

SCSL - 04 - 16 - T
(17994 - 18007)

**SPECIAL COURT FOR
SIERRA LEONE**

Case No. SCSL-2004-16-T

Before: Justice Richard Lussick, Presiding
Justice Teresa Doherty
Justice Julia Sebutinde

Interim-Registrar: Lovemore Munlo

Date filed: 3 April 2006

THE PROSECUTOR

against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU

PUBLIC

**JOINT DEFENCE REQUEST FOR LEAVE TO APPEAL FROM DEFENCE MOTIONS FOR
JUDGEMENT OF ACQUITTAL PURSUANT TO RULE 98 OF 31 MARCH 2006**

Office of the Prosecutor:

Luc Coté
Lesley Taylor

Defence Counsel for Kanu:

Geert-Jan A. Knoops, Lead Counsel
Carry J. Knoops, Co-Counsel
A.E. Manly-Spain, Co-Counsel

Defence Counsel for Brima:

Kojo Graham
Glenna Thompson

Defence Counsel for Kamara:

Andrew Daniels
Mohamed Pa-Momo Fofanah

SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT MANAGEMENT	
3 rd APR 2006	
NAME	NEIL GIBSON
SIGN	<i>[Signature]</i>
TIME	16:42

I INTRODUCTION AND SUMMARY OF PROCEEDINGS

1. On 13 December 2005, the Defence teams filed their “Joint Legal Part – Defence Motion for Judgment of Acquittal under Rule 98” (“**Defence Joint Legal Part**”); on that same day Counsel for Kanu filed its “Kanu – Factual Part Defence Motion for Judgment of Acquittal under Rule 98.” The preceding day, Counsel for the First and Second Accused filed their “Brima Motion for Acquittal Pursuant to Rule 98” and “Defence Motion for Judgment of Acquittal of the Second Accused, Brima Bazy Kamara.”
2. On 23 January 2006, the Prosecution filed its “Prosecution Response to Defence Motions for Judgement of Acquittal Pursuant to Rule 98” (“**Prosecution Response**”).
3. On 30 January 2006, the Defence filed a “Joint Legal Reply to Prosecution Response to Defence Motions for Judgment of Acquittal,” the “Brima Reply to Prosecution Response to Defence Motions for Judgment of Acquittal,” the “Kamara Reply to Prosecution Response to Defence Motions for Judgment of Acquittal,” and on 27 January 2006, the “Confidential Kanu Reply to Prosecution Response to Defence Motions for Judgment of Acquittal” (“**Kanu Defence Reply**”).
4. On 3 April 2006, the Trial Chamber issued its “Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98” (“**Rule 98 Decision**”) in which it dismissed the Defence motions for judgement of acquittal pursuant to Rule 98 in their entirety.
5. The Defence herewith files its “Joint Defence Request for Leave to Appeal from Defence Motions for Judgement of Acquittal Pursuant to Rule 98 of 31 March 2006” (“**Request**”).

II PRELIMINARY ARGUMENT: LEGAL BASIS FOR THE APPEAL

6. The Rules of Procedure and Evidence (“**Rules**”), the Statute and the Practice Direction for Certain Appeals before the Special Court do not specifically refer to appellate review of a Rule 98 decision, and it is ambiguous on which Rule it should base its (request for leave to) appeal. Therefore, the Defence will set forth two legal foundations to obtain leave to appeal, leaving it to the discretion of the Trial Chamber which legal avenue should be pursued.

2.1 Legal Basis: Rule 73

7. As a primary legal basis, the Defence seeks leave to appeal on the basis of Rule 73 of the Rules, saying that “[d]ecisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal.” Therefore, in this case, the Trial Chamber would have to grant leave to appeal.
8. Although it may seem clear that Rule 73 would be the proper basis for an application for leave to appeal, the ICTY submitted a different interpretation. The ICTY Trial Chamber in *Prosecutor v. Blagojevic et al.*¹ ruled that the appeal provision of Rule 73 did not apply to an appeal from the Rule 98*bis* judgement, because the Rule 98 judgement in that case did not qualify as a ‘decision’² in the sense of Rule 73.
9. As a result thereof, the ICTY Trial Chamber found that “the Prosecution erred in bringing the request under Rule 73 of the Rules.”³ The Blagojevic Trial Chamber moreover held that “Rule 108 – and not Rule 73 – is the proper Rule under which

¹ *Prosecutor v. Blagojevic et al.*, Decision on Request for Certification of Interlocutory Appeal of the Trial Chamber’s Judgement on Motions for Acquittal Pursuant to Rule 98*bis*, 23 April 2004, Case No. IT-02-60-T (“**Blagojevic decision**”), paras. 8-9.

² Rule 73(B) of the ICTY Rules of Procedure and Evidence reads, *inter alia*: “Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber (...).”

³ *Blagojevic decision*, para. 15.

to bring an appeal from a judgement including a judgement rendered pursuant to Rule 98 *bis*.”⁴

10. Notwithstanding that the ICTY Trial Chamber ruled that an appeal from a judgement for acquittal should not be based on Rule 73 of the Rules, one of its major arguments supporting that conclusion was that Rule 73 provides for appeals from ‘decisions,’ whilst Rule 108 provides for appeals from ‘judgements.’ However, in the case of *Prosecutor v. Blagojevic*, the Trial Chamber had issued a “Judgement on Motions for Acquittal Pursuant to Rule 98*bis*.” In the current case, the Trial Chamber called its document “Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98.” The fact that the honorable Trial Chamber used a different formulation for the similar document, may be an indication that the Trial Chamber does want the request for appeal to fall under Rule 73 of the Rules.
11. In the underlying Prosecution motion resulting in the Trial Chamber I “Decision on Prosecution Application for Leave to Appeal *Proprio Motu* Findings in Decision on Motions for Judgment of Acquittal Pursuant to Rule 98,”⁵ the Prosecution put forward Rule 73 as the basis for its request for leave to appeal. The Trial Chamber did not dispute this legal basis, which may indicate that Rule 73 is thus the proper basis for such request.
12. Therefore, primarily, the Defence bases its current Request on Rule 73, and requests the honorable Trial Chamber to grant the Defence leave to appeal from its Rule 98 Decision.

⁴ *Blagojevic* decision, para. 14.

⁵ *Prosecutor v. Norman et al.*, Decision on Prosecution Application for Leave to Appeal *Proprio Motu* Findings in Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 24 January 2006, Case No. SCSL-2004-14-T-545.

2.2 Legal Basis: Rule 108

13. In the alternative, in case the Trial Chamber would find that Rule 73 is not the proper basis for an appeal from a judgement for acquittal, the Defence basis its Request on Rule 108 of the Rules.
14. According to the Rule 98 Decision, the wording of the ICTY Rule 98*bis* and the Special Court Rule 98 are similar.⁶ This may be an indication that the Trial Chamber will follow the ICTY's interpretation of the ICTY Rule 98*bis*, and order that appeal from the Rule 98 Decision should be based on Rule 108.
15. Rule 108(A) provides, *inter alia*, that "a party seeking to appeal a judgement or sentence shall (...) file with the Registrar and serve upon the other parties a written notice of appeal, setting forth the grounds." Therefore, in this case, the appeal would lie as of right, and the Defence would have to address the Appeals Chamber.

2.3 Conclusion

16. Therefore, the Defence bases this Request on Rule 73 of the Rules. In case the Trial Chamber would find that this is not the proper basis for the appeal, the Defence respectfully prays the honorable Trial Chamber to indicate to the Defence at its earliest convenience that the Request should have been based on Rule 108 instead, so that the Defence can file its proper Request to the Appeals Chamber within the time period prescribed by Rule 108 (i.e. 14 days from the receipt of the full judgement and sentence).

⁶ Rule 98 Decision, para. 7.

III EXCEPTIONAL CIRCUMSTANCES AND IRREPARABLE PREJUDICE

17. As set out above, the requirement of Rule 73 is twofold: both exceptional circumstances and irreparable prejudice need to be established.

3.1 Exceptional Circumstances

18. The Defence submits that the arguments mentioned under section 3.2 below are of such nature that they qualify for the high threshold of ‘exceptional circumstances’ in the sense of Rule 73(B) of the Rules. Given the arguments mentioned below, it is not clear to the Defence what the exact charges against the Accused are, both with respect to the locations and villages mentioned in the Indictment, and moreover with respect to the definition of ‘pillage’ as charged in Count 14 of the Indictment. Moreover, the fact that the Trial Chamber did not provide a clear ruling on the villages – despite their ambiguity in geographical sense – mentioned in the Prosecution evidence, results in exceptional circumstances and above all, also irreparable prejudice to the Defence (see below).

19. Exceptional circumstances are in the first place formed by the fact that on several key issues of the interpretation of Rule 98, Trial Chamber I and Trial Chamber II have diverging opinions (see below).

3.2 Irreparable Prejudice

20. The Defence submits that irreparable prejudice will result if the Defence would not be allowed to appeal from the Rule 98 Decision.

21. In the **first place**, while dismissing the Rule 98 Motion in its entirety, the Trial Chamber has failed to connect the proper remedy to the fact that the Prosecution averred it has not led evidence on many of the villages mentioned in the

Indictment. As a result, the Trial Chamber failed to apply the proper standard for a Rule 98 decision.

22. The Trial Chamber holds that “[w]e do not consider that we are empowered by Rule 98 to break a Count down to its particulars supplied in the Indictment and then to enter a judgement of acquittal in respect of any particular which has not been proved; nor would it be practical to do so.”⁷ However, although the Trial Chamber did thus not accept that the Rule 98 threshold had been met with regard to those aspects, at the same time it indicates that “[i]t goes without saying that the Defence will not be expected to call evidence concerning locations about which no evidence has been given.” As a result, the Trial Chamber arrived at a contradictory conclusion with respect to this issue. It is not consistent to say on the one hand that the Defence is not expected to call evidence in this regard, while on the other hand observing and concluding that the Rule 98 standard has not been met, especially in light of preceding case law from Trial Chamber I in this respect.

23. This argument is supported by the observation that in the CDF case, Trial Chamber I arrived at a different application of Rule 98 with respect to locations and villages regarding which the OTP did not lead any evidence. Reference can be made to especially Chapter VII from the *Norman et al.* Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, where Trial Chamber I held that the Rule 98 threshold had been met with regard to several areas mentioned in the Indictment, against which the Prosecution had not been able to bring forward any evidence.⁸

24. The Defence respectfully holds that by issuing the Rule 98 Decision, the Trial Chamber erred in applying this incorrect standard of Rule 98, thereby creating

⁷ Rule 98 Decision, para. 22.

⁸ *Prosecutor v. Norman et al.*, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98 (“**Norman Rule 98 Decision**”), Chapter VII, p. 27.

contradictory case law for future reference, and leaving the Defence in their preparation for the Defence case in an ambiguous and unclear situation.

25. The Defence respectfully holds that this causes irreparable prejudice to the Accused, and that the Appeals Chamber is the proper instance to decide on such principle matter, especially now that Trial Chambers I and II have diverging opinions on the interpretation of such important provision in the Rules.

26. In the **second place**, the Trial Chamber held in para. 24 of its Rule 98 Decision that the Kanu Reply raised a new issue denying the Prosecution an opportunity to respond thereto. The Defence respectfully holds that, as was indicated in the Defence Reply, this argument was raised in response of an argument mentioned by the Prosecution's Response, where the Prosecution "seems to assert that different names (...) refer to the same villages."⁹ Explicit references were made to the Prosecution Response. Therefore, no *de facto* new argument was developed by the Defence and therefore the Trial Chamber erred in law and fact by holding that "[r]egarding this submission, we do not consider striking out the names of these locations to be an appropriate or desirable remedy."¹⁰ The Trial Chamber herewith suggests that it does not address this issue because it was a new issue raised in reply by the Defence. Rather than an argument developed by the Defence, it was merely an observation put forward by the Defence against a Prosecution assertion. After all, it was the Prosecution that intended to equate locations with different names as one single location. This can therefore not qualify as a 'new argument' raised in reply by the Defence, but is simply a defense against a Prosecution argument which is, according to the humble submission of the Defence, incorrect.

27. However, in that same paragraph, the Trial Chamber does go into the substance of this argument, while stating that "the Defence had ample opportunity to raise any

⁹ Kanu Defence Reply, para. 6, referring to Prosecution Response paras. 118, 271, 272, 276, 277, 304, and 305.

¹⁰ Rule 98 Decision, para. 25.

doubts about evidence relating to a given location through cross-examination of the Prosecution witnesses.” However, in all fairness, this is not an issue to be addressed in cross-examination by the Defence. It is the Prosecution’s case that these different names actually refer to one single location; it is thus also up to the Prosecution to *show* that these different names actually refer to one single location, and not to the Defence to show that these different names actually refer to different places. This interpretation offered by the Trial Chamber certainly seriously prejudices the Defence, and the Defence contends that it should be the Appeals Chamber to offer a verdict on such principle matter. As a matter of law, failure of the Prosecution to meet the evidentiary standard of Rule 98 cannot be counterbalanced by a reference to the possibility of the Defence to have had ample opportunity to cross-examine witnesses during the Prosecution case.

28. In the **third place**, the Defence respectfully holds that the Trial Chamber, by deferring its decision on the interpretation on the count of pillage in the Indictment, caused irreparable prejudice to the Accused.
29. A first aspect of this argument relates to the fact that the two Trial Chambers have created different definitions of one of the crimes embedded in the Statute. The elements of crime of ‘pillage’ formulated by Trial Chamber II in the Rule 98 Decision, do not concur with the elements as set out by Trial Chamber I in the *Norman* Rule 98 Decision, where Trial Chamber II held that “[i]t is therefore our view that the requirement of ‘private or personal use’ is unduly restrictive and ought not to be an element of the crime of pillage.”¹¹ According to the humble submission of the Defence, the Appeals Chamber needs to decide on these diverging interpretations of one of the crimes in the Statute, and it would cause irreparable prejudice if the Defence would not be allowed to have this matter settled in this instance. The Defence would prepare its case with the current interpretation provided by Trial Chamber II, but if the Appeals Chamber would in the end come to another definition, the Defence would be seriously hampered.

¹¹ Rule 98 Decision, para. 242.

30. A second aspect of this argument relates to the fact that the Trial Chamber indicated that “what we are called upon by the parties to decide is whether or not acts of destruction of civilian property by burning fall within the definition of ‘pillage.’”¹² It continues to suggest to the Prosecution that such charge may be more appropriately brought under Article 3.b., 3.d. or perhaps 4(a) of the Statute,¹³ or even under Article 3 of the Statute, “even though it is not among the offences mentioned in Article 3.”¹⁴ It concludes this section with stating that there is sufficient evidence to support a conviction of Count 14. However, no decision is made on the interpretation of the crime of pillage, where the Trial Chamber holds that “[w]e are of the view that it is more appropriate to defer a final decision on this issue until the end of the trial.”

31. The Defence respectfully submits that in the absence of any clarification on the actual charge in this regard against the Accused at this stage of the proceedings, the Accused are irreparably prejudiced. After all, in the absence of a clear and unequivocal decision of the Trial Chamber prior to the start of the Defence case, the Defence is hampered in its preparation in that it is kept unclear against what charge it has to defend itself. For the Trial Chamber itself, although not making a final decision in this regard, seems to invite the Prosecution to categorize and apply the evidence of burning in support of other charges in the Indictment, such as collective punishments or acts of terrorism. The Defence respectfully prays the honorable Trial Chamber to grant the requested leave to appeal, so that the Appeals Chamber can decide on this matter at its earliest convenience, in order to formulate the exact parameters of the charges against the Accused and thus in the preparation of the Defence case.

32. In the **fourth place**, a similar argument is developed by the Defence with respect to paras. 323-326 of the Rule 98 Decision. The Trial Chamber in para. 326 holds

¹² Rule 98 Decision, para. 262.

¹³ Rule 98 Decision, para. 263.

¹⁴ Rule 98 Decision, para. 264.

that it “will not at this stage make a final determination as to the precise basis of liability of each Accused for participation in a joint criminal enterprise (...).” Prior to this observation, the Trial Chamber observed that “the evidence (...) is capable of establishing all categories of joint criminal enterprise.” In the absence of a clear decision on the exact basis of which category of joint criminal enterprise can be admitted within the context of a Rule 98 decision, while leaving open the precise basis of alleged liability of each Accused in this regard, the Defence is irreparably prejudiced in that it is left unclear to which form of liability it has to defend itself. Such an approach seems contrary to the extensive case law of the ICTY, the Defence quoted in its Rule 98 Motions, and cannot be disposed of by the mere observation that a challenge to the form of the Indictment should have been raised in a preliminary motion under Rule 72, as the Trial Chamber notes in para. 323 of the Rule 98 Decision. The framework of Rule 98 is also designed for an assessment of the question whether or not sufficient evidence has been introduced for the exact basis of alleged criminal liability, especially within the context of the concept of joint criminal enterprise in view of its extensive third category. Therefore, the Trial Chamber erred in law by not addressing this argument of the Defence, and by holding that it would make its final determination not at this stage.

3.3 Conclusion

33. For these reasons, the Defence is of the opinion that with this Request, it has fulfilled the strict requirements of Rule 73(B) of the Rules, in the sense that it has been shown that both exceptional circumstances exist, as well as that irreparable prejudice will be administered to the Accused if leave to appeal would be denied, in the sense that this will inevitably result in a delay of the preparation of the Defence case, aside from causing undue delay in the preparation thereof.

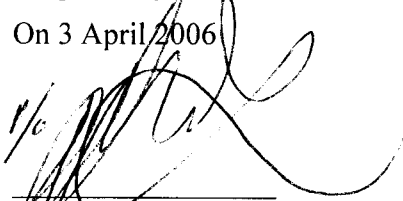
IV CONCLUSION

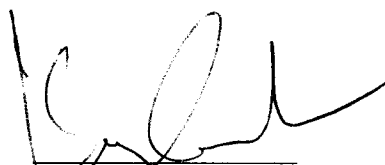
34. On the basis of the above arguments, the Defence respectfully prays the honorable Trial Chamber:

- (i) In case the Trial Chamber would find that Rule 73 is not the proper basis for the appeal, to indicate to the Defence at its earliest convenience (i.e. timely within the requisite 14 days time limit provided by Rule 108) that the Request should be based on Rule 108 instead, so that the Defence can file its appeal with the Appeals Chamber within the time period prescribed by this Rule; or
- (ii) In case the Trial Chamber would find that Rule 73 is the proper legal basis for the current Request, to grant the Defence leave to appeal from the Rule 98 Decision.

Respectfully submitted,

On 3 April 2006


Geert-Jan Alexander Knoops


Kojo Graham

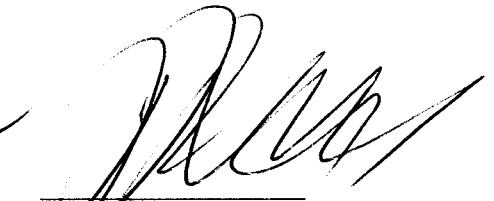

Andrew Daniels

TABLE OF AUTHORITIES

SCSL

Prosecutor v. Brima et al., Brima Motion for Acquittal Pursuant to Rule 98, 12 December 2005, Case No. SCSL-2004-16-T-442.

Prosecutor v. Brima et al., Defence Motion for Judgment of Acquittal of the Second Accused, Brima Bazy Kamara, 12 December 2005, Case No. SCSL-2004-16-T-443.

Prosecutor v. Brima et al., Kanu – Factual Part Defence Motion for Judgment of Acquittal under Rule 98, 13 December 2005, Case No. SCSL-2004-16-T-444.

Prosecutor v. Brima et al., Joint Legal Part – Defence Motion for Judgment of Acquittal under Rule 98”, 13 December 2005, Case No. SCSL-2004-16-T-445.

Prosecutor v. Brima et al., Prosecution Response to Defence Motions for Judgement of Acquittal Pursuant to Rule 98” (“**Prosecution Response**”), 23 January 2006, Case No. SCSL-2004-16-T-458.

Prosecutor v. Brima et al., Joint Legal Reply to Prosecution Response to Defence Motions for Judgment of Acquittal, 30 January 2006, Case No. SCSL-2004-16-T-461.

Prosecutor v. Brima et al., Confidential Kanu Reply to Prosecution Response to Defence Motions for Judgment of Acquittal (“**Kanu Defence Reply**”), 27 January 2006, Case No. SCSL-2004-16-T-460.

Prosecutor v. Brima et al., Brima Reply to Prosecution Response to Defence Motions for Judgment of Acquittal, Case No. SCSL-2004-16-T-463.

Prosecutor v. Brima et al., Kamara Reply to Prosecution Response to Defence Motions for Judgment of Acquittal, Case No. SCSL-2004-16-T-462.

Prosecutor v. Brima et al., Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98 (“**Rule 98 Decision**”), 3 April 2006, Case No. SCSL-2004-16-T-469.

Prosecutor v. Norman et al., Decision on Prosecution Application for Leave to Appeal *Proprio Motu* Findings in Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 24 January 2006, Case No. SCSL-2004-14-T-545.

ICTY

Prosecutor v. Blagojevic et al., Decision on Request for Certification of Interlocutory Appeal of the Trial Chamber’s Judgement on Motions for Acquittal Pursuant to Rule 98bis, 23 April 2004, Case No. IT-02-60-T (“**Blagojevic decision**”)