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SCSL-2003-10-PT

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SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 27th day of January, 2004

PROSECUTOR against

ISSA HASSAN SESAY
(Case No.SCSL-2003-05-PT)
ALEX TAMBA BRIMA
(Case No.SCSL-2003-06-PT)
MORRIS KALLON
(Case No.SCSL-2003-07-PT)
AUGUSTINE GBAO
(Case No.SCSL-2003-09-PT)
BRIMA BAZZY KAMARA
(Case No.SCSL-2003-10-PT)
SANTIGIE BORBOR KANU
(Case No.SCSL-2003-13-PT)

DECISION AND ORDER ON PROSECUTION MOTIONS FOR JOINDER

Office of the Prosecutor:
Luc Coté
Robert Petit
Boi-Tia Stevens

Defence Counsel for Issa Hassan Sesay:
Timothy Clayson
Wayne Jordash
Abdul Serry Kamal

Defence Counsel for Alex Tamba Brima:
Terence Terry
Karim Khan

Defence Counsel for Morris Kallon:
James Oury
Steven Powles
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao:
Girish Thanki
Andreas O'Shea
Ken Carr

Defence Counsel for Brima Bazzy Kamara:
Ken Fleming
C.A. Osho Williams

Defence Counsel for Santigie Borbor Kanu :
Geert-Jan Alexander Knoops

THE SPECIAL COURT FOR SIERRA LEONE ("Special Court"),

SITTING as the Trial Chamber composed of Judge Bankole Thompson, Presiding Judge, Judge Benjamin Mutanga Itoe and Judge Pierre Boutet ("Chamber");

BEING SEIZED of six (6) motions filed by the Office of the Prosecutor ("Prosecution") on 9 October 2003 for joinder of the trials of the Accused in *Prosecutor v. Issa Hassan Sesay* (Case No.SCSL-2003-05-PT), *Prosecutor v. Alex Tamba Brima* (Case No.SCSL-2003-06-PT), *Prosecutor v. Morris Kallon* (Case No.SCSL-2003-07-PT), *Prosecutor v. Augustine Gbao* (Case No.SCSL-2003-09PT) *Prosecutor v. Brima Bazzy Kamara* (Case No.SCSL-2003-10-PT), and *Prosecutor v. Santigie Borbor Kanu* (Case No.SCSL-2003-13-PT) ("Motions");

NOTING THAT Counsel for Issa Hassan Sesay filed a Response on 18 November 2003 to which the Prosecution filed a Reply on 21 November 2003;

NOTING ALSO THAT Counsel for Alex Tamba Brima filed a Response on 15 October 2003 to which the Prosecution filed a Reply on 17 October 2003;

NOTING ALSO THAT Counsel for Morris Kallon did not file a Response;

NOTING ALSO THAT Counsel for Augustine Gbao filed a Response on 31 October 2003;

NOTING ALSO THAT Counsel for Santigie Borbor Kanu filed a Response on 16 October 2003, to which the Prosecution filed a Reply on 20 October 2003;

NOTING ALSO THAT Counsel for Brima Bazzy Kamara filed a Response on 18 November 2003, to which the Prosecution filed a Reply on 20 November 2003;

NOTING FURTHER THAT on 2 December 2003 the Chamber heard oral arguments from the parties,

CONSIDERING THE SUBMISSIONS AND ARGUMENTS OF THE PARTIES

I. THE MOTIONS

A. The Prosecution Submissions

1. Pursuant to Rule 73 and Rule 48 (B) of the Rules, the Prosecution seeks that the Accused Issa Hassan Sesay, Alex Tamba Brima, Morris Kallon, Augustine Gbao, Brima Bazzi Kamara and Santigie Kanu be jointly tried for the following reasons:

(i) The circumstances of this case meet the requirements for joinder

2. The Prosecution submitted that the requirements for joinder under the Rules of Procedure and Evidence of the Special Court ("Rules") are clearly met by the circumstances in this case. The crimes alleged against the Accused Sesay, Brima, Kallon, Gbao, Kamara and Kanu are crimes which formed part of a common scheme to gain effective control of the territory and population of Sierra Leone, as alleged in each of their Indictments. The Indictments against the aforementioned Accused are almost identical, especially in material particulars. The offences charged are exactly the same. Except in respect of the Accused Kamara and Kanu, the arguments in respect of time and locations are the same. The Accused are commonly alleged to have been members of the senior leadership of the Revolutionary United Front ("RUF") and/or the Armed Forces Revolutionary Council ("AFRC") and of the RUF and AFRC alliance during the relevant time period; and committed the crimes charged in their senior leadership capacity. The case also meets the guidelines for joinder established by the jurisprudence of the International Criminal Tribunal for Rwanda ("ICTR"), for example the decision in *Prosecutor v. Nyiramasuhuko et al.*[1]

(ii) A joint trial would serve the interests of justice

3. The interests of justice are best served by trying all the Accused together. Given the similarity of the facts of the case against each Accused, a joint trial would reduce the risk of contradictions, inconsistencies or discrepancies in decisions rendered in separate trials. In support of this submission, the Prosecution cited the decision of the ICTR in *Prosecutor v. Kayishema,*[2] and the decision of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in *Prosecutor v. Brdanin and Talic.*[3] Separate trials could lead to other severe practical difficulties were the judgment in a first trial to be appealed with subsequent trials yet to start or in progress. There is also the possibility of the same factual issues being considered simultaneously by a Trial Chamber and an Appeal Chamber. In addition, there is the possibility of the Trial Chamber in separate trials reaching different decisions on the same question of law. Further, because the Indictments are identical, the majority of the evidence to be tendered by the Prosecution against each Accused will overlap; hence a joint trial would obviate the difficulty of duplication of evidence. Furthermore, a joint trial, as opposed to separate trials, promotes efficient administration of justice by eliminating the possibility of one hundred and sixty (160) potential

[1] ICTR-97-21-I, ICTR-97-29A and B-I, ICTR-96-15-T, ICTR-96-8-T, Decision on the Prosecution's Motion for Joinder of Trials, 5 October 1999 ("*Nyiramasuhuko* Decision"), paras. 10-12.
[2] ICTR-95-1-T, Decision on the Joinder of the Accused and Setting the Date for Trial, 6 November 1996.
[3] IT-99-36, Decision on Motions by Momir Talic for a Separate Trial and for Leave to File a Reply, 9 March 2000, para 31.

Prosecution witnesses being called upon to testify in six (6) separate trials and that of the consequential effects of (a) traumatisation, (b) re-traumatisation, and (c) concerns for the physical security of such potential witnesses.

(iii) A joint trial would not deny the Accused any fundamental right

4. In the present case, joinder is not precluded by Rule 82(B) of the Rules.[4] A joint trial would not deprive any of the Accused of any fundamental right that would otherwise be accorded in a separate trial nor of the right to a fair trial guaranteed by Article 17 of the Statute of the Special Court ("Statute"). A joint trial would indeed more fully protect each Accused's right to trial without undue delay, as required by Article 17(4)(c) of the Statute.[5] Due to the fact there is only one Trial Chamber, the possibility existing for an additional Trial Chamber, separate trials would almost certainly delay the trials of some of the Accused whereas joinder would expedite such trials. A joint trial would not result in any conflict of interest leading to serious prejudice to the Accused due to the fact that such trials will be conducted by professional Judges as opposed to lay juries. In support of this submission, the Prosecution cited the recent decision of this Court in *Prosecutor v Augustine Gbao*[6] and the ICTY decision in *Prosecutor v. Delalic et al.*[7] Finally, joinder of these cases would be consistent with the evolving international jurisprudence of international criminal tribunals.

5. By way of relief the Prosecution seeks both an order that the Accused be tried jointly and an order that a single, consolidated indictment be prepared as the Indictment on which the joint trial shall proceed, to which the Registry should assign a new case number.

6. In their oral arguments before the Chamber, Counsel for the Prosecution reinforced and elaborated upon their written submissions as set out in the following paragraphs. They also put forward an oral Consolidated Reply to the Defence Responses and oral arguments, a summary of which appears below.

B. The Defence Responses

7. The only Accused who offered no opposition to the Motions was Augustine Gbao. However most of the contested responses to the Motions presented by the various

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[4] Rule 82 states that:

> "(A) In joint trials, each accused shall be accorded the same rights as if he were being tried separately.
>
> (B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice."

[5] Article 17 of the Statute, on the Rights of the Accused, at paragraph (4)(c), reads as follows:

> "4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
>
> ...
>
> c. To be tried without undue delay; ..."

[6] SCSL-2003-09-I, Order on the Urgent Request for Direction on the Time to Respond to and/or an Extension on Time for the Filing of a Response to the Prosecution's Motion, 16 May 2003, page 2.

[7] IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998.

Counsel for the other Accused were based on a series of arguments that the Motions for a joint trial of the six Accused are premature at this stage of the proceedings.

(i) Readiness for trial

8. A general issue raised in the Defence responses was a lack of a clear indication by the Prosecution or the Special Court as to when the trials will commence. Similarly, several Counsel submitted that there was non-cognisance on the part of the Defence of 'trial readiness' or 'perceived readiness' for trial.

(ii) Procedural deficiencies in the motions

9. On behalf of Alex Tamba Brima, learned Defence Counsel, Terence Terry, consistent with the main thrust of his written submissions, argued that the Motions were premature because the individual Indictments (and the relevant orders approving them) were not annexed to the joinder Motions. Learned Counsel contended, quite forcefully, that exhibiting the said Indictments was a condition precedent with which the Prosecution had failed to comply and that though the procedural difficulty was not incurable, the Prosecution had failed to do so, and that, in consequence the Motions should be dismissed. Furthermore, Counsel submitted that non-disclosure or failure to exhibit as part of the Motion a proposed "single consolidated indictment" on which a joint trial should proceed, if joinder were granted, was also a fatal deficiency. Similar submissions were made by learned Counsel Osho-Williams on behalf of Brima Bazzy Kamara.

(iii) Incomplete disclosure of prosecution witnesses

10. Several Counsel pointed to the fact that Orders of the Court pursuant to Rule 69 and 75 of the Rules granting protective measures to Prosecution witnesses meant that disclosure pursuant to Rule 66(A)(i) was not yet complete. On behalf of Morris Kallon, in respect of whom the Defence had not filed a written response, learned Counsel Steven Powles, with leave of the Chamber, submitted that considering the possible two hundred and seventy (270) prosecution witnesses that may be called to testify at the trial of his client, it was too soon to know how many would in fact be called. He speculated that it might be that only twenty-thirty (20-30) would be needed to testify, contending that this would determine the length and expense of any trial. He again speculated that this number would impact on whether there could be added trauma created by separate trials, as the witnesses who may be called may not be victims. Counsel concluded that until all these uncertainties are resolved, it would be premature to grant a joinder.

11. Similarly, on behalf of Santigie Borbor Kanu, learned Counsel Professor Knoops noted that although some Prosecution witnesses' statements against his client have been provided to the Defence, the lack of full disclosure rendered a determination of whether joinder would materially prejudice an individual Accused very difficult. He invited the Chamber either to reject the Motion or adjourn it until all the Prosecution materials have been disclosed.

(iv) *Joinder will amount to addition of new charges*

12. On behalf of Brima Bazzy Kamara, learned Counsel Osho-Williams contended that it would not be in the interest of the Accused persons to be tried jointly or indicted now in a consolidated indictment, as it would amount to adding new allegations against his client. He was, therefore, opposing the Motion. Similarly, Counsel for Morris Kallon submitted that joinder of the Indictments would amount to amending each of them by adding new charges and allegations which can only be done by a specific application to amend pursuant to Rule 50 of the Rules.[8]

(v) *Preliminary objections not yet completed*

13. Several Counsel, in their filed responses to the Motions, raised the argument that the time has not yet elapsed for the purposes of lodging preliminary motions in respect of jurisdiction and defects in the form of the indictment. However, this ground was not pursued at length in their oral submissions.

(vi) *Substantive responses*

(a) *Joinder into a single trial is not in the interests of justice*

14. Counsel for both Morris Kallon and Issa Hassan Sesay argued that joinder into a single trial would not be in the interests of justice. However, they both submitted that if the Chamber were minded to grant the joinder, the Accused persons allegedly belonging to the RUF and AFRC should be tried separately in two trials, as they were two separate organisations.

(b) *Joinder not justified on grounds of "broad generalities" as to "same transaction"*

15. Consistent with his written submissions, Counsel for Santigie Borbor Kanu noted that even in cases involving charges of common purpose the principle of individual criminal responsibility remained paramount. Relying heavily on jurisprudence from the ICTR, he submitted that the Chamber should caution itself against granting the joinder motions on the basis of "broad generalities" as to the concept of the "same transaction". A similar point was made by Counsel for Issa Hassan Sesay.

C. Prosecution's Consolidated Reply:

16. In an oral consolidated reply, Ms Boi-Tia Stevens for the Prosecution argued that whether or not the RUF and the AFRC are different organisations is irrelevant to the issue of whether there was a common scheme between them, and that the Indictments make it clear that they continued to control the territory of Sierra Leone, and that they had authority over the perpetrators of the crimes charged. Responding to the Defence contention that the Indictments should have been exhibited as part of the Motions, the Prosecution submitted that no such requirement exists in the Rules and that there is no

[8] Rule 50 of the Rules provides for the procedure to be followed by the Prosecution for requesting the amendment of an indictment before or after the initial appearance of an Accused.

analogous practice in the ICTY and ICTR because in international tribunals the Registry makes available to the Chamber documents that have already been filed. On the issue of lack of certainty as to the number of potential Prosecution witnesses as an unresolved matter, the Prosecution submitted that clarifications can be sought after a joinder order has been made. The Prosecution also contended that a consolidated indictment would not result in added allegations or charges except for some differences in locations which would not affect existing allegations. Concluding, the Prosecution noted that there was a slight difference between the legal tests for joinder applied by the ICTY and ICTR, and submitted that should the Special Court decide to adopt the three-pronged test, the six joinder Motions fulfil the said test.

AND HAVING DELIBERATED, DECIDES AS FOLLOWS:

17. The Chamber now proceeds to a consideration of the preliminary objections taken by the Defence as to the prematurity of the Motions.

II. DEFENCE OBJECTIONS

18. The Chamber recalls that some Defence Counsel argued strenuously that the joinder Motions were premature. Two submissions in respect of the prematurity argument, which are mere variations of the same theme, are that there was a lack of clear indication by the Prosecution or the Special Court as to when the trials will commence, and the non-cognisance, on the part of the Defence, of 'trial readiness' or 'procedural readiness'. With all due respect to the Defence, the Chamber does not see the relevance of this issue to the joinder equation, given the plain and ordinary meaning of Rule 48(B) of the Rules.

19. On the prematurity issue, it was also submitted that delayed disclosure of statements of Prosecution witnesses pursuant to Rules 66(A)(i), Rule 69 and Rule 75 of the Rules rendered the Motions premature. Relying on the *Nyiramasuhuko* Decision, the response of the Chamber to this submission is that despite the importance of timely disclosure, it is not an issue at this stage of the proceedings. The Chamber is of the view that even if the Prosecution had not disclosed such material, the rights of the Accused would not have been infringed by the operation of Rule 66(A)(i) of the Rules. It is noteworthy that the said Rule refers to the disclosure of material in support of evidence the Prosecutor intends to present at trial, not disclosure of material in support of a joinder motion.

20. The final submission as regards the argument based on prematurity put forward by the Defence is that the time has not yet elapsed for the purpose of lodging preliminary motions in respect of jurisdiction and defects in the form of the indictment. The Chamber does not see how the rights of the Accused to make preliminary motions in respect of jurisdiction and defects in the form of indictment are in any way derogated from or jeopardised by an application for joinder.

21. It was also submitted by some Defence Counsel that the failure of the Prosecution to exhibit both the original Indictments and the anticipated consolidated indictment to the Motion for judicial scrutiny amounted to non-compliance with a

condition precedent. Even though this practice may be regarded as an advocacy for procedural tidiness in the preparation of motions and may have some merit in the sphere of procedural law in national legal systems, it is difficult to require it as a mandatory rule in the context of international criminal tribunals where the Registry not only makes available to the Chamber documents that have already been filed but also provides accessibility to them as public documents in the absence of non-disclosure orders. In so far as the Special Court is concerned, the Chamber is of the opinion that, due to the need for expeditiousness and flexibility in its processes and proceedings, recourse to procedural technicalities of this nature will unquestionably impede the Special Court in the expeditious dispatch of its judicial business. Therefore, with all due respect to learned Counsel for the Defence who forcefully canvassed this issue, the Chamber does not think, in the context of the juridical peculiarities of the Special Court, that it is necessary for the Prosecution to exhibit both the original and anticipated consolidated indictments to establish a basis for joinder.

III. APPLICABLE LAW

A. Relevant Basic Principles of International Criminal Law

22. As a general starting point for determining the substantive merits of the Prosecution's Motions for joinder of the Indictments of the Accused persons herein, the Chamber deems it imperative to restate that it is a cardinal principle of international criminal law that criminal responsibility is based on the notion of personal culpability.[9] Jurisprudentially, the doctrine of personal culpability has its origins in, and is a transplant from, national criminal law systems,[10] providing some theoretical support for the monist school of thought that international law and municipal law are constituent elements of a single, integrated universal normative order. In the specific context of the Special Court's evolving jurisprudence, as an international criminal tribunal, the doctrine of personal culpability is replicated in Article 6 (1) of its Statute, which states that:

> "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2-4 of the present Statute shall be *individually responsible* for the crime."[11] (emphasis added).

23. The statutory ambit of Article 6(1) of the Statute is sufficiently broad to encompass individual criminal responsibility for any of the five enumerated categories for any person who "planned", "instigated", "ordered", "committed", or "aided and abetted in the planning, preparation or execution of a crime" specified in Articles 2-4 of the Statute. The clear statutory effect of Article 6(1) is that criminal liability *on an individual basis* by an offender or any other person who has been involved in the crime can be incurred in any one of the enumerated modes prescribed by the said Statute. Hence, the need for persons accused of crimes to be tried separately and individually, as a logical emanation of the principle of individual criminal culpability.

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[9] See *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Appeal Judgment, Appeals Chamber, 15 July 1999, para. 186.

[10] Id. para. 186

[11] See also Article 7(1) of the Statute establishing the ICTY and Article 6(1) of the Statute establishing the ICTR, after which precedents Article 6(1) of the Special Court's Statute was modeled.

24. This fundamental principle notwithstanding, the Chamber wishes to observe that Article 6(1) also encompasses and recognises *the doctrine of collective criminal responsibility* in the sense that in the penal setting of war crimes, the most egregious offences of the criminal law are "perpetrated by a collectivity of persons in furtherance of a common criminal design."[12] *It is this principle of collective criminal responsibility that forms the doctrinal basis of the Prosecution's Motions for joint trial in respect of the Accused persons herein who were separately indicted on diverse dates in the year 2003.* The Motions, made pursuant to Rule 48(B) of the Rules, seek leave of this Trial Chamber that Issa Hassan Sesay, Alex Tamba Brima, Morris Kallon, Augustine Gbao, Brima Bazzy Kamara and Santigie Borbor Kanu, separately indicted for various Crimes against Humanity, Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II and Other Serious Violations of International Humanitarian Law, be jointly tried pursuant to the aforesaid Rule 48(B) on the grounds that, using the exact language of the Rule, they are "*accused of the same or different crimes committed in the course of the same transaction.*" What then, are the applicable provisions and jurisprudence?

B. Applicable Statutory Provisions

25. The Chamber notes that the rules governing the joinder of the Indictments within the jurisdiction of the Special Court are embodied in the founding instruments of the Special Court. Firstly, according to Article 17(2) of the Statute, every person accused of crime is entitled to a fair and public hearing. Secondly, and equally pre-eminent is Article 17(4)(c) which enjoins that a person accused of crime is entitled to be tried without undue delay. Thirdly, Rule 48(B) of the Rules of Procedure and Evidence of the Special Court expressly provides that:

> "Persons who are separately indicted, accused of the same or different crimes committed in the course of the same transaction, may be tried together, with leave granted by the Trial Chamber pursuant to Rule 73."

In the Chamber's judgment, the cumulative effect of these statutory provisions is the vesting of a discretionary jurisdiction in the Special Court to grant the joinder of indictments, weighing the overall interests of justice and the rights of the accused person. In fact, the founding instruments of both the ICTY and ICTR are to the same effect.

C. Applicable Jurisprudence

26. Although generally mindful of the desirability for the Special Court, as was stated in some of its prior Decisions on the Prosecutor's Motions for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure,[13] to develop its own

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[12] *Prosecutor v. Dusko Tadic*, *supra* note 9, para. 193.

[13] See the Decisions of 23 May 2003 in *Prosecutor v. Issa Hassan Sesay*, SCSL-2003-05-PT at para 11, *Prosecutor v. Alex Tamba Brima*, SCSL-2003-06-PT at para 11, *Prosecutor v. Morris Kallon*, SCSL-2003-07-PT at para 12, *Prosecutor v. Samuel Hinga Norman*, SCSL-2003-08-PT at para 11; and *Prosecutor v. Moinina Fofana*, SCSL-2003-11-PT, Decision of 16 October 2003 at para 13; *Prosecutor v. Brima Bazzy Kamara*, SCSL-2003-10-PT, Decision of 23 October 2003 at para 16, in each case *per* Judge Thompson as follows:

> "...it must be emphasized that the use of the formula "shall be guided by" in Article 20 of the Statute does not mandate a slavish and uncritical emulation either precedentially or persuasively, of the principles and doctrines enunciated by our sister tribunals."

case law, it will, as a matter of principle, adhere to persuasive jurisprudential enunciations of its sister Tribunals, the ICTY and ICTR, with necessary adaptations of course, to fit into its own jurisprudence based on its Rules and local realities on the one hand, and the need to ensure uniformity in judicial rulings on interpretation and application of the procedural, evidentiary and substantive rules and principles of International Criminal Tribunals, on the other.[14]

27. Consistent with this broad discretionary power vested in the Court, it is necessary for the Chamber, in this first set of Motions for joinder of accused persons brought before it, to articulate briefly the relevant general operative principles in this area of law. *A key principle in this regard is that regardless of whether the Accused were indicted together or not, where the factual allegations in the indictment support the Prosecution's theory of the existence of a common transaction among the Accused and there is no resulting material prejudice to the Accused, joinder may be granted.*[15] *Another key principle is that even if the Accused were charged separately, joinder may still be granted where the Prosecution's theory of the existence of a common transaction is supported by the allegations within the factual parameters of the Indictments.*[16]

28. Predicated upon the foregoing reasoning, the Chamber deems it quite instructive to ascertain the state of the evolving jurisprudence of ICTY and ICTR by summarising below *specific principles* on the question of joinder. These are the main propositions deducible from case-law authorities in those two jurisdictions:

(a) Under Rule 48, a joinder of Accused persons charged with the same or different crimes committed in the course of the same transaction is permissible in law;[17]

(b) The term "transaction" in Rule 2 of the Rules implies that an Accused can be jointly tried with others if their acts fall within the scope of Rule 48;[18]

(c) In a joinder case, Rule 48 must be read in light of the definition of "transaction" in Rule 2 and Rule 82(B);[19]

(d) The plain and ordinary meaning of "transaction" is "a number of acts or omissions whether occurring as one event, at the same time or different transactions being part of a common scheme, strategy or plan;"[20]

See also *Prosecutor v. Augustine Gbao*, Case No. SCSL-2003-09-PT, Decision of 10 October 2003 where at para 31 the Chamber observed *per* Judge Boutet that:

> "From a plain reading of Article 20(3) of the Statute, it is clear, to the Special Court's understanding, that the jurisprudence from the two *ad hoc* Tribunals is not binding upon the Special Court, but can be used as guidance in so far as it is adapted to the specificities of the Special Court."

[14] See Decision of 23 May 2003 in *Prosecutor v. Issa Hassan Sesay*, SCSL-2003-05-PT, at para 11, note 13 above.

[15] See *Archbold*, International Criminal Courts, Practice, Procedure and Evidence, Sweet & Maxwell Ltd., London, 2003 at pages 204-207.

[16] Id.

[17] See *Prosecutor v. Ntabakuze and Kabiligi*, Case No. ICTR-97-34-I, Decision on the Defence Motion Requesting an Order for Separate Trials, 30 September 1998.

[18] See *Nyiramasuhuko* Decision, *supra* note 1, para 7.

[19] See *Prosecutor v. Ntabakuze and Kabiligi*, *supra* note 17.

(e) In determining the permissibility under Rule 48 of joinder of Accused persons who have been indicted separately, the Court must be satisfied that:

(i) The acts of the Accused must be connected to material elements of a criminal act. For example, the acts of the Accused may be non-criminal/legal acts in furtherance of future criminal acts;

(ii) The criminal acts to which the acts of the Accused are connected must be capable of specific determination in time and in space;

(iii) The criminal acts to which the acts of the Accused are connected must illustrate the existence of a common scheme, strategy or plan.[21]

(f) Factors to be taken into consideration in determining whether the interests of justice will be served by a joinder include:

(i) the public interest in savings and expenses and time;

(ii) the interest of transparent justice that there be consistency and fairness with respect to the verdicts of persons jointly tried pursuant to Rule 48;

(iii) the public interest in avoiding discrepancies and inconsistencies inevitable from separate trials of joint offenders;[22] and

(iv) whether joinder would allow for a more consistent and detailed presentation of evidence, and for better protection of the victims' and witnesses' physical and mental safety by eliminating the need for them to make several journeys;[23]

(g) The need for a consistent and detailed presentation of evidence and that of protecting victims and witnesses must be balanced, in a joinder equation, against the rights of the Accused to a trial without undue delay and any other possible resultant prejudice to the Accused;[24]

(h) The Chamber, in an application for joinder, must confine itself to the parameters of the factual allegations embodied in the Indictment;[25]

(i) An application for joinder is not to be treated as a trial;[26]

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[20] Id.
[21] Id.
[22] See *Prosecutor v Delalic et* al, IT-96-21-T, Decision on the Motion by the Defendant Delalic Requesting Procedures for Final Determination of the Charges against Him, 1 July 1998, para 35, cited in *Archbold, supra* note 15 at page 206.
[23] See *Prosecutor v Kayishema*, ICTR-95-1-T, Decision on the Joinder of the Accused and Setting the Date for Trial, 6 November 1996 at page 3.
[24] See *Prosecutor v Bagosora* et al, ICTR-96-7, Decision on the Prosecutor's Motion for Joinder, 29 June 2000, paras 145-156.
[25] Id. paras. 119-122.
[26] Id.

(j) Concurrent presentation of evidence pertaining to one Accused with that pertaining to another Accused does not *per se* constitute a conflict of interests, nor does calling a co-Accused to testify during the joint trial constitute a conflict of interests between them;[27]

(k) The fact that there is evidence which may, in law, be admissible against one Accused and not others, is not necessarily a ground for severance in an international tribunal where trial is by judges without a jury, since it is generally assumed that judges can rise above such risk of prejudice and apply their professional judicial minds to the assessment of evidence;[28]

(l) Rule 82 vests in an Accused in a joint trial all the rights of a single Accused on trial before a Trial Chamber; accordingly the Accused jointly tried does not lose any protection under Articles 20 and 21 of the ICTY Statute and Articles 19 and 20 of the ICTR Statute;[29]

(m) The interpretation of the phrase "the same transaction" in Rule 48 is a question of law;[30]

(n) The acts of the Accused for the purpose of joinder may form part of the same transaction notwithstanding that they were carried out in different areas and over different periods, provided that there is a sufficient nexus between the acts committed in the two areas;[31]

(o) Joinder is permissible under Rule 48 where possible public interest and the concern for judicial economy would require joint offences to be tried together;[32]

(p) It is impermissible in law for the purposes of joinder to join unconnected acts on the ground that they are part of the same plan;[33]

(q) In determining whether to grant joinder Rule 48 should be construed in the light of the Statute as a whole especially in the light of the entitlement of the Accused to a fair hearing;[34]

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[27] See *Prosecutor v. Kovacevic et al*, IT-97-24-AR73, Decision on the Motion for Joinder of Accused and Concurrent Presentation of Evidence, 14 May 1998.

[28] *Prosecutor v. Barayagwiza*, ICTR-97-19-I, Decision on the Request of the Defence for Severance and Separate Trial, 26 September 2000.

[29] *The Prosecutor v. Delalic et al*, *supra*, note 22.

[30] See *Prosecutor v. Milosevic*, IT-99-37-AR.73, IT-01-50-AR73, IT-01-51-AR73, Decision on Prosecutor's Interlocutory Appeal from Refusal to Order Joinder, 1 February 2002, at para 19.

[31] See *Prosecutor v. Ntakirutimana et al*, ICTR-96-10-I, ICTR-96-17-I, Decision on the Prosecution's Motion to Join the Indictments, 22 February 2001.

[32] *Prosecutor v Kanyabashi*, ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of the Trial Chamber, 3 June 1999, para 31.

[33] *Prosecutor v. Kovacevic et al*, IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998.

[34] See *Prosecutor v. Bagosora*, *supra*, note 24.

(r) Joinder should not be granted where the interests of justice would be prejudiced – those interests relate not only to the Accused but also to the interests of the Prosecution and the international community in the trial of any accused charged with serious violations of international humanitarian law;[35]

(s) To justify joinder what must be proved is that:

(i) there was a common scheme or plan; and

(ii) that the Accused committed crimes during the course of it.

It does not matter what part the particular Accused played provided that he participated in a common plan. It is not necessary to prove a conspiracy between the Accused in the sense of direct coordination or agreement.[36]

29. This Chamber endorses generally the specific principles and propositions developed by the ICTY and ICTR on the question of joinder as enumerated in the preceding paragraph as legally sound and logical.

D. The Three-pronged Test

30. It is evident from the foregoing that prominent among the approaches to the question of joinder in the ICTY and ICTR is the three-pronged test propounded in the case of *Prosecutor v. Ntabakuze and Kabiligi*.[37] Cognisant of the value of this test, the Chamber, however, taking its judicial cue from Lord Morris's speech in *Director of Public Prosecutions v. Doot & Others*,[38] cited by the ICTR Trial Chamber in *Bagosora*, wishes to re-emphasize the words of the learned Law Lord that:

> "questions of joinder, whether of offence or of offenders, are considerably matters of judicial practice which this court unless restrained by statute has inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice. Here is essentially a field in which rules of fairness and convenience should be evolved and where there should be no fetter to the fashioning of such rules".

E. The Applicable Test

31. Consistent with this approach, the Chamber's preference is for a test based on a plain and literal interpretation of the object and purpose of Rule 48(B). Convinced that the legislative intent behind Rule 48(B) is to render joinder permissible only in cases where the acts and omissions of accused persons (who have been separately indicted) amount to the same or different crimes committed in the course *of the same transaction simpliciter*, we are of the opinion that to succeed on a joinder motion pursuant to Rule 48(B) of the Rules of the Special Court for Sierra Leone, the Prosecution must show:

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[35] Id.

[36] *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-PT, Decision on Accused Mario Cerkez's Application for Separate Trial, 7 December 1998, para 10.

[37] *Supra* note 17.

[38] (1973) A.C. 807 (House of Lords).

(a) that the Accused persons sought to be joined and tried together were separately charged with the same or different crimes committed in the course of the same "transaction" as defined in Rule 2;

(b) that the factual allegations in the Indictments will, if proven, show a consistency between the said crimes as alleged in the Indictments and the Prosecution's theory that they were committed in furtherance, or were the product, of a common criminal design, and

(c) that it will be in the interests of justice to try the Accused jointly, due regard being given to their rights as guaranteed by Article 17(2) and 17(4)(c) of the Statute of the Court.

32. We also wish to emphasise that in applying "the consistency or product test", there is no presumption of automaticity in favour of the Prosecution. Further, there is no obligation on the Accused to show material prejudice or its likelihood. The question of whether the factual allegations will, if proven, show a consistency between the specified crimes and the Prosecution's theory of consistency with a common criminal design is essentially a judicial exercise, involving a determination "whether, on the basis of legal and factual assessment, there exists a justification for holding",[39] within the limits of reasonableness, a joint trial of the Accused in question.

33. In the light of the test laid down the Chamber now proceeds to a consideration of the merits of the Prosecution's Motions.

IV. APPLICATION OF THE 'CONSISTENCY OR PRODUCT TEST' TO THE SUBSTANTIVE MERITS OF THE MOTIONS

A. Were the Accused, Now Sought to be Joined Pursuant to Rule 48(B), Separately Charged With the Same or Different Crimes Committed in the Course of the Same Transaction?

34. Based on the records before the Chamber, it is evident that all the six Accused persons sought to be joined under Rule 48(B) were separately indicted on diverse dates in the year 2003. A close comparison of Counts 1-2, 3-5, 6-8, 9-10, 11, 12, 13, 14-17 of the Indictment against Issa Hassan Sesay, alongside the charges in Counts 1-2, 3-5, 6-8, 9-10, 11, 12, 13, 14-17 of the Indictment against Alex Tamba Brima; and Counts 1-2, 3-5, 6-8, 9-10, 11, 12, 13, 14-17 of the Indictment against Morris Kallon; Counts 1-2, 3-5, 6-8, 9-10, 11, 12, 13, 14-17 of the Indictment against Augustine Gbao; Counts 1-2, 3-5, 6-8, 9-10, 11, 12, 13, 14-17 of the Indictment against Brima Bazzy Kamara; and Counts 1-2, 3-5, 6-8, 9-10, 11, 12, 13, 14-17 of the Indictment against Santigie Borbor Kanu *reveals that the specific crimes charged in those several counts are exactly the same*, except for the allegations in respect of time and locations as regards Accused, Brima Bazzy Kamara and Santigie Borbor Kanu, again, an issue of no materiality for the instant purpose.

[39] *Nyiramasuhuko* Decision, *supra* note 1, at para 4.

35. On a close textual examination of the several charges as alleged in the various Indictments, the conclusion is irresistible that the crimes, as alleged, arise from a number of acts or omissions, allegedly, occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan. For example, the Indictments assert that:

(a) the Accused are all alleged to have been members of the senior leadership of the RUF and/or AFRC, and of the RUF/AFRC alliance;

(b) the alleged crimes took place between about 1 June 1997 and 15 September 2000 in diverse locations, including Kono, Bo, Bombali, Kailahun and Freetown; and

(c) the Accused allegedly shared a common plan, purpose or design (joint criminal enterprise) with the RUF and the AFRC to gain political power and control over the territory of Sierra Leone, the said crimes being actions within the joint criminal enterprise.[40]

B. Will the Factual Allegations in the Indictments, if Proven, Show a Consistency Between the Said Crimes as Alleged and the Prosecution's Theory that they Were Committed in Furtherance, or Were the Product, of a Common Criminal Design?

36. In addressing this issue, the Chamber's task is, as already noted, to determine whether, on the basis of a legal and factual evaluation, there exists a reasonable justification for holding a joint trial of the Accused persons. The Chamber has meticulously examined the factual allegations in the several Indictments in the light of the test prescribed for the application of Rule 48(B), to determine whether the allegations, if proven, would establish a consistency between the crimes charged and the Prosecution's theory that they were committed in furtherance, or were the product, of a common criminal design.

37. The Chamber finds there exists both a factual and legal basis reasonably justifying a joint trial in respect of the Accused persons as exemplified by the several allegations that the Accused "acted in concert", "shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political control over the territory of Sierra Leone, in particular the diamond mining areas", and further that the alleged joint criminal enterprise "included gaining and exercising control over the population of Sierra Leone in order to prevent or minimise resistance to their geographic control, and to use members of the population to provide support to members of the joint criminal enterprise".[41] *In the Chamber's considered opinion, there is sufficient showing that the factual allegations in the Indictments herein will, if proven, show a consistency between the crimes charged and the Prosecution's theory that they were committed in furtherance, or were a product, of a common criminal design on the part of all six Accused. The formula "if proven" is legally indicative of the fact that, in the ultimate analysis, it is supremely an evidentiary matter whether the alleged crimes were actually committed in pursuance of a common criminal design.*

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[40] See Id., paragraphs 10-20, for a similar analysis.

[41] For example, see paragraphs 21-25 of the Indictment preferred against Issa Hassan Sesay.

C. Will Joinder be in the Interests of Justice?

38. Having determined that there is reasonable justification for a joint trial based on the Chamber's findings that the Prosecution has met or satisfied the first two criteria of "the consistency or product test" under Rule 48(B) enunciated by the Chamber, it is, at this stage, necessary to determine the final question, to wit, whether it is in the interests of justice to order a joinder, a matter that is pre-eminently discretionary, due regard being paid to the rights of each Accused under Article 17(2) and 17(4)(c) of the Statute, or whether the interests of justice would be more enhanced by granting a joinder in respect of two separate joint trials as canvassed by Counsel Serry Kamal on behalf of Issa Hassan Sesay and by Counsel Steven Powles for Morris Kallon, on the grounds that the RUF and the AFRC were two separate and distinct entities despite their subsequent alliance, as alleged by the Prosecution.

39. In our view, the mere allegation that they were two distinct and separate entities *ab initio*, the subsequent merger of these two alleged combatant groups, a point not disputed but indeed confirmed by the Prosecution in their recitals in the Indictments, raises a spectre of a potential conflict in defence strategy and the possibility of mutual recrimination derogating from the rights to which each Accused is entitled in the context of separate trials.

40. In adopting this view, we are mindful of our obligation, even where we exercise our discretion to grant a joinder of offences and offenders, to proceed with each accused person as if he were being tried separately and thus, having regard to the principle of individual criminal responsibility, the right of each Accused to a fair and expeditious trial, including the presumption of innocence and other rights that are guaranteed to the Accused person, respectively under Articles 6 and 17 of the Statute.

41. If in the exercise therefore of the discretion to grant an application or applications for joinder, there is any suggestion or the Chamber is satisfied, as we are in this case, that the rights of the accused to a fair and expeditious trial could or will be jeopardised through a potential or real possibility not only of a conflict in defence strategy but also the possibility of mutual recriminations between indictees of the RUF and those of the AFRC, this Chamber must exercise its discretion against granting the application for a joinder, in the form as applied for by the Prosecution.

42. In resolving the question of whether the joinder will be in the interests of justice, the Chamber recalls, by way of persuasive guidance, some of the key factors articulated in the jurisprudence of both the ICTY and ICTR to be taken into account when determining whether the interests of justice will be served by a joinder. These include:

(a) the public interest in savings and expenses and time;

(b) the interest of transparent justice that there be consistency and fairness with respect to the verdicts of persons jointly tried pursuant to Rule 48;

(c) the public interest in avoiding discrepancies and inconsistencies inevitable from separate trials of joint offenders;

(d) the need for consistent and detailed presentation of evidence;

(e) better protection of the victims' and witnesses' physical and mental safety by eliminating the need for them to make several journeys; and

(f) due regard for judicial economy.

43. The evolving jurisprudence of the ICTY and ICTR also highlights these additional factors:

(a) the interests of the Prosecution;

(b) the interests of the international community in the trial of persons charged with serious violations of international humanitarian law; and

(c) pre-eminently, whether joinder will infringe the rights of the Accused to a fair and expeditious trial.

44. In the specific and peculiar context of the Special Court, this Chamber now articulates the key factors to be borne in mind in the final determination of whether a joinder of the Indictments herein will serve the interests of justice. These include:

(a) the Special Court's limited mandate as to persons who are prosecutable, meaning all those "who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996";

(b) that the majority of the Accused herein were indicted on average nine (9) months ago and are still awaiting trial;

(c) that the said Accused persons have been in custody ever since their Indictments, despite applications for bail by some of them;

(d) that there is currently only one Trial Chamber (with a mere possibility of a second) to undertake the judicial workload of conducting nine (9) separate trials;

(e) that many of the witnesses to be called by the Prosecution are common to all the Accused;

(f) the practical, emotional and mental hardships likely to be experienced by Prosecution witnesses if they were to testify in six (6) separate trials;

(g) the need for protection of Prosecution witnesses;

(h) the possibility, if a second Trial Chamber is established, of the two Trial Chambers reaching different decisions in separate trials on the same issues of law;

(i) the possibility of overlapping testimonies in separate trials;

(j) that separate trials of the Accused do have a high potential of being very protracted thereby prolonging the ordeal and emotional suffering of the Accused while they await the outcome of their respective cases;

(k) that a joint trial (rather than separate trials) would be more in keeping with and would effectively protect and enforce, the pre-eminent due process right of each of the Accused to a fair and expeditious public trial;

(l) the need to guarantee the Accused persons to the greatest possible extent a fair and expeditious trial free from unnecessary legal technicalities; and

(m) the paramount interest of the international community in the expeditious but fair trial of persons accused of egregious offences of international humanitarian law as a definitive response to the culture of impunity.

45. Taking into account the foregoing enumerated factors, and supremely sensitive to the need for adequate judicial protection within the compass of a joint trial, of the rights to which an accused is entitled in the context of a separate trial, the Chamber acknowledges that the right of the six (6) Accused to a fair and expeditious trial could be infringed or jeopardised by joinder if it is granted in the form sought by the Prosecution.

46. Reiterating its commitment to guarantee such rights and weighing the overall interests of justice and the rights of the Accused herein, this Chamber holds that it would be more conducive to the interests of justice if the three (3) Accused allegedly belonging to the RUF, as charged in their separate indictments, to wit, Issa Hassan Sesay, Morris Kallon and Augustine Gbao, were tried together separately from the other three (3) Accused allegedly belonging to the AFRC as charged in their separate indictments: that of Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu. More significantly, the Chamber is firmly convinced that not only would the interests of justice be better protected by trying each group separately, but that their chances of a fair and expeditious trial would be greatly enhanced.

47. In conclusion, while the Chamber is, in the light of the foregoing considerations, of the opinion and finds that there is a need, in the circumstances and for reasons advanced by the Prosecution, to order a joinder, we are equally of the opinion that in the exercise of our discretion to make an order to this effect, the Chamber must ensure firstly, that such an order would serve the interests of a fair and expeditious trial of each accused or group of accused within which, as recognised by the Prosecution, they did initially operate before they went, as it is alleged, into an RUF/AFRC coalition.

48. In addition and more importantly, the Chamber, in the exercise of this discretion, must equally be mindful and conscious of the protection and respect for the legal rights stipulated under Article 6(1) and 17 of the Statute, accorded and guaranteed to the accused persons, not only as individuals, but also, as a group so joined together for purposes of the trial. The Chamber therefore, in light of the above, rules in favour of the principle of a joinder and having regard to the preceding analysis and considerations, upholds the submission of Counsel for Issa Hassan Sesay, Mr. Serry Kamal and that of Counsel for Morris Kallon, Mr. Steven Powles, and directs that the Prosecution proceeds

with the joinder and in so doing ensure a separate joint trial of the RUF group of indictees and a separate joint trial for the indictees of the AFRC group.

The Chamber, accordingly, **HEREBY ORDERS** the joint trial of Issa Hassan Sesay, Morris Kallon, and Augustine Gbao of the RUF, and a separate joint trial of Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu of the AFRC;

FURTHER CONSEQUENTIALLY ORDERS

1. That two consolidated indictments be prepared as the Indictments on which the separate joint trials shall proceed and that the Registry assign new case numbers to the consolidated indictments;

2. That the said consolidated indictments be filed in the Registry within ten (10) days of the date of delivery of this Decision;

3. That the said indictments be served on each Accused in accordance with Rule 52 of the Rules.

Judge Benjamin Mutanga Itoe appends a separate opinion on the nature of a consolidated indictment.

Done at Freetown this 27th day of January 2004

Judge Bankole Thompson
Presiding Judge

Judge Benjamin Mutanga Itoe

Judge Pierre Boutet

[Seal of the Special Court for Sierra Leone]

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 27th day of January, 2004

PROSECUTOR against

ISSA HASSAN SESAY
(Case No.SCSL-2003-05-PT)
ALEX TAMBA BRIMA
(Case No.SCSL-2003-06-PT)
MORRIS KALLON
(Case No.SCSL-2003-07-PT)
AUGUSTINE GBAO
(Case No.SCSL-2003-09-PT)
BRIMA BAZZY KAMARA
(Case No.SCSL-2003-10-PT)
SANTIGIE BORBOR KANU
(Case No.SCSL-2003-13-PT)

SEPARATE OPINION OF JUDGE BENJAMIN MUTANGA ITOE ON THE NATURE AND LEGAL CONSEQUENCES OF THE RULING IN FAVOUR OF THE FILING OF TWO CONSOLIDATED INDICTMENTS

Office of the Prosecutor:
Luc Coté
Robert Petit
Boi-Tia Stevens

Defence Counsel for Issa Hassan Sesay:
Timothy Clayson
Wayne Jordash
Abdul Serry Kamal

Defence Counsel for Alex Tamba Brima:
Terence Terry
Karim Khan

Defence Counsel for Morris Kallon:
James Oury
Steven Powles
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao:
Girish Thanki
Andreas O'Shea
Ken Carr

Defence Counsel for Brima Bazzy Kamara:
Ken Fleming
C.A. Osho Williams

Defence Counsel for Santigie Borbor Kanu :
Geert-Jan Alexander Knoops

MY LORDS, HONOURABLE AND LEARNED COLLEAGUES,

DISTINGUISHED AND LEARNED MEMBERS OF THE PROSECUTION AND OF THE BAR,

1. Before I go into the core of this opinion, I would like to make it abundantly clear that I entirely agree and concur with our judgment, I mean the judgment of the Trial Chamber in the matter of the *Prosecutor against Issa Hassan Sesay, Alex Tamba Brima, Morris Kallon, Augustine Gbao, Brima Bazzy Kamara and Santigie Borbor Kanu*, which has just been read out as the decision of the Trial Chamber.[1]

2. I am therefore not dissenting from this judgment in so far as, and to the extent that it ordains a separate joint trial for Issa Hassan Sesay, Morris Kallon, and Augustine Gbao on the one hand, and a separate joint trial of Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu on the other, and further, as far as it orders:

i. That two consolidated indictments be prepared as the Indictments on which the separate joint trials shall proceed and that the Registry assigns new case numbers to the consolidated indictments;

ii. That the said consolidated indictments be filed in the Registry within ten (10) days of the date of delivery of this Decision;

iii. That the said indictments be served on each Accused in accordance with Rule 52 of the Rules.

3. It should be recalled that all the six Accused stand indicted, already arraigned after they made their initial appearances, and pleaded 'Not Guilty' on the individual indictments which charge them with crimes that touch on serious violations of international humanitarian law and Sierra Leonean law, committed within the territory of Sierra Leone since the 30th of November, 1996.

[1] SCSL-2003-05-PT; SCSL-2003-06-PT; SCSL-2003-07-PT; SCSL-2003-09-PT; SCSL-2003-10-PT; SCSL-2003-13-PT, Decision and Order on the Prosecution Motions for Joinder, 27 January 2004.

4. The above-mentioned components of our decision reflect the unanimity that accompanied it after a number of elaborate deliberations that gave rise to several drafts which preceded the final one that has just been read out on our behalf.

5. During our examination of and deliberation on the final draft on the 23rd January, 2004, I raised certain issues with my Learned and Honourable Brothers and Colleagues, which I thought should be set out as the fourth, in addition to the three Orders we made at the tail end of our unanimous judgment, just after the mention of 'FURTHER CONSEQUENTIALLY ORDERS.'

6. This fourth Order which I proposed to my Distinguished Colleagues for their consideration was to read as follows:

> "That the said indictments be submitted to a Designated Judge for verification and approval in accordance with the provisions of Rule 47 of the Rules within ten days of the delivery of this decision."

I further added that the Accused persons had to be called upon to plead afresh to the consolidated indictments.

7. What ran through my reasoning in making this proposal was that the two consolidated indictments we are ordering the Prosecution to prepare are in fact, to all intents and purposes, new indictments which need to be subjected to the procedures outlined in Rule 47 and Rule 61 of the Rules of the Special Court and this, notwithstanding the fact that all of the Accused persons had already earlier made their initial appearances and had already been arraigned individually on individual indictments, which might not necessarily contain the same particulars as those in the consolidated indictments that are yet to be served on the Accused persons for subsequent procedures and proceedings before the Trial Chamber.

8. The Honourable Presiding Judge in his argument during the deliberations, did indicate that the indictments are not new and that even if the said indictments were new 'in form' they remain the same 'in substance' and this, following assurances to this effect by the Prosecution. He added that there was no need for a 'paragraph four' to be integrated into the Decision as there was neither any further necessity to subject the consolidated indictments to the approval procedures defined in Article 47 of the Rules, nor was there any justification for fresh pleas to be taken on the consolidated indictments.

9. My Colleague and Brother, Hon. Judge Pierre Boutet, shared the same opinion with our Learned Colleague, The Hon. Presiding Judge.

10. I also urged them to agree with me that even though the Rules were not expressly clear on the proposals I was making on the joinder application before us, the provisions of Rule 47 and the fact that the consolidated indictments are, in my considered opinion, and to all intents and purposes, new, lends support to the proposition that those indictments have to be subjected to the procedures of Rules 47 and 61 in the form which they will take and will be presented, following our decision on these joinder motions.

11. The main argument that has motivated my stand on this matter is that the consolidated indictments are new, if only because their 'form' is no longer what it was when the Accused were indicted and initially appeared individually before the Pre-Trial Judges by virtue of the individual indictments initially preferred against them. As far as the substance of the consolidated indictments are concerned, the decision we have just rendered quotes Counsel for the Prosecution/applicant in this motion, Ms. Boi-Tia Stevens, as saying that the consolidated indictments will not result in added allegation of charges "except for locations". It means that there will be some changes in locations where these crimes were committed but that this would not, according to Counsel, affect the existing allegations.

12. It is my considered opinion that an indictment becomes altered and new when the particulars of the location change and this, even if as Ms Boi-Tia Stevens contended, it would not affect existing allegations. If Counsel concedes, as she indeed did, that some particulars on locations where the offences were committed might change, and it is equally conceded that the form of the consolidated indictment is new, as it is indeed when compared to the single individual indictments on which the Accused persons, now grouped in two different individual groups and poised for two separate trials were originally indicted, it must logically be conceded that submitting these new indictments to the provisions of Rule 47 for scrutiny is the logical conclusion to the situation that has been so created.

13. The other issue which I consider important in the present context is the submission by the Defence Counsel that the original and the anticipated consolidated indictments should have been exhibited as part of the Motions and that a failure by the Prosecution to do this in order to ensure judicial scrutiny amounted to non-compliance with a condition precedent for the granting or even examining the application for joinder.

14. On this submission, the Prosecution replied that the Rules do not provide for this procedure and that the Defence contention must not be considered as a condition precedent for the filing or granting of the application for joinder. Our finding on this argument in the circumstances, is, and I quote:

> "Even though this practice may be regarded as an advocacy for procedural tidiness in the preparation of motions and may have some merit in the sphere of procedural law in national legal systems, it is difficult to require it as a mandatory rule in context of international criminal tribunals,"[2]

and further, to conclude and I quote:

> "...the Chamber is of the opinion that, due to the need for expeditiousness and flexibility in its processes and proceedings...recourse to procedural technicalities of this nature will unquestionably impede the Special Court in the expeditious dispatch of its judicial business.. The Chamber, therefore, does not think that it is necessary for the Prosecution to exhibit an anticipated consolidated indictment...to establish a basis for joinder."[3]"

[2] Paragraph 21 of the Decision of 27 January 2004, above note 1.
[3] Decision of 27 January 2004, above note 1 at paragraph 11.

15. I share these views expressed in our judgment but even though we have unanimously upheld the argument of the Prosecution in this regard and although we know that the consolidated indictments are still undisclosed, I think that we should remain resolved in our determination and quest to steadily build up some jurisprudence from certain shortcomings or lacunae in our Rules, which case law will enhance, advance, and not necessarily prejudice a proper and equitable application of, or interpretation of our Rules. This will in fact encourage the application of the 'Best Practices Rule' which is neither contrary to nor inconsistent with the general principles of international criminal law and procedure.

16. It is my hope that the submission put across by the Defence in this regard would, in future, be given due consideration particularly in the light and the spirit of the provisions of Rule 47 of the Rules, and particularly so because the newly drawn up and yet-to-be-disclosed consolidated indictments will, following our judgment, be filed without having satisfied the guarantees and standards stipulated in Rule 47(E) of the Rules which provides as follows:

> The Designated Judge shall review the indictments and the accompanying material to determine whether the indictment should be approved. The Judge shall approve the indictment if he is satisfied that:
>
> (i) the indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court; and
>
> (ii) that the allegations in the prosecution's case summary would, *if proven*, amount to the crime or crimes as particularised in the indictment. [emphasis added]

17. In the course of this exercise and pursuant to the provisions of Rule 47(F), the Designated Judge, it should be noted, is vested with powers to approve or to dismiss each count. It is my considered opinion that the provisions of Rule 47 are intended to empower the Judge to control the validity of the charges in the indictment before the accused is called upon to plead to them. It stands to reason, therefore, and it is, in my opinion so implied, that any trial based on a new indictment which has not been subjected to and passed through the test provided for in the provisions of Rule 47, is null and void *ab initio* for non-compliance with a mandatory statutory requirement for the institution of proceedings before the Trial Chamber of the Special Court and of conferring on it, the jurisdiction to proceed with the trial.

18. The only question to be asked and to be answered at this stage is whether the consolidated indictments are new indictments which ordinarily ought to and should in fact go through the grilling Rule 47 processes. The answer to this question, from the analysis which has preceded this question, is yes. Firstly, in our judgment which has just been rendered, we rightfully have ordered:

(i) That the consolidated indictment be prepared as the indictment on which separate joint trials shall proceed and that the Registry assigns new case numbers to the consolidated indictments.

(ii) That the second consolidated indictments be filed in the Registry within ten days of the date of the delivery of this decision; and

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(iii) That the said indictments be served on each accused person in accordance with the provisions of Rule 52 of the Rules.

19. A careful examination of these Orders will readily and unambiguously reveal that they were made because it is recognised and conceded that the said indictments which were consolidated, reformed, and new, not only had to have new numbers from the Registry, but also had to be filed in the Registry as is indeed required by Rule 47(i) where the Registrar is required to submit same to a Designated Judge for review after assigning new numbers to them.

20. In addition, a reference to some Dictionaries for the meaning of "New", this time within the context and scope of this opinion, can contribute to determining whether it is appropriate to refer to these proposed undisclosed consolidated indictments as new for them to be subjected to the mandatory scrutiny and the due process stipulated in Rule 47.

21. In the Macquarie Dictionary the word "New" is given the following meanings,

- "Having only lately or only now come into knowledge."
- "Coming or occurring afresh; further; additional."
- "Other than to the former or the old."
- "Being the later or latest of two or more things of the same kind."
- "Recently or lately."
- "Freshly; anew or afresh."[4]

In the French Dictionary *Le Dictionaire Des Expressions et Locutions*, *"A nouveau"* (meaning new) is defined as *"de facon, entierement differente"*, meaning, 'in an entirely different manner'; and *"pour le seconde fois encore,"* meaning for the second time again.[5]

22. Coming closer home in our *Concise Oxford English Dictionary* "New" is defined as:

- "not existing before, made, introduced or discovered recently."
- "reinvigorated restored or reformed."
- "Superseding and more advanced than others of the same kind."[6]

23. In examining these definitions, and in the light of the foregoing considerations, the consolidated indictments as they are now, would incontestably fall within one or more of these definitions either as something having only lately or only new come into knowledge, coming or occurring afresh, further and additional or other than the former or the old, being the later or the latest of two or more things of the same kind, or something introduced in an entirely different manner and for the second time, reinvigorated, restored or reformed , or even superseding and more advanced than others of the same kind.

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[4] See A. Delbridge et al (eds), *The Macquarie Dictionary*, 2nd Edition, The Macquarie Library Pty Ltd, (1991) at page 1197.

[5] See Alain Rey and Sophie Chantreau (eds), *Dictionnaire Des Expressions et Locutions*, 12th Edition, Discorobert Inc., (1993) at page 550

[6] See Judy Pearsall (ed), *Concise Oxford English Dictionary*, 10th Edition, Oxford University Press, New York, (2002) at page 959

24. Viewed in another perspective and given that the Prosecution already concedes that the consolidation of these indictments would include changes in locations, presumably where the crimes were committed, in addition to the trimming down of the indictments from six to two only, with the attendant possibilities of pleading an alibi where locations change in the new consolidated indictments, I am of the opinion that this exercise is not only aimed at a consolidation of the indictments, but also and furthermore, constitutes a fundamental amendment of the original indictments which would, to my mind, require compliance with the provisions of Rules 50 and 52 as we indeed have already ordered in the judgment we have just delivered.

25. This said, I am of course, because of our resolve and determination to ensure expeditiousness in the proceedings before us, not of the opinion that adopting the view I have taken necessarily implies throwing open once more, the floodgate for motions on issues which have already been adjudicated upon, to be entertained by the Trial Chamber, unless of course, just cause is shown by the Party so seeking to move the Court.

26. In the light of the foregoing, it is my opinion that it is in conformity with logic to hold and to conclude that the yet-to-be-disclosed consolidated indictments are new and that they should not only be subjected to the provisions of Rule 47 but also, that the indictees be subjected once more to the procedures stipulated in Rule 61 of the Rules of Procedure and Evidence of the Special Court of Sierra Leone.

These Comments, My Lords and Learned Colleagues, Conclude My Humble Opinion.

Done at Freetown this 27th day of January 2004

Judge Benjamin Mutanga Itoe

[Seal of the Special Court for Sierra Leone]