SCSL-04-15-T
(25510-25519)

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THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

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

Registrar: **Mr. Lovemore Green Munlo, SC**

Date filed: **16th November 2006**

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 04 – 15 – T

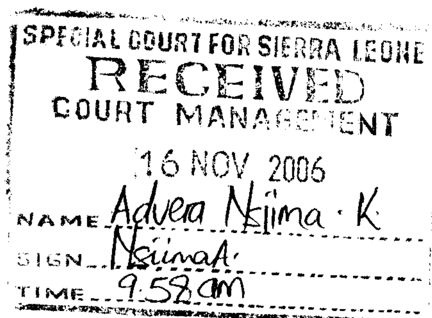
PUBLIC

DEFENCE REPLY TO PROSECUTION RESPONSE FOR CLARIFICATION ON RULE 98 DECISION

Office of the Prosecutor
Christopher Staker
Peter Harrison
Shyamala Alagendra

Defence
Wayne Jordash
Sareta Ashraph

Defence Counsel for Kallon; Shekou Touray and Charles Taku
Defence Counsel for Gbao; Andreas O'Shea and John Cammegh



Introduction

1. On 13th November 2006 the Prosecution filed a Response ("The Response") to the "Sesay Defence Request for Clarification on the Rule 98 Decision" ("The Motion"). The Defence herein files its Reply.

2. The Prosecution's suggestion that "neither the Defence nor the Trial Chamber raised this issue in the Rule 98 proceedings, and there is accordingly nothing that was said in the Rule 98 Decision of any relevance to this question that could be clarified"[1] is puzzling. If what is being suggested is that no issue of clarification could arise from legal argument unless it had been specifically raised during the argument then clearly this is mistaken. There are many reasons why clarification is not sought during actual argument, not least of which is that the issue is not immediately apparent. A point of clarification cannot be raised until it arises or is apparent. In any event if an issue of clarification arises, which goes to the fairness of the proceedings, a party ought not to be estopped from raising it because it was not raised previously, especially absent a positive duty to do so.[2]

3. The Prosecution's Response, in seeking to characterise the Defence Motion, as a "new and independent motion alleging defects in the form of the indictment"[3] is unhelpful. It is clearly in the interests of justice to raise issues of consistency (with the ruling in *Norman et al.*[4]) (hereinafter the *Norman Decision*) when the issue arises. It is self evident that this clarification could not have been sought until the Rule 98 oral decision on behalf of the RUF Accused had been delivered on the 25th October 2006. It is in the interests of judicial economy and fairness to both parties that any perceived or actual

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[1] Para. 5 of the Response.

[2] See Prosecutor v. Oric. IT-03-68-T, Transcript of 4th May 2005, page 7853, Judge Agius noting that Rule 98 procedure is no longer party driven.

[3] Para. 6 of the Response.

[4] 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," 3rd February 2006.

inconsistency (and the consequences thereof) is dealt with at the time it arises. There is little, but old fashioned formalism, to suggest that a remedy, if required, should not be fashioned expeditiously.

4. Even if the Motion could be interpreted as concerning the same, or similar, issues as would be found within a motion alleging defects in the form of the indictment, this does not prevent the Trial Chamber from dealing with the issues raised. In the *Norman Decision* the Trial Chamber felt constrained, in order to provide the Defence with information which would assist in ensuring a refined presentation of their case, to clarify the Indictment. In the circumstances this involved a striking out of Paragraph 25(g) of the Indictment. The fact that the "striking out" remedy is one of the remedies available in the event of a successful application alleging defects in the indictment did not prevent the Trial Chamber from concluding that the paragraph should be struck out from the Indictment as "unspecific and vague".[5] The Defence Motion - Clarification I and II – seeks, consistent with the *Norman Decision*, clarification that the RUF Indictment will benefit from the same relief.

Requested Clarification 1

5. The Prosecution claim that there is no inconsistency with the *Norman Decision* because "the subsequent decision in question concerned a paragraph in the indictment in the CDF case that alleged unlawful killings in four specified locations only, and did not allege such killings in any other place".[6] The Defence submits that this reasoning misrepresents the reality of the situation. Whilst it is correct that the Prosecution accepted that Paragraph 25(g) only alleged killings in four specified locations they also attempted to

[5] Para. 8 of the Response.
[6] Para. 15 of the Response.

suggest that they had always intended that the accompanying general Paragraph 24(f), should incorporate other "killings or other unlawful acts committed as part of Operation Black December in the southern and eastern Provinces of Sierra Leone".[7] At that time, in pursuit of a different cause, the Prosecution sought to persuade Trial Chamber I that this pleading was sufficiently "clear and precise for the preparation of the Defence case" in relation to these other unspecified additional killings and unlawful acts.

6. The Trial Chamber disagreed finding the indictment "in this respect is unspecific and vague"[8] and as a consequence the Prosecution were "estopped from expanding the particulars to include all other unspecified locations on the major highways in the southern and eastern Provinces of Sierra Leone".[9]

7. It follows that if the geographical specification, expressed in 24(f) as being limited to *only* the major highways in the southern and eastern Provinces of Sierra Leone, is vague and unspecific, then the significantly larger geographical locations specified in Paragraphs 58, 60, 67, 68, 73, 74, and 83 of the RUF Indictment are equally impermissible. When the Trial Chamber decided that the Prosecution's pleading in the *Norman* case, concerning allegations of crime on the major highways in the southern and eastern Provinces of Sierra Leone, provided the Accused with too little information to be able to prepare the Defence, it is reasonable to infer that it was intended that the ruling be of general application. Clearly, pursuant to Article 17(1) of the Statute of the Special Court, each Accused is entitled to equality before the Tribunal.

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[7] See Prosecution Response to Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal Pursuant to Rule 98," SCSL-04-14-T-459, 4th November 2005, at Para. 10.

[8] *Norman Decision*, Para. 8.

[9] *Ibid* Para. 8.

8. It follows that the ruling and the underlying reasoning must be applied to Paragraphs 58, 60, 67, 68, 73, 74, and 83 of the RUF Indictment. The Defence therefore seeks clarification that this is indeed the position.

Requested Clarification II

9. It follows from the *Norman Decision* that the Prosecution ought to be estopped from expanding their particulars to include all other unspecified geographic locations. This was the consequential effect of the vague and unspecific pleading – as found by Trial Chamber I – in the *Norman* case. The Defence seeks clarification concerning whether the ruling applies to the RUF case.

10. It is submitted that this clarification would also be consistent with the Prosecution's pleading of locations throughout the indictment. It is instructive to observe that throughout the indictment the Prosecution's pleading alleges crimes "in various locations in the District, including [location/s]"[10] or "throughout the District including [location/s]" or "in [District] including [location/s][11] or "in locations including [location][12] etc. The one exception to this is paragraph 83 of the Indictment wherein the Prosecution alleges crimes in locations "including but not limited to [particular Districts]". It must be presumed, in the absence of any other reasonable inference, that the Prosecution intended the difference in pleading and intended paragraph 83 *alone* to extend to allege criminal acts in locations other than those specifically particularised.

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[10] For example Para. 55.
[11] For example Para. 57.
[12] For example Para. 47.

Requested Clarification III

11. The Prosecution's interpretation of the evidence given by TF1-117 and TF1-272 is ambitious. The fact remains that in order to conclude that TF1-117 "refers to One Mile as part of Kabala"[13] the Prosecution have to omit to mention, or close their eyes to, the only piece of evidence that deals with the precise location of One Mile. The witness's evidence speaks for itself,

"One Mile is when you are entering Kabala. That is the first place you get to before you enter Kabala Town".[14]

12. The Prosecution's approach thus demonstrates the paucity of evidence pointing to One Mile being within Kabala. It is submitted that this evidence could not properly sustain a conviction based upon TF1-117 amputating the hands of civilians in Kabala *unless* the Trial Chamber regarded evidence of amputations within One Mile as evidence of amputations within Kabala. In order to arrive at this conclusion the Trial Chamber must have taken an approach that provides Prosecution witnesses with a degree of latitude in their attesting to events in specific locations. In other words the Trial Chamber's assessment of the evidence, notwithstanding the burden of proof, would appear to allow evidence of crime in one place to be probative of evidence in another *providing* the two places are sufficiently close to each other. This is highly relevant to the case the Defence must meet. The Defence therefore seeks clarification on this issue; namely if the Prosecution have adduced sufficient evidence of crime in one location, do the Defence have to consider presenting evidence in rebuttal in relation to nearby locations as per the example of One Mile and Kabala?

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[13] Para. 21 of the Response.
[14] Prosecutor v. Sesay et al. SCSL – 04-15-T, Trial Transcript 29th June 2006, page 111.

Requested Clarification IV

13. The Prosecution's Response in Paragraph 23, wherein they assert that the clarification sought is "too abstract to be capable of a general answer" is misconceived. The Defence have to be provided with a degree of certainty concerning the meanings of time frames within the Indictment. The issue is not, as is suggested, what is the meaning of "at all time relevant to the Indictment" but how far, if at all, outside the approximate dates specified in Indictment, do the Defence have to focus to rebut the case against the Accused. Clearly the Prosecution believe it is in their interests to keep the dates (and the Indictment as a whole) as unclear and as malleable as possible thus enabling them to continue to create their case as they go along. This is unfortunate and creates bad law.

14. If the Prosecution's latest stance is correct, which is not accepted, and paragraph 76 does not allege the crimes to which it relates occurred "About the month of February 1999 (and) … (t)he relevant time is provided in paragraph 69, namely all times relevant to this Indictment" then this fact alone illustrates the peril of this Indictment. The Defence had not discerned this meaning from the Indictment. Mr Sesay thus risks being convicted, not because he is guilty, but because the Indictment is insufficiently clear.

15. The Prosecution submissions appear to suggest that the Defence should have known that "about the month of February 1999" applied only to the allegation that the AFRC/RUF fled from Freetown. However in their 2004 Pre-trial Brief the Prosecution expressed their case, in relation to Paragraph 76, rather differently,

"During February 1999 members of the AFRC/RUF used civilians, including those abducted from Freetown and the Western Area, as forced labour within

Port Loko District. The AFRC/RUF also abducted civilians from Port Loko District and used them as forced labour (refer paragraph 76)."[15]

16. It is trite law in International Tribunals that there is an absolute obligation on the Prosecution to set out with detailed particularisation, either in the indictment[16] or the Pre-trial Brief[17] the facts, which form the basis of the case against the Accused. The Prosecution's Pre-trial Brief in the RUF case, whilst lacking any mention or reference to the vast majority of the factual allegations subsequently adduced as part of the Prosecution case, did express a degree of specificity in relation to the dates pleaded on the Indictment. The dates referred to in the Pre-trial Brief (which are referable to specific paragraphs in the Indictment) are referred to with a degree of exactitude lacking in all other instances. For example the case against the Accused, which is pleaded to allege unlawful killings in Bo "Between about 1 June 1997 and 30 June 1997" (refer paragraph 46) is particularised in the Pre-trial Brief as "In June 1997".[18] Similarly the case against the Accused, which is pleaded to allege unlawful killings in Kailahun "Between about 14 February 1998 and 30 June 1998" (refer paragraph 49) is particularised in the Pre-trial Brief as "Between 14 February 1998 and 30 September 1998"[19].

17. It follows that the Prosecution ought not to be permitted to mislead the Defence or to change their case mid stream to obtain unfair advantage. It follows that the Indictment ought not to be interpreted by the Trial Chamber

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[15] Prosecution Supplemental Pre- Trial Brief Pursuant (1617 – 2033), 21st April 2004, pp. 171, Para. 521.
[16] Prosecutor v. Bizimungu et al, Case No. ICTR-99-50-T, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAB, GKC, GKD and GFA, 23rd January 2004, para. 14.
[17] Prosecutor v. Krajisnik, Case No. IT-0039 & 40, Decision Concerning Preliminary Motion on the Form of the Indictment, 1st August 2000, para. 13.
[18] See pp.1624 of the Pre-trial Brief at Para. 19.
[19] See Pre-trial Brief pp.1633 at Para. 43. See also for example: pp. 1636 Para. 51 (refer paragraph 50 of the indictment), pp. 1638 Para. 59 (refer paragraph 51 of the indictment), pp.1641 Para. 67 (refer paragraph 52 of the indictment), pp.1645 Para. 75 (refer paragraph 53 of the indictment), pp. 1647 Para. 84 (refer paragraph 55 of the indictment), pp. 1650 Para. 92 (refer paragraph 56 of the indictment) and pp. 1652 Para. 100 (refer paragraph 57 of the indictment).

to permit a wider temporal jurisdiction than was particularised in the Prosecution's Pre-trial Brief. The Defence submits that it is vital to the fairness of the trial that the Prosecution be estopped from expanding Paragraph 76 (or any other paragraph in the Indictment) in the way sought.

18. The Prosecution submissions highlight the very real dangers faced by the Accused in the absence of the clarification requested. In light of the Prosecution's assertion in their Pre-trial Brief that their case was that the abductions and forced labour took place in Port Loko *during* February 1999 the Defence are entitled to clarification since *prima facie* the Trial Chamber in its Rule 98 Decision interpreted the term "about the month of February 1999" in a way which was not only incompatible with the Prosecution's own stated case, but in a way which created a significantly wider liability.

19. The Defence are entitled to some clarity concerning the likelihood of this possibility occurring in relation to other paragraphs of the Indictment and concerning the breadth of the case it must meet in the presentation of the defence.

REQUEST

The Defence respectfully requests clarification on the points raised in the Motion.

The Defence also requests that the Prosecution be estopped from their attempt to "amend" the Indictment by widening any temporal jurisdiction within the Indictment from that expressed in their Pre-trial Brief in 2004.

Respectfully submitted,

Wayne Jordash
Sareta Ashraph

BOOK OF AUTHORITIES

Decisions

Prosecutor v. Krajisnik, Case No. IT-0039 & 40, "Decision Concerning Preliminary Motion on the Form of the Indictment," 1st August 2000.

Prosecutor v. Bizimungu et al., Case No. ICTR-99-50-T, "Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAB, GKC, GKD and GFA," 23rd January 2004.

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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," 3rd February 2006.

Motions and Requests

Prosecutor v. Norman et al., SCSL-04-14-T-459, "Prosecution Response to Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal Pursuant to Rule 98," 4th November 2005.

Prosecutor v. Sesay, SCSL-04-15-T, "Sesay Defence Request for Clarification on Rule 98 Decision," 7th November 2006.

Prosecutor v. Sesay, SCSL-04-15-T, "Prosecution Response to Sesay Defence Request for Clarification on Rule 98 Decision," 13th November 2006.

Trial Transcripts

Prosecutor v. Sesay et al., SCSL – 04-15-T, Trial Transcript, 29th June 2006.

Indictments and Particulars

*Prosecutor v. Sesay et al.,*SCSL-04-15-T, Prosecution Supplemental Pre- Trial Brief Pursuant (1617 – 2033), 21st April 2004.