

THE SPECIAL COURT FOR SIERRA LEONE

Before: Hon. Justice Bankole Thompson, Presiding
 Hon. Justice Pierre Boutet
 Hon. Justice Benjamin Itoe

Registrar: Mr. Lovemore Green Munlo, SC

Date filed: 11th July 2006

The Prosecutor

-v-

**Issa Hassan Sesay
 Morris Kallon
 Augustine Gbao**

Case No: SCSL - 04 - 15 - T

Public

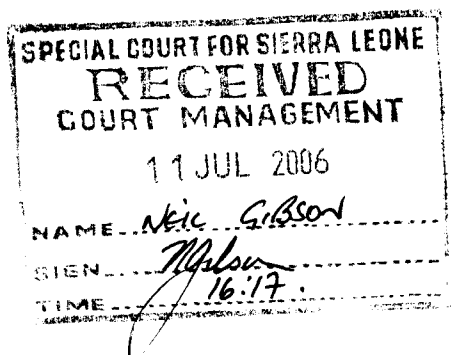
**Joint Defence Position Paper On
 Implementing Rule 98 Modalities**

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INTRODUCTION

1. At the Status Conference held on 19th June 2006, the Presiding Judge, on behalf of the Trial Chamber, requested that the parties submit position papers on implementing the modalities of Rule 98,¹ as amended on 13th May 2006.² In response to the Presiding Judge's request, the Defence teams on behalf of Sesay, Kallon and Gbao (the "Defence") jointly submit this position paper.

Amendments To Rule 98

1. On 13th May 2006, the Special Court for Sierra Leone amended the Rules of Procedure and Evidence such that Rule 98 now provides for oral submissions on a "Motion of Judgment of Acquittal":

If, after the close of the case for the prosecution, there is no evidence capable of supporting a conviction on one or more counts of the indictment, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgment of acquittal on those counts.

2. This amendment brings Rule 98 into conformity with the amendment to the "Judgment of Acquittal," Rule 98 of the ICTY. Rule 98*bis*, as amended, reads:

At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgment of acquittal on any count if there is no evidence capable of supporting a conviction.

3. The Rule 98 procedure in the ICTR was not amended to bring it into conformance with the Rule 98 procedure in the ICTY.

Purpose Of Rule 98

4. The Defence understands Rule 98 to be a Rule directed to furthering the efficient administration of justice. It is intended to streamline the case and reduce the proceedings to allegations of crimes on which a finding of guilt could be found:

While Rule 98*bis* is an important procedural safeguard, the object and proper operation of the Rule should not be lost sight of. Its essential function is to *separate out and bring to an end only those proceedings in*

¹ *Prosecutor v. Sesay et al.*, SCSL-04-15-T, transcript, 19 June 2006, pages 21-25.

² *Rules of Procedure and Evidence of the Special Court for Sierra Leone*, amendments adopted at Seventh Plenary, 13 May 2006.

*respect of a charge for which there is no evidence on which a Chamber could convict, rather than to terminate prematurely cases where the evidence is merely weak.*³

RULE 98 MODALITIES

5. As stated above, during the status conference, the Presiding Judge requested that the parties prepare position papers on implementing the modalities of Rule 98. The Defence understands the Presiding Judge's request to be directed towards i) when the Prosecution will file its concessions, as invited, if any; ii) when the Defence will file its skeleton argument and notice of time estimate, if any; iii) when oral submissions, if any, will be presented by the Defence; and v) when oral submissions, if any, will be presented by the Prosecution. This position paper therefore addresses the same.

6. The Defence understands the above to be the Trial Chamber's request because the request was made in response to Rule 98 being amended to provide for oral submissions. Questions of law are not addressed here.

Prosecution Concessions

8. The Prosecution, as a Minister of Justice, is invited to provide concessions, if any, where they find that there exist charges, and underlying criminal allegations in support of those charges, on which there is no evidence capable of supporting a conviction. This is consistent with the principles of *Prosecution v. Strugar*⁴ and the purpose of the Rule 98 proceedings.

Defence Submissions

9. The Defence submits that the Trial Chamber might defer to the Accused and their Counsel for a representation on the amount of time it will take – within reason – to adequately prepare its Rule 98 submissions (i.e., notices, authorities, and oral

³ *Prosecutor v. Strugar*, IT-01-42-T, “Decision on Defence Motion Requesting Judgment of Acquittal Pursuant to Rule 98Bis (TC),” 21 June 2004, emphasis added.

⁴ Note 3, *supra*.

submissions). The Defence jointly submits that 8 weeks from the close of the Prosecution case, should the Prosecution case close on 3rd August 2006, will be necessary to prepare its Rule 98 submissions. That is to say, the Defence requires 4 weeks from the end of the judicial recess in the event that the Prosecution case closes in August 2006. Should the Prosecution case close in September 2006, the Defence, for the reasons set out in para 38 below, requires 3 weeks from the close of the Prosecution case.

10. Due to the complexity of the case, the number of witnesses testifying and the resulting pages of transcript⁵ as well as the number of underlying criminal allegations which must be cross-referenced with the charges to determine the merits of Rule 98 submissions, the Defence finds the requested time reasonable to prepare its submissions in preparation of the Rule 98 proceedings.
11. It is the position of the Defence that the outcome of the Rule 98 proceedings will have a negligible effect, if any, on the preparation of its Defence case, which is expected to commence in mid-January 2007. As such, the scheduling of the Rule 98 proceedings should be decided on the understanding that it is highly unlikely to affect the start of the Defence case.
12. The Defence further submits that the Trial Chamber should not give undue weight to the Rulings of the ICTY, ICTR, or SCSL when determining the length of time allowed to the Defence to prepare its Rule 98 submissions. Clearly each Prosecution case is going to be of various complexity and duration and will have a different number of witnesses called and documentary evidence tendered. These variations are based upon, among other things, the specific time periods of the indictment for particular counts, the nature of the counts and underlying criminal allegations and how much evidence is called for each allegation.

⁵ Currently estimated to be approximately 20,000 pages.

13. That aside, two reasons for amending the Rule 98 procedure in the ICTY proceedings, among others, are to prevent the loss of time and resources in preparing lengthy legal submissions⁶ and to expedite the completion of cases because the longer “it takes to bring a case to an end, the longer someone else will be waiting for his trial to come up, in the meantime, most of the time in a state of detention.”⁷ The latter consideration does not arise in respect of the Special Court for Sierra Leone.
14. As stated above, the Defence submits that the Trial Chamber might defer to the Defence for a representation on the amount of time it will take to prepare its Rule 98 submissions, where the time suggested is within reason. Should, however, the Chamber not defer to the Defence’s representation and instead look to jurisprudence from the ICTY and SCSL, the Defence respectfully request the Chamber to consider the following with respect to ICTY jurisprudence.
15. The Defence is only aware of three ICTY cases in which the amended Rule 98 procedure was used. Those cases are *Prosecutor v. Orić*,⁸ *Prosecutor v. Krajišnik*,⁹ and *Prosecutor v. Martić*.¹⁰ An examination of the details of those cases gives no guideline as to the length of time that should be provided to a defence team to prepare its Rule 98 submissions.
16. In *Orić*, the Third Amended Indictment consists of 4 counts spanning thirty-eight months (June 1992 to August 1995).¹¹ The Prosecution’s case lasted 100 days,¹² fifty witnesses were called,¹³ and the defence counsel was provided one week to prepare its Rule 98 oral submissions.

⁶ *Orić*, transcript, 4 May 2005, page 7849, lines 6-9.

⁷ *Orić*, transcript, 4 May 2005, page 7850, lines 6-8.

⁸ IT-03-68.

⁹ IT-00-39&40.

¹⁰ IT-95-11.

¹¹ *Orić*, 30 June 2005, available at <http://www.un.org/icty/indictment/english/ori-3ai050630e.htm>.

¹² *Orić*, IT-03-68-AR73.2, “Interlocutory Decision on Length of Defence Case,” 20 July 2005, paragraph 9.

¹³ *Orić*, IT-03-68, transcript, 1 July 2005, page 9051, line 24.

17. In *Martić*, the Amended Indictment consists of 19 counts spanning fifty-three months (August 1991 to December 1995).¹⁴ The Prosecution's case lasted approximately 71 days and the defence counsel was provided one week to prepare its Rule 98 oral submissions.¹⁵
18. In *Krajišnik*, the Amended Consolidated Indictment consists of 8 counts spanning eighteen months (July 1991 to December 1992).¹⁶ The Prosecution's case lasted approximately 178 days, 157 witnesses were called (including viva voce witnesses and Rule 92 bis witnesses),¹⁷ and the defence counsel was provided one month to prepare its Rule 98 oral submissions.¹⁸
19. In comparison, in *Prosecutor v. Sesay, Kallon & Gbao*, the trial, should it end on 3rd August 2006, will have lasted 188 days and the Prosecution will have called 85 witnesses (84 Prosecution witnesses) to bring evidence on an 18 count indictment, spanning 46 months (30th November 1996 – 15th September 2000).
20. It is the view of the Defence that the position in the instant case most resembles that of *Krajišnik* in terms of the length of trial and number of witnesses called (both of which impact on the volume of material that must be analysed for Rule 98 submissions). Nevertheless, the Defence believe that the limited jurisprudence provides no consistent pattern to guide the Trial Chamber and that one cannot determine the amount of time defence counsel should be provided to prepare its submissions based simply on the number of counts, how many witnesses were called, or how long the Prosecution's case lasted. This determination should be based on legitimate issues that defence counsel would like to raise. The amount

¹⁴ *Martić*, 9 September 2003, available at <http://www.un.org/icty/indictment/english/mar-2ai030909e.htm>

¹⁵ Prosecution evidence closed on 20 June 2006 (ICTY WEEKLY PRESS BRIEFING, 14 June 2006, available at <http://www.un.org/icty/briefing/2006/PB060614.htm>); the Rule 98 *bis* submissions began 26 June 2006 (OVERVIEW OF COURT PROCEEDINGS, Update No. 48, 30 June 2006, available at <http://www.un.org/icty/news/courtprocmain-e.htm>).

¹⁶ *Krajišnik*, 7 March 2002, available at <http://www.un.org/icty/indictment/english/kra-cai020307e.htm>.

¹⁷ *Krajišnik*, transcript, 19 August 2005, page 17118, lines 21-22.

¹⁸ *Krajišnik*, transcript, 16 August 2005, page 17063, lines 5-13.

of time provided should then be based on defence counsel's professional request for a reasonably adequate time to prepare its submissions.

Oral Hearings

21. Although we provide a suggestion, the Defence respectfully defers to the Chamber to set its own schedule with respect to the amount of time it will take to review the Prosecution concessions, the Defence submissions, and the Prosecution's submissions. The Defence expresses its hope that the Trial Chamber will provide suitable notice prior to the hearing for all interested parties to make appropriate travel arrangements to attend the hearings.
22. The Defence cannot now comment on the length of time it will take for all of its submissions to be heard at the oral hearing. This will be determined, in part, on the Prosecution's concessions. As soon as practically possible, the Defence will inform the Trial Chamber of the expected amount of time it will take to complete its oral submissions.

Decision

23. The Defence also respectfully defers to the Chamber to set its own schedule with respect to entering a Decision on the Rule 98 submissions.

PROPOSED TIMING AND SCHEDULING FOR IMPLEMENTING RULE 98

Sequence and length of argument and notice to the prosecution

24. It is suggested that the Defence provide time estimates prior to the oral arguments, rather than setting some specific time limit. It should be possible for each defence team to complete their submissions with half a day or at least a day, but much will depend on the evidence which needs to be referred to and the number of counts being addressed. In some cases there may be a need for reasonably extensive

reference to the evidence. The length of the process may also depend on the extent of intervention from the Trial Chamber.

25. The Defence has no objection to providing notice to the Prosecution of the nature of the arguments. This can be achieved by the submission of a draft skeleton argument on the dates indicated on the tables below.

Schedule in the event of Prosecution closing on 3 August 2006

26. In the event that the Prosecution case closes on 3rd August 2006, the Defence will require 8 weeks from the close of the Prosecution case (that is to say, 4 weeks from the end of the judicial recess) for the preparation of oral arguments. We request that the Defence case start in January 2007 so there should be no reason for undue delay arising out of the adoption of such a schedule.
27. The Defence is entitled to adequate time to prepare its case at all stages of the proceedings and it is suggested that this is not an unreasonable period having regard to the scope of the Prosecution indictment, the length of the prosecution case, the complexity of the evidence and the number of witnesses heard. While there is no need to wait an unreasonable time for such submissions, it is in the interests of justice to ensure that the Defence has adequate time. Properly prepared submissions if at least partially successful are likely to reduce the overall length of the trial by reducing the scope of the indictment which has to be met by Defence evidence.
28. The Defence envisages that their case will be prepared and ready to begin mid-January 2007 (e.g., Monday, January 16, 2007). The Defence foresees little impact on the preparation of the Defence case based on the outcome of the Rule 98 proceedings.

Proposed schedule (Prosecution case finishing on 3rd August 2006)

Prosecution case ends	3 rd August
Date of calculation	27 th August
Judicial Recess	4 th -27 th August
Invited Prosecution concessions	3 rd September (7 days)
Defence Skeleton and time estimate for oral hearing	25 th September (56 days for close of Pros case/ 28 days from end of judicial recess)
Prosecution Skeleton and time estimate	5 th October (11 days)
Status conference	9 th October
Hearing	10 th -12 th October
Status conference	15 th January
Start of defence case	16 th January

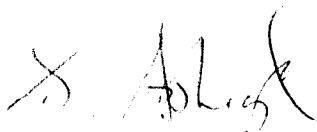
Scheduling in the event of the Prosecution case not finishing this session

37. In the event that the Prosecution case does not finish this session we invite the Trial Chamber to hold a further final session in the month of September (we propose the 7th to 19th September).
38. If faced with this situation, the Defence remains prepared to have the Rule 98 submissions in October 2006 as the outstanding evidence is only likely to consist of one or two witnesses and preparations for Rule 98 submissions can start between the end of the 8th trial session and the start of the 9th trial session. As such the Defence requests 21 days from the close of the Prosecution case in September 2006.
39. In any event the Defence is content to start the Defence case in January 2007, and it is submitted that what ever the scheduling for the Rule 98 submissions, this aim need not be prejudiced.

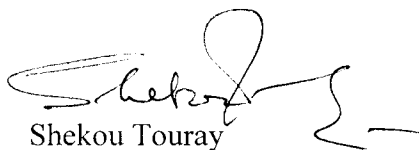
Proposed schedule (Prosecution case not closing on 3 August 2006)

	Scenario 1	Scenario 2
Prosecution case ends	8 th September	15 th September
Date of calculation	8 th September	15 th September
Judicial Recess	n/a	n/a
Invited Prosecution concessions	15 th September (7 days)	22 nd September (7 days)
Defence Skeleton and time estimate for oral hearing	29 th September (21 days)	6 th October (21 days)
Prosecution Skeleton and time estimate	6 th October (7 days)	13 th October (7 days)
Status conference	9 th October	16 th October
Hearing	10 th -12 th October	17 th -19 th October
Status conference	15 th January	15 th January
Start of defence case	16 th January	16 th January

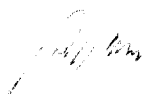
Dated 11th July 2006



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Book of Authorities

Cases

Prosecutor v. Krajišnik, IT-00-39&40.

Prosecutor v. Martić, IT-95-11.

Prosecutor v. Norman et al., SCSL-04-14-T.

Prosecutor v. Orić, IT-03-68.

Decisions and Orders

Prosecutor v. Orić, IT-03-68-AR73.2, "Interlocutory Decision on Length of Defence Case," 20 July 2005, paragraph 9.

Prosecutor v. Strugar, IT-01-42-T, "Decision on Defence Motion Requesting Judgment of Acquittal Pursuant to Rule 98Bis (TC)," 21 June 2004.

Rules

Rules of Procedure and Evidence of the Special Court for Sierra Leone, amendments adopted at Seventh Plenary, 13 May 2006.

Transcripts

Prosecutor v. Sesay et al., SCSL-04-15-T, Transcript, 19 June 2006, pages 21-25.

Prosecutor v. Orić, IT-03-68, 4 May 2005, page 7849-50; 1 July 2005, page 9051.

Prosecutor v. Krajišnik, IT-00-39&40, 17 May 2005, pages 13088-89, 16 August 2005, page 17063; 19 August 2005, page 17118.

Indictments

Prosecutor v. Krajišnik, "Amended Consolidated Indictment," 7 March 2002, available at <http://www.un.org/icty/indictment/english/kra-cai020307e.htm>.

Prosecutor v. Martić, "Amended Indictment," 9 September 2003, available at <http://www.un.org/icty/indictment/english/mar-2ai030909e.htm>

Prosecutor v. Orić, Third Amended Indictment," 30 June 2005, available at <http://www.un.org/icty/indictment/english/ori-3ai050630e.htm>.

Miscellaneous

ICTY WEEKLY PRESS BRIEFING, 14 June 2006, available at <http://www.un.org/icty/briefing/2006/PB060614.htm>).

OVERVIEW OF COURT PROCEEDINGS, Update No. 48, 30 June 2006, available at <http://www.un.org/icty/news/courtprocmain-e.htm>