SCSL-04-14-T
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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Interim Registrar: Mr. Lovemore Munro

Date filed: 4 November 2005

THE PROSECUTOR **Against** **Samuel Hinga Norman**
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

PROSECUTION REPLY TO DEFENCE RESPONSE TO APPLICATION FOR LEAVE TO APPEAL *PROPRIO MOTU* FINDINGS IN DECISION ON MOTIONS FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 98

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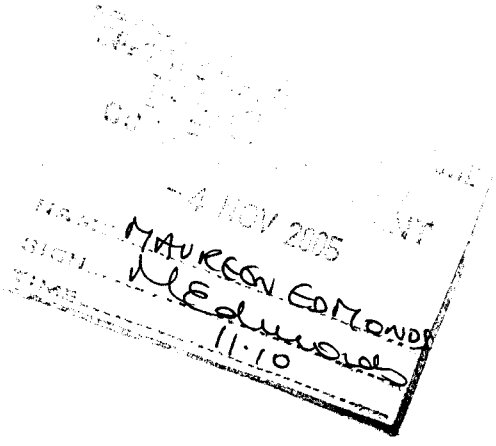

I. INTRODUCTION

1. The Prosecution files this Reply to the Joint Defence Response to Prosecution Application for Leave to Appeal *Proprio Motu* Findings in Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, filed on 1 November 2005 ("Defence Response").[1]

2. In its Response, the Defence agrees with the Prosecution, in principle, that the failure to provide any party with the opportunity to be heard potentially threatens the cause of justice and clearly amounts to exceptional circumstances.[2] However, the Defence argues that the Prosecution has failed to demonstrate the existence of any actual danger of irreparable prejudice and that therefore the twin requirements for the granting of leave to appeal under Rule 73(B) of the Rules of Procedure and Evidence ("Rules") have not been met.

II. ARGUMENTS

Exceptional Circumstances

3. Since Prosecution and Defence agree that exceptional circumstances exist, the Prosecution makes no further arguments on this point. Indeed, paragraphs 9-13 of the Defence Response bolster the arguments of the Prosecution and demonstrate that the issue of the right to be heard is of fundamental importance to Prosecution and Defence alike.

Irreparable Prejudice

4. In paragraph 16 of its Response, the Defence argues that the danger articulated by the Prosecution in its application[3]—namely, that the right to be heard in this instance will impact the availability of the right in other instances—is a "hypothetical danger" and one that is not likely to manifest itself again. The Prosecution submits that by expounding on the principle of the right to be heard in paragraphs 9-13 of the Response, the Defence has itself recognized a danger that the right to be heard could be overlooked in the future, perhaps to the disadvantage of the Defence. As the Defence Response itself states, "The

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[1] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-478, "Joint Defence Response to Prosecution Application for Leave to Appeal *Proprio Motu* Findings in Decision on Motions for Judgment of Acquittal Pursuant to Rule 98", 1 November 2005 ("Defence Response").
[2] Defence Response, para. 3.
[3] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-473, "Decision on Motions for Judgment of Acquittal Pursuant to Rule 98", 21 October 2005.

issuance of judicial orders without the input of the parties is a dangerous approach and should never be the practice of any tribunal".[4] A decision of the Appeals Chamber would assure both parties of their rights and the scope of those rights in future proceedings. More specifically, in the absence of such a decision, the Prosecution submits that in future responses to motions pursuant to Rule 98 presented by the Defence, it will need to set out all the evidence in the case to avoid the risk of being prejudiced by a *proprio motu* decision of the Trial Chamber, requiring a generous page limit. The situation of uncertainty that has been created, the consequent additional or premature work involved in setting out all the evidence, and the possible dragging out of the Rule 98 process, creates a real danger of irreparable prejudice.

5. In paragraph 17 of the Response, the Defence submits that there was no evidence presented with respect to the relevant locations and therefore no prejudice resulted from their removal from the Indictment. The Prosecution submits that the question whether there is or is not evidence is not a matter for the current application. The crucial point for the purposes of the current application is that the Prosecution has not been afforded the opportunity, pursuant to a clearly established right to be heard, to present what it believes is the evidence that the Trial Chamber should have taken into account before reaching its decision.

6. As stated in paragraph 10 of its Application for Leave to Appeal[5], the Prosecution believes, particularly in relation to at least four of the locations, that it has presented evidence capable of supporting a conviction under the Rule 98 standard, according to which a judgment of acquittal shall be entered where there is "*no evidence capable of supporting a conviction* [...]".

7. In relation to Panguma, near Tongo, the Prosecution would rely on the testimony of Witness TF2-079 and Witness TF2-144. In relation to Sembehun, Moyamba District, the Prosecution would rely on the testimony of Witness TF2-073. In relation to Gerihun (Black December Highway Ambushes), the Prosecution would rely on the testimony of

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[4] Defence Response, para. 12.
[5] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-476, "Prosecution Application for Leave to Appeal *Proprio Motu* Findings in Decision on Motions for Judgment of Acquittal Pursuant to Rule 98", 24 October 2005, ("Application for Leave to Appeal").

Witness TF2-014. In relation to Blama, Kenema District, the Prosecution would rely on the testimony of Witness TF2-041. In respect of these four locations in particular, the Prosecution submits that since there is, in the Prosecution's view, evidence of a sufficiency to satisfy the Rule 98 standard, it has suffered irreparable prejudice.

8. The Defence submits additionally in paragraph 17 that it would be within the purview of the Appeals Chamber to decide in a post final judgment appeal that the Prosecution had submitted sufficient evidence with respect to the relevant locations. The Prosecution disagrees that the matter could be dealt with in a final appeal. What the Defence appears to be suggesting is that the Prosecution could bring the proposed appeal against the Decision on Motions for Judgment of Acquittal after the Trial Chamber's final judgment has been given. If that occurred, and if the Prosecution's appeal against the Decision were to succeed at that stage, the result would be that the Accused would have a case to answer in respect of the geographic locations that were the subject of the appeal. This would mean that there would then be a need for a subsequent trial on those geographical locations, followed possibly by a further appeal against the subsequent judgment of the Trial Chamber. It would be impractical to leave the matter for this late stage and unrealistic to expect the Appeals Chamber to order a re-trial only on the relevant geographical locations. A re-trial would result in delays and impact upon the successful and timely completion of the Special Court's mandate.

9. In paragraph 18 of the Response, the Defence submits that Rule 73(B) contemplates the eventuality of a 'harmless error', in other words a mistake of law that does not result in prejudice to any party and does not require a remedy beyond an acknowledgement of the error. The Prosecution disagrees that the alleged error in this case is harmless. The Prosecution reiterates that it has suffered irreparable harm by the denial of its right to direct the Trial Chamber's attention to what it believes is relevant evidence that should have been considered prior to making a decision, and also by the end result that several geographical locations have, wrongly in the Prosecutions' view, been removed from the Indictment. The fact that, with reference to the *Jelisic* precedent,[6] in a post-judgment appeal the Appeals Chamber might find that in the overall context of the case an error was

[6] *Prosecutor v Goran Jelisic*, IT-95-10, "Judgement", 5 July 2001.

not serious enough to warrant a re-trial, simply reinforces the Prosecution's contention that this type of error should be corrected at the interlocutory stage, otherwise there is a risk that the prejudice might never be repaired.

III. CONCLUSION

10. The Prosecution submits that it has met the threshold under Rule 73(B) and respectfully requests leave to appeal against the *proprio motu* findings of the Trial Chamber in relation to the seven geographic locations referred to in paragraph 9(iii) of its Application for Leave to Appeal.

11. The Prosecution re-emphasizes that it does not wish to delay the proceedings or the commencement of the Defence case and notes that an appeal under Rule 73(B) shall not operate as a stay of proceedings unless the Trial Chamber so orders and that the Prosecution would not seek any such order.

Filed in Freetown,

4 November 2005

For the Prosecution,

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