

61)

SCSL-2004-16-PT
(4862-4865)

4862

**SPECIAL COURT
FOR SIERRA LEONE**

Case No. SCSL-2004-16-PT

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

Registrar: Robin Vincent

Date filed: May 4, 2004

THE PROSECUTOR

against

SANTIGIE BORBOR KANU

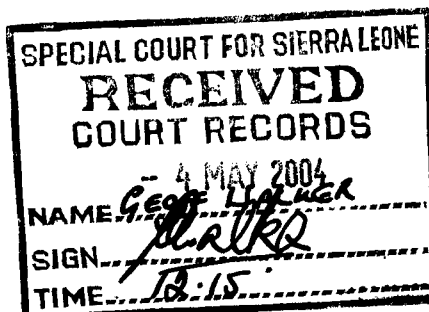
**KANU – RESPONSE TO PROSECUTION’S MOTION FOR CONCURRENT HEARING OF
EVIDENCE COMMON TO CASES SCSL-2004-15-PT AND SCSL-2004-16-PT**

Office of the Prosecutor:

Defense Counsel:

Mr. Luc Coté
Mr. Robert Petit
Mr. Paul Flynn
Mr. Abdul Tejan-Cole
Mr. Leslie Taylor
Ms. Boi-Tia Stevens
Mr. Christopher Santora
Mr. Sharan Parmar

Mr. Geert-Jan Alexander Knoops, Lead Counsel
Ms. Carry J. Knoops, Co-Counsel
Mr. J.O.D. Cole, Co-Counsel
Mr. A.E. Manly-Spain, Co-Counsel



I INTRODUCTION

1. In furtherance to the “Prosecution’s Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT,” (“**Prosecution Motion**”) filed on April 30, 2004, the Defense herewith files its “Response to Prosecution’s Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT” (“**Response Motion**”).

II RULE 48(C) OF THE RULES

2. Rule 48(C) of the Rules of Procedure and Evidence (“**Rules**”) provides the possibility for the concurrent hearing of evidence in separate trials. The relevant part of this Rule reads as follows: “*A Trial Chamber may order the 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. (...)*.”

III ARGUMENTS

Decision on Prosecution Motion for Joinder

3. The Defense holds the humble opinion that granting this Prosecution Motion infringes the object and purpose of the Trial Chamber’s “Decision and Order on Prosecution Motions for Joinder,” (“**Decision**”) from January 27, 2004.
4. In this Decision, the Trial Chamber held that the mere allegation that the RUF and the AFRC were two distinct and separate entities *ab initio* and merged subsequently, is insufficient to substantiate that there would thus be no conflict of interest between these two groups of defendants. The Trial Chamber further opined that this observation raises a spectre of potential conflict in defense strategy and the possibility of mutual recrimination derogating from the rights to which each Accused is entitled in the context of separate trials. The Trial

Chamber therefore explicitly recognized the potential conflict of defense strategies between the RUF and AFRC defenses.

5. This same argument is recognized by the ICTY Trial Chamber in the case of Mr. Milan Kovacevic, referred to in footnote 7 of the Prosecution Motion, where it states under para. 10(d) that: *“[t]he Trial Chamber recognises that some victims and witnesses called to give evidence suffer hardship [by rejecting the Prosecution motion for joinder and concurrent hearing of evidence], and has well in mind its duty to protect witnesses. On the other hand, pursuant to Article 20, paragraph 1, the accused have the right to a fair and expeditious trial. Rule 75 (A) specifies that any measures for protection of witnesses may only be ordered if they are consistent with the rights of the accused. The Trial Chamber considers that the course requested by the Prosecution may endanger the rights of all the accused to a fair trial, because it may lead to conflict of interests between the accused in conducting their defence. Such conflict would cause serious prejudice to all the accused.”*
6. This argument therefore, referred to in the Joinder Decision, not only applies to joint trials, but can also be extended to the Prosecution’s request for concurrent hearing of evidence. It is the Defense’s humble opinion that the assessment of criminal evidence through the hearing of witnesses forms the cornerstone of not only the Prosecution’s strategy but in most cases also of the defense strategy, irrespective of whether this evidence is restricted to ‘crime base witnesses.’
7. As a consequence it is the humble opinion of the Defense that the suggestion of the Prosecution made in para. 21 of its Motion, entails insufficient safeguards as to compensate the danger that the examination of a certain witness may adversely affect the rights of the Accused or the interest of justice. After all, a severance of the hearing of a particular witness on the one hand and the concurrent presentation of common evidence on the other hand, are judicially eo ipso not interchangeable. A concurrent hearing of witnesses on common evidentiary issues

may well infringe the purposes and rationale of the parameters the honourable Trial Chamber has set forth in the Joinder Motion.

- 8. It is the modest view of the Defense that granting the Prosecution Motion would thus indirectly have the result, at least for a major part, of a joinder of trials, which was deemed against the interest of the Accused in the Decision on the Prosecution’s motion for joinder. The argument with respect to the “same transaction” that would underlie the charges of both the AFRC and the RUF defendants, can not be deemed decisive for the requested concurrent hearings.

Individual Criminal Responsibility

- 9. In addition, the Defense respectfully submits that granting the Prosecution Motion would infringe the principle of individual criminal responsibility. In the event the Prosecution is allowed to present evidence concurrently in the RUF and the AFRC cases, this principle can easily fade away due to the risk that no clear distinction is made between the purported individual criminal responsibility of each accused within each group. Such concurrent presentation of evidentiary topics, even if these relate to only crime-based elements, may easily transgress into the presentation of some kind of collective responsibility, which notion is not accepted within international criminal law.¹

IV RELIEF REQUESTED

- 10. For all these reasons, the Defense respectfully requests the honourable Trial Chamber to deny the Prosecution Motion.

Respectfully submitted,
Done at this 4th day of May 2004



Geert-Jan Alexander Knoops, Lead Counsel

¹ See Antonio Cassese, International Criminal Law 136-137 (2003).