SCSL-2004-16-PT
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SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 11 May 2004

THE PROSECUTOR Against Alex Tamba Brima
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-04-16-PT)

DECISION ON THE PROSECUTION MOTION FOR CONCURRENT HEARING OF EVIDENCE COMMON TO CASES SCSL-2004-15-PT AND SCSL-2004-16-PT

Office of the Prosecutor:
Mr. Luc Côté
Mr. Robert Petit
Mr. Paul Flynn
Mr. Abdul Tejan-Cole
Ms. Leslie Taylor
Ms. Boi-Tia Stevens
Mr. Christopher Santora
Ms. Sharan Parmar

Defence Counsel for Alex Tamba Brima:
Mr. Terence Terry

Defence Counsel for Brima Bazzy Kamara:
Mr. Ken Fleming QC

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

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THE SPECIAL COURT FOR SIERRA LEONE ("Court");

COMPOSED OF, Judge Bankole Thompson, Presiding Judge, Judge Benjamin Mutanga Itoe and Judge Pierre Boutet;

BEING SEIZED of the Prosecution's Motion For Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT And SCSL-2004-16-PT ("Motion") filed by the Office of the Prosecutor ("Prosecution") on 30 April 2004;

RECALLING the Court's Decision and Order on Prosecution Motions for Joinder dated 27 January 2004 in respect of Accused Issa Hassan Sesay, Alex Tamba Brima, Morris Kallon, Augustine Gbao, Brima Bazzy Kamara and Santigie Borbor Kanu ("Joinder Decision") in which it ordered 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;

RECALLING ALSO the Court's other Decision And Order On Prosecution Motions For Joinder dated 27 January 2004 in respect of Accused Sam Hinga Norman, Moinina Fofana and Allieu Kondewa in which it ordered the joint trial of the three (3) Accused Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa;

NOTING THAT the Motion specifically seeks an order that "one hearing be held where evidence common to both the case of *Prosecutor v. Sesay, Kallon and Gbao* (SCSL-2004-15-PT) ("RUF Case") and the case of *Prosecutor v. Brima, Kamara and Kanu* (SCSL-2004-16-PT) ("AFRC Case") will be presented concurrently;"

NOTING FURTHER that the Court, in its aforementioned Joinder Decision, did rule in favour of the concept of joinder but ruled against a single joint trial of Accused Issa Hassan Sesay, Alex Tamba Brima, Morris Kallon, Augustine Gbao, Brima Bazzy Kamara, and Santigie Borbor Kanu, and ordered separate joint trials of the RUF and AFRC factions;

CONSIDERING the Order for Expedited Filing of response and reply of 30 April 2004;

CONSIDERING that Counsel for Accused Alex Tamba Brima did not file any response to the Motion;

CONSIDERING the Response filed by Counsel for Accused Santigie Borbor Kanu on 4 May 2004 ("Kanu Response");

CONSIDERING the Response filed by Counsel for Accused Brima Bazzy Kamara on 6 May 2004 ("Kamara Response");

CONSIDERING ALSO the Reply to the Kanu Response filed by the Prosecution on 5 May 2004;

CONSIDERING ALSO the Reply to the Kamara Response filed by the Prosecution on 7 May 2004;

MINDFUL of the provisions of Rule 48(C) of the Rules of Procedure and Evidence ("Rules");

PRE-EMINENTLY RECOGNISING that the Motion calls upon the Court to implement what is unquestionably an innovative procedure for, allegedly, expediting the Court's adjudicating process in the execution of its mandate in the light of limitations and constraints imposed by its politically-dictated judicial life-span, it is significant to emphasise that the adoption of any procedural innovation within the adversarial framework of the Court must be carefully evaluated against the

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paramount interest of the rights of the Accused to a fair and expeditious trial, and the Court's capability to deliver high quality justice.

NOTING THE SUBMISSIONS OF THE PARTIES:

A. The Prosecution Motion

1. In its Motion, the Prosecution requests the Trial Chamber to order pursuant to Rule 48(C) of the Rules a concurrent hearing of witnesses common to both the RUF Case and AFRC Case on the basis that all Accused therein were separately indicted and subsequently joined in two separate trials and are all accused of crimes committed in the course of the same transaction.

2. The Prosecution submits that the concurrent hearing of evidence common to these two cases will promote the right of each of the six Accused thereof to a fair and expeditious trial and advance judicial economy, consistency in jurisprudence and the credibility of the judicial process.[1]

3. It contends further that if the same Judges were to assess twice the credibility of the testimony of common witnesses, if rendered separately in each of the two separate trials, their second assessment of such witnesses might appear to be influenced by the first assessment. In addition, the Prosecution submits that in the case of the establishment of a second Trial Chamber, with a different bench of Judges to sit on one of the trials, these Judges will hence hear essentially the same evidence as the first, but may nevertheless render contradictory or inconsistent decisions regarding the credibility and weight of the same evidence adduced by the same common witnesses in the other trial.[2]

4. Continuing, the Prosecution argues that if a concurrent hearing of the testimony of common witnesses is granted, the Trial Chamber will avoid the possibility of having witnesses appearing in one trial but, due to security related and other reasons, then becoming unable or unwilling to appear in the subsequent trial, and also reduce the costs, logistical arrangements and security risks for such witnesses and substantially minimise the overall length of the trials.[3]

5. Consistent with its oral submissions during the Status Conference held in this case on 8 March 2004, the Prosecution reiterates that as many as 56% of the current total number of 267 witnesses it intends to call in each trial are common to both the RUF and AFRC Cases. On the assumption that the current number of witness will remain the same, the Prosecution hence estimates that about 150 witnesses will then be called twice to testify.[4]

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[1] Motion, para. 13.
[2] *Id.*, para. 22.
[3] *Id.*, para. 23.
[4] *Id.*, para 15.

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6. The Prosecution emphasises that the measures requested in the Motion do not, implicitly or indirectly, entail the holding of a joint trial of all the Accused. More specifically, the Prosecution submits that the testimonies to be given by these common witnesses will relate to allegations pertaining to all Accused in both RUF and AFRC Cases but, however, will not directly implicate any of the individual Accused persons in the commission of the crimes, the contents of such testimonies being possibly characterised as crime-base evidence only aiming at demonstrating the widespread and/or systematic nature of certain acts. Any evidence which goes to prove the criminal responsibility of the Accused individuals, according to the Prosecution, will be presented separately during the course of the two separate trials. In addition, the Prosecution indicates that the Defence will be always entitled to seek severance of the testimony of certain common witnesses in case it foresees either potential mutual recriminations or a conflict of defence strategies.[5]

B. The Kanu Response

7. In its Response, the Kanu Defence requests the Trial Chamber to dismiss the Motion essentially on the basis that it infringes the object and purpose of the Joinder Decision which found, according to the Defence, the spectre of a potential conflict in defence strategies and the consequential possibility of mutual recriminations derogating from the rights of each accused in the context of separate trials. Granting the Motion, in its view, will essentially have the indirect result of a joinder of the RUF Case and AFRC Case in a single trial.[6]

8. The Defence further contends that the argument referred to in the Joinder Decision does not apply solely to joint trials and also forms parts of the Defence strategy, rather than only to the prosecutorial strategy, regardless of whether the evidence is limited to crime-base witnesses. Specifically, the Defence asserts that a severance of the hearing of a particular witness, on the one hand, and the concurrent presentation of concurrent evidence, on the other, are judicially not interchangeable. And so, the Defence contends, the Prosecution's suggestion provides no sufficient safeguards against the prejudice to the rights of the Accused.[7]

9. In addition, the Defence argues that the concurrent hearing of such common witnesses would infringe the principle of individual criminal responsibility due to the risk that no clear distinction is made between the purported individual criminal responsibilities of each accused within each group. Indeed, concludes the Defence, even if the concurrent hearing would only relate to crime based elements, there is a possibility it might relate to the issue of collective responsibility.[8]

C. The Kamara Response

10. The Response to the Motion by the Kamara Defence was filed on 6 May 2004, one day after the expedited time limit set forth in the Order for Expedited Filing. Counsel seeks therefore leave for such late filing on several grounds, especially the difference in time zone between

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[5] *Id.*, paras 16-17 and 19-21.
[6] Kanu Response, paras 3-5 and 8.
[7] *Id.*, paras 6-7.
[8] *Id.*, para 9.

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Freetown and Australia, where he resides, as well as the contemporary receipt of several documents from the Prosecution that he considered important for preparation of his Response to the Motion.[9]

11. In the event of leave being granted, the Defence arguments in response to the Motion substantially allege an attempt by the Prosecution to join the RUF Case and the AFRC Case as one joint trial, an issue already disposed of by the Trial Chamber in its Joinder Decision and, further, in the subsequent denial of leave requested by the Prosecution to appeal such Decision.[10]

D. The Prosecution's Replies

12. Despite the fact that the Order for Expedited Filing provided for the Prosecution to file its reply in a consolidated form, the Prosecution has replied to the submissions of the Defence for the Accused Kanu and Kamara in two specific and separate replies.

13. The Prosecution Reply to the Kanu Response was filed before the prescribed time limits for Counsel for the other Accused to respond to the Motion.

The Reply to the Kanu Response

14. In its Reply to the Kanu Response, the Prosecution reaffirms that it is in the overall interest of justice and in the best interest of the Accused to grant the Motion thereby promoting the expeditious nature of the proceedings, and essentially reiterates its arguments contained in the Motion on the crime-base nature of the concurrent common evidence hearing in rebuttal of the submissions made by the Defence in its Response.

15. In particular, the Prosecution contests the Defence assertion that the concurrent hearing of common evidence sought in the RUF and AFRC Cases could be affected by the risk of potential recriminations and re-asserts the possibility for the Defence to properly apply for severance of particular and specific common witnesses if need arises. Moreover, the Prosecution contends, the risk of possible conflicts in defence strategies is indeed mitigated by the very nature of crime-base evidence of such witnesses, without direct implication of each of the Accused persons.[11]

16. In addition, the Prosecution denies that the granting of the Motion will result in a joinder of the trials contrary to the Joinder Decision, and restates that in case of a joint trial all the evidence will be presented currently for all the accused joined therein, while the Motion only seeks concurrent hearing of about 56% of its witnesses, and merely limited to crime-base evidence.[12]

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[9] Kamara Response, paras 1-12.
[10] *Id.*, para 13.
[11] Reply to the Kanu Response, paras 3-7.
[12] *Id.*, para. 7.

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17. Finally, the Prosecution also rejects the specific submission of the Defence that the granting of the Motion will infringe the principle of individual criminal responsibility and attempt to establish some form of collective responsibility. Again, the Prosecution submits that the purpose of the Motion is only to hear concurrently common witnesses on crime-base evidence and that a specific link between such evidence and each Accused would still need to be subsequently proved.[13]

The Reply to the Kamara Response

18. In its Reply, the Prosecution submits that the Kamara Response should be dismissed as it was filed out of time and does not meet the criteria of exceptional circumstances or good cause as required by the established jurisprudence of the Special Court in respect of requests of a similar nature.[14]

19. The Reply also addresses the submission of the Defence on the merits of the Motion, should the Trial Chamber decide to entertain the Response.

20. In particular, reiterating the same argument advanced in connection with the Reply to the Kanu Response with reference to the fact that the granting of the Motion will substantially result in a joinder of the trials, the Prosecution submits that it merely seeks the concurrent hearing of common witnesses of crime-base evidence and limited to 56% of its witnesses, whereby in case of a joint trial all the evidence will be presented concurrently.[15]

AND HAVING DELIBERATED THUS:

E. Introduction

21. By way of a preliminary observation, it should be noted that there have occurred as regards the filing of Responses and Replies to this Motion certain procedural irregularities. These relate to compliance with the Order for Expedited Filing, which was issued due to the peremptory nature of the instant Motion and the expedition with which the Chamber intends to dispose of it. First, despite the requirement for the Prosecution to file a consolidated reply to the Defence responses, it has filed separate Replies for the Accused Kanu and Kamara. It also filed the Reply to the Kanu Response prior to the expiration of the prescribed time limit for Responses from Defence Counsel.

22. The Chamber wishes to emphasise that it is pre-eminently the obligation of the adversarial parties to comply with procedural requirements so as to ensure the efficiency of the judicial process. In relation to the filing of the Prosecution Replies, the Chamber is prepared to waive these breaches, and will proceed to consider the merits of the Motion on the assumption that there has been no procedural irregularity in respect thereof.

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[13] *Id.*, paras 8-9
[14] Reply to the Kamara Response, paras 3-10.
[15] *Id.*, paras 11-12.

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23. However, secondly, the Chamber notes that the Kamara Response was filed out of time and sought leave to do so as part of the submissions contained therein. Although the document was accepted for filing, the Chamber finds that Counsel for the Accused Kamara has not made out any exceptional circumstances or good cause, and accordingly declines to take further note of the Kamara Response.

24. This Motion presents this Court with the task of having to wrestle courageously and ingeniously with an issue that calls for a measure of judicial innovation and creativity in addressing its statutory mandate of adjudicating on cases in respect of those persons who, allegedly, bear the greatest responsibility for serious violations of international humanitarian law and certain specified laws of Sierra Leone during the hostilities during the recent conflict.

25. In the Chamber's judicial estimation, the Motion poses for the Court the challenge of reconciling conceptually and doctrinally, the judicial concern and safeguards for the rights of the Accused persons herein reflected in its Joinder Decision, on the one hand, with the extent to which a tribunal must be prepared to make judicial accommodations to strategies by the Prosecution as to how best and effectively it can present its case. As always, this is a matter of much legal delicacy and complexity. In a sense, it demands a careful deliberation of the issue as to how a court should respond to legitimate requests from the parties for judicial innovation while ascertaining respect for fairness in the judicial process.

F. Order Requested

26. The Motion herein specifically seeks an Order that *"one hearing be held where evidence common to both the case of Prosecutor v. Sesay, Kallon, and Gbao (SCSL-2004-15-PT) and the case of Prosecutor v. Brima, Kamara and Kanu (SCSL-2004-16-PT) will be presented concurrently."*[16]

G. Legal Basis of the Motion

27. The Prosecution's Motion is filed pursuant to Rule 48(C) of the Rules, the provisions of which were recently incorporated into the aforesaid Rules and adopted during the March 2004 Plenary Meeting of the Court. Rule 48(C) is in these terms:

> "A Trial Chamber may order concurrent hearing of evidence common to the trials of persons separately indicted or joined in separate trials and who are accused of the same or different crimes committed in the course of the same transaction. Such a hearing may be granted with leave of a Trial Chamber pursuant to Rule 73."

According to Rule 73(A):

> "Subject to Rule 72, either party may move before the Designated Judge or Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Designated Judge or the Trial Chamber, or a Judge designated by the Trial Chamber from among its members, shall rule on such motions based solely on the written submissions of the parties, unless it is decided to hear the parties in open court."

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[16] Motion, para. 32. Emphasis added.

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28. Construed together, Rule 48(C) and Rule 73(A) leave open the possibility for this Motion to be determined and disposed of by a Designated Judge pursuant to Rule 28 or "a Judge designated by the Trial Chamber from among its members". However, *ex abundante cautela*, this Court will proceed to determine its merit or otherwise as a Trial Chamber.

H. Applicable Principles

29. In ascertaining the applicable principles in respect of motions of this type, it is instructive to note, firstly, that Rule 48(C) does not specify the relevant criteria for granting such motions. However, the Chamber takes the view that the applicable criteria are logically, with necessary adaptations and modifications, of the same generic type as those contained in sub-rules (A) and (B) of the aforesaid Rule 48 and Rule 49. We are reinforced in this observation by the finding that, on a plain and literal interpretation of Rule 48(C), there are two (2) conditions that must be fulfilled before the Court can properly entertain the application. They are:

    (i) that the Accused persons in question were either separately indicted or joined in separate trials in respect of the same or different crimes; and

    (ii) that the crimes alleged must have been committed in the course of the same transaction.

    Procedurally, the Chamber wishes to observe that it is abundantly clear that the Prosecution is within its rights to file the instant application, having satisfied the conditions precedent for such a Motion.

30. Secondly, as a matter of statutory construction, it is clear that Rule 48(C) does not imply or import any notion of automaticity in respect of the Order sought once the Prosecution has satisfied the conditions precedent. The Rule confers on the Trial Chamber a discretion in the matter. It is trite law that where a discretion is vested in an authority or a body, such discretion is to be exercised reasonably and judiciously, and, we should add, in the case of an application of such dimension and complexity, '*with great circumspection*' due to the extraordinary nature of the procedure which is the subject-matter of the application whilst at the same time keeping an open judicial mind to the issue.

31. Furthermore, it is the Chamber's view that the primary focus of the exercise of a discretion under Rule 48(C) should be on how the extraordinary procedure applied for would impact upon the rights of the Accused in question, and not how it would or would not enhance the Prosecution's capability in presenting its case in an efficient manner. It is important for the Court to preserve such a focus especially where it has ordered separate joint trials for each category of accused persons. Unless the Court is satisfied that the Prosecution has established that the exceptional procedure sought would not impact adversely, or be prejudicial to, the right of the accused to be tried fairly and expeditiously, and that the integrity of the proceedings would not be compromised, the presumption should be against granting the Order.

I. Evaluation of Application's Merit

32. Having determined the applicable principles, the Chamber now proceeds to a consideration of the merit or otherwise of the application based on the foregoing exposition of the law.

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33. In terms of substance and as to their main focus, all of the Prosecution's submissions can be grouped into two (2) main categories. The first category is that the Motion will serve the interest of justice in the sense that it will advance judicial economy, consistency in jurisprudence and the credibility of the judicial process. Noting that judicial economy, consistency in jurisprudence and credibility of the judicial process are not universally acknowledged factors of criminal adjudication, the key question for the Chamber is whether the conclusion that the interest of justice will be served by granting the Order sought logically follows from the premise that the Order, if granted, will promote these presumed values of international criminal justice. We think not; nor would an empirical inquiry testing the validity of such a hypothesis convince us otherwise because of all the possible intervening variables that could be at play; for example, the possibility of two accused persons from one group or their counsel becoming suddenly indisposed for a protracted period of time during the common hearing involving both groups. This submission is clearly without merit. Implicit in it are three (3) unproven assumptions:

    (i) that judicial economy is a necessary function of the accused's right to a fair trial;

    (ii) that consistency in jurisprudence is an issue free from juristic controversy; and

    (iii) that credibility of the judicial process is a well-recognised concept within the province of law and can easily be evaluated.

34. The second category of submissions is that conducting two trials will involve the calling of about one hundred and fifty (150) witnesses twice to testify before the Court at two different occasions, with certain adverse consequences.

    (i) that of contradicting the principle of judicial economy;

    (ii) unwillingness on the part of many Prosecution witnesses to testify at a subsequent trial because of fears already expressed about testifying;

    (iii) jeopardising the principle of a fair trial and thereby compromising the credibility of the judicial process and the interest of justice because of the appearance that the judges would have already assessed the credibility of the evidence, as the same panel of judges, when evaluating the second hearing;

    (iv) the possibility of a second Trial Chamber, if established, sitting on the second trial, hearing essentially the same evidence as the first, but rendering contradictory or inconsistent decisions regarding the credibility of the same evidence addressed by the same witnesses in the first trial, thereby undermining the credibility of the judicial process and compromising jurisprudential consistency;

    (v) considerable increase of risk to security of witnesses and undermining of the efficiency of witness protective measures; and

    (vi) prolongation of stay of Prosecution witnesses in the witness protection programme with overwhelming financial costs and severe logistical implications for the Victims and Witnesses Unit.

35. As regards the first submission that implementing the Court's Joinder Decision will contradict the principle of judicial economy, it is the Chamber's view that the legal rationalisation about the principle of judicial economy that has come to feature prominently

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in the evolving jurisprudence of sister international tribunals, to wit, the need to strike a balance between such a value in the context of international criminal adjudication and the right of the accused to a fair trial, has generally been formulated in a manner that attaches greater primacy to judicial economy over the accused's right to a fair and expeditious trial. As was noted in the Decision of *Prosecutor v. Krajisnik*, "judicial economy should never outweigh the right of the Accused to a fair trial."[17] ***In our opinion, a tribunal's reputation and credibility must be measured not in terms of judicial economy but its capability to deliver superior quality justice fairly and dispassionately, and with reasonable expedition.***

36. With respect to the Prosecution's second contention in category two (ii) above, the Chamber wishes to observe that it is one of the harsh realities of the functioning of the criminal law, as a social control mechanism, that witnesses and victims called to testify as to the commission of crimes of international gravity and dimension will experience some measure of inconvenience and hardship. *In the instant situation, such inconvenience and hardship could be reduced by the prosecutorial creativity and foresight shown by the provision of 'back-up witnesses' as was stated by learned Counsel for the Prosecution during the Pre-Trial Conferences.* Furthermore, the interests of victims and witnesses will remain protected in accordance with Article 16 of the Statute of the Special Court through the Victims and Witnesses Unit and by the judicious use of Rule 92*bis* of the Rules.

37. Further, an interesting facet of this submission, from the Chamber's perspective, is that the Accused were separately indicted giving rise to a reasonable presumption that they would be tried separately, the implication being that there would be nine (9) separate trials. If that was not the premise of the Prosecution's theory of liability at the material time, then the question becomes relevant – Why were they not jointly indicted, based on the facts available to the Prosecution at the material time?[18]

38. The Prosecution further submits that hearing the same witness twice, in two separate trials, on essentially the same evidence by the same panel of judges will jeopardise the principle of a fair trial in that the appearance that the judges would have already assessed the credibility of the evidence when conducting the second hearing would undermine the credibility of the judicial process and would be contrary to the interest of justice. This submission, in the Chamber's opinion, is specious and speculative from two perspectives; namely, (i) that the judges have sworn to discharge their judicial functions faithfully, conscientiously, and impartially; (ii) that it is the accepted norm implicit in the Bangalore Principles of Judicial Conduct,[19] that professionally trained and qualified judges are able to assess the credibility of witnesses with a remarkable degree of dispassionateness as opposed to trial juries. Accordingly, this Court already held that:

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[17] *Prosecutor v. Krajisnik*, IT-00-39 and 40, Decision on Prosecution's Motion for Judicial Notice of Adjudicated facts and Admission of Written Statements of Witnesses Pursuant to Rule 92 bis, 28 February 2003. para. 20.

[18] In any event, this question was the subject of consideration in the Joinder Decision.

[19] Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002.

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> "Issues before the Special Court are conducted before professional judges, who by virtue of their education and experience are able to ponder independently without prejudice to each and every case which will be brought before them"[20]

It may be inquired – Why would they suddenly lose their disciplined focus and objectivity when confronted with separate joint trials?

39. For the same reasons, we hold as untenable the fourth submission alleging probable lack of objectivity on the part of the second Trial Chamber.

40. It may be recalled that it was also submitted by the Prosecution that the concurrent presentation of evidence common to both cases (a) does not constitute a conflict of interests, (b) would only apply to Prosecution witnesses and (c) would not directly implicate the Accused individuals in the commission of crimes, but rather, would only relate to acts of others than the Accused individuals. The Chamber's short response to these kindred submissions is that in the light of the Responses from the Defence, these issues remain highly contentious, based on how the Witness List and the summaries of evidence are interpreted. It is likewise noteworthy, from the Chamber's viewpoint, that the Prosecution's submission that risks of possible mutual recriminations or possible conflicts in defence strategies can be dealt with by the application of the doctrine of severance is not convincing from a practical perspective, given all the unknown variables.

41. The Prosecution also submits that hearing the same witnesses twice will involve considerable risk to the witnesses and will not be cost-effective from the standpoint of the Victims and Witness Unit. The Chamber's response to this argument will feature in the Concluding Analysis of this Decision.

42. The Chamber's evaluation of the merits of the Motion thus far leads, compellingly, to only one conclusion. It is that the 'concurrent hearing of evidence' or 'common trunk' order sought by the Prosecution is an attempt, on its part, to re-litigate an issue already decided by the Court. It is trite law that there must be finality to litigation. In this regard, the Prosecution is perilously caught within the web of the common law doctrine of issue estoppel.

J. Concluding Analysis

43. Predicated upon the judicial philosophy of this Court's legitimate preoccupation with the paramount need for protecting the right of each of the Accused herein to be tried fairly and expeditiously according to accepted and recognised standards of justice, utilising tested and well-tried techniques of criminal adjudication, the Chamber finds that in the light of its Joinder Decision in respect of the RUF and AFRC groups, granting the Order sought would

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[20] *Prosecutor v. Augustine Gbao*, SCSL-2003-09-I, Order on the Urgent Request for Direction on the Time to Respond to and/or an Extension of Time for the Filing of a Response to the Prosecution Motions, 16 May 2003, page 2 per Judge Boutet. See also *Prosecutor v. Delacic et al.*, IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, para. 20 and *Prosecutor v. Ntakirutimana et al.*, ICTR-96-10-I and ICTR-96-17-T, Decision on the Prosecutor's Motion to Join the Indictments ICTR 96-10-I and ICTR 96–17-T, 22 February 2001, para. 26.

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amount to approbating and reprobating at the same time. We so find because the thrust of our Joinder Decision was clearly to foreclose the application of any concept, however characterised, that would, in practical terms, create the semblance of the inseparability of the trial of the two groups. ***Hence we hold, and accordingly rule, that the notion of 'common trunk' or 'concurrent hearing of evidence', particularly in light of the amount of evidence sought to be introduced through such a process and in the context of the Chamber's Joinder Decision, is conceptually irreconcilable with the notion of 'joint separate trials'.***

44. However, we do observe that our ruling as to the conceptual irreconcilability between a 'concurrent hearing of evidence' and 'joint separate trials', in the context of this case, does not, in any way, detract from the theoretical attractiveness of the notion of 'common trunk hearing'. *In practical terms, all the Chamber wishes to convey is that given its Joinder Decision, it would be imprudent for the Court to become, as it were, an empirical testing-ground of the theory of 'concurrent hearing of evidence' where, based on the Chamber's appreciation of the evolving jurisprudence of sister tribunals, it has not been successfully applied for in any international criminal jurisdiction.*[21]

45. Noting that the thrust of the Prosecution's argument in support of the Motion rested on three notions, chief among which is judicial economy, the Chamber deems it worthwhile to recall that this Court has constantly been reminded by the Prosecution during various submissions before it and by the Court's Administration, including the Management Committee, of its limited judicial life-span, fiscal and budgetary constraints on its operations, and the need for judicial economy in the conduct of trials. In response, this Chamber can do no better than adopt the words of his Honour Judge David Hunt in the case of *Prosecutor v. Slobodan Milosevic*.[22] In that case, the learned Judge had this to say:

> "The international community has entrusted the Tribunal with the task of trying persons charged with serious violations of international humanitarian law. It expects the Tribunal to do so in accordance with those rights of the accused to which reference is made in the previous paragraph. If the Tribunal is not given sufficient time and money to do so by the international community, then it should not attempt to try those persons in a way which does not accord with those rights. In my opinion, it is improper to take the Completion Strategy into account in departing from interpretations which had earlier been accepted by the Appeals Chamber where this is at the expense of those rights."

46. It should be observed here that although we understand and appreciate the intended purpose being pursued by the Prosecution with its Motion, because of its filing at the end of the pre-trial conferences it had the consequence of (unfortunately) delaying the announcements of the dates for the commencement of trials.

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[21] See *Prosecutor v. Kovacevic et al.*, IT-97-24-AR73, Decision on Motion for Joinder of Accused and Concurrent Presentation of Evidence, 14 May 1998 and *Prosecutor v. Brdanin, Tadic and Stakic*, IT-99-36-PT and IT-99-24.PT, Decision on Prosecution's Motions for a Joint Hearing, 11 January 2002.

[22] *Prosecutor v. Slobodan Milosevic*, IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt On Admissibility of Evidence In Chief In The Form of Written Statement, Appeals Chamber, 21 October 2003, para. 21.

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47. Finally, this Chamber wishes to observe that, as a sovereign entity within its jurisdictional competence, a court must not recoil from its supreme responsibility of maintaining the integrity of its proceedings both in the interests of the Prosecution and the Defence, and more so in protecting the procedural and substantive due process rights of persons accused of crime until proven guilty. To sacrifice those rights in favour of political or economic expediency is tantamount to abdicating its sovereign attributes of independence. Hence, it must be emphasised that the limited judicial life-span of a Court cannot provide justification in law for abridging or curtailing the right of an accused person to a fair trial.

BASED ON THE FOREGOING DELIBERATION

I, Judge Bankole Thompson, on behalf of the Trial Chamber, pursuant to Rule 48(C), hereby deny the Motion and accordingly dismiss it.

Done at Freetown this 11th day of May 2004

Judge Bankole Thompson

Presiding Judge,
Trial Chamber

[Seal of the Special Court for Sierra Leone]

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