

470

SCSL-04-16-T
(18090-18097)

18090

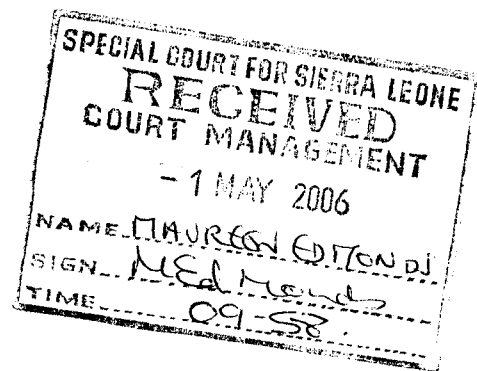
**SPECIAL COURT FOR
SIERRA LEONE**

Case No. SCSL-2004-16-T

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

Registrar: Lovemore G. Munlo, SC

Date filed: 1 May 2006



THE PROSECUTOR

against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU

**PUBLIC JOINT DEFENCE REPLY TO PUBLIC PROSECUTION RESPONSE TO JOINT
DEFENCE REQUEST FOR LEAVE TO APPEAL FROM DECISION ON DEFENCE MOTIONS
FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 98 OF 31 MARCH 2006**

Office of the Prosecutor:
Desmond de Silva

Defence Counsel for Kanu:
Geert-Jan A. Knoops, Lead Counsel
Cary 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

I INTRODUCTION

1. On 31 March 2006, the Trial Chamber issued its “Trial Chamber’s Decision on Defence Motions for Judgment of Acquittal pursuant to Rule 98” (“**Rule 98 Decision**”).¹ On 3 April 2006, the Defence for all three Accused filed their “Public Joint Defence Request for Leave to Appeal from Defence Motions for Judgment of Acquittal pursuant to Rule 98 of 31 March 2006” (“**Defence Request**”).² In response, the Prosecution filed its “Public Prosecution Response to ‘Joint Defence Request for Leave to Appeal from Defence Motions for Judgment of Acquittal pursuant to Rule 98 of 31 March 2006’” (“**Prosecution Response**”).³ The Defence herewith files its “Public Joint Defence Reply to Public Prosecution Response to Joint Defence Request for Leave to Appeal from Decision on Defence Motions for Judgment of Acquittal pursuant to Rule 98 of 31 March 2006 (“**Reply**”).

II LEGAL ARGUMENT

2. The Defence herewith replies to the arguments set out in the Prosecution Response, without reiterating its Defense request.

2.1 Exceptional Circumstances

3. The Prosecution indicates that the Defence has insufficiently proved the existence of exceptional circumstances.⁴ The Defence objects to this conclusion, and states that both elements mentioned in the Defence Request, namely the fact that the

¹ *Prosecutor v. Brima, Kamara and Kanu*, Trial Chamber’s Decision on Defence Motions for Judgment of Acquittal pursuant to Rule 98, 31 March 2006, Case No. SCSL-2004-16-T-469.

² *Prosecutor v. Brima, Kamara and Kanu*, Public Joint Defence Request for Leave to Appeal from Defence Motions for Judgment of Acquittal pursuant to Rule 98 of 31 March 2006, 3 April 2006, Case No. SCSL-2004-16-T-471.

³ *Prosecutor v. Brima, Kamara and Kanu*, Prosecution Response to ‘Public Joint Defence Request for Leave to Appeal from Defence Motions for Judgment of Acquittal pursuant to Rule 98 of 31 March 2006,’ 25 April 2006, Case No. SCSL-2004-16-T-475.

⁴ See Prosecution Response, paras. 12-13.

charges against the Accused are, to say the least, unclear,⁵ and moreover the fact that Trial Chamber I and Trial Chamber II of the Special Court have diverging views on key issues of the interpretation of the law,⁶ both separately and in conjunction constitute exceptional circumstances within the meaning of Rule 73(B) of the Rules.

4. Firstly, the Defence respectfully submits that the principle of *lex certa* has been violated by the Rule 98 Decision, in that the Accused on several aspects of the Indictment (see para. 18 of the Defence Request) are not sufficiently informed as to what the charges against them entail. This violation concerns a general principle of law, a violation of which can be considered as exceptional circumstances as referred to in Rule 73(B).⁷
5. In the second place, the Defence contends that the interpretation by Trial Chamber I and II of Rule 98 diverges.⁸ This concerns an issue of “fundamental legal importance to the Special Court for Sierra Leone.”⁹ The Defence moreover submits that the current interpretation provided by the honourable Trial Chamber diverges not only from the practice of Trial Chamber I, but from the case law of the Yugoslavia and Rwanda Tribunals.¹⁰

⁵ See Defence Request, para. 18.

⁶ See Defence Request, para. 19.

⁷ *Prosecutor v. Sesay, Kallon and Gbao*, Decision on Defence Applications for Leave to Appeal Rulings of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, Case No. SCSL-2004-15-T, para. 25.

⁸ This argument refers to Defence Request, para. 19.

⁹ *Id.*

¹⁰ See for example *Prosecutor v. Blagojevic*, Judgement on Motions for Acquittal Pursuant to Rule 98bis, 4 April 2004, Case No. IT-02-60-T, Chapter IV – Disposition, in which several factual allegations have been removed from the indictment, as well as parts of counts; *Prosecutor v. Brdjanin*, Decision on Motion for Acquittal Pursuant to Rule 98bis, 28 November 2003, Case No. IT-99-36-T, under Chapter IV – Disposition, in which the ICTY Trial Chamber struck part of count 1 from the indictment against the accused, as well as several factual allegations. Also in *Prosecutor v. Galic*, Decision on the Motion for the Entry of Acquittal of the Accused Stanislav Galic, 3 October 2002, Case No. IT-98-29-T, Chapter IV – Disposition. For ICTR practice, see for instance *Prosecutor v. Bizimungu et al.*, Decision on Defence Motions Pursuant to Rule 98bis, 31 October 2005, Case No. ICTR-99-50-T, where the Trial Chamber held that with respect to several counts, the accused were acquitted only in respect of Article 6(3) responsibility only; see also *Prosecutor v. Nyiramasuhuko et al.*, Decision on Defence Motions for Acquittal under Rule 98bis, 16 December 2004, Case No. ICTR-98-42-T, para. 169, where the Trial Chamber acquitted Sylvain Nsabimana of one paragraph of the indictment.

6. In addition, the Defence wishes to submit that the Rule 98 judgment for acquittal is a crucial phase in the case against an accused. The Defence respectfully submits that the honourable Trial Chamber's current interpretation of this Rule violates the rationale of this Rule, which is to clearly define and limit the charges against the Accused as well as to judicially streamline the proceedings. The Defence avers that the interpretation provided by Trial Chamber II raises a serious fundamental issue of fundamental legal interpretation of Rule 98, in practice one of the key provisions of the Rules of Procedure and Evidence, justifies leave to appeal.
7. It is for the above two reasons that the Defence submits that exceptional circumstances exist.

2.2 Irreparable Prejudice

8. The second limb of Rule 73(B) requires the establishment of irreparable prejudice. This argument is referred to in paras. 20-32 of the Defence Request.

2.2.1 Failure to Apply Proper Standard of Rule 98

9. As regards the first Defence argument, i.e. that the honourable Trial Chamber failed to apply the proper standard for Rule 98, the Defence, in addition to its arguments set out in the Defence Request, refers to the practice of Trial Chamber I, as well as the practice of the Yugoslavia and Rwanda Tribunals.¹¹
10. Moreover, as set out above, one of the rationales of Rule 98 is also to further refine the factual allegations against the Accused. By its current interpretation, the Trial Chamber defers such clarification to the judgment phase of the trial. The

¹¹ See footnote 10 above.

Defence submits that not only does that contradict such interpretation in the current practice of international criminal law, but that it moreover may lead to straining the proceedings and violation of the principle of *lex certa*. It is the Accused person's right to know the charges against them, as set out in Article 17(4)(a) of the Statute, which provision holds that each Accused has the right to "be informed promptly and in detail (...) of the charge against him or her."¹² The Defence submits that absence of such clarification is clearly to the detriment of the Accused's basic rights.

11. The Defence thus reiterates that irreparable prejudice will result if leave to appeal would not be granted.

2.2.2 *Village Names Which Do Not Concur*

12. As set out its Defence Request, the Defence reiterates that failure to determine at this stage in the proceedings whether villages mentioned by witnesses concur with villages mentioned in the Indictment, causes irreparable prejudice, while no reasonable justification for such delay which could possibly justify the procedural harm done against the Accused exists.

13. The current situation for the Defence is that it will have to look for exculpatory evidence in all possible villages and towns mentioned in the Prosecution evidence and Indictment. In several instances, villages with similar names occur in different districts, and even within one single district or chiefdom. Thus, by not determining which exact villages are meant at this stage of the proceedings, delay and prejudice is caused to the Defence investigations simply because it is not clear to the Defence whether the different names referred to in the Prosecution evidence may refer to different villages. By the Rule 98 Decision, it is unclear at this stage as what the Trial Chamber's opinion will be in this regard at the end of the trial. Thus the Defence needs to anticipate two options for each occurrence of

¹² Underlining added, GJK.

diverging names: one, that the Trial Chamber will actually accept that the names in fact do refer to different villages, or two, that they do refer to one and the same village. Both options would obviously lead to different investigation tactics on the part of the Defence.

14. The foregoing shall also lead to irreparable prejudice to the Accused, in that it will cause a heavy burden on the Defence to investigate both alternatives. Moreover, delay of such decision by the Trial Chamber is not based upon any reasonable justification, which reinforces the Defence argument that it will be irreparably damaged by dismissal of the current Defence Request.

2.2.3 *Interpretation of 'Pillage'*

15. With regard to this matter, the Defence humbly submits that it would serve judicial economy to have the Appeals Chamber at this stage in the proceedings determine the elements of the count of pillage. Again, delay of such determination would result in this matter being determined only at the appeal stage, i.e. after the investigative stage of this case. Trial Chamber I has set forth its interpretation of the count of pillage, yet, Trial Chamber II indicated its wish to postpone such decision.
16. Besides the argument of judicial economy, the Defence respectfully submits that it is irreparably damaged, in the sense that the Accused persons are not fully aware of the exact nature of charges against them. This is in clear violation of Article 17(4)(a) of the Statute. The Defence submits that for a determination of the legal aspects of this provision, there is no need to await the Defence case especially as it pertains to a legal argument.
17. Therefore, this argument necessarily leads to an unjustifiable and irreparable prejudice to the Accused. It will also strain and prolong the Defence case, both joint and individual.

2.2.4 *Forms of Joint Criminal Enterprise Liability*

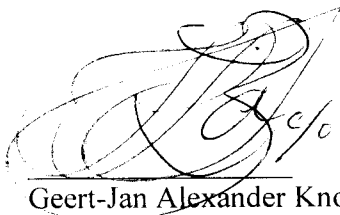
18. As to the arguments developed by the defence in its request with respect to the vagueness of the exact form of joint criminal enterprise, it is repeated that the ICTY case law is clear in that the Prosecutor must indicate the exact form of joint criminal enterprise it intends to rely on, irrespective of a challenge to the indictment, in this regard by way of preliminary motions. Also, Rule 98 proceedings may serve to clarify the Prosecution's standpoint which approach would be in line with the rationale of a Rule 98 decision. Accordingly, in the absence of this classification of the nature of the joint criminal enterprise liability basis, the Defence suffers prejudice and irreparable procedural damage.

III PRAYER

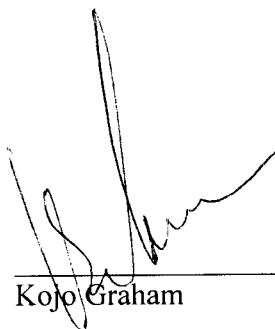
19. For the reasons set out above, and in addition to the arguments set out in the Defence Request, the Defence respectfully requests the honorable Trial Chamber to grant the Defence leave to appeal from the Rule 98 Decision.

Respectfully submitted,

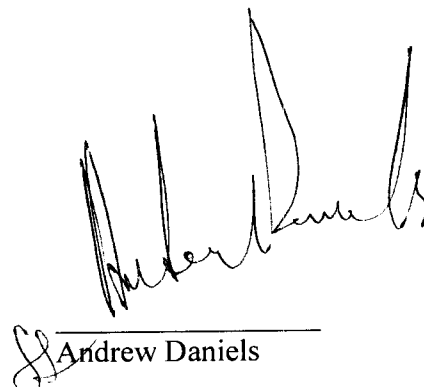
On 1 May 2006



Geert-Jan Alexander Knoops



Kojo Graham



Andrew Daniels

TABLE OF AUTHORITIES

Special Court for Sierra Leone:

- *Prosecutor v. Sesay, Kallon and Gbao*, Decision on Defence Applications for Leave to Appeal Rulings of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, Case No. SCSL-2004-15-T, para. 25.
- *Prosecutor v. Brima, Kamara and Kanu*, Trial Chamber's Decision on Defence Motions for Judgment of Acquittal pursuant to Rule 98, 31 March 2006, Case No. SCSL-2004-16-T-469.
- *Prosecutor v. Brima, Kamara and Kanu*, Public Joint Defence Request for Leave to Appeal from Defence Motions for Judgment of Acquittal pursuant to Rule 98 of 31 March 2006, 3 April 2006, Case No. SCSL-2004-16-T-471.
- *Prosecutor v. Brima, Kamara and Kanu*, Prosecution Response to 'Public Joint Defence Request for Leave to Appeal from Defence Motions for Judgment of Acquittal pursuant to Rule 98 of 31 March 2006,' 25 April 2006, Case No. SCSL-2004-16-T-475.

International Criminal Tribunal for the Former Yugoslavia:

- *Prosecutor v. Brdjanin*, Decision on Motion for Acquittal Pursuant to Rule 98bis, 28 November 2003, Case No. IT-99-36-T (<http://www.un.org/icty/brdjanin/trialc/decision-e/031128.htm>), under Chapter IV – Disposition.
- *Prosecutor v. Galic*, Decision on the Motion for the Entry of Acquittal of the Accused Stanislav Galic, 3 October 2002, Case No. IT-98-29-T (<http://www.un.org/icty/galic/judgment/04140652.htm>), Chapter IV – Disposition.
- *Prosecutor v. Blagojevic*, Judgement on Motions for Acquittal Pursuant to Rule 98bis, 4 April 2004, Case No. IT-02-60-T (<http://www.un.org/icty/blagojevic/trialc/judgement/040405.htm>), Chapter IV – Disposition.

International Criminal Tribunal for Rwanda:

- *Prosecutor v. Bizimungu et al.*, Decision on Defence Motions Pursuant to Rule 98bis, 31 October 2005, Case No. ICTR-99-50-T (<http://69.94.11.53/ENGLISH/cases/Bizimungu/decisions/311005.htm>).
- *Prosecutor v. Nyiramasuhuko et al.*, Decision on Defence Motions for Acquittal under Rule 98bis, 16 December 2004, Case No. ICTR-98-42-T (<http://69.94.11.53/ENGLISH/cases/Nyira/decisions/161204%20index.htm> and <http://69.94.11.53/ENGLISH/cases/Nyira/decisions/161204%20Delib%20III.htm>)