

THE SPECIAL COURT FOR SIERRA LEONE**BEFORE:**

Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe

Registrar: Mr. Robin Vincent

Date filed: 19th July 2005

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL - 2004 - 15 - T

**DEFENCE RESPONSE TO PROSECUTION MOTION OBJECTING TO
DEFENCE SUBMISSIONS OF WITNESS STATEMENTS WITH
INCONSISTENCIES MARKED**

Office of the Prosecutor

Luc Côté
Lesley Taylor
Peter Harrison

Defence Counsel for Issa Sesay

Wayne Jordash
Sareta Ashraph

Neil Gibson
[Signature]
16:30.

INTRODUCTION

1. On 29th June, 1st July and 5th July 2005, the Sesay Defence Team (“the Defence”) filed its “Defence Submissions of the Statements of Prosecution Witnesses...with Inconsistent Statements Marked” for witnesses called in July 2004, October 2004 and January 2005, respectively (the “Defence Submissions”).
2. At the RUF pre-trial status conference held on 4th July 2005, the issue of the Defence Submissions was raised by His Honour Justice Thompson as part of the review of Motions Pending before the Trial Chamber. Counsel for Sesay confirmed that the Defence had filed submissions of the statements of Prosecution witnesses called in July 2004 with inconsistent statements marked, noting “it was pursuant to Your Honours’ order on the CDF trial exhibits”¹. His Honour Justice Thompson enquired from the Prosecution as to whether there were any complications concerning the Defence Submissions. The Prosecution, at that time, made no comment nor raised any objection.
3. On 11th July 2005, the Prosecution filed its “Prosecution Motion Objecting to the Defence Submission of Witness Statements with Inconsistencies Marked”². The Prosecution Motion objects to the Defence Submissions on the grounds that (a) no such request for Defence Submissions was made by the Trial Chamber and (b) the formula adopted by the Defence “does not accord with the 16 July 2004 Decision on the Disclosure of Witness Statements and Cross Examination in *Prosecutor v. Norman, Fofana and Kondewa*, or the statement of Hon. Justice Boutet during proceedings on 14 January 2005”³, and asks that the Trial Chamber reject the Defence submissions.
4. Alternatively, the Prosecution in its Motion requests that the “Trial Chamber establish a fair procedure for determining the admissibility of the proposed

¹ Transcript of RUF pre-trial status conference, 4th July 2005, pages 11-14, Annex A

² Hereinafter, the Prosecution Motion

³ Para 6, Prosecution Motion

exhibits”, submitting that the appropriate procedure would be for the Defence to file a motion requesting the admission of alleged prior inconsistent statements into evidence with a complete contextual explanation for the request, with the Prosecution reserving the right to challenge each alleged inconsistency⁴.

SUBMISSIONS

5. The Defence notes that both paragraph 1 of the Defence Submissions and paragraph 7 of the Prosecution Response quote paragraph 21(v) of *Prosecutor v. Norman et al*, Decision on Disclosure of Witness Statements and Cross-Examination, 14th July 2004⁵ and concurs that this sets out the relevant procedure for cross-examination of vive voce testimony and a previous statement.

6. The Defence also agrees, as per paragraph 7 of the Prosecution Response, that this corresponds with the practice before the International Criminal Tribunals for the Former Yugoslavia and Rwanda. The Defence draws particular attention to the statement of the ICTR Trial Chamber in *Ruzindana* case⁶ which ruled that whenever Counsel for the Prosecution or the Defence perceives there is a contradiction between the written and oral statement of a witness, they should raise the issue formally by

“putting to the witness the exact portion in issue to enable the witness to explain the discrepancy, inconsistency or contradictions, if any, before the Tribunal. Counsels should then mark the relevant portion of such a written statement and formally exhibit it so as to form part of the record of the Tribunal.”

7. The Defence also notes the ruling in the *Kunarac* trial, as quoted in paragraph 20 of the Norman Decision, which states that a prior statement may be

⁴ Para 14, Prosecution Motion

⁵ Hereinafter, the Norman Decision

⁶ *Prosecutor v. Ruzindana*, Order on the Probative Value of Alleged Contradiction Between the Oral and Written Statement of a Witness During Examination, 17 April 1997 (as quoted in paragraph 19 of the Norman Decision)

tendered in evidence as an exhibit, after an inconsistency with the trial testimony had been established.

8. The Defence has followed this procedure. The statements sought to be exhibited are (i) those exact portions which were put to the witness and (ii) which have the relevant portions marked. The Defence has complied with the Trial Chamber's request to have them form part of the record of the Tribunal. The Defence therefore do not understand the basis of the Prosecution complaint.
9. The Defence further submit that it is apparent from the transcript of 14th January 2005⁷ that it was the Trial Chamber's intention (and the Defence's understanding) that the witness's prior statements were to be submitted as an exhibit with the relevant alleged inconsistencies as raised during cross-examination marked. The Defence draws the attention of the Trial Chamber to the following excerpts from the January transcript⁸:

Page 97 lines 15 – page 98, line 18

“MR. JORDASH: I think...I have...throughout this trial been putting inconsistencies to witnesses based on their statements, and I haven't been requested by the Court to file the statement as an exhibit. I mean with General Tarnue, I would have had to file the whole statement.

JUDGE BOUTET: I know there were many questions with General Tarnue. I can't say...But the procedure is, and it may be that in the case of Tarnue....But now, you're at a stage where the witness is clearly telling you that what is there is not what happened. In other words, there is a clear contradiction, and you want to use that for that purpose, to show that at some other time the witness has said something different than what he is saying in Court under oath. For that purpose, I'm saying to you that you need to produce that document because we do not have that in evidence.

⁷ Hereinafter, the January transcript

⁸ Please note that the full exchange contained in the January transcript regarding the appropriate procedure to follow in relation to inconsistent statements runs from page 96, line 6 – page 105, line 9. This full exchange is set out in Annex B of the present Response. Where excerpts are quoted, the Defence has made all efforts to ensure that it correctly reflects the view as is set out in the context of the full exchange.

MR. JORDASH: Well, I will....go back through the last two months of trial and produce all the statements which I've put to witnesses in inconsistent statements. It's a big job. But if that's Your Honour's way of proceeding, but I don't see that I've done anything different to this statement than I have been doing for the last two months.

JUDGE BOUTET: I cannot say. All I am saying is that if you're using this as a prior inconsistent statement, that's the procedure we should be following..."

Page 99, line 7 – page 99 line 23

"JUDGE THOMPSON: And to buttress...Because if the answers clearly show that there is a contradiction, prima facie, between the testimony here and the prior inconsistent statement, then it warrants the procedure of tendering the statement so that we can examine the degree of inconsistency, the material of ..alleged inconsistency when it comes to the time because that the procedure we have adopted....

MR. JORDASH: Of course I'm in Your Honours' hands.... But it does involve going back through the last two months. Because almost in all cases I've used statements as proof of inconsistency, not simply to refresh a witness's mind."

Page 104 line 8 – page 105 line 9

"JUDGE BOUTET: But ...if this is what you want to achieve, you need to put these statements in evidence, and we don't have that. And then you have to go through the procedure of ...establishing all the preliminaries... And then it will be marked as an exhibit and⁹– for the purpose of establishing yes or no that...

MR. JORDASH: Yes, well I will do so.

JUDGE THOMPSON: This is the law as we've laid down in the decision that I cited.....

....

MR. JORDASH: It will take a few weeks.. But it will be done, of course.

JUDGE BOUTET: You mean a few weeks of work for you, not for the Court to sit and listen for two weeks to listen to that.

MR. JORDASH: No, Your Honour will be pleased to hear it's our work"

⁹ Emphasis added

10. The Defence has complied with the Trial Chamber's order. It is noteworthy that the Prosecution do not offer any alternative interpretation but simply allege that the submission of the statements is "procedurally defective, unhelpful to the Court and prejudiced to the Prosecution"¹⁰. The Prosecution does not explain why nor how the Trial Chamber's order (and the Defence's compliance with it) is contrary to the jurisprudence of this and other international Courts.
11. It is a belated attempt to appeal the Trial Chamber's Norman Decision through a re-litigation of the issue. The Defence respectfully urge the Trial Chamber to resist this attempt pursuant to the doctrine of finality.

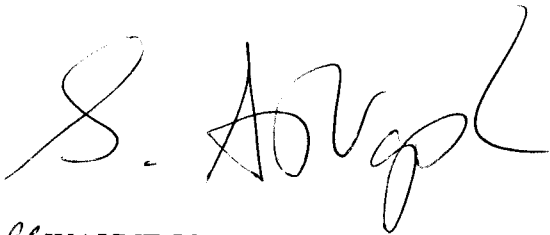
Submissions on the Prosecution's Alternative Procedure

12. The Defence strongly resist the alternative procedure set out in paragraph 14 of the Prosecution Motion. The exhibits sought to be filed set out the portions of the witness statements the Defence allege to be inconsistent with the witness testimony as raised during cross-examination *as requested by the Trial Chamber*. The attempt by the Prosecution to now have their admissibility decided by their suggested alternative procedure is misconceived and wholly without merit.
13. The attempt by the Prosecution to oblige the Defence to provide a contextual explanation for each and every inconsistent statement is strongly resisted. The Prosecution are entitled to challenge any inconsistency alleged during the course of the examination of a particular witness. The Prosecution are further entitled to re-examine should the matter remain unclear. The Prosecution are entitled to challenge the import of the inconsistencies at the time when the Trial Chamber invites submissions on this point. This is not the time.

¹⁰ Paragraph 8, Prosecution Motion

14. The Defence acknowledge that the exhibits were filed late. The volume of the transcripts and the sheer number of inconsistencies alleged, against the background of limited resources, made the process more time-consuming and laborious than originally anticipated.

Dated the 19th day of July 2005

A handwritten signature in black ink, appearing to read 'S. Ashraph' or similar, written in a cursive style.

PP WAYNE JORDASH

SARETA ASHRAPH

BOOK OF AUTHORITIES

1. *Prosecutor v. Sesay et al*, Defence Submission of the Statements of Prosecution Witnesses Called in July 2004, with Inconsistent Statement Marked”, dated 29th June 2005.
2. *Prosecutor v. Sesay et al*, Defence Submission of the Statements of Prosecution Witnesses Called in October 2004, with Inconsistent Statement Marked”, dated 1st July 2005.
3. *Prosecutor v. Sesay et al*, Defence Submission of the Statements of Prosecution Witnesses Called in January and February 2005, with Inconsistent Statement Marked”, dated 5th July 2005.
4. *Prosecutor v. Sesay et al*, Prosecution Motion Objecting to the Defence Submission of Witness Statements with Inconsistencies Marked, dated 11th July 2005.
5. *Prosecutor v. Norman et al*, Decision on the Disclosure of Witness Statements and Cross-Examination, dated 16th July 2004.
6. *Prosecutor v. Ruzindana*, Order on the Probative Value of Alleged Contradiction Between the Oral and Written Statement of a Witness During Examination, dated 17 April 1997.

ANNEXES

- A. Transcript of RUF pre-trial status conference, 4th July 2005.
- B. RUF Trial transcript, 14th January 2005, page 96, line 6 to page 105, line 9.

ANNEX A

Transcript of the RUF pre-trial status conference, 4th July 2005



Case No. SCSL-2004-15-T
 THE PROSECUTOR OF
 THE SPECIAL COURT
 V.
 ISSA SESAY
 MORRIS KALLON
 AUGUSTINE GBAO

MONDAY, 4 JULY 2005
 10.00 A.M.
 STATUS CONFERENCE

TRIAL CHAMBER I

Before the Judges:	Bankole Thompson, Presiding
For Chambers:	Ms Candice welsch Mr Matteo Crippa
For the Registry:	Mr Geoff walker
For the Prosecution:	Mr Peter Harrison Mr Alain Werner Ms Suzanne Mattler (intern) Mr Mark wallbridge(Case Manager)
For the Principal Defender:	Ms Haddijatou Kah-Jallow
For the accused Issa Sesay:	Mr Wayne Jordash Ms Ellen Rogers Ms Elizabeth Shackelford
For the accused Morris Kallon:	Mr Melron Nicol-wilson Mr Charles Taku
For the accused Augustine Gbao:	Mr John Cammegh Mr Ben Holden

OPEN SESSION

1 [HS040705A-SGH]
2 Monday, 4 July 2005
3 [Status Conference]
4 [Open Session]
5 [The accused Sesay and Kallon present]
6 [The accused Gbao not present]
7 [Upon commencing at 10.00 a.m.]

8 MR WALKER: This is Case no. SCSL-04-15-T. Prosecutor v
9 Issa Hassan Sesay, Morris Kallon and Augustine Gbao, which is
10:03:25 10 listed for a status conference.

11 PRESIDING JUDGE: Good morning, counsel. This proceeding
12 is the status conference preceding the fifth trial session of the
13 RUF case. It is being held in pursuance of Rule 65 *bis* of the
14 Rules of Procedure and Evidence of this Court. According to 65
10:03:59 15 *bis*, and I quote, "A status conference may be convened by the
16 designated judge or by the Trial Chamber. The status conference
17 shall: (i) organise exchanges between the parties so as to
18 ensure expeditious trial proceedings; (ii) review the status of
19 his case and allow the accused the opportunity to raise issues in
10:04:24 20 relation thereto."

21 Guided by these objections of a status conference, I now
22 proceed with representation. Who appears for the Prosecution?

23 MR HARRISON: My name is Harrison. H-A-R-R-I-S-O-N,
24 initials P H and appearing with me is Mr Werner. First name
10:04:47 25 Alain. And also appearing with the Prosecution is Ms Suzanne
26 Mattler, an intern in the Prosecution's office.

27 PRESIDING JUDGE: Thank you. For the first accused.

28 MR JORDASH: For the first accused myself, Wayne Jordash,
29 Elizabeth Shackelford and Ellen Rogers.

1 PRESIDING JUDGE: Thank you. For the second accused.

2 MR NICOL-WILSON: For the second accused Charles Taku and
3 Melron Nicol-wilson.

4 PRESIDING JUDGE: And the for the third Accused.

10:05:13 5 MR CAMMEGH: John Cammegh and Ben Holden.

6 PRESIDING JUDGE: Thank you. Any other appearances?

7 Right, let me now indicate the agenda items for this morning's
8 session. The substantive agenda items for today's status

9 conference as follows: One, matters or issues relating to the
10:05:40 10 health of the accused or their detention. Two, trial logistics.

11 (A) trial schedule; (B) case presentation. Three, witness
12 issues. (A) additional witnesses; (B) witnesses for the fifth
13 trial session; (C) other witness issues; (D) expert witnesses.

14 The fourth item is outstanding motions pending in the Trial
10:06:18 15 Chamber and the Appeals Chamber. And then we will round up the
16 day by looking at any other matters.

17 Let us proceed with the first on my list; matters or issues
18 relating to health of the accused persons or their detention. Do
19 counsel for the Defence have any issues relating to the health of
10:06:40 20 the accused persons or their detention? First health.

21 MR JORDASH: For Mr Sesay, no, thank you.

22 PRESIDING JUDGE: Learned counsel for the second accused.

23 MR TAKU: For Morris Kallon, nothing that I know of.

24 PRESIDING JUDGE: And learned counsel for the third
10:06:55 25 accused.

26 MR CAMMEGH: So far as we are aware, nothing in relation to
27 Augustine Gbao.

28 PRESIDING JUDGE: Thank you. Does the head of the
29 detention facility, Mr Barry Wallace, have any matters in

1 relation to the health of the accused persons or their detention
2 to bring to the attention of the Court?

3 MR WALLACE: Nothing, Your Honour.

4 PRESIDING JUDGE: Thank you. Let us proceed with trial
10:07:25 5 logistics. (A) trial schedule. It should be noted that the
6 fifth trial session of this case will commence tomorrow,
7 5th July 2005, pursuant to the Trial Chamber's order of 20th May
8 2004 detailing amendment to judicial calendar and scheduling
9 order for status conference. The aforesaid fifth trial session
10:07:58 10 will end on 5th August 2005.

11 Due to a major outstanding issue left over from the last
12 trial session of the CDF case scheduled for a one day hearing out
13 of session on Wednesday, 6th July 2005, the RUF fifth trial
14 session will continue on Thursday, 7th July 2005 and not on
10:08:35 15 Wednesday, 6th July 2005 .

16 It should also be noted that the hours of court sitting
17 remain unchanged: Monday, Tuesday, Thursday and Friday, we will
18 sit from 9.30 a.m. until 6.00 p.m. with a lunch break from
19 1.00 p.m. to 2.30 p.m. Wednesday sittings will be only from 9 .30
10:09:04 20 to 1.00 o'clock as is now customary.

21 As regard case presentation, I need to reiterate that
22 despite noticeable improvement - and I say that with all feeling
23 of satisfaction - it is the Chamber's view that some aspects of
24 examinations-in-chief and cross-examinations continue to be
10:09:36 25 unduly lengthy, repetitious and sometimes oblique not too
26 relevant. Again all the Chamber can do is to appeal to counsel
27 on both sides to co-operate with the Bench in giving efficacy to
28 a joint commitment to ensure that all accused persons receive a
29 fair and expeditious trial.

1 Witness issues. Let us begin with (A) additional
 2 witnesses. The records show that on 11th February 2005, the
 3 Trial Chamber granted the Prosecution leave to add three
 4 additional witnesses to its witness list. The witnesses on the
 10:10:27 5 reference are TF1-366, TF1-367 and TF1-368. In its application
 6 for leave, the Prosecution reserved the right to apply for the
 7 said witnesses to be granted category C; that is insider
 8 witnesses status and for them to be accorded the existing
 9 protective measures. The Bench is advised that these witnesses
 10:11:02 10 will not be testifying during the fifth trial session. Is this
 11 correct? Will the Prosecution respond to the earlier comments
 12 from the Bench and also the last question?

13 MR HARRISON: It is correct. They will not be testifying
 14 in this session.

10:11:23 15 PRESIDING JUDGE: Thank you. Do counsel for the Defence
 16 have any comments to make on this subject at this stage?

17 MR JORDASH: No, thank you.

18 PRESIDING JUDGE: Thanks. I also wish to mention that
 19 pursuant to the Trial Chamber's consequential order to the
 10:11:40 20 decision on further renewed witness list of 13th April 2005, the
 21 Prosecution filed an up-dated core witness list on 5th May 2005
 22 comprising 101 core witnesses. On 10th June 2005, the Trial
 23 Chamber granted the Prosecution leave to add an additional
 24 witness as an expert witness to that list, bringing the total up
 10:12:16 25 to 102. Is the calculation correct that up to this point in time
 26 33 out of 102 witnesses have testified? Is it also true that a
 27 Prosecution investigator has been called to testify pursuant to a
 28 request by the Defence? Will the Prosecution please respond to
 29 these comments in question?

1 MR HARRISON: Yes, I think the numbers are accurate. If
2 the Prosecution investigator is added, then it is a total of 34
3 witnesses who have testified to date. The Prosecution takes no
4 position and has no concern whether that investigator is deemed
10:13:01 5 to be a Prosecution witness or a witness of the Court.

6 PRESIDING JUDGE: Right, thank you.

7 MR HARRISON: Or categorised from any other.

8 PRESIDING JUDGE: Are there any responses from the Defence
9 at this stage?

10:13:09 10 MR JORDASH: No, thank you.

11 PRESIDING JUDGE: Let us now address the issue of witnesses
12 for the fifth trial session. The Prosecution did file its
13 proposed order of appearance of witnesses on 20th June 2005.
14 According to that list, 17 Prosecution witnesses are scheduled to
10:13:34 15 testify during this trial session. According to the records, the
16 Prosecution indicated that the Defence was informed on
17 31st May 2005 of this order of appearance in compliance with the
18 42 day disclosure requirement. Will the Prosecution confirm
19 this?

10:13:59 20 MR HARRISON: Yes, we confirm that. Is it helpful to the
21 Court if I indicate now some changes.

22 PRESIDING JUDGE: Yes, that is fine. Yes. Expound if you
23 want to.

24 MR HARRISON: I have indicated this to counsel for the
10:14:13 25 first accused and the second accused already. Unfortunately
26 counsel for the third accused and I were not able to have a brief
27 conversation this morning. But what I wish to indicate at the
28 outset is that the existing list has, as the first witness,
29 TF1-306 and as the second witness TF1-122, the Prosecution wishes

1 to advise the Court and Defence counsel that the Prosecution is
 2 not in a position at this moment to call either one of those
 3 witnesses tomorrow. And we would wish to call as the first
 4 witness tomorrow TF1-035, which is the third witness on the
 10:14:57 5 current list. And the Prosecution would also like to inform the
 6 Court and Defence counsel that on Thursday when we resume, the
 7 Prosecution would like to call as its next witness TF1-272. This
 8 is the witness that we in fact wished to call on the last
 9 session, but because of certain timing inconveniences were not
 10:15:25 10 able to do so. And this is a witness that comes to Sierra Leone
 11 from another jurisdiction and we are asking the Court and Defence
 12 counsel to indulge us by allowing the Prosecution to call TF1-272
 13 as a second witness, hopefully early on Thursday, if not the very
 14 beginning of Thursday.

10:15:45 15 PRESIDING JUDGE: Thank you. Learned counsel for the
 16 Defence. Mr Jordash, your response.

17 MR JORDASH: Perfectly acceptable.

18 PRESIDING JUDGE: Good. Mr -- I do apologise.

19 MR TAKU: Mr Taku.

10:15:58 20 PRESIDING JUDGE: Your response.

21 MR TAKU: No objection, Your Honour.

22 PRESIDING JUDGE: And Mr Cammegh.

23 MR CAMMEGH: No, no response.

24 PRESIDING JUDGE: Thank you. And the Bench does not see
 10:16:06 25 any difficulty with that.

26 So, on 28th June 2005, the Prosecution filed the transcript
 27 of the testimony of witness TF1-22 [sic] at the AFRC trial on
 28 24th June 2005 as disclosure of additional information pertaining
 29 to this witness. Are there any comments on this? Do you want to

1 elaborate on this or just confirm?

2 MR HARRISON: I confirm it and the Prosecution sees that as
3 its obligation to disclose that as quickly as possible.

10:16:56

4 PRESIDING JUDGE: Thanks and any responses from the
5 Defence? Any problems?

6 MR JORDASH: No, thank you.

7 PRESIDING JUDGE: No. Counsel?

8 MR TAKU: No.

10:17:02

9 PRESIDING JUDGE: Thank you. Other witness issues. Let me
10 observe that the Prosecution has not yet indicated whether it
11 intends to apply for closed session hearing for part or the
12 entire testimony of any of the witnesses appearing during the
13 fifth trial session. May I have a response from the Prosecution?

10:17:23

14 MR HARRISON: Yes, the intention is to apply for closed
15 sessions. I can indicate now that the intention is to apply for
16 the entirety of the evidence of TF1-036 to be in closed session;
17 the entirety of the evidence of TF1-360. In addition, TF1-361 we
18 anticipate that the entirety of that will be in closed session,
19 but no decision has been made as to whether it is necessary for
20 the entirety of that evidence to be in closed session or simply a
21 portion of that.

10:17:54

22 And finally, the witness that I have already referred to,
23 the one that the Prosecution hopes to call on Thursday, TF1-272,
24 there is an existing order establishing witness protection
25 measures and also closed session measures for that witness and we
26 will be seeking to have that order applied in this Court.

10:18:14

27 PRESIDING JUDGE: Thank you. Any brief responses?
28 Mr Jordash.

29 MR JORDASH: No, thank you.

1 PRESIDING JUDGE: Learned counsel for the second accused.

2 MR TAKU: Just one minute, My Lord.

3 PRESIDING JUDGE: Yes.

4 MR TAKU: Nothing, My Lord.

5 PRESIDING JUDGE: No. Mr Cammegh?

6 MR CAMMEGH: Nothing from me.

7 PRESIDING JUDGE: It is also of interest to note that
8 pursuant to the order for compliance of Prosecution with Rule 94
9 *bis*, the Prosecution has disclosed the confidential expert
10 reports of witnesses TF1-296 and TF1-301. The records show that
11 all Defence counsel have indicated their intention to
12 cross-examine these witnesses on the basis of their reports. Are
13 there any comments on the parties?

14 MR HARRISON: There is nothing I can add to that.

15 PRESIDING JUDGE: Right. And learned counsel for the
16 accused persons. There is on record some indication that you
17 intend to cross-examine these witnesses on the basis of their
18 report.

19 MR JORDASH: Yes, every expert witness will be
20 cross-examined.

21 PRESIDING JUDGE: Right.

22 MR TAKU: We do have nothing to say, My Lord, but we want
23 just to know or have an idea when the Prosecutor intends to call
24 these expert witnesses so we can start preparing in time. If the
25 Prosecutor has made up his mind when.

26 PRESIDING JUDGE: Are you in a position to say that yet?

27 MR HARRISON: I am sorry, I can't give you any clear
28 guidance on that. But we will try to give you that information
29 prior to the end of this session.

1 PRESIDING JUDGE: All right. Okay. Learned counsel for
2 the third, Mr Cammegh?

3 MR CAMMEGH: I am quite certain we will wish to
4 cross-examine every expert witness.

10:20:20 5 PRESIDING JUDGE: Good, yes.

6 MR CAMMEGH: Without exception.

7 PRESIDING JUDGE: Right. Thanks. Okay. Also of some
8 relevance is that on 10th June 2004, the Chamber granted leave to
9 the Prosecution to add an additional expert witness to its list
10:20:43 10 by the name of Zainab Bangura, an expert on forced marriage. Let
11 me make just a few brief comments on this thing. The first is
12 that no application has come from the Prosecution about
13 protective measures for this witness. And second, that the
14 curriculum vitae and her expert report were filed on 10th June
10:21:10 15 this year. The third is that counsel for all the accused persons
16 have indicated their intention to cross-examine her on her
17 report. Any further light to be shed on this matter,
18 Mr Harrison?

19 MR HARRISON: I can't shed any right now. I will
10:21:33 20 investigate this matter and try to report back to Defence
21 counsel, if not tomorrow or Thursday.

22 PRESIDING JUDGE: Very well. Learned counsel, are you
23 satisfied with that undertaking.

24 MR JORDASH: Yes.

10:21:39 25 MR TAKU: Yes, My Lord.

26 PRESIDING JUDGE: Right. Outstanding motions before the
27 Chambers.

28 MR HARRISON: I am sorry to interrupt.

29 PRESIDING JUDGE: That is okay. Fine.

1 MR HARRISON: Under the heading of witnesses, I thought
 2 there might be one further piece of information which the
 3 Prosecution ought to convey. That information is this; the
 4 Prosecution wishes to advise Defence counsel and the Court that
 5 the Prosecution does not expect to call in this session TF1-356
 6 or TF1-143. Neither of those witnesses will be called in this
 7 session.

10:22:08

8 PRESIDING JUDGE: Thank you. Learned counsel will please
 9 make note of that.

10:22:41

10 Pending before this Chamber are the following motions:
 11 Accused Gbao and Sesay, joint defence application for the
 12 exclusion of testimony of witness TF1-141. The motion was filed
 13 jointly on 17th May this year. A response was received from the
 14 Prosecution on 27th May 2005, and a reply was filed on
 15 1st June 2005. I am advised that the motion is under
 16 deliberation.

10:23:12

17 The second motion pending before this Chamber, it is a
 18 joint defence motion requesting conformity of procedural practice
 19 for taking witness statements. The motion was filed jointly by
 20 the Defence for the first and third accused on 21st June 2005.
 21 And a response by the Prosecution was filed on 1st July 2005. A
 22 reply by the Defence, if any, is pending.

10:23:38

23 In addition, on 29th June and 1st July, the Defence for the
 24 first accused filed defence submissions of statements of
 25 Prosecution witnesses called in July 2004 with inconsistent
 26 statements marked. Can we shed some light on that?

10:24:06

27 MR JORDASH: well, it is correct.

28 PRESIDING JUDGE: It is correct.

29 MR JORDASH: It is pursuant to Your Honours' order on the

1 CDF trial exhibits.

2 PRESIDING JUDGE: Right. Thanks. So there is no
3 complication about that?

4 MR JORDASH: I don't think so.

10:24:35 5 PRESIDING JUDGE: At this stage.

6 MR JORDASH: Not yet.

7 MR CAMMEGH: Your Honour, can I raise a logistical matter
8 in relation to that that strikes me as quite sensible?

9 PRESIDING JUDGE: Trial logistics or any other matter?

10:24:45 10 MR CAMMEGH: It --

11 PRESIDING JUDGE: It fits into the scheme of trial
12 logistics?

13 MR CAMMEGH: well, it does, yes.

14 PRESIDING JUDGE: Okay.

10:24:54 15 MR CAMMEGH: But it has direct bearing on Mr Jordash's
16 submission of the inconsistencies. I know that the case manager
17 for the Prosecution, Mr Wallbridge, has already been extremely
18 helpful to us by serving a disk on which all the exhibits in this
19 case have been placed. In relation to complying with the CDF's
10:25:22 20 trial's order that we should file inconsistencies, it would be
21 very, very helpful - I don't know if it will be possible - but it
22 would be very helpful if it were that the Prosecution could
23 similarly serve a disk containing the statements of witnesses
24 called thus far. The logistics of that being self-explanatory.
10:25:42 25 It is very difficult and expensive to take witness bundles back
26 and forth from London to here.

27 PRESIDING JUDGE: Yes.

28 MR CAMMEGH: If we had it on disks - and I am only asking
29 of course for witnesses who have been called in the trial not the

1 whole bundle by any means - but if we had a disk, it would make
2 matters much more efficient or enable things to be much more
3 efficiently handled - I wonder if that is something the OTP could
4 put their minds to. I think it would be of great assistance to
10:26:08 5 everybody.

6 PRESIDING JUDGE: Right. Thanks.

7 MR CAMMEGH: It is not urgent, but it is something I would
8 ask them to consider.

9 PRESIDING JUDGE: Yes, it is something to ponder upon.

10:26:13 10 MR CAMMEGH: Yes.

11 PRESIDING JUDGE: Mr Harrison, your response?

12 MR HARRISON: Yes, we will look into that.

13 PRESIDING JUDGE: Your tentative response.

14 MR HARRISON: We will look into that and try to determine
10:26:23 15 and give some advice to Defence counsel as soon as we can.

16 PRESIDING JUDGE: Right. Thanks. I am also advised that
17 there are no matters in respect of this trial, no motions pending
18 before the Appeals Chamber. The last item is any other matters.
19 Does the Prosecution have anything to say --

10:26:47 20 MR HARRISON: No, thank you.

21 PRESIDING JUDGE: -- for the purpose of this status
22 conference? Anything further? Thanks. Learned counsel for the
23 Defence, Mr Jordash?

24 MR JORDASH: No, thank you.

10:26:56 25 PRESIDING JUDGE: Learned counsel, Mr Taku?

26 MR TAKU: Yes, My Lord. We just wanted to find out if at
27 this point in time the Prosecutor has made up its mind to drop
28 any of the 103 witnesses? If he has made up his mind he can
29 inform us.

OPEN SESSION

1 PRESIDING JUDGE: Yes. Well, counsel, at some point in
2 time you will communicate your response?

3 MR HARRISON: Yes, we will.

10:27:23

4 PRESIDING JUDGE: I don't want to put you under any
5 pressure here on this point.

6 MR HARRISON: We will try to convey some information to you
7 as soon as we can and it may be possible to convey that
8 information prior to the end of this session. But as of this
9 moment I am not able to tell you.

10:27:37

10 PRESIDING JUDGE: Right. Okay.

11 MR CAMMEGH: Just one thing from me, Your Honour. It is a
12 little far off, but forward planning is always sensible. We
13 would be very grateful if the Court could indicate as early as
14 they can whether or not the RUF trial is likely to be sitting in
15 January of next year. I understand that the CDF case may well be
16 approaching completion. I am not quite sure what the position
17 is. But certainly, as far as one's professional diary is
18 concerned, the earlier we know whether we have to be here in
19 January of next year the better it will be.

10:27:55

20 PRESIDING JUDGE: The Chamber is very sensitive to that and
21 I understand that discussions are on-going to make sure that we
22 come out with some indication as soon as possible.

23 MR CAMMEGH: We are most grateful for that.

24 PRESIDING JUDGE: Right. Yes, Counsel.

10:28:29

25 MR TAKU: Yes, Your Honour. We very respectfully suggest
26 that in making a determination, Your Honours also take into
27 consideration we will be here up to December, sometime in
28 December.

29 PRESIDING JUDGE: Yes. Well, as I say, we will factor all

1 the possible parameters into this complicated exercise and
2 certainly come out with the most agreeable and fair solution.
3 Yes, quite.

10:29:00 4 MR JORDASH: On the same subject, may I be so bold as to
5 ask Your Honours to consider consulting with counsel who come
6 from overseas? If there are two choices I would certainly
7 appreciate being able to put my views across as to which I would
8 prefer.

10:29:20 9 PRESIDING JUDGE: You are not being presumptuous. We think
10 it is absolutely necessary. I mean, we do not have any kind of
11 rigid, ritualistic response to that. I mean, it is for the
12 interest of all the parties, including ourselves, as the ones who
13 virtually facilitate the judicial process. So we certainly
14 will -- you can communicate to our Chamber legal advisors your
10:29:51 15 own input and we certainly are very flexible on this.

16 MR JORDASH: Thank you.

17 PRESIDING JUDGE: Right. Anything else? Well, if there is
18 nothing else, I am minded now to bring this status conference to
19 a close and to say have a restful, if you can, rest of the day.

10:30:07 20 [whereupon the Status Conference adjourned at
21 10.27 a.m.]

22
23
24
25
26
27
28
29

1 witness that he has said that he did not make any
2 complaints because the persons to whom he should have
3 complained were themselves the perpetrators of the acts.
4 And now, when the statement -- or that portion of his
5 statement is put to him, he said that he did not say
6 that, and the person who recorded it may have made a
7 mistake. I just wanted to know whether he's prepared to
8 move beyond just "may have made" since he has denied that
9 he did not say that to the recorder.

10 Yes, learned counsel for the Prosecution.

11 MR HARRISON: I just wanted to clarify one thing.

12 JUDGE THOMPSON: Yes.

13 MR HARRISON: The person who recorded the statement, but I
14 think Mr Jordash will agree with me, that the statement
15 is quite clear in saying that the language during the
16 interview was Krio. The statement is in English. So in
17 addition to the recorder, there's also a translator.

18 JUDGE THOMPSON: Yes, yes. That is part of the equation.
19 It's just that I wanted him in the light of what I am
20 interpreting to be a categorical denial that he did not
21 say that he complained to the perpetrators, whether he is
22 prepared to say that the person who did record it did
23 make a mistake, or just to leave it at "may have made a
24 mistake." For me, that is critical.
25 And the reason I insist on this is because counsel is
26 alleging that now there is a clear denial. It's no
27 longer an equivocation. We have moved away from
28 equivocation. We have contradictory statements. And in
29 my own judicial estimation, it's one that can be true,

ANNEX B

RUF Trial transcript, 14th January 2005, page 96, line 6 – page 105, line 9

1 the other false; both cannot be true and false at the
2 same time. That is the reason why I am seeking the
3 clarification from the witness. Of course, if he's not
4 able to give it, that's fine. But I just thought I
5 should make this point for the record.

6 JUDGE BOUTET: Can I add as well for the record that - and it
7 is really for your information as well, Mr Jordash, so
8 you're not misled in this respect - up to now, you've
9 used statements to refresh the memory of the witness. We
10 have no evidence of these statements in Court. So if
11 you're trying now to show contradiction between his
12 evidence and what was in the statement, we don't have
13 that in evidence.

14 In other words, you either go with refreshing the
15 memory, or you're trying to introduce the statements to
16 show that he said something different at some other time,
17 or you're trying to introduce the statements as evidence
18 in Court. You seem to be puzzled by my comments.

19 MR JORDASH: Only because up until now the procedure we have
20 followed has been to simply read into the record the
21 portion of the statement.

22 JUDGE BOUTET: But the statements were eventually produced to
23 say this is that portion and that portion, and these
24 statements are marked as exhibits in those cases.

25 MR JORDASH: Not in our trial.

26 JUDGE THOMPSON: I would concur. The difficulty was that,
27 Mr Jordash, you began by seeking to refresh his memory.
28 It is my suggestion that we've gone beyond that now.

29 MR JORDASH: Yeah.

1 JUDGE THOMPSON: It's now merely refreshing memory now. It's
2 seeking to establish inconsistencies between testimonies
3 here or sessions here and prior statements.

4 MR JORDASH: I beg your pardon for interrupting.

5 JUDGE THOMPSON: Yes. Let me just finish that. And if we've
6 moved from the plane of refreshing memory, merely
7 refreshing it, to a situation where what you have
8 elicited amounts to calling in question the veracity of
9 the testimony here vis-a-vis the statements that he gave
10 to the Prosecutor, then we have moved to the area of
11 possible prior inconsistent statement. In which case the
12 procedure adverted to by my learned brother would come
13 into play. But you can give us your own perception of
14 the law or the procedure.

15 MR JORDASH: I think it's a matter of practice, and I have
16 throughout my -- throughout this trial been putting
17 inconsistencies to witnesses based on their statements,
18 and I haven't been requested by the Court to file the
19 statement as an exhibit. I mean, with General Tarnue, I
20 would have had to file the whole statement.

21 JUDGE BOUTET: I know there were many questions with General
22 Tarnue. I can't say. I have to go to the record. But
23 the procedure is, and it may be that in the case of
24 Tarnue, I don't have that fresh in my mind now, that he
25 acknowledged that what was there was inaccurate or
26 whatever it was. In other words, the contradiction that
27 existed was explained in some fashion, and therefore
28 there was no need to produce. But now, you're at the
29 stage where the witness is clearly telling you that what

1 is there is not what happened. In other words, there's a
2 clear contradiction, and you want to use that for that
3 purpose, to show that at some other time the witness has
4 said something that is clearly different than what he is
5 saying today in Court under oath.

6 For that purpose, I'm saying to you that you need to
7 produce that document because we do not have that in
8 evidence.

9 MR JORDASH: Well, I will happily -- I wouldn't say happily go
10 back through the last two months of trial and produce all
11 the statements which I've put to witnesses in
12 inconsistent statements. It's a big job. But if that's
13 Your Honours' way of proceeding, but I don't see that
14 I've done anything different to this statement than I
15 have been doing for the last two months.

16 JUDGE BOUTET: I cannot say. All I'm saying is if you're
17 using this as prior inconsistent statement, that's the
18 procedure we should be following. If we have not done
19 that, I don't know. I will have to check the record on
20 this. But I do know that in the other trial, this is the
21 standard procedure, and we've done that many, many times.

22 MR JORDASH: To be frank, I am aware of that procedure because
23 your learned legal officer informed me of it. And I was
24 expecting the Chamber to impose the same. But up until
25 now, nothing has been said, and so seeking to save my
26 team work --

27 JUDGE BOUTET: This is why I'm arguing with you, Mr Jordash.
28 But you'll recall that earlier in your cross-examination,
29 I asked you the question: Are you doing this to refresh

1 the memory of the witness or are you trying to...? And
2 you said no, this is to refresh the memory. So I left it
3 there at that time because that's the track you were
4 pursuing. But now you've moved on a different scenario.
5 I'm just mentioning that to be fair to you, so you're not
6 taken by surprise and say how come?

7 JUDGE THOMPSON: And to buttress that, the thing, of course,
8 we didn't want to pre-empt you because we didn't know
9 what kind of answers you'd get. Because if the answers
10 clearly show that there is a contradiction, prima facie,
11 between the testimony here and the prior inconsistent
12 statement, then it warrants the procedure of tendering
13 the statement so that we can examine the degree of
14 inconsistency, the materiality of inconsistency
15 -- alleged inconsistency when it comes to the time
16 because that's the procedure we've adopted. But of
17 course, in the case of refreshing memory, it's different.

18 MR JORDASH: Of course, I'm in Your Honours' hands as to what
19 procedure Your Honours want to follow. But it does
20 involve, and we will of course do this, but it does
21 involve going back through the last two months. Because
22 almost in all cases I've used statements as proof of
23 inconsistency, not simply to refresh a witness's mind.

24 JUDGE THOMPSON: Well, again, as I say, it depends if we look
25 at the records on the kind of answers that you got from
26 the witness because that is what is going to trigger the
27 procedure for tendering a document where there's a prior
28 inconsistent statement. I mean, you may have put
29 statements to the witness based on what he told the

1 interrogators. But then you find that the answer does
2 not trigger the procedure we're talking about.

3 JUDGE BOUTET: The answer in Court has to be clearly
4 inconsistent --

5 JUDGE THOMPSON: Inconsistent, that's what I'm saying.

6 JUDGE BOUTET: If the answer is only explaining what he said
7 before but does not contradict what he said before, we
8 don't have to go into that scenario. So that's why in
9 many of these instances we're referring to, the witness
10 has explained. There was no contradiction between what
11 is now here, and what was there before. There was an
12 explanation as to why the differences. Now it's quite
13 different and the prior statement is clearly inconsistent
14 with what is being said today. That's why you're
15 tendering that statement for that purpose. Do you follow
16 me?

17 MR JORDASH: I'm not sure, to be honest, I see the
18 distinction.

19 JUDGE BOUTET: Because there are no inconsistencies between
20 -- there might be differences between what the witness is
21 saying today because he's explaining why there were
22 differences, but now in the scenario that we're talking
23 about now, the witness is saying -- he's saying something
24 today that's clearly different. It's not a question of
25 explanation. It's clearly different. And at that stage,
26 you're asking these questions for the purpose of showing
27 that the witness today is saying something that is
28 clearly different and inconsistent with what he said
29 before. And in that scenario, if you want to use that,

1 we need to have that evidence. We don't have it. In
2 other words, we need to have the statement in evidence.

3 JUDGE THOMPSON: We have decision on this on the 16th of July
4 this year where we, in fact, clearly articulated in that
5 decision the procedure when it is sought to cross-examine
6 on prior inconsistent statements. And we set out clearly
7 this procedure in the case of SCSL-04-14-T, 16 July was
8 the decision. Alleged inconsistencies between
9 testimonial evidence and written statement of the
10 Prosecution. If you look at paragraphs 10, 11, 23, and
11 24 of that particular decision, you will see that we
12 clearly articulate the procedure that should be followed.
13 As my learned brother said, there must be, prima facie,
14 some evidence from the answers of the witness that
15 clearly what he has said today here contradicts
16 completely what he told the police.

17 But where he explains the alleged inconsistency, it
18 wouldn't trigger the procedure.

19 MR JORDASH: The only problem I have in understanding this is
20 that throughout, whatever the witness says, we maintain
21 an inconsistency. The witness, to our minds, may give an
22 explanation, but when it's inconsistent with what we
23 -- the case we are putting, it's an inconsistency, we
24 would say, and an inconsistency which needs to be
25 considered by the Honourable Chamber. For our mind, the
26 decisive factor is not how persuasive the witness is in
27 trying to explain away the inconsistency. To our mind is
28 what is relevant is the inconsistency, and the answer he
29 gives or she gives must be weighed by the Honourable

1 Chamber to decide who is right.

2 JUDGE THOMPSON: But how would we examine whether the
3 in-- there is an inconsistency or whether the
4 inconsistency is material or significant, and what
5 weight, if any, to attach to it, the evidence of the
6 witness on the witness stand, if we determine that it's a
7 material consistency, and we ask how do we proceed to
8 evaluate this if we do not have the statement made to the
9 interrogators in evidence when we come at the end of the
10 day to look at the evidence in its totality?

11 MR JORDASH: Well, I understand that, Your Honour. But what I
12 don't understand is why a distinction should be drawn
13 dependent upon the answer given by the witness. Because
14 the answer given by the witness is to be weighed in due
15 course when compared to the inconsistency alleged by the
16 Defence, whatever the witness says, I maintain the
17 inconsistency.

18 JUDGE THOMPSON: Suppose he admits that he did -- suppose that
19 he had admitted here that he did, in fact, tell the
20 police or the interrogators that he did not complain to
21 the mining management people? Suppose he said "I did
22 complain," virtually affirming what he said to the
23 police. Why would that be an inconsistency if he affirms
24 his answer in the witness -- in the statement?

25 MR JORDASH: Because I would have put it to him in response to
26 an oral answer in Court, and the inconsistency would
27 exist between that oral and the witness statement, even
28 if he adopted the written statement or rejected it.

29 JUDGE THOMPSON: Well, I mean, if he adopts it, says yes, I

1 did say that, and then he says on the witness stand, this
2 is exactly my position. He did not deny.

3 MR JORDASH: I would still in due course invite Your Honours
4 to look at the written statement, look at his oral
5 testimony which I had submitted is in contradiction to
6 it. Whether he'd adopted the written statement or not, I
7 would still suggest that the contradiction between the
8 oral testimony and the written statement is such that you
9 should infer that the Defence are right.

10 JUDGE THOMPSON: It's only when there is perceived
11 contradiction, but not when there's an admission. You
12 put the question to him and he admits.

13 MR JORDASH: There's still an inconsistency between the oral
14 testimony and the written statement.

15 JUDGE THOMPSON: In what sense?

16 MR JORDASH: If the witness says that the cow was blue and the
17 written statement says the cow is red, and I put to the
18 witness, "Well, you said the cow was red," and he says,
19 "Oh, yes, the cow was red," I would still say that the
20 fact that he couldn't maintain a consistent version of
21 events about the colour of the cow, you could infer from
22 that that he's not telling the truth.

23 JUDGE THOMPSON: That's a very interesting position. Because
24 I would have thought what you have is the inconsistency
25 being apparent from his answer vis-a-vis the statement
26 that he made out of Court, rather than the notion that
27 he's now saying something different. And remember that
28 he could say something different by way of an explanation
29 as long as it's not contradictory.

1 MR JORDASH: Your Honours may conclude, but the fact is that
2 it was a long time ago and the witness may have forgotten
3 the colour of the cow.

4 JUDGE THOMPSON: Precisely.

5 MR JORDASH: But Your Honours will still need to take our
6 position into account when deciding whether that is, in
7 fact, a reasonable explanation.

8 JUDGE BOUTET: But to come back to my preliminary observation
9 is if this is what you want to achieve, you need to put
10 these statements in evidence, and we don't have that.
11 And then you have to go through the procedure of
12 saying -- establishing all the preliminaries, this is a
13 statement that was made in these circumstances, it was in
14 English, in Krio, whatever it was, and it was read,
15 translated, I mean, all of this. And then it will be
16 marked as an exhibit and -- for the purpose of
17 establishing yes or no that that --

18 MR JORDASH: Yes, well, I will do so.

19 JUDGE THOMPSON: This is the law as we've laid it down in the
20 decision that I cited. In fact, we clearly relied on
21 existing authorities in the other Tribunals, and we
22 virtually even adopted the definition from Black that an
23 inconsistent statement is one which conflicts with the
24 testimony of the witness.

25 MR JORDASH: Your Honours --

26 JUDGE THOMPSON: That's our major premise, and there must be a
27 conflict there. It can be a patent conflict, it can be a
28 latent conflict.

29 MR JORDASH: I'm happy to do that.

- 1 JUDGE THOMPSON: Okay.
- 2 JUDGE BOUTET: Mr Prosecutor, you were up? I'm sorry.
- 3 MR HARRISON: I'll speak to Mr Jordash when we've adjourned.
- 4 JUDGE BOUTET: Okay.
- 5 MR JORDASH: It will take a few weeks, of course. But it will
6 be done, of course.
- 7 JUDGE BOUTET: You mean a few weeks of work for you, not for
8 the Court to sit for two weeks to listen to that.
- 9 MR JORDASH: No, Your Honour will be pleased it's our work.
10 I can wrap up relatively quickly I would have
11 thought, no more than 15 minutes, if that's of any
12 reassurance to the Court.
- 13 Q. We are still, Mr Witness, looking at what your statement
14 says. And I don't think we had an answer to whether you
15 are saying that the person who took your statement took
16 what you said to him down wrongly or he may have taken it
17 down wrongly? I think that was where we were at.
- 18 Are you with us, Mr Witness? Mr Witness? I know it
19 has been a long day. Are you with us?
- 20 A. I don't know if you'll give me a little bit of time so
21 that I can read this portion.
- 22 JUDGE BOUTET: Yes, yes. You want to read it? Take the time
23 you need to read it.
- 24 THE WITNESS: What I want to be translated, the evidence I
25 gave about us being flogged if we didn't find diamonds, I
26 haven't seen in this statement. Let me read.
- 27 MR JORDASH:
- 28 Q. Mr Witness, why don't I read it in English, and have it
29 translated to you through your headphones.