SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

**Before:** Hon. Justice Pierre Boutet, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Benjamin Mutanga Itoe

**Interim Registrar:** Lovemore Green Munlo

**Date:** 26th of October 2005

PROSECUTOR **Against** ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

# DECISION ON THE JOINT DEFENCE MOTION REQUESTING CONFORMITY OF PROCEDURAL PRACTICE FOR TAKING WITNESS STATEMENTS

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09.30

**TRIAL CHAMBER I** ("Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Pierre Boutet, Presiding Judge, Hon. Justice Bankole Thompson, and Hon. Justice Benjamin Mutanga Itoe;

**SEIZED OF** the *Joint Defence Motion Requesting Conformity of Procedural Practice for Taking Witness Statements* filed on the 21st of June 2005 ("Application") by Counsel for the Accused Issa Hassan Sesay and Counsel for the Accused Augustine Gbao ("Defence");

**NOTING** the *Prosecution Response Joint Defence Motion Requesting Conformity of Procedural Practice for Taking Witness Statements* filed on the 1st of July 2005 ("Response") by the Office of the Prosecutor ("Prosecution");

**NOTING** the Defence Reply to the above-noted Response filed on the 6th of July 2005 ("Reply");

**NOTING** the list provided by the Prosecution identifying the date of signed witness statements where such statements exist for the "core" Prosecution witnesses;

**CONSIDERING** the oral submissions of Defence made on the 10th of May 2005 on this issue;

**MINDFUL OF** Article 17(4) of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 54, 89 and 91 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules");

## I. SUBMISSIONS OF THE PARTIES

### A) Defence Application

1. The Defence submit that while they accept this Chamber's finding that witness statements do not have to be signed in order to be admissible, the issue of conformity with formal procedural requirements may be essential in the determination of the reliability of evidence. The Defence agree that, as a matter of law, the Trial Chamber has discretion to exclude evidence to protect the integrity of the proceedings.[1]

2. The Defence, however, submit that the Trial Chamber is entitled to give directions in order to guarantee a fair trial in accordance with Article 17 of the Statute. In particular, the Defence state that

[1] Application, paras 6-7.

Rule 89(B) of the Rules gives effect to this power by requiring the Chamber to "apply rules of evidence which will best favour a fair determination of the matter before it." The Defence also refer to the Chamber's general power under Rule 54 to make such orders as are necessary for the conduct of the proceedings.[2]

3. Furthermore, the Defence submit that the consequences of unsigned statements are as follows:

a. Defence are not able to prepare based on the most accurate information on the case they have to meet;

b. New evidence is more likely to come out in later statements or during testimony due to the Prosecution's lack of care in ensuring the accuracy and comprehensiveness of witness statements thereby causing delay;

c. Defence's ability to effectively cross-examine is diminished due to the lack of notice and the ease with which the witness may disown prior inconsistent statements;

d. False testimony cannot be identified in the same way, thereby diminishing the integrity of the proceedings.[3]

4. In addition, they contend that a "written statement" which a witness "knows, or has reason to know, may be used in evidence in proceedings before the Special Court" in accordance with Rule 91(D), should be signed. The Defence further submit that the jurisprudence suggests that witness statements which are not signed ought to be accorded less weight as evidence. They highlight that the Trial Chamber itself acknowledged during oral argument that it was "better practice" to have witness statements signed.[4]

5. The Defence also argue that in light of the fact that the Trial Chamber has the "primary responsibility for assessing and weighing evidence"[5], the appending of a signature to a witness

[2] *Id.*, para. 9.
[3] *Id.*, paras 10-11.
[4] *Id.*, para. 12.
[5] *Prosecutor v. Niyitegeka*, ICTR-96-14, "Judgement of the Appeals Chamber", 9 July 2004, para. 98.

statement would allow the Defence to effectively highlight prior inconsistent statements and thereby maximize the reliability of the Chamber's deliberations.[6]

6. In support of their application, the Defence refer to the Judgement and Sentence in *Prosecutor v. Musema*[7] in which the Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") noted that the assessment of the authenticity of a document by such factors as whether it is signed or officially authorized was central to the credibility and reliability of documentary evidence. They indicate that the Chamber further stated that whether a witness had reviewed the statement at the time it was made and the use of a solemn declaration were relevant in determining the probative value of witness testimony. Similarly, the Defence argue that the Trial Chamber of the ICTR in *Prosecutor v. Akayesu*[8] took the view that a witness statement that does not meet certain standards attesting to reliability has "considerably less" probative value and would be treated with caution in assessing inconsistencies with oral testimony.[9]

7. The Defence submit that if the Trial Chamber were to conclude that it would be unfair to impeach the credibility of a witness through inconsistencies between oral testimony and a prior written statement that is unsigned, then it will be the Defence who will be prejudiced.[10]

8. Further, the Defence contend that the Trial Chamber's powers to punish false testimony under Rule 91 of the Rules is rendered nugatory by the Prosecution's practice of unsigned witness statements since a signature is the most reliable and definitive evidence that the statement was in fact made by the witness.[11]

9. In conclusion, the Defence request that the Chamber order the Prosecution to ensure that the witnesses are asked to read through their statements and sign them as to the truth of its contents every time they are interviewed or, alternatively, that the Chamber issue a practice direction on the signing of witness statements. The Defence also seek from the Chamber an order that the Prosecution make its best efforts to secure signatures on all prior witness statements.[12]

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[6] Application, paras 14 -15.
[7] *Prosecutor v. Musema*, ICTR-96-13, "Judgement and Sentence of the Trial Chamber", 27 January 2000, paras 65-67 and 85.
[8] *Prosecutor v. Akayesu*, ICTR-96-4, "Judgement of the Trial Chamber", 2 September 1998, para. 137.
[9] Application, paras 16-18.
[10] *Id.*, para. 19.

B) Prosecution Response

10. The Prosecution emphasises that the trial proceedings are governed by the principle of orality. It submits that *viva voce* testimony is given the greatest weight since it is under oath and subject to cross-examination and that the general practice of the Court is not to admit prior witness statements into evidence as such. The Prosecution submits that the principle of orality is particularly important given the difficulties in the written statements such as translation, witness illiteracy, the time lapse between the taking of the statement and the oral testimony and the existence of both signed and unsigned statements.[13]

11. According to the Prosecution, full disclosure of all witness statements provides the accused with notice of the type and manner of the evidence against him and allows him to adequately prepare a defence, to safeguard himself against delay and to examine witnesses. The Prosecution asserts that whether or not a statement is signed contributes little to this notice.[14]

12. The Prosecution maintains that new evidence may emerge during trial due to the nature of live testimony regardless of whether the prior witness statements are signed or not, and that such an occurrence usually does not require an adjournment and may be further explored or used as a source of impeachment during cross-examination.[15]

13. In addition, the Prosecution outlines the procedure for the Defence to impeach the credibility of a witness using a prior inconsistent statement, and submits that out-of-court statements tendered to impeach the credibility of a witness need not rise to the same level of reliability as evidence-in-chief. According to the Prosecution, the Trial Chamber must then "decide what weight to give both the inconsistency and the source of the inconsistency",[16] noting that prior inconsistent statements are admitted for impeachment as a matter of practice, whether they are signed or not.[17]

14. The Prosecution also highlights a series of practical considerations regarding the conditions under which the witness statements were obtained in this case, namely that witnesses were interviewed in rural or war-ravaged areas, many witnesses were illiterate, some were amputees, and the

[11] *Id.*, paras 20-23.
[12] *Id.*
[13] Response, paras 6-7.
[14] *Id.*, paras 8-9.
[15] *Id.*, para. 10.
[16] *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgement, Appeals Chamber, 1 June 2001, para. 134.
[17] Response, paras 11-13.

interviews were often conducted through the use of one or two translators. The Prosecution, therefore, submits that these conditions meant that it was often impractical to obtain signatures and the assurance of veracity provided by those signatures that were obtained was often reduced.[18]

15. Concluding, the Prosecution contends that it would be impractical to have previous witness statements signed and this would provide no benefit to the rights of the accused and submits that a practice direction requiring signatures would be needlessly constrictive. According to the Prosecution, the Defence has failed to demonstrate that it has suffered any prejudice and that the Application should be dismissed in its entirety.[19]

C) **Defence Reply**

16. In their Reply, the Defence submit that the principle of orality is simply a principle of preference for oral testimony rather than written statements and is irrelevant to the present motion. The Defence argue that the real issue is "whether the process of evaluation through the assessment of consistency of oral testimony with previous written statements, which have been prepared with the specific intention that they *may* subsequently be used in evidence, is *enhanced* by seeking a solemn undertaking from the witness" which would confirm that the evidence is true that the witness understands the consequences of wilfully and knowingly giving false testimony.[20]

17. The Defence also submit that the purpose of witness statements includes the admission of those statements into evidence and not merely the provision of notice to the Defence and that a witness signs a statement to affirm that it was given voluntarily, that the witness understands and consents to its use in legal proceedings and that he or she understands the consequences of giving false testimony. According to the Defence, the present Application is not concerned with all witness statements, but only "those which are notified to the witness as possibly to be used in evidence" which can easily be signed.[21]

18. In addition, the Defence point out that the Prosecution appreciates the importance of establishing ownership of a disputed witness statement.[22]

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[18] *Id.*, para. 14.
[19] *Id.*, paras 15-16.
[20] Reply, paras 1-3.
[21] *Id.*, paras 4-6.
[22] *Id.*, para. 7.

19. Furthermore, they contend that the Prosecution's submissions regarding the practical considerations that impede their ability to obtain signed witness statements are unfounded. They also maintain that an illiterate person can listen to their account read back to them and confirm it to be true and that the use of a translator requires only a simple procedure to ensure that the witness' statements have been accurately recorded and that he or she understands the need to tell the truth. The Defence express their concern that the Prosecution may be unsure as to whether the Prosecution witnesses understand the need to tell the truth in their statements. The Defence, accordingly, submit that the Prosecution should obtain competent interpreters and "simply ask their witnesses whether they are telling the truth and to indicate by way of signature, fingerprint or toe print whether they adopt the statement as true and understand the consequences of false testimony."[23]

## II. APPLICABLE LAW

20. The authority of the Trial Chamber to issue orders and warrants is embodied in Rule 54 of the Rules. According to the said Rule:

> **Rule 54: General Provision**
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> At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

21. As regards the guiding principles governing the admission of evidence, the relevant provision is Rule 89 which states:

> **Rule 89: General Provisions**
>
> (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
>
> (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
>
> (C) A Chamber may admit any relevant evidence.

[23] *Id.*, paras 8-11.

22. Further, it is noteworthy that pursuant to Rule 91 of the Rules, the Trial Chamber may punish false testimony given in proceedings before it. Rule 91 is in these terms:

> **Rule 91: False Testimony under Solemn Declaration**
>
> (A) A Chamber, on its own initiative or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so.
>
> (B) If a Chamber has strong grounds for believing that a witness may have knowingly and wilfully given false testimony, the Chamber may follow the procedure, as applicable, in Rule 77.
>
> (C) The maximum penalty for false testimony under solemn declaration shall be a fine of 2 million Leones or a term of imprisonment of 2 years, or both. The payment of any fine imposed shall be made to the Registrar to be held in the separate account referred to in Rule 77(H).
>
> (D) Sub-Rules (A) to (C) shall apply to a person who knowingly and wilfully makes a false statement in a written statement which the person knows, or has reason to know, may be used in evidence in proceedings before the Special Court.

23. The Trial Chamber is authorised pursuant to Rule 92*bis* to admit written witness statements in lieu of oral testimony. Rule 92*bis* states that:

> **Rule 92*bis*: Alternative Proof of Facts**
>
> (A) A Chamber may admit as evidence, in whole or in part, information in lieu of oral testimony.
>
> (B) The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.
>
> (C) A party wishing to submit information as evidence shall give 10 days notice to the opposing party. Objections, if any, must be submitted within 5 days.

## III. MERITS OF THE APPLICATION

### A) Form of Witness Statements

24. The Trial Chamber wishes to observe that the Rules do not set out any formal requirements for the recording of a witness statement.

25. However, this Trial Chamber has made it clear that the phrase "witness statement" must be given a broad interpretation. To this effect, we have stated in one of our recent Decisions that:

> *The fact that a witness statement is not, grammatically or, from the point of view of syntax, is not in the 'first person' but in the 'third person' goes more to* ***form*** *than to* ***substance****,* and does not deprive the materials in question of the core quality of a statement. The Trial Chamber agrees with the assertion given by the Prosecution at the 1 June 2004 Status Conference that a statement can be, "anything that comes from the mouth of the witness" regardless of the format. By parity of reasoning, the fact that a statement does not contain a signature, or is not witnessed does not detract from its substantive validity.
>
> In this regard, we are of the opinion and we so hold, that any statement or declaration made by a witness in relation to an event he witnessed and recorded in any form by an official in the course of an investigation, falls within the meaning of a 'witness statement' under Rule 66(A)(i) of the Rules.[24] [Emphasis in original.]

26. We, therefore, reiterate that the Prosecution is required to disclose all witness statements to the Defence in accordance with Rule 66 regardless of the form in which they are recorded. The Chamber has found that the Prosecution "witness statements" include interview notes that were not signed by the witness,[25] handwritten interview notes taken by the Prosecution and its investigators,[26] and new evidence elicited during "proofing sessions" with Prosecution counsel.[27] This broad definition of witness statements under Rule 66 affords the Defence the broadest disclosure rights.

27. The Chamber recalls that while highlighting that witness statements were disclosable even if they do not meet this standard, the Appeals Chamber of the ICTR outlined the ideal standard for the taking of witness statements in these terms:

> A record of a witness interview, ideally, is composed of all the questions that were put to a witness and of all the answers given by the witness. The time of the beginning and the end of an interview, specific events such as requests for breaks, offering and accepting of cigarettes, coffee and other events that could have an impact on the statement or its assessment should be recorded as well.
>
> Such an interview must be recorded in a language the witness understands. As soon as possible after the interview has been given, the witness must have the chance to read the record or to have it read out to him or her and to make the corrections he or she deems necessary and then the witness must sign the record to attest to the truthfulness and correctness of its content to the best of his or her knowledge and belief. A co-signature by the investigator and interpreter, if any, concludes such a record.[28]

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[24] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, "Decision on Disclosure of Witness Statements and Cross-Examination", 16 July 2004, paras 22-23.
[25] Id., paras 22-24
[26] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, "Ruling on Disclosure of Witness Statements", 1 October 2004, paras 5-6.
[27] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, "Decision On The Gbao And Sesay Joint Application For The Exclusion Of The Testimony Of Witness TF1-141", 26 October 2005, para. 34.
[28] *Prosecutor v. Niyitegeka, supra* note 5, paras 31-32.

28. It is noteworthy, however, that the Appeals Chamber also emphasised that "a witness statement which does not correspond to the standard set out above does not necessarily render the proceedings unfair."[29]

### B) Admissibility of Witness Statements

29. The Chamber notes that most of the evidence in the trials before the Special Court has been adduced by way of *viva voce* witness testimony. In the case of *Prosecutor v. Norman et al.*, this Trial Chamber emphasised:

> *The Special Court adheres to the principle of orality, whereby witnesses shall, in principle, be heard directly by the Court.*[30] [Emphasis in original.]

30. Despite this preference for oral testimony, the Chamber notes that the Rules also permit the admission into evidence of written witness statements as proof of the truth of their contents.

31. Rule 92*bis* of the Rules provides for the admission into evidence of other "information" in lieu of oral testimony "if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation".[31] In *Norman*, this Chamber held that at the stage of admission, the Chamber must determine whether documents admitted under Rule 92bis are relevant, whether they possess sufficient indicia of reliability and whether their admission would not prejudice unfairly the Defence, such as if documents pertaining to the acts and conduct of the Accused are admitted into evidence without giving the Defence the opportunity of cross-examination.[32]

32. Moreover, this Trial Chamber has repeatedly noted that the Rules of the Special Court allow for a flexible approach to the admission of evidence before it with Rule 89(C) vesting the Trial Chamber with discretionary power to admit any relevant evidence.[33]

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[29] *Id.*, para. 35.

[30] *Prosecutor v. Norman, Fofana and Kondewa, supra* note 24, para. 25.

[31] As highlighted by the Appeals Chamber in *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-AR65, "Fofana - Decision on Appeal Against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence'", Appeals Chamber, 16 May 2005, para. 26, Rule 92*bis* of the Rules of the Special Court is much broader than Rule 92*bis* of the Rules of Procedure and Evidence of either the International Criminal Tribunal for the Former Yugoslavia ("ICTY") or the International Criminal Tribunal for Rwanda ("ICTR") which provide for very specific conditions as to the content and form for the admission of written witness statements in lieu of oral testimony.

[32] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, "Decision on Prosecution's Request to Admit into Evidence Certain Documents Pursuant to Rules 92bis and 89(C)", 14 July 2005, p. 4.

[33] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, "Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker", 23 May 2005, para. 6.

33. In its Decision *Fofana – Appeal Against Decision Refusing Bail*, the Appeals Chamber held that unsigned documents should have been admitted into evidence under Rule 89(C) of the Rules:

> If relevant, then under Rule 89(C) they may... be admitted, with their weight to be determined thereafter. There is no rule that requires, as a precondition for admissibility, that relevant statements or submissions must be signed. That may be good practice, but it is not a rule about admissibility of evidence. Evidence is admissible once it is shown to be relevant: the question of its reliability is determined thereafter, and is not a condition for its admission.[34]

34. In addition to being admitted for the purposes of establishing the truth of their contents, witness statements, in our view, may alternatively be used to impeach the credibility of a witness after an inconsistency is established between the oral testimony and a prior written statement of the witness in cross-examination.

35. In *Norman*, this Chamber ruled that the following procedure was to be adopted in order to establish that a witness under cross-examination had made a prior inconsistent statement:

> (i) A witness may be cross-examined as to previous statements made by him or her in writing, or reduced into writing, or recorded on audio tape, or video tape or otherwise, relative to the subject matter of the case, in circumstances where an inconsistency has emerged during the course of *viva voce* testimony, between a prior statement and this testimony;
>
> (ii) In conducting cross-examination on inconsistencies between *viva voce* testimony and a previous statement, the witness should first be asked whether or not he or she made the statement being referred to. The circumstances of the making of the statement, sufficient to designate the situation, must be put to the witness when asking this question;
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> (iii) Should the witness disclaim making the statement, evidence may be provided in support of the allegation that he or she did in fact make it;
>
> (iv) That a witness may be cross-examined as to previous statements made by him or her, relative to the subject matter of the case, without the statement being shown to him or her. However, where it is intended to contradict such witness with the statement, his or her attention must, before the contradictory proof can be given, be directed to those parts of the statement alleged to be contradictory;
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> (v) That the Trial Chamber may direct that the portion of the witness statement that is the subject of cross-examination and alleged contradiction with the *viva voce* testimony, be admitted into the Court record and marked as an exhibit.[35]

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[34] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-AR65, "Kondewa - Appeal Against Decision Refusing Bail", 11 March 2005, para. 24.

[35] *Prosecutor v. Norman, Fofana and Kondewa*, *supra* note 24, para. 21.

C) **Reliability of Evidence**

36. As noted, the Special Court, like the other international tribunals, "favour[s] a flexible approach to the issue of admissibility of evidence, leaving the issue of weight to be determined when assessing probative value of the totality of the evidence."[36]

37. After setting out the ideal standard for a witness statement as noted above, the Appeals Chamber of the ICTR had this to say:

> Also, a statement not fulfilling the ideal standard set out above is not inadmissible as such. Pursuant to Rule 89(C) of the Rules, a Chamber may admit any relevant evidence which it deems to have probative value. However, any inconsistency of a witness statement with the standard set out above may be taken into consideration when assessing the probative value of the statement, if necessary.[37]

38. We, nevertheless, emphasise that the Trial Chamber may choose to admit for the truth of their contents witness statements with formal or procedural irregularities into evidence under Rule 92*bis* or Rule 89(C) of the Rules, the impact of these on the weight to be given to the witness statement, if any, can only be properly determined in light of the totality of the evidence before the Chamber, taking into account all the relevant factors and indicia of reliability.

39. The present Application, however, concerns the impact of defects in the procedure and form of witness statements taken by the Prosecution on the weight to be given to the statement when the Defence uses a written statement in order to impeach the credibility of Prosecution witnesses.

40. It is of interest to note that this issue came up before the Trial Chamber of the ICTR in the case of *Prosecutor v. Akayesu*. The said Chamber addressed specifically the issue of the impact of the circumstances surrounding the taking of pre-trial statements on their probative value. The Chamber reasoned thus:

> During the trial, the Prosecutor and the Defence relied on pre-trial statements from witnesses for the purpose of cross-examination. The Chamber ordered that any such statements to which reference was made in the proceedings be submitted in evidence for consideration. In many instances, the Defence has alleged inconsistencies and contradictions between the pre-trial statements of witnesses and their evidence at trial. The Chamber notes that these pre-trial statements were composed following interviews with witnesses by investigators of the Office of the Prosecution. These interviews were mostly conducted in Kinyarwanda, and the Chamber did not have access to transcripts of the

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[36] See, for example, *Prosecutor v. Norman et al.*, SCSL-04-14-AR65, "Fofana - Appeal Against Decision Refusing Bail", 11 March 2005 at paras 22-24 and *Prosecutor v. Sesay, Kallon and Gbao, supra* note 33, para. 4.

[37] *Prosecutor v. Niyitegeka, supra* note 5, para 36.

> interviews, but only translations thereof. It was therefore unable to consider the nature and form of the questions put to the witnesses, or the accuracy of interpretation at the time. The Chamber has considered inconsistencies and contradictions between these statements and testimony at trial with caution for these reasons, and in light of the time lapse between the statements and the presentation of evidence at trial, the difficulties of recollecting precise details several years after the occurrence of the events, the difficulties of translation, and the fact that several witnesses were illiterate and stated that they had not read their written statements. Moreover, the statements were not made under solemn declaration and were not taken by judicial officers. In the circumstances, the probative value attached to the statements is, in the Chamber's view, considerably less than direct sworn testimony before the Chamber, the truth of which has been subjected to the test of cross-examination.[38]

41. Noting that it was open to the Trial Chamber to make the finding which it made in light of the particular circumstances of the case,[39] the Appeals Chamber of the ICTR underscored its opinion on the pre-eminence of the principle of orality in these terms:

> [T]he general principle is that Trial Chambers of the Tribunal shall hear live, direct testimony. In the opinion of the Appeals Chamber prior statements of witnesses who appear in court are as a rule relevant only insofar as they are necessary to a Trial Chamber in its assessment of the credibility of a witness. It is not the case... that they should or could generally in and of themselves constitute evidence that the content thereof is truthful. For this reason, live testimony is primarily accepted as being the most persuasive evidence before a court.[40]

42. The Defence argue that they are prejudiced if the Prosecution does not ask a witness to read through his or her statement and sign to attest as to the truth of its contents since the Court will accord less weight to an unsigned statement thereby diminishing their ability to highlight prior inconsistencies and the Court will not be able to control false testimony under Rule 91.

43. On this issue, the Chamber notes that in the case of *Prosecutor v. Rwamakuba* before the ICTR, the Defence brought a motion seeking that the Prosecution be required to have will-say statements read to and signed by the witnesses. There, the Trial Chamber characterised will-say statements as communications from one party to the other "anticipating that a witness will testify about matters that were not mentioned in previously disclosed witness statements"[41] that were disclosable under Rule 67(D) of the Rules and noted that they were distinguishable from written and signed witness

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[38] *Prosecutor v. Akayesu*, Trial Judgement, *supra* note 8, para. 137.
[39] *Prosecutor v. Akayesu*, Appeals Judgement, *supra* note 16, para. 133.
[40] *Id.*, para. 134.
[41] *Prosecutor v. Simba*, ICTR-01-76-T, "Decision on the Admissibility of Evidence of Witness KDD", 1 November 2004, para. 9.

statements that were disclosed pursuant to Rule 66.[42] In that case, the Chamber denied the Defence Motion and held:

> In the Chamber's view, the fact that the will-say statement is not signed does not limit the right of the Accused to cross-examine the Witness and show inconsistencies with his testimony at trial. The weight to be attached to such related evidence will be addressed at a later stage by the Chamber in light of the circumstances including the manner in which the interview was recorded and on a case-by-case basis.[43]

44. In the Application before us, the Defence have emphasised that they are seeking that those statements that the witness "knows, or has reason to know, may be used in evidence in proceedings before the Special Court" be signed by the witness and not will-say statements.[44] As already noted, it is clear from our jurisprudence that all witness statements, in whatever form they are recorded, are disclosable under Rule 66 of the Rules.

45. We take the view that the findings of the Trial Chamber of the ICTR in *Rwamakuba* are applicable to all forms of witness statements. We accordingly restate our position that the Defence have the right to cross-examine witnesses on unsigned statements and to demonstrate that there are inconsistencies between these statements and oral testimony. We also observe that they have, in fact, fully exercised this right throughout the trial proceedings. The weight to be attached to this evidence will be assessed by the Chamber having regard to the particular circumstances surrounding the making of the statement and testimony in question on a case-by-case basis.

46. The Chamber would like to emphasise that a signature at the end of a statement is neither the conclusive nor the sole factor in determining a statement's reliability. It is merely one of a number of factors to be considered in the final assessment and determination of the weight to be given to each witness' evidence before the Court.

47. In the Chamber's view, the presence of a signature is even less important when the witness is subjected to cross-examination. The witness can be asked whether or not he or she actually made the statement. If the witness admits to making the statement, then, as the Defence admitted in oral submissions, it is not relevant whether or not the statement was signed. If the witness denies ever having made the statement, then other evidence can be called by the Defence to refute this assertion. Once it has been established that a witness has made a statement, the issue of any inaccuracies in the

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[42] *Prosecutor v. Rwamakuba*, ICTRY-98-44C-T, "Decision on the Defence Motion Regarding Will-Say Statements", 14 July 2005, paras 3-4.
[43] *Id.*, para. 5.

statement can also be addressed through cross-examination and will be considered and weighed by the Chamber on a case-by-case basis in light of the totality of the evidence before the Chamber.

48. This Chamber has already noted that it is good practice to have witness statements read back to the witness and to have the witness then sign the statement as to the truth of its contents and agrees with the comments of the Appeals Chamber of the ICTR in the *Niyitegeka* as to what would constitute an "ideal" standard for taking witness statements. However, the Chamber does recognize the peculiarity of the circumstances existing in this case of testifying in a hostile environment and under conditions similar to those outlined in the *Akayesu* Judgement.[45]

49. Based on the foregoing considerations, the Chamber is of the view that it would not be in the interests of justice to depart from the current practice and order the Prosecution to comply with any particular practice or to promulgate a practice direction on the issue of the signing of witness statements. Each situation and each statement will be assessed on the basis of its own circumstances and a proper determination of the weight and reliability to be attached to it will be proceeded with in due course.

## IV. DISPOSITION

50. Accordingly, the Defence Application is dismissed in its entirety.

Done at Freetown, Sierra Leone, this 26th day of October 2005

Hon. Justice Benjamin Mutanga Itoe

Hon. Justice Pierre Boutet
Presiding Judge
Trial Chamber I

Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

[44] Transcripts of trial proceedings, 27 July 2005, p. 2-4.

[45] *Prosecutor v. Akayesu*, Trial Judgement, *supra* note 8, para. 137.