

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

**Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe**

Registrar: Mr. Robin Vincent

Date filed: 6th July 2005

The Prosecutor

-v-

**Issa Hassan Sesay
Morris Kallon
Augustine Gbao**

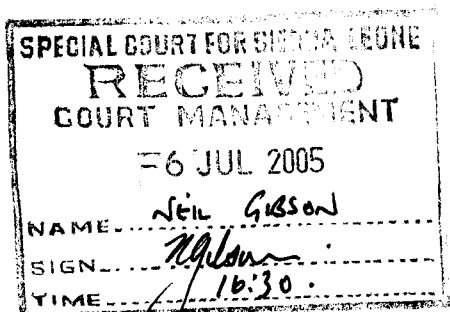
Case No: SCSL - 2004 - 15 - T

**JOINT DEFENCE REPLY TO PROSECUTION RESPONSE TO
MOTION REQUESTING CONFORMITY OF
PROCEDURAL PRACTICE FOR TAKING WITNESS STATEMENTS**

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Prosecution submissions – Orality (paras. 6 -7)

1. The Prosecution's reliance upon the principle of orality in support of their application is misconceived and irrelevant to the issue of whether they ought to assist in the process of ensuring the reliability, authenticity and probative value of statements which *may* be used in evidence. The Principle of orality as defined by the well respected jurist, the late Judge May,¹ reflects an intention to establish direct evidence or the orality of evidence as a general rule for the manner in which the testimony of a witness is to be presented to a Chamber. In other words it is a principle of preference for oral testimony rather than written. The Prosecution's assertion therefore that the "principle of orality allows the Trial Chamber to evaluate the credibility of a witness while he or she is testifying and discourages false testimony"² is misleading. Whilst it is true that the **hearing** of oral evidence allows for the evaluation of the credibility of a witness whilst they are testifying and discourages false testimony, it is incorrect to state that it is the **principle** of orality which has this effect. The principal of orality (that is the preference for oral testimony) contributes to a process by which the Trial Chamber may evaluate evidence and its credibility. Undoubtedly the preference is an important part of that process (and may even be the mainstay of it), but the process of evaluation does not begin and end with the hearing of oral testimony.

2. The Prosecution's assertions that (i) the "general practice is not to admit prior witness statements in to evidence as such" and (ii) that "orality demands particular adherence where, as in the Special Court, extrinsic conditions make authenticated signatures difficult to collect or where witness statements vary widely as to form and content"³ are accurate insofar as they reflect the principle of orality. They are however irrelevant and, moreover, inaccurate in regard to the issues which this Motion seeks to address.

¹ See International Criminal Evidence, Judge May and Marieke Wierda, pp. 163 para. 6.02

² Paragraph 6 of the response to the Motion Requesting conformity of procedural practice for taking witness statements ("The response").

³ See para. 7 of the Response.

3. The real question for the Trial Chamber is whether the process of evaluation, through the assessment of consistency of oral testimony with previous written statements, which have been prepared with the specific intention that they *may* subsequently be used in evidence, is *enhanced* by seeking a solemn undertaking from the witness.⁴ The solemn undertaking of the witness would confirm that the evidence is true and that he/she understands the consequences of willfully and knowingly giving false testimony. In short the issue to be decided concerns the nature and form of *these* written statements and does not concern either oral statements or other types of written statements.

Prosecution submissions – Form and Function (paras. 8 -10)

4. The attempt by the Prosecution to restrict the purpose of witness statements to the issue of notice ought to be dismissed. The purpose of disclosing witness statements does include the provision of adequate notice to the accused so that “he may then do whatever is necessary to prepare a defence, safeguard himself against surprise and delay, and examine witnesses against him.”⁵ However, contrary to the Prosecution view that disclosure “serves only to notify the Defence of not only the evidence but the type of manner of that evidence,”⁶ the Defence submit the purpose of statements can (and often does) include the admission of those statements into evidence.
5. Thus a witness does not simply sign a statement to indicate that he/she has seen it, but to affirm (i) that it was given voluntarily, (ii) that the witness understands and consents to its use in legal proceedings, and (iii) that the witness understands the consequences of giving false testimony. The Prosecution’s continued reiteration of the Trial Chamber’s broad definition of a witness statement as “anything which

⁴ See Defence filings of 29th June 2005, 1st July and 5th July 2005 “Submission of statements of Prosecution witnesses.... With inconsistent statements marked” which demonstrate that witness statements are being filed routinely, pursuant to the CDF ruling of the 16th July 2004 to be used by the Trial Chamber as an important aid to the evaluation of evidence and as evidence of credibility or otherwise.

⁵ See Response para. 8

⁶ See Response para. 8

comes from the mouth of a witness”⁷ as a sufficient or meaningful response to the Defence submissions is another attempt to obscure the important issues on which the Defence is seeking deliberation. The Defence have made clear a number of times, both in its oral submissions on the 29th April 2005 and in its Motion, that the statements which ought to be signed are those “which a witness knows, or has reason to know may be used in evidence in proceedings before the Special Court.”⁸

6. In other words, we accept wholeheartedly the very cogent definition of a statement as adjudicated by the Trial Chamber, but our focus in this Motion is on a particular sub-set of statements within the overall definition: those which are notified to the witness as possibly to be used as evidence. Such statements are not “far removed in form from the traditional affidavit-style witness interviews with fewer procedural indicia of reliability,”⁹ and can easily be signed (or otherwise authenticated to indicate the above).

Prosecution submissions – Impeachment (para. 11 – 13).

7. The Prosecution accepts that if “the Defence are called upon to establish an inconsistency using the out-of-court witness statement it must first lay the foundation for impeachment by establishing whether the witness made the statement and identifying the relevant portion of the statement.”¹⁰ The Prosecution appreciates thus the importance of establishing ownership of a disputed statement to the truth seeking process yet do appear to not want to contribute to it. This approach seems to be at odds with their role as Ministers of Justice who seek not convictions at all costs but the truth and a fair resolution of the issues.

⁷ See Response para. 9.

⁸ See Motion para. 12.

⁹ See Response para. 9

¹⁰

Prosecution Submissions - Practical Considerations (para. 14)

8. The Prosecution's submissions lack substance and do not stand up to scrutiny. It is accepted that operating in Sierra Leone and in international criminal proceedings brings its own set of peculiar problems. However the Prosecution's attempt to disguise the frailty of their evidence by suggesting that difficulties have arisen due to illiteracy, lack of education or translation difficulties is unfair to their own witnesses, to the court process and to the accused. A witness who is illiterate is not unintelligent and can understand the need to tell the truth and is able to relate their version of events orally as accurately and as honestly as a literate person. The ability of such persons to listen to their account read back to them line by line and confirm it to be true is also unaffected by their lack of ability to read or write.

9. The fact that there is a translator (and sometimes even two) does not per se indicate that the process of obtaining witness statements is difficult. The process of taking a witness statement through a translator requires a competent translator and a witness who understands the need to tell the truth. It requires no special procedure, facility or education, but a simple procedure designed to record the witness's version of events and thereafter a question and answer session to ensure that what the witness has said has been accurately recorded and that the witness understands the need to tell the truth.

10. The Prosecution's submission therefore that "if a witness does not wholly understand the document or the significance of signing a statement, the value of the signature is effectively negated"¹¹ is worrying to say the least. It suggests that they may well be relying upon witnesses who do not understand the purpose of recording their account, that their case relies upon Rule 66 statements which have not been verified as truth and that they themselves are unsure of whether their witness understands the need to tell the truth in their witness statements and in

¹¹ Response para. 14.

court. In the event that this accurately reflects the Prosecution view of their own evidence, then this ought to be disclosed, in particular instances, pursuant to rule 68 of the Rules of Procedure and Evidence.

11. If this does not accurately represent the view of the Prosecution, they ought to obtain competent interpreters and, during the course of their very many “proofing sessions” (of the 47 witnesses whose statements remain “unsigned”), simply ask their witnesses whether they are telling the truth and to indicate by way of signature, fingerprint or toe print whether they adopt the statement as true and understand the consequences of false testimony. In the event that this cannot be achieved, the Prosecution has an obligation not to call the witness since Rule 66 disclosure would be rendered meaningless and there would be no guarantee that the witness understands that the account they are giving is intended to be the truth. The consequences of this for the accused and the truth finding process are obvious.

12. ACCORDINGLY IT IS HEREBY REQUESTED:

That the Trial Chamber orders the Prosecution:

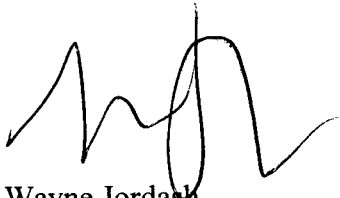
- (i) to ensure that each time the Prosecution interviews a witness, it asks the witness to read through the statement, or alternatively reviews the content of the statement with the witness, and asks the witness to sign or otherwise confirm the truth of its contents;
- (ii) to make its best efforts to secure the signature of all prior witness statements.

IN THE ALTERNATIVE:

That the Trial Chamber:

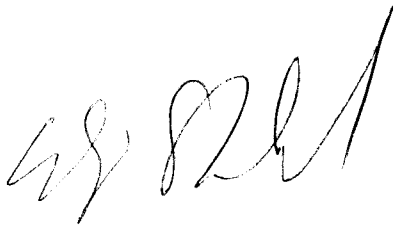
- (i) issues a practice direction on the signing of witness statements;
- (ii) orders the Prosecution to make its best efforts to secure the signature of all prior witness statements.

Dated the 6th day of July 2005



Wayne Jordash

Counsel for Issa Sesay



Andreas O'Shea

Counsel for Augustin Gbao

BOOK OF AUTHORITIES

1. SCSL, Prosecutor v. Norman et al, *Decision on Disclosure of Witness Statements and Cross-Examination*, 16 July 2004
2. Prosecutor v. Norman et al. *Ruling on Disclosure of Witness Statements*, 1 October 2004
3. ICTR, Prosecutor v. Niyitegeka, *Judgment of the Appeals Chamber*, 9 July 2004
4. ICTR, Prosecutor v. Musema, *Judgment and Sentence*, 27 January 2000
5. ICTR, Prosecutor v. Akayesu, *Judgment*, 2 September 1998
6. ICTR, Prosecutor v. Rutaganda, *Judgment of the Appeals Chambers*, 26 May 2003
7. ICTR, Prosecutor v. Bagilishema, *Decision on the Defence Motions to Direct the Prosecutor to Investigate the False Testimony of Witness "R"*, 9 March 1998

ANNEXES

- A: Prosecution's List of Core Witnesses indicating whose statements have not been signed or otherwise proved, dated 14th May 2005

14 May, 2005

THE PROSECUTOR**Against****Issa Hassan Sesay
Morris Kallon
Augustine Gbao**

Case No. SCSL – 2004 – 15 – T

We identified errors in the 9 May, 2005, list of witnesses who gave signed statements to the Office of the Prosecutor. The corrections are included in this list. The error is crossed out and adjacent to the error is the correct information.

Core Witnesses

	Pseudonym	Date of signed statement
1.	TF1-074	16.11.02
2.	TF1-196	Nil
3.	TF1-214	Nil
4.	TF1-021	25.02.03
5.	TF1-064	02.12.02
6.	TF1-199	Nil
7.	TF1-077	16.11.02
8.	TF1-217	Nil
9.	TF1-331	04.03.03
10.	TF1-305	Nil
11.	TF1-253	28.10.03
12.	TF1-235	20.08.03
13.	TF1-139	Nil
14.	TF1-167	Nil
15.	TF1-355	Nil
16.	TF1-197	Nil
17.	TF1-016	18.11.02
18.	TF1-304	16.11.02
19.	TF1-078	14.11.02
20.	TF1-071	12.02.03, 14.11.02, 13.09.04, 23.12.04
21.	TF1-141	08.11.03
22.	TF1-015	15.11.02
23.	TF1-195	Nil
24.	TF1-192	Nil
25.	TF1-263	Nil
26.	TF1-218	05.11.02
27.	TF1-012	16.11.02

28.	TF1-362	18.05.04
29.	TF1-113	27.03.03
30.	TF1-108	Nil
31.	TF1-114	Nil
32.	TF1-296	Nil
33.	TF1-301	Nil
34.	TF1-150	Nil 18.04.05
35.	TF1-046	Various signed documents
36.	TF1-035	16.11.02
37.	TF1-060	02.02.03
38.	TF1-125	30.01.03
39.	TF1-127	Nil
40.	TF1-122	30.01.03
41.	TF1-129	01.02.03
42.	TF1-138	26.10.02
43.	TF1-172	Nil
44.	TF1-212	06.11.02
45.	TF1-215	11.03.03
46.	TF1-329	Nil 26.03.03
47.	TF1-143	Nil
48.	TF1-213	06.11.02
49.	TF1-272	Nil
50.	TF1-252	Nil
51.	TF1-250	Nil
52.	TF1-261	Nil
53.	TF1-152	Nil
54.	TF1-023	16.02.03
55.	TF1-101	19.03.03
56.	TF1-093	26.03.03
57.	TF1-104	18.02.03
58.	TF1-097	05.03.03
59.	TF1-169	Nil
60.	TF1-022	26.02.03
61.	TF1-082	27.03.03
62.	TF1-029	26.02.03
63.	TF1-054	26.11.02
64.	TF1-005	25.11.02
65.	TF1-004	27.11.02
66.	TF1-008	26.11.02
67.	TF1-117	17.01.03
68.	TF1-180	Nil
69.	TF1-323	Nil
70.	TF1-251	Nil 21.01.04
71.	TF1-314	29.10.03

72.	TF1-165	Nil
73.	TF1-042	18.04.03
74.	TF1-043	Nil
75.	TF1-044	Nil
76.	TF1-174	Nil
77.	TF1-186	Nil
78.	TF1-290	Nil
79.	TF1-179	Nil
80.	TF1-343	Nil
81.	TF1-041	16.01.03
82.	TF1-289	Nil
83.	TF1-207	Nil
84.	TF1-156	Nil
85.	TF1-031	19.01.03
86.	TF1-232	Nil
87.	TF1-028	18.01.03
88.	TF1-159	31.01.03 Nil
89.	TF1-360	Nil
90.	TF1-361	Nil
91.	TF1-363	Nil
92.	TF1-045	Nil 31.01.03
93.	TF1-151	Nil
94.	TF1-036	12, 14.10.02
95.	TF1-334	Nil
96.	TF1-184	30.06.03
97.	TF1-356	31.03.04
98.	TF1-210	Nil
99.	TF1-366	05.02.04
100.	TF1-367	Nil
101.	TF1-368	Nil