

Case No. SCSL-2004-15-T
THE PROSECUTOR OF
THE SPECIAL COURT
V.
ISSA SESAY
MORRIS KALLON
AUGUSTINE GBAO

TUESDAY, 10 MAY 2005
9.47 A.M.
TRIAL

TRIAL CHAMBER I

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| Before the Judges: | Benjamin Mutanga Itoe, Presiding Bankole Thompson Pierre Boutet |
| For Chambers: | Ms Candice Welsch Mr Matteo Crippa |
| For the Registry: | Ms Maureen Edmonds |
| For the Prosecution: | Mr Peter Harrison Mr Alain Werner Ms Wambui Ngunya Mr Mark Wallbridge(Case Manager) |
| For the Principal Defender: | No appearances |
| For the accused Issa Sesay: | Mr Wayne Jordash Ms Eleanor Hutchison Ms Elizabeth Shackelford |
| For the accused Morris Kallon: | Mr Shekou Touray Mr Melron Nicol-Wilson Mr Charles Taku Ms Rachel Irura |
| For the accused Augustine Gbao: | Mr Andreas O'Shea Mr John Cammegh |

1 [HS100505A - EKD]

2 Tuesday, 10 May 2005

3 [Open session]

4 [The accused Gbao not present]

09:29:48 5 [Upon commencing at 9.47 a.m.]

6 PRESIDING JUDGE: Learned counsel, good morning and welcome back from
7 the break. I hope that you took advantage of that to relax a bit and that
8 we come much stronger, more determined to move on from where we stopped
9 last time. So you're welcome back from the break and the Prosecution --

09:51:05 10 MR HARRISON: I'm sorry, Mr Touray.

11 PRESIDING JUDGE: Yes.

12 MR TOURAY: Good morning, Your Honours. May I with your leave for
13 the second time crave the indulgence to introduce another member of the
14 Kallon Defence team. He is Mr Charles Taku and he is no stranger to this
09:51:28 15 area of jurisprudence. In fact he represented Semanza at the ICTR.

16 PRESIDING JUDGE: Mr?

17 MR TOURAY: Having said that -- Mr Charles Taku. I believe,
18 Your Honour, we are about to lose another member of the Defence team I
19 earlier introduced here. I believe he is about to metamorphose into a
09:52:23 20 position in the Defence office. So we now have an able replacement.

21 PRESIDING JUDGE: Since you are taking us back to the biological
22 process of metamorphosis, we hope that it really comes through. We hope
23 so. We understand what you mean to say, learned counsel.

24 MR TOURAY: Thank you, Your Honour.

09:52:54 25 PRESIDING JUDGE: Yes, Mr Jordash.

26 MR JORDASH: May I do the same with our new legal assistant who sits
27 behind me, called Lizzie Shackleford. Always been Miss Shackleford, no
28 metamorphosis.

29 PRESIDING JUDGE: You say Lucy?

1 MR JORDASH: Elizabeth, but Lizzie.

2 PRESIDING JUDGE: Lizzie, okay. I thought I heard Lucy. Elizabeth
3 Shack --

4 MR JORDASH: Shackleford, S-H-A-C-K-L-E-F-O-R-D.

09:54:05 5 PRESIDING JUDGE: She's counsel, is she?

6 MR JORDASH: Legal assistant.

7 PRESIDING JUDGE: Legal assistant, right, okay. We say a hearty
8 welcome to Mr Taku and Ms Shackleford, and we hope to share our pleasures
9 and our tensions, which always end up being pleasures as well when the
09:54:39 10 tensions are over with. We will look forward to them contributing to a
11 healthy development of the due process in this Tribunal. Thank you very
12 much, you are welcome to the team. Yes, Mr Harrison.

13 MR HARRISON: I should also introduce a new member of the Prosecution
14 office, and that is Ms Wambui Ngunya. I shall spell the last name first if
09:55:03 15 I may. N as in Norman, G as in George, U as in uniform, N-Y-A. The first
16 name Wambui, W-A-M-B-U-I.

17 At this time the Prosecution is prepared to call what would be the
18 32nd witness, which is TF1-129, but I wish to advise the Court of two
19 matters. The first is the Prosecution will be making an application that
09:56:00 20 this witness's testimony be in closed session, and I wish to be able to
21 have the opportunity to make that application in a closed session. Before
22 I do so, I understand that Mr Jordash may have a matter that he would like
23 to raise with the Court.

24 PRESIDING JUDGE: You said the witness is TF1-129?

09:56:22 25 MR HARRISON: Correct.

26 JUDGE THOMPSON: Is it a portion of his testimony or the entire
27 testimony?

28 MR HARRISON: No, we will be asking that the entirety of the
29 testimony be in closed session. The reason for it --

1 JUDGE THOMPSON: To shift from the Status Conference.

2 MR HARRISON: Yes, I can't explain it to you in open session --

3 JUDGE THOMPSON: That's okay, it's fine. I just wanted to make sure
4 that we moved away from the commitment during the Status Conference to the
09:56:54 5 entire testimony. Okay. I hear Mr Jordash wants to say something.

6 MR JORDASH: Yes, please. It relates to the issue of signed
7 statements, which was raised just before we broke a week ago. The
8 Prosecution have provided a list of their core witnesses indicating which
9 core witnesses have either signed their statement or the equivalent by
09:57:37 10 placing a fingerprint upon the statement. There are a number of their core
11 witnesses who have not been asked, it would appear, to sign their witness
12 statements or prove them otherwise by a fingerprint.

13 My application is to invite the Honourable Chamber to direct the
14 Prosecution to have those remaining statements signed or proved by a
09:58:18 15 fingerprint.

16 JUDGE BOUTET: I just want to make sure I hear and understand what
17 you are saying. You are saying that this Chamber should order the
18 Prosecution to have these witnesses who have not signed to sign their
19 statements? This is what you're asking?

09:58:37 20 MR JORDASH: Yes, that's what I'm asking. The reasons for that are
21 as follows -- before I give the reasons I would invite Your Honours to
22 consider that you have the power to do so under Rule 89(B) of the Rules of
23 Procedure and Evidence, which I quote:

24 "In cases not otherwise provided for in this section, a chamber shall
09:59:06 25 apply rules of evidence which will best favour a fair determination of the
26 matter before it and are consonant with the spirit of the Statute and the
27 general principles of law."

28 In a nutshell, the reason why we would submit this ought to be done
29 is to bring a degree of certainty to the proving of witness statements.

1 Your Honours delivered a judgment in the CDF case on the 16th of July 2004
2 which dealt largely with the process by which the Defence must seek to
3 prove inconsistencies.

4 JUDGE BOUTET: That is a prior inconsistent statement.

10:00:19 5 MR JORDASH: Your Honour, yes. Paragraph 17 describes that certain
6 safeguards must be met before a witness can be cross-examined on a prior
7 inconsistent statement or have that statement admitted into evidence. The
8 paragraph goes on to say, as Your Honours will of course appreciate,

9 "However, if the prior statement is made in writing the witness will
10 be shown the statement before he can be asked about any alleged
11 inconsistency, and if the statement is proved, the statement is admitted
12 into the record as evidence. This requirement is consistent with the
13 ruling in The Queen's Case 4 Wigmore, para. 1259 that a witness is not
14 compelled to answer any questions on a statement until the statement is
10:01:14 15 shown to him or her and is tendered. Such documents must therefore be
16 capable of being admitted into the evidence."

17 And the paragraph below that, paragraph 18, refers to Rule 89(B) as
18 the guiding principle as to why that should be done.

19 In short, this process which the Defence or any cross-examining party
10:01:39 20 must follow starts off with a process of proving that the original
21 statement is the witness's statement.

22 JUDGE BOUTET: I thought in that decision we also -- I don't have the
23 decision in front of me, but my recollection was to say that notes during
24 an interview could be said to be a statement. So if it is notes taken,
10:02:06 25 does not imply any signature. So it all goes to probative value and weight
26 to be attached to these documentations. So a statement -- and we did not
27 give any specific definition to say a statement to be admitted needs to
28 have so many [inaudible] signatures and so on. Because this is not the way
29 we perceive it to be and we refrained from going in that direction in that

1 decision. We just gave an outline of what would be the procedure. In that
2 procedure you describe, this Court to my recollection did not say it has to
3 have a signature on it.

4 MR JORDASH: I completely agree, Your Honour. But as Your Honour
10:02:44 5 appreciates, the issues are probative value and weight.

6 JUDGE BOUTET: Yes, so if there is no signature then this is part of
7 the probative value to be assessed by the Court.

8 MR JORDASH: Yes. But with interview notes the Prosecution will
9 undoubtedly say in due course, well, these were just notes, they weren't
10:03:08 10 signed by the witness, they weren't reviewed by the witness, any
11 inconsistency relied upon by the Defence can be explained away by those
12 deficiencies. What the Defence is concerned about is that that same
13 explanation cannot apply to the witness statements. What the Defence are
14 being asked to do is prove the witness statement by putting it to the
15 witness, by asking the witness to confirm yes or no whether that statement
16 was his or hers, and then at a later stage tendering that statement as an
17 exhibit.

18 The process then which the Prosecution ought to assist in in the
19 interests of justice is to prove those statements themselves if it is
10:04:02 20 within their ability to do so. Because it would be highly unfair, I would
21 respectfully submit, for them to refuse to do so and then later on at the
22 deliberation stage submit to Your Honours, well, the witness never signed
23 the statement, the Defence were only able to go so far in proving them,
24 because the witness --

10:04:28 25 PRESIDING JUDGE: But Mr Jordash, if we have said in this decision
26 that a statement, like my learned colleague has just pointed out, does not
27 necessarily need to be signed for it to come within the meaning of a
28 witness statement, how does that prejudice the case for your client? I
29 would like to follow up by saying I don't know who you expect to supervise

1 the signing of these statements now, because the Prosecution may have taken
2 some, yes, while some may have been taken by other investigators who are
3 not necessarily here. Don't you think that if we embarked on that we would
4 have to get into a process where we may have to call in those who took the
10:05:23 5 statements, for them to start reading and -- look at the lapse of time that
6 has occurred since some of the statements were taken. I think that we are
7 very, very clear on this. The statement does not necessarily need to be
8 signed for it to qualify as a witness statement.

9 MR JORDASH: Two things, Your Honour.

10:05:45 10 JUDGE BOUTET: But the Prosecution to my recollection in this case
11 and these cases is not using these statements instead of the evidence of a
12 witness. They call a witness, they question the witness, they lead
13 evidence-in-chief with that particular witness. They have the obligation
14 to disclose, in accordance with the Rules, to the Defence any statement
10:06:06 15 and/or information they have obtained from these witnesses, and that is
16 what they disclose to you. Now you are using this to cross-examine, as you
17 are entitled to, the witness as to whether or not this is indeed what they
18 have said or not said; and now you would say, well, it is not sufficient
19 for us because the Prosecution over and above all of that, even though they
10:06:23 20 are not using these statements as we call them as part of their case to
21 lead evidence of that witness, they should have these statements signed by
22 these witnesses.

23 I would like to ask you do you have any caselaw to quote to this
24 Court in this respect - anywhere - that would support your position?

10:06:41 25 MR JORDASH: The caselaw of this Court.

26 JUDGE BOUTET: Any caselaw that these statements need to be signed.
27 Any caselaw.

28 MR JORDASH: The decision I have just referred to, I would
29 respectfully submit, supports my position.

1 JUDGE THOMPSON: Shall I take you up on that. Which particular
2 section or paragraph? Because I recall this particular issue coming before
3 us in the CDF issue and it was the Defence that strenuously contended that
4 in fact interview notes do not amount to statements within the meaning of
10:07:17 5 Rule 56 of the Rules. Of course, we disagreed strongly with that in
6 paragraph 9 and said that -- the question for me would be has the
7 Prosecution indicated whether these statements that you have -- upon which
8 you have premised your application, have they categorised them into witness
9 statements or interview notes? Have they made that distinction? Have they
10:07:44 10 done that in the disclosure to you?

11 MR JORDASH: Well, perhaps the Prosecution could confirm one way or
12 another, because --

13 JUDGE THOMPSON: Even if they have done that it would seem as if we
14 cover that in paragraphs 8 and 9 of our decision, that in fact we are not
10:08:05 15 prepared to accept Defence submission that interview notes do not amount to
16 statements within the meaning of Rule 66; and, as my learned brothers have
17 said, we even say that unsigned witness statements come within the meaning
18 of Rule 66. So what is the difficulty that you find yourself in in terms
19 of your clients?

10:08:28 20 MR JORDASH: The difficulty is this: That however the Prosecution
21 define these statements --

22 JUDGE THOMPSON: It is the Court that has defined -- or you mean
23 categorise the statements?

24 MR JORDASH: How they categorise --

10:08:42 25 JUDGE THOMPSON: Because we have defined what a statement is in
26 paragraphs 8, 9 and 10 of our decision in CDF.

27 MR JORDASH: Yes, and that's --

28 JUDGE THOMPSON: That's the law until we are overruled.

29 MR JORDASH: And that is the starting point.

1 JUDGE THOMPSON: Yes.

2 MR JORDASH: We are served statements and written notes, all of which
3 fall within the category, according to Your Honour's decision --

4 JUDGE THOMPSON: Precisely, our ruling. Statements.

10:09:04 5 MR JORDASH: As statements.

6 JUDGE THOMPSON: Quite.

7 MR JORDASH: We then move to the next stage, which is effectively to
8 ask, during the process of trying to prove inconsistencies, a witness
9 whether that statement is one that they have made. That is what my
10 application is directed at.

11 JUDGE THOMPSON: And whether they signed them.

12 MR JORDASH: Well, whether they have signed them is part of the
13 building blocks by which we can prove --

14 JUDGE THOMPSON: Precisely. The foundation.

10:09:28 15 MR JORDASH: -- that the statement was the witness's statement.

16 JUDGE THOMPSON: But then the difficulty, Mr Jordash, is that we
17 virtually have said in our rulings here consistently that the issue of
18 whether a statement is signed or not, as long as there is an acknowledgment
19 that it is the statement of the witness, is a factor which will have to be
20 taken at the end of the day when we come to assess the weight of probative
21 value. And unless you persuade me that the fact that the statement is not
22 signed by a witness is a function of reliability which in fact must be
23 considered as an admissibility issue, I am not persuaded of the merit of
24 the application. We can admit the statement and then at the end of the day

25 say that because it is unsigned and as a result of a combination of other
26 factors, it does not have much probative value. We are not precluded from
27 doing that, the Court is authorised to do that.

28 MR JORDASH: But the point -- let me refer you to paragraph 21 of
29 Your Honours' ruling. This is the paragraph which sets out the process by

1 which a cross-examining party must prove an inconsistency. Paragraph 21(1)
2 speaks of "A witness may be cross-examined as to previous statements made
3 by him or her in writing or reduced into writing or recorded." That
4 obviously relates to Your Honour's categorisation of a number of things
10:11:10 5 which can amount to statements.

6 JUDGE BOUTET: Statements, yes.

7 JUDGE THOMPSON: Statements, yes.

8 MR JORDASH: Paragraph 21(2):

9 "In conducting cross-examination on inconsistencies between viva voce
10:11:19 10 testimony and a previous statement, the witness should first be asked
11 whether or not he or she made the statement being referred to. The
12 circumstances of the making of the statement sufficient to designate the
13 situation must be put to the witness when asking this question."

14 21(3), and this is the crux of my application:

10:11:37 15 "Should the witness disclaim making the statement, evidence may be
16 provided in support of the allegation that he or she did in fact make it."

17 What we are being denied by the Prosecution's process by which they
18 do not ask the witness to prove their statement - and it is not just the
19 Defence being denied, it is the Court being denied it - is the ultimate and
10:11:57 20 most definitive way of proving a statement as pursuant to 21(3). Because

21 the best evidence that the witness provided that -- sorry. The best
22 evidence that the witness made the statement is the fact that it is signed.

23 JUDGE BOUTET: I don't necessarily agree with you. The best evidence
24 is his answer in court under oath that I did or did not make a statement.

10:12:24 25 [Overlapping speakers]

26 PRESIDING JUDGE: Or that I made the statement and I made some parts
27 of the statement, yes, I agree with certain portions, I disagree with
28 certain portions. Then it becomes a matter for the Court eventually to
29 determine the probative value.

1 MR JORDASH: But why would the Court need to determine that process
2 by Defence having to cross-examine in the hope that the witness agrees that
3 the statement was made by them when in fact the Court can be --

4 PRESIDING JUDGE: Mr Jordash, Mr Jordash, to be very fair to
10:12:53 5 witnesses who have appeared before us, I mean, there has not been a
6 systematic denial of their statements. I do not think so. Whenever the
7 statements are -- when you put questions to them, when you lay the
8 foundation, they have always accepted that they made these statements. And
9 then, you know, it is when you go into the details - it is when you go into
10:13:15 10 the details of the statements that they say yes, I said this, I did not say
11 this, and that is how we have been moving along.

12 MR JORDASH: But Your Honour is --
13 PRESIDING JUDGE: And where they are admitting -- where they admit
14 certain portions of the statement, that is fine. Where they do not, you
10:13:36 15 have taken them on that to confront them and to treat that statement as
16 being a prior inconsistent statement to their testimony that they have
17 given in court. So this is how they have been proceeding and it is at the
18 end of the day that we would determine the probative value to give to the
19 statements as a whole, given of course - given of course - that what guides
10:14:03 20 a court first is the viva voce testimony that this witness has given in
court under oath. We would, of course, look at the statements for purposes
22 of determining certain inconsistencies which you normally highlight, and I
23 think we have been proceeding well so far.

24 MR JORDASH: But the --
10:14:25 25 JUDGE THOMPSON: Let me add to this so that you can just answer us
26 together. Because I think it was precisely this technicality, this
27 difficulty, which of course in a national system would be a matter of much
28 materiality at the admissibility level, that we were trying to avoid
29 consistent with the jurisprudence that we must not let the technicalities

1 of national law systems, in terms of admissibility of evidence, actually
2 stand in the way of admitting evidence for the purpose of international
3 tribunal. It is within the general philosophy of flexibility that we, in
4 fact, in our ruling here, which you are relying upon as authority,
10:15:10 5 virtually say that even interview notes would amount to statements within
6 the meaning of Rule 66. So an interview note which is unsigned by the
7 witness does not necessarily disqualify that document from being
8 characterised as a witness statement.

9 MR JORDASH: I am not addressing my application to whether these
10:15:35 10 statements are admissible or not. In my view it is beneficial for the
11 Defence that these statements are admissible --

12 JUDGE THOMPSON: Precisely.

13 MR JORDASH: -- because that is why we rely upon them to show
14 inconsistency.

10:15:46 15 JUDGE THOMPSON: Then what are you doing? I mean, if a witness
16 acknowledges his statement as his statement without -- and saying I did not
17 sign it, how does this prejudice your position and how does this relate to
18 your application now?

19 MR JORDASH: Because it doesn't prejudice the position if the witness
10:16:01 20 says this statement was mine, I agree, I made it.

21 JUDGE THOMPSON: But I did not sign it.

22 MR JORDASH: In those circumstances it is not --

23 JUDGE THOMPSON: A difficulty.

24 MR JORDASH: There is no prejudice. The prejudice accrues when the
10:16:11 25 witness says I have never seen this statement, it is not my statement, I
26 have never been asked to sign it. And then --

27 JUDGE THOMPSON: Good. Well, let me agree with you so that we
28 resolve this matter neatly. Let me agree with you that you are right on
29 that, but then you say in your application how many of such statements are

1 we now confronted with?

2 MR JORDASH: Which are not signed?

3 JUDGE THOMPSON: Which, in fact, the witnesses have again disclaimed
4 as their statements.

10:16:38 5 MR JORDASH: We have had witness after witness say I didn't say --

6 JUDGE THOMPSON: Disclaiming the statement?

7 MR JORDASH: Disclaiming parts of the statement. And [Overlapping
8 speakers].

9 JUDGE THOMPSON: [Overlapping speakers].

10:16:46 10 MR JORDASH: But the signature relates to confirming the content of
11 the statement.

12 JUDGE BOUTET: Absolutely not, absolutely not. It may or may not.
13 It is a question of weight again. I mean, he may have misunderstood the
14 statement, still sign it. And then he may as a witness say, well, that is
10:17:03 15 not what I meant; they wrote that, but I misunderstood. So, I mean, it's
16 an additional factor. But the fact that it is not there is one of those
17 criteria we are going to use to make the proper determination as to how
18 much weight. The signature is not the end of it. The mere fact that you
19 have a signature on it - Mr Jordash, I know you will agree - does not make
10:17:18 20 the statement absolutely reliable as such. The witness may dispute that
21 and the witness may say, I was feeling bad that day, I was misunderstood,
22 whatever it is.

23 PRESIDING JUDGE: Exactly. I was going to say just what my learned
24 colleague has echoed, that it could well be signed and would be within the
10:17:40 25 same scenario. I have signed it, but this is not what I said. Yes, I
26 agree this is what I said, but I did not say this. How does that change it
27 if it has a signature appended to it?

28 MR JORDASH: Well, Your Honours have outlined precisely the
29 difficulties which must be addressed by bringing as much certainty to this

1 process as is possible. [Overlapping speakers]

2 JUDGE THOMPSON: And let me agree with you for that. Let me say I
3 agree with you on that. How are members of the Bench handicapped in
4 resolving the issue that you have now asked us to address? In other words,
10:18:13 5 don't we have any guidance from the jurisprudence that when we are
6 confronted with the peculiarities of this situation, which you quite
7 rightly raise, we know how to resolve it in the ultimate analysis? Once
8 more, probative value.

9 MR JORDASH: Probative value based upon indicators of reliability --

10:18:34 10 JUDGE THOMPSON: That's the difficulty.

11 MR JORDASH: -- and weight.

12 JUDGE THOMPSON: That's the difficulty, quite. That is where we are
13 parting company. Virtually you are saying that the reliability of the
14 evidence must be a function of admissibility. We probably are saying that
10:18:59 15 it is not that simple, that according to the practice of the tribunals it
16 would seem to be the case that reliability is an important function of the
17 probative value of the evidence.

18 MR JORDASH: Reliability is a precondition of the admissibility of
19 the evidence.

10:19:17 20 JUDGE THOMPSON: That is your view.

21 MR JORDASH: No, that is the view of the ICTR and the ICTY.

22 JUDGE THOMPSON: Well, the preponderant viewpoint - and I am prepared
23 to agree with you that there are divergencies of positions on this - is
24 that reliability is also and importantly a function of probative value.

10:19:42 25 MR JORDASH: I would respectfully --

26 PRESIDING JUDGE: Mr Jordash, can you please wrap up.

27 MR JORDASH: I will wrap up by making this point. That at some point
28 Your Honours may look at these alleged inconsistencies relied upon by the
29 Defence and you will have to look at whether a witness has told the truth

1 about whether they did or did not make a statement in the written form
2 before coming to court. Now, a signature would assist you in those
3 deliberations, because you would say, well, the witness gave an
4 explanation, he said he didn't make the statement, but there is his
10:20:28 5 signature there. That would assist Your Honours. It may not be definitive
6 of the issue but it would assist you to know that the witness had been
7 taken through his statement and been asked to confirm or otherwise by a
8 signature. And what this Court --

9 PRESIDING JUDGE: Which may not be definitive, like you said, of the
10:20:47 10 issue.

11 MR JORDASH: But it will assist. Your Honours have on many occasions
12 obliged the Defence to go through a procedure by which we show the witness
13 statement to the witness, by which we try to get over the language
14 difficulties because the statement is in English and not in Krio and not in
10:21:04 15 another language of Sierra Leone, in order to bring some certainty so that
16 Your Honours can say whether that written statement belongs to the witness
17 or not. What I am submitting is no different to that process. It is
18 simply saying well, there is another way by which Your Honours could be
19 more certain that the witness made that statement, and it lies completely
10:21:27 20 within the hands of the Prosecution. They could ask the witness to sign
21 and it would assist Your Honour.

22 PRESIDING JUDGE: All right, thank you. The Prosecution, please.

23 MR O'SHEA: Your Honour, before the Prosecution speaks.

24 PRESIDING JUDGE: Yes, sorry, Mr O'Shea.

10:21:45 25 MR O'SHEA: I would respectfully like to join this application. I
26 would like to express --

27 JUDGE BOUTET: Maybe, Mr O'Shea, we should ask the second accused
28 first if they have any comments before --

29 MR O'SHEA: I do apologise; that's quite right, Your Honour.

1 MR TAKU: Good morning, Your Honours. I have listened very carefully
2 to the application of my learned colleague, I have listened to the views
3 expressed by Your Honours on this issue. To surmount some of the
4 difficulties expressed by Your Honours on this issue, I would like to
10:22:25 5 suggest as follows:

6 One, that perhaps you consider this question on a case by case basis.
7 Because it may well arise that a witness arrives here and refutes all or
8 part of the statement that was recorded. Now, that issue, Your Honours,
9 should be looked at in the total assessment of the demeanour of that
10:23:06 10 particular witness. The circumstance might, therefore, arise where
11 Your Honours will ask the witness to sign the statement on the spot in
12 order to ascertain whether indeed that statement is that of that particular
13 witness.

14 I say so because we are confronted with a similar issue about a
10:23:31 15 declaration made by one Judge Mbale of the Supreme Court of Cameroon when
16 he was the Director of Judicial Affairs in the Semanza case. He didn't
17 testify in a way, but he had a declaration that was tendered to the Court
18 and were confronted with this issue. The issue is still unresolved and I
19 think the Appeals Chamber will take a judicial decision on that on the 20th
10:23:58 20 of May.

21 It may well also arise, Your Honours, too, that a witness did not
22 sign a statement for particular reasons. Either he had both arms amputated
23 or he had to ask some other persons to stand by and sign as the
24 transcripts -- I have read some of the transcripts, that the particular
10:24:16 25 witness arrived here and had both arms amputated. There may be some
26 explanation for that. That explanation is something that Your Lordship
27 would take --

28 PRESIDING JUDGE: But learned counsel, we have not placed a premium
29 on signatures. So whether you are amputated or what, we have not placed

1 any premium - any real premium - on signature. It is desirable, if there
2 is a signature, for the statements to have a signature. But we have said
3 in our ruling that we don't necessarily need a signature for us to consider
4 it as a statement. And the witnesses who have appeared before us have not
10:25:00 5 necessarily refuted making those statements because their signatures are
6 not appended to those statements, and yet they have had their two hands
7 with them, they could easily have signed if it came to that. So, you see,
8 it is a question of addressing us on the necessity to have a signature.

9 JUDGE THOMPSON: Let me just say one thing, too, because it is
10:25:26 10 absolutely clear that when we decided in that particular case, the CDF
11 case, 16 July, we relied extensively on decisions of ICTY and ICTR in
12 coming to the position which my learned brother just stated. We went as
13 far as Blaskic case, the Musema case. We used those, in fact, and at
14 paragraph 10 of our ruling we virtually said:

10:25:59 15 "The Chamber observes that nowhere in the Rules is a witness
16 statement defined. It is worth noting that the Appeals Chamber of the ICTY
17 has considered that the usual meaning to be ascribed to a witness statement
18 is" - and I quote - "An account of a person's knowledge of a crime which is
19 recorded through due procedure in the course of an investigation into the
10:26:24 20 crime" - emphasis added. "The Tribunals have also considered that
21 transcribed trial testimony, radio interviews, and" - now emphasis -
22 "unsigned witness declarations and records of questions put to witnesses
23 and answers constitute witness statements."

24 So it seems as if the fact that a witness statement is unsigned, even
10:26:53 25 though as a matter of practicality or procedural irregularity raises
26 problems, we have actually, following ICTR and ICTY, taken care of that
27 from a legal perspective, saying that it would not in any way be a
28 stumbling block when we come to evaluating the probative value. And I
29 don't know why at this point in time this particular aspect of the issue

1 becomes so important, or in fact assumes paramount proportions.

2 PRESIDING JUDGE: And we have taken, I think, the submission that
3 every situation should be considered on a case by case basis. We have
4 always said that in our deliberations and we are not tied down by
10:27:56 5 particular situations. If we get tied down we would never evolve -- our
6 jurisprudence would never evolve. So, you see, the issue we would like you
7 to address is what you consider about the necessity to have all these
8 statements signed before we proceed. This is it.

9 MR TAKU: Exactly, Your Honour. I think that's as I said myself with
10:28:24 10 that. And one of the reasons why these statements were signed, because it
11 may well be that the circumstances under which a signature was never
12 appended on the statement is well explained could well affect the integrity
13 of the case presented by the Prosecution --

14 JUDGE THOMPSON: You mean the witness's own testimony?
10:28:47 15 MR TAKU: No, no. Yes, the integrity of the witness's statement, as
16 well as the integrity of the Prosecution's case.

17 JUDGE BOUTET: Why? I would like to hear you on this, bearing in
18 mind that the Prosecution is not relying on these statements when the
19 witness is called. This is the principle of orality. The witnesses
10:29:05 20 testify; that information that they have has been disclosed to you and it
21 may or may not be inconsistent with what the witness has said. Then you go
22 and cross-examine on this issue. So I would like to hear what you are
23 saying on this issue because I fail to follow your reasoning on this.

24 MR TAKU: The integrity of the Prosecution's case --
10:29:19 25 PRESIDING JUDGE: And, please, please, we want to be brief on this
26 issue because we are taking a lot of time. We would like the
27 Prosecution -- you know, we would like to be done with it this morning.

28 MR TAKU: Yes, Your Honour. The integrity of the Prosecution's case,
29 because there must be an explanation why a witness would say one thing and

1 the Prosecution or members of the Prosecution team write something else.

2 JUDGE THOMPSON: No, that is not the issue, learned counsel. The
3 issue is not that yet. Go back to the procedural problem of whether a
4 statement that is unsigned is necessarily deprived of assessment in the
10:29:55 5 context of probative value. That is why we go back to our decision. We
6 virtually considered this very carefully and said that unsigned witness
7 statements will amount to witness statements within the meaning of Rule 66,
8 and therefore not necessarily become ineligible when we come to assess the
9 probative value. It is not whether a witness repudiates a portion of it.

10:30:27 10 The fact that a statement is unsigned, does that in itself amount to an
11 invalidating factor?

12 JUDGE BOUTET: And I would like to refer to paragraph 18 of the
13 decision referred to, which says, and I will just read the beginning of
14 that paragraph:

10:30:37 15 "In the opinion of the Chamber" - being this Chamber - "prior
16 inconsistent statements are generally admissible in international criminal
17 trials as a means to impeach credibility of a witness."

18 So that is the purpose of all of this that we are talking about.
19 Yes, if it is signed it may be another factor to be used to assess. But to
10:30:59 20 make it a condition as such and an obligation on the Prosecution is quite a
21 huge step that is being requested at this time.

22 MR TAKU: Thank you, Your Honour.

23 PRESIDING JUDGE: Right, thank you. Yes, Mr O'Shea.

24 MR O'SHEA: Yes, Your Honours, I beg your indulgence. I know I am
10:31:19 25 third on the indictment but this is an important point for us as well. We
26 would like to put it in a slightly different way, however, to the other two
27 counsel. Let me just make a few preliminary observations which I think are
28 important to Your Honours' understanding where I am coming from on this.

29 First of all, I do not --

1 MR HARRISON: I apologise for interrupting Mr O'Shea. I just wanted
2 to make a suggestion. If the Court was of a mind - we understand in
3 general the application that has been made by the first and second
4 accused - if the third accused wish to put it in writing, the Prosecution
10:32:03 5 then will be in a position to respond fully and we could proceed with the
6 next witness.

7 MR O'SHEA: I'm sorry, Your Honours, that's not acceptable to us.
8 PRESIDING JUDGE: Since we are literally at the end, you know,
9 please.

10:32:18 10 MR O'SHEA: That is not acceptable to us. We have started with the
11 procedure orally and we should finish so.

12 PRESIDING JUDGE: We must admit that if it became complicated, we
13 would say put it in writing. But let's see how we proceed.

14 MR O'SHEA: That I understand, Your Honours; that is a different
10:32:35 15 point.

16 Your Honours, let me say straight away that I do not argue on the
17 basis that an unsigned statement is not admissible under Rule 66. I do not
18 argue on that basis. I fully understand Your Honours' jurisprudence thus
19 far on the definition of a witness statement and the fact that it is
10:32:56 20 consistent with previous jurisprudence in other tribunals. Secondly, I
21 also understand and agree with the point about the ability of the judges to
22 evaluate the evidence and my argument is not based on that either.

23 Thirdly, on the question of authority in relation to how a witness
24 statement should be prepared, I have not done any extensive or any research
10:33:26 25 on this in fact. However, I would suggest that there is a good reason why
26 if there are authorities on this matter, they are few. The reason is this:
27 Because this is usually not treated as a matter of rules but as a matter of
28 good practice. On the national level it would normally be dealt with, in
29 my submission, in a practice direction of some sort. On the international

1 level that may be the case also, but to my knowledge the issue has not
2 arisen on international level for this reason: Although in the cases of
3 Blaskic and Musema and so forth the courts have accepted that a witness
4 statement can be a document that is unsigned, that is not because it is the
10:34:17 5 practice in those tribunals to have unsigned statements. It is because the
6 Defence have applied for disclosure of material which is in the Prosecution
7 hands which might by of various natures. The fact of the matter is,
8 according to my understanding, is that in the International Criminal
9 Tribunal For Rwanda and in the International Criminal Tribunal for the
10:34:39 10 Former Yugoslavia, the normal practice of the Prosecution is to read the
11 statement back to the witness or have the witness read the statement and
12 then ask the witness to sign the statement. That is, as far as I know, the
13 normal practice in both of the other ad hoc tribunals, and that is why
14 there is no authority that immediately springs to mind.

10:35:01 15 I would ask Your Honours to take judicial notice of the fact - and I
16 say judicial notice because matters of law are generally considered as
17 matters of fact if they are in foreign jurisdictions - take judicial notice
18 of the fact that it is general practice in many national jurisdictions and
19 international tribunals, as a matter of good practice, that prosecution
10:35:26 20 witness statements are prepared with a degree of regularity, including the
21 fact that they are signed.

22 Let me further say that I am not in any way trying to delay these
23 proceedings. I do not request that the proceedings stop so that all the
24 witness statements be signed. What I do request, however, from this
10:35:49 25 Tribunal is a practice direction, or in the alternative an order under Rule
26 54, which would facilitate the fairness of these proceedings. We can
27 proceed with these witnesses, but we want the situation of the regularity
28 of these statements to be rectified as soon as possible.

29 PRESIDING JUDGE: Are you suggesting that the practice directive

1 should be, in a sense, directing the Prosecution that all witness
2 statements have to be signed? Is that what you are suggesting?

3 MR O'SHEA: It should be directing the Prosecution as to that and --

4 PRESIDING JUDGE: Whoever, investigators or Prosecution, yes.

10:36:30 5 MR O'SHEA: -- as to the fact that witness statements should be
6 signed, but laying down a procedure which should be followed by the
7 Prosecution.

8 PRESIDING JUDGE: No, but what do we do? What becomes of the
9 principle of international criminal justice that allows for a very wide
10 principle, you know, of admissibility of evidence and documents? What will
11 become of the provisions of Rule 89?

12 MR O'SHEA: Well, I said at the very outset, Your Honours, that I did
13 not contest the question of admissibility. Let me say this: If a document
14 coming from the Prosecution is deemed by this Chamber at the end of the day
10:37:07 15 not to be reliable, that disadvantages the Defence, not the Prosecution.

16 Because it is us who are relying on these documents that we receive from
17 the Prosecution, number one, to prepare for our case, and number two, as a
18 basis for challenging the evidence of the witness in the witness box. So
19 the question of the lack of reliability of a document is a problem for us,
10:37:35 20 not for the Prosecution.

21 JUDGE THOMPSON: But even if we agree at the end of the day that it
22 is worthless, how --

23 MR O'SHEA: If we receive a statement which has not been signed and
24 has not been read through by the witness, and for other reasons
10:37:52 25 Your Honours at the end of the day say --

26 JUDGE THOMPSON: Say it's worthless.

27 MR O'SHEA: -- that that document is worthless --

28 JUDGE THOMPSON: How are you disadvantaged?

29 MR O'SHEA: We are disadvantaged because we would have relied upon

1 that document during the course of our cross-examination.

2 JUDGE BOUTET: For what purpose?

3 MR O'SHEA: For the purpose of establishing inconsistent [Overlapping
4 speakers].

10:38:09 5 JUDGE THOMPSON: But you would have achieved your --

6 JUDGE BOUTET: But you would have achieved that.

7 JUDGE THOMPSON: But you would have achieved your purpose of
8 destroying the credibility of the witness.

9 MR O'SHEA: Not if the document is not reliable, Your Honours.

10:38:19 10 Because if the document is not reliable --

11 PRESIDING JUDGE: Are you saying that if the document is not signed
12 it is unreliable? Is that your submission?

13 MR O'SHEA: No, no. Your Honour Judge Thompson put the question to
14 me what if we were to find that the document was worthless and I was
10:38:31 15 responding to that question.

16 JUDGE BOUTET: Our purpose here is trying to show inconsistency with
17 what a witness would have said under other circumstances and with what he
18 says here. Once you have achieved that, you are achieving what you are
19 intending to do with that particular document or whatever it is and the
10:38:47 20 witness: To show today he is saying something and on a previous occasion
21 he said something different.

22 MR O'SHEA: With the greatest respect, Your Honour, that can't be
23 right. If the document is not reliable then it says nothing about whether
24 he actually made that statement.

10:39:00 25 JUDGE BOUTET: That's your opinion and that's fine. I don't
26 necessarily share your views on this but that's okay.

27 JUDGE THOMPSON: Let me shift counsel a little slightly. Suppose you
28 were even minded to accept your option of a practice direction and were to
29 come out in specific terms saying what you suggest we should say, would

1 this operate retrospectively or prospectively?

2 MR O'SHEA: I would ask that Your Honours supplement such a practice
3 direction with an order under Rule 54 --

4 JUDGE THOMPSON: Because I can see some great --

10:39:34 5 MR O'SHEA: -- to operate retrospectively.

6 JUDGE THOMPSON: For me it would be terribly inconvenient to give it
7 retrospective effect.

8 MR O'SHEA: It may be inconvenient, but it is fundamental for the
9 fairness of these proceedings. Let me state the legal basis upon which I
10:39:52 10 say it is important for the fairness of these proceedings. The Defence,
11 under Rule 17(4)(C), I think it is, has the right to adequate facilities
12 for the preparation of this case. Now, Rule 66 is designed to facilitate
13 that right by directing the Prosecution to disclose all of the witness
14 statements of the witnesses that they intend to call. Now, it is in my
10:40:22 15 submission in the interests of justice that the witness statements - and I
16 am not referring to the definition of them, but the witness statements
17 which we receive from the Prosecution - are as accurate as justice can
18 allow.

19 JUDGE THOMPSON: Except that some of them are unsigned. Is that what
10:40:43 20 you are suggesting?

21 MR O'SHEA: If they are unsigned then that removes much of their
22 ability to testify to accuracy.

23 JUDGE THOMPSON: How is the interests of justice thereby prejudiced
24 when we have said that an unsigned statement is a witness statement within
10:41:00 25 the meaning of Rule 66? You are asking us to revisit that?

26 MR O'SHEA: Not at all, Your Honour, not at all. I do not contest
27 that it is a witness statement. I do not contest that it is something we
28 are entitled to have.

29 JUDGE THOMPSON: Probably a witness statement not so properly called,

1 is that what you are contesting?

2 MR O'SHEA: Right. And I am not saying the fact that the Prosecution
3 follows a bad practice in a particular instance means that that document
4 would become inadmissible; I am not saying that. But what I am saying is
10:41:35 5 that a matter of good practice, in order to uphold the fairness of these
6 proceedings --

7 JUDGE THOMPSON: I am agreeing with you that it is good practice. I
8 am familiar with this kind of background myself and it is good practice.
9 But here the law finds itself in a situation where it is confronted with
10:41:52 10 some kind of massive and huge machinery for investigating crimes of such
11 huge and complex dimensions, necessitating some kind of logistical
12 techniques which are not the usual in terms of national law systems. We're
13 trying to see that justice is done, bearing in mind the rights of the
14 accused persons and also the interests of the victims and witnesses. Some
10:42:21 15 of the persons who come and testify are persons who themselves have not the
16 benefit of the education and sophistication which we have. We find that
17 sometimes somebody has to write their statements for them. And we say that
18 Rule 66 has to be interpreted not in a strict legalistic context, but in a
19 context which takes into consideration all these realities. We have a
10:42:47 20 compromise, and now you say to us undo what you've done in your decision.

21 MR O'SHEA: I please Your Honour, I want it to be very clear that --
22 JUDGE BOUTET: Mr O'Shea, I agree with you, this would be a better
23 practice to have signed statements. But what would be your suggestion if
24 they have unsigned statements? Does that mean that -- where do you
10:43:08 25 conclude that this Court should go, other than issuing an order that if it
26 is not complied with -- are you suggesting that if we do -- I'm not saying
27 we should order, but that is one of the proposals that we issue directives,
28 orders and so on. And if not complied with, presumably you would say then
29 that evidence is not admissible. I mean, where are we going with all of

1 this?

2 MR O'SHEA: I think Your Honours are quite capable of drafting a
3 provision which would ensure that the question of admissibility is not
4 affected. I want to make it quite clear that in my submission it is quite
10:43:42 5 possible to give a directive on this without affecting the jurisprudence of
6 July and October of last year. Because we're not talking about
7 admissibility here, we are talking about good practice and good practice
8 has a reason. Good practice is not just there for the sake of it. Good
9 practice is there for the fairness of the proceedings.

10:44:05 10 JUDGE THOMPSON: Conceded. Would you venture a formulation then?

11 MR O'SHEA: Your Honours, I'd be --

12 JUDGE THOMPSON: I mean, because if you want to be that constructive
13 and creative, want to assist the Court in such a difficult situation, it is
14 an obligation on counsel to venture a formulation.

10:44:22 15 MR O'SHEA: My suggestion would be this: That Your Honours craft a
16 practice direction on the conduct of interviews with witnesses and set down
17 certain minimum procedural requirements which ought to be followed when a
18 witness is interviewed. One of those would be --

19 PRESIDING JUDGE: And when they are not followed, where do we move to
10:44:46 20 next? Where what we set in our directive as far as these unsigned
21 statements are concerned -- I mean, where what we set in our directives is
22 not followed, where do we move to?

23 MR O'SHEA: If a practice direction is -- [Overlapping speakers]

24 PRESIDING JUDGE: It has a snowballing effect. A practice directive
10:45:06 25 has an effect. You know, it could drive us to a situation where there
26 might be no end to the journey.

27 MR O'SHEA: Your Honour, any legal provision has a snowballing
28 effect, but it is up to judges, I say respectfully, and legislators to try
29 to give effect to the objective as closely as possible.

1 PRESIDING JUDGE: We judges don't want to legislate. We do not
2 legislate. We endeavour to interpret the law as it is, and that is what we
3 have done in our Hinga Norman decision as far as section 66 is concerned,
4 as far as witness statements are concerned.

10:45:50 5 MR O'SHEA: I am not asking Your Honours to legislate. I'm asking --

6 PRESIDING JUDGE: The practice directive might have the effect of
7 conferring on us, you know, some legislative powers which might - which
8 might - go contrary, first of all, to Rule 66 and, of course, the general
9 principles of admissibility under international law and our own

10:46:14 10 jurisprudence on this matter which you say you do not dispute.

11 MR O'SHEA: Respectfully I disagree, Your Honour. A practice
12 direction is not legislation. It is a means -- just another means for
13 judges to ensure the fairness of the proceedings. And even an order of the
14 Court --

10:46:36 15 PRESIDING JUDGE: But it is legally binding. If it is not a
16 legislation, it is legally binding on the parties when it is issued by the
17 Court; isn't it?

18 MR O'SHEA: But the question of remedy or sanction may differ. If
19 you have --

10:46:49 20 PRESIDING JUDGE: No, it wouldn't differ because if the indications
21 in the practice directive are not followed there is a silent sanction.
22 There is a sanction, even if it is not mentioned, and the practice
23 directive will not necessarily mention a sanction.

24 MR O'SHEA: Your Honour, with respect, the practice directive would
10:47:07 25 need to be interpreted in the context of the Rules. So if a Defence
26 counsel were to argue that because the Prosecution had not followed the
27 practice directive, that therefore the document was inadmissible, there
28 would be a simple answer to that, which would be 89(C) and Your Honours'
29 jurisprudence.

1 PRESIDING JUDGE: So what would have been the purpose for us to have
2 taken a practice directive if 89(C) is there to take care of such
3 situations?

4 MR O'SHEA: Because our difficulty is not with admissibility. Our
10:47:37 5 difficulty is with our preparation of this case and our ability to
6 effectively challenge the witnesses that come forward here. Let me say
7 this, Your Honours --

8 PRESIDING JUDGE: Which you have done so well. I'm telling you you
9 have done that so well throughout these proceedings.

10:47:52 10 JUDGE BOUTET: How is your ability to challenge diminished by that?
11 I would like to know this.

12 MR O'SHEA: Because of this very issue that the document will be
13 admissible in evidence, but not necessarily attested as reliable. So let
14 me say this: If I put a question to a witness and I say did you not say X
10:48:17 15 before --

16 JUDGE BOUTET: Yes, but you will have achieved your purpose of
17 showing that this witness is not reliable for any purpose. He's even
18 denying making a statement, as an example.

19 MR O'SHEA: If he denied making a statement that would be another
10:48:32 20 matter. But let's say he doesn't deny making a statement.

21 JUDGE BOUTET: He admits making it but not all of it.

22 MR O'SHEA: Well, let's say he admits making the statement but he
23 says I did not say that.

24 JUDGE BOUTET: That's right.

10:48:42 25 MR O'SHEA: If he says I did not say that, there is a large gap
26 between the situation where the witness has been asked to read through the
27 statement and sign it and the situation where the witness has not been
28 asked to read through the statement and sign it.

29 JUDGE BOUTET: But if they read a statement at the end and he doesn't

1 sign it - other than the fact that in one case there's a signature, the
2 other one there's not - what is in essence the difference?

3 MR O'SHEA: It affects his credibility if he says I didn't say that
4 if it is a signed statement. It doesn't affect his credibility --

10:49:15 5 JUDGE BOUTET: No, no, [Overlapping speakers].

6 JUDGE THOMPSON: In other words, you're saying that the Court would
7 be invited to -- when he signed the statement the Court would be invited to
8 apply a presumption of regularity in that sense. Is that what you say?

9 MR O'SHEA: Well, I don't want to [overlapping speakers]

10:49:29 10 presumptions, but --

11 JUDGE THOMPSON: But that's where we lead to. Quite right. It has
12 to be. I mean, a signed statement would mean that everything was regularly
13 done.

14 MR O'SHEA: All right, we can say that.

10:49:36 15 JUDGE THOMPSON: And so --

16 MR O'SHEA: Let's say there is a presumption of regularity.

17 JUDGE THOMPSON: Yes.

18 MR O'SHEA: But that presumption can be rebutted.

19 JUDGE THOMPSON: Quite right. And of course, you are saying that
10:49:48 20 where the statement is unsigned there is not a presumption of regularity.

21 You can't run away from those two logical positions.

22 MR O'SHEA: But there's the matter of degree, Your Honour.

23 JUDGE THOMPSON: Well, that is the thing.

24 MR O'SHEA: But it is an important matter of degree.

10:50:04 25 JUDGE THOMPSON: Good point. But then, of course, the question is
26 that the judges are authorised, but when we come to look at this so-called
27 gap between regularity and irregularity, then they will factor what needs
28 to be done into the question of should we give much weight or not to this
29 particular document.

1 MR O'SHEA: I agree. Your Honours still have the tools. The problem
2 is that the tools are being removed from us; that's the important thing.

3 JUDGE BOUTET: What tools? You have the statement.

4 MR O'SHEA: First of all, if we are preparing this case on the basis
10:50:36 5 of witness statements that we receive well in advance, which this Court has
6 accepted as a basic principle of fairness to the Defence, it is in the
7 interests of justice that those statements be as accurate as possible.

8 JUDGE BOUTET: Indeed.

9 MR O'SHEA: So that we have as accurate a picture as possible of what
10:50:55 10 the witness is going to say in the witness box.

11 JUDGE THOMPSON: But then, you see, you might be mixing apples and
12 peaches. We are talking here about formal validity. "Accurate" is not the
13 word.

14 MR O'SHEA: I am not talking about formal validity.

10:51:10 15 JUDGE THOMPSON: The regularity aspect does not in my own assessment
16 go to the accuracy of the document. It is whether some formality, which
17 usually attaches to the taking of statements, was in fact followed giving
18 the statement an appearance of being a valid document in a formal sense.

19 MR O'SHEA: Let me say that I am not referring to --

10:51:37 20 JUDGE THOMPSON: You must make that distinction to --

21 MR O'SHEA: I am not referring to validity, because that would be
22 inconsistent with Your Honours' previous jurisprudence.

23 JUDGE THOMPSON: All right.

24 MR O'SHEA: I am not referring to validity. I am referring to a
10:51:51 25 question of good practice which is there in order to enable that the
26 Defence has the proper facilities to, number one, prepare its case, and
27 number two, effectively challenge the evidence of the witnesses.

28 JUDGE THOMPSON: Turn it the other way. The absence of a signature.

29 JUDGE BOUTET: You have all of that. The only difference is in one

1 case you don't have the signature. And you are telling this Court now that
2 the fact that you don't have a signature, you don't have the tools to
3 prepare the defence. I am really --

4 MR O'SHEA: That is not what I am saying, Your Honour.

10:52:18 5 JUDGE BOUTET: No?

6 MR O'SHEA: That is not what I said.

7 JUDGE BOUTET: Well, repeat that again then.

8 MR O'SHEA: If I was to have said that, that would have been a large
9 leap. I did not say we did not have the facilities, but --

10:52:30 10 JUDGE BOUTET: No, you said you don't have the tools to prepare the
11 defence.

12 MR O'SHEA: No, the tools are being removed from us. It is a box of
13 tools. We have the spanner, we don't have the screwdriver. The point is
14 it is a matter --

10:52:39 15 PRESIDING JUDGE: Maybe you are relying on a spanner that is not
16 very, very vital in servicing your engine, your machine.

17 MR O'SHEA: You see, Your Honours, it is my submission that it is
18 very, very vital for us that we have as accurate -- and I am not saying
19 that we don't have any accuracy, but I am saying it is vital for us, and in
10:52:57 20 the interests of justice, that we have as accurate a picture as possible of
21 the evidence. That is the reason for the rule of good practice that I am
22 referring to.

23 JUDGE THOMPSON: I will make one short distinction here and then
24 restrain myself. It is this: Learned counsel, I would take your point
10:53:17 25 totally if you were talking about an unsigned indictment.

26 MR O'SHEA: Can I just make one final statement?

27 PRESIDING JUDGE: Mr O'Shea, yes, I was going to say I think we
28 should move forward, please.

29 MR O'SHEA: In my submission, if Your Honours were to hold today that

1 it was perfectly acceptable for the Prosecution to go through a procedure
2 because of so-called logistics whereby their entire batch of witness
3 statements, or a large part of their witness statements, could be disclosed
4 to the Defence in the form that they have not been read by the witness and
10:53:59 5 they have not been signed by the witness, that would set a very, very bad
6 precedent for the International Criminal Court and other jurisdictions in
7 my respectful submission.

8 PRESIDING JUDGE: Thank you. Mr Harrison, please.

9 MR HARRISON: I think it is for the final point that Mr O'Shea raised
10:54:15 10 as to the importance that he perceives this issue to be before this Court
11 that the Prosecution is asking for the right to be able to consider this
12 application, which it had no prior notice of, and to respond in writing.

13 MR O'SHEA: Can I just say, Your Honours, that that is not necessary.

14 PRESIDING JUDGE: We could see it coming. The arguments were long
10:55:35 15 and very interesting, very technical and challenging. The Prosecution was
16 not given the opportunity to prepare for these arguments this morning and I
17 think, working within the principle of equality of arms, we would suggest
18 to the Defence that this oral application be reduced in writing for us to
19 address all the issues that have been raised this morning and which, of
10:56:15 20 course, will allow the Prosecution to reply adequately. Because the
21 arguments are very vital and interesting for the development of our
22 jurisprudence, which is not static. We are not saying that we are stuck
23 with the Hinga Norman decision, certainly not. And so we would like to
24 evolve as much as international criminal jurisprudence is evolving. So
10:56:42 25 this is the directive of the Court.

26 JUDGE THOMPSON: I beg your leave, Mr Presiding Judge, to add that
27 conceding also the complexity that Mr O'Shea's submissions brought to the
28 entire process.

29 PRESIDING JUDGE: Right. I think the Bench is understood on this,

1 are we? Right, having said this, we would call Mr Harrison to present the
2 32nd witness.

3 MR HARRISON: Yes, it is the 32nd, and this is the application that
4 the Prosecution indicated it wished to advance at this time. That is, an
10:57:30 5 application that the witness testify in closed session.

6 PRESIDING JUDGE: This said, I would like to inform the -- it's a
7 pity it's coming up on the first day since we went on break. We will be
8 asking the gallery to liberate the gallery because this application under
9 the law is supposed to be made in a closed session. The entire testimony
10:57:59 10 of this witness, from what the Prosecution informs us, will be heard in
11 closed session. We can't give you any -- Mr Harrison, could you venture
12 some estimation as to --

13 MR HARRISON: The estimation of the length --

14 PRESIDING JUDGE: And, of course, I wanted to say that if the entire
10:58:16 15 testimony is in closed session, the cross-examination will also be in
16 closed session, so we do not know -- Mr Harrison, there is no point. You
17 might say you are going to use 30 minutes or one hour, but we do not know
18 how much time the Defence would need to conclude.

19 MR HARRISON: Yes, I can only estimate the Prosecution will be asking
10:58:36 20 for 40 to 60 minutes.

21 PRESIDING JUDGE: For the examination-in-chief of this witness?

22 MR HARRISON: Correct.

23 PRESIDING JUDGE: The gallery will take its chance and keep hanging
24 around until we go into the open session. Yes, Mr Jordash.

10:58:52 25 MR JORDASH: Just that it might assist the gallery that I think the
26 application is opposed.

27 PRESIDING JUDGE: Is?

28 MR JORDASH: Is opposed.

29 PRESIDING JUDGE: Is opposed?

1 MR JORDASH: Yes.

2 PRESIDING JUDGE: I see. We will take a short break and come back to
3 hear the application.

4 [Break taken at 10.58 a.m.]

5 [At this point in the proceedings, a portion of the
6 transcript, pages 35 to 97, was extracted and sealed
7 under separate cover, as the session was heard in
8 camera.]

9 [Whereupon the hearing adjourned at 5.53 p.m., to be
10 reconvened on Wednesday, the 11th day of May, 2005, at
11 9.30 a.m.]

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WITNESSES FOR THE PROSECUTION:

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