SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber I

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

Registrar: Robin Vincent

Date: 7 July 2005

THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

JOINT DEFENCE RESPONSE TO PROSECUTION REQUEST FOR LEAVE TO APPEAL DECISION ON PROSECUTION MOTION FOR A RULING ON THE ADMISSIBILITY OF EVIDENCE

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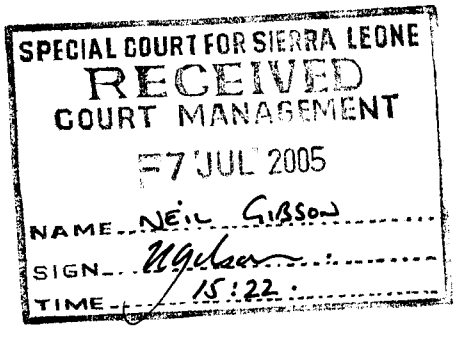

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INTRODUCTION

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (the "Rules"), the Prosecution seeks leave to file an interlocutory appeal against the Trial Chamber's 'Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence' (the "Majority Decision")[1] and related oral rulings pertaining to witnesses TF2-187, TF2-135 and TF2-189 (the "Rulings")[2].

2. Counsel for the three Accused (the "Defence") hereby submit their joint response to the Prosecution's 'Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence' (the "Request")[3].

3. The Prosecution claims that alleged errors of law in the Majority Decision amount to "exceptional circumstances"[4] which, if not remedied by the Appeals Chamber, will result in "irreparable prejudice"[5] to the Prosecution's case. The Defence submits that the requirements for a grant of leave to appeal under Rule 73(B) have not been met, as the Prosecution has failed to demonstrate both the existence of exceptional circumstances and the danger of irreparable prejudice. Accordingly, the Defence submits that the Request should be denied.

SUBMISSIONS

The Applicable Law

4. There is no *right* to appeal the denial of a motion under Rule 73. Rather, Rule 73(B) provides that *leave* to make an interlocutory appeal "may" be granted

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[1] Document No. SCSL-04-14-T-434, 24 May 2005.
[2] *Prosecutor v. Norman et al.*, Trial Transcripts: 1 June 2005 at 2, 2 June 2005 at 47, 3 June 2005 at 19.
[3] Document No. SCSL-04-14-T-440, 27 June 2005.
[4] Rule 73(B).
[5] *Ibid.*

by the Trial Chamber only "in exceptional circumstances and to avoid irreparable prejudice to a party".

5. The Appeals Chamber has construed Rule 73(B) very narrowly:

> The standard for leave to appeal at an interlocutory stage is *set high* by Rule 73(B), which restricts such leave to *exceptional cases* where irreparable prejudice may otherwise be suffered. That test is not satisfied merely by the fact that there has been a dissenting opinion on the matter in the Trial Chamber, or that the issue strikes the Trial Chamber judges as interesting or important for the development of international criminal law. In this Court, *the procedural assumption is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals* ... and that any errors which affect the final judgment will be corrected in due course by this Chamber on appeal[6].

6. In accordance with this interpretation, the Trial Chamber has repeatedly emphasised that "Rule 73(B) of the Rules generally does not confer a right of interlocutory appeal but only grants leave to appeal in *exceptional cases*"[7].

7. Rule 73(B)'s restrictive nature[8] takes into account both the need for expedition in the proceedings, given the Special Court's limited mandate[9], and the

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[6] *Prosecutor v Norman et al.*, 'Decision on Amendment of the Consolidated Indictment', Appeals Chamber, 18 May 2005, ¶ 43 (emphasis added).

[7] *Prosecutor v Norman et al.*, 'Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on First Accused's Motion on Abuse of Process', Trial Chamber I, 24 May 2005, at p.2 (emphasis added). *See also Prosecutor v Norman et al.*, 'Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on Presentation of Witness Testimony on Moyamba Crime Base', Trial Chamber I, 24 May 2005, at p.2; *Prosecutor v Norman et al.*, 'Decision on Application by First Accused for Leave to Make Interlocutory Appeal Against the Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment', Trial Chamber I, 16 December 2004, at p.2; *Prosecutor v Norman et al.*, 'Decision on Prosecution Application for Leave to Appeal Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment', Trial Chamber I, 15 December 2004, at p.2; *Prosecutor v Norman et al.*, 'Decision on Joint Request for Leave to Appeal Against Decision on Prosecution's Motion for Judicial Notice', Trial Chamber I, 20 October 2004, ¶ 13; *Prosecutor v Norman et al.*, 'Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment', Trial Chamber I, 2 August 2004, ¶ 21.

[8] *See Prosecutor v. Sesay et al.*, SCSL-2004-15, 'Decision on Prosecutor's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecutor's Motion for Joinder', Trial Chamber I, 13 February 2004, ¶ 11 ("[T]he amendment [that created Rule 73(B)] was carefully couched in such terms so as only to allow appeals to proceed in very limited and exceptional situations. In effect, it is a *restrictive* provision".) (emphasis added)

[9] *See Prosecutor v. Norman et al.*, 'Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend

Appeals Chamber's ability to correct fundamental errors of law in due course, *viz.*, at the end of the trial after the delivery of a final judgement[10].

8. Acknowledging its limited application, this Court has consistently noted that Rule 73(B)'s two-prong test is a conjunctive one, obliging the moving party to show *both* "exceptional circumstances" and "irreparable prejudice" before leave can be granted[11].

9. Regarding the question of "exceptional circumstances", this Chamber has noted—echoing the Appeals Chamber[12]—that "judicial dissent amongst the Judges of the Trial Chamber on the applicable law and procedure applied in the Impugned Decision does not itself constitute an exceptional circumstance"[13].

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the Indictment', Trial Chamber I, 2 August 2004, ¶ 25 ("At this point in time, as the trials are progressing, the Chamber must be very sensitive, and rightly so, to any proceedings or processes that will indeed encumber and unduly protract the ongoing trials. For this reason, it is a judicial imperative for us to ensure that the proceedings before the court are conducted expeditiously and to continue to apply enunciated criteria with the same degree of stringency as in previous applications for leave to appeal so as not to defeat or frustrate the rationale that underlies the amendment of Rule 73(B)".); *Prosecutor v. Sesay et al.*, SCSL-2004-15, 'Decision on Prosecution Application for Leave to File an Interlocutory Appeal Against Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15 and SCSL-2004-16', Trial Chamber I, 1 June 2004, ¶ 21 ('[T]he overriding legal consideration in respect of an application for leave to file an interlocutory appeal is that the applicant's case must reach a level of exceptional circumstances and irreparable prejudice. *Nothing short of this will suffice having regard to the restrictive nature of Rule 73(B) of the Rules and the rationale that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals*'.) (emphasis added).

[10] *See* n.6, *supra,* ("In this Court, the procedural assumption is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals ... and that *any errors which affect the final judgment will be corrected in due course by this Chamber on appeal*".) (emphasis added)

[11] *See Prosecutor v Norman et al.*, 'Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on First Accused's Motion on Abuse of Process', Trial Chamber I, 24 May 2005, at p.2. *quoting Prosecutor v. Sesay et al.*, SCSL-2004-15, 'Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Motions for Joinder', Trial Chamber I, 13 February 2004, ¶ 10 ("[T]his rule involves a high threshold that must be met before this Chamber can exercise its discretion to grant leave to appeal. The two limbs to the test are clearly conjunctive, not disjunctive; in other words, they must *both* be satisfied") (emphasis in original); *see also Prosecutor v. Brima et al.*, SCSL-2004-16, 'Decision on Joint Defence Application for Leave to Appeal Against the Ruling of Trial Chamber II of 5 April 2005', Trial Chamber II, 15 June 2005, ¶ 14.

[12] *See* n.6, *supra,* (Rule 73(B)'s "test is not satisfied merely by the fact that there has been a dissenting opinion on the matter in the Trial Chamber".)

[13] *Prosecutor v Norman et al.*, 'Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on Presentation of Witness Testimony on Moyamba Crime Base', Trial Chamber I, 24 May 2005, at 3. *See also Prosecutor v Norman et al.*, 'Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment', Trial Chamber I, 2 August 2004, ¶ 28 ("[D]isagreements amongst Judges on some of the multi-faceted legal and factual issues which

10. In the CDF case, this Court has granted leave to appeal on only two occasions. Significantly, both decisions dealt with issues of broad procedural importance whose impact was likely to be felt beyond the confines of this trial[14]. Conversely, and in keeping with Rule 73(B)'s restrictive approach, this Chamber has denied leave where a request sought merely to re-litigate substantive issues previously decided by the Chamber[15] and where an appeal threatened to unduly stymie the progress of the trial[16].

The Prosecution Has Failed to Demonstrate Exceptional Circumstances

The Alleged Errors of Law Do Not Amount to Exceptional Circumstances

11. In an attempt to prove the "exceptional circumstances" required under Rule 73(B), the Prosecution asserts that the "Trial Chamber committed errors of law ... when it held that evidence relating to sexual violence was inadmissible [and] ... did not address the evidentiary spectrum by which sexual violence

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constitute the core of legal disputes is a normal judicial feature that is inherent in the exercise by the Judges of judicial independence on which the administration of justice is, and will continue to be, based.")

[14] *See Prosecutor v Norman et al.*, 'Decision on Application by First Accused for Leave to Make Interlocutory Appeal Against the Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment', Trial Chamber I, 16 December 2004, at 3 and *Prosecutor v Norman et al.*, 'Decision on Prosecution Application for Leave to Appeal Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment', Trial Chamber I, 15 December 2004, at 3. (Leave granted where the application raised "serious issues that concern the charges against the Accused contained in the Consolidated Indictment, and that may impact on the Accused's right to a fair trial and the presentation of the Prosecution case".) *See also Prosecutor v Norman et al.*, 'Decision on Joint Request for Leave to Appeal Against Decision on Prosecution's Motion for Judicial Notice', Trial Chamber I, 20 October 2004, ¶¶ 20, 25 (Leave granted where the Chamber admitted that its failure to give "proper consideration to the oral Response of the Second Accused" amounted "to exceptional circumstances which create[d] a basis for granting the leave" and where the Chamber was convinced that it was in the interests of justice for the Appeals Chamber to provide "guidelines for the application of the principles relating to the doctrine of judicial notice".)

[15] *Prosecutor v Norman et al.*, 'Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on First Accused's Motion on Abuse of Process', SCSL-04-14-T-406, 24 May 2005, at 3 (Leave denied where counsel "simply seeks to re-litigate issues which have been ruled upon by the Trial Chamber..." and "has not raised any matter of fundamental significance to the integrity of the judicial system and the development of this Court's jurisprudence to justify the granting of leave".)

[16] *See Prosecutor v Norman et al.*, 'Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment', Trial Chamber I, 2 August 2004, ¶ 32 ("Given the limited judicial lifespan of the Court, and the proliferation of requests from diverse international bodies for weekly summaries of the conduct of the trial so as to evaluate the court's commitment to expeditiousness, the Chamber takes the view that it is too tenuous a submission to warrant any merit in the context of the instant application".)

evidence can be led"[17]. By way of support, the Request contains a reassertion of legal arguments previously advanced by the Prosecution as to why the contested evidence should have been admitted by the Trial Chamber[18].

12. It must be emphasised that, in this Court, a request for leave to appeal is not a vehicle for re-litigating substantive arguments formerly rejected by a Trial Chamber[19]. This Chamber has previously held that Rule 73(B) is not intended for this time-consuming purpose[20]. Yet, this is exactly what the Prosecution seeks to accomplish. Errors of law—to the extent any have been made—may be corrected by the Appeals Chamber in due course[21].

13. Furthermore, an appeal at this stage would do nothing but "encumber and unduly protract the ongoing trials"[22]. With the deadline for Rule 98 submissions looming, this Chamber must be mindful of the consequences of granting leave at this point. If the Prosecution indeed aims to see the process to its logical conclusion, then granting leave now would also necessitate granting a stay of the proceedings to obviate the need for a subsequent motion for acquittal should the Prosecution ultimately be permitted to present the contested evidence. If, on the other hand, the Prosecution simply seeks vindication through the creation of Appeals Chamber jurisprudence, then this application amounts to an unjustified academic exercise.

The Disagreement Amongst the Judges Does Not Amount to an Exceptional Circumstance

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[17] Request, ¶ 8.
[18] Request, ¶¶ 13-30.
[19] It is submitted that errors of law are clearly outside the contemplated scope of Rule 73(B). Had the drafters of the Rule intended such a result, appeal would lie as of right (and not by leave) with the Appeals Chamber.
[20] *Prosecutor v Norman et al.*, 'Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on First Accused's Motion on Abuse of Process', SCSL-04-14-T-406, 24 May 2005, at 3 (Leave denied where counsel "simply seeks to re-litigate issues which have been ruled upon by the Trial Chamber").
[21] "The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on ... [a]n error on a question of law invalidating the decision." SCSL Statute, Article 20. *See also* Rule 106(A)(b).
[22] *Prosecutor v. Norman et al.*, 'Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment', Trial Chamber I, 2 August 2004, ¶ 25.

14. While acknowledging that disagreement amongst judges does not *ipso facto* satisfy the first prong of Rule 73(B)[23], the Prosecution nonetheless devotes the bulk of its submissions to the differences between the majority and dissenting opinions[24]. However, the Prosecution fails to explain why this particular disagreement amounts to an exceptional circumstance, as required by the Rules. The mere fact of judicial dissent amongst judges of a trial chamber on the applicable law and procedure does not in itself constitute an exceptional circumstance[25]. As noted by this Chamber: "disagreement amongst Judges ... is a normal judicial feature that is inherent in the exercise ... of judicial independence on which the administration of justice is, and will continue to be, based"[26].

15. The Defence acknowledges that the Trial Chamber has indicated "the nature and significance of the matters sought to be appealed in conjunction with the fact of dissent" might be relevant to the determination of exceptional circumstances[27]. However, the Prosecution has provided no indication as to the particular *nature and significance* of the matters sought to be appealed in this case, other than to state simply "the subject matter is of such importance, that clarity and consistency is paramount and [the judicial disagreement] should be resolved by the Appellate Chamber"[28]. The Defence submits that the Majority Decision is both clear and consistent, the contested evidence having been rejected for the same reasons repeatedly articulated by this Chamber since 20 May 2004[29].

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[23] Request, ¶ 10.
[24] Request, ¶ 11.
[25] Simply stating the obvious, as the Prosecution does at paragraph 12 of the Request—"The differences between the majority decision and the dissenting opinion are irreconcilable"—does not advance its argument. A dissenting opinion is, by definition, irreconcilable with the majority view.
[26] *Prosecutor v Norman et al.*, 'Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on Presentation of Witness Testimony on Moyamba Crime Base', Trial Chamber I, 24 May 2005, at 3. *See also Prosecutor v Norman et al.*, 'Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment', Trial Chamber I, 2 August 2004, ¶ 28.
[27] *Prosecutor v Norman et al.*, 'Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on Presentation on Witness Testimony on Moyamba Crime Base', Trial Chamber I, 24 May 2005, at 3.
[28] Request, ¶ 10.
[29] The day this Chamber delivered its 'Decision on Prosecution Request for Leave to Amend the Indictment'.

16. Notwithstanding its conclusory assertions to the contrary, the Prosecution has failed to satisfy the first-prong of Rule 73(B)'s conjunctive test. Judicial disagreement on this issue does not amount to an exceptional circumstance, nor has the Prosecution given any indication as to the particular nature and significance of the matter sought to be appealed. Accordingly, the Request should be denied.

The Prosecution Has Failed to Demonstrate Irreparable Prejudice

17. Assuming, *arguendo*, the Prosecution succeeds in establishing the existence of exceptional circumstances, the Defence submits that the Prosecution also fails to satisfy the second prong of Rule 73(B)'s conjunctive test—a showing of irreparable prejudice.

18. As to the issue of irreparable prejudice, the Prosecution submits that it "has been precluded from adducing relevant evidence in support of the charges contained in the Consolidated Indictment" and that "[t]his harm cannot be remedied at the close of the trial"[30]. Presumably in support of this assertion, the Prosecution then sets forth portions of the differing opinions of two Judges of this Chamber[31], yet fails to provide elaboration or explanation as to their significance.

19. Due to this lack of specificity, the Defence is at a loss to respond, except to say that while the Prosecution may disagree with the Chamber's ruling as to the admissibility of the evidence, this does not amount to irreparable prejudice under Rule 73(B). Indeed, the Defence respectfully submits that it is disingenuous to argue that the exclusion of irrelevant evidence has caused the Prosecution irreparable prejudice. Surely the Prosecution, in its adversarial zeal, does not hope to secure convictions on charges not properly pleaded in its Indictment.

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[30] Request, ¶ 33.
[31] Request, ¶ 34.

20. In conclusion, the Defence submits that the Prosecution is unable to demonstrate "irreparable prejudice"—lasting or permanent harm—because it simply does not exist. As neither the Rules nor the Statute of the Special Court prescribes any limitations period, the Prosecutor—subject to his professional discretion and Rule 47—is not without other modes of redress.

CONCLUSION

21. For the reasons stated above, the Defence respectfully submits that the Request should be denied.

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DEFENCE LIST OF AUTHORITIES

1. Statute of the Special Court for Sierra Leone, Article 20

2. SCSL Rules of Procedure and Evidence, Rules 73(B) and 106(A)(b)

3. *Prosecutor v Norman et al.*, 'Decision on Amendment of the Consolidated Indictment', Appeals Chamber, 18 May 2005

4. *Prosecutor v Norman et al.*, 'Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on First Accused's Motion on Abuse of Process', Trial Chamber I, 24 May 2005

5. *Prosecutor v Norman et al.*, 'Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on Presentation of Witness Testimony on Moyamba Crime Base', Trial Chamber I, 24 May 2005

6. *Prosecutor v Norman et al.*, 'Decision on Application by First Accused for Leave to Make Interlocutory Appeal Against the Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment', Trial Chamber I, 16 December 2004

7. *Prosecutor v Norman et al.*, 'Decision on Prosecution Application for Leave to Appeal Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment', Trial Chamber I, 15 December 2004

8. *Prosecutor v Norman et al.*, 'Decision on Joint Request for Leave to Appeal Against Decision on Prosecution's Motion for Judicial Notice', Trial Chamber I, 20 October 2004

9. *Prosecutor v Norman et al.*, 'Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment', Trial Chamber I, 2 August 2004

10. *Prosecutor v. Sesay et al.*, SCSL-2004-15, 'Decision on Prosecutor's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecutor's Motion for Joinder', Trial Chamber I, 13 February 2004

11. *Prosecutor v. Sesay et al.*, SCSL-2004-15, 'Decision on Prosecution Application for Leave to File an Interlocutory Appeal Against Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15 and SCSL-2004-16', Trial Chamber I, 1 June 2004

12. *Prosecutor v. Brima et al.*, SCSL-2004-16, 'Decision on Joint Defence Application for Leave to Appeal Against the Ruling of Trial Chamber II of 5 April 2005', Trial Chamber II, 15 June 2005