

THE TRIAL CHAMBER (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”);

SEIZED of the Motion on Abuse of Process Due to Infringement of Principles of *nullum crimen sine lege* and Non-Retroactivity as to Several Counts (“Motion”), filed on 20 October 2003 on behalf of Santigie Borbor Kanu (“Accused”), pursuant to Rule 72(B)(v) of the Rules of Evidence and Procedure of the Special Court (“Rules”);

NOTING the Prosecution’s Response to the Motion filed on 30 October 2003 (“Response”);

NOTING the Defence Reply thereto, filed on 5 November 2003 (“Reply”);

NOTING Rule 72 of the Rules;

NOTING that the Indictment charges the Accused with several counts of crimes against humanity, punishable under Article 2 of the Statute of the Special Court (“Statute”), violations of Article 3 Common to the Geneva Conventions (“Common Article 3”) and of Additional Protocol II, punishable under Article 3 of the Statute, and of Other Serious Violations of International Humanitarian Law, punishable under Article 4 of the Statute;

HAVING CONSIDERED THE SUBMISSIONS OF THE PARTIES,

HEREBY gives the written reasons for the Trial Chamber’s Oral Decision, delivered in public session during the Status Conference held on 8 March 2004, in which it **DISMISSED THE MOTION.**

I. SUBMISSIONS OF THE PARTIES

The Defence Motion:

1. The Defence seeks relief pursuant to Rule 72(B)(v) of the Rules concerning what it contends to be a potential abuse of process.
2. The principle of *nullum crimen sine lege* provides that punishment shall not be imposed retroactively on individuals who commit acts which subsequently become criminalised. It is a fundamental principle of customary international criminal law that protects the rights of an

accused, as enshrined in many international conventions and the Statute of the International Criminal Court (“ICC Statute”).¹

3. The Indictment against the Accused includes charges based on crimes against humanity, violations of Common Article 3, Additional Protocol II and other serious violations of international humanitarian law. Although the Republic of Sierra Leone acceded to the Geneva Conventions and Additional Protocol II, this was not fully implemented within domestic law. Accordingly those charges are void in view of Articles 23(7) and 171(15) of the 1991 Sierra Leone Constitution (“Constitution”).²

4. According to the Defence, while the Accused is charged with crimes against humanity in Counts 3, 4, 6, 7, 10, 12 and 15, crimes against humanity were not criminal offences under domestic law when allegedly committed, namely, before the Agreement between the UN and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone (“Special Court Agreement”).³

5. The Defence alleges abuse of process on the part of the Prosecution, arguing that the Prosecution would unjustly benefit from this breach of a norm of customary international law and constitutional principle, by means of allowing the Prosecution to prosecute these crimes.⁴

6. The Defence further contends that at the time of some of the alleged facts in Counts 3, 4, 10 and 12, there was no agreed international definition of the concept of crimes against humanity.⁵ Accordingly, the Defence requests that Counts 3, 4, 6, 7, 10, 12 and 15 insofar as they entail the concept of crimes against humanity, be dismissed primarily by virtue of the principle of *nullum crimen sine lege* and in the alternative, by virtue of Articles 23(7) and 171(15) of the Constitution.⁶ In addition, the Defence requests that Counts 1, 2, 5, 8, 9, 11, 13, 14, 16 and 17 be dismissed because at the time of the acts, Common Article 3 and/or Additional Protocol II and

¹ Motion, paras 3 and 6.

² Constitution, 1991 [Act No. 6 of 1991]. Article 23(7) reaffirms the principle of *nullum crimen sine lege*; Article 171(15) states that any law found to be inconsistent with the Constitution shall be void and of no effect. See Motion, paras 4-8.

³ Motion, para. 9.

⁴ Motion, para. 13.

⁵ Motion, para. 14.

⁶ Motion, para. 16.

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other serious violations of international humanitarian law were allegedly not implemented into domestic law.⁷

The Prosecution Response:

7. The Prosecution contends that a motion seeking a finding of an abuse of process is the incorrect procedure for the complaint raised in the Motion.⁸ It is submitted that the principle of *nullum crimen sine lege* has not been violated and that express consideration of that principle was given in the Statute.⁹ In the Prosecution's submissions, the principle requires only that the relevant acts were unlawful at the time of their commission as a matter of international and not domestic law. The Prosecution complains that if the Defence argument were correct, any State could avoid the jurisdiction of an international criminal tribunal by ensuring that crimes under international law are not incorporated into its domestic law.¹⁰

8. The Prosecution reiterates its argument in the 'Prosecution Response to the Defence Motion Challenging Jurisdiction of the Court',¹¹ that the Special Court exists and functions within the sphere of international law.¹²

9. The Prosecution rejects the arguments that the Accused should not be charged with violations of Common Article 3, Additional Protocol II and other serious violations of international humanitarian law, submitting that the offences in question entailed individual criminal responsibility under international law.¹³

The Defence Reply:

⁷ Motion, para. 17.

⁸ Response, para. 4.

⁹ Response, paras 5-8.

¹⁰ Response, para. 7.

¹¹ *The Prosecutor v. Santigie Borbor Kanu*, Case No. SCSL-03-3-PT, Prosecution Response to the Defence Motion challenging Jurisdiction of the Court, 30 October 2003.

¹² Response, para. 7.

¹³ *Prosecutor v. Delalić et al. ("Čelebići")*, Case No. IT-96-21-A, Appeals Chamber Judgment, 20 February 2001 ("Delalić Appeals Judgment") from the International Criminal Tribunal for the former Yugoslavia ("ICTY"). Further, the Prosecution submit that Article 4 of the Statute of the International Criminal Tribunal for Rwanda ("ICTR") recognises that certain violations of additional Protocol II entailed individual criminal responsibility at least from 1 January 1994.

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10. Highlighting two authorities in support of the existence of the abuse of process doctrine, the Defence contends that there are no limitations as to the extent of the legal principles to which it may apply.¹⁴

11. The Defence argues that the Defence answered those arguments submitted by the Prosecution in the Response to the Motion on Jurisdiction,¹⁵ in its Reply of 5 November 2003.¹⁶

12. Finally, the Defence submits that the Constitution enumerates the sources of national law without mentioning either international law or bilateral agreements. Accordingly, irrespective of whether Common Article 3 was part of international law, the principle of *nullum crimen sine lege* is infringed with respect to Common Article 3, Additional Protocol II and other serious violations of international humanitarian law because these provisions were not embedded in national law at the time of alleged commission.¹⁷

II. APPLICABLE LAW

13. Rule 72 of the Rules provides as follows:

(B) Preliminary Motions by the accused are:

(i) Objections based on lack of jurisdiction;

[...]

(v) Objections based on abuse of process.

[...]

(D) The Trial Chamber shall, except as provided by Sub-Rules (E) and (F) below, dispose of preliminary motions before the trial, and its decisions thereon shall not be subject to interlocutory appeal.

14. As to the duties and power of the Prosecutor, Article 15(1) of the Statute states, in part:

The Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

15. Rule 47(B) of the Rules states:


¹⁴ *The Prosecutor v. Dokmanović*, Case No. IT-95-13-A.-PT, Decision on the Motion for Release, 22 October 1997. Also *The Prosecutor v. Milošević*, Case No. IT-99-37-PT, Decision on Preliminary Motions of 8 November 2001, paras 43-44. See Reply, para. 2.

¹⁵ *The Prosecutor v. Santigie Borbor Kanu*, Case No. SCSL-03-13-PT, Prosecution Response to the Defence Motion Challenging Jurisdiction of the Court, 30 October 2003.

¹⁶ *The Prosecutor v. Santigie Borbor Kanu*, Case No. SCSL-03-13-PT, Defence Reply to Prosecution Response to the Defence Motion Challenging Jurisdiction of the Court, 5 November 2003.

¹⁷ Reply, para. 7.

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The Prosecutor, if satisfied in the course of an investigation that a suspect has committed a crime or crimes within the jurisdiction of the Special Court, shall prepare and submit to the Registrar an indictment for approval by the aforementioned Judge.

16. Articles 2 to 5 of the Statute specify under four heads the crimes falling within the jurisdiction of the Special Court, to wit, 'Crimes against humanity' (Article 2), 'Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II' (Article 3), 'Other serious violations of international humanitarian law' (Article 4), and 'Crimes under Sierra Leonean law' (Article 5).

17. Article 6 of the Statute attributes individual criminal responsibility for those crimes specified in Articles 2 to 5.

III. THE MERITS

A. The Doctrine of Abuse of Process

18. Rule 72(B)(v) was incorporated into the Rules at the 2nd Plenary meeting in March 2003. It is a provision found in neither the Rules of Procedure and Evidence of the ICTY nor the ICTR. The Rule codifies the practice at other tribunals where Judges exercise their inherent powers to control the process and procedures, including any abuse thereof, and which permit the parties to bring abuse of process motions as a right deriving from common law precedent. The rationale behind providing for an additional basis for bringing preliminary motions in the Rules of the Special Court is primarily to enhance and further protect the rights of the accused. The Trial Chamber is in accord with the Appeals Chamber, which recently stated: "At the root of the doctrine of abuse of process is fairness. The fairness that is involved is not fairness in the process of adjudication itself but fairness in the use of the machinery of justice."¹⁸

19. The Rules do not, however, provide guidance as to what constitutes an abuse of process. On this point the Prosecution Response highlights the lack of authorities in the Defence Motion. Some attempt to remedy this was made in the Reply. For the purposes of this Decision, it is imperative to examine the principle of abuse of process as it has been applied in international criminal law and in national systems.

¹⁸ *Prosecutor v. Morris Kallon*, Case No. SCSL-04-15-AR72(E) & *Prosecutor v. Brima Bazzy Kamara*, Case No. SCSL-04-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, dated 13 March 2004 and filed 15 March 2004, para. 79. See generally, *Id.*, paras 75-85.

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20. According to Black's Law Dictionary, abuse of process is defined as the "improper and tortuous use of legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope."

21. Under the abuse of process doctrine, proceedings that have been lawfully initiated may be terminated after an indictment has been issued if "improper or illegal proceedings" are employed in pursuing an otherwise lawful process.¹⁹

22. The doctrine operates as a matter of judicial discretion, and will be utilised where proceeding with the trial would contravene the court's sense of justice, due to pre-trial impropriety or misconduct.²⁰ As the House of Lords made clear in *R v Latif*,

proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place.²¹

23. The doctrine's flexibility was also alluded to in *Toronto (City) v. C.U.P.E.*²² To the same effect is McLachlin J.'s observation in *R. v. Scott*:

abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.²³

24. Although this Chamber does not accept the Defence's unsupported observation that "the doctrine [of abuse of process] has no limitations as to the extent of the legal principles it may apply to", the Trial Chamber acknowledges the breadth and latitude of its discretionary authority in this regard.²⁴ The categories of such circumstances are indeed not closed. It has, for example, been invoked in extradition proceedings where the prosecuting authority has an obligation of due

¹⁹ See *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-I, Decision, 3 November 1999 ("Barayagwiza Appeals Decision") para. 74. See also *Hui Chi-ming v. R.* [1992] 1 A.C. 34, 57 in which the Privy Council observed that the doctrine of abuse of process should be applied where there is, "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding".

²⁰ See *R v. Latif* [1996] 2 CR. App. R. 92 [1996] 1 WLR 104 HL, pp. 101 and 112H as per Lord Steyn; *Barayagwiza Appeals Decision*, para. 77; *R. v. Horseferry Road Magistrates' Court ex parte Bennett* [1994] 1 AC 42.


²¹ *R v Latif* [1996] 2 CR. App. R. 92 [1996] 1 WLR 104 HL, pp. 101 and 112H as per Lord Steyn.

²² *Canadian Union of Public Employees, Local 79 v. City of Toronto and Douglas C. Stanley and A-G of Toronto*, 2003 SCC 63, para. 37. See also *House of Spring Gardens Ltd. v. Waite* [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

²³ *R. v. Scott* [1990] 3 S.C.R. 979, at p. 1007.

²⁴ Reply, para 2.

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diligence to make a good faith effort to bring the defendant before the court.²⁵ It has also been frequently invoked in cases of delay in proceedings caused by the Prosecution,²⁶ on the grounds that the delay must not be “unconscionable”.²⁷ Another use has been in quashing a conviction based on an unlawful arrest and an illegally obtained confession.²⁸

25. The Trial Chamber wishes to emphasise that the operation of judicial discretion involves an assessment of the nature and severity of the crimes with which the accused is charged, weighed against the abuse of process that continuing the prosecution would engender. In this regard, Lord Lowry in the House of Lords case *ex parte Bennett* was of the opinion that there may be situations:

in which the seriousness of the crime is so great relative to the nature of the abuse of process that it would be a proper exercise of judicial discretion to permit a prosecution to proceed or to allow a conviction to stand notwithstanding an abuse of process in relation to the defendant’s presence within a jurisdiction. *In each case it is a matter of discretionary balance, to be approached with regard to the particular conduct complained of and the particular offence charged.*²⁹ (Emphasis added)

26. Evidence of improper motive is not required for a finding of abuse of process. In its decision of 3 November 1999 in the case of *Jean-Bosco Barayagwiza v. The Prosecutor*, the Appeals Chamber of the ICTR emphasised that the finding of specific fault by one section of the court is not required. If the rights of the Accused have been violated, that is sufficient for the Chamber to find that the integrity of the judicial process has been undermined.³⁰ In the Trial Chamber’s opinion the authorities show that any violation of the rights of the accused must reach a certain threshold level to constitute an abuse of process.³¹ A finding of impropriety on the part of one party may, however, contribute to the ultimate finding that a violation of the rights of an accused has reached such a threshold as to undermine the integrity of the proceedings. As the Supreme

²⁵ *Smith v. Hoey*, 393 U.S. 374 (1969).

²⁶ See for example *Bell v. DPP of Jamaica* [1985] 1 AC 937; [1985] 3 WLR 73; [1985] 2 All ER 585.

²⁷ *R. v. Oxford City Justices*, *ex parte Smith* (D.K.B.).

²⁸ *The Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002 (“*Nikolić Decision*”). See also *R. v. Hartley*, Wellington Court of Appeal, [1978] 2 NZLR 199.

²⁹ *R v. Horseferry Road Magistrates Court, ex p. Bennett* [1994] 1 AC 42 at p. 158.

³⁰ The Appeals Chamber noted, “First and foremost, this analysis focuses on the alleged violations of the Appellant’s rights and is not primarily concerned with the entity responsible for the alleged violation(s)...even if fault is shared between the three organs of the Tribunal - or is the result of the actions of a third party... - it would undermine the integrity of the judicial process to proceed.” (Emphasis added). *Barayagwiza Appeals Decision*, para. 73.

³¹ In the *Nikolić Decision*, the Trial Chamber had to decide whether “such serious factors” were involved in a case of alleged illegal arrest that it would amount to an impediment for the Tribunal to exercise its jurisdiction. *Nikolić Decision*, paras 73-74, and the analysis that follows.

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Court of Canada observed in *Toronto (City) v. C.U.P.E.*, the focus is less on the interests of the parties and more on the integrity of judicial decision making as a whole.³²

B. Would the Prosecution of the Accused Amount to an Abuse of Process in the Circumstances?

27. Applying the principles of the doctrine of abuse of process outlined above to the facts of this case, the question to be addressed is whether proceeding with the prosecution under any or all of the Counts brought against the Accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct. This should be considered in the context of the Trial Chamber's earlier observation that "improper or illegal procedures" would justify a finding of "abuse of process."³³

28. On a close examination of the Motion and the subsequent Response and Reply, it is apparent that while the Defence has sought relief pursuant to Rule 72(B)(v), the issues raised overlap considerably with a different basis for objection to the indictment, namely a challenge to the jurisdiction of the Special Court under Rule 72(B)(i). The Trial Chamber notes that the Defence in this case also filed a motion entitled, 'Motion Challenging the jurisdiction of the Special Court, raising serious issues relating to Jurisdiction on various grounds and objections based on abuse of process' on 20 October 2003, which this Chamber referred to the Appeals Chamber under Rule 72(E) on 22 January 2003. We further observe that although the Defence could have raised the issues herein so to challenge the jurisdiction of the Special Court, it did not in the current Motion. However, even if it had, the Motion does not "raise a serious issue relating to jurisdiction" warranting an otherwise mandatory referral to the Appeals Chamber pursuant to Rule 72(E).

29. In effect, what the Defence is arguing is that the Prosecutor, by bringing an Indictment (as he is empowered to do under Article 15 of the Statute) which contains counts for crimes which fall within the subject-matter jurisdiction of the Special Court for Sierra Leone, as defined in Articles 2 to 5 of the Statute, having sought review and approval of the Indictment by a designated Judge (in accordance with Rule 47 of the Rules) and having received approval of the Indictment, has thereby committed a form of abuse of process. It would appear that the Defence is also

³² *Canadian Union of Public Employees, Local 79 v. City of Toronto and Douglas C. Stanley and A.G of Toronto*, 2003 SCC 63 para. 43.

³³ *Barayagwiza* Appeals Decision of 3 Nov 1999, para. 74.

arguing, if only implicitly, that the designated Judge contributed to the abuse of process by approving the Indictment and the charges contained therein.

30. This Trial Chamber finds that neither the lawful exercise of the powers of the Prosecutor to bring an Indictment which is based upon the alleged commission of crimes within the jurisdiction of the Special Court for Sierra Leone nor the approval of such an Indictment by a Judge of the Special Court in accordance with the Statute and the Rules would, and indeed could, constitute an abuse of process. The veiled suggestion that the designated Judge may have contributed to the alleged abuse of process is objectionable, particularly when there is no evidence put forward to rebut the presumption of regularity. Counsel is admonished that such submissions, depending on the facts and circumstances, may well border on contempt of court.

31. On this finding alone, the Trial Chamber deems it to be sufficient to dismiss the Motion in its entirety.

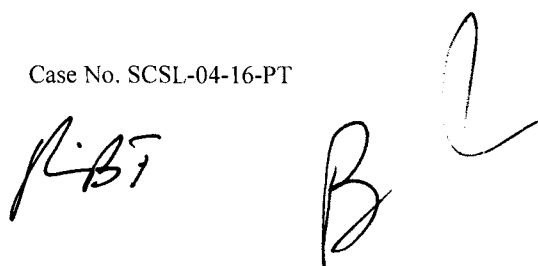
32. In order to prevent the Defence in this case, or for that matter defence in other cases, from bringing a similar Motion in which the alleged violations are re-characterised as errors of law in defining the competence or jurisdiction of the Special Court, the Trial Chamber will briefly address this issue.

33. It is well established under customary international law that Crimes against Humanity, violations of Common Article 3 and of Additional Protocol II, and serious violations of international law entail individual criminal responsibility.³⁴ Further, and as a matter of reference, Sierra Leone is a signatory to the four Geneva Conventions, Additional Protocol II to the Geneva Conventions and the Statute of the International Criminal Court. Therefore, there is no violation of the fundamental principle of legality in this case.

C. On a Separate Matter: Invoking a “Constitutionality” Argument

34. On a separate matter, the Trial Chamber has noted an important recurrent issue which has again been raised in the course of arguments by the Accused and which deserves some attention with a view to further reemphasising the position of the Trial Chamber on this and other related issues. This touches upon and concerns the submission by the Counsel for the Accused who

³⁴ See, e.g., *Prosecutor v. Duško Tadić*, Case No. IT-94-I-AR72, Decision on the Defence on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.



again, like other colleagues who preceded him, contends that the Special Court, its procedures and processes, are subject to the provisions of the Constitution, 1991 [Act No. 6 of 1991].

35. In this regard, Counsel for the Applicant submits that charges in the Indictment which are based on crimes against humanity, violations of Common Article 3, Additional Protocol II and other serious violations of international humanitarian law, are void in so far as they are introduced in violation of the principle of *nullum crimen sine lege*, and of Sections 23(7) and 171(5) of the Constitution. Counsel accordingly submits that Counts 3, 4, 6, 7, 10, 12 and 15 of the Indictment, should, because they are void in the light of the above arguments, be quashed.

36. In view of the persistence of submissions of this nature which tend to convey a wrong impression of the legal basis and status of the Special Court, we deem it necessary to restate the stand already taken by this Chamber on this issue.

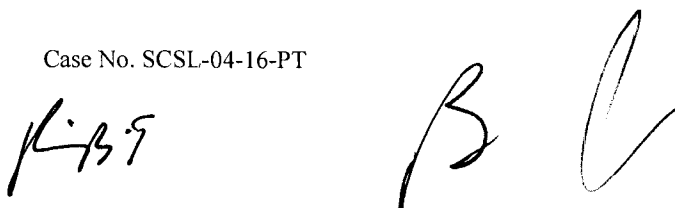
37. In the Decision dated 22 July 2003, which considered the habeas corpus application by Alex Tamba Brima, it was held that the Special Court of Sierra Leone derives its existence, not to the Constitution or to the Parliament of the Republic of Sierra Leone, but solely to the Security Council Resolution No. 1315 of 14 August 2000 and the Agreement between the United Nations and the Government of Sierra Leone which set it up.³⁵

38. It was further held in the *Brima* case that the application of Section 125 and other Sections of the Constitution, which were referred to by Counsel for the Accused in that case, was only limited to the courts created under the Constitution and not to a post-1991 international creation that owes its existence to an international instrument of the Security Council and an equally international Agreement between the United Nations and the Government of Sierra Leone. This fact was further confirmed by the Sierra Leone Legislature which in Article 11 (2) of the Special Court Agreement 2002, (Ratification Act) 2002 affirms as follows:

‘The Special Court shall not form part of the Judiciary of Sierra Leone’

39. In bringing this argument as a Motion raising abuse of process, Counsel for the Accused seems to be trying to re-litigate, this time by a devious route, the same issue as one of an abuse of process, having already raised it as a serious matter of jurisdiction. The Trial Chamber wishes to observe emphatically that, although it does not intend to discourage creative and imaginative legal

³⁵ See, *Prosecutor v. Alex Tamba Brima*, Case No. SCSL-03-06-PT, Ruling on the Application for the Issue of a Writ of habeas corpus Filed by the Applicant, dated 22 July 2003 and filed 4 August 2003.



argument, Counsel should make every effort to bring motions before the Chamber under the correct rules of procedure.

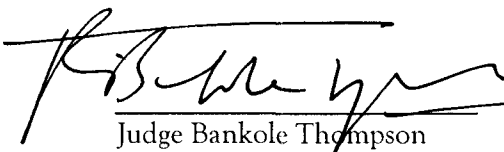
40. The Trial Chamber also recalls the decision by the Appeals Chamber "Decision on Constitutionality and Lack of Jurisdiction" which affirms that the Special Court operates in the sphere of international law and is not subject to the Constitution of Sierra Leone.³⁶ Considering the principle of judicial hierarchy and the doctrine of *stare decisis* and in light of the other reasons hereinbefore advanced, we consider this argument by Counsel as frivolous and accordingly dismiss it.

IV. CONCLUSION AND DISPOSITION

41. Based on the foregoing, the Trial Chamber finds that the circumstances of this case do not meet the test required that "proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct."

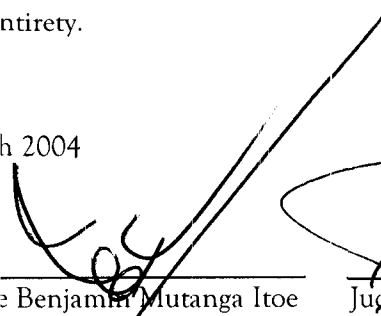
42. Accordingly, the Trial Chamber finds that there has been no abuse of process and the Motion is hereby **DISMISSED** in its entirety.

Done at Freetown this 31st day of March 2004

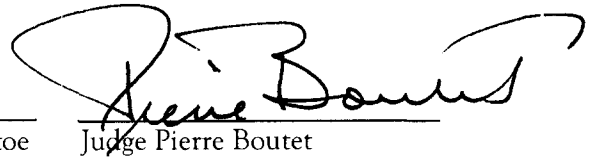


Judge Bankole Thompson

Presiding Judge,
Trial Chamber



Judge Benjamin Mutanga Itoe



Judge Pierre Boutet



[Seal of the Special Court of Sierra Leone]

³⁶ See, e.g., *Prosecutor v. Brima Buzzy Kamara*, Case No. SCSL-04-16-AR72(E), Decision on Constitutionality and Lack of Jurisdiction, dated 13 March 2004 and filed 15 March 2004.

