

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

SEIZED OF the *Norman Counsel’s Request for Leave to Appeal under Rule 46(H)*, filed by Court Appointed Counsel for the First Accused on the 31st of May, 2005 (“Motion”), seeking leave to appeal the Chamber’s order to the Principal Defender and requesting the Chamber for “an immediate interim stay of that order”;

NOTING the *Prosecution Response to Norman Counsel’s Request for Leave to Appeal under Rule 46(H)*, filed by the Prosecution on the 8th of June, 2005 (“Response”);

NOTING the *Defence Reply to the Prosecution Response to Norman Counsel’s Request for Leave to Appeal under Rule 46(H)*, filed by Court Appointed Counsel for the First Accused on the 13th of June, 2005 (“Reply”);

MINDFUL of the Chamber’s *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*, delivered on the 24th of May, 2005 (“Impugned Decision”), in which the Chamber, *inter alia*, ordered the Principal Defender to withhold from Court Appointed Counsel for the First Accused all costs and fees associated with the motion, which on account of the Chamber constituted abuse of process;¹

MINDFUL of the Chamber’s *Decision on First Accused’s Motion on Abuse of Process*, delivered on the 28th of April, 2005 (“Abuse of Process Decision”);

MINDFUL of the Appeals Chamber’s *Decision on Amendment of the Consolidated Indictment*, delivered on the 16th of May, 2005;

NOTING that Rule 46 of the Rules of Procedure and Evidence for the Special Court for Sierra Leone (“Rules”) in its relevant parts provides that:

(A) A Chamber may, after a warning, impose sanctions against or refuse audience to a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice. This provision is applicable to counsel for the prosecution.

[...]

(C) 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.

[...]

(H) Decisions made by a Trial Chamber under Sub-Rules (A) to (C) above may be appealed with leave from that Chamber. Where such leave is refused, the Party may apply to a bench of at least three Appeals Chamber Judges for leave.

¹ *Defence Request for Leave to Appeal Against the Decision on First Accused’s Motion on Abuse of Process*, filed on the 2nd of May, 2005 (“Motion of the 2nd of May”).

CONSIDERING that although Rule 46(H) of the Rules provides for the possibility to appeal decisions made pursuant to Rule 46(A) or Rule 46(C) of the Rules, it does not articulate the standard for granting or refusing leave for such an appeal;

CONSIDERING that neither Rules of the International Criminal Tribunal for Rwanda (“ICTR”) nor Rules of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) provide for the right to appeal a decision of the Trial Chamber that imposes sanctions against Counsel for bringing a frivolous motion or a motion, which constitutes an abuse of process;²

CONSIDERING that the standard for granting an interlocutory appeal against the Chamber’s decision made under Rule 45(A) or Rule 46(C) of the Rules, is the standard prescribed by Rule 73(B) of the Rules;

NOTING that Rule 73(B) of the Rules provides that:

Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

NOTING that Rule 73(B) of the Rules generally does not confer a right of interlocutory appeal but only grants leave to appeal in exceptional cases;

NOTING that the criteria of exceptional circumstances and irreparable prejudice outlined in Rule 73(B) of the Rules represent two limbs of the test and are conjunctive and must both be satisfied;³

NOTING the Chamber’s prior ruling in the case of *Prosecutor v. Sesay, Kallon and Gbao*, where the Chamber stated that:

[T]he overriding legal consideration in respect of an application for leave to file an interlocutory appeal is that the applicant’s case must reach a level of exceptional circumstances and irreparable prejudice. Nothing short of that will suffice having regard to the restrictive nature of Rule 73(B) of the Rules and the rationale that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals.⁴

² Rule 73(F) of the ICTR Rules provides that “In addition to the sanctions envisaged by Rule 46, a Chamber may impose sanctions against Counsel if Counsel brings a motion, including a preliminary motion, that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof.”

Rule 73(D) of the ICTY Rules provides that “Irrespective of any sanctions which may be imposed under Rule 46 (A), when a Chamber finds that a motion is frivolous or is an abuse of process, the Registrar shall withhold payment of fees associated with the production of that motion and/ or costs thereof.”

³ *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-2004-15-PT, Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder, 13 February 2004, para. 10 (emphasis in original); see also *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-2004-16-PT, Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder, 13 February 2004, para. 13.

⁴ *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-2004-15-PT, Decision on Prosecution Application for Leave to File an Interlocutory Appeal against Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT, 1 June 2004, para. 21.

NOTING further that the overriding rationale behind granting leave to appeal is to uphold the interests of justice and that “[b]oth the concept of “exceptional circumstances” and “irreparable prejudice” are to be considered in the light of the detriment caused to the interests of justice;”⁵

CONSIDERING that the reasons advanced by the Court Appointed Counsel for the First Accused in support of his Motion are nothing more than reiteration of his previous arguments on the matter, which he made in his two previous motions⁶ and fail to demonstrate the existence of any exceptional circumstances for granting this leave;

NOTING the finding of the ICTR Trial Chamber in *Prosecutor v. Nzirorera*, in respect of the power of the Chamber to impose sanctions, which provided that:

The Chamber is of the view that such a Rule, which grants a court or a tribunal an effective power to regulate its own proceedings, including the conduct of the parties, is reasonably required in any judicial system. The power to impose sanctions should, however, be exercised cautiously, bearing in mind the interests of justice and the right to a fair trial.⁷

NOTING further the conclusion of the ICTR Trial Chamber in the same case that:

The sanctions orders are not substantive. They are merely ancillary or consequential to the substantive motions. They reflect the conclusion by the Trial Chamber that bringing those motions was frivolous or was an abuse of process.⁸

CONSIDERING that the sanction for bringing an abuse of process motion is not a criminal sanction⁹ and therefore the First Accused will suffer no irreparable prejudice for sanctioning his Counsel;

NOTING that in its Abuse of Process Decision, the Chamber has already drawn Court Appointed Counsel’s attention to the provisions of Rule 46(C) and specifically held that his Motion of the 15th of February was “not only frivolous, but also amount[ed] to a gross abuse of process, indeed, even more abusive of the process than what the Applicant and his Learned Counsel are deploring [...] which, in our considered opinion, is bereft of any merits”;¹⁰

NOTING that after having given such a warning, the Chamber proceeded to declare Counsel’s Motion of the 2nd of May as an abuse of process, because it sought to re-litigate issues, did not raise

⁵ *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, Dissenting Opinion of Judge Pierre Boutet on Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution’s Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, 5 August 2004, para. 14.

⁶ *Abuse of Process Motion by First Accused for Stay of Trial Proceedings*, filed on the 15th of February, 2005 (“Motion of the 15th of February”) and Motion of the 2nd of May.

⁷ *Prosecutor v. Nzirorera*, ICTR-98-44-PT, Decision on Motion to Vacate Sanctions Rules 73(F) and 120 of the Rules of Procedure and Evidence, 23 February, 2005, para. 6.

⁸ *Prosecutor v. Nzirorera*, ICTR-98-44-PT, Decision on Joseph Nzirorera’s Motion for Order Finding Prior Decisions to Be of “No Effect”, Rules 46(A) and 73 of the Rules of Procedure and Evidence, 24 May, 2005, para. 12.

⁹ *Prosecutor v. Nzirorera*, ICTR-98-44-AR73(F), Decision on Counsel’s Appeal From Rule 73(F) Decisions, 9 June 2004, p. 3.

¹⁰ Abuse of Process Decision, paras 20, 22. See also Separate Concurring Opinion of Justice Bankole Thompson for the view that the Motion is “an intemperate and unjustified aspersion not only on the judicial process itself but also on the judges as custodians of the process” (para. 7).

any matter of fundamental significance to the integrity of the judicial system and the development of this Court's jurisprudence and for the language used;¹¹

CONSIDERING that it is not in the interests of justice to grant leave to appeal the Impugned Decision;

CONSIDERING that this Motion constitutes an abuse of the process;

PURSUANT TO Rule 46(C) and Rule 73(B) of the Rules;

THE TRIAL CHAMBER DENIES the application for leave to appeal and ORDERS the Principal Defender to withhold from Court Appointed Counsel for the First Accused all costs and fees associated with the present Motion.

Done in Freetown, Sierra Leone, this 25th day of July, 2005

[Handwritten signatures of Benjamin Mutanga Itoe, Pierre Boutet, and Bankole Thompson]

Hon. Justice Benjamin Mutanga Itoe

Hon. Justice Pierre Boutet
Presiding Judge,
Trial Chamber I

Hon. Justice Bankole Thompson



¹¹ Impugned Decision, p. 3; see also: Abuse of process - the improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope, Black's Law Dictionary, Seventh Edition, Ed. B. A. Garner, 1999, p. 10.