

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

Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe

Registrar: Mr. Robin Vincent

Date filed: 21st June 2005

The Prosecutor

-v-

Issa Hassan Sesay
Morris Kallon
Augustin Gbao

Case No: SCSL – 2004 – 15 – T

**JOINT DEFENCE MOTION REQUESTING CONFORMITY OF
PROCEDURAL PRACTICE FOR TAKING WITNESS STATEMENTS**

Office of the Prosecutor
Luc Côté
Lesley Taylor
Peter Harrison

Defence Counsel for Issa Sesay
Wayne Jordash
Sareta Ashraph
Elizabeth Shackelford

Defence Counsel for Augustin Gbao
Andreas O'Shea
John Cammegh

SPECIAL COURT FOR SIERRA LEONE	
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INTRODUCTION

1. On 28th April 2005, during the cross-examination of Ms. Hatt, former investigator for the Office of the Prosecutor (“the Prosecution”), Ms. Hatt stated that during the time that she worked as an investigator for the Prosecution, it was no longer the practice of the Prosecution to have witness statements signed by the witness.¹
2. The issue of signed statements was again raised on 29th April 2005, when Mr. Jordash, Counsel for Issa Sesay, invited the Prosecution to “bring signed statements to court if they exist.”² In response to the Trial Chamber’s query as to the existence or otherwise of signed statements, the Prosecution provided a list of core witnesses whose statements had not been signed or otherwise proven.³
3. On receipt of that list, Counsel for Sesay requested that the Trial Chamber, pursuant to Rule 89(b) of the Rules of Procedure and Evidence, order the Prosecution to have the remaining unsigned statements signed by the witnesses and institute a future practice of ensuring that all future witness statements are signed. It was submitted inter alia that this was necessary (i) in order to bring a degree of certainty to the proving of witness statements and (ii) to provide the best way of “proving”⁴ a statement (particularly in the context of proof of inconsistency between a previous out of court written statement and an in – court oral statement).
4. This submission was supported by Counsel for the other Accused. Counsel for Gbao added that, without challenging the admissibility of unsigned statements, the requirements of signed statements was a matter of good practice designed to ensure the fairness of the trial and in particular in order to respect the right to adequate facilities for preparation and the right to examine witnesses, so that the Defence could be satisfied that it had been provided with the most accurate bone

¹ Transcript of Proceedings, 28 April 2005, p. 16, line 29; p. 17, line 1.

² Transcript of Proceedings, 29 April 2005, p. 112, lines 25-29.

³ Annex A.

⁴ In other words demonstrating the origin and authenticity of the statement in question.

vide picture of the witness's intended testimony and to assist in the effective challenge of such testimony.

5. The Trial Chamber indicated that it regarded the issue as complex and ordered the Defence to draft written submissions in support of their contention.⁵

SUBMISSIONS

Issue of admissibility

6. The Defence is cognisant of (and accepts without reservation) the Trial Chamber's Ruling of 16th July 2004,⁶ as followed in its Decision of 1st October 2004,⁷ which inter alia noted that witness statements do not have to be signed in order to be admissible. The Defence accepts that the admissibility of a statement does not depend upon the existence of prescribed formalities (or alternatively upon an assessment of any particular formality or number of prescribed formalities which were followed in its compilation). Nonetheless, this is not to concede that the formal procedure adopted (and evidenced) in its compilation is irrelevant to the Trial Chamber's deliberations. The issue of conformity with formal procedural requirements (or proof of formalities) may well be essential in the inevitable deliberations as to the *reliability* of evidence.⁸
7. The existence of procedural requirements for the production of witness statements does not affect the admissibility of statements which do not fulfill such requirements, save to the extent that the Trial Chamber has a discretion to exclude evidence on the basis of improper conduct on the part of the Prosecution. There may be cases, especially where *male fides* is shown to exist, where the Trial

⁵ Transcript of Proceedings, 10 May 2005, p. 32, lines 14 - 25

⁶ Prosecutor v. Norman et al, *Decision on Disclosure of Witness Statements and Cross-Examination*, 16 July 2004.

⁷ Prosecutor v. Norman et al. *Ruling on Disclosure of Witness Statements*, 1 October 2004.

⁸ See para 14, Prosecutor v. Norman et al, *Decision on Disclosure of Witness Statements and Cross-Examination*, 16 July 2004, which whilst departing from the jurisprudence of the ICTY and ICTR nevertheless still obliges a fact finding tribunal to assess reliability during its deliberations.

Chamber will exercise its discretion to exclude evidence to protect the integrity of the proceedings, without pronouncing on the general admissibility of such evidence. Such cases will, however, be the exception rather than the rule and imposing procedural requirements on the production of witness statements therefore creates no jurisprudential inconsistency with the Trial Chamber's prior jurisprudence on the effect of Rule 66 on the disclosure, as opposed to production, of such statements or the general admissibility of unsigned statements.

Power of the Chamber to address the issue of proper procedure in investigations

8. The Accused are entitled to a fair trial and the Trial Chamber has the inherent or implied power to protect the integrity of the proceedings for the fair administration of justice. Article 17 of the Statute recognises certain minimum guarantees required to ensure the fair trial of the Accused, including the right to adequate facilities for the preparation of his or her defence (Article 17(4)(b)), the right to a trial without undue delay (Article 17(4)(c)) and the right to examine witnesses against him or her (Article 17(4)(e)).

9. It is submitted that the Trial Chamber is entitled to give directions as to fair procedural practices which will best favour respect for the above mentioned minimum guarantees to a fair trial. In particular, Rule 89(B) of the Rules of Procedure and Evidence gives effect to this power by requiring the Trial Chamber to "apply rules of evidence which will *best* favour a fair determination of the matter before it."⁹ Rule 54 also grants the Trial Chamber a general power to make such orders as are necessary for the conduct of the proceedings.

The desirability of direction on the signing of witness statements

10. It is submitted that unsigned statements militate against the fairness of the trial by placing the Defence in a position where:
 - (a) it does not have the most accurate indication of the case it has to meet and therefore adequate facilities for the preparation of its case;

⁹ Emphasis added.

- (b) due to the lack of care in ensuring the accuracy and comprehensive nature of the witness statements, new evidence is more likely to come out in later statements or in the witness box, leading to the necessity of adjournments or aspects of unprepared cross-examination, thereby affecting the length of the trial the corresponding right to a trial without undue delay; and
- (c) by not being assured of having the most accurate picture of the case against it, its ability to effectively cross-examine is diminished both because of the lack of notice of the true nature and scope of the evidence and because of the ease with which the witness may disown prior inconsistent statements.

11. Each of the above problems derives from the difficulties associated with the reliability, authenticity and probative value of unsigned statements. Further, the consequent loss of the monitoring mechanism for identifying false testimony both encourages testimony for the wrong motives and diminishes the integrity of the proceedings, thereby enhancing the unfairness of the trial. As a result of the Defence having to navigate the difficulties set out in paragraph 10(a)-(c) above, the Trial Chamber is also deprived of the most effective procedural regime for the presentation of an inquiry into the truth.

12. The Defence submits that a “written statement” which a witness “knows, or has reason to know, may be used in evidence in proceedings before the Special Court”¹⁰ ought to be signed. It is submitted that the Trial Chamber should order the Prosecution to sign the statements to ensure the proper administration of justice and to ensure the integrity of the proceedings with which it is presently seized. The Defence further submits that the available jurisprudence, set out below, suggests that witness statements – which lack the “authentication” of a signature - ought to be accorded less weight as evidence before the Trial Chamber.

¹⁰ See the wording of Rule 91(D) for a definition of a written statement. The Defence relies upon this definition to distinguish the statements which ought to be signed.

13. The Trial Chamber itself acknowledged during the course of oral argument on the 10th May 2005 that the signing of witness statements reflected “good practice” and was “better practice” than the taking of witness statements without a signature.¹¹ It was specifically accepted that such practice was desirable.¹²

Reliability

14. The Defence does not dispute that, for the purposes of defining the Prosecution’s disclosure obligations, a statement does not have to be signed to be defined as a witness statement.¹³ This Decision of the Trial Chamber is indeed a reflection of previous jurisprudence from the ICTY and ICTR. In its Judgment, the Appeals Chamber in *Prosecutor v Niyitegeka* compelled the production of interview notes as witness statements. The Appeals Chamber asserted that “[t]he fact that a particular witness statement does not correspond to [a certain] standard ... does not free a party from its obligation to disclose it...”¹⁴ However the Appeals Chamber’s explicitly stated standard for recording witness statements included having the witness review and sign the statement.¹⁵

15. The Appeals Chamber in *Niyitegeka* went on to note “Trial Chambers have the primary responsibility for assessing and weighing evidence, determining whether a witness is credible and the evidence reliable, and according the tendered evidence its proper weight.”¹⁶ Rule 89(B) of the Rules of Procedure and Evidence provides this Chamber with the authority to ensure that it has the necessary tools to properly assess the reliability and credibility of witnesses and evidence. In other words the appending of a signature to a witness statement provides the Defence with the best means to effectively highlight for the Trial Chamber prior inconsistent statements and thus allows the Chamber to maximize the reliability

¹¹ Transcript of Proceedings, 10 May 2005, at p. 25, lines 7 and 22.

¹² Id. at p. 17, lines 1-2.

¹³ *Prosecutor v. Norman et al, Decision on Disclosure of Witness Statements and Cross-Examination*, 16 July 2004.

¹⁴ ICTR, *Prosecutor v. Niyitegeka*, Judgment of the Appeals Chamber, 9 July 2004, para. 35.

¹⁵ Id. at para. 31-32.

¹⁶ Id. at para. 98.

of its deliberations and to thereafter arrive at a “fair determination of the matter before it.”

Authenticity

16. In the *Prosecutor v. Musema*, the Trial Chamber in its Judgment and Sentence, asserted that the establishment of the “*authenticity of the document*” [emphasis in the original] is “[c]entral to the establishment of the credibility and reliability of documentary evidence.”¹⁷ If a witness denies making a statement, establishing the authenticity of the statement becomes problematic. In the same case, the Chamber outlined several factors which would assist in the assessment of authenticity, including “whether the document is signed, sealed, certified, stamped or in any other way officially authorized....”¹⁸

Probative Value

17. The Trial Chamber in *Musema* further stated that criteria for evaluating the probative value of witness testimony include “the use or non-use of solemn declarations; and the fact of whether or not a witness had read or reviewed the statement at the time at which it was made.”¹⁹ The presence of a signature on a written statement is therefore essential. It indicates understanding, prior agreement and solemn undertaking by the witness, in the overall assessment of the probative value of evidence.²⁰

¹⁷ ICTR, *Prosecutor v. Musema*, Judgment and Sentence, 27 January 2000, para. 65.

¹⁸ *Id.* at para. 67.

¹⁹ *Id.* at para. 85.

²⁰ It is instructive to note the affirmation which is the solemn undertaking to which the signature relates. “I, _____, affirm that I have read or have had this statement read to me in the English Language, or have had this statement read to me in a language that I understand. I give this statement voluntarily and I understand that this statement may be used in legal proceedings before the Special Court for Sierra Leone, and that I may be called to give evidence before the Special Court. I understand that willfully and knowingly making false statements in this statement could result in proceedings before the Special Court for giving false testimony. I have not willfully or knowingly made any false statements in this statement. I understand the importance of speaking only the truth, and the information contained in this statement is true and correct to the best of my knowledge and belief”. The signature thus evidences an agreed relationship between the witness and the jurisdiction of the court and represents a promise to the court (from which consequences may flow if not honored) that the evidence is true.

18. According to the Trial Chamber's Judgment in the *Prosecutor v. Akayesu*, where the manner of recording a witness statement does not meet certain standards attesting to reliability, the statement has "considerably less" probative value and will, therefore, be treated "with caution" in the assessment of inconsistencies with oral testimony before the Chamber.²¹ The Presiding Judge in *Prosecutor v. Rutaganda* went so far as to say that "according to a general principle of law, such an unsigned statement ... cannot be used against the witness, unless he recognises having made the statement."²²

19. Briefly put, in the event that the Trial Chamber were to conclude that it would be unfair, according to the general principles of law, to use an unsigned witness statement to impeach the credibility of a witness (through the reliance upon inconsistencies between oral and written evidence), it is the Defence who will be prejudiced. The Prosecution ought not to be able to avoid this type of impeachment by failing to ensure that its witnesses sign their statements.

False Testimony

20. Rule 91 empowers the Trial Chamber to regulate its procedure by ensuring the integrity of evidence before it by warning witnesses of the consequences of false testimony and imposing penalties when false testimony has been given. Rule 91 only provides penalties for false statements made "knowingly and willfully," and therefore (in the context of written evidence) it is effectively rendered nugatory by a practice whereby witnesses fail to sign their statements. In the face of a witness who denied making a written statement the Trial Chamber would struggle to be satisfied that the requisite standard of proof had been reached and moreover to be satisfied that the witness had in fact "knowingly and wilfully" made a particular statement.

²¹ ICTR, *Prosecutor v. Akayesu*, Judgment, 2 September 1998, para. 137.

²² Qtd. in the Judgment of the Appeals Chambers, *Prosecutor v. Rutaganda*, 26 May 2003, para. 326.

21. The importance of a witness's signature on a statement in order to prove false testimony under Rule 91 is amply demonstrated by a consideration of the elements of the offence pursuant to Rule 91. In *Prosecutor v. Bagilishema*²³, the elements must be proved (as regards proof of false testimony) were outlined and included the existence of a solemn declaration and proof that the alleged false statement was contrary to that declaration.²⁴ The Chamber also asserted that the party alleging false testimony must prove that the false testimony was given "knowingly and willfully."²⁵
22. Simply put, a signature is the most reliable and definitive evidence that the statement was in fact made by the witness. In the absence of a signature Rule 91 loses much of (if not all of) its force in guiding witnesses to tell the truth and thereafter providing a real (rather than illusory) procedure for imposing penalties for not doing so. The integrity of the proceedings ought to be protected by the Prosecution and not hindered by a practice that makes it more difficult to identify and penalise deliberate false testimony.
23. The Defence submits that the Prosecution ought not to be permitted to follow a practice that effectively removes the Trial Chamber's inherent and legislative jurisdiction to ascertain and prosecute those responsible for the giving of false testimony.

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 and sign as to the truth of its contents;
- (ii) to make its best efforts to secure the signature of all prior witness statements.

²³ ICTR, *Prosecutor v. Bagilishema, Decision on the Defence Motions to Direct the Prosecutor to Investigate the False Testimony of Witness "R,"* 9 March 1998.

²⁴ *Id.* at para. 4.

²⁵ *Id.* at para. 6.

IN THE ALTERNATIVE:

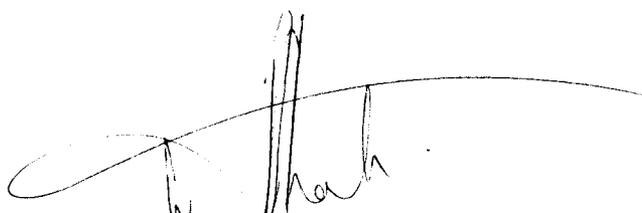
That the Trial Chamber:

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

Dated the 21st day of June 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

ANNEX 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