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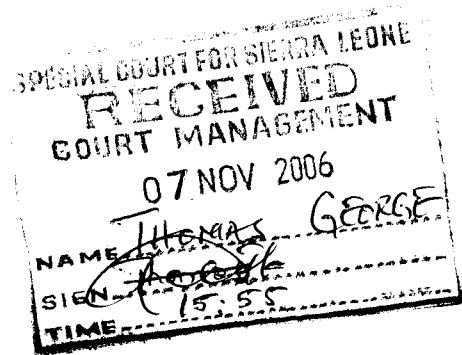
THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

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

Registrar: Mr. Lovemore Green Munlo, SC

Date filed: 7th November 2006



The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL - 04 - 15 - T

Public

SESAY DEFENCE REQUEST FOR CLARIFICATION ON RULE 98 DECISION

Office of the Prosecutor
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INTRODUCTION

1. On 25th October 2006, the Trial Chamber provided its oral decision¹ ("Decision") on the Rule 98 application on behalf of the RUF Accused.² The Rule 98 Decision did not explicitly address i) the significance of general paragraphs in the RUF Indictment (the "Indictment");³ ii) the probative value of evidence of crimes concerning locations not specifically pleaded in the Indictment; iii) the probative value of evidence of crimes in locations near to, or in the surrounding areas of, locations specified in the Indictment; or iv) the meaning of "approximate" temporal time periods pleaded in the Indictment, for example "about the month of February 1999"⁴ or "between 6 January 1999 and 28 February 1999."⁵
2. The Defence requests, following the ruling in *Prosecutor v. Norman et al.*,⁶ clarification concerning a) whether general paragraphs lacking particularization of specific criminal events in specific locations ought not to be struck from the RUF Indictment; b) the probative value, if any, of the evidence of events relating to locations not specifically pleaded in the Indictment; and c) whether evidence of crime in locations near to, or in the surrounding areas of, locations pleaded in the Indictment is probative of crime in the specified locations. The Defence also requests clarification concerning the meaning of the terms "about the month" and "between about [a date] and [a date]" as pleaded in the Indictment. In order to ensure the efficacious presentation of its case the Defence seeks clarification on these issues.

CLARIFICATION 1 – Consistent with *Norman*, should paragraphs lacking particularisation of specific criminal acts in specific locations be struck from the Indictment?

Generalised paragraphs

3. On 13th October 2003 the Trial Chamber ruled that the Indictment had to plead all the precise allegations against the accused.⁷ The Trial Chamber ruled that it was impermissible for the Prosecution to adduce evidence of specific crimes during the trial unless it had been precisely

¹ *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Transcript, 25 October 2006.

² *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Transcript, 16 October 2006.

³ *Prosecutor v. Sesay et al.*, SCSL-04-15-619, "Corrected Amended Consolidated Indictment," 2 August 2006.

⁴ RUF Indictment, Para. 60.

⁵ RUF Indictment, Para. 59.

⁶ *Prosecutor v. Norman et al.*, SCSL-04-14-550, "Decision on Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal Pursuant to Rule 98," 3 February 2006.

⁷ *Prosecutor v. Sesay*, SCSL-03-05-080, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment," 13 October 2003.

pleaded in the Indictment. Consequently, the Prosecution could, if it wished to rely upon other events, "provide in a Bill of Particulars specific events alleged against the Accused."

4. On 3rd November 2003 the Prosecution filed a Bill of Particulars purportedly representing that the Indictment and the Bill of Particulars specified the totality of criminal events alleged against the Accused.⁸ Similarly, as was the case with the Indictment in the CDF trial, the Indictment thus purported to be particularised to ensure that the Defence had notice of all the events alleged. The particularisation included the notification of specific crimes in specific geographic locations in support of general allegations.
5. In the CDF Indictment, paragraph 24(f) generally alleged unlawful killings during operation "Black December" in which the CDF "blocked all major highways and roads leading to and from major towns mainly in the southern and eastern Provinces. As a result of these actions, the CDF unlawfully killed an unknown number of civilians and captured enemy combatants".⁹ Paragraph 25(g) further specified the crimes alleged in Paragraph 24(f) by stating that: "between about 1 November 1997 and about 1 February 1998, as part of Operation Black December in the southern and eastern Provinces of Sierra Leone, the CDF unlawfully killed an unknown number of civilians ... in road ambushes at Gumahun, Gerihun, Jembah, and the Bo-Matotoka Highway."¹⁰
6. Gumahun, Gerihun, Jembah, and the Bo-Matotoka Highway were the only specific locations alleged as part of Operation Black December. In the CDF Rule 98 Decision, the Trial Chamber decided that there was no evidence adduced capable of supporting a conviction against the CDF Accused in these four locations.¹¹
7. The resulting Paragraph 25(g) contained only allegations of a general nature. No allegation concerning a specific event in a specific location remained. The Trial Chamber subsequently ruled that general allegations "would stand only if the specific allegations ... were sustained."¹² The Prosecution's argument that a paragraph in the indictment "is still in existence, except for the specific locations mentioned in the Disposition," failed.¹³ The Trial Chamber stated that:

⁸ *Prosecutor v. Sesay*, SCSL-03-05-084, "Bill of Particulars," 3 November 2003.

⁹ *Prosecutor v. Norman et al.*, SCSL-03-14-003, "Indictment," 4 February 2004.

¹⁰ *Id.*

¹¹ *Prosecutor v. Norman et al.*, SCSL-04-14-550, "Decision on Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal Pursuant to Rule 98," 3 February 2006, paragraphs 91-92.

¹² *Id.* at paragraph 9.

¹³ *Id.* at paragraph 11.

We therefore consider that the Prosecution is now estopped from expanding these particulars to include all other unspecified geographic locations on the major highways in the southern and eastern Provinces of Sierra Leone, as the Indictment in this respect is *unspecific and vague*.¹⁴

Paragraph 25(g) was therefore struck from the Indictment.

8. The Chamber thereby accepted the reasoning of the Defence for the first and second accused in the CDF trial that "an indictment must make clear the capacity in which it is alleged the accused committed offences and the material facts by which this will be established."¹⁵ The Chamber accepted the reasoning as expressed in, among other jurisprudence, *Prosecutor v. Kunarac and Kovac*: "The indictment must also leave no doubt as to what the accused is alleged to have done at a *particular venue* on a *particular date* during a particular time period, with whom, to whom, or to what purpose ..."¹⁶
9. In accordance with the foregoing, the Defence requests clarification on whether evidence of alleged crimes in locations not particularised specifically in the Indictment is evidence in support of the general paragraphs, or whether the Prosecution is estopped from expanding these particulars (by the introduction of evidence) to include other unspecified geographic locations.¹⁷ If the Prosecution is estopped, clarification is sought concerning whether paragraphs 58, 60, 67, 68, 73, 74, and 83 ought to be struck from the RUF Indictment.

Examples of the Generalities in Paragraphs 58, 60, 67, 68, 73, 74, and 83 of the Indictment

10. Paragraph 58 of the RUF Indictment, Counts 6-9, Kailahun District, generally alleges that women and girls were "brought to AFRC/RUF camps in the District." No specific events in any specific locations are averred. Paragraph 60 of the RUF Indictment, Counts 6-9, Port Loko

¹⁴ *Id.* at paragraph 8; emphasis added.

¹⁵ *Prosecutor v. Norman et al.*, SCSL-04-14-477, "Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal Pursuant to Rule 98," 27 October 2005, page 2.

¹⁶ IT-96-23&23/1, "Decision on the Form of the Indictment," 4 November 1999, paragraph 6; emphasis added. It is submitted that this is trite law and echoed in every relevant decision in cases at the ICTR and the ICTY. *See*, for example: *Prosecutor v. Sylvain Nsabimana*, Case No. ICTR-97-29A-T, "Decision on the Defence Motion for the Amendment of the Indictment, Withdrawal of Certain Charges and Protective Measures for Witnesses," 9 July 1998, which *inter alia* stated "The Trial Chamber has read the concise statement of facts in this indictment. We underscore the need to have the precise statement of facts correspond to and explain the specific charges. The Prosecutor should also ensure that the facts used as a basis for the charges are clear enough so that the accused will not have to refer to the witness statements."

¹⁷ The Defence accepts that such evidence might be relevant to the Indictment, for example as explanatory evidence, but without prior particularisation of the specific allegation in the Indictment, the Prosecution is estopped from expanding the general paragraphs to include any other unspecified location.

District, generally alleges that women and girls "in various locations in the District" were used raped, used as sex slaves, and/or subjected to other forms of sexual violence. No specific events in any specific locations are averred. Paragraph 67 of the RUF Indictment, Counts 10-11, Port Loko District, generally alleges, "members of the AFRC/RUF mutilated an unknown number of civilians in various locations in the District, including, cutting off limbs." No specific events in any specific locations are averred. Paragraph 68, Count 12, generally alleges that "[m]any [boys and girls under the age of 15] were first abducted, then trained in AFRC/RUF camps in various locations throughout the country, and thereafter used as fighters." No specific events in any specific locations are averred. Paragraph 73 of the RUF Indictment, Count 13, Bombali District, generally alleges, "members of the AFRC/RUF abducted an unknown number of civilians and used them as forced labour." No specific events in any specific location are averred. Paragraph 74 of the RUF Indictment, Count 13, Kailahun District, generally alleges, that civilians were captured and "brought to various locations within the District and used as forced labour." No specific events in any specific locations are averred. Paragraph 83, Counts 15-18, generally alleges "the AFRC/RUF engaged in ... unlawful killings of UNAMSIL peacekeepers, and abducting hundreds of peacekeepers and humanitarian assistance workers who were then held hostage." No specific events in any specific locations are averred.

11. The Defence submits, in light of the Trial Chamber's reasoning in *Norman*, that the aforementioned paragraphs¹⁸ are "unspecific and vague" and the Prosecution ought to be estopped from expanding their general pleading to include other unspecified events in other geographic locations within the District alleged. The Accused in the RUF case are entitled to exactly the same protection from unspecific and vague pleading as enjoyed by the CDF Accused.
12. It is submitted that logic and sound judicial policy dictates that generalised paragraphs, unsupported by specific allegations, be struck out from an indictment. The alternative would be to create legal precedent in favour of pleading indictments without specific allegations. This would be contrary to all International Criminal Tribunal precedent. It would be an invitation to unprincipled Prosecutors to circumvent the Rule 98 procedure by pleading indictments lacking specificity whilst relying upon evidence to particularise (and thereby expand) the general

¹⁸ The same could also be argued in relation to Paragraph 64 if the evidence of TF1-272 and TF1-117 is deemed insufficient to sustain a conviction. In the event that Kabala is struck out of Paragraph 64 of the Indictment (as unsupported by sufficient evidence) there remains no specific locations in the paragraph. Paragraph 64 would thus be struck out. *See* paragraphs 17-20 of this Request, *infra*.

paragraphs. The Rule 98 procedure would be rendered nugatory and indictments lacking specificity would become the norm.

CLARIFICATION 2 – what is the probative value, if any, of the evidence of events relating to locations not specifically pleaded in the Indictment?

13. The Decision ought to have provided the Defence with clear notice concerning which allegations the Defence needs to address in the presentation of its defence. In relation to the paragraphs in the Indictment where specific crimes have been alleged in specific locations, the Rule 98 procedure provided the Defence with an opportunity to challenge the sufficiency of evidence in relation to *those* events. In these instances, the Rule 98 procedure was a meaningful enquiry into the sufficiency of evidence in relation to an alleged event in a specific location. The Decision provided the Defence with a clear indication of the specific events which must be addressed during the presentation of its case.
14. However, in relation to paragraphs that generally allege crimes without specifying locations (for example, Paragraphs 58, 60, 67, 68, 73, 74, and 83) and evidence of events in locations not particularised in the Indictment, there could be no meaningful testing of the sufficiency of the evidence in relation to the charges in the Indictment. The Rule 98 enquiry was reduced to the mere assessment of whether in relation to a broad category of alleged criminal events (the generalized paragraphs), the Prosecution had adduced any *prima facie* evidence of a corresponding unlawful event. Thus, in relation to the majority of the Prosecution evidence, there was no assessment of the sufficiency of the evidence relating to specific events in specific locations. The Defence, through the Prosecution's failure to particularize the Indictment to reflect actual events in actual locations, was deprived of a Rule 98 mechanism by which it could challenge the sufficiency of evidence in relation to most of the specific allegations. Consequently, the Defence has been deprived of a meaningful indication of which specific allegations it has to address in the presentation of its case or, conversely, when it can safely maintain its right to silence.

Rule 98: providing illusory or real rights?

15. The Defence attempted to argue the insufficiency of evidence in relation to a specific allegation of crime (*see* Confidential Annex A of *Sesay Request*)¹⁹ but the Prosecution, relying on their failure to plead this allegation, argued that the Defence was not permitted to request that the Trial Chamber consider the sufficiency of evidence in relation to specific allegations of crime unless the allegation had been pleaded in the Indictment.²⁰ The Trial Chamber appears to have agreed with this submission and declined to address the challenge in its Decision.
16. On the other hand, the Trial Chamber in the CDF Rule 98 Decision made clear that the purpose of Rule 98 was to rule on "whether the Prosecution had put forth a case sufficient to warrant the defence being called upon to answer it."²¹ The Defence was therefore given a legitimate expectation that, through the Decision, it would benefit from a clear indication concerning which allegations could sustain a conviction and which could safely be ignored. This is not a dry academic question – it relates to the Accused's right to remain silent - enshrined in Article 17(g) of the Statute as the right not to be compelled to testify against himself or herself.²² Without a clear indication of the sufficiency of evidence in relation to each factual allegation, the Accused is effectively deprived of this minimum guarantee. It is submitted therefore that there is a pressing need for clarification as to whether this evidence is admissible in support of the general allegations or whether, consistent with the ruling in the *Norman* case, the Prosecution are to be estopped from using it to expand their particulars.

¹⁹ *Prosecutor v. Sesay*, SCSL-04-15-655, "Sesay Defence Team Request for Consideration of Additional Locations When Considering the Sesay Rule 98 Motion," 19 October 2006.

²⁰ *Prosecutor v. Sesay*, SCSL-04-15-656, "Response to the Sesay Request for Consideration of Additional Locations Relevant to the Rule 98 Motion and Regarding Another Allegation Filed on a Confidential Basis," 20 October 2006, paragraphs 3-5.

²¹ *Prosecutor v. Norman et al.*, SCSL-04-14-473, "Decision on Motions for Judgment of Acquittal Pursuant to Rule 98," 21 October 2005, paragraph 39, citing *Prosecutor v. Kordic*, IT-94-14-/2, "Decision on Defence Motions for Judgment of Acquittal," 6 April 2000, paragraph 11.

²² Judge Agius, speaking about the amendments to Rule 98 in the ICTY in *Prosecutor v. Oric*, IT-03-68-T, Trial Transcript, 4 May 2005, pages 7848-49, stated that "Basically, the whole idea behind – the ratio [sic] behind the creation or the insertion of our rules of Rule 98 *bis* in its original form was the following: that the accused has a right to remain silent, and if the Prosecution has in regards – relation to any particular count not brought forward evidence which is sufficient to sustain a conviction later on, then the accused should not be put in a position where he has to defend himself in any way."

CLARIFICATION 3 – Is evidence of crimes in locations near to, or in the surrounding areas of, locations specified in the Indictment, probative of specific allegations of crimes in the specified locations?

For example: Kabala, Counts 10-11

17. The Decision relied upon the testimony of TF1-272 and TF1-117 and concluded that this evidence was sufficient to sustain a conviction on Counts 10-11 in Kabala.²³ The Defence submits that the evidence from these two witnesses points unambiguously to the crime of mutilation (falling within Counts 10-11) occurring in One Mile and not Kabala. Kabala is specified in the Indictment whereas One Mile is not.²⁴ It would appear that the Trial Chamber, in their assessment of this evidence, have regarded specific evidence of crime within One Mile as probative of specific crime in Kabala.
18. On page 11 of TF1-272's testimony, the witness stated, "58 patients had been admitted [to the hospital] the night before, of which *a number* had been amputated, lacerated and seriously wounded and the patients were in need of further follow-up and medical care."²⁵ TF1-272 did not state that any of the patients had been mutilated in Kabala. TF1-272 described patients, some of who were mutilated in locations other than Kabala, arriving at the hospital.²⁶ The only reference to patients coming from Kabala was an assertion by TF1-272 to the effect that patients had been picked up by helicopter in Kabala.²⁷ Clearly this evidence could not sustain an inference that the "patients" had been amputated in Kabala. It is evidence of the patients' presence in that location sometime after the amputation. It is evidence that a helicopter was chartered to a location to pick up amputees. It does not, without more, speak to the precise location where the injury was sustained.
19. The Defence submits that any inference, which might arise, from the evidence of TF1-272 (to the effect that amputations occurred in Kabala) is wholly undermined by the evidence of TF1-117. TF1-117's evidence is unambiguous in stating that amputations occurred at One Mile and not in

²³ Decision, page 28.

²⁴ See Paragraph 64 of the Indictment.

²⁵ *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Transcript, 5 July 2005, page 11; emphasis added.

²⁶ *Ibid.* See, for example, page 55.

²⁷ *Ibid.* at pages 57-58. "[W]e chartered a helicopter [to Kabala] to pick up patients because there was no other transport. We picked up six injured women. All six of them left arm amputated, including the daughter of one of the women. She was a six-year-old girl. A six-year-old girl had been amputated left arm as well."

Kabala.²⁸ The Defence submits that a fair minded observer, considering the evidence of TF1-117, either in isolation or in conjunction with the evidence of TF1-272, would conclude that the available evidence points to amputations occurring in One Mile and not Kabala. The Defence therefore seeks clarification on how the Trial Chamber arrived at the conclusion that the evidence of TF1-272 and TF1-117 was sufficient to sustain a conviction based upon amputations occurring in Kabala. The Defence seeks clarification on whether the Trial Chamber, in its assessment of the evidence, used the evidence of crime in one nearby location as evidence of crime in another. This clarification will assist the Defence in ensuring it understands the case it must meet (in relation to all locations specified in the Indictment) and is therefore in the interests of fairness and judicial economy.

20. The clarification is crucial to an understanding of the approach to the evidence taken by the Trial Chamber since, *prima facie*, the underlying reasoning is inconsistent with the approach taken in *Norman*.²⁹ In *Norman*, the Trial Chamber stated that only *precise* allegations were permissible and would be reviewed against each Accused.³⁰ The Chamber unambiguously stated that, "when applying the Rule 98 standard to the charges against the Accused, as set forth in the Indictment, it reviewed only the precise allegations against each Accused, and excluded from consideration, broad phrases such as, 'and surrounding areas,' in relation to the pleading of areas where such crimes were allegedly committed."³¹ In other words, the Chamber implicitly stated that it would consider only specific evidence in specified locations. It follows as a matter of consistency that allegations of amputations occurring in One Mile ought not to be regarded as support for allegations that amputations occurred in Kabala.

²⁸ Q. Can you describe in terms of distance where One Mile was or is in Kabala?

A. One Mile is when you are entering Kabala. That is the first place you will get to *before you enter* Kabala Town. (*Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Transcript, 29 June 2006, page 111; emphasis added)

And:

Q. So captured civilians at Bauya One and Bauya Two. What did you do with those civilians you captured?

A. *We came with them to One Mile* and lined them up.

Q. What happened after that?

A. Then we began to cut their hands, one by one. (Ibid. at 112; emphasis added)

²⁹ *Prosecutor v. Norman et al.*, SCSL-04-14-550, "Decision on Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal Pursuant to Rule 98," 3 February 2006.

³⁰ *Id.* at paragraph 5.

³¹ *Id.*

CLARIFICATION 4 – what is the meaning of the terms “about the month” and “between about (a date) and (a date)” as pleaded in the Indictment?

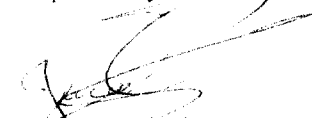
For example: Lunsar, Count 13

21. Paragraph 76 of the Indictment, *inter alia* alleges “[a]bout the month of February 1999 [after] the AFRC/RUF fled from Freetown”³² members of the AFRC/RUF used civilians as forced labour in Lunsar. The Decision relied upon the testimony of TF1-255 and concluded that this was sufficient to sustain a conviction on Count 13 in Lunsar. The Defence notes that TF1-255 testified that four days after Chendekom was first attacked on 29th May 1999,³³ he was captured³⁴ by rebels who came from the Masiaka end.³⁵ Subsequently, TF1-255 was taken to Lunsar by his captors³⁶ and was held by his captors for ten days.³⁷ TF1-255 agreed that he was in Lunsar in June 1999³⁸ before he escaped. The Defence submits that the 29th May 1999 could not reasonably equate to the time period envisaged by the term “about the month of February 1999.” The Defence therefore seek clarification from the Trial Chamber as to the definition applied to the term “about the month of February 1999” and the term “between about [a date] and [another date].”³⁹ These terms are employed throughout the Indictment and the Defence would be assisted in the preparation of its defence with a clear indication of the meaning of these terms.

REQUEST

22. The Defence respectfully requests clarification on the above points.

Respectfully submitted,


Wayne Jordash
Sareta Ashraph

³² RUF Indictment, paragraph 76.

³³ *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Transcript, 18 July 2006, at pages 69-70.

³⁴ *Ibid.* at page 74.

³⁵ *Ibid.* at page 72.

³⁶ *Ibid.* at pages 97-98.

³⁷ *Ibid.* at page 108.

³⁸ *Ibid.* at pages 111-112.

³⁹ For example Para. 62 of the RUF Indictment, which states “Between about 14 February and 30 June 1998.”

BOOK OF AUTHORITIES

Decisions

Prosecutor v. Sylvain Nsabimana, Case No. ICTR-97-29A-T, “Decision on the Defence Motion for the Amendment of the Indictment, Withdrawal of Certain Charges and Protective Measures for Witnesses,” 9 July 1998.

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