SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber I

Before:	Justice Pierre Boutet, Presiding Justice Bankole Thompson Justice Benjamin Mutanga Itoe
Interim Registrar:	Mr Lovemore Munlo
Date:	1 November 2005

THE PROSECUTOR

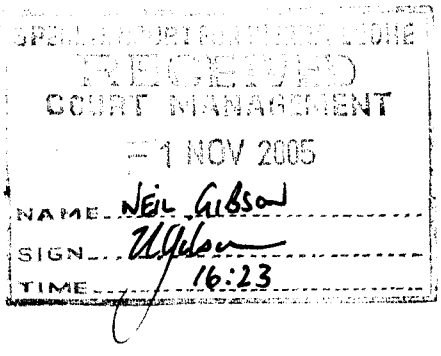
-against-

SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

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

Office of the Prosecutor:
Mr Mr Luc Côté
Mr James C. Johnson
Ms Nina Jørgensen
Mr Mohammed Bangura



Counsel for Moinina Fofana:
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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 'Decision on Motions for Judgment of Acquittal Pursuant to Rule 98' (the "Rule 98 Decision")[1]. Counsel for the three accused persons (the "Defence") hereby submits its response to the Prosecution's application for leave to appeal the Decision (the "Application")[2].

2. The Prosecution claims that the Trial Chamber's removal, *proprio motu*, of certain geographic locations from the Indictment[3] without affording the Prosecution an opportunity to be heard amounts to "exceptional circumstances" which, if not remedied by the Appeals Chamber, will result in "irreparable prejudice" to the Prosecution's case.

3. 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. However, 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 the existence of any actual danger of irreparable prejudice. Accordingly, the Defence opposes the Application.

SUBMISSIONS

The Applicable Law

4. There is no right to appeal the denial of a motion under Rule 73. Rather, the Rules provide that leave to make an interlocutory appeal "may" be granted by the Trial Chamber only "in exceptional circumstances and to avoid irreparable prejudice to a party"[4].

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[1] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-473, 21 October 2005.
[2] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-475, 24 October 2005.
[3] *Prosecutor v. Norman et al.*, SCSL-2004-14-PT-003, 5 February 2004.
[4] Rule 73(B).

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. ... 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[5].

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"[6].

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

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[5] *Prosecutor v Norman et al.*, SCSL-2004-14-AR73-397, Appeals Chamber, 'Decision on Amendment of the Consolidated Indictment', 18 May 2005, ¶ 43 (emphasis added).

[6] *Prosecutor v Norman et al.*, SCSL-2004-14-T-406, Trial Chamber I, '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', 24 May 2005, at p.2 (emphasis added). *See also Prosecutor v Norman et al.*, SCSL-2004-14-T-404, Trial Chamber I, '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', 24 May 2005, at p.2; SCSL-2004-14-T-313, Trial Chamber I, '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', 16 December 2004, at p.2; SCSL-2004-14-T-312, Trial Chamber I, 'Decision on Prosecution Application for Leave to Appeal Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment', 15 December 2004, at p.2; SCSL-2004-14-T-231, Trial Chamber I, 'Decision on Joint Request for Leave to Appeal Against Decision on Prosecution's Motion for Judicial Notice', 20 October 2004, ¶ 13; SCSL-2004-14-T-170, Trial Chamber I, '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', 2 August 2004, ¶ 21.

[7] *See Prosecutor v. Sesay et al.*, SCSL-2004-15-T-014, '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).

[8] *See Prosecutor v. Norman et al.*, SCSL-2004-14-T-170, Trial Chamber I, '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', 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-2004-15-150, Trial Chamber I, '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', 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).

ability to correct fundamental errors of law in due course, *viz.*, at the end of the trial after the delivery of a final judgment[9].

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[10].

Exceptional Circumstances

9. As noted above, the Defence agrees with the Prosecution's position as stated at paragraphs 12–28 of the Application. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") has explicitly recognized a right to be heard prior to a *proprio motu* finding on the question of whether there is evidence sufficient to sustain a conviction[11]. Accordingly, this Chamber's failure to provide the Prosecution with the opportunity to be heard prior to making a *proprio motu* decision with respect to the geographic locations in question clearly amounts to exceptional circumstances. Such disregard for an established right potentially threatens "the cause of justice"[12].

10. The Defence has found no principled basis from which to contest the first portion of the Application. Indeed, the Defence submits that the sound principles articulated by the ICTY in the *Jelisic* case serve to protect the interests of all parties to a controversy[13].

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[9] *See* n.5, *supra.*

[10] *See Prosecutor v Norman et al.*, SCSL-2004-14-406, Trial Chamber I, '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', 24 May 2005, at p.2. *quoting Prosecutor v. Sesay et al.*, SCSL-2004-15-014, Trial Chamber I, 'Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Motions for Joinder', 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-2004-16-308, Trial Chamber II, 'Decision on Joint Defence Application for Leave to Appeal Against the Ruling of Trial Chamber II of 5 April 2005', 15 June 2005, ¶ 14.

[11] In a unanimous decision, the Chamber held: "The prosecution therefore had a right to be heard on the question of whether the evidence was sufficient to sustain a conviction; it was denied that right. Counsel for the respondent rightly concedes this". *Prosecutor v. Jelisic*, IT-95-10, Appeals Chamber, 'Judgment', 5 July 2001, ¶ 28.

[12] *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-357, Trial Chamber I, 'Decision on Defence Application for Leave to Appeal Rulings of 3 February 2005 on the Exclusion of Statements of Witness TF1-141', 28 April 2005, ¶ 26 (where the Trial Chamber held that exceptional circumstances may exist where, *inter alia*, "the cause of justice might be interfered with").

[13] *See Prosecutor v. Jelisic*, IT-95-10, Appeals Chamber, 'Judgment', 5 July 2001, ¶ 27.

11. The Defence feels particularly compelled to concede this point because the Prosecution explicitly invoked its right to be heard in its responses to the various motions for judgment of acquittal[14]. As all parties to a controversy are entitled to be heard, the Defence cannot, in principle, object to such a right. Doing so would threaten to compromise the Defence's own right to be heard in the future.

12. The Defence submits that a trial chamber should be acutely mindful of its function as a creator of legal precedent. As such, one of its cardinal concerns should be the production of sound law, to the benefit of parties to an instant case as well as future litigants before courts of international criminal law. The production of reasoned decisions based on the comprehensive submissions of all concerned should be the norm. The issuance of judicial orders without the input of the parties is a dangerous approach and should never be the practice of any tribunal. As noted in the Application, a court should not "spurn the participation of the parties"[15]. Rather, it has an obligation to engage the parties in all aspects of the adversarial process, with the obvious exception of *in camera* deliberations.

13. A related concern, one perhaps best understood as a sort of corollary to the right to be heard, is the preference for reasoned decisions which explicitly address—whether accepting or rejecting—the submissions put forward by the parties. Such practice especially benefits the accused persons who are themselves laymen of the law and deserve at least some measure of acknowledgement and explanation with respect to arguments advanced on their behalf[16]. Of course, it is in the interests of all concerned that the Chamber outline its reasoning in an explicit and transparent manner.

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[14] Application, ¶ 6.

[15] Application, ¶ 19, *citing Nuclear Test Case (Australia v. France)*, Dissenting Opinion of Judge Sir Garfield Barwick, (1974) ICJ Reports 253 at 442.

[16] The Rule 98 Decision was lacking in this respect, and not only with regard to the *proprio motu* findings against the Prosecution as noted in the Application at paragraph 25. As a general matter, the Rule 98 Decision contained only a statement of the parties' submissions, a recitation of the Chamber's view of the law, and then summary dismissals of each point. However, with respect to the Fofana motion, the Chamber wholly neglected to address the arguments advanced regarding the Court's jurisdiction *ratione personae* vis-à-vis Mr Fofana. Further, the decision summarily dismissed arguments regarding the command responsibility and joint criminal enterprise theories of liability. While there is admittedly no established right to have decisions spelled out in detail, reasoned analysis is always preferable to summary dismissal given the precedent-setting functions of the Special Court and the level of sophistication of the defendants. If a court finds no merit in a particular point raised by an accused person, then it should at least explain—however briefly—why.

Irreparable Prejudice

14. Notwithstanding the existence of exceptional circumstances as outlined above, the Defence submits that the Prosecution has failed to satisfy the second prong of Rule 73(B)'s conjunctive test—a showing of irreparable prejudice.

15. As to this issue, the Prosecution submits that (i) the denial of its right to be heard in this instance will impact the availability of the right in other instances and (ii) the removal of several geographical locations "cannot be cured in a post final judgment appeal"[17]. The Defence submits that there is no merit in either point.

16. With respect to the first argument, the Prosecution has articulated a hypothetical danger, one that is not likely to manifest itself again. As a general matter, the Chamber is aware of the fundamental legal principle giving a party the right to be heard. The Prosecution has failed to demonstrate a real danger that the Chamber would overlook this right again in the future.

17. Regarding the Prosecution's second point, the Defence submits that—despite the failure to hear argument on the issue—the geographic locations in question have been correctly dropped out of the Indictment. There simply was no evidence presented with respect to those locations. Accordingly, their removal from the Indictment in no way prejudices the Prosecution's case. In any event, it is certainly within the purview of the Appeals Chamber to decide, upon review of the Trial Chamber's final judgment, that the Prosecution had actually presented sufficient evidence with respect to those locations now at issue.

18. The Defence submits that Rule 73(B)—with its two-prong conjunctive test—contemplates the eventuality of "harmless error"[18], *viz.*, a mistake of law that nonetheless results in no prejudice to any party. The reasoning of the ICTY Appeal Chamber in the *Jelisic* case lends further support to the concept of harmless error as part of international criminal procedure. In that case, the Appeals Chamber

[17] Application, ¶ 30.

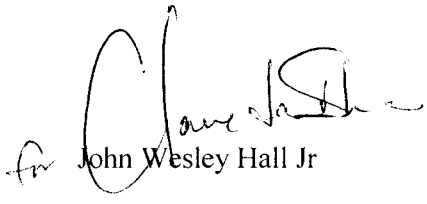
[18] A concept well-known, at least, to the various legal systems of the United States, "harmless error" or *error in vacuo* has been defined as "an error that does not affect a party's substantive rights or the case's outcome; a harmless error is not grounds for reversal". *Black's Law Dictionary*, 8th Edition (2004 West) at 582.

unanimously (and with the concession of the respondent) granted an appeal on the identical question raised in the Application. However, the Appeals Chamber then considered the question of remedy as a separate concern[19], noting that even in the face of a clear oversight, it was "not obliged, having identified [the] error, to remit for trial"[20]. In other words, the potential for prejudice caused by such an error was not considered high enough to require a new trial. The error was, in this sense, "harmless". By analogy, having identified exceptional circumstances, an SCSL Trial Chamber is not obliged to grant an appeal unless there exists an actual danger of irreparable prejudice. As noted above, there is no such risk in the instant case.

CONCLUSION

19. For the reasons stated above, the Defence respectfully submits that the Application should be denied.

COUNSEL FOR SAMUEL HINGA NORMAN



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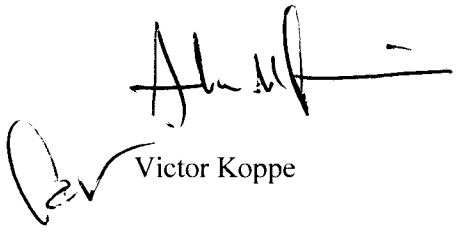

Victor Koppe

[19] *Prosecutor v. Jelisic*, IT-95-10, Appeals Chamber, 'Judgment', 5 July 2001, ¶¶ 73-77.
[20] *Ibid.*, ¶ 77; *see also ibid.*, ¶ 75 (The Chamber declined to do so, noting *inter alia* the limited mandate of the tribunal: "The *ad hoc* nature of the International Tribunal, unlike a national legal system, means resources are limited in terms of man-power and the uncertain longevity of the Tribunal".)

COUNSEL FOR ALLIEU KONDEWA

Charles Margai

DEFENCE LIST OF AUTHORITIES

1. SCSL Rules of Procedure and Evidence, Rule 73(B)

2. *Prosecutor v Norman et al.*, SCSL-2004-14-AR73-397, Appeals Chamber, 'Decision on Amendment of the Consolidated Indictment', 18 May 2005

3. *Prosecutor v Norman et al.*, SCSL-2004-14-T-406, Trial Chamber I, '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', 24 May 2005

4. *Prosecutor v Norman et al.*, SCSL-2004-14-T-404, Trial Chamber I, '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', 24 May 2005

5. *Prosecutor v Norman et al.*, SCSL-2004-14-T-313, Trial Chamber I, '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', 16 December 2004

6. *Prosecutor v Norman et al.*, SCSL-2004-14-T-312, Trial Chamber I, 'Decision on Prosecution Application for Leave to Appeal Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment', 15 December 2004

7. *Prosecutor v Norman et al.*, SCSL-2004-14-T-231, Trial Chamber I, 'Decision on Joint Request for Leave to Appeal Against Decision on Prosecution's Motion for Judicial Notice', 20 October 2004

8. *Prosecutor v Norman et al.*, SCSL-2004-14-T-170, Trial Chamber I, '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', 2 August 2004

9. *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-013, Trial Chamber I, 'Decision on Prosecutor's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecutor's Motion for Joinder', 13 February 2004

10. *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-150, Trial Chamber I, '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', 1 June 2004

11. *Prosecutor v. Brima et al.*, SCSL-2004-16-308, Trial Chamber II, 'Decision on Joint Defence Application for Leave to Appeal Against the Ruling of Trial Chamber II of 5 April 2005', 15 June 2005

12. *Prosecutor v. Jelisic*, IT-95-10, Appeals Chamber, 'Judgment', 5 July 2001