

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: 24 October 2005

THE PROSECUTOR**Against**

Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

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

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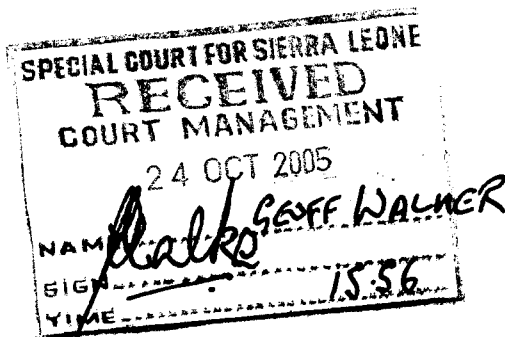
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I. INTRODUCTION

1. The Prosecution files this application pursuant to Rule 73(B) of the Special Court's Rules of Procedure and Evidence ("Rules") seeking leave to appeal against one specific aspect of the Trial Chamber's Decision on Motions for Judgment of Acquittal Pursuant to Rule 98 of 21 October 2005 ("Decision on Motions for Judgment of Acquittal").¹
2. The Prosecution appreciates that the Decision on Motions for Judgment of Acquittal was largely in its favour and that the Motions of the three Accused have been dismissed. The Prosecution finds itself obligated, however, to seek leave to appeal on a discrete point of principle, namely the right to be heard in relation to a *proprio motu* decision of the Trial Chamber under Rule 98 of the Rules.

II. BACKGROUND

3. At the close of the Prosecution's case, the Defence for each Accused filed a Motion pursuant to Rule 98 of the Rules² ("Motions for Acquittal") in accordance with the time frames set out originally in a written Scheduling Order³ and later adjusted orally⁴ by the Trial Chamber. The Prosecution filed its responses within two weeks as ordered ("Responses").⁵
4. The Trial Chamber heard oral arguments on 20 September 2005 that were largely unrestricted in material scope, although restricted to a half hour time frame for each argument and response. The Trial Chamber had previously hinted that oral submissions

¹ *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005.

² *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-455, Motion for Judgement of Acquittal of the First Accused Samuel Hinga Norman, 3 August 2005; SCSL-04-14-T-457, Fofana Motion for Judgment of Acquittal, 4 August 2005; SCSL-2004-14-T-458, Motion for Judgment of Acquittal of the Third Accused Allieu Kondewa, 4 August 2005.

³ *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-419, Scheduling Order on Filing of Submissions by the Parties should a Motion for Judgment of Acquittal be Filed by the Defence, 2 June 2005.

⁴ Norman et al., Trial Transcript, 14 July 2005, p. 11.

⁵ *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-459, Confidential Prosecution Response to Motion for Judgement of Acquittal of the First Accused Samuel Hinga Norman, 18 August 2005 ("Norman Response"); SCSL-04-14-T-460, Confidential Prosecution Response to Fofana Motion for Judgment of Acquittal, 18 August 2005; SCSL-04-14-T-461, Confidential Prosecution Response to Motion for Judgment of Acquittal of the Third Accused Allieu Kondewa, 18 August 2005.

would be “very focused” and that the parties would be asked to speak on specific issues.⁶ The Trial Chamber did not advise the parties of any questions in advance, but did ask a number of questions during the hearing.

5. The Prosecution emphasized, both in its written Responses and in its oral argument, that in accordance with the wording and purpose of Rule 98, it was only called upon in its Responses to address the specific matters raised by the Defence.⁷
6. The Prosecution had requested in paragraph 3 of each of its Responses: “If the Trial Chamber should, *proprio motu*, question the sufficiency of evidence in relation to a particular Count...that it be afforded its right to respond.”
7. At the oral hearing the Trial Chamber did not indicate to the Prosecution that it was uncertain as to the sufficiency of the evidence in relation to specific locations set out in the Indictment as particulars of the various Counts.
8. In its Decision on Motions for Judgment of Acquittal, the Trial Chamber found that notwithstanding its decision to dismiss the Motions for Acquittal, there was no evidence capable of supporting a conviction in respect of murder under Article 2(a) and Article 3(a) of the Special Court’s Statute (“Statute”), in respect of 13 geographic locations specified in the Indictment. It further found that there was no evidence capable of supporting a conviction in respect of inhumane acts under Article 2(i) of the Statute and cruel treatment under Article 3(a) of the Statute, in respect of an additional geographic location, or of pillage under Article 3(f) of the Statute in respect of a further geographic location.⁸
9. Of these fifteen geographic locations referred to in the previous paragraph:

⁶ *Norman et al.*, Transcript, Status Conference, 25 May 2005, p. 9.

⁷ See paras 9-10 of the Norman Response: “where the Defence files a Rule 98 motion, this does not place a burden on the Prosecution to establish that the evidence meets the Rule 98 standard in respect of all aspects of the Prosecution case. If the position were otherwise, this would be inconsistent with the purpose of Rule 98, as it would require the Prosecution and the Trial Chamber to undertake a comprehensive analysis of all the evidence in the case at the hal-time stage” (para. 9). “Rather, in a case where the Defence files a Rule 98 motion, the burden is on the Defence to identify the specific issues in respect of which it says that the evidence does not meet the Rule 98 standard” (para. 10). See also p.5 of the *Norman et al.* Trial Transcript, 20 September 2005, where Counsel for the Prosecution stated that “Your Lordships could in propria motu [sic] raise issues for which we, the Prosecution, would be prepared to respond to...it is the position of the Prosecution that the motion and response are specific to the issues.” See also pp. 6 and 11-12 of the Transcript.

⁸ Decision on Motions for Judgment of Acquittal, Disposition, para. 2.

- (i) in respect of four of the locations, the Prosecution had conceded that no evidence of unlawful killing was presented for the locations of Kpeyama,⁹ Bylago¹⁰ and Jembeh,¹¹ and that no direct evidence of looting or burning was led in relation to the location of Mobayeh;¹²
- (ii) in respect of four of the locations, the Defence had challenged the sufficiency of the evidence in their Motions for Acquittal, and the Prosecution had made submissions in response to the Defence's arguments;
- (iii) in respect of seven of the locations,¹³ the sufficiency of the evidence was *not* raised by the Defence, nor did the Trial Chamber itself raise the issue of the sufficiency of the evidence in relation to these seven locations. As a result, neither the Defence nor the Prosecution had made submissions to the Trial Chamber directly addressing the sufficiency of the evidence in relation to these seven locations.

10. The Prosecution hereby seeks leave to appeal against the Decision on Motions for Judgment of Acquittal, only in relation to the Trial Chamber's decision in respect of the seven geographic locations referred to in paragraph 9(iii) above. The Prosecution believes, particularly in relation to four of these locations, that it has presented evidence capable of supporting a conviction under the Rule 98 standard. The Prosecution ground of appeal would be that as the Defence had not in their Motions for Acquittal challenged the sufficiency of the evidence under the relevant particulars of the Indictment in relation to these seven locations, the Trial Chamber could not, *proprio motu*, find that there was no evidence capable of supporting a conviction in relation to those seven locations without first putting the parties on notice that it was considering the issue, and without affording the parties the opportunity to be heard on the issue.

⁹ Norman Response, para. 91.

¹⁰ Norman Response, para. 96.

¹¹ Norman Response, para. 108.

¹² Norman Response, para. 119.

¹³ Panguma, Sembehun (near Tongo Field), Sembehun (Moyamba District), Gbangbatoke, Gerihun, Bo-Matotoka Highway and Blama.

III. REQUIREMENTS UNDER RULE 73(B)

11. Rule 73(B) of the Rules provides that leave to appeal may be granted in exceptional circumstances and to avoid irreparable prejudice to a party. The restrictive nature of Rule 73(B) has repeatedly been emphasized in the jurisprudence of the Special Court. The two limbs – exceptional circumstances and irreparable prejudice - are conjunctive and the Prosecution is aware that both must be satisfied if an application for leave to appeal is to be granted. The Appeals Chamber has noted that “The underlying rationale for permitting such appeals is that certain matters cannot be cured or resolved by final appeal against judgement.”¹⁴

IV. ARGUMENT

A. Exceptional Circumstances

(i) Fundamental Principle of Law

12. The Prosecution submits that in denying it the right to be heard before proceeding to make findings with respect to specific locations, the Trial Chamber breached a fundamental principle of law.

13. In a recent decision, this Trial Chamber held that exceptional circumstances may exist where:

the question is one of general principle to be decided for the first time, or is a question of public international law upon which further argument or decision at the appellate level would be conducive to the interests of justice, or where the cause of justice might be interfered with, or is one that raises serious fundamental issues of fundamental legal importance to the Special Court for Sierra Leone, in particular, or international criminal law, in general, or some novel substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems.¹⁵

¹⁴ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T-319, Decision on Prosecution Appeal Against the Trial Chamber Decision of 2nd August 2004 Refusing Leave to File An Interlocutory Appeal, 17 January 2005, para. 29; see also *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T-357, Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February, 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, para. 21.

¹⁵ *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-357, Decision on Defence Applications for Leave to Appeal Rulings of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, para. 26.

14. The Prosecution submits that the cause of justice might be interfered with if the principle of the right to be heard is left in a state of uncertainty. It is a fundamental issue of legal importance to the Special Court and law in general and therefore the Prosecution submits that exceptional circumstances exist.
15. The Prosecution does not question the right of the Trial Chamber to raise issues *proprio motu*. Indeed, this issue was touched on in the oral hearing wherein the Prosecution agreed with the judges that while there was no requirement to consider the sufficiency of evidence in relation to paragraphs and allegations in support of a Count, there was equally no prohibition.¹⁶ The issue now being raised by the Prosecution relates exclusively to the requirement to give notice of a possible *proprio motu* decision in relation to paragraphs and allegations in support of a Count.
16. In the Judgement of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) in the *Jelusic* case, it was stated as a general proposition that a party always has a right to be heard on its motion.¹⁷ The Appeals Chamber went on to say that in its view:

the fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party, but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made. Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial. The Rules must be read on this basis, that is to say, that they include a right of the parties to be heard in accordance with the judicial character of the Trial Chamber. The availability of this right to the prosecution and its exercise of the right can be of importance to the making of a correct decision by the Trial Chamber: the latter could benefit in substantial ways from the analysis of the evidence made by the prosecution and from its argument on the applicable law.¹⁸

¹⁶ *Norman et al.*, Trial Transcript, 20 September 2005, pp. 21-22. See also *Prosecutor v Erdemovic*, IT-96-22, Judgement, 7 October 1997, para. 16, where the ICTY Appeals Chamber raised preliminary issues *proprio motu* pursuant to its inherent powers and could find nothing in the Statute or the Rules, or the practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties.

¹⁷ *Prosecutor v Goran Jelusic*, IT-95-10, Judgement, 5 July 2001, para. 25.

¹⁸ *Ibid*, para. 27.

17. The issue in the *Jelusic* case was precisely the question of an error of law by not giving the prosecution an opportunity to be heard on a *proprio motu* decision of the Trial Chamber under the ICTY's Rule 98bis (judgement of acquittal), in that case resulting in an acquittal on a count (genocide). The Appeals Chamber found that the right to be heard had been denied.¹⁹
18. The right to be heard has been described as a self-evident rule of natural justice in domestic case law,²⁰ and indeed, as so fundamental a rule of natural justice that it is questionable whether it can be waived.²¹
19. In his Dissenting Opinion in the *Nuclear Tests Case* before the International Court of Justice ("ICJ"), Judge Sir Garfield Barwick alluded to the principle as being applicable also in cases before the ICJ in his remark that there was "a degree of judicial novelty in the proposition that, in deciding matters of fact, the Court can properly spurn the participation of the parties."²²
20. The Prosecution submits that the effect of the denial of the right to be heard on the requirement of fairness amounts to exceptional circumstances.

(ii) Precedent under Rule 98

21. The Prosecution submits that exceptional circumstances also exist by virtue of the effect the Trial Chamber's Decision on Motions for Judgment of Acquittal may have on the correct interpretation of the purpose of Rule 98 and on future motions and responses under the Rule. The Trial Chamber's Decision constitutes the first decision under Rule 98 by the Special Court. It will therefore serve as an important model for future proceedings under the Rule in other cases and before different Trial Chambers. If an error as to a fundamental principle is not corrected at this stage, it may be repeated in subsequent Rule 98 proceedings.

¹⁹ Ibid, para. 28.

²⁰ *R v Barking Justices Ex p. D.P.P.*, (1995) 159 J.P. 373 (QBD); Crim L. R. 1995, 953-954, at p. 954, ("R v. Barking").

²¹ *Mayes v Mayes*, [1971] 2 All E.R. 397, per Sir Jocelyn Simon P., p. 685.

²² *Nuclear Tests Case (Australia v France)*, Dissenting Opinion of Judge Sir Garfield Barwick, (1974) ICJ Reports 253, at p. 442.

22. The Prosecution set out in detail its analysis of the purpose of Rule 98 in its written Response.²³ Rule 98 is designed to expedite proceedings and it would defeat the purpose of the Rule if the Prosecution had to set out all the evidence in the form of what would effectively amount to a final trial brief at the half time stage. In order to avoid the risk of being caught off guard by a *proprio motu* decision in the future, the Prosecution will need to set out all the evidence in relation to all particulars of the Indictment regardless of whether or not the sufficiency of the evidence is challenged by the Defence. On the other hand, if the Trial Chamber were to put the Prosecution on notice as to the areas where it considered the evidence to be lacking, the Prosecution would be in a position to assist the Trial Chamber in reaching a fair and just decision.

23. The Prosecution submits that given the Trial Chamber's unique position in this case as being the first to deliver a Rule 98 decision, exceptional circumstances exist.

(iii) Uncertainty as to Basis for Decision

24. The Prosecution does not disagree with the Trial Chamber's analysis of the test under Rule 98. In the Prosecution's view, the Trial Chamber correctly considered that "the evaluation of the evidence, its reliability, as well as the credibility of the witnesses, should be kept in abeyance for a later stage".²⁴ The Trial Chamber appeared to rely on the decision of the Trial Chamber in the *Milosevic* case under the ICTY's Rule 98*bis*, to the effect that the Trial Chamber could consider the sufficiency of the evidence as it pertains to elements of a charge, and that, where there is some evidence, but such that, taken at its highest a Trial Chamber could not convict on it, a motion for acquittal would be allowed.²⁵

25. In those instances where the Trial Chamber found no evidence capable of supporting a conviction in specific locations, no explanation as to the Trial Chamber's reasoning was provided and there was similarly no footnote reference to any testimony that, taken at its highest weight, could not support a conviction. Given the Trial Chamber's interpretation of Rule 98, and its confirmation that it would not look to the reliability and credibility of witnesses, the implication is that it found *no evidence* related to these locations (as

²³ See e.g. Norman Response, paras 4-10.

²⁴ Decision on Motions for Judgment of Acquittal, para. 38.

²⁵ Ibid, para. 49.

opposed to insufficient evidence). The Prosecution notes that it can only draw inferences as to the Trial Chamber's reasoning, and the need to do so in itself builds on its argument as to exceptional circumstances.

26. In the English case of *R v Barking Justices Ex p. D.P.P.*, the Queen's Bench Divisional Court held that the policy behind the rule affording a right to reply to a submission of no case to answer was to:

afford an opportunity to point out to the justices something they might otherwise overlook and which might have the effect of changing their minds on the issue. If the defence have not seen fit to make a submission, it would appear more likely that the justices might have overlooked something.²⁶

27. This sums up precisely the Prosecution's argument, namely, that the possibility, however remote, exists that relevant evidence may have been overlooked. This possibility should not be dismissed lightly in view of the fact that cases before the Special Court are legally and factually complex and concern numerous charges and crime bases. Moreover, the Defence Motions for Judgment of Acquittal differed widely in their approaches and, with the exception of the Motion on behalf of Norman, did not address the evidence in relation to specific locations. This must necessarily have increased the burden on the Trial Chamber during a process that by definition needed to be conducted speedily and efficiently.

28. The Prosecution submits that the risk of a lack of appearance of justice, where an unreasoned decision is made without hearing the party that the decision goes against, supports its arguments as to exceptional circumstances.

B. Irreparable prejudice

29. The Prosecution has suffered irreparable prejudice in two respects. First, as a matter of principle, denial of the right to be heard in this instance means that the Prosecution cannot be assured that it will be afforded such a right in other instances, or in other cases, and may find itself unable to direct the Chamber's attention to what it believes is evidence in support of particulars of a Count. Secondly, in this particular case, the Prosecution has suffered prejudice in that several geographical locations have been removed.

²⁶ *R v Barking*, at p. 954.

30. The type of prejudice suffered cannot be cured in a post final judgment appeal. The Prosecution submits that the fundamental principle being raised here cannot be left in doubt for the remainder of the trial. Furthermore, it would neither be practical nor serve the interests of justice to consider whether geographic locations could be reinstated in the Indictment at the final appeal stage, which would then require an additional subsequent trial to be held in relation to those seven locations.

IV. CONCLUSION


31. For the articulated reasons, 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) above.

32. The Prosecution 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 in principle operate as a stay of proceedings.

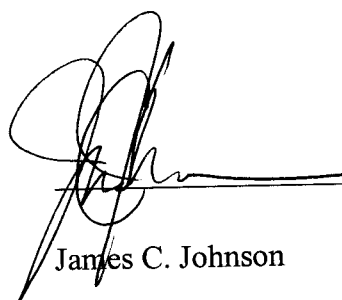
Filed in Freetown,

24 October 2005

For the Prosecution,



Luc Côté



James C. Johnson

Index of Authorities

A. Orders, Decisions and Judgments

1. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005.
2. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-455, Motion for Judgment of Acquittal of the First Accused Samuel Hinga Norman, 3 August 2005; SCSL-04-14-T-457, Fofana Motion for Judgment of Acquittal, 4 August 2005; SCSL-2004-14-T-458, Motion for Judgment of Acquittal of the Third Accused Allieu Kondewa, 4 August 2005.
3. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-419, Scheduling Order on Filing of Submissions by the Parties should a Motion for Judgment of Acquittal be Filed by the Defence, 2 June 2005.
4. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-459, Confidential Prosecution Response to Motion for Judgment of Acquittal of the First Accused Samuel Hinga Norman, 18 August 2005 (“Norman Response”); SCSL-04-14-T-460, Confidential Prosecution Response to Fofana Motion for Judgment of Acquittal, 18 August 2005; SCSL-04-14-T-461, Confidential Prosecution Response to Motion for Judgment of Acquittal of the Third Accused Allieu Kondewa, 18 August 2005.
5. *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T-319, Decision on Prosecution Appeal Against the Trial Chamber Decision of 2nd August 2004 Refusing Leave to File An Interlocutory Appeal, 17 January 2005, para. 29.
6. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T-357, Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February, 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, para 21.
7. *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-357, Decision on Defence Applications for Leave to Appeal Rulings of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, para.26.
8. *Prosecutor v Erdemovic*, IT-96-22, Judgment, 7 October 1997, para. 16.
<http://www.un.org/icty/erdemovic/appeal/judgement/erd-aj971007e.htm>
9. *Prosecutor v Goran Jelusic*, IT-95-10, Judgement, 5 July 2001, para. 25.
<http://www.un.org/icty/jelusic/appeal/judgement/jel-aj010705.pdf>

10. *R v Barking Justices Ex p. D.P.P.*, (1995) 159 J.P. 373 (QBD); Crim L. R. 1995, 953-954, at p. 954, (“R v. Barking”).

<http://web2.westlaw.com/Find/Default.wl?bhcp=1&DB=UK%2DCASELOC&FindType=Y&FN=%5Ftop&rs=dfa1%2E0&SerialNum=1994262754&ssl=n&strRecreate=no&sv=Split&vr=2%2E0>

11. *Mayes v Mayes*, [1971] 2 All E.R. 397.

<http://web2.westlaw.com/Find/Default.wl?bhcp=1&DB=4891&FindType=g&FN=%5Ftop&rs=dfa1%2E0&SerialNum=1971022909&ssl=n&strRecreate=no&sv=Split&vr=2%2E0>

12. *Nuclear Tests Case (Australia v France)*, Dissenting Opinion of Judge Sir Garfield Barwick, (1974) ICJ Reports 253, at p. 442.

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B. Rules of Procedure and Evidence

1. Rules of Procedure and Evidence of the Special Court, Rule 73(B) Amended 14 May 2005.

C. Transcripts

1. *Norman et al.* Trial Transcript, 20 September 2005, pp 5, 6, 11-12, 21-22, and 56.
2. *Norman et al.*, Transcript, Status Conference, 25 May 2005, p. 9.