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SCSL-04-15-T

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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: 25 July 2005

THE PROSECUTOR

Against

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

**PROSECUTION REPLY TO DEFENCE RESPONSE TO 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

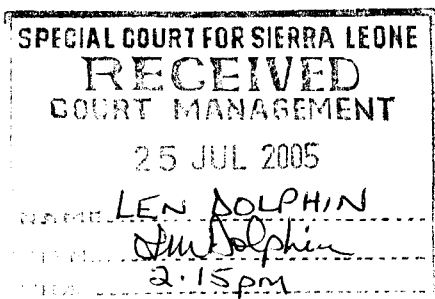
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon

Shekou Touray
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao

Andreas O'Shea
John Cammegh



I. INTRODUCTION

1. The Prosecution files this Reply to the Sesay “Defence Response to the Prosecution Motion Objecting to Defence Submissions of Witness Statements with Inconsistencies Marked” (“Response”) filed on 19 July 2005.
2. In its Response, the Defence argues that the Prosecution’s Motion should be denied for the following reasons:
 - a) The Defence has followed the required procedure in compliance with the Trial Chamber’s order by seeking to exhibit those statements that (i) are the exact portions which were put to the witness and (ii) which have the relevant portions marked;
 - b) The Prosecution is attempting to re-litigate an issue determined in the 16 July 2004 Decision on Disclosure of Witness Statements and Cross Examination in *Prosecutor v Norman, Fofana and Kondewa*¹ which should be resisted pursuant to the doctrine of finality;
 - c) The alternative procedure put forward by the Prosecution is misconceived and without merit.
3. The Prosecution reiterates the submissions in its Motion and asks the Trial Chamber to rule that the statements submitted by the Defence are inadmissible, or alternatively, to establish a fair procedure for determining their admissibility.

II. ARGUMENTS

4. The Defence submits that the trial Transcript of 14 January 2005 reveals that it was the Trial Chamber’s intention, and the Defence’s understanding, that the witness’s prior statements were to be submitted as exhibits with the relevant inconsistencies as raised during cross-examination marked. According to the

¹ *Prosecutor v Norman, Fofana and Kondewa*, Case No. SCSL-04-14-PT, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004.

Prosecution's interpretation of the Transcript, Defence Counsel and the Trial Chamber appeared to have a potentially different conception of what could constitute an inconsistency. This means that despite the Defence assertion that it had been introducing inconsistencies throughout the trial, the Trial Chamber was unable to confirm whether on those previous occasions the procedure for introducing prior inconsistent statements as exhibits had been triggered. Indeed, when the question arose on 14 January 2005, it appeared to be the first time the judges recognized a "clear contradiction"² that warranted the procedure of tendering the statement. Judge Boutet, drawing a distinction with a previous witness, stated:

"...the contradiction that existed was explained in some fashion, and therefore there was no need to produce. But now, you're at the stage where the witness is clearly telling you that what is there is not what happened. In other words, there's a clear contradiction, and you want to use that for that purpose, to show that at some other time the witness has said something that is clearly different than what he is saying today in Court under oath."³

5. The Prosecution and the Defence agree on what the correct procedure for establishing an inconsistency should be, based on the jurisprudence.⁴ However, the belated attempt by the Defence to remedy its failure to invoke this procedure at the appropriate time results in a procedural defect because the Defence rather than the Trial Chamber is now determining what constitutes a *prima facie* inconsistency of such a nature as to require the admission of the alleged prior inconsistent statement into evidence. This is not the procedure envisaged in the Decision on Disclosure of Witness Statements and Cross Examination in *Prosecutor v Norman et al.*
6. The manner in which the alleged prior inconsistencies have been filed is unhelpful to the Court as it deprives the judges of the necessary contextual foundation upon which to determine whether the statements are admissible and does not allow the

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

³ Ibid.

⁴ Response, paras. 5-7.

judges the opportunity of examining the degree and materiality of the alleged inconsistency in the context of the oral testimony. As a result the Trial Chamber is being asked to do the work of the Defence.

7. The Prosecution would suffer prejudice if the witness statements filed by the Defence were admitted into evidence and marked as exhibits without further inquiry. Particularly in the light of the ambiguities surrounding the meaning of the term “inconsistency” as revealed by the Transcript of 14 January 2005, the Prosecution reserves its right to challenge each alleged inconsistency that the Defence seeks to have admitted. The Prosecution submits that although this debate should have happened at the relevant time during proceedings, the doubt as to whether inconsistencies, as understood by the Trial Chamber, were in fact being asserted during cross-examination, means that the only way to determine admissibility is to reopen the debate. The resulting delay would prejudice the Prosecution and impinge upon the fairness of the trial.
8. The Prosecution submits that the alleged inconsistent statements submitted by the Defence should be rejected as inadmissible. In the alternative, the Prosecution submits that the admissibility of the statements could still be determined at this stage of the proceedings if the Trial Chamber establishes a procedure that is fair to the Prosecution as well as to the Defence. While the Defence believes itself to be acting in accordance with an order of the Trial Chamber, any such order can not have been intended to deny the Prosecution the right to respond in relation to alleged inconsistencies whose status as such may not have been clearly established during proceedings. The Prosecution agrees that it is entitled to challenge the import of inconsistencies when the Trial Chamber invites submissions on the point during proceedings, but the Transcript suggests that the question of an inconsistency may not have arisen at that point. Therefore, the Prosecution submits that the only way to establish the admissibility of the statements at this stage is to revisit the context in which the impeachment took place and allow the Prosecution to be heard.
9. The Prosecution is by no means seeking to re-litigate an issue that was decided in the Decision on Disclosure of Witness Statements and Cross Examination in

Prosecutor v Norman et al. Indeed, its aim is to ensure that the Court adheres to the principles and procedure laid down in that decision.

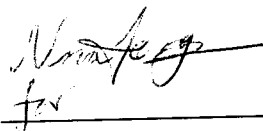
III. CONCLUSION

10. For these reasons the Prosecution respectfully asks the Trial Chamber to rule that the statements submitted by the Defence are inadmissible or alternatively, to issue the appropriate orders as it sees fit to establish a fair procedure for determining the admissibility of the proposed exhibits.

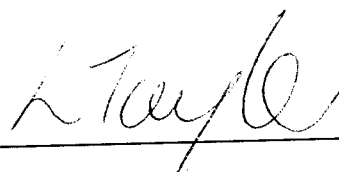
Filed in Freetown,

25 July 2005

For the Prosecution,



Luc Côté
Chief of Prosecutions



Lesley Taylor
Senior Trial Counsel