

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Mr. Robin Vincent

Date filed: 11 July 2005

THE PROSECUTOR

Against

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

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

Office of the Prosecutor:

Luc Côté
Lesley Taylor
Peter Harrison
Nina Jørgensen

Defence Counsel for Issa Hassan Sesay

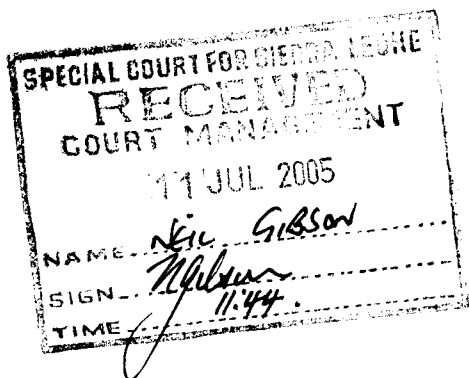
Wayne Jordash
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Andreas O'Shea
John Cammegh



I. INTRODUCTION

1. On 29 June 2005, Defence Counsel for Sesay filed a document entitled “Defence Submission of Statements of Prosecution Witnesses Called in July 2004, with Inconsistent Statements Marked. This was followed by further filings on 1 July 2005, submitting statements of prosecution witnesses called in October 2004 with inconsistent statements marked, and on 5 July 2005, submitting statements of prosecution witnesses called in January and February 2005 with inconsistent statements marked.
2. The Prosecution files this Motion objecting to the Defence submissions and respectfully requests that the Trial Chamber reject as inadmissible the alleged prior inconsistent witness statements, or alternatively, that it make the appropriate orders regarding the correct procedure to be followed with respect to these statements.

II. BACKGROUND

3. During trial proceedings on 14 January 2005, the question of a possible prior inconsistent statement arose while witness TF1-304 was being cross-examined. The Trial Chamber referred to its standard procedure for using prior inconsistent statements, which involves the tendering of the statement or portion of the statement as an exhibit so that the degree of an alleged inconsistency can be examined.¹ Defence Counsel for Sesay revealed that although in the view of the Defence, inconsistencies had been put to witnesses based on their prior statements throughout the trial, the Court had not requested that the statements be filed as exhibits.²
4. It emerged that Defence Counsel and the Trial Chamber had potentially a different conception of what could constitute an inconsistency, with the Defence interpretation being broader than that of the Trial Chamber.³ The Trial Chamber reiterated its definition of an inconsistent statement as one which conflicts with

¹ Sesay et al., Trial Transcript, 14 January 2005, p. 99, 7-17.

² Sesay et al., Trial Transcript, 14 January 2005, p. 97, 15-19.

³ Sesay et al., Trial Transcript, 14 January 2005, p. 101-103.

the oral testimony of a witness.⁴

5. The Defence has now, five months later, filed a series of highlighted witness statements on the basis that “On 14 January 2005, Trial Chamber I requested the Defence teams to submit copies of the statements of prosecution witnesses called at trial with any inconsistencies brought out in cross-examination highlighted for the Trial Chamber’s attention, in accordance with its Decision of 16 July 2004”.

III. GROUNDS FOR OBJECTION

6. The Prosecution submits that no such request was made by the Trial Chamber and that, in any event, the formula adopted by the Defence does not accord with the 16 July 2004 Decision on Disclosure of Witness Statements and Cross Examination in *Prosecutor v Norman, Fofana and Kondewa*,⁵ or the statement of Hon. Justice Boutet during the proceedings on 14 January 2005 that:

“you need to put these statements in evidence, and we don’t have that. And then you have to go through the procedure of saying...establishing all the preliminaries, this is a statement that was made in these circumstances...And then it will be marked as an exhibit”.⁶

7. The Decision of 16 July 2004 set out the procedure for cross-examination on inconsistencies between *viva voce* testimony and a previous statement and established that “the Trial Chamber may direct that the portion of the witness statement that is the subject of cross-examination and alleged contradiction with the *viva voce* testimony, be admitted into the Court record and marked as an exhibit”.⁷ This corresponds with the practice before the International Criminal Tribunals for the Former Yugoslavia and Rwanda.⁸
8. The Defence is seeking to remedy a failure to invoke a well-established procedure at the appropriate time during proceedings by belatedly submitting statements of

⁴ Sesay et al., Trial Transcript, 14 January 2005, p. 104, 19-24.

⁵ *Prosecutor v Norman, Fofana and Kondewa*, Case No. SCSL-04-14-PT, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004.

⁶ Sesay et al., Trial Transcript, 14 January 2005, p. 104, 8-16.

⁷ Ibid, para. 21(v).

⁸ See *ibid*, paras 18-20.

prosecution witnesses called at trial with alleged inconsistencies marked in a manner that is procedurally defective, unhelpful to the Court and prejudicial to the Prosecution.

9. The Prosecution submits that the Defence is not entitled to file witness statements for admission into evidence contrary to the procedure that is clearly spelt out in the jurisprudence of this and other international courts. Written witness statements do not constitute evidence *per se* in an adversarial system governed by the principle of orality. The statements have been filed without any corresponding transcript reference or precise date of oral testimony.
10. The purpose of the procedure for tendering prior inconsistent statements during the testimony of the witness is to afford the judges the opportunity of examining the degree and materiality of the inconsistency in the context of that oral testimony and the evidence as a whole when the time comes to weigh in its totality the evidence against the Accused. It is essential to know the context of the alleged inconsistency.
11. The Prosecution submits that it would be improper to allow the Defence to re-open through a different channel a debate that took place or should have taken place during cross-examination when the witnesses were heard and which is already reflected in the transcript. It would be a lengthy process for the Trial Chamber to determine at this stage the admissibility of the alleged prior inconsistent statements that have been filed. The Defence would need to prove with reference to the transcript that there was indeed an inconsistency which was introduced in the proper way and which triggered the procedure for tendering a document. The Trial Chamber, being under an obligation to hear both parties before determining the question of admissibility, would need to hear from the Prosecution in relation to each alleged inconsistency. Such a process would result in considerable delay and impinge upon the fairness of the trial.
12. The Prosecution submits that the Defence should not be permitted to select and file portions of witness statements that the Defence says contradicts oral testimony many months after the witness has given evidence. The proper time to raise inconsistencies is during cross-examination. Reopening at this stage the

entire debate as to inconsistencies is improper and firmly opposed by the Prosecution.

13. The Prosecution therefore requests that the Trial Chamber reject the statements of witnesses with inconsistent statements marked as inadmissible.
14. Alternatively, the Prosecution requests that the Trial Chamber establish a fair procedure for determining the admissibility of the proposed exhibits. The Prosecution submits 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. The Prosecution would reserve the right, which the Court is obligated to protect, to challenge each alleged inconsistency.

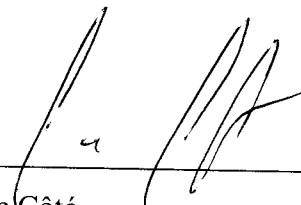
IV. CONCLUSION

15. For these reasons the Prosecution respectfully asks the Trial Chamber to rule that the statements submitted by the Defence are inadmissible.
16. Alternatively, the Prosecution requests that the Trial Chamber issue the appropriate orders as it sees fit to establish a fair procedure for determining the admissibility of the proposed exhibits.
17. The Prosecution requests further that the Trial Chamber order the Defence to stay the filing of further statements of prosecution witnesses with inconsistent statements marked.

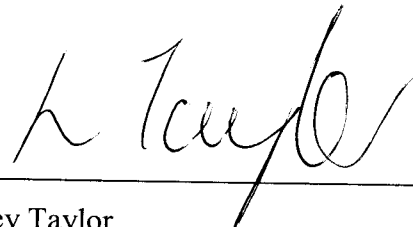
Filed in Freetown,

11 July 2005

For the Prosecution,



 Luc Côté
 Chief of Prosecutions



 Lesley Taylor
 Senior Trial Counsel

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Prosecution Index of Authorities

Prosecutor v Norman, Fofana and Kondewa, Case No. SCSL-04-14-PT, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004.