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: 11 May 2004

THE PROSECUTOR Against **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao
(Case No.SCSL-04-15-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 Issa Hassan Sesay:
Mr. Timothy Clayson
Mr. Wayne Jordash
Mr. Abdul Serry Kamal

Defence Counsel for Morris Kallon:
Mr. Shekou Toure

Defence Counsel for Augustine Gbao:
Mr. Andreas O'Shea
Mr. Girish Thanki
Ms. Glenna Thompson

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 30 April 2004;

CONSIDERING the Response filed by Counsel for Accused Issa Hassan Sesay on5 May 2004 ("Sesay Response");

CONSIDERING ALSO the Response filed by Counsel for Accused Morris Kallon on 5 May 2004 ("Kallon Response");

CONSIDERING the Decision on Urgent Request for Extension of Time to Respond to Prosecution Motion to Hear Evidence Concurrently filed 4 May 2004 which denied an application by Counsel for the Accused Gbao for extension of time to file a response to the Motion;

CONSIDERING that Counsel for Accused Augustine Gbao did not file any response to the Motion within the prescribed time limits;

CONSIDERING ALSO the Consolidated Reply 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 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's Motion

1. In its Motion, the Prosecution requests the Trial Chamber to order pursuant to Rule 48(C) of the Rules the concurrent hearing of witnesses common to both the RUF Case and the 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 2 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.

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

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]

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 Sesay Response

7. In its Response, the Sesay Defence submits that the Motion should be rejected in entirety.

8. The Defence firstly complains about the timing of the Prosecution in filing the Motion. In particular, the Defence submits that the intention of the Prosecution to request the concurrent hearing of some common evidence first arose during the Status Conference held on 3 March 2004 and following the adoption of the new Rule 48(C) at the latest Plenary Meeting of the Special Court as proposed by the Prosecution. However, according to the Defence, at no time during the RUF Pre-Trial Conference held on 29 April 2004 did the Prosecution indicate its intention to file the Motion, which filing has in addition now forced a delay on a decision to fix the trial date, therefore causing serious prejudice to the preparation of the Defence case.[6]

9. As regards the merits of the Prosecution Motion, the Defence claims that this should not be decided in the abstract and solely on the basis of the Prosecution assertions and predictions. Indeed, the Prosecution fails to provide the Trial Chamber with an indication of the precise evidence which it suggests to be heard concurrently, with the risk to effectively hold a joint trial. On the contrary, the Prosecution suggests that the Defence could apply for the severance of certain common evidence in case it deems a possible conflict might arise from its concurrent hearing. According to the Defence, the specific evidence needs to be analysed with the Prosecution case at that time and with reference to the respective defences being relied upon. Such lack of specificity in the view of the Defence prejudices the right of the Accused to a fair trial and might create conflict in defence strategies and mutual recriminations which the Joinder Decision specifically aimed to avoid.[7]

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[4] *Id.*, para 15.
[5] Id., paras 16-17 and 19-21.
[6] Sesay Response, paras 4-14.
[7] *Id.*, paras 15-18 and paras 28 and 32.

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10. In addition, the Defence notes that the Prosecution's indication of the possible number of common witnesses to be concurrently heard is based on the tentative witness list filed by the Prosecution and is not sufficiently representative of the effective number of such common witnesses who will be called at trial.[8]

11. With particular reference to the Prosecution's submissions that the evidence to be concurrently heard at trial only relates to crime-base evidence, the Defence submits that such evidence goes directly to the heart of the Prosecution case against the Accused Sesay, whereby most of the evidence does not implicate him directly but seeks to implicate him in concert with the other co-Accused through the common purpose and command responsibility doctrines.[9]

12. The Defence finally submits that the Prosecution fails to appreciate the impact of its request on the trial process. The need to assess the possibility to sever the concurrent hearing of some evidence might well prejudice the expeditiousness of the trials. Moreover, the holding of such concurrent hearing will require the simultaneous presence of each trial team in both RUF and AFRC Cases and their continuing presence in Freetown with the requirement to abandon any other commitment during the course of the trials.[10]

C. The Kallon Response

13. In his Response, the Kallon Defence urges that the Motion be dismissed, submitting that the Prosecution is essentially attempting to raise for the second time the issue of a joint trial for the RUF and AFRC Cases under the guise of a joint or simultaneous session of common evidence and despite the fact that the Joinder Decision ultimately disposed for the holding of separate joint trials in order to protect the right of the Accused.[11]

14. In particular, the Defence submits that the Motion is premature, absent full disclosure of all the witness statements, and only speculates on the actual and effective number of common witnesses for which the Prosecution seeks concurrent hearing of the evidence in the two Cases.[12]

15. On the contrary, the Defence argues that judicial economy could rather be achieved with a drastic cut of repetitive witnesses or with witness evidence more specifically pertaining and focusing on each of the Cases rather than with a concurrent hearing of witnesses. In addition, the Defence contends that the suggestion by the Prosecution for the Defence to eventually apply for severance of particular common witnesses called to testify concurrently will require re-litigating the issue, possibly raise the issue of mutual recriminations and will similarly undermine judicial economy and therefore delay the proceedings.[13]

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[8] *Id.*, para 19.
[9] *Id.*, paras. 20-21.
[10] *Id.*, paras 23-27.
[11] Kallon Response, para 12.
[12] *Id.*, para 13-15.
[13] *Id.*, para 16-20.

D. The Prosecution Consolidated Reply

16. In accordance with the Order for Expedited Filings the Prosecution filed its Reply to the Sesay and Kanu Responses in a single and consolidated form, essentially reiterating the submissions made in the Motion.

17. In addressing the submission of Counsel for Accused Sesay on the timing for the filing of the Motion, the Prosecution submits that it was only on 28 April 2004, during the Pre-Trial Conference for the CDF Case, that the Trial Chamber first stated that it was considering the possibility of trying that case in alternation with either the RUF or the AFRC Case.[14]

18. Further, the Prosecution refutes the arguments advanced by Counsel for Accused Sesay on the need for a specific indication of the precise evidence which it is suggested be heard concurrently on the grounds that it was against judicial economy, as it requires the Prosecution to bring individual motions in respect of each common witness for which it seeks to hold a concurrent hearing. On the contrary, the Prosecution submits that the Defence already benefits from sufficient evidence presently disclosed in order to specifically respond to the Motion.[15]

19. With reference to the arguments of the Counsel for the Accused Kallon that the Motion is premature in the absence of full disclosure, the Prosecution reasserts that it has already disclosed to the Defence redacted statements, supporting charts and summaries of its witnesses, while full disclosure of their identity in compliance with the existing protective measures granted by the Court will then allow the Defence to properly assess any potential risk arising from a concurrent hearing of a specific common witness, and therefore apply for its severance. In addition, the Prosecution contends that the tentative character of the current witness list is irrelevant to the issue of holding a concurrent hearing, but nevertheless it does reflect the proportion of its crime base and common witnesses.[16]

20. More specifically on the issue of the nature of crime-base evidence for which the Prosecution seeks such concurrent hearings, contested in particular by Counsel for the Accused Sesay, the Prosecution reiterates its arguments that such evidence is relevant to the proceedings and does not directly relate to each of the Accused.[17]

21. Both Counsel for Sesay and Kallon also asserted that the granting of the Motion will result in a joint trial of the RUF and AFRC Cases. The Prosecution rebuts this submission by again reiterating that the evidence for which concurrent presentation is sought only relates to crime-base evidence and is limited to only 56% of its evidence, while in a joint trial all evidence is presented concurrently.[18]

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[14] Consolidated Reply, paras 5-6.
[15] *Id.*, paras 7-9.
[16] *Id.*, paras 10-14.
[17] *Id.*, paras 16-17.
[18] *Id.*, para 18.

22. The Prosecution also emphasises that in the absence of a concurrent hearing, common evidence will have to be presented twice and separately for each trial, thereby prolonging such proceedings and that there is a potential of inconsistent verdicts as the same evidence will be decided upon by different Chambers.[19]

23. In concluding its Consolidated Reply, the Prosecution reaffirms its position that the granting of the Motion and the consequential holding of a concurrent hearing of common evidence is in the overall interest of justice and in the best interest of the Accused, as such hearing will facilitate the expeditiousness of the proceedings.[20]

AND HAVING DELIBERATED THUS:

E. Introduction

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 that took place 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.*"[21]

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

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[19] *Id.*, paras 19. See also para. 22, paras 25-28 and para. 30.
[20] *Id.*, para. 33.
[21] Motion, para. 32. Emphasis added.

> 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."

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.

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 the following 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 judicial economy that has come to feature prominently in the evolving jurisprudence of sister international tribunals, to wit, the need to strike a balance between such a factor 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." [22] ***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), 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 prosecutorial creativity and foresight, given 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?[23]

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

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[22] *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.

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

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,[24] 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:

> "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"[25]

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 Witnesses 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.

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[24] 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.

[25] *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.

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 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 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 a '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.*[26]

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*.[27] 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

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[26] 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.

[27] *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.

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.

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]