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SCSL-2004-14-T
(12531 - 12534)

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SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

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

Registrar: Robin Vincent

Date: 28th of April, 2005

PROSECUTOR **Against** **SAM HINGA NORMAN**
MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

**SEPARATE AND CONCURRING OPINION OF JUSTICE PIERRE BOUTET ON THE
DECISION ON FIRST ACCUSED'S MOTION ON ABUSE OF PROCESS**

Office of the Prosecutor:
Luc Côté
James Johnson
Kevin Tavener

Court Appointed Counsel for Sam Hinga Norman:
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.

Court Appointed Counsel for Moinina Fofana:
Michiel Pestman
Arrow Bockarie
Victor Koppe

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

SPECIAL COURT FOR SIERRA LEONE
KECE
COURT I
29 APR 2005
NAME... MAURICIA EDMONDS
SIGN... M. Edmunds
TIME... 09.25

1. I concur with the findings and Decision of Trial Chamber I to dismiss the Abuse of Process Motion filed by Court Appointed Counsel for the First Accused. However, with respect, I cannot endorse the reasoning adopted by the Trial Chamber in respect of the doctrine of *functus officio* as being applicable to this Motion at this stage of the trial. I am of the view that a “court continues to be seized of the case and is not *functus* until the formal judgment has been drawn up and entered”, which means final decision, and sentence, if applicable.¹ Therefore, any order or decision relating to the conduct of the trial “may be revoked or varied if the ‘circumstances’ present at the time of the order have ‘materially changed’ in relation to the matter that justified the making of the order in the first place”.²
2. I therefore, offer my separate reasons in support of this Decision below.

I. JURISDICTIONAL BASIS TO ENTERTAIN MOTION

3. Court Appointed Counsel for the First Accused filed an “Abuse of Process” Motion with the Court on the 8th of February 2005. This Motion was filed pursuant to Rules 54 and 73(A) of the Rules. This Motion raises issues that have already been determined in previous decisions of the Trial Chamber or that are on appeal. Furthermore, this Motion is an attempt to circumvent the prescription of Rule 72 which provides that objections based on lack of jurisdiction shall be brought within 21 days of disclosure of material pursuant to Rule 66(A)(i).
4. There are currently two appeals lodged with the Appeals Chamber against the Trial Chamber’s Indictment Decision.³ The arguments set forth in the current Motion, that do not solely concern jurisdiction, raise issues that have already been determined in that Impugned Decision,⁴ and furthermore, that have been determined by the Trial Chamber in its Decision on Joinder.⁵
5. The well established principle in international law of *res judicata*, applies in these circumstances, as authority that decisions of the Court competent to decide them are final and that the same issues may not be disputed again by the parties before that Court.
6. 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;

¹ See R. v. Adams, [1995] 4 S.C.R. 707, 103 C.C.C. (3d) 262, 44 C.R. (4th) 195, 131 D.L.R. (4th) 1, 110 W.A.C. 161, 178 A.R. 161, 190 N.R. 161

² *Id*; See also *Montague v. Bank of Nova Scotia* (2004), 69 O.R. (3d) 87, 180 O.A.C. 381, 30 C.C.E.L. (3d) 71, 2004 C.L.L.C. ¶210-027 (C.A.).

³ Indictment Decision.

⁴ See paras 10-24 and 29 of the Motion and paras 13, 30, 32, 37 and 28 of the Indictment Decision.

⁵ See paras 3-7, 10-18 of the Motion and paras 11, 15, 32 and 38 of the Joinder Decision.

- 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.
7. 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*⁶ case stated to this effect that:
- 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.
8. The established exception to this principle is that a Trial Chamber 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.⁷
9. Applying the above doctrine to the case at hand, Counsel are estopped from bringing this Motion as the issues raised therein concern matters that have already been determined by the Chamber in its Indictment Decision and Joinder Decision and that these Decisions are final.⁸ There is no new evidence or information submitted by Counsel that would cause the Chamber to review its decision. Furthermore, the Indictment Decision 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. No appeal has been lodged against the Joinder Decision and the time limitations for filing such appeals has expired.
10. Furthermore, the 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.⁹ In accordance with the Rules, any submissions on the jurisdictional basis of the Court should be filed by way of preliminary motion pursuant to Rule 72 of the Rules. Rule 72 provides that preliminary motions are to be brought 21 days following the disclosure of the Prosecution to the Defence of all materials envisaged in Rule 66(A)(i) of the Rules, which takes place 30 days following the initial appearance of the Accused. Considering that Rule 72 is the *lex specialis* governing the filing of motions on jurisdiction, it is evidence that this Motion has been filed out of time and has not been filed in accordance with this Rule.
11. There is no foundation for Counsel’s submission that there is an abuse of process. A Court may exercise its discretion to operate a stay of proceedings for an abuse of process only in the

⁶ *Prosecutor v. Barayagwiza*, Decision on the Prosecutor’s Request for Review or Reconsideration, 31 March 2000, para. 20.

⁷ *Prosecutor v. Nyiramasuhuko*, Decision on the Prosecutor’s Motion for, *inter alia*, Modification of the Decision of 8 June 2001, 25 September, para. 11.

⁸ See in particular, paras 13, 30, 32, 37, 38 of the Indictment Decision and paras 11, 15, 32 and 35 of the Joinder Decision.

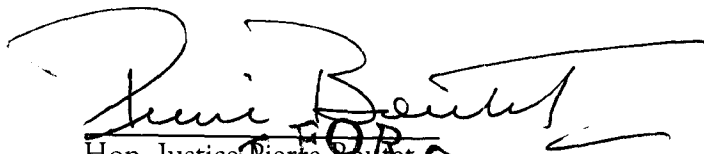
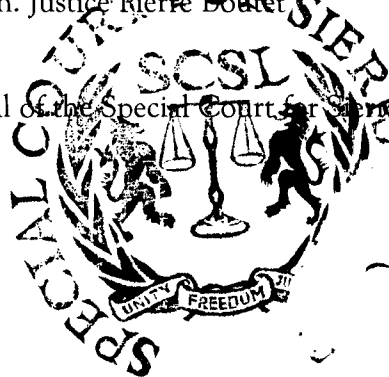
⁹ See paras 1, 2, 11, 27 and 28 of Motion.

“clearest of cases”,¹⁰ and where there is “overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interests of justice”.¹¹

11. This application, by raising issues that are clearly “*res judicata*” with this Court and by re-litigating 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.

FOR THE ABOVE REASONS I concur with the Decision to DENY and DISMISS the Motion.

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


Hon. Justice Rierre Boulet
[Seal of the Special Court for Sierra Leone]


¹⁰ *R v. Young* [1984] 40 C.R. (3d) 289.

¹¹ *R v. Power* [1994] 1 SCR 601, 616.