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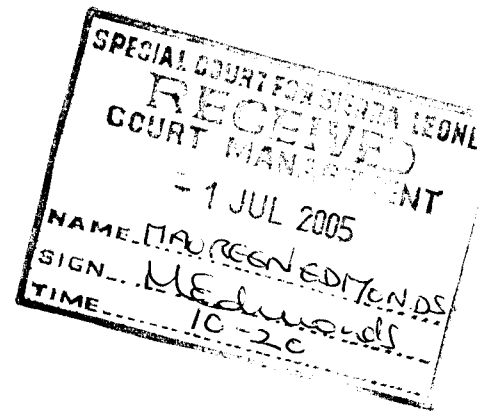
SCSL-04-15-T  
(12386-12393)  
**SPECIAL COURT FOR SIERRA LEONE**  
OFFICE OF THE PROSECUTOR  
Freetown – Sierra Leone

12386

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

Registrar: Mr. Robin Vincent

Date Filed: 1 July 2005



**THE PROSECUTOR**

Against

**ISSA HASSAN SESAY  
MORRIS KALLON  
AUGUSTINE GBAO**

Case No: SCSL – 2004 – 15 – T

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

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**SPECIAL COURT FOR SIERRA LEONE**  
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**I. Introduction**

1. On 21 June 2005 the Defence filed the Joint Motion Requesting Conformity of Procedural Practice for Taking Witness Statements (“the Motion”) seeking either of two alternative sets of orders to remedy harm alleged to have arisen from Office of the Prosecutor (“OTP”) investigators failing to obtain the signatures of witnesses when collecting witness statements.
2. The Motion argues that:
  - a) The Prosecution has disclosed witness statements for its core witnesses to the Defence, a number of which have not been signed by the witness;
  - b) Unsigned witness statements deprive the accused of their right to adequate facilities for the preparation of the case;
  - c) Unsigned statements may deprive the accused of their right to a speedy trial;
  - d) Unsigned statements diminish the Defence’s right to confrontation though effective cross-examination; and
  - e) Unsigned witness statements impede the Trial Chamber’s ability to control False Testimony under Rule 91.
3. The Motion seeks that the Trial Chamber, pursuant to Rule 89(b) order that:

- a) OTP investigators ask the witness to read through statements and sign as to the truth of its contents each time they interview a witness.
- b) The OTP makes its best effort to secure signatures for all previously obtained witness statements

Or, in the alternative, the Motion requests that:

- a) The Trial Chamber issue a practice direction on the signing of witness statements.
  - b) The Trial Chamber orders the Prosecution to make its best efforts to secure signatures of all previously obtained witness statements.
4. The Prosecution submits that the arguments outlined in paragraph 2 above have no foundation and that the relief sought is inappropriate. Accordingly, the Prosecution submits that the Motion should be dismissed in its entirety.

## II. Argument

5. The Defence asserts in its Motion that unsigned, unsworn, and consequently unreliable witness statements may impede the Accused's right to a fair trial in that: it is uncertain that such statements are true and complete reflections of intended testimony, which may hinder defence preparation for cross-examination and result in new evidence coming out at trial and associated delays.

### Orality

6. The adversarial nature of the proceedings before the International Tribunals are governed by the principle of orality and oral testimony is the primary evidence. 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. While the Special Court does not express an explicit preference for live testimony<sup>1</sup>, orality remains the standard bearer for evidence-in-chief, as *viva voce* testimony is given the greatest weight since it is under oath and subject to cross examination. The general practice is not to admit prior witness written witness statements in to evidence as such.
7. 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. The ICTR in the *Akayesu* Judgment, when faced with similar

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<sup>1</sup> Special Court for Sierra Leone Rules of Procedure and Evidence, Rule 90(A), Amended 14 May 2005.

difficulties, namely: translation, time lapse between statement and testimony, time lapse between the events and the interview, witness illiteracy, and tendering of both signed and unsigned statements; deemed such statements carried considerably less probative value than direct, sworn testimony.<sup>2</sup> The practical evidentiary realities of Special Court proceedings, then, render orality especially relevant. Both Prosecution and Defence may be taken by surprise, whether to their advantage or detriment, by what emerges during direct examination or cross examination.

#### Witness Statements: Form and Function

8. The fundamental purpose for disclosing witness statements to the Defence is notice – it serves to inform the accused of the evidence against him in accordance with his statutorily guaranteed rights. As long as the accused has adequate notice of the evidence against him, he may then do whatever is necessary to prepare a defence, safeguard himself against surprise and delay, and examine witnesses against him. Disclosure serves only to notify the Defence of not only the evidence but the type and manner of that evidence. The actual import and weight of the evidence can only be determined by the Trial Chamber at the close of proceedings. Whether a witness statement is signed or not, then, contributes little, if anything, to notice beyond allowing the Defence to make a preliminary assessment of the strength of that evidence.
9. In the Decision of 16 July 2004, the Trial Chamber defined “witness statement” broadly as “anything that comes from the mouth of the witness.”<sup>3</sup> This necessarily includes statements far removed in form from the traditional affidavit-style witness interview and with fewer procedural indicia of reliability. The Trial Chamber did not rule narrowly, that only statements that conformed to set procedural guidelines could qualify as witness statements. Thus, transparency though full disclosure was seen to provide the best protection of the rights of the accused. The ruling encompasses statements that provide the Defence the most complete possible picture of the case against it.
10. Concordant to the Defence argument that unsigned statements prevent the Defence from adequately preparing a defence is their assertion that the increased possibility of new evidence arising during *viva voce* testimony increases the possibility of delays and

<sup>2</sup> *Prosecutor v. Akayesu*, “Judgment,” ICTR-94-T, para 137, 2 September 1998.

<sup>3</sup> *Prosecutor v. Norman et al*, “Decision on disclosure of witness statements and cross-examination,” para. 22, 16 July, 2004.

unprepared cross-examination. Though the Defence may be surprised by these instances, it does not follow that new evidence will lead to an adjournment or that the Defence is unprepared to cross-examine the witness on that evidence.<sup>4</sup> New evidence does sometimes come to light due to the nature of live testimony.<sup>5</sup> This is true whether the prior witness statements are signed or not. It is usually not an exceptional occurrence necessitating an adjournment. Further, the Defence may use the fact that the new evidence does not appear in prior statements to impeach the witness and may use cross-examination to explore the new evidence.<sup>6</sup> Whether a witness statement is signed, then, has little bearing on its adequacy for notification purposes and subsequent preparation of a defence.

### Impeachment

11. If the Defence is 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. Once the defence has established that the witness maintains the veracity of the witness statement, or at least the relevant portion, the foundation has been laid and the Defence may proceed to challenge the witness's in-court testimony by contrasting it with the witness statement.
12. Once the foundation is laid and the inconsistency properly highlighted, the Trial Chamber may admit the relevant portions of the statement as evidence of the inconsistency.<sup>7</sup> The Defence recognizes that a statement does not have to be signed to be admissible.<sup>8</sup> The admitted inconsistency goes only to the witness's *credibility*.<sup>9</sup> Out-of-court statements tendered for impeachment purposes, then, need not rise to the same level of reliability as evidence-in-chief to prove that the witness cannot or will not testify consistently.
13. In evaluating the probity of the inconsistency, the Trial Chamber must "decide what weight to give both the inconsistency and the source of the inconsistency."<sup>10</sup> The contents of the statement itself need not necessarily have any self-evident indication of

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<sup>4</sup> *Id.* at para. 25.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at para. 18.

<sup>8</sup> *Id.* at para. 22.

<sup>9</sup> *Prosecutor v. Akayesu*, "Appeals Chamber Judgment," ICTR-96-4-A, para. 134, 1 June 2001.

<sup>10</sup> *Id.*

truth for an effective impeachment.<sup>11</sup> Practice has shown that where a prior-inconsistent statement is introduced for impeachment purposes to a witness who denies making the statement, the statement has been admitted. This has been true of both signed and unsigned statements.

### Practical Considerations

14. The Trial Chamber is well aware of the extraordinary circumstances arising both from the nature of international criminal proceedings and from operating in Sierra Leone. The OTP collected a majority of these witness statements under circumstances that were less than ideal: Investigators were deployed to rural or war-ravaged areas, many witnesses were illiterate, and investigators and their subjects often had to communicate through one or sometimes two translators. They also served to identify possible witnesses and to formulate an over-all impression of the conflict for the Prosecution. Obtaining signatures in all cases was found to be impractical and sometimes impossible as investigators took, by hand statements from illiterate witnesses, who were unable sign their own names, and in the case of some double amputees, who could not even leave a fingerprint to attest to the veracity of a statement translated into a foreign language. These circumstances make it more difficult not only to secure a signature but lack of education, translation barriers, and illiteracy significantly reduce a signature's assurances of veracity. If the witness does not wholly understand the document or the significance of signing a statement, the value of the signature is effectively negated. It is these practical considerations that have resulted in some statements being unsigned and by no means a "lack of care in insuring the accuracy and comprehensive nature of the written statements." On the contrary, OTP procedures have been designed to ensure the comprehensiveness of the statements.

### **III. Conclusion**

15. The Prosecution has disclosed over one-hundred witness statements during the course of these proceedings, many of which are unsigned. For the Prosecution to have all prior witness statements signed now would be as impracticable as it was at the time the statement was taken and would provide no benefit to the rights of the Accused. Additionally, formalizing what the Trial Chamber has already stated to be a good practice by instituting a practice directive making OTP investigators obtain witness signatures

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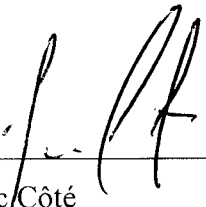
<sup>11</sup> *Id.*

would be needlessly constrictive and may overlook some of the practical and logical obstacles to compliance.

16. For the reasons articulated above, the Prosecution submits that the defence has failed to demonstrate that it has suffered any actual prejudice and therefore the Motion and it should be dismissed in its entirety.

Filed this 1st day of July 2005

In Freetown



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Luc Côté  
Chief of Prosecutions



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Lesley Taylor  
Senior Trial Counsel

### Table of Authorities

1. *Prosecutor v. Akayesu*, “Judgment,” ICTR-94-T, para 137, 2 September 1998. Available at: <http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>
2. *Prosecutor v. Akayesu*, “Appeals Chamber Judgment,” ICTR-94-T-A, I June 2002, para. 134. Available at: <http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/Arret/index.htm>
3. *Prosecutor v. Norman et al*, “ Decision on Disclosure of Witness Statements and Cross-Examination,” SCSL-2004-14-PT, para. 18, 22, 25,16 July 2004.
4. Special Court for Sierra Leone, Rules of Procedure and Evidence, Rule 90(A), Amended 14 May 2005.