendments introduced without leave by way of changes to the Consolidated Indictment" and for which amendments the Appeals Chamber has given leave to the Prosecution to make(Para. 87 of #397 at RP. 12685), and that such arraignment be effected before the Prosecution closes its case.

3. The relevant procedural background dates from the Prosecution Motion for Joinder, 9 October 2003, #87 at RP. 2324-2337 **(the Joinder Motion)** whereby the Prosecution sought under Rule 48(B) of the RPE/SCSL to have the three accused persons jointly tried and their pre-existing separate individual indictments consolidated into a single all-embracing indictment with its own new Registry number, on the clear understanding by oral undertaking of the Prosecution that the consolidated indictment "will not involve any change in the substance of the original indictments" (para 10 of #131 at RP. at RP. 6551), as per the Trial Chamber's Decision and Order on Prosecution Motions for Joinder of 27 January 2004, # 131 at RP. 6547-6569. Contrary to regular standard practice in the current international criminal tribunals of the ICTY and ICTR, **the Joinder Motion** had not been accompanied by any filed draft or text of the proposed consolidated indictment exhibited thereto, a fact to which counsel for the First Accused objected in oral submission (para. 9 of # 131) but was overruled on the grounds that such a requirement would be a "procedural technicality" which would "unquestionably impede the Special Court in the expeditious dispatch of its judicial business "(Para. 11 of # 131 at RP. 6551). The said consolidated Indictment was ultimately unveiled by being filed on 5 February 2004 as the basis on which the **CDF** trials would proceed with effect from some time in June 2004.

4. Before the trial proper commenced, however, the First Accused, having relieved his entire team of assigned counsel and whilst he was formally defending or representing himself at the time, did on 15 June 2004, in an Opening Statement under Rule 84 of the RPE/SCSL, make "a legitimately orally taken legal objection challenging the opening of the Trial without an indictment having been served on him and **without his having taken a plea on that Indictment on which the trial was about to proceed**" (para. 80 of #293 at RP. 10996; see generally paras. 73-812 thereof; emphasis added). But the learned Honourable Justices of the Trial Chamber merely "took note" of his observations and, in the words of the Presiding Judge at the time, decided to "proceed with the trial without any further comments on that" (Para. 74 of #293 at RP. 10995). Nothing more was done about his objections until some three months later, when he decided to proceed by formal written motion.

5. Accordingly, on 21 September 2004 the First Accused Filed his Motion for Service and Arraignment on Second Indictment, #203 at RP. 9572-9577. And ultimately, on 29 November 2004, the Trial Chamber delivered its decision on that Motion in #282 at RP. 10888-10894, wherein it found that the Consolidated Indictment contained new and additional elements that were not included in the previous separate individual indictment against the First Accused and "that are material and embody new factual allegations and substantive elements of the charges" (Order in #282 at RP. 10894). The Trial Chamber then ordered these elements to "be stayed" and put the Prosecution on its election to either expunge them completely or "seek an amendment of the said Indictment in respect of those identifies portions", in either case by leave of the Trial Chamber (Order in #282 at RP. 10894).

6. Both the Prosecution and the Defence then filed interlocutory appeals to the Appeals Chamber against the said Trial Chamber decision of 29 November 2004 on 12 January 2005 in # 316 at RP. 11232-11259 and on 17 January 2005 in #318 at RP 11297-11325 respectively. Each of them also separately made application to the Trial Chamber **on issues related to those in their respective appeals.** On 8 December 2004 the Prosecution filed in the Trial Chamber a Request for Leave to Amend the Indictment Against Norman, #305 at 11108-11130, in terms of the findings and orders in # 282. And the Norman Defence, on its part, filed its Abuse of Process Motion on 8 February 2005 in #340 at RP. 11972-11989. Presumably pursuant to Rule 73(C) of the **RPE/SCSL**, no decision had been made on the Prosecution's #305 by the time the Appeals Amendment Decision in # 397 came out on 18 May 2005. As for the Norman Abuse of Process Motion, however, in despite of the said Rule 73(C), Trial Chamber 1 delivered a categorical decision on it on 28 April 2005 in #385 at RP. 12525-12531. Leave to appeal against the said Decision was sought on 2 May 2005 in #390 at RP. 12561-12566, but it was equally firmly rejected by the said Chamber on 24 May 2005, in #406 at RP. 12815-12818. (A somewhat tangential application in respect of the said #406 has now been made by Court Appointed Counsel for Norman in #415 at RP. 12927-12945 of 31 May 2005, upon which further processes and a decision are yet pending).

7. The First Accused's main concerns both in his oral Opening Statement of 15 June 2004, and in his ultimate Motion of 21 September 2004, #202, were mutually consistent. On 15 June 2004 he orally protested before the trial Chamber as follows:

> "There is or are no charge or charges legally placed before this Chamber against me. If there is or are charge(s) against me before this Chamber, **then I submit that by law I have not taken any plea before this Chamber on any indictment against me before Your Honours**. I will state the reasons when I hear the response from Your Lordships" (See para. 73 of #293 at RP. 10994-10995. Emphasis added).

And then in his ultimate written Motion of 21 September 2004, #202, having apparently got no "response" from their Lordships to his oral objections of 15 June 2004, he made the following observations and submissions, among others, viz:

> "8.... Under the consolidated indictment Chief Norman faced a considerably extended indictment period of an additional 20 months, until December 1999, and additional geographic locations.......
>
> "9. **The First Accused submits that he has not been** served with the second indictment and **properly arraigned on the new, expanded charges that he faces as requi8red by Rule 50(B)(i),** and that pursuant to Rule 61 the Designated Judge must cause the new consolidated indictment to be read to him and call upon the accused to enter a plea of guilty or not guilty as required by Rule 61(iii).
>
> "10. The First Accused submits he faces substantially different allegations than those on which he was arraigned, including new geographical locations of crimes previously not alleged against

him and a considerably increased time period of some 20 additional months. **The first Accused seeks arraignment on the allegations that he faces under the consolidated indictment pursuant to the Rules**" (paras. 8-10 of #202. Emphases added).

8. It must be emphasised here that in its decision in #282 of 29 November 2004, the Trial Chamber in effect broadly endorsed the observations and submissions of the First Accused's Motion #202 of 21 September 2004, although it considered that an amendment of the consolidated indictment was necessary as an intermediate curative measure in resolving the difficulties involved and that in any case the changes and additions did not thereby make it a "new" indictment.

"30. Upon close analysis of the Consolidated Indictment, there are clearly new factual allegations adduced in support of existing confirmed counts, as well as new substantive elements of the charges that were not in the Initial Indictment of the First Accused. ...... **We consider that all these additions to the Consolidated Indictment, without any amendment to the counts against the Accused and personal service on the Accused, in accordance with the prescribed procedure, could prejudice the Accused's right to a fair trial if the trial proceeds on this basis**". (Para, 30 of #282 at RP. 10890). (Emphasis added).

"32. ...... as we have found, there are material changes made to the Consolidated Indictment. **The Trial Chamber finds that the Accused has not been afforded the opportunity to make a ;lea to these material changes to the Indictment, and that unfair prejudice may result if the Indictment is not amended and the Accused served with the Indictment and arraigned on the material changes to the Indictment**" (Para. 32 of #282 at RP. 10891). (Emphasis added).

9. Broadly speaking, the Prosecution's appeal against the Trial Chamber's decision in #282 was concerned with the findings of the changes and additions identified by the Trial Chamber in the Consolidated Indictment, i.e. as to whether or not they were substantive and material. Equally broadly speaking, the Defence appeal against the same decision in #282 was concerned, among other things, with the relevance and propriety of the proposed amendments. The Defence thus argued in its #318 of 17 January 2005 that the said consolidated indictment was invalid and so legally non-existent because of certain jurisdictional anomalies and irregularities in its modes of genesis and therefore unamenable and unavailable for amendment as a legal instrument or text (paras. 53-67, 95 and 102(1) of #318); and that in any case a gross formal or logical absurdity was involved in seeking to amend a document by in effect retaining in it intact and unchanged the very elements which were already contained in it in the same form, as the Trial Chamber had proposed for the Prosecution to consider doing (paras. 52, 97, 102(2) of #318).

10. In its decision in #397 of 18 May 2005, the Appeals Chamber rejected the Prosecution's perception and construction that the identified changes and additions to the consolidated indictment contained no new facts and that they were not material

> "**In our view the Prosecution claim must be rejected. These new allegations amount to serious charges of criminality, in places and at times that are not indicated in the original paragraph 18**" (para. 85 of #397; emphasis added).

With respect to the Defence submissions, however, the Appeals Chamber did not directly engage or tackle the allegations of invalidity of the consolidated indictment or the formal or logical absurdity of seeking to amend it in the form and manner proposed. It chose instead to use their appellate power to revise the Trial Chamber's decision in #282 by granting "leave to the Prosecution to make all the amendments introduced without leave by way of changes to the consolidated Indictment", as identified by the Trial Chamber in paragraph 19 of its #282 of 29 November 2004, and to "leave it to the Trial Chamber to make

any appropriate order necessary **to ensure that the Defence is not incommoded**" (para. 87 of #397; emphasis added). Trial Chamber 1's Majority Decision in #408 at RP. 12899-12902, Consequential Order on Amendment of the Consolidated Indictment, is its purported compliance with the said instructions or suggestions of the Appeal's Chamber.

II. OBJECTIONS TO THE IMPUGNED ORDER

11. In response to the Appeals chamber decision in #397 of 18 May 2005, Trial Chamber 1 made its first Order as follows in its Majority Decision in #408 of 25 May 2005, viz:

> "That the Consolidated Indictment approved on the 5th of February 2004, is valid and continues in existence against the Accused, Sam Hinga Norman, Moinina Fofana and Allieu Kondewa, and **that no further service or arraignment on this consolidated Indictment is required"** (Emphasis added).

12. In view of the findings by both the Trial and Appeals Chambers as to the changes and additions effected in the consolidated indictment, amounting in places to new charges, Rule 50(B)(i) and (iii) would seem applicable on the grant of the proposed amendments, Rule 50(B)(i) being specifically and mandatorily being concerned with "a further appearance" having to be held soon enough "to enable the accused to enter a plea on the new charges". The consequential order aforesaid is accordingly a violation of this crucial right of the accused under Rule 50(B)(i) and contrary to the purpose for which the Appeals Chamber left it to the said Chamber to make such orders, to wit, "to ensure that the Defence is not incommoded" (para. 87 of #397).

13. It should also be recalled that the Trial Chamber itself had envisaged the arraignment or re-arraignment of the accused after the amendments adumbrated by it would have been effected (See para. 32 of #282, as cited in para. 8 hereof above). So also it seems that the Appeals Chamber itself contemplated re-arraignment if the amendments proposed were effected, considering its obvious

concern about the rights of the accused and the avoidance of his being "incommoded". As the dissenting Presiding Judge put it:

> "In view of the fact that **the Appeals Chamber** in issuing the Order was concerned with respecting the rights of the Accused, it certainly, in my opinion, **impliedly opted for a further Initial Appearance of the Accused since this is his inalienable legal right as an Accused in a criminal proceeding as this where he stands charged for very grave crimes against humanity"** (para. 60 of #428. Emphasis added)

With most of the evidence relating to the amendments having already been adduced, the denial of the Accused person's rights to a fair trial would only be more prejudiced if he cannot even plead either guilty or not guilty to charges founded on such evidence.

III. RULE 73(B) RELEVANCE.

14. The tests of "exceptional circumstances" and the avoidance of irreparable prejudice to the Accused are more than amply met in these circumstances. Perhaps the most obvious exceptional circumstance is the manner and timing of the amendments for which leave has been granted in this case. The Appeals Chamber ruled in effect, for instance, that the Prosecution had been in excessively sustained breach, neglect or avoidance of its obligations to seek the relevant amendments since 9 October 2003, when it presented its Joinder Motion (87 at RP. 2324-2337). It could have applied to do so under Rule 50 even before the Joinder Decision of 27 January 2004, or with leave thereafter under Rule 73(B). As it turned out, it failed to do so in either way and the said amendments have practically had to be done by the Chambers themselves at the beginning of the 5th and final Trial Session, when virtually all the relevant evidence has been adduced. Defence entitlements such as are mandated in Rule 50(B)(i) and (ii) or in even Rule 62(A), for instance, are in all realistic probability already lost And the risks as to the Accused person's rights to fair trial which are involved are more than obvious. As the dissenting Presiding Judge again puts it ever so poignantly:

"I am of opinion, and I so do hold, that a failure to order a further Initial Appearance of the 1st Accused, Chief Sam Hinga Norman, would amount not only to a fundamental breach of the law and practice on pleas in criminal proceedings, but also a violation of the statutory rights of the Accused ......" (para. 72 of #428; emphasis added).

The avoidance of the inevitable prejudice arising from such breaches or violations is a sure justification of the leave being sought herein.

IV. CONCLUSION

15. Accordingly, Trial Chamber 1 is hereby respectfully urged to grant the First Accused leave to appeal against its consequential order ruling out the need for arraignment for the First Accused on the Consolidated Indictment. Alternatively, pursuant to Rule 54, to make an order with the utmost urgency and immediacy in its inherent jurisdiction and judiciousness discharging or annulling the said consequential non-arraignment order and installing in its place an order to the effect that the First Accused be immediately arraigned on "all the amendments introduced without leave by way of changes to the Consolidated Indictment" and for which amendments the Appeals Chamber has given leave to the Prosecution to make(Para. 87 of #397 at RP. 12685), and that such arraignment be effected before the Prosecution closes its case.

Done in Freetown this 13th day of June 2005

PP DR. BU-BUAKEI JABBI

COURT APPOINTED COUNSEL

SAM HINGA NORMAN

FIRST ACCUSED