

TRIAL CHAMBER I (“The Chamber”) of the Special Court for Sierra Leone (“Special Court”) composed of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, Hon. Justice Bankole Thompson, and Hon. Justice Pierre Boutet;

SEIZED OF the *Abuse of Process Motion by First Accused for Stay of Trial Proceedings*, filed on the 15th of February, 2005 (“Motion”);

MINDFUL of the *Prosecution Response to the First Accused’s Abuse of Process Motion*, filed on the 25th of February, 2005 (“Response”);

MINDFUL of the *Defence Reply to Prosecution Response to the First Accused’s Abuse of Process Motion for Stay of Trial Proceedings*, filed on the 28th of February, 2005 (“Reply”);

MINDFUL of the Trial Chamber’s *Decision and Order on Prosecution Motions for Joinder*, dated the 27th of January, 2004 (“Joinder Decision”);

CONSIDERING the Consolidated Indictment against the Accused, Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa, approved on the 5th of February, 2004 (“Consolidated Indictment”);

MINDFUL of the Trial Chamber’s *Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment*, dated the 29th of November, 2004 (“Indictment Decision”);

PURSUANT TO Rule 54 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (“Rules”);

ISSUES THE FOLLOWING DECISION:

I. SUBMISSIONS OF THE PARTIES

1. The Trial Chamber will, for ease of reference, outline the central arguments contained in the Motion. In support of their allegation of “gross and sustained abuses of the process” Learned Counsel for the Applicant appears to rely on the following:

(a) That the “constituting of the Special Court itself, at least in one respect, and the subsequent instituting and conducting of the entire pre-trial and trial proceedings upon the current consolidated indictment against the three accused persons, have only been made possible by acts which egregiously violate the substantive fundamental rights of the accused persons”.

(b) That the preambular paragraph 2 and Article 1(1) of the Special Court Agreement and Articles 1(1) and 15(1) of the Statute of the Special Court which stipulate that the Special Court was established “to prosecute persons who bear the greatest responsibility for” the relevant crimes infringe the presumption of innocence for the accused persons.

(c) That the current Consolidated Indictment and the trial proceedings conducted upon it “so far have been from their inception not only completely null and void but also contrary to the interests of justice ... primarily because of their original mode of genesis and their subsequent application as a basis for and a process of administering international criminal justice, all of which have conjointly engendered a gross and sustained abuse of process in which the accused

persons are deprived of crucial due process rights and thereby irretrievably prejudiced in their rights to a fair trial ". Counsel, also refer generally to specific Rules relating to the Indictment, including Rules 47, 50(A), 51, 52, 61 and 62.

(d) That the Prosecution's Joinder Motion under Rules 48(B) and 73 "in so far as its joint-charging or consolidation aspect was concerned, was a violation of the relevant material rules" and "its failure to annex the draft consolidated indictment to the motion was also a violation of a regular rule of standard practice in the international criminal tribunals".

(e) That the protection of the Accused against double jeopardy is "egregiously violated in the current trial proceedings" by the refusal of the Prosecution to formally withdraw the "previous separate individual indictments" after the adoption of the Consolidated Indictment.

II. JURISDICTIONAL BASIS TO ENTERTAIN MOTION

2. Court Appointed Counsel for the First Accused filed this "Abuse of Process" Motion with the Court on the 8th of February 2005, pursuant to Rules 54 and 73(A) of the Rules. It raises the following issues:

A) JURISDICTION OF THE COURT TO TRY THE APPLICANT

3. Firstly, the Applicant and his Learned Counsel have tangentially raised issues of the jurisdictional competence of the Court to try the Applicant on the charges contained in the Consolidated Indictment. In their arguments in this regard, they have this to say:

"... In each case, it is further submitted, the process and procedure applied were without jurisdiction and so fatally flawed that the ensuing Consolidated Indictment was a nullity ab initio..."

"There is also the question of jurisdiction under the relevant rules. On the one hand, the relevant joinder rules (SCSL Rules 48(A), 48(B), 48(C), 49 and 50) all seem to envisage only specific, identifiable extant items or texts for consideration, rather than future, prospective or anticipated texts or items. So that there is no express jurisdiction for the latter. By the same token, the said rules have not express provision for the Trial Chamber to consider any such supposed, anticipated or non-existent items or texts for consideration or decision under the said rules. And so the said rules are reasonably to be construed as having implied prohibitory injunctions against either seeking or granting any joinder on such a putative or hypothetical basis. As Trial Chamber I at the ICTR ruled only the day before the SCSL joinder:

"The Chamber has no jurisdiction do decide motions on Indictments which have been superseded; nor to decide motions in respect of Indictments which did not exist at the time of filing"

4. The Chamber notes that this Motion contains arguments that relate to the jurisdiction of the Court from its very inception, and in particular, the personal jurisdiction of the Court over the Accused persons.¹ In this regard, Rule 72 of the Rules provides that any submissions on the jurisdictional basis of the Court should be filed by way of a preliminary motion. Preliminary motions, according to this Rule, are to be brought 21 days following the

¹ See paras 1, 2, 11, 27 and 28 of Motion.





disclosure by the Prosecution to the Defence, of all materials envisaged in Rule 66(A)(i) of the Rules and it takes place 30 days following the initial appearance of the Accused. This disclosure in fact took place since the 5th of June, 2003.

5. Considering that Rule 72 is the special law governing the filing of motions on jurisdiction, the Chamber is of the opinion that this Motion, in so far as it touches on and raises issues of the jurisdictional competence of the Court, having been filed on the 3rd of February 2004, is time barred because the Prosecution in fact complied with its disclosure obligations under Rule 66 (A)(i) of the Rules, as we have indicated above, since the 5th of June, 2003.

B) THE PRINCIPLE OF “RES JUDICATA”

6. In our consideration of the jurisdictional issue, we would like to invoke the well established principle in international law of *Res Judicata*, and to hold that decisions rendered by a Court that is competent to make them are final and that the same issues, except in very exceptional circumstances, may not again be raised or litigated by the parties before that Court.
7. Rule 72bis of the Rules sets out the applicable laws of the Special Court that include “general principles of law derived from national laws of legal systems of the world”. Rule 72bis provides as follows:

The applicable laws of the Special Court include:

- i. the Statute, the Agreement, and the Rules;
 - ii. where appropriate, other applicable treaties and the principles and rules of international customary law;
 - iii. general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of the Republic of Sierra Leone, provided that those principles are not inconsistent with the Statute, the Agreement, and with international customary law and internationally recognized norms and standards.
8. The principle of *Res Judicata* is one of the general principles of law recognised in national laws of various legal systems. The Appeals Chamber of the ICTR in the *Barayagwiza*² case stated as follows:

“The principle of res judicata is well settled in international law as being one of those “general principles of law recognized by civilised nations”, referred to in Article 38 of the Statute of the Permanent Court of International Justice ... and the International Court of Justice ... As such it is a principle which should be applied by the Tribunal.”

9. It is indeed founded on the logical understanding of the need and necessity for expediency and finality in the judicial process, which is that there should, at a certain stage, be an end to

² *Prosecutor v. Barayagwiza*, Decision on the Prosecutor’s Request for Review or Reconsideration, 31 March 2000, para. 20.

litigation in order to prevent parties from relitigating issues that have finally been laid to rest by the Judges.

10. The Permanent Court of International Justice (“ICJ”) has applied the doctrine of *Res Judicata*, in the *Case Concerning Arbitral Award Made by the King of Spain on 23 December 1906*, where it found non-justiciable, a claim by Nicaragua to re-examine the substantive issues of a dispute which was decided by the King of Spain in a prior arbitration case.³ In *The Pious Fund Case*, the ICJ upheld the submission by the United States which contended that Mexico was raising issues that had been decided in a previous legal action.⁴

C) SUBMISSIONS ON THE JOINDER MOTION AND DRAFT CONSOLIDATED INDICTMENT

11. The second issue raised by the Applicant in this Motion is:

“That the Prosecution’s Joinder Motion under Rule 48(B) and 73 ‘in so far as its joint charging and consolidation aspect was concerned, was a violation of the relevant rules’ and ‘its failure to annex the draft Consolidated Indictment to the Motion was also a violation of a regular rule of standard practice in International Criminal Tribunals.’”

Learned Counsel further refers generally to Rules 47, 50(A), 51, 52, 61 and 62 relating to the Indictment.

12. We observe that the issues which Learned Counsel is raising here are glaringly and textually the same as those that were raised during our examination of the Joinder Motion whose decision we rendered on the 29th day of January, 2004, with a partially dissenting opinion that is appended to it. It is pertinent to note in this regard, that no leave to appeal was sought by the Applicant within 3 days of our Decision as provided for by Rule 73(B) of the Rules of Procedure and Evidence. In fact, no leave can now be sought for an appeal to be filed by any party at this stage, as this would not only violate the law but will also and above all, constitute an abuse of process which Learned Counsel for the Applicant is canvassing in this Motion.
13. Furthermore, the Trial Chamber finds that Counsel in this case is, for the time being, estopped from bringing this Motion as the issues raised therein touch on and concern matters that have already been determined by the Chamber in its Joinder Decision and that The Chamber, as far as that Decision is concerned, is now *functus officio*.⁵ We observe that no appeal was lodged against that Decision and that the time limit for filing any appeal has expired. In addition, the Decision on the Motion for Service and Arraignment on the Second Indictment is currently on appeal, and in accordance with Rule 73(C) of the Rules, the proceedings on the said Motion are stayed until a final determination by the Appeals Chamber of the issues at stake.

³ *Case Concerning Arbitral Award made by the King of Spain on 23 December 1906* (Honduras v. Nicaragua), I.C.J. Reports, 1960, 192.

⁴ *The Pious Fund Case (U.S. v. Mex.)*, 9 R.I.A.A. 1 (May 22, 1902).

⁵ See in particular, paras 13, 30, 32, 37, 38 of the Indictment Decision and paras 11, 15, 32 and 35 of the Joinder Decision.

D) THE CURRENT CONSOLIDATED INDICTMENT-DOUBLE JEOPARDY AND THE PRINCIPLE OF "FUNCTUS OFFICIO"

14. Thirdly, and furthermore, the Applicant and his Learned Counsel contend:

" That the current Consolidated Indictment and the trial proceedings conducted upon it so far have been from their inception not only completely null and void but also, contrary to the interests of justice... primarily because of their original mode of genesis and their subsequent application as a basis for and a process of administering International Criminal Justice, all of which have co-jointly engendered a gross and sustained abuse of process in which the Accused Persons are deprived of crucial due process rights and thereby irretrievably prejudiced in their rights to a fair trial."

15. The Applicant and his Learned Counsel, to sustain the contentions in their Motion, further argue:

"That the protection of the Accused against double jeopardy is egregiously violated in the current trial proceedings by the refusal of the Prosecution to formally withdraw the previous separate individual indictments after the adoption of the Consolidated Indictment"

16. The Chamber, again here, is of the view that these issues are precisely and textually the same as those that were fully presented and canvassed by the Parties in an earlier Motion by this same Applicant and his Learned Counsel on Service and Arraignment on the Second Indictment, whose decision we rendered on the 29th of November, 2004, and against which an Appeal has been filed, not only by this Applicant and his Learned Counsel, but also by the Prosecution.

17. These Appeals, we note, are still pending before the Appeals Chamber and Learned Counsel, knows very well and more than anyone else, that this Chamber, having rendered its Decision on these same issues which he is again now raising before it in this recently filed 'Abuse of Process Motion', is now functus officio as far as those issues are concerned, pending of course, the decision of the Appeals Chamber on the 2 appeals filed by both the Prosecution and Defence against our Decision.

CONCLUSION

18. The Chamber is of the view that a Court may exercise its discretion to order a stay of proceedings on the grounds of an abuse of process but "only in the clearest of cases"⁶and "where there is overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interests of justice"⁷.

19. Having regard to the foregoing analysis, it is evident to us that the nature of the proceedings in the ongoing trial of the Applicant and his Co-Accused does not at all come within the purview of the standard referred to above because there is, as far as we are concerned, overwhelming evidence of the apparent interaction and due consideration of the principle of

⁶ R v Young [1984] 40 C.R. (3d) 289

⁷ R v Power [1994] 1 S.C.R 601, 616

fairness in the process before us so far which the Appeals Chamber will of course, in due course, either affirm or annul.

20. We would like to observe here that the language used by Learned Counsel for the Applicant is unprofessional and borders on contempt. In this regard, The Chamber would like to draw Learned Counsel's attention to the provisions of Rule 46(C) of the Rules which provides as follows:

"Counsel who bring Motions or conduct other activities that in the opinion of the 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."

21. Finally we observe; firstly, that 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.
22. Having regard to these 3 observations and given the foregoing analysis, we, in conclusion, hold that this Motion is not only frivolous, but also amounts to a gross abuse of process, indeed, even more abusive of the process than what the Applicant and his Learned Counsel are deploring in this "Abuse of Process Motion" which, in our considered opinion, is bereft of any merits.

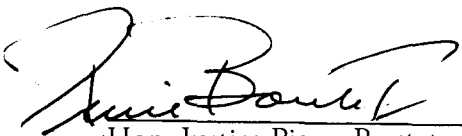
FOR THE ABOVE REASONS, THE TRIAL CHAMBER FINDS AS FOLLOWS:

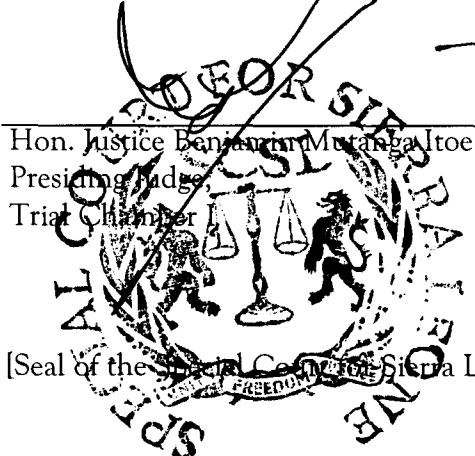
THAT THIS Motion which in itself, is misconceived and without any merits constitutes an abuse of process.

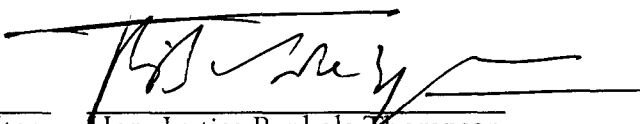
IT IS THEREFORE DENIED AND ACCORDINGLY DISMISSED.

Hon. Justice Bankole Thompson and Hon. Justice Pierre Boutet append their Separate and Concurring Opinions to this Decision.

Done in Freetown, Sierra Leone, this 28th day of April, 2005.


Hon. Justice Pierre Boutet


Hon. Justice Benjamin M. G. Alton
Presiding Judge
Trial Chamber


Hon. Justice Bankole Thompson

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