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

TUESDAY, 5 JUNE 2007
9.53 A.M.
TRIAL

TRIAL CHAMBER I

Before the Judges:	Bankole Thompson, Presiding Pierre Boutet Benjamin Mutanga Itoe
For Chambers:	Mr Matteo Crippa Ms Erica Bussey
For the Registry:	Mr Thomas George
For the Prosecution:	Mr Peter Harrison Mr Vincent Wagona
For the Principal Defender:	Ms Haddijatou Kah-Jallow
For the accused Issa Sesay:	Mr Wayne Jordash Ms Sareta Ashraph Mr Tobias Berkman
For the accused Morris Kallon:	Mr Shekou Touray Ms Francis Issa
For the accused Augustine Gbao:	Mr John Cammegh

[RUF05JUN07A - MC]
Tuesday, 5 June 2007
[Open session]
[The accused present]
[The witness entered court]
[Upon commencing at 9.53 a.m.]
WITNESS: ISSA HASSAN SESAY [Continued]

PRESIDING JUDGE: Good morning, counsel. The trial is resumed. And I think last Friday we certainly were trying to sort out the procedure in respect of alleged statements made by the first accused which the Prosecution has given notice to tender at some point in time. I think -- yes? Intervention.

MR JORDASH: Your Honour, sorry to interrupt.

PRESIDING JUDGE: That's okay. That's fine.

MR JORDASH: On Friday Your Honours ordered that a medical report be obtained.

PRESIDING JUDGE: Yes, quite right. Have you obtained one?

MR JORDASH: A verbal report from Dr Harding's present replacement. Dr Harding is on leave at the moment. The short of it is that Mr Sesay is feeling much better as regards his injury to his leg. I think the rest did him some good.

PRESIDING JUDGE: Very well.

MR JORDASH: And, as I understand it, he is ready to continue as regards his leg. The doctor did say that Mr Sesay has been taking anti-malarial medicines so that is the one aspect which I don't have an up-to-date position on.

PRESIDING JUDGE: By way of a prophylactic, is it?

MR JORDASH: I think so, yes. Yesterday was when we received the news, so I don't know how Mr Sesay feels today. I

haven't spoken to him directly about the condition but I did ask him if he was feeling okay and he said yes.

PRESIDING JUDGE: Well, we'll rely on that representation from him to you, unless he wants to say anything to corroborate that?

THE WITNESS: My Lord, I'm much better, sir. Thank you.

PRESIDING JUDGE: Right. Thanks. I was also saying that my recollection in respect of the alleged bundle of statements that may well be forthcoming from the Prosecution at some stage, is that there was in fact a collective disposition on the part of the Bench to hear any legal submissions on the question of admissibility, only at the point in time when the Prosecution seeks to tender those statements in evidence. I need to say that that position remains the same and there has not been a shift of judicial ground on that.

MR JORDASH: I'm not making any application in relation to that.

PRESIDING JUDGE: Very well. Yeah. Quite. In that regard, we'll now move on to the Prosecution. Mr Harrison.

MR HARRISON: I understood the Court's comments but if I can just point out that consistent with the ruling in the Norman decision --

PRESIDING JUDGE: Yes.

MR HARRISON: - the actual tendering of the document would not take place until the end of the cross-examination.

PRESIDING JUDGE: Correct; right.

MR HARRISON: When the alleged inconsistencies are under --

PRESIDING JUDGE: Good point. But of course we can do it in two stages: You can -- objections are usually raised also at

the level of the attempt by the -- counsel to lay the proper legal foundation for the document. But indeed, the proper time for the objection, cum legal submissions, will be at the time when the counsel intends to tender the document. Because that is the time at which we would be asked to receive the document in evidence.

JUDGE ITOE: My Lord Presiding Judge I suppose re-emphasises the stand, you know, of the Chamber, on the prematurity of seeking to tender the documents even before we went into other portions of his evidence, as was the stand on Friday. And I am happy that the Prosecution has come to that same reasoning at this point in time. Thank you.

JUDGE BOUTET: Mr Presiding Judge, I thought what the Prosecution is suggesting is about the tendering into evidence to be marked as an exhibit should it be accepted, but I would imagine that if there is any attempt by the Prosecution to use these statements, and there is objection by the Defence at that moment to the use, I'm not even talking of the introduction of these documents as for any purpose, then the Defence is likely to raise that objection at that time and at that time we would have

to dispose of the matter. So, in other words, as you were suggesting, it may be that two-step process. You have to --

PRESIDING JUDGE: Yes, quite right. I'm not --

JUDGE BOUTET: -- dispose of the objection --

PRESIDING JUDGE: Good point.

JUDGE BOUTET: -- and then later on, if it is ruled admissible, it will be in. If it is ruled inadmissible then that is the end of the process as far as those documents are concerned.

PRESIDING JUDGE: Well, the two options are open.
JUDGE BOUTET: Yes.
PRESIDING JUDGE: If at the threshold stage of seeking to use the document there is a successful objection then, as we say in law, short Latin, cadit quaesitio, no further. But if we don't, then we go on to the possible stage two. Very well. That is clear.
MR HARRISON: Just so that the Court is clear as to the Prosecution's understanding of the law, in the ICTR cases the requirement was that the Prosecution apply for permission to cross-examine on a statement of the accused for the purpose of impeaching the credibility of the accused and the Prosecution is content to make an application to you for leave to cross-examine on the statement for that purpose and those would be the very first questions put to the accused, if that is the Court's wish to --
PRESIDING JUDGE: The Court also adopts a kind of open-ended approach, a kind of open system cross-examination, where counsel on both sides are at liberty to cross-examine as to

issue as well as to credit. And I think what the position that you have cited seems to be a kind of closed system approach which is adopted in those other tribunals. But we've gone in for a much greater latitude rather than applying for leave but to assume that the Prosecution and the Defence have a right to cross-examine, both as to matters in issue and as to credibility, impeaching, rather than asking for leave. But if you think you need a formal leave for that, the second one, cross-examining to impeach the witness, of course what you say really applies generally ordinarily to ordinary witness, not to accused persons.

MR HARRISON: No. The difference is --

JUDGE ITOE: Let me say this, Mr Harrison: If your cross-examination is going to be based on those statements which are likely to be contested by the accused, then the issue of their admissibility, or the circumstances under which they were taken, comes into light and it has to be disposed of. This is the way I look at it because you cannot proceed to seek our leave to cross-examine without disposing of certain objections which might be formulated by the Defence on whether they're topics which are going to raise for cross-examination, are those that would ordinarily have been acceptable, given the circumstances on which they allege the statements were taken.

PRESIDING JUDGE: Yes, Mr Harrison. You can further enlighten us on this because my position is that without even wanting to treat the accused person as a different kind of witness, which I don't think is the issue here, that it is still open to the Prosecution to cross-examine him as to matters in controversy between the two sides and also to cross-examine him for the purposes of impeaching his credibility. What methodology

you'd adopt is entirely within prosecutorial discretion subject to judicial controls.

For example, if you'd seek to cross-examine him on certain matters that you think come under the rubric of prior inconsistent statements, then the procedure would be in line with, as we expounded it in the CDF decision.

But if you intend to move outside that and within -- some special leave of the Court is required, then persuade us that this is a procedure which we need to follow. It is just that we think that already you can cross-examine as to credibility,

impeach his credibility, without even seeking our leave.

MR HARRISON: One could but for the fact that the basis of it is the accused's statement, and the court may come to the conclusion that no statement of an accused can be used in court until such time as its voluntariness has been determined, and the Prosecution's understanding of the law --

PRESIDING JUDGE: Yes.

MR HARRISON: -- is that the Prosecution ought to indicate to the Court --

PRESIDING JUDGE: Yes.

MR HARRISON: -- that it is about to embark upon an attempt to use a statement of an accused and, before such time as it can be substantively dealt with in cross-examination, the question of voluntariness must be addressed by the Court through the parties.

PRESIDING JUDGE: Your understanding of the law is clearly in line with our understanding; it is just that we didn't want to be pre-emptive, in fact to even begin to characterise what are these alleged statements in terms of voluntary or involuntary.

Now that you have mentioned it, it puts a different complexion on the situation and raises a different approach. Now I am with you.

MR HARRISON: I'm not trying to prolong this, I'm --

PRESIDING JUDGE: No, no, no, no. It is quite important because the mention of the word "voluntary" brings in a whole scenario of legal options and possibilities. I was not in fact on that same radar screen. I just thought these were statements that could be characterised as statements simpliciter.

MR HARRISON: There certainly are statements but the Prosecution is simply seeking to advise the Court that, as it

understands the law, it must advise the Court that they are accused statements and the Prosecution --

PRESIDING JUDGE: And the issue of voluntariness might come in.

MR HARRISON: Before such time --

PRESIDING JUDGE: Very well.

MR HARRISON: -- any statement can be dealt with substantively. That is why the Prosecution deems it appropriate to seek the permission of the Court to cross-examine the co-accused, sorry, the accused, first accused, on the question of a prior statement.

PRESIDING JUDGE: Yes.

MR HARRISON: So that the Court can determine the questions it deems appropriate before there is any unfairness that follows to the first accused.

PRESIDING JUDGE: In other words, if I understand you, correct me if I am wrong, you are putting the issue of voluntariness right here now, for determination?

MR HARRISON: The Prosecution thinks it would be appropriate for the Court to focus its mind on the --

JUDGE BOUTET: I would like to have some clarification

indication. It is your position, I take it, that before you can use, as Prosecutor, any such statements as you described them, that have been given by the accused at some past time, you need to establish voluntariness, even if the only purpose that you intend to use these statements is to show, in your view, inconsistencies between the evidence the witness has given as a witness in this trial, and what he might have said at different times, different other times. So it is not to prove the content

of these statements but simply to show that, at different times, he has given different answers to the same issue or questions; am I correct?

MR HARRISON: That's correct.

JUDGE BOUTET: So your position is that whether it is for credibility purposes only or for the truth of its content, the procedure is the same?

MR HARRISON: The Prosecution --

JUDGE BOUTET: It's your position?

MR HARRISON: [Overlapping speakers] accept that.

JUDGE BOUTET: Okay.

MR JORDASH: May I?

PRESIDING JUDGE: Yes, Mr Jordash, what's your response to that?

MR JORDASH: I am grateful to the Prosecution. We agree with what the Prosecution have just said.

PRESIDING JUDGE: Thank you.

[The Trial Chamber conferred]

PRESIDING JUDGE: Mr Harrison, we'll hear you.

MR HARRISON: I've been corrected twice this morning that there is a yellow book of authorities which the Prosecution

prepared and I believe, handed up two weeks ago. To me, that's it, but I'm still convinced it's green.

PRESIDING JUDGE: But have you admitted before, in this Court, that you are colour-blind?

MR HARRISON: Yes, I have.

PRESIDING JUDGE: For once, we are on the same radar screen. I am colour-blind, so I don't even know what this is.

MR HARRISON: That's certainly --

JUDGE ITOE: Excepting that I would say, even though I'm not colour-blind, I would think that this is yellow, whatever colour. Anything, but not green.

JUDGE BOUTET: But it is written on top of it "OTT authorities."

MR HARRISON: That's probably what I should rely upon.

PRESIDING JUDGE: Okay, let's proceed.

MR HARRISON: The Prosecution is wanting to persuade the Court that it would be entirely consistent with the Appeals Chamber decision of this Court in Fofana, the Fofana -- a bail review decision, to adopt the procedural findings made by the ICTR in the Ntahobali case, and to adopt the substantive conclusion in the Ntahobali case, which involved an application to use a statement of a co-accused during cross-examination for the purpose of impeaching the credibility of that co-accused.

And the passage from the Fofana decision, which the Court would find at the ninth tab in that binder.

JUDGE ITOE: Was that the Fofana bail decision?

MR HARRISON: Yes, correct. That's right.

JUDGE ITOE: That was my decision.

MR HARRISON: Yes.

JUDGE ITOE: That was revisited and reviewed by the Appeals Chamber.

MR HARRISON: That's correct.

JUDGE ITOE: That's right.

MR HARRISON: Some of us were surprised at the decision, but it is the law. At any rate, it's tab 9. It was paragraph 26, which we say can be of some guidance to the Court as we try to analyse the proper procedural and substantive approach to this

question.

At paragraph 26, the Appeals Chamber said the following: "Rule 89(C) ensures that the administration of justice will not be brought into disrepute by artificial or technical rules, often devised for a jury trial, which prevents judges from having access to information which is relevant. Judges sitting alone can be trusted to give secondhand evidence appropriately in the context of the evidence as a whole and according to well understood forensic standards. The Rule is designed to avoid sterile legal debate over admissibility so the Court can concentrate on the pragmatic issue of whether there is a real risk that the defendant will not attend the trial or will harm others."

Now, the Appeals Chamber decision in Ntahobali, in the Prosecution's view, applies that analysis, and it's also applied in the Trial Chamber decision.

The Prosecution is, first of all, going to take you to the Trial Chamber decision and spend a few minutes on that, because we say it meets the questions posed here in this particular issue

at all four corners. The Trial Chamber decision is at tab 2 of the OTP book of authorities.

By way of background, I'd like to explain to the Court the factual circumstances that arose, by starting at paragraph 1 of that decision, the paragraph that actually has the number one attached to it.

You will see that this arose as a request by one of the co-accused. It's the defence for Kanyabashi, who was requesting leave of the permission of the Trial Chamber to use the statements of a co-accused, that's the co-accused Ntahobali,

during cross-examination. And this issue surfaced at the end of the direct examination. So, in essence, really no notice was given in that case of the intention to cross-examine using a statement.

You'll find that once the application is made by the co-accused Kanyabashi on the same day, this is all in oral argument, the Prosecution stands up and says, "We too have the same intention and we, too, are applying to cross-examine the co-accused Ntahobali on his prior statement given to the Prosecution."

And the comment with respect to the Prosecution's intention to found at paragraph 8. The Prosecution advised the Trial Chamber that, in its view, there is a wide discretion available to the Trial Chamber pursuant to the Rules of the ICTR. In particular, they've referred to 89(D) and 94. And at paragraph 15 of that decision, they also referred to the Mrksic decision, which seems to be a case that is often referred to now from the ICTY, which, as a general comment, stated that in the ICTR, in a way, the practice there is in favour of admissibility. Whereas

the admission of a document is not equivalent to the recognition of its correctness, and we don't understand there to be any dispute or discrepancy between this Court and what has been held in the ICTY in that respect.

The comments of the Trial Chamber which, we suggest, are helpful in resolving the issues, can be found, first of all, at paragraph 50. In this particular section of the decision, the Trial Chamber is asking itself whether or not there is any need to conduct a voir dire to determine this issue. And at paragraph 50, in its deliberations, the Trial Chamber said:

"While the Chamber recalls that since a voir dire procedure is usually embarked upon in the absence of the jury in order to prevent contamination of evidence, there is no such risk of contamination of evidence because the Chamber is composed of professional judges who hear the case without the aid of jurors."

Paragraph 51 is a comment that I will come back to when I refer to the Appeals Chamber. But just so that the Court is aware, at paragraph 51 the Trial Chamber uttered the follow words:

"The Chamber notes that since Ntahoboli's interviews are not confessions to the commission of the crimes for which he has been charged and that, rather, the interviews include account of the events of 1994, the voir dire procedure requested is not appropriate in the circumstances of the case."

And going on to paragraph 53, the Trial Chamber says:

"The Chamber agrees with the Appeals Chamber that the Rules should be primarily applied with assistance of national principles, only if necessary for guidance in the

interpretation of these Rules. The Chamber's not convinced that it is only by way of a voir dire that the challenge to the Prosecution's compliance with the Statute and the Rules when it conduct Ntahoboli's interviews can be dealt with."

Then at paragraph 54, the judgment reads:

"The Chamber recalls that in the cases of Bagosora et al, Bizimungu et al and Kabiligi and Ntabakuze, trial chambers at the tribunal perused the transcripts of the interviews in which custodial statements of the respective accused

persons were taken and made determinations as to whether the Prosecution complied with the relevant articles; i.e. Articles 18 and 20 and the relevant rules; i.e. Rules 42, 43, 63 and 92."

And, with respect to the procedural argument that the Prosecution is advancing, we say that ought to apply here but we say that it is very significant that the Prosecution can, and is prepared to make available to the Trial Chamber, the audiotapes and the videotapes of the interview of the first accused. And the Prosecution's position is, the whole purpose of audiotaping and videotaping is to ensure that there is no inappropriate, clandestine, unlawful act being undertaken that would be a subterfuge of the judicial process and lead to a statement that ought not to be in evidence, getting into the evidence. There can be no better evidence before the Court in assisting you in determining whether or not the statement is admissible than by looking at the videotape or listening to the audiotaping.

And it is clear from the Trial Chamber's decision that they in fact did look at the transcript, reviewed it, looked at the

documents which were purported to be the waivers signed by the accused in that case, and their decision came as a consequence of that review.

Just on a factual matter, if I can tell the Court that the very first interview which took place on 10 March, there is only an audiotape available. But for the remaining ten interviews, ten subsequent days of interviews, there are videotapes available. Now, as a consequence of this approach adopted by the Trial Chamber, they ruled that there was no need to hold a voir dire and, in fact, paragraph 56 is the Court's determination of

that issue.

That is not to say, though, that there wasn't a broad range of information before the Court. There was, in fact, a letter from the accused; there were extensive representations made from both parties on the issue. And if I can take you now away from what we see as the procedural question, that is, whether or not there should be a voir dire to what we understand to be the more substantive question --

PRESIDING JUDGE: Before you go further, perhaps we should clear that up. So, in other words, based on your own submission so far, and your guidance as you seek them from the authorities that you have cited, in a nutshell, you are recommending to the Court, as the preferred judicial methodology, to listen (a) to the audiotape and (b) to watch the video, to be able to come to a determination as to the circumstances leading to the taking of those alleged statements. In other words, to satisfy ourselves whether the process was tainted or not tainted, so that would be

your recommendation to the Court?

MR HARRISON: That's the suggestion we are making.

PRESIDING JUDGE: Very well. I'm clear on that procedural issue. But let me further, before you embrace the substantive question, suppose that, having adopted that methodology, we came out with a nil return, in other words, we are unable to make a determination one way or the other, what would be, then, again using the authorities which, again, merely at a glance I find fairly instructive, very useful, what would be then the alternative preferred judicial methodology?

MR HARRISON: Yes. I think in that event it would then become incumbent upon the Prosecution to call those witnesses

which the Court, should it wish to offer guidance, deems to be relevant with the suggestion that the Prosecution be given some latitude in determining who the Prosecution deems to be relevant witnesses. Whether that has to take place within the confines of what is formally called a voir dire, the Prosecution simply sees that as a tool that has evolved in the common law and whether or not it ought to have a prominent place in international tribunals.

PRESIDING JUDGE: Well, speaking for myself, I think the analogy here, the arguments that the voir dire thing was more to prevent the jury from hearing contaminated, allegedly contaminated evidence, still holds to be the main rationale behind a voir dire and judges , professional judges, are presumed to be purified, cleansed of all that kind of thing. So, then, that renders the voir dire process analytically useless, in a way, on one perception. But that's all right. I am satisfied on my --

JUDGE BOUTET: If I may on this too, but I do not disagree

with the Presiding Judge, but whether you call it a voir dire or some other procedure, it would remain in this last alternative, should -- the result is not clear for the Court -- you would have to call witnesses and it may -- you may not call them voir dire, but it would be sort of a side issue, if I can put it, to be decided as such so -- which is akin and similar to a voir dire, you may not call it, or it may not be called a voir dire but that becomes a specific issue to be determined which is admissibility or the possibility to use or not to use. It is only upon that decision that you will proceed ahead with or without these statements, depending on the decision of the Court. So, I would

say it is about the same, except you don't call it a voir dire but I agree with, certainly the Presiding Judge that --

MR HARRISON: You are actually one case ahead of me because, ultimately, the Appeals Chamber said: You can call it a voir dire. You don't have to call it a voir dire but what happened here was pretty darn similar to what people call a voir dire. I will take you to that in a moment. I just want to finish this case, the Trial Chamber, before I take you to the appeals decision.

What I was going to take you to now is at paragraphs 60 to 62.

JUDGE BOUTET: Of the same?

MR HARRISON: Of the Trial Chamber's decision which is still at the same tab.

JUDGE BOUTET: Thank you. Yes.

MR HARRISON: It should be tab 2. This is the Trial Chamber now opining upon the substantive issue before it, and at paragraph 60 the Trial Chamber says the following:

"The Chamber is of the opinion that as a general principle the use of prior statements of a witness during the

witness's cross-examination for the purpose of challenging his credibility is allowed and should not be precluded if it is shown to be relevant and reliable. The Chamber considers that there is no distinction between an ordinary witness and an accused who testifies on his behalf in this regard."

61:

"The Chamber sees no reason to preclude the Prosecution or any other cross-examining party from using interviews for

the purpose of cross-examining the accused on issues pertaining to his credibility only as long as they are admissible. The Chamber stresses, however, that since the Prosecution did not seek to use the interviews as evidence during the presentation of its case it is precluded from using their substance at this stage of the proceedings. Regardless of the accused's choice whether to testify on his own behalf the Prosecution should have presented this evidence if it intended to rely on the substance of the interviews."

That governs the situation here. We, the Prosecution, did not call it as part of its case and the substance of the interviews ought not to be thrown in, in one gigantic exhibit, against the first accused. It's only if the Prosecution complies with what this Court has already said in Norman, that the inconsistencies become relevant for the purpose of reviewing and assessing the credibility of the witness.

PRESIDING JUDGE: In other words, you can't introduce by the back door what you should have brought in by the front door.

MR HARRISON: Correct.

JUDGE ITOE: And, in fact, if you look at 60, which you have read, I have some problems with the last statement of the Trial Chamber in this regard, where it says that: "The Chamber considers that there is no distinction between an ordinary witness and an accused who testifies on his behalf in this regard."

I, for my part, see quite a difference between the statements which we have seen so far but we -- if certain statements have been tendered by the Defence for purposes of

demonstrating prior inconsistencies that have been in the statements of ordinary witnesses, even if some of these statements have been those that have been made by insider witness, who themselves were potential accused persons, accomplices as a matter of fact, we would term them, they were still witnesses. They were not under any threats of the Prosecution, nor were they arrested as accused persons. But this is, we have before us an accused person who has opted to give evidence on his own behalf, and is being confronted by statements which were recorded from him as an accused person, and I think that there is, notwithstanding that statement in 60, to me, and for my part, a distinction between Mr Sesay sitting there as an accused person, and Mr Sesay sitting there as a witness. If Mr Sesay were taken here as an insider witness I would have no problems with treating -- with using those statements as -- to demonstrate prior inconsistencies.

My difficulty arises where Mr Sesay, as an accused, is faced with the dilemma of statements which he made now being used against him by the Prosecution, and I think that the voir dire procedure is an extension of what, in national systems, we use to

call "a trial within a trial." A trial within a trial.

If your statement is disputed, normally, the circumstances under which that statement, you know, was taken are examined by calling evidence, by calling -- even tendering other exhibits which would show that the circumstance of recording that statement are either regular or irregular for purposes of determining -- of enabling the Court to determine whether those statements should be admitted or not, for purposes of these proceedings. So this is the distinction which I see in these

circumstances and the other difficulty which I have is addressed by paragraph 61 which says it all because, to my mind, I thought, I thought that ordinarily these statement should have been tendered in the proper way in the conducting of your case.

There is also the other possibility of their coming in as prior inconsistent statements, but there is a difficulty there. And I think that these are things which you will have to address in order to convince the Chamber as to what it has to do in these circumstances. Thank you.

On the points raised by Your Honour Judge Itoe, this is -- it gets us some comment in this decision, but if I can just address you, first of all, to what is said in the Prosecution filing, which is -- you'll find the comment at paragraph 11 in this Trial Chamber decision. I am at the same case, the same decision, just at paragraph 11. This is the Trial Chamber summarising, as it understood a submission made by the Prosecution.

The Trial Chamber there goes on to say that the Prosecution submits that it did not use the statements during the Prosecution

case because it was not known, at the time, whether the accused was going to testify and whether his testimony would be inconsistent with his previous statements.

So the Prosecution is always in the circumstance of trying to refine a case that, admittedly, took over two years to be heard. So it's trying to reduce witnesses and it's trying to identify that which is significant. And similar to what happened before the ICTR, it was also the case here that the Prosecution simply would have made a determination not to attempt to adduce the statements as part of its case. And so far as the

Prosecution is aware, that is a prosecutorial decision which it is entitled to have some discretion over in determining how the matter should be presented to the Court.

And with respect to what is said in paragraph 60 and 61, although we accept the force of the comments made by Justice Itoe, the Prosecution's reading of those two paragraphs is that the Trial Chamber was stating that, as a general principle, that's the first phrase in paragraph 60, the general principle is that if you do have an inconsistent statement, it does not matter if it's an accused or a witness, in principle, so long as it's admissible, it can be put to an accused or a witness. That the Rule, with respect to prior inconsistent statements, does not have a caveat or a subset of rules which would hive off from the general principle the understanding that so long as the Prosecution puts the inconsistent statement fairly and the statement is admissible, then no wrong is being committed.

The Trial Chamber --

JUDGE BOUTET: Mr Harrison, so I understand your position

clearly on this, you're saying, on the general principle of putting a prior inconsistent statement to a witness, whether the witness is an accused or not, the principle is the same but there is a caveat to it, when it's an accused and you're trying to use a prior inconsistent statement, you have to go in addition to just using the statement; you have to show some other aspect related to the provision of that statement by the accused?

MR HARRISON: The only thing the Prosecution is suggesting to the Court as being sound in law is that there is a burden to show that the statement is voluntary.

JUDGE BOUTET: Okay.

MR HARRISON: The Prosecution is not aware of any other caveat.

JUDGE BOUTET: Once, if you do establish that, that's what you say, but you still have to go through that first, and, if this is accepted, then the general principle is applicable; that is, from that moment on, the principle of being able to challenge credibility in cross-examination by putting these statements is applicable.

MR HARRISON: Yes.

PRESIDING JUDGE: But would this be subject to the overriding discretion of the Court to ensure that in matters of such nature where an accused is involved, one has to respect, in every way, a doctrine of fundamental fairness.

MR HARRISON: Yes, of course. That's always an application.

PRESIDING JUDGE: Very well.

MR HARRISON: Just a final rejoinder to the comment of Mr Justice Itoe, in paragraph 61, in the fourth line, it's the very last phrase of the first paragraph, where the Trial Chamber

decided to qualify its earlier comments by saying, "as long as they are admissible."

Now, we, the Prosecution, read that to be in reference to the voluntariness of the accused's statement, because this is an accused who is involved here in Trial Chamber -- in Trial Chamber II of the ICTR, and we read that phrase to be somewhat significant and possibly of some guidance to the comments made by Mr Justice Itoe.

The conclusions reached in the Trial Chamber at the ICTR

are found beginning at paragraph 70. And the Trial Chamber is probably not aware, but when the Prosecution delivered to Court Management and to the parties the transcripts, the Prosecution, at the same time, attached the actual waiver forms signed by the first accused, and those are all before the Court. And what happened was, on each day of interview, at the very beginning of the interview, an independent waiver form would be executed. It would be explained to the accused and then executed.

At paragraph 70, the Trial Chamber says:

"The transcripts of interviews show that the accused was clearly informed of his rights under Rules 42 and 43 at the beginning of the interview of 24 July 1997, as well as at the beginning of the interview of 26 July 1997, as well as on several occasions throughout the interview."

Paragraph 71 says:

"The accused was informed of his right to counsel, to the free assistance of an interpreter and that if he chooses to answer questions without the presence of counsel, he can

stop the interview at any time and request a counsel. The accused answered that he understood. When the accused was informed of his right to remain silent, and that any statements he makes shall be recorded and may be used in evidence, he indicated that he understood. After the accused read out a paper containing a waiver of rights to counsel, the investigator asked him if he understood that what he had read meant that he chose to be interviewed without a lawyer. The accused answered in the affirmative. The accused was asked if he chose to be interviewed without threat or duress from anyone, and he confirmed the fact.

The accused was offered the option to write down his account and the events or to be questioned, and he chose to be questioned."

And paragraph 72 then goes on to point out that the interviews were audio recorded and you have here the advantage of audio recording and video recording for ten of the 11 interviews.

And the conclusion of the Trial Chamber, found at paragraph 80, and there the Trial Chamber said:

"Having reviewed interviews, the Chamber has not found any instance in which the accused asked to stop the interview to obtain presence of counsel or which showed that his statement was given under duress."

If I can just alert the Court that the next sentence, we suggest, is helpful to you and in applying the law. The Trial Chamber said:

"The Chamber finds that Ntahoboli's interviews show that the accused was questioned voluntarily and answered in a language that he understood. The Chamber concludes that Ntahoboli's interviews fully comply with the requirements

of Article 20 of the Statute and Rules 42, 43 and 63 of the Rules and are relevant to the trial."

And that was the basis of Trial Chamber's ruling.

The Appeals Chamber decision, which is at tab 1, affirmed all aspects of the decision and, for the benefit of the reporter, this decision is dated 27 October 2006 and the stile of cause is The Prosecutor v Ntahoboli, which I was negligent in not spelling, and I will spell it now, N-T-A-H-O-B-A-L-I, and Nyiramasuhuko, which is spelled N-Y-I-R-A-M-A-S-U-H-U-K-O.

At paragraph one, you will see a very brief description of

the history of the proceedings. Paragraphs 2 and 3 summarise the background of the proceedings and the discussion begins at paragraph 9. We say this case is helpful because it encapsulates all of the issues before you, and we think they're summarised in paragraph 9.

The Appeals Chamber said:

"This interlocutory appeal involves two issues. One, whether the Trial Chamber erred in determining the admissibility of the previous statements without holding a voir dire procedure and, if the answer to this question is in the negative; two, whether the Trial Chamber erred in ruling that the portions of previous statements used in cross-examination to test Mr Ntahoboli's credibility were admissible as evidence."

At paragraph 11, the Appeals Chamber explains that it's during the cross-examination that the issue arises and it's only at that point in time that Defence counsel indicated that he was intending to use these statements in cross-examination.

It's then, when it's raised in court for the first time,

that in response to a question raised by Mr Ntahoboli from the witness box, that the Trial Chamber gave the parties the opportunity to present submissions on whether there was sufficient basis to the allegation that the previous statements were in violation of the Rules, such as to require a voir dire procedure.

So it is at the cusp of the debate that the accused put the matter in issue and was saying that it was necessary to have a voir dire because of some impropriety or some unlawful act. In spite of it being brought forward at that time, the Trial Chamber

still was of the view that it was not necessary to have a voir dire, a view which the Appeals Chamber endorsed.

And the reason why the Appeals Chamber endorsed that view is found in the subsequent paragraph. It's about -- it's in, if you go down seven lines to paragraph 12, you will see the Appeals Chamber making the following comment:

"There are no provisions in the Rules which direct Trial Chambers to adopt a formal procedure for determining whether they should conduct a voir dire. Instead, Rule 89(B) of the Rules provides that reference may be made to evidentiary Rules, 'which will best favour a fair determination of the matter.' This discretion can extend to the conduct of a voir dire procedure when it is determined appropriate by the Trial Chamber."

And what it follows immediately is the Appeals Chamber's assessment and review of what took place in the Trial Chamber. The Appeals Chamber says that the procedure conducted by the Trial Chamber permitted the parties to make submissions as to whether the Prosecution and co-accused could use the previous statements to impeach Mr Ntahobali. And I emphasise the word

"submissions." It wasn't a case of evidence being called in the Trial Chamber, in spite of the fact that the accused made a representation from the witness stand that something had gone afoul or some unfairness had ensued during the statement-taking.

The Appeals Chamber went on in the next sentence to point out that the Trial Chamber considered the submissions of the parties and whether it was necessary for a voir dire. They made a finding that it was not necessary and the Trial Chamber determined the admissibility of the previous statements on the

basis of the submissions made by the parties.

But I should add that the record from the Trial Chamber's decision makes amply clear that the Trial Chamber judges had before it all of the statements, had been transferred to the Trial Chamber by Court Management at their request, along with several ancillary documents related to the transcripts and all of that was before the Trial Chamber in its deliberations. It is for that reason we say that the Trial Chamber can rely upon the videotapes, should it so choose to do so.

Paragraph 13 of the Appeals Chamber decision informs us that the Trial Chamber heard the parties on the circumstances surrounding the taking of the statements. There was in fact, in addition to a statement from Mr Ntahobali from the witness stand, I think I'd earlier said a document, it is clearly a written affidavit as referred to by the Appeals Chamber, from Mr Ntahobali into evidence on that issue and then the Trial Chamber decided that no further evidence was required to determine whether the previous statements were in accordance with the Rules.

The Appeals Chamber's comment on that is in the final

sentence of paragraph 13: "The Appeals Chamber does not see any abuse of the Trial Chamber's discretion in the way that it chose to proceed."

Paragraphs 16 and 17 also provide further guidance to this Court, the Prosecution says. And this, in particular paragraph 16, has reference to a passage I referred to earlier about the Trial Chamber deciding that the statements were not a confession.

Paragraph 16, the Appeals Chamber said:

"The Defence for Mr Ntahobali further argues that the Trial

Chamber erred by distinguishing the previous statements [as interviews by the Prosecution investigators] from a confession in finding that a voir dire procedure is inappropriate in this case. The Appeals Chamber notes that a confession does indeed require additional consideration under the Rules as confessions are specially addressed under Rule 92 of the Rules. However, this provision requires the confession to be conducted in strict compliance with Rule 63 of the Rules. Therefore, the distinction between confessions and interviews of the accused is not an appropriate basis for deciding when to conduct a voir dire because both forms of statements require the same consideration under Rule 63."

That is exactly the same Rules in existence here. So there can be no principal distinction drawn between a confession, which presumably would be words to the effect "I did it" and a statement from an accused which presumably would touch on topics outside of, or bordering only on relevance to the gravamen of the offence.

And paragraph 17 gives you a sense of the type of concerns raised by the witness co-accused before the ICTR and if you go down seven lines in paragraph 17, you will see somewhat of a precis of what the Defence allegations were. The Appeals Chamber says:

> "The Defence for Mr Ntahobali alleges that he received inducements and threats from representatives of the Prosecution before the 1997 interviews were conducted. These claims, if substantiated, could fall within the terms of Rule 95. The Trial Chamber considered these allegations

and heard the parties' submissions. It concluded, however, that there was nothing to suggest that the interviews had been conducted in an improper manner and thus there was no need for further evidence on the matter. Mr Ntahobali was informed of his rights and the proceedings contained no evidence of oppressive questioning by the Prosecution investigators."

The conclusion of the Court was that there was no error, either in the procedure adopted by the Trial Chamber, or in its assessment of the admissibility of the statements for the purpose of cross-examination.

The Prosecution also wants to touch on some of the prior proceedings which took place in this trial and, in fact, they're proceedings from the pre-trial stage.

There was a decision made by this -- or not this Chamber, it was made as a pre-trial decision by His Honour Judge Thompson and the decision was rendered in 2003. The decision was as a result of a motion brought by what was then, I believe, the Acting Principal Defender's Office and you will find this

decision at, I believe it's tab 3 of the book that you have, and it's titled "Decision on request of Defence Office for order regarding contact with accused."

By virtue of the date 30 May I can tell the Court that this decision came after the last of the interview which are the subject of this motion before you. The last interview took place on 15 April 2003. A motion is made. The response is filed. The reply was filed. And from the proceedings the Court will be able to observe that what was being put in issue was whether or not the first accused had waived his right to have counsel present.

The issue is actually stated by Mr Justice Thompson at paragraph 15 of the decision which you will find at page 6. There, the issue was described as the following:

"The key issue for determination is whether there exists under international law practice or within the parameters of universally recognised and accepted standard of justice a right in favour of the counsel for an accused to require that contacts between his client and the Prosecution for the purposes of interviews be made only through him/her and to interpose his subjective evaluation as to the propriety of the accused choices where such an accused has voluntarily and knowingly waived his right to the presence of counsel at such interviews, such waiver being perceived by counsel as illogical and detrimental to the interests of the accused."

And the substance, or the significant passages which the Prosecution relies upon are at paragraphs 20 and 21, and it's only --

JUDGE ITOE: But, Mr Harrison, I also have my finger on my

paragraph 18 of that same decision, and it is that it should be emphasised that historically, the right not to incriminate oneself has acquired a invaluable sacrosanctity, having regard to its judicial roots in antiquity as far back as the Roman times which is embodied in the Latin expression, and all that, and so on. The emphasis here is that notwithstanding what he said in 15, as I understand it, there is also the fundamental legal principle that an accused is not allowed to incriminate himself, which is the purport and the legal thrust of the reasoning in paragraph 18 of this decision which you have cited. Are we --

have you seen what I'm saying there?

MR HARRISON: Yes. And if you continue on in that paragraph, if you turn to the next page, but remaining in paragraph 18.

JUDGE ITOE: Yes, I am -- it's the main principle, it's the main principle which I am concerned. I'm not going further because that is what strikes me, that is the rule against self-incrimination by an accused. And even if it has to be, even if -- I mean, an accused is not precluded from making a confessional statement. He isn't precluded at all, and it is his right. It is not even the right of his lawyer to preclude him from making one if he so decides to but, notwithstanding this, there is the principle of the rule against self-incrimination.

That is why courts are very very cautious in dealing with statements that are confessional in nature. I must confess, that I have not been through the bundle of statements, and I've not yet arrived at the conclusion that the statements in question are confessional in nature or not, and that it is on the confessional nature of these statements that you're trying to base the inconsistencies which you are drawing from his testimony.

MR HARRISON: That is not quite accurate.

JUDGE ITOE: I see.

MR HARRISON: What the Prosecution, if permitted, what the Prosecution would be attempting to do is to put inconsistent statements to the accused --

JUDGE ITOE: What if they are confessional in nature? If those statements are confessional in nature, I agree that they may be inconsistent to statements that he has provided in oral testimony, what if they're confessional in nature? Would that

make a difference to this exercise?

MR HARRISON: It would not. And the reason is the Prosecution is bound by this Trial Chamber's decision in the Norman case, which says, and has been applied throughout this trial, that any inconsistencies, should it be accepted by the Court to be an inconsistency, can only be used for assessing the credibility of the witness. So it's not a question of attempting to incriminate, it is only a question of impeaching on credibility.

JUDGE ITOE: This is what I was saying earlier on, because the Norman decision was based on a statement by an ordinary witness. It was not an accused person. Here we are faced with a concrete example of dealing with statements which have been offered to the Prosecution by an accused person who is testifying on his own behalf. That is why I say, you know, that you have to address us on this because it's -- we are on new grounds. We are not just within the rubric of an ordinary witness whose statement you want to use for purposes of establishing inconsistencies with the oral testimony in court. We are within the rubric of the

statements offered to the Prosecution by an accused person for the first time, this is happening to us for the first time, who is now testifying on his own behalf. That's where our difficulty lies. And I think that I would like to hear more on this because that is where my difficulty is.

MR HARRISON: The purpose of taking you through the Trial Chamber decisions from the ICTR --

JUDGE ITOE: I'm following you very well. I'm following you very, very well.

MR HARRISON: The purpose of spending a bit of time on that

was to try to show you how the law developed there and was applied. And we've had this debate already this morning. The Trial Chamber at the ICTR used the words that there was a general principle of admissibility, and they went on to comment how there should be no preclusion of an accused from that general principle. The Prosecution here says, today, that in reading the ICTR decision, we think it's part of that decision that the Prosecution still had to show the voluntariness of the statement of an accused. But once that is demonstrated to the satisfaction of the Trial Chamber, then there ought not to be any distinction between a prior inconsistent statement from an accused as opposed to a prior inconsistent statement from a witness.

It is not unusual in national systems to put prior inconsistent statements to an accused person. That is done for the same purpose that was accepted in the Norman decision, for the purpose of attacking the credibility of the accused/witness, and for no other purpose. And the Prosecution is trying to be helpful to the Court and in setting out what it sees its

obligation as being and, frankly, if the Court is not satisfied on the voluntariness of statement, the Prosecution does not envision any further attempts at trying to cross-examine using the statement either for the purpose of impeaching credibility or any other purpose.

JUDGE ITOE: And I would like you, Mr Harrison, to hear the Court out, because when we agreed that voluntariness in these circumstances is a very important element to determine, how are we going to get about determining the voluntariness? I mean, are we going to use the Ntahoboli decision and the procedures that were used by them? I mean, the decision has very, very

respectable parameters. They're decisions which I do respect, but when it comes to it in terms of their binding this Court, our Statute is very clear on this, and that is that the Appeals Chamber, you know, in deciding, in giving its decisions is guided, guided by the decisions of the ICTY and the ICTR. The Statute does not say, you know, that it is bound. But the philosophy of that that underlies these decisions is very sound.

But where I'm driving at is that, in determining the voluntariness, don't you think that more is expected to be done than ordinary submissions of the parties? Can we do that without hearing from the accused person as to the circumstances under which this was done? Maybe a little bit more going a little bit further than ordinary submissions by the parties as is suggested in the decisions that we have in front us. Because it is only in that perspective that we will able to determine the voluntariness. We don't even know whether these statements are contested. Up to now, we do not know. And if they are, on what basis are they contested? We are still in a vacuum there. And I

think these matters should clarified and we'd be able to move more systematically.

PRESIDING JUDGE: Consistent with what Honourable Justice Itoe is saying, I reckon that even in the Ntahoboli situation, and correct me if I'm misreading the ratio there or the principles enunciated. Even though the Appeals Chamber endorsed the procedure of hearing submissions simpliciter, yet that was not all what the Trial Chamber did there. They went on to consider evidentiary material. Because even if this were merely confined to just listening to legal submissions, the entire exercise, in my own judgment, would have been an exercise in

abstracto, it would never have been able to reach any kind of concrete or definitive conclusion as to the actual circumstances culminating in the making of the alleged statement.

MR HARRISON: Yes, that's perfectly accurate. As I tried to inform the Court earlier, it's very clear from the Trial Chamber's decision in Ntahoboli that the Trial Chamber took the copies of the actual statements and a number of ancillary documents, the alleged waivers signed by the accused, and reviewed them and assessed them, and that was, we can assume, a very significant part of the judicial exercise undertaken.

PRESIDING JUDGE: And there was a mention of an affidavit somewhere.

MR HARRISON: That's correct. From the accused/witness.

JUDGE BOUTET: But in that case, rather than here, viva voce evidence from whatever witness, they decided to go on documentary evidence, documentary evidence which would have included in that case an affidavit by the accused as to the circumstances, so that's the way they proceeded.

MR HARRISON: That's correct. And the Prosecution is suggesting that that's why we started out with the Fofana decision; the Statute and Appeals Chamber's decisions of this

Court make clear that this Court was created to serve important and really essential functions and yet it was also designed in a unique way to recognise the experience of the trial judges, their ability to deal with issues, complicated and sometimes controversial, but in a manner that may be more efficient from the approach that might be adopted in a national system, be it the United States, or France, or elsewhere. And that, to some extent, where those principles may be competing, it becomes

difficult for the Court to reconcile them. It appears to be the Appeals Chamber's decisions that this Trial Chamber and the other Trial Chamber is expected to try to develop fair procedures which ensure justice for the accused and which are also efficient.

PRESIDING JUDGE: And the Trial Chamber -- the Appeals Chamber in the Ntahoboli case did recognise a very wide discretion in evidentiary matters of trial chambers.

MR HARRISON: Yes, that's true.

JUDGE BOUTET: I listened to the question posed to you by my colleague and brother Justice Itoe about his understanding of your position. May I -- as to the confessional aspect or not of these documents, am I properly upstanding -- I'm not sure if you addressed that in details -- but my understanding is that your position is whether it's a confession or not, it is irrelevant for the purpose, because you're not tendering that for their content, but only to show that there are inconsistencies. And, in this respect, this is where you go and base your argument on the Fofana decision in CDF trial.

MR HARRISON: Yes, that's perfectly correct.

JUDGE BOUTET: Okay, thank you.

MR HARRISON: I would like to take you to the Rule, but if I could just finish off what we understand to be the ratio of the decision of Mr Justice Thompson back in 2003. It's at paragraph 21. Paragraph 21 of that decision states:

"Finally, as regards the instant motion by the Defence Office, it is necessary to focus on the issue of whether the waiver by the accused herein of his right to have counsel present at the interviews with the OTP was voluntary and informed. This can only be determined

objectively from the confidential report of the Registrar.

In this regard, I have had the benefit of studying very closely the said confidential report of the Registrar, dated 13 May 2003, made pursuant to the order of this Chamber, dated 1 May 2003.

Predicated upon the same, I find nothing therein to convince me that the waiver on the part of accused of his right to have counsel present at the interviews with the OTP was not voluntary and informed, by force of logic the contrary factual finding would have vitiated the waiver in law."

And the conclusion of that decision, at the bottom of the same page, at paragraph 3, is that:

"The waiver by the accused herein of his right to have counsel present at the said interviews was voluntary and informed."

The Prosecution understands that to be one of the issues that must be grappled with by the Court. We say we have a decision already on that very issue.

There is some further information that the Prosecution would like to put before the Court with respect to that 2003

application. In the motion materials, and the motion itself is at tab 4 of that binder but I'm not asking you turn it up, in that motion, there is absolutely no suggestion that Mr Sesay, at any time, said that he did not want to speak to the Office of the Prosecutor.

In the response to that motion, which again I'm not asking you to turn up but you will find it at tab 6 of that same binder, you'll find a memo of Mr John Berry, one of -- the investigator

who was present for ten of the 11 interviews. That memo was actually part of the Registrar's report that is referred to in Mr Justice Thompson's decision. And that memo makes clear that there were, in fact, three occasions when Defence Counsel, or counsel from the Defence Office, I should say, the Principal Defender's Office, three occasions where they met with Mr Sesay during this time period of the interviews.

On the -- let me clarify this. That's not quite right. There were two occasions when there was a meeting, that the Prosecution's aware of, and there's a third occasion where a person from the Registry goes to the Prosecution to make enquiries.

On 11 March, which is the day of the second interview, a person named Beatrice Utrech went to the Prosecution and was given a copy of the rights advisement. On 13 March, which is on the fourth day of the interviews, the interviews started on the 10th, on 13 March, the memo refers to a female Gambian lawyer going to speak to Mr Sesay. And that memo says that, at no time, did she indicate to me that she had any concern about the fact that Issa Sesay was speaking to an investigator from the Office

of the Prosecutor and never requested that she be allowed to be present during the interview. And the third time is when, again, a female Gambian lawyer attends, and that is on 24 March 2003.

That document is -- it has Court Registry numbers, and it was a filed document, and the Court Management number is page 311.

And, in addition, another document was filed before Mr Justice Thompson, and it's also in that binder as part of the response, at tab 6. There is a declaration of Mr Gilbert

Morissette, who was the investigator present on the first day, wherein he details all of the events that took place during that interview, and on a subsequent two occasions, April 14 and 15, where he reappears or reattends on Mr Sesay for the purpose of having another type of document reviewed and approved by Mr Sesay. That declaration of Mr Morissette is at Court Management numbers 344 to 346, but it is part of the Prosecution response that's included in the book.

The Rules of this Court which govern this leave application are Rules 42, 43, 63 and 92. And we would prefer to actually start off at Rule 92 because we think it's helpful to the Court to understand that this is really what the Prosecution is saying.

Rule 92 says that:

"A confession by the suspect or the accused given during questioning by the Prosecutor, shall, provided the requirements of Rule 43 and Rule 63 were complied with, be presumed to have been free and voluntary."

So the Prosecution says that the presumption should apply here because Rules 43 and 63 were complied with and, therefore,

the presumption should be put in place, that the statement of Mr Sesay is free and voluntary.

And as a footnote to that Rule, the Court should know that Rule 92 is slightly different from the Rule -- the companion Rule in the ICTR and ICTY. Again, they're both referred to as Rule 92, but, at those courts, the Rule says that the Rules shall be strictly complied with. Here, the Rule says, "provided the requirements of Rule 43 and Rule 63 were complied with." The words "strict compliance" was struck from the Special Court's Rules.

PRESIDING JUDGE: Making room for what?

MR HARRISON: The suggestion would be that mere technical matters which do not address any substantive or significant willful conduct which violates the rights of the accused still permit Rule 92 to be invoked here.

PRESIDING JUDGE: In other words, the doctrine of substantial compliance. Right, okay.

MR HARRISON: Rules 42 and 43 are of interest to the Court. But, again, what I have to point out is that Rule 92 does not refer to Rule 42, but I think it's relevant and the Court ought to know about it. Rule 42 has a heading, "Rights of Suspects During Investigation."

And it makes clear that a suspect who is questioned by the Prosecutor shall have the following rights, of which he should be informed in a language he speaks and understands. And the first right is the right to legal assistance of his own choosing, including the right to have legal assistance provided by the Defence Office where the interests of justice so require and where the suspect does not have sufficient means to pay for it.

The second is the right to have the free assistance of an

interpreter if he cannot understand or speak the language to be used for questioning. And, thirdly, the right to remain silent and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

Now, again, the Prosecution says that all that was complied with, but that is Rule 42. It goes on to say, and this is really the issue that appeared before Mr Justice Thompson, I think, back in 2003, 42(B) says:

"Questioning of a suspect shall not proceed without the

presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease and shall only resume when the suspect has obtained or has been assigned counsel."

And the Prosecution simply reminds the Court that we rely upon the decision of Mr Justice Thompson to the effect that there was an expressed waiver back in 2003 by Mr Sesay.

Rule 43 is the one which talks about the recording and questioning of suspects, and this is a rule that must be considered when looking at Rule 92. And it says that:

"Whenever the Prosecutor questions a suspect, the questioning, including any waiver of the right to counsel, shall be audio recorded or video recorded in accordance with the following procedure."

And that's why I referred you, earlier this morning, to the existence of the audio recording for all days and a video recording for ten of the 11 days. The first day was not video recorded, simply because the Prosecution had to go to the Registry and other locations to try and find a video recorder.

Rule 43 then goes out to set out five different requirements which must be complied with, and I don't propose to take you through all of them. I think the Court can review the Rules as well as I can, but one decision which the Prosecution says may be helpful to the Court in considering Rule 43, is the Bizimungu decision, which is at tab 7 of the book of authorities that the Office of the Prosecutor handed up. And the spelling of the accused name in that case is B-I-Z-I-M-U-N-G-U, and it's a

decision on -- or the title of the decision is "Decision on Prosper Muriraneza's renewed motion to exclude his custodial statements from evidence of 4 December 2003."

In a nutshell, this case stands for the proposition that there does not have to be perfect compliance with the Rules in order for a statement to be admissible, because at paragraph 17 of that decision, the Trial Chamber said:

"After a careful review of the transcripts of the interviews of the accused, which took place on 8, 13 and 19 April 1999, the Trial Chamber does not consider that the rights of the accused, guaranteed by Rule 42, have been violated.

It appears clearly on the records that on 8 April 1999 the accused was read out Rule 42 by the investigators and he answered, unequivocally, that he agreed to talk to the investigators in the absence of his counsel. When asked if he would like to waive his right to counsel, the accused stated, 'Not completely but, for the moment, I accept to talk to you.' The Trial Chamber considers that this waiver of right to counsel is unequivocal and, therefore, the

absence of counsel was not prejudicial to the right of the accused."

Going on at paragraphs 29 of that same decision, the Trial Chamber recalled that:

"In applying the provisions of Rule 95, this Tribunal considers all the relevant circumstances and will only exclude evidence if the integrity of the proceedings would indeed otherwise be seriously damaged."

In paragraph 30:

"Therefore, as stated above in paragraph 27, the detention of the accused in Cameroon is lawful and the statements given by the accused are not to be considered as unlawfully obtained. The Trial Chamber does not see any ground for these statements to be excluded. It is, therefore, in the Trial Chamber's opinion that the rights of the accused pursuant to Rule 40 have not been violated."

And a further guidance to the Court, and the Prosecution says significance, are paragraphs 33 and 37 of that decision.

Thirty-three says:

"The Trial Chamber notes that it does not appear on the transcript that the accused was duly informed of the content of Rule 43. It is not contested by the Prosecutor that none of the investigators told the accused that the interview was being recorded. However, it appears on several occasions in the transcripts that the investigators mentioned the fact that they had to take a break to change tapes. The Trial Chamber is of the opinion that this constitutes sufficient information that the interview was being recorded."

And, finally, in paragraph 37:

"Furthermore, it is reasonable to assume that the recording equipment was visible to the accused during his interrogation. Moreover, the investigators cautioned the accused that, pursuant to Rule 42, any statement he makes shall be recorded and may be used in evidence. Upon a full examination of the transcripts, the Trial Chamber comes to the irresistible conclusion that the accused, although not explicitly warned of the fact of recording his interview,

was in fact aware and conscious of the fact that the interview was being recorded on tape. Therefore, the Trial Chamber considers that there has been no violation of Rule 43 and that the rights of the accused were not prejudiced."

And, again, this is based on Rules where --

MR JORDASH: Sorry, to interrupt.

PRESIDING JUDGE: Yes.

MR JORDASH: I would have done earlier, but I didn't want to stop my learned friend. If I can assist in narrowing the issues, there is no challenge to Rule 43.

PRESIDING JUDGE: Yeah, okay.

MR JORDASH: We do not say that the non-compliance had a particular part -- has a bearing on the issues they seek to argue now.

PRESIDING JUDGE: Very well. In any event, we are going to give you an uninterrupted run. Go ahead.

MR HARRISON: I'll just -- I know the Court wants to take a break. If I can just finish Rule 63.

JUDGE ITOE: No, we are not in that much of a hurry, You

know. Please continue, because there is a matter -- it's usually not very clean, you know, to interrupt. Let's pursue it to its logical end.

PRESIDING JUDGE: But clearly, I'll keep my eyes on the clock.

MR HARRISON: I think if I finish Rule 63, then I may be wrapping up. The other rule that you must know about is Rule 63, because, of course, that's specifically referred to by Rule 62. And Rule 63 has a heading which makes it significant. Obvious to the Court, it says, "Questioning of the Accused."

And Rule 63 imposes the following, it says:
"Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel, unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease and shall only resume when the accused's counsel is present."
And sub-paragraph B states:
"The questioning, including any waiver of the right to counsel, shall be audio recorded and, if possible, video recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall, at the beginning of the questioning, caution the accused in accordance with Rule 42(A)(i)."
And just so there is no uncertainty, (A)(i) says that in the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before the audio recording or video recording ends.
This, again, and the Prosecution's suggestion to the Court,

points to the wisdom of the Trial Chamber accepting the usefulness of, not only a review of the transcript, but a review of the audio recording and, in particular, of the video recording, because the Prosecution, frankly, cannot think of any better evidence, either to show lack of voluntariness or an existence of voluntariness, than a video recording of the actual interview process.

The Prosecution says that from a review of the transcripts and a review of the waiver documents, and I know that the

Prosecution thought we would be helping Court Management by producing these binders with the statements in them, which, unfortunately, turned out to be of no assistance whatsoever because your Chamber's legal officers were well ahead of us and had already done it. But, at any rate, the document has in it from pages, Court Management pages, 28302 up to and including 28332, the copies of documents which are referred to as rights advisements.

And these are the documents which on every day the interview was to take place, the investigator present would go through the verbal rights advisement warning and then have the accused circle and initial the document, indicating whether or not he accepted what was being said to him, understood what was being said to him and agreed to the interview process. So those documents are before you, as are the statements themselves.

Upon any review of those statements, the Prosecution says that at least two things are manifestly obvious. The first is the accused clearly understood what was taking place, and the second is that he voluntarily agreed to give a statement to the Prosecution.

If you go through the transcripts you will, in fact, find instances of the first accused correcting the interviewer on certain matters. You will find him explaining in more detail, then asked about on certain topics. And by viewing the videotape, it's obvious that there was, from body language alone, a willingness on the part of the first accused to take part in this interviewing process.

PRESIDING JUDGE: Your fifth point? I've got four so far.

MR HARRISON: I hope -- I think I've exhausted all my

points. The concluding comments I wanted to leave with the Court were this: I perfectly understand the amount of hesitance that the Court may have in adopting a procedure which is not consistent with something which may be tried and true in national systems. But the Prosecution simply says that this is an international court; it's not a Common Law court. And in civil jurisdictions such a streamlined, yet fair and rigorous process, is the general rule.

What we are suggesting here is that the guidance that you have from the ICTR decisions which have been referred to you, is clear, compelling authority for this Court to act fairly, yet efficiently, by taking the submissions of the parties, reviewing the statement and making a determination on whether or not the Prosecution should have its request for leave to cross-examine Mr Sesay on the statements granted or not.

PRESIDING JUDGE: Well, we recognise that sometimes we are called upon to navigate unfamiliar waters. We will at this point take the usual morning break and when we resume, Mr Jordash, you

will have your turn, an uninterrupted run.

MR JORDASH: Thank you.

PRESIDING JUDGE: We'll take a break at this point.

[Break taken at 11.47 a.m.]

[RUF05JUN07B - MD]

[Upon resuming 12.06 p.m.]

PRESIDING JUDGE: Yes, Mr Jordash, we will hear you in reply.

MR JORDASH: Could I seek Your Honour's guidance on an issue?

PRESIDING JUDGE: Very well.

MR JORDASH: It's an issue raised by the Prosecution concerning what they say is a decision on the subject already made, arising from Your Honour's judgment at Prosecution tab 3.

As I understand the Prosecution's submissions on this point, they say, firstly, you have no need to consider the issue of Rule 42 or Rule 43 because the decision has already been made. That was my understanding of what they were seeking to say about Your Honour's decision of 30 May 2003.

Now, if that is right then --

PRESIDING JUDGE: Can we then ask him if that's what his position is, so that it may well dispose of whatever -- if they give a different answer.

MR JORDASH: Certainly.

JUDGE ITOE: For him to say if that was right.

PRESIDING JUDGE: Yes.

MR JORDASH: If that's right, then there seems little point addressing [overlapping speakers] --

PRESIDING JUDGE: That's what I want to check. Make sure Mr Harrison would respond to that and dispose of that matter for

us.

MR HARRISON: Yes. As I have come to understand the law of res judicata, it may be a law that increasingly has a number of holes in it. So the Prosecution suggestion to the Court is there is a decision not on the question of the voluntariness of the statement, but there is a decision on the question of whether there was a voluntary waiver of the right to have counsel present during the taking or the giving of the statement, and because it is, as I understand it, not the law that res judicata prevents a party from asserting new circumstances, new allegations of fact,

which may be relevant to the issue that was determined in the original decision. But, if it's simply repeating the same arguments advanced during a prior application, then res judicata may apply to foreclose simply repeating the same arguments that were advanced some time ago.

PRESIDING JUDGE: Thank you. Mr Jordash.

MR JORDASH: If I may then give my understanding of this decision, and if I may then seek clarification from Your Honours as to whether that understanding is correct. Looking at paragraph 21 of Your Honour's decision, tab 3 of the Prosecution bundle, it would appear that the decision was made with only reference to the confidential report of the Registrar. This, I do not have, but I am presuming that that report was based on submissions made by the Prosecution and by submissions made by the Registrar.

And my understanding of this decision is that the decision was made limited to that available evidence at that time. A decision which was, by its very nature, having not heard from the Defence, a limited and restricted decision. This is the time, we

would submit, for the Defence to provide their submissions on the issue.

[The Trial Chamber conferred]

PRESIDING JUDGE: It's the collective disposition of the Bench to hear you as fully and as amply as possible on all the aspects that are raised by the Prosecution, and using that decision of May 2003 as merely just a guide, a citation, an authority, but not as foreclosing or precluding you from even raising issues that may be, what, peripheral or core or tangential. Remember, we don't want to -- again, we are

cautioned in international tribunals to avoid allowing technicalities to stand in the way of our search for the truth and, therefore, this Bench is not disposed to go into the nature and extent of the doctrine of res judicata and how it applies here at this point in time.

We are prepared to hear you as comprehensively as you can, even if you can, distinguishing their decision, narrowing it down, restricting it to whatever. You are at liberty to do that.

MR JORDASH: Well may I --

PRESIDING JUDGE: In other words, what we are saying is that on the issue in hand, we would like to take the view that everything is open season, until we think that you probably are travelling beyond legitimate boundaries.

MR JORDASH: Well, certainly -- thank you, Your Honour -- certainly that would be consistent with another decision which I don't have in front of me.

PRESIDING JUDGE: Yes. And it would be consistent with a fair methodology to give you a full chance of defending this position.

MR JORDASH: Thank you.

PRESIDING JUDGE: Right.

MR JORDASH: Do Your Honours have a skeleton argument which I gave to your learned legal officer this morning?

PRESIDING JUDGE: Probably on the way to us.

JUDGE ITOE: Probably on the pile still.

PRESIDING JUDGE: I thought I saw it on the way to us.

MR JORDASH: It may that the skeleton contains issues which I now do not need to go into, given the Prosecution submissions and the way they put their position.

The Prosecution's starting point appears to be Ntahobali. We would submit that that is the wrong starting point. Ntahobali contains no general principle which deals with the points which we seek to raise. The general principle dealt with in that case is at paragraph 60, and it's a general principle that the use of prior statements of a witness during the witness's cross-examination for the purpose of challenging his credibility is allowed and should not be precluded, if it is shown to be relevant and reliable.

Now that, largely, is something we can accept. That is the general principle arising from Ntahobali. And I draw to Your Honour's attention if it is shown to be relevant and reliable, with one caveat which may arise later on, which is adequate notice of service. Adequate notice that it would form part of the Prosecution's case. Those are submissions we will reserve until the issue of voluntariness has been decided.

We would submit that that case, Ntahobali, is simply a case on its individual merit. The Prosecution would like the Court to

adopt the substantive findings, but the substantive findings, of course, are specific to the facts in that case which, in due course, we will submit, are quite different.

The starting point for any application to exclude statements of the accused is an examination of the relevant law and an examination of the facts at hand.

The Defence submits that the prior statements of the first accused are inadmissible pursuant to Rule 89 and 95 of the Rules of Procedure and Evidence. The statements were obtained in breach of Article 17.g of the Special Court of Sierra Leone and the right not to be compelled to testify against himself, the

accused. That is the starting point of the application.

This Court cannot accept evidence which would bring the administration of justice into serious disrepute. This Court cannot create evidential rules which would not best favour a fair determination of the matter before it. Those two rules, by necessity, are case-specific.

The Defence submits that the statements of the accused were obtained as a result of an investigative conspiracy, designed to confuse the accused and to sap his will to the extent that he would agree to the course of action proposed by the Prosecution. And the course of action proposed by the Prosecution was to speak, waive his right to counsel, implicate his accused, whether it be true or not, and to basically abandon his right to silence.

This is not an issue which can be properly considered by looking at the demeanour of the accused on the audio/visual equipment, or even listening to the accused when he gave his forced account during the course of the interviews. Aside from distress in the first interview on 10 March 2003, when complete compliance had not then yet been achieved, there will be little

sign of the coercion which had taken place before the interviews.

That was the effectiveness of the acts and conduct of the investigators prior to the interview. That was the effectiveness of the acts and conduct of the investigators during and between the various interviews. But there is, we would say, ample evidence on the face of the transcripts that the accused did not voluntarily waive his right to counsel, nor voluntarily provide statements to the Prosecution.

In short, the Prosecution investigators, one, and I'm referring to paragraph 3 of the skeleton, deliberately failed to

explain the full meaning and import of the accused's Article 17, Rule 42 rights. The Prosecution investigators, Mr Morissette, Mr Berry, Mr White and Mr Saffa and perhaps persons unknown, inculcated a process designed to trick Mr Sesay into believing that he was a witness for the Prosecution and not an accused facing an approved indictment. They then executed a deliberate plot to threaten, coerce, and persuade Mr Sesay that the only way in which he would come out of this process, either alive or with any life whatsoever, was by cooperating with them. Cooperating, as I've said, to be interviewed without the presence of a lawyer, and in breach of his right to silence.

The starting point is the facts which are alleged. The facts which are, in brief, alleged are that when Mr Sesay had been in custody, in the custody of the CID for a short period on 10 March, Mr Berry and Mr Saffa invited Mr Sesay's cooperation for the safety of his life. John Berry and Gilbert Morissette then promised that, in exchange for cooperation, Mr Sesay would not be a suspect but would be a witness against the other accused. Mr Berry and Mr Morissette threatened Mr Sesay with

life imprisonment and promised a reward if he were to cooperate, and that word "cooperate" is a word which we will see arising. And it arises without convincing explanation of what that means from any of the Prosecution evidence thus far. We would submit cooperation could only have been in this context: Speak, implicate and you will remain a witness.

This well thought-out procedure, involved the continuation of those threats throughout the process. It involved the acquiescence of detention centre staff. It involved the removal from detention wearing a hood, in the manner of Guantanamo Bay

prisoner, blindfolded and brought to Freetown. In that way, in order to confuse and isolate the accused. And I submit the detention regime was acquiescing with this process. They started the hooding. They allowed him to be removed without order from the Registry. They were part of it. This has to be considered alongside, we would submit, this was a detention regime where firearms were routinely taken out and threatened and used against the detainees; brandished as part of a normal routine even when detainees wanted to go to the bathroom; the detainees were forced against the wall, face forwards, simply just to allow the staff to enter the cells. That process goes alongside the Prosecution process.

Mr Sesay was then denied any information about his family whereabouts and they were denied that information about his whereabouts. You will not have to take my word for it. It's there on the transcript, which I will take Your Honours to shortly. So the process of isolating Mr Sesay began and continued, with his family used as further inducement: Cooperate

with us and your family will be looked after. His wife was taken into Prosecution protective custody and used as a bargaining chip: Speak to us, continue cooperating and your wife will remain protected and assisted by us. Again, you won't have to take Defence's word for it. There is evidence which clearly, indicates, from the Prosecution, that that was the case.

So we submit it's no point the Prosecution looking towards Ntahobali and saying: This is the situation, it's been dealt with before, you don't need to explore further. There was no suggestion in Ntahobali that Rule 92 had been breached, that the statements themselves were not voluntary. The arguments there

were limited to 42, 43 and 63. Notwithstanding, Ntahobali still required evidence from the accused. Firstly, by way of an affidavit and, secondly, the accused was asked, in court: Do you have anything further to add to what has been written in the affidavit?

I refer Your Honour, in that reference, to paragraph 55 of the decision, Ntahobali. Notwithstanding the limits of the arguments advanced in Ntahobali, which didn't go, as I said, to the voluntariness of the statement, the procedure adopted was found to be very similar to a voir dire. And we ought not, I submit, get hooked or hung up on what we call it, whether it's a voir dire or whether it's calling of evidence.

My learned friend is right that the voir dire procedure, of course, is traditionally, in a domestic setting, used as a means by which the accused are protected from the inadmissible evidence being placed before the jury before it's being decided to be admissible. But, of course, that's not the raison d'etre for voir dire. The raison d'etre of a voir dire is that a proper exploration of the issue takes place. We don't submit you have

to call it a voir dire. We submit that Your Honours have no choice when allegations which may amount to torture, if not torture, cruel and inhumane punishment, or treatment, are made by an accused and there is evidence of that, that Your Honours have to explore in the widest possible way.

My learned friend's suggestion that evidence isn't called is simply one designed to ensure efficiency, rather than fairness. My learned friend cannot simply say, well, look, we've provided transcripts, we've provided the audio visual, we've provided the tapes and, moreover, we've provided statements from

our investigators which we say ought to be relied upon. It's relevant probative evidence what happened, but then resist an application to hear live from those investigators. This is evidence which is designed to inculcate the accused. It's designed to say, look, whatever he said during those interviews was voluntary and you can rely upon it, and, even with the Prosecution's suggestion that it only be used to impeach credibility, it will necessarily, then, become probative of guilt, if Your Honours accept that it does impeach credibility.

The Prosecution cannot say all of that, serve investigator statements and ask you to accept their evidence but not then provide the Defence with an opportunity to challenge the evidence, evidence which is challenged, has always been challenged, from 2003 when Mr Sesay eventually found his way to the custody of Defence lawyers. The evidence provided by them is clearly relevant and the allegations are serious and ought to be considered alongside that evidence and that evidence ought to be tested.

Now, I will skip through the skeleton, but I ask Your Honours to take into account the various paragraphs. But

paragraph 5, Your Honours can see the fundamental nature of Article 17 of the Statute echoed in other human rights legislation. Article 6, the absolute fundamental right not to be subjected to torture or to cruel, inhumane or degrading treatment or punishment.

If I may just refer Your Honours to bundle B, which I gave your learned officer just before the break, the first page of that bundle, you will see the definitions "cruel, inhumane or degrading treatment." And I quote from the case of Mucic,

judgement of 16 November 1998, ICTY Trial Chamber, that is:

"Inhumane treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture."

And perhaps more apposite, the definition given in the European Court of Human Rights, the Greek case, 1969:

"Inhumane treatment covers at least such treatment as deliberately causes severe suffering, mental or physical which, in the present situation, is unjustifiable. Torture is inhumane treatment which has a purpose such as the obtaining of information or confessions."

And the statement goes on.

That is, we would submit, the starting point of Your Honours' inquiry. Your Honours, can see from paragraph 9 of the skeleton -- I only skip the paragraphs, not because I do not submit they're relevant, but just to save time and leave this skeleton with Your Honours when you retire to deliberate on the issue.

Article 17 and Rule 42 states in unconditional terms that a

detainee has the right to immediate assistance of counsel. The right is rooted in the concern that an individual, when detained by officials for interrogation is often fearful, ignorant and vulnerable.

Perhaps I can pause at this stage to pass Mr Sesay a copy of this skeleton, which he hasn't seen, which he might want to follow. We are looking at paragraph 9. That fear and ignorance can lead to false confessions by the innocent and that vulnerability can lead to abuse of the innocent and guilty alike,

particularly when a suspect is held incommunicado, in isolation.

There can be no doubt that the accused was isolated. There can be no doubt, we would submit, that Mr Sesay was vulnerable, like any accused, but especially those arrested by a United Nations court and especially when the powers of that court are unclear. And it is incumbent, if not upon the Prosecution, to explain properly what the powers are and it's incumbent upon Defence counsel or Defence representatives to do the same.

Now, the principles which must be applied, Your Honours can see paragraph 110, statement taken in violation of the fundamental right to the assistance of counsel must be excluded pursuant to Rule 95. Paragraph 13, the Prosecution's burden is a heavy one, and Rule 42 - and of course I include within this Rule 63 - contains stringent requirements. The Court must demand the most exacting standards. Thus the Prosecution claiming voluntariness on the part of the accused or suspect, or absence of oppressive conduct is required to prove it convincingly and beyond a reasonable doubt.

If I can take you to Bagosora which, we would say, is the apposite case. This is where Your Honours will find strong principles which must be applied; strong principles which are absent in Ntahoboli. You will find that, Your Honours, at page 29787.

If I can take Your Honours to paragraph 18, please. Sorry, if I can take Your Honours to paragraph 14.

JUDGE BOUTET: What is the page reference you gave, Mr Jordash?

MR JORDASH: 29787. I'm asking Your Honours to turn to page 29791. The principles to be derived from this case are

important but the facts, when compared to this particular instance, are also instructive.

The facts there were a challenge to Rule 42. And the right to counsel and the voluntariness of the waiver of the right and the Trial Chamber said, at paragraph 15, the genuineness of the offence must be considered in the context of the entire conversation preceding his signature. We will shortly submit that the technical waiver of counsel, which the Prosecution rely upon, must be considered in the context of how it was explained to Mr Sesay. There is but one explanation offered; and it's an explanation which is wholly misleading and we would submit deliberately so.

Turning to the next page, 29792. The issue there concerned Kabiligi asking for counsel, but not quite understanding that counsel was or could be obtained at that point in time and Kabiligi, if Your Honours go to seventh paragraph down, Kabiligi answers, during the course of his interview:

"Personally, I'm prepared to talk at this time, but questioning or preliminary investigation or interview of

me, but reserving the right to request the assistance of counsel, and exercise the full benefit of the rights which have just been read to me as soon as I find out the case against me because I don't know what it is at this time."

The case turned on that statement with the Prosecution submitting that was a full and unequivocal waiver of the right to counsel. The Trial Chamber found that not to be the case. They went through an exhaustive analysis of the principles to be applied. I ask Your Honours to turn to page 29793, and you will see there paragraph 16, the quote which I have just read from the

skeleton. And over the page to paragraph 17, the importance of the right to counsel and the precariousness of its exercise by a suspect in detention is reflected in the stringent requirement in Rule 42.

You will see there a definition which was quoted with approval from the case of Delalic, which I will take Your Honours to very briefly in a moment, thereby placing the burden of proof clearly on the Prosecution and setting the standard as beyond a reasonable doubt.

And then, perhaps, as important to this, is the last paragraph on the page:

"National courts in which the right to counsel is recognised have elaborated that a waiver cannot be voluntary unless the detainee knows of the right to which he is entitled. These rights, and the practical mechanisms for the exercise must be communicated in a manner that is reasonably understandable to the detainee and not simply by some incantation which a detainee may not understand."

Going over the page:

"Generally, a suspect may be taken to comprehend what a reasonable person would understand, but where there are indications that a witness is confused, steps must be taken to ensure that the suspect does actually understand the nature of his or her rights."

The Prosecution submission that the technical waiver is somehow the beginning and end of the submission, or that the technical waiver, in view of the accused's demeanour, is the beginning and end of the submission is, of course, not right because the burden is a heavy one on the Prosecution. If there

are signs on the transcript, or evidence outside of the transcripts, that would indicate that an accused does not understand the incantation, then the Prosecution have to go a bit further and that must be right. It must be right that the burden is a heavy one, if an accused, vulnerable as most are, are placed into the hands of the Prosecution and the accused then makes very serious allegations against the investigators, then of course the Prosecution have to do more than simply read the technical waivers. If nothing more is required than that, it's a licence to investigators to simply do what is required off tape to obtain the acquiescence and compliance of the accused and then have the accused tick the boxes. We submit, as will be seen from the transcripts, that the accused showed clear signs of not understanding what it meant to waive his right to counsel.

We submit that the investigators didn't themselves understand and explained in a way either to deliberately confuse or as a reflection of their own lack of understanding. But, we submit, the Prosecution had to go much further than simply

reading the technical waivers.

One can see further down the page and we have included this in the bundle of authorities, the case of Evans, at footnote 15.

I won't ask Your Honours to turn it up, but Your Honours can see from the paragraphs there:

> "In most cases, one can infer from the circumstances that the accused understands what he has been told. In such cases, the police are required to go no further. But where, as here, there is a positive indication that the accused does not understand his right to counsel, the police cannot rely on their mechanical recitation of the

right to the accused and must take steps to facilitate that understanding. It is true that the police informed the appellant of his right to counsel but they did not explain that right when he indicated that he did not understand it."

Just turning over the page, and I am taking some time because these are principles which must be applied and which are extremely important, we would submit.

Paragraph 19, this was the finding of the Trial Chamber based, simply, looking at what the accused had said about wanting counsel but wanting to know what his rights -- sorry, what the charges were against him first; one single aspect of this case, and the Trial Chamber found that the Prosecution hadn't discharged their burden. Relying upon these principles, the Chamber is of the view the Prosecution has not discharged its burden of showing the accused, Kabiligi, voluntarily waived his right to assistance of counsel, as required by Rule 42(B). At the beginning of his interview with the investigators, the accused demonstrated that he did not understand that he had an immediate right to the assistance of counsel. And the paragraph

goes on and explains the factual basis for the decision.

Then at paragraph 21, down the page, the right to counsel during a custodial interrogation is closely intertwined with the exercise of the right to silence, the right to be cautioned that any statement may be used against a detainee in evidence at trial, and the right in Article 20, which is mirrored in Article 17 of the Statute of the Special Court, not to be compelled to testify against himself or herself to confess guilt.

And then over the page, again, a reference to Delalic at

the top of the page, reading from the third line of the paragraph:

"As stated by the ICTY Chamber in Delalic it is difficult to imagine a statement taken in violation of the fundamental right of the assistance of counsel which would not require its exclusion under Rule 95 as being antithetical to and would seriously damage the integrity of the proceedings."

I, again, make the point, that was one problem identified by the Trial Chamber, one problem which led to the exclusion of the interview.

If I may turn now to Delalic, which, again, has important statements of principle of general application. Your Honour can see at page -- well, the beginning of the judgment is at 29800, and if Your Honours, would turn to paragraph 34. 29810.

It has been pointed out to me that, sorry, could I just take instructions? I see.

Yes, apparently, the bottoms of some of the pages have been

cut off by process of scanning so it may be that we might have to provide other copies but paragraph 34, sorry, 29810 and there it deals with the application of Rule 89, and the Chambers not being bound by national Rules of Evidence. I am trying to understand what the Prosecution submit about Rule 89 and the decision in the Fofana case. We would say that Rule 89 supports our application. The Appeal Chamber has not ruled that there can be no assessment of reliability; it hasn't ruled that there cannot be any assessment of fairness. Rule 89 can be applied and ought to be applied to the creation of the procedure which is best able to arrive at the fairest result.

If I may just deal with Prosecution submissions as far as I follow them on this issue.

They rely upon the Fofana decision and, in order to properly understand the Fofana decision, I would respectfully submit we need to look at Delalic, which is -- sorry, I'm just finding something -- if I can take Your Honours to that decision very briefly. It's my tab 12 but I think the bundle I was provided has different tabs to the Prosecution's so if I could just ask the Prosecution's assistance in terms of which tab that decision is marked by.

MR HARRISON: I believe it's the Chambers tab number 9.

MR JORDASH: Thank you very much. Now, taking Your Honours to paragraph 26 of that decision --

JUDGE BOUTET: We are talking of the Appeals Chamber's decision?

MR JORDASH: Your Honour, yes, in the Fofana appeal against decision refusing bail.

JUDGE BOUTET: Okay. Sorry, tab 9, that's right.

MR JORDASH: 11 March 2005, it's the Court Management page 12462. As I understand the Prosecution's submission they submit

that somehow Rule 89(C) ameliorates against the holding of a voir dire. Paragraph 26 refers to the administration of justice being brought into disrepute by artificial or technical rules, often devised for jury trial which prevent judges from having access to information which is relevant.

And further down that paragraph:

"The Rule is designed to avoid sterile legal debate over admissibility."

We submit that this is far, very far from a sterile legal

debate. This is about conduct which, if correct, is far more likely to bring the administration into disrepute than excluding evidence, the type of evidence which the Appeal Court were referring to when reaching this decision.

If I may refer you to decision which the Appeal Chamber relied upon, Your Honours will see that in bundle B, and if I can take Your Honours first of all to paragraph 24 when the Appeal Chamber is discussing their decision concerning the decision at first instance.

PRESIDING JUDGE: Is that the Fofana decision?

MR JORDASH: Your Honour, yes. Sorry to jump around.

PRESIDING JUDGE: That's okay.

MR JORDASH: "The so-called best evidence rule is an anachronism. It was developed in a pre-industrial age when copying was done by hand," and so on. Then over the page, Your Honours can see, four lines down the first paragraph, page 12462.

"There is no rule that requires as a pre-condition for admissibility that relevant statements or submissions must be signed. It may be good practice but it is not about --

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 the condition for its admission."

Then there is a reference there to Delalic, which I would like to refer Your Honours to, which is at the back of bundle B.

In my respectful submission, I am taking some time over this as well because, in my submission, Rule 89(C) ought not to become a provision which says that everything is included. Everything must come in because, in my respectful submission,

Fofana, the Appeal Chamber decision doesn't say that and neither does Delalic, which is what the Appeal Chamber based its decision, in some part, upon. Delalic is at page 53 of bundle B. It hasn't got a Court Management page number.

PRESIDING JUDGE: What is your submission on Rule 89(C) in terms of its statutory purport? You say it shouldn't become a kind of -- 89(C)? What would be your caution to the Bench in terms of how we interpret its nature and scope? Because my plain meaning reading of 89(C) imports a discretionary authority on the part of the Chamber.

MR JORDASH: But the discretion has to be circumscribed.

PRESIDING JUDGE: Quite right. I mean, it's not a mandatory provision, and that is all I am saying. In other words, the Court has to exercise discriminatory judgment even on the question of relevance.

MR JORDASH: Exactly. Well, the question must be exercised judicially.

PRESIDING JUDGE: Quite right.

MR JORDASH: But moreover, I would submit, there has to be

an assessment at some stage of -- or there can be assessment of reliability.

PRESIDING JUDGE: Yes. Okay.

JUDGE BOUTET: At the time of admissibility?

MR JORDASH: Yes. Let me take you to --

JUDGE BOUTET: Are you making a difference between ICTY and this Court's Rules of Evidence.

MR JORDASH: No.

JUDGE BOUTET: Because if I am not mistaken ICTR and ICTY have, as part of their equivalent 89, reliability as a condition,

so am I -- I haven't checked that this morning but that is based on my own recollection, Mr Jordash. I may be mistaken on that but that is how much I recollect of this. I say this because if -- obviously ICTY, I think ICTY has relevancy and reliability under 89(C), or word to that effect. Am I misquoting the -- I am not talking of Delalic, I am just talking of their Rules of Evidence.

MR JORDASH: I think the difference is that the ICTY and ICTR have the word "probative."

JUDGE BOUTET: Probative; okay.

MR JORDASH: And I know in the past Your Honours have, in a sense, appeared to suggest to the Defence that somehow reliability was not therefore a question.

We would submit it is a question, and the way in which one can see that the Appeal Chamber did not intend to abandon that as an issue, one can see from Delalic, which they quote with approval.

PRESIDING JUDGE: The difficulty with our Rule is that if you go into the legislative history of 89(C) we may have at some

point had the formula probative value but it was abandoned.

MR JORDASH: Yes. And we would submit that that does change the Rule but it doesn't change it to make reliability a non-issue.

PRESIDING JUDGE: Right. Okay.

MR JORDASH: If I can take you to paragraph 16, please, page 5 of the 11th -- page 5 of 11.

JUDGE BOUTET: Of what?

MR JORDASH: Of Delalic, sorry, the decision on the motion of the Prosecution to the admissibility of evidence 19 January

1998. Perhaps I can take you straight to paragraph 20, page 6, in the Defence page numbering 58. It's simply this, paragraph 20.

"While the importance of the rules on admissibility in common law follows from the effect which the admission of a certain piece of evidence might have on a group of lay jurors, the trials before the international tribunal are conducted before professional judges who, by virtue of their training and experience, are able to consider each piece of evidence which has been admitted and determine its appropriate weight. As noted above, it is an implicit requirement of the Rules that the Trial Chamber give due consideration to indicia of reliability when assessing the relevance and probative value of evidence at the stage of determining its admissibility."

So what we would submit is this: That the implicit rules, sorry, let me start that again. The Rules have an implicit requirement that the Trial Chamber gives due considerations to the indicia of reliability when assessing the relevance of evidence at the stage of determining its admissibility. You

don't have to, under this Rule 89, have to consider indicia of relevant -- of reliability concerning probative value. You have to consider the implicit requirement of the Rules which require you to give due consideration to indicia of reliability, when assessing relevance. I hope that's clear. What's gone is probative.

PRESIDING JUDGE: Let's be clear, a bit. In other words are we getting to a position where your submission would seem to imply that from the existing state of the law, given the

interpretation that reliability can be a condition of admissibility and also a condition of probative value?

MR JORDASH: Yes, exactly.

PRESIDING JUDGE: All right. Thanks.

MR JORDASH: And because this Rule no longer has probative value in it then --

PRESIDING JUDGE: Quite right.

MR JORDASH: -- Your Honours don't have to consider the implicit -- what is the -- the implicit requirement of the Rules as regards due consideration to indicia of reliability as regards probative.

PRESIDING JUDGE: Yes.

MR JORDASH: But you do have to have it as regards relevance.

PRESIDING JUDGE: Yes.

MR JORDASH: It's a very hard distinction to draw.

PRESIDING JUDGE: Well, it can look like, in some kind of rather difficult way kind of chicken and the egg sort of situation, but let's leave that.

MR JORDASH: Well, it is very difficult to interpret --

PRESIDING JUDGE: But the chicken and the egg.

MR JORDASH: -- but it may prove important.

PRESIDING JUDGE: Yes.

MR JORDASH: Because the Prosecution's submissions would appear to suggest that due to the Fofana decision, then reliability isn't a consideration.

PRESIDING JUDGE: At the admissibility stage.

MR JORDASH: And our submission is that voluntariness is an issue pursuant to Rule 42 and 63, voluntariness is an issue

pursuant to Rule 92, reliability is always an issue during those considerations.

We would say a proper exploration has to take place in relation to each and every aspect, but there has to be due consideration before these interviews become admissible. Reliability cannot be abandoned, in short.

Now, if I can return very briefly to -- I note the time. I am afraid I have got a fair bit to say.

PRESIDING JUDGE: Yes. Well, we will certainly recess for lunch at this point and resume at 2.30 p.m.

[Luncheon recess taken at 1.10 p.m.]

[RUF05JUN07C - MC]

[Upon resuming at 2.55 p.m.]

PRESIDING JUDGE: Please continue, Mr Jordash.

MR JORDASH: Your Honour, thank you. I was just dealing with the remaining paragraphs of Delalic. If I can take Your Honours, please, to paragraph 37.

JUDGE ITOE: Let's have the page again.

MR JORDASH: 29810. It is important, as it says here, to bear in mind the provisions of Rule 5, which are set out in the

applicable provisions section of this decision, and I refer Your Honours to that Rule, which I would respectfully submit --

JUDGE ITOE: What paragraph is it again?

MR JORDASH: Paragraph 37, Your Honour, Rule 5 of the Rules of Procedure and Evidence, non-compliance with the Rules:

"Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber or the Designated Judge may grant relief if the non-compliance has caused

material prejudice to the objecting party."

JUDGE BOUTET: So you're reading Rule 5 from our own Rules, not the one in that decision?

MR JORDASH: Your Honour, yes. It's the same Rule.

JUDGE BOUTET: Well, it's not quite the same wording, but may be they're the same Rule. I'm looking at Delalic, that's why. I was not reading from --

MR JORDASH: I beg your pardon. Sorry. Well, we would submit it's a --

JUDGE BOUTET: It would appear to be substantially the same.

MR JORDASH: Yes.

JUDGE BOUTET: It's at page 29803.

MR JORDASH: Thank you. And if I can refer to the comparable Rule in this Court, it is important to note that the test is one of material prejudice which may well be a more stringent standard than the Rule 5 from the ICTY, in that the objecting party does not have to show a miscarriage of justice. And I simply -- we simply refer to that and rely upon it, that any cross-examination, we would submit, on statements such as these, in the face of these clear breaches, and even if not clear

breaches, breaches which would become apparent, through the calling of the Prosecution investigators, would cause material prejudice to the Defence.

JUDGE BOUTET: The three breaches you already include, what are they?

MR JORDASH: Well, breach of Rule 42, we would submit; breach of Rule 63; and Rule 92.

JUDGE BOUTET: Yes, but you're basing that on what; on

arguments or on evidence? I'm just trying to follow your arguments. You say on three breaches that --

MR JORDASH: It's our submission that -- let me put it in a nutshell: Our submission is that when Your Honours look at the transcripts and we'll take you there very shortly, it is clear that there has been a breach Rule 42 and Rule 63. And it's clear because it is clear and manifest on the face of the transcripts, one, that the waivers were never properly explained to the accused and, in fact, they were explained in a way which was demonstrably inaccurate. Two, it is clear from the face of those transcripts that the accused did not understand what he was purporting to waive. Three, it's clear that, from the face of the transcripts and the available evidence, that the investigators behaved improperly and in a way which could form either an inducement and/or coercive circumstances to sap the will of the accused. Finally, and I'm simply headlining the submission to come, it is clear from the available evidence and the transcript that the accused did not understand the role of the duty counsel. It is clear that the investigators took advantage of that and it's clear that something went very wrong

in terms of the role played by the investigators in interfering with privileged matters. In other words, interference with the accused's right to select his own counsel, without having that information being placed in the Prosecution hands.

Those are the headlining points I will make which, we would submit, cannot be answered by the Prosecution because it is so manifestly clear and unfair on the transcripts and the available evidence, and that's why our first application is to exclude the statements without more. We ask Your Honours to find that there

is nothing the Prosecution could do to convince you beyond a reasonable doubt that the accused was informed, understood and voluntarily waived his right to counsel.

If Your Honours are not with us on that, then we seek a voir dire because, at the very least, the problems are such that it would only be fair to hear a further explanation from the Prosecution investigators, who were the only people who could clarify certain issues which arise on the face of the available evidence. If Your Honours are not with us on those issues, then we would say it is not within the discretion of the Court to refuse to hear from Mr Sesay concerning the circumstances of his interviews, pursuant to Rule 92, where the burden is then placed upon the Defence. Not only is it not within Your Honours' discretion to prevent that, it is not within Your Honours' --

JUDGE ITOE: Pursuant to Rule 92.

MR JORDASH: Rule 92. As soon as Your Honours make a finding that the Prosecution have discharged their burden pursuant to Rule 42 and Rule 63, then the burden shifts to the Defence, and we accept that. We don't accept it is beyond a reasonable doubt but, as would be customary, on a preponderance

of evidence. And we would submit that Your Honours do not have a discretion to not hear from the accused, nor do Your Honours not have a discretion to prevent other relevant evidence being called at some stage to deal with that burden.

Then if Your Honours are not satisfied that the statements were involuntary, then the final issue -- well, two final issues, I suppose, arise, depending upon what use Your Honours make of the investigators' statement, then a consideration arises as to whether Your Honours are able to draw conclusions, at first to

the Defence, in any way, based on those statements without allowing cross-examination of the evidence because it is contested and a fundamental right of the accused to confront his accusers. And these investigators are effectively accusers because they seek to have the Court accept that nothing went wrong, that the statements, confessions or otherwise, were voluntary and reliable. And they can be used to impeach, they can be used to draw adverse inferences as to guilt and, therefore, it would be fundamentally wrong to allow the evidence to be held against Mr Sesay in his interests without it being tested in the usual way.

And if Your Honours are against us on that, then we still come to the issue of whether the Prosecution should have served those statements as part of the Prosecution case, in order to be able to rely upon them now, whether to impeach or otherwise. That those are the steps we would submit that the Court needs to go through before allowing the statements to be used to impeach.

PRESIDING JUDGE: Let me ask one question that is particularly exercising my mind, and it is a result of your going

through the various options available in case one alternative is decided against the Defence and what the Court can do.

The issue of voluntariness, when it is raised, and suppose the say hypothetical Chamber were to decide that issue against the Defence, would it be open to the Defence to, in re-examination, to revisit some of the circumstances?

MR JORDASH: Once admissibility has been decided by relevant evidence, statements then become admissible.

PRESIDING JUDGE: Yes.

MR JORDASH: The Prosecution can then use them and then we

can then re-examine.

PRESIDING JUDGE: Good, right.

MR JORDASH: But this first step is that the issue of voluntariness, pursuant to Rule 42, 63 and 92 must be decided --

PRESIDING JUDGE: Yes.

MR JORDASH: -- by relevant evidence.

PRESIDING JUDGE: Yes.

MR JORDASH: So we would submit that this Court does not have a discretion not to allow Mr Sesay to give evidence, first and foremost, on the issue of voluntariness. That is before the statements become admissible.

PRESIDING JUDGE: Yes.

MR JORDASH: And before they can be used by the Prosecution. Only then can Your Honours make a consideration pursuant to Rule 92 as to whether these statements were not obtained as alleged by the Defence.

JUDGE BOUTET: So you're saying that 89 has no application here?

MR JORDASH: Well, it has application, but it has to be considered in light of Rule 95 and Your Honours have to consider the issue of whether what caused the production of these

statements was of such a magnitude and led -- and led to the statements being involuntary, that the admission of the evidence would bring the administration into disrepute. This Court cannot decide that issue by allowing the statements in first, allowing the Prosecution to do their best with them, and then making a decision as to their voluntariness. Number one, because of Rule 95 and Rule 89. Let me break that down.

One, because of Rule 95, because the horse will have bolted

the stable and, number two, because of Rule 89 which would necessarily, we would submit, place the Trial Chamber into a position where it would have to say: What is a fair way of dealing with this? And a fair way of dealing with it must be to give the accused an opportunity to explain and persuade the Court that what he says is true, or might be true.

PRESIDING JUDGE: For the purposes of what?

MR JORDASH: For the purposes of Your Honour coming to a conclusion.

PRESIDING JUDGE: At what stage?

MR JORDASH: That the statements were not voluntary.

PRESIDING JUDGE: But at what stage?

MR JORDASH: Before the statements are put into evidence by the Prosecution.

PRESIDING JUDGE: Evidence, yes.

MR JORDASH: Admissibility has to be decided --

PRESIDING JUDGE: Quite right.

MR JORDASH: -- before use. And there's a -- the best reason for that is Rule 95, that this Court cannot and should not create a precedent whereby statements obtained, possibly through conduct which is so manifestly wrong, can be used against an

accused before the admissibility is decided.

PRESIDING JUDGE: In other words, statements which allegedly may well have been obtained as a result of conduct of such an egregious nature and probably, if you want to put it as high as shocking the conscience of the Court, may well be evidence that brings the administration of justice into disrepute.

MR JORDASH: Yes.

PRESIDING JUDGE: In other words, you're saying that this Chamber is foreclosed from admitting such evidence, in other words, at the gatekeeping or threshold level, we should block it and not let it pass the test of admissibility.

MR JORDASH: Well, Your Honours --

PRESIDING JUDGE: Because what would happen here, if I take your point accurately, it means that if we let it pass the test then it would be also the duty of this Chamber to determine how it deals with a piece of evidence allegedly designed to bring the administration of justice into disrepute at the probative value stage.

JUDGE ITOE: Do I understand at this point in time the test to be the test of voluntariness; is that the test?

MR JORDASH: The test is voluntariness under both rules but a different objective is pursued.

JUDGE ITOE: Because what you're contesting all along is what, you know, you have been saying. You're turning around the notion of voluntariness. That is, that these statements were not

voluntarily given by your client and that there was undue influence, there was all that you have said, promises that he was not going to be treated as an accused, if I got you right in your submissions.

MR JORDASH: Yes, Your Honour.

JUDGE ITOE: And that in such circumstances, and in the absence of voluntariness, those statements would not pass the test of admissibility. Is that what you're saying, Mr Jordash?

MR JORDASH: Yes. What I'm saying is this: That I referred Your Honours before lunch to Delalic and the statements principle -- sorry, it was the case of Bagosora quoting with

approval the statement of Delalic which said:

"It is difficult to imagine a statement taken in violation of the fundamental right to the assistance of counsel which would not require its exclusion under Rule 95."

That's only with reference to Rule 42. If Your Honours found that these statements were involuntarily obtained --

JUDGE ITOE: Because I am emphasising on voluntariness because both of you, both the Prosecution and yourself do concede that voluntariness is a material factor in determining the admissibility of these statements, that that aspect should be addressed. I am sure, you know, that this is what is on the record.

I heard Mr Harrison conceding that, you know, that voluntariness has to be demonstrated and that is why, you know, he went into video and audio recordings and said that there were no constraints and so on and so forth, and that the voir dire also, you know, was not necessary.

You are taking the position that with all the alternatives that you have given, all the possible solutions that you have given, you are suggesting that if we have to admit the

statements, they must be seen to have been voluntarily made and that your client should be heard on this, at one stage or the other, and that there is nothing the Chamber can do. I am just trying to get together, there is nothing the Chamber can do without hearing your client on this issue of the circumstances under which the statements were taken.

MR JORDASH: The first issue is the voluntariness under Rule 42.

JUDGE ITOE: Yes.

MR JORDASH: That could be decided -- well, it must be decided first, and the Court must decided --

JUDGE BOUTET: On 42, Mr Jordash, you mean the voluntariness, if we can determine in this respect, that he was -- the consent given by the waiver that is, rather than the consent, or the consent to the non-presence of his counsel, this is what you mean by voluntariness under 42?

MR JORDASH: Yes, exactly.

JUDGE BOUTET: I just want to make it clear, because you referred to 42. 42 has to do with complying with those requirements that are listed there which, one of which is that the accused has got to be informed of his right to counsel, and he may waive and so on. So this is what you mean by -- when you're talking voluntariness under 42, this is what you're making reference to?

MR JORDASH: Yes. Sorry, I should have been more specific. Rule 42(B) questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel.

JUDGE BOUTET: The voluntariness there and pursuant to 42, is that the one you're talking about? You are not talking of the voluntariness of the statement per se, as such?

MR JORDASH: No.

JUDGE BOUTET: It is sort of a pre-condition to the statement, if I can put it this way. In other words, you have to go through this step first before you address the other portions.

MR JORDASH: Yes.

JUDGE BOUTET: In fact even before you get to the statement.

MR JORDASH: Well, it -- not before one gets to the statement but as a consideration of the surrounding circumstances in which the statement was taken and the statement itself and whether that waiver can be said to be voluntary.

JUDGE BOUTET: But your position on that is it has not been complied with and therefore, the waiver, if any were given at that time, even though there is a piece of paper that says so, you say because of the existing circumstances as such, is it not to [indiscernible] the waiver and therefore it was not complied with and therefore anything that followed from there was not voluntary. Am I misquoting you?

MR JORDASH: Not -- in most respects, no. The Prosecution have to prove that the accused voluntarily waived his right to counsel. If they prove that beyond a reasonable doubt, our allegations go wider than that. We say the waiver was obtained involuntarily. The statement itself was obtained involuntarily.

JUDGE BOUTET: Well, that is what I meant by step. The first step is the waiver, and even though you go through that you say the statement over and above that was not obtained

voluntarily?

MR JORDASH: Yes, exactly. And, in terms of the burden of proof, then pursuant to Rule 42 and 63 --

PRESIDING JUDGE: But, sorry, in other words, to clarify it because I myself was a little worried that you canvass in various heads of involuntariness --

MR JORDASH: Yes.

PRESIDING JUDGE: -- that is what you're saying. In other words, it is not just limited to the waiver because the term involuntary really means that a person's will is overborne.

MR JORDASH: Yes.

PRESIDING JUDGE: By some superior will and it could be done in different -- other different circumstances.

MR JORDASH: And it can be done to varying degrees.

PRESIDING JUDGE: Yes.

MR JORDASH: It may be that at some stage, hypothetically, an accused is persuaded to waive his right to counsel and persuaded on misleading grounds.

PRESIDING JUDGE: Yes.

MR JORDASH: And it couldn't be said in those circumstances that the waiver was voluntary.

PRESIDING JUDGE: Yes.

MR JORDASH: But it might be that the accused then went on to give statements which he was fairly happy to give.

PRESIDING JUDGE: Yes, quite right.

MR JORDASH: And the Defence or the accused couldn't prove, on the preponderance of evidence, that he hadn't given those statements voluntarily.

PRESIDING JUDGE: Well, I am satisfied because I was under the same misconception whether we were talking about a

restrictive notion of voluntariness or involuntariness, or a much broader concept, or what we might say, an all encompassing context.

MR JORDASH: All encompassing, and one which we would submit requires an exploration of all the circumstances and not simply the demeanour of the accused during the interview, because that is the point of our submissions; that it is not simply that there was some misunderstanding about the nature of the waiver, as in the case of Bagosora, which was nevertheless judged to be

involuntary. But that not only was there a misunderstanding, it was deliberately perpetrated by the investigators, and it was part of a course of conduct which ultimately made the statement itself involuntary.

PRESIDING JUDGE: I would like to say that I find that particularly helpful because when it was canvassed this morning that there was a decision of this Court in May 2003, a decision given by myself, I recalled the ratio decidendi of that decision to relate only to the question of whether in law an accused person can actually waive or, for the purpose of interviews, waive his right to counsel being present.

I was not -- I don't think the ratio of that case related to the admissibility of the alleged puritan product of the interviews.

MR JORDASH: No.

PRESIDING JUDGE: That was not before me so -- and the decision therefore has a limited scope in terms of its ratio decidendi.

MR JORDASH: Limited further by the fact that there wasn't a Defence position clearly laid out at that stage.

JUDGE ITOE: This is what I was going to say, because there was no Defence, from what I see on the record --

PRESIDING JUDGE: That's right.

JUDGE ITOE: -- there was no Defence intervention in those particular circumstances, under which that decision was made by our colleague.

PRESIDING JUDGE: In other words, if the issue was [indiscernible] -- if any kind of doctrine of estoppel here would apply to be more in -- not in a general res judicata sense

or to a matter of issue estoppel which, of course, could still be argued.

MR JORDASH: Your Honour could only make a decision on the evidence you had available at the time, and the question which was asked at the time.

PRESIDING JUDGE: Yes. I just wanted to clarify that, because it's very helpful to me.

MR JORDASH: We are at a very different place now, we would submit.

JUDGE BOUTET: I don't have the record in front of me but I thought the decision given by my learned brother Justice Thompson was done as a result of an application by the Defence. Are you saying the Defence was not represented? I thought it was an application by Defence, not Prosecution, for a ruling. So it may be the Defence was not you, at the time, but I thought that was an application by Defence. I stand to be corrected on that, but I thought that was the -- the Defence, whoever it was, was seeking a remedy to prevent further interviews to be conducted with your client, as such, and that's why they asked this

decision. So it was an application by Defence, and only Defence, in fact, if I'm not mistaken. The Prosecution was not even represented or asked to make any argument on it.

MR JORDASH: Well, that's --

JUDGE BOUTET: They may have, but certainly it was a Defence application.

PRESIDING JUDGE: If I recall rightly, it may well have been that this was a decision given exclusively and purely on the basis of written submissions.

MR JORDASH: Well, that's not wholly correct. It appears

to be that the Defence Office, in some capacity, made written submissions. But --

JUDGE BOUTET: Prosecution responded, I see, on the document.

MR JORDASH: But Prosecution responded, not only with submissions, but also with statements from John Berry and Gilbert Morissette. And also --

JUDGE ITOE: A statement from the Registrar as well.

MR JORDASH: And the Registrar also, I think, commented in some way on the correctness or otherwise of the procedure. I'm not sure on what basis, since the Registrar wasn't a lawyer, but, nevertheless, that was the way in which it went. Without evidence --

PRESIDING JUDGE: Yes. Well, it wasn't an oral hearing, anyway. I recall there was no oral hearing. It was purely on the basis of written submissions.

MR JORDASH: Your Honour, yes. In my submission, it's clear. A decision such as this cannot simply be made forever and a day as a consequence of a motion such as this at that time.

JUDGE BOUTET: My intervention was only to make sure that -- because the comments I was hearing, that it was an

application where the Defence -- the accused was not represented.

Well, it's an application by the Defence Office, who was acting on behalf of the accused at the time. That's my only comments.

I'm not going to the substantive nature of that decision, whether it's applicable or not. This is not my intervention. My intervention was to make sure that my recollection of that case, as was quoted this morning, was it was an application on behalf of the accused and not by anybody else. As I say, it was not

you, Mr Jordash, but it was somebody who represented himself or herself to be acting on behalf of the accused, Principal Defender or the Defence Office. That's one of their roles, as such, that is clearly spelled out in the Rules.

PRESIDING JUDGE: Well, with those very important clarifications, let's hear you continue.

MR JORDASH: Thank you.

PRESIDING JUDGE: We were going to give you uninterrupted run, but sometimes we make promises which we're not able to fulfil.

JUDGE BOUTET: [Overlapping speakers] Presiding Judge before, Mr Jordash, just to make sure that I follow your reasoning. You say that the Court should exclude these statements, without more evidence being adduced, simply by looking at the record as such. In other words, you're saying the Court need not go in a voir dire and this is, in this respect, on different grounds. With respect, this is the position the Prosecution has taken this morning. You say look at the transcript and you're going to see that. If we disagree to the exclusion, then we should go in a voir dire. Am I, on that

aspect, putting your position? Because I tried to write down what you were saying. You said, first, to exclude without more and without a necessity to go to a voir dire. Then, if we disagree with your position, then we would -- if not, then we should go in a voir dire to hear this evidence. Am I -- and you've made a further submission just focusing on these first two.

MR JORDASH: Yes, is the simple answer, because of the burden of proof. Because the burden is on the Prosecution and we

would say that it's clear from the transcript that the burden cannot be satisfied. But it's not the same as saying that the whole issue can be decided against the accused on the face of the transcripts. Because there has to be, we would say, if a decision is going to be made that the Prosecution have proven beyond a reasonable doubt, there has to be more than simply a look at the audio visual and a perusal of the technical waivers, which is what the Prosecution submit. That could not satisfy the burden of proof. This Court could not be sure from the technical waiver, and look at the demeanour of the accused, that everything was okay, that there weren't any inducements offered, that there weren't any threats made, that everything was okay off the tape. That's the substance of what we say.

If one looks at the case of Bagosora, and the accused there, Kabiligi, there was a clear indication on the tape that the accused had not understood his rights and, from that, the Trial Chamber could exclude the interview. But, as I will come to shortly, in my respectful submission -- I just want to make sure I don't overstate the case, but the Prosecution --

PRESIDING JUDGE: Yes. That's an interesting point. You can take it from there, because you would help me, too, then -- in other words, are you inviting us to lift the veil, and if we are to lift the veil, to see what's behind the veil, how much of that do we do? Because if you say, and I find it attractive, that merely listening to audios and looking at videos may not give us the totality of the picture, in other words, we're merely probably asked to just sense the tip of the iceberg.

MR JORDASH: Yes.

PRESIDING JUDGE: So we are then invited to look to lift

the veil.

MR JORDASH: Yes.

PRESIDING JUDGE: When we are invited to do that, how much of this or how far do we go? I mean, you don't need to answer straightaway in winding up. You can see if you address that issue.

MR JORDASH: Well, I can address that now.

JUDGE ITOE: And I would add to that: And at what stage?

MR JORDASH: At what stage would be now, or certainly before the use of the statements. And if it is not now, then we have to adjourn the cross-examination of the accused until that issue has been resolved and evidence has been called. As to how much of the veil is lifted, ultimately it is a matter for this Court and the Prosecution. The Prosecution would have to call which evidence it believed could discharge its burden and this Court would then have to consider if it required, in order to make the decision, any further evidence.

To a certain extent, it's not in our hands, but we would submit, at a minimum, Mr Berry, Mr Morissette and Mr Saffa, three people, we say, were most involved with the threats and the

inducements prior to and during the course of the interviews, at a minimum, we would submit, their evidence would go to the issues which we are dealing with.

JUDGE ITOE: Morissette, Saffa and who?

MR JORDASH: Mr Berry. And it's ultimately their professional conduct which is at issue. But it might well be wider. And if we call evidence, then, ultimately, we would say that Mr Sesay could discharge any burden under Rule 92 himself, but if that's not sufficient, we would seek to go wider than

that.

There are people who saw Mr Sesay being hooded in Bonthe. There are people who could testify as to the regime that operated in Bonthe and the rather liberal use of firearms being drawn. There are witnesses who can, perhaps, give evidence as to his state of mind, Mr Sesay's state of mind, during the course of these interviews. And there are witnesses who might be able to give evidence of conversations they had with Mr Sesay at the time of these interviews.

So the issue is potentially quite wide, but our respectful submission would be if you do call evidence, it would be crystal clear from the evidence of these investigators that they're unable to answer the queries which I will raise from the face of the transcripts and the available evidence in a short while. They cannot be answered because the lack of comprehension is so clearly manifestly visible. The inducements, whether intentionally or inadvertently offered, are so clearly and manifestly visible from the available evidence. I am thinking at the moment about Mr Sesay's wife being taken into Prosecution

protective custody. And she remained in Prosecution protective custody on the admission of Mr Robert Petit, senior trial attorney for the Prosecution at the time, for over one year. And he, and I will refer Your Honour to it shortly, said that this was because Mr Sesay was possibly being a witness. And Mr Sesay's wife was taken into that custody within a matter of days of the interview process beginning. Why would that happen if Mr Sesay was a suspect? Why would he be taken -- his wife be taken into Prosecution protective custody as a witness with all the assistance that that brought, if there wasn't a

representation to Mr Sesay that he was to be a witness, or that he might be a witness? And if he might be a witness, there is a clear inducement, a clear inducement which takes away Mr Sesay's right to self incrimination. That is just one example. I'll come to the rest in chronological order when we go through the interviews.

But there is nothing that can be said by the Prosecution about that, which takes away from the central submission: Mr Sesay was either told he was going to be a witness, told he might be a witness and offered the protection for his wife, consistent with being a witness. What can the Prosecution say about that? Well, I anticipate they would say, well, we didn't want anyone to know he was cooperating with us and so, for the safety of his wife, we took her into protective custody.

But therein lies the importance of that word "cooperating." Cooperating for what purpose? Well, according to the Prosecution then so he could be a witness. That's why his wife was in protective custody. That's why assistance was offered for over a year. So we end up in the same place. Whatever explanation the

Prosecution investigators want to give on that single issue, we end up back in the same place. Mr Sesay was reasonably likely to believe he might be a witness, and that is an inducement.

And perhaps one of most fundamental inducements: You cooperate with us, you implicate your accused, fellow accused, and instead of life imprisonment, instead of perhaps the death penalty, you end up as a witness with all the freedom that that entails. There perhaps couldn't be a more powerful inducement to an accused to give up his right to counsel and give up his right to silence.

If I can just finish going through the legal principles, and I'll do this as rapidly as I can, because I hope that the point we are trying to make is crystal clear that this is an issue which is far beyond Mr Sesay saying, "Yes, I waive my right to counsel," on tape.

If I make take you, Your Honours, to Delalic. Your Honours, page 29800, and at paragraph 66. 29800 is the first page and the page I want to refer Your Honours to is page 16 of the judgment, which is Court Management page numbering -- I think 29816, paragraph 66:

"Similar to an involuntary confession, statements induced by coercion, force or fraud, or oppressive conduct which saps the concentration and has sapped the free will of the suspect through various acts and weakens resistance, rendering it impossible for the suspect to think clearly may constitute such conduct oppressive and the statement resulting from its exercise unreliable. This, however, is a question of fact. Whether or not conduct is oppressive in each case will depend upon many factors, the categories

of which cannot be exhausted."

Paragraph 67:

"Some of the factors to be considered may be the characteristics of the person making the statement, the duration of the questioning and the manner of the exercise of the questioning. The facilities provided such as refreshments or rests between periods of questioning are material considerations. What may be regarded as oppressive with respect to a child, old man or invalid or someone inexperienced in the ways of the administration of

justice may not be oppressive with a mature person, familiar with the police or judicial process. The effect is, therefore, relative."

I pause here to make this point: Mr Sesay was arrested on 10 March 2003. At that point, he was a man with education up to the age of 13 who had effectively spent ten years in the bush fighting a guerrilla war, who, it is clear from the evidence, had an adjutant to be able to assist him with literacy, who had no experience of a Western or Anglo notion of criminal justice, who had no experience of a United Nations court and who relied wholly upon the information to be passed to him by the Prosecution investigators.

That's the character of the person who was arrested. This is not somebody who was familiar with these proceedings at all. And it may be that he had the rights read to him during the interview, but did anyone ever say to him what the sentence of this Court could be. Aside from the investigators, and I'm speculating perhaps, but I've been asked, and I'm not giving evidence, but I've been asked a number of times whether this

Court imposes the death sentence. And I suspect most people in this courtroom have been asked that question. That is the state of mind that Mr Sesay must have been in at the time of his arrest. Does this Court impose the death sentence? One omission [indiscernible] piece of information would have been a powerful threat to someone so unfamiliar with these proceedings.

May I refer Your Honours to Halilovic, please. Your Honours, page 29817. If I can refer Your Honour to the arguments of the Defence at paragraph 3, 29818. The arguments which are relevant to this present submission were as follows, the fourth

paragraph of paragraph 3:

"The 'voluntariness' of the interview (it was submitted) was also affected by the length of the interview and the fact that the accused was in detention at the time. Moreover, it is alleged that the accused was not 'effectively represented' at the time of the interview. The admission of evidence obtained in such circumstances would be in breach of the accused's privilege against self-incrimination, his right to remain silent and generally his right to a fair trial."

And they're the submissions pursuant to Rule 89 and 95 of the Rules. Down at the bottom there, the Prosecution's retort:

"The record of interview of the accused is admissible (it is said) as it is in compliance with Rules 42, 43 and 63 of the Rules and does not infringe upon either Rule 89(D) or Rule 95 of the Rules. Once the Prosecution has established beyond a reasonable doubt that the interview was given voluntarily, it is the Defence that must bear a shifting evidentiary burden to demonstrate otherwise."

If I can take Your Honours straight to the aspect which we

place the most reliance upon. The Trial Chamber at this stage, well, the Trial Chamber found against the Defence and found against the Defence on the basis that --

JUDGE ITOE: Mr Jordash, where is this?

MR JORDASH: Sorry, I'm just going to take Your Honour as soon as I find my note. The Trial Chamber found that the accused had spoken because he wanted to speak, and Your Honours will find this at paragraph 12 of the discussion which is on page 3, the Court Management page 29819.

Now, the accused had said, as Your Honours can see at paragraph 12, during his initial appearance, that he intended to fully cooperate with the Tribunal and he wanted to tell the truth. And the Trial Chamber found that that was a factor which led them to conclude that the Prosecution had discharged their burden pursuant to Rule 42.

I hesitate to say at this stage, there was no challenge pursuant to Rule 92 on this authority. The Trial Chamber then went on to find, at paragraph 13 and 14, that a promise by the Prosecution that they would take a favourable stance towards provisional release was not an inducement.

And that at paragraph 16, a break in the interview where there was a discussion off tape concerning alleged agreements reached off tape, about cooperation in exchange for some kind of benefits, was not something which they needed to inquire into. They finally concluded at paragraph 18 all the technical aspects of the waiver had been complied with. There was no need for a voir dire and the Prosecution had discharged their burden.

The Appeal Court decided otherwise. And that -- they ruled that the Trial Chamber had erred by admitting the interview and

by failing to find that the appellant's participation was rendered involuntary by the inducements prior to interview.

PRESIDING JUDGE: Which reference is that, the Appeals Chamber's reference?

MR JORDASH: The Appeal Chambers, it's 29824. Well, let me take you first of all to paragraph 35.

PRESIDING JUDGE: Would you give us -- what about paragraph 6 would clearly set other grounds of appeal; have you been instructed?

MR JORDASH: Sorry, Your Honour?
PRESIDING JUDGE: I said, wouldn't paragraph 6 be appropriate to give us an idea of the grounds of appeal?
MR JORDASH: It certainly would.
PRESIDING JUDGE: Quite. And then proceed with the others then.
MR JORDASH: The grounds of appeal were that --
PRESIDING JUDGE: Yes. I mean, you can take us through that, yes.
MR JORDASH: Yes. The Trial Chamber had erred by failing to find that the appellant's participation in the interview was rendered involuntary on the basis of inducement offered by the Prosecution. By failing to consider that the circumstances in which the interview was conducted rendered the interview unreliable, and by failing to take into account that at the time of the interview the appellant was not represented by competent counsel. And the appellant argued that the Trial Chamber should have exercised [microphone not activated] pursuant to Rule 89(D) and should have excluded the record of interview.
And paragraph 34, at page 29832, is instructed -- the

Appeal Chamber found -- well, let me deal with paragraph 34.

In the impugned decision the Trial Chamber accepted that the Prosecution had represented to the accused that a full cooperation of Mr Halilovic would have a positive influence on the Prosecution's position in respect of an application for provisional release. However, the Trial Chamber reasoned that the statement could not be considered an inducement because the Prosecution did not offer a promise of provisional release but only indicated to the accused that in case of full cooperation

the Prosecution would favourably support a potential application for provisional release, which may only actually be granted by a Trial Chamber.

Thirty-five, the Appeals Chamber sets out its, or begins to set out its reasoning. It did not agree that the Prosecution's inability to grant the appellant provisional release means that the Prosecution statement had full cooperation by the appellant could have a positive influence on the Prosecution's position in respect of a potential application for provisional release, did not amount to an inducement to the appellant. Such a statement is clearly an inducement because it provides the incentive of a possible reward for cooperation.

We submit, offering, dangling the tempting prospect of being a witness in front of an accused is clearly an inducement, because it provides the incentive of possible reward for cooperation. Reading on, they again refer to the offer not to oppose the accused's application for provisional release in

paragraph 36, saying that it can be a powerful incentive for an accused to speak when he may otherwise have chosen to remain silent.

Now, paragraph 38 explains further what the Appeal Chamber meant. Prosecutorial offers that serve as inducements to the accused's cooperation may, if the inducement is sufficiently powerful, render statements made pursuant to that cooperation involuntary. In other cases, however, the inducements are simply an incentive. The fact that the accused may have taken this incentive into account, in deciding whether to cooperate, does not mean that the defendant was not acting voluntarily.

We would say that that must be right, and we don't run away

from that, but we say what greater incentive could there be than to become a witness rather than a Prosecution suspect, or an accused? One means freedom, and one means potentially life imprisonment at least.

And reading down to paragraph 41, dealing with the break in interview, and the Trial Chamber had said, "Well, we don't need to look into what happened during the break in interview. We don't need to look at what happened off the tape. We can simply look at what happened on the tape." And the Appeal Chamber said, 41, sorry, paragraph 40, looking to the fourth line from the bottom:

"This break in the record in the statements made by the appellant and his counsel prior to that break provide some support to the appellant's argument that he would not have cooperated absent those agreements. The Appeal Chamber is satisfied that the Trial Chamber erred in failing to take this factor into account in its assessment of the voluntariness of the interview."

And then later down there, 41, three lines down:

"While the Rules do not explicitly require when an interview is stopped to address an on-the-record question of the appellant that clearly implicates the potential of non-voluntariness of the interview that the parties get an answer to the question and reached agreement so that we know how to proceed. The interview should recommence with a full explanation of what has occurred in the break and what understanding has been reached by the parties. It is only in this way that the Chamber can be satisfied that the rights of the accused are in fact protected."

And paragraph 45:

"The Prosecution strongly denies, so said the Appeal Chamber, having offered such an inducement and the Trial Chamber accepted those denials. However, the Appeals Chamber has already expressed its discomfort with the break in the interview and lack of clarification following the break in the interview. On this basis alone the Appeals Chamber is satisfied that the Trial Chamber erred in failing to consider that the break in interview did raise the reasonable possibility that the appellant, in giving the interview, was labouring under the misapprehension that his cooperation could lead to the withdrawal of the indictment against him."

And, just for completeness sake, over the page, at paragraph 46:

"Further, in light of the evidence raised by the appellant in relation to the voluntariness of the interview it was incumbent on the Trial Chamber to fully explore the circumstances surrounding the taking of that interview. While the Trial Chamber itself did not refer to Rule 92 of the Rules it appears that the Trial Chamber was applying

the principle underlying that Rule in reaching its decision. That Rule does not permit the Trial Chamber to accept that a duly recorded interview with an accused is voluntary moving the burden to establish otherwise to the accused. In this case, however," -- Sorry, I think I said that Rule does not; I meant that Rule does permit.

"In this case, however, the requested break in the

interview itself should have been sufficient to raise the concern of the Chamber to explore more fully the voluntariness of that interview. This does not necessarily require the holding of a voir dire although there may be certain advantages in doing so."

Clear principle of general application, that a single break in an interview, and evidence of conversations off tape which might have implicated the possibility of agreement to cooperate, sufficient to render the interview involuntary.

We would submit, and Your Honours will see it, there are conversations off tape and the Prosecution investigator slipped up by referring to those conversations when they got back on the tape. Discussions, at the very least, about evidence and the contents of Mr Sesay's evidence to be given on tape, and I will come to that in a moment, but what these cases clearly do is suggest that the Prosecution really do have a burden. These cases involve one aspect which is suspect. This case of Halilovic. One single break, and the suspicion that the accused might be right, was sufficient. Same with Bagosora. One single

issue.

What we have in this case is a number of issues, each of which we would submit is sufficient to render the interviews involuntary pursuant to Rule 42 and also pursuant to 92. In our research we haven't found a case with as many problems as we will outline and be able to demonstrate on the transcripts in this case.

And perhaps to try to shorten matters, those are the three most important cases which establish the principles to be applied. And Your Honours will see from the skeleton that the

principles are laid out clearly there, and reference is made to various other authorities which detail the need for a proper and full inquiry when issues such as this are raised.

If I can refer Your Honours to paragraph 39 of the skeleton. I won't take you through all the number of American authorities but -- which support the proposition that a voir dire should be held, not because the jury will not be able to deal with that evidence, but in order to make sure a proper inquiry is made. This is the import of these various cases. It is about whether an inquiry, a proper inquiry, should be made.

Your Honours will see from paragraph 39, in order to meet its burden that the waiver in the statement is free and voluntary, the Prosecution must put before the Court all the circumstances. And Your Honours will see at paragraph 40 --

JUDGE ITOE: 39 of your summary?

MR JORDASH: 39 of the summary, yes, Your Honour. International cases and domestic cases support this proposition. If I can refer you to paragraph 40 in the case of Prosecutor v Slobodan Milosevic, and paragraph, sorry, page 29987, sorry, 29988, and the final conclusions there in the discussion: "A voir

dire is a procedure that may be used in trials at ICTY."

Paragraph 16:

"Examples of circumstance in which the voir dire procedure may be used include determining the admissibility of the defendant's previous guilty plea to the offence for which he is currently on trial; the admissibility of a confession by the accused."

And I stop at this point to say there is very little in those statements which could not be conceived of, sorry, which

couldn't be described as some form of confession. That doesn't arise because Mr Sesay was confessing to a huge number of crimes, although he did confess to some, but because of the breadth of the Prosecution indictment, and most of the material in there relates to proof of Prosecution indictment and thereby is, in fact, properly characterised as confessions.

Then turning over the page to paragraph 17, reference to the procedure in England and Wales and then 7.4:

"The issue to be addressed in the exercise of discretion in this case is whether it is necessary and appropriate the Trial Chamber should, during the Defence case, hear additional evidence from Prosecution witnesses as to the reliability of the proposed evidence."

Milosevic did not consider that such a procedure would be inefficient.

Now, if I can take Your Honours to the actual statements and the evidence which we say completely undermines the ability of the Prosecution to prove what is required pursuant to 42.

Firstly, the statements of John Berry and Gilbert Morissette. Your Honours, page 309, I think, for Mr Berry, and

344 for Gilbert Morissette. Now, I don't wish to labour the point but the Prosecution have, in a sense, proven the importance of what we say by putting these statements into the bundle. They have demonstrated that they, too, agree that their evidence is relevant. It cannot be correct to simply allow statements which may well be self-serving, as we say they are, without them being tested by the Defence.

But turning to the contents of them. Even on their statements, there are issues which arise of significance,

significant -- which are significantly important.

Mr Berry, for example, and Mr Morissette, describe how Mr Sesay's arrested at 12.00 and from 12.00 to 1.30, when we say the threats and coercion and promises were made, the Prosecution have not provided any evidence of what happened during that period. We just don't know. The only submission before the Court is that in that period there were acts and conduct of an improper nature. The Prosecution evidence doesn't deal with it. It's unexplained.

Secondly, on their statements, they claim that Mr Sesay was approached at 13.25 whereby Mr Berry advised Mr Sesay that they were investigators from the Special Court. This is the second paragraph of Mr Berry's statement, that he had been arrested in relation to charges laid by the Special Court:

"I advised him that I could not promise him anything and that I wanted to offer to him at this time the opportunity to speak to us about his involvement during the war. I advised him to take his time as this was a very important decision on his part. He advised that he wanted to

cooperate with the Court and was willing to speak to us. I advised him that this is all that we would discuss at this time and he was returning to the holding cell at 13.30."

So, according to the Prosecution investigators, Mr Sesay was approached. He was told what he had been arrested for, made a -- asked to cooperate and made a decision within five minutes. No evidence of arrest, on what was said upon arrest at 12.00, and yet this huge decision was accurately conveyed to Mr Sesay, he deliberated and made that decision in five minutes.

We would submit that is not a realistic assessment. It does not have the hallmarks of truth, that he, Mr Sesay, could

sit there for an hour-and-a-half with no evidence from the Prosecution as to what's going on and then, in five minutes, he has decided to cooperate, in full cognizance of his rights. This requires, we would say, explanation. And it requires a special -- especially explanation because the Prosecution breached this Court's order and they breached this Court's order in this way:

Your Honours made an order that the Prosecution could have a member present, a member present, when Mr Sesay was arrested. Not go mob-handed but have a single member of the Prosecution. I hope Your Honours recollect that order. But I'll --

JUDGE BOUTET: I don't but --

MR JORDASH: Well, I can take you to page 28340, the first interview of Mr Sesay, 10 March 2003. And page 28340, and the -- Mr Morissette is reading to Mr Sesay the rights -- sorry, he is reading the arrest warrant, the beginning of the read begins at 28336. Mr Morissette says, "But first, let's go over the arrest warrant."

And this arrest warrant is then read out and culminates at page 28340 where it says: "A member of the Office of the Prosecutor may be present from the time of arrest."

Now, if one looks at Mr Berry's statement, March 10, 2003:

"At 12.00 I attended to CID HQ with Alan White, Gilbert Morissette, Johan Peleman, Thomas Lamin, Joseph Saffa for the arrest of those three people."

Not one person a piece but one, two, three, four, five, six people for the arrest of three; in direct breach of this Court's order. Why is that significant? Because this was part of the process of intimidation. Go mob-handed, inculcate the process,

frighten the accused, bring him in, obtain his acquiescence. It is particularly a breach because one of those people there was not even properly under arrest. He was always going to be a witness. He had been interviewed on a number of occasions and months before his arrest. So this was mob-handed breach of a court order for no reason as yet explained by the Prosecution.

No notes of any conversations kept by the Prosecution. No custody log provided indicating what was happening during the unexplained hours. No notes of the initial arrest. No contemporaneous notes of any kind to justify or explain what was happening. Nothing. These are professional investigators with huge experience from the ICTR. Where are the notes to prove what they have to prove under Rule 42?

Mr Sesay is then taken to the OTP office and the first interview begins at 3.03.

Now, I would ask the Court to reasonably conclude that at that stage Mr Sesay must have been fairly frightened. I don't think that is an unreasonable conclusion to draw from an arrest of this kind, whether everything was done properly or not, but then we arrive at the interview.

Now, page 28332 is where the interview begins, 3.03 p.m. This interview is key, we say, because this is where the acquiescence was properly obtained or properly reached at around this time, shortly before or during. And the only record we have of his rights, Mr Sesay's rights being read to him is at the beginning of this interview. There is no suggestion by Mr Berry or Mr Morissette they have done it before. They've told him that he is charged pursuant to the Special Court, that even they don't say they read him his rights before this time in the interview.

And it is clear, by looking at the rights, when they explain them to him, it is the first time.

And, again, what I would ask this Court to do is to draw a reasonable conclusion. If I read these rights out to any member of this Court, in this courtroom right now, and I read them once, there is not a person in this Court who would understand every single aspect of those rights. Not a trained lawyer, no one.

And yet, what the Prosecution want this Court to accept is that by reading the rights once, and this incantation, rights, details of arrest, that Mr Sesay, a fighter from the bush, would have understood the import of the rights, we submit much more is required.

This is not an accused with huge experience, certainly not at that stage. And there was an obligation to explain those rights properly, but they weren't explained properly. They were barely explained at all. And when they were explained they were explained deliberately wrongly.

Your Honours, page 28341. You will see there the --

Mr Morissette reading on the -- onwards in the warrant of arrest -- sorry, no. He then moves on to the rights advisement for a suspect or accused. Okay. That's at the top there.

And then a curious explanation is offered, two thirds of the way down the page:

"So being a suspect, which is the reason why there wasn't an arrest warrant issued for you and that's why you were considered as a suspect, okay?"

Why is that curious? Because Mr Sesay wasn't a suspect because an arrest warrant had been issued for him, he was a suspect because there was evidence which had been found by the

approving judge, Your Honour Justice Bankole Thompson, which created some kind of prima facie case that he was a suspect.

What this is is an attempt by the Prosecution to essentially create the impression with Mr Sesay that him being a suspect has not really got much to do with the Prosecution. It is to do with the judge who approved the warrant of arrest: "That's why you're a suspect. For us, you're not really a suspect." This confirmed the conversations off the tape and was the beginning of the process by which the investigators created the impression that, notwithstanding the reading of the rights and the reference that he was a suspect, this really had nothing to do with the Prosecution.

This is confirmed across the page, 28342. Mr Morissette says:

"Okay, summarising a part of these rights. Okay. Basically, it's what -- the rights of the accused I read to you earlier here, it's a repetition of what we're doing now. But the reason we're doing this is this will become part of the suspect's statement, if there is such a thing

[indiscernible] if we do take a suspect's statement."

Now, what does that mean? "If we do take a suspect's statement." Mr Sesay was an accused who had had an indictment approved. There was no prospect of him not being a suspect or more, unless an approved procedure was followed through, unless this Court said: "Upon application by the Prosecution this indictment no longer will stand."

But more important than that, why is Mr Morissette suggesting to Mr Sesay that him being a suspect is contingent upon something? What is it contingent upon? We would submit him

cooperating. There is no other explanation. Why suggest to him that you're not a suspect at this time, but you never know. You might be, depending upon events which might occur.

Over the page, 28343. A third of the way down the page, sorry, a third of the way down the page. Question by Mr Morissette:

"So this is the right for assistance by counsel. You're saying you understand. The right of free assistance, interpreter and the right to remain silent. Yes, sir. Good. Now, we continue as same. Are you willing to waive the right to counsel and proceed with the interview, and preparation of a witness statement? Yes or no?"

In other words, are you willing to discuss with us your involvement? Are you willing to tell us what happened and what you know of these events? This is the only explanation on record offered by the investigators as to the right to counsel. In other words, are you willing to discuss with us your involvement? Are you willing to tell us what happened and what you know of these events? Your Honours can go through the interviews. There is no other explanation ever offered to this accused as to the

meaning of whether he's willing to waive the right to counsel.

Now, either Mr Morissette didn't understand the right himself, or this was a deliberate explanation designed to simply draw Mr Sesay into the process. In any event, whatever the purpose of it was, it's incorrect, it's misleading and it is the only explanation on record. And, as Your Honour will see, in due course, it led to -- if that misunderstanding -- Your Honours will see that from the interview of the 14th of March 2003. Your Honours, page 28839. Mr Sesay has undoubtedly misunderstood what

he is saying "yes" to, when he answers the waiver of the right to counsel.

At the bottom there you can see again the right is read by, I think at this point Mr Berry, yes, it is, and he reads the right, as Your Honours can see: "The right to be assisted by counsel of your choice." And then Mr Sesay says something extremely indicative, "Yeah, but according to you I'm a suspect of, you know." Mr Berry intervenes, "Yes, you're a suspect and that's why you have been advised of your rights, that you have the right to contact and speak with and have a lawyer present, or an interpreter or to" -- Mr Sesay intervenes, "So all these days I'm saying yes, meaning yes, I'm not guilty."

There can be no other more compelling statement as to whether Mr Sesay understood his rights or not. So he's saying, "Yes, all these days to the waiver of rights," meaning yes, I'm not guilty.

What other explanation could there be for that statement? If there is another explanation, perhaps the Prosecution investigators would like to offer it. And then, after saying

that, Mr Berry quickly intervenes and Your Honours can see from the next few questions and answers that they move quickly to obtain, not even yeses to questions but simply mms: "Do you understand that you don't have to say anything, you can remain silent?" "Mm."

Over the page. "Are you willing to waive your right to counsel and proceed with the recorded interview?" "Mm." "Okay, I will just have your initial right there for me, please."

And I refer Your Honour back to the case law which is set out in the skeleton. This was a clear indication that the

accused had a problem understanding. At the very least his answer was ambiguous as to what he had been signing the waivers for.

What do we have in response from the investigators is: Let's just get on with the job. Let's not try and clarify for you. Because they're not really interested in clarifying the issue; they want to have the information.

And I refer Your Honours to paragraph 18, 19 and 20 of the skeleton. Incantations, regurgitations of these waivers are simply not enough when an accused shows such a lack of understanding.

Can I ask Your Honours to turn to page 28349, which is the 10 March interview again. All the while this rush to have Mr Sesay tick the boxes on the waivers is occurring, things are happening behind the scenes. 28349, the very first interview, 10 March, the bottom of the page. Sorry, if I can take Your Honours to 28348? Mr Sesay burst into tears. Going over the page, we can find out why that is. 28349, bottom of the page: "You know, I said what got me so shattered when you ask me about my children, because presently they don't even know my whereabouts, you know. That caused me to cry."

What would a reasonable investigator have done at that moment? Well, certainly not just ignored the subject, as Mr Morissette did. I can't think of a domestic jurisdiction where an accused would be arrested and his family not informed of his whereabouts, and yet Mr Morissette, Mr Berry and Mr Saffa appeared to think that it's perfectly acceptable. At the very minimum, they appear to think it's acceptable. We say it goes further than that. It was part of reducing this accused's

ability to be able to make decisions which were in his best interests.

And even at this time there is no suggestion by the investigators, "Don't worry about it, we'll inform your family." This Court has to, in my respectful submission, ask itself that question: Why not? Would that not have been the humane thing to do? Would that not have been ensuring that an accused's rights were being protected? Would that not have been ensuring that an accused was speaking because he wanted to and not because he was distressed and his will was being overborne?

And that process continued. Because around this time, Mr Sesay's wife was also taken into protective custody, so-called protective custody. I have referred Your Honours to that and I will refer Your Honours quickly to the letter from Mr Petit, which was sent to, I think, Tim Clayson, who was then the lead counsel for Mr Sesay. And Your Honours will find that -- I'm afraid I don't think I've got the right page numbering on this. I don't know if Your Honours can see this. It's a letter of 24

February 2004. It was served as part of the overall bundle, and it says --

PRESIDING JUDGE: Go ahead, we'll follow you.

MR JORDASH: Yes, it's page 29651, 2004, "From: Robert Petit. To: Tim Clayson. Subject: Issa Sesay family protection and disclosure." Second paragraph:

"As you know because of his initial decision to give a statement to the OTP and the possibility of your client being a witness for the Prosecution, the OTP, under its budget, has been providing witness protection measures for your client's family for almost a year now."

And so on.

Then the third paragraph, a recommendation that Mr Clayson make contacts with the witness and victims' support unit "to have them assess what assistance they can provide as the OTP's assistance to your client's family will cease."

A clear statement that Mr Sesay's wife was in Prosecution protective custody because he was possibly going to be a witness and assistance was being offered to her from day one. What could that be, if not an inducement? Why did the Prosecution take Mr Sesay's wife into protective custody? Why didn't she go into witness and victims' protective custody? What special budget did the Prosecution have to be taking witnesses into their own protective custody? Certainly not a budget that's been provided to the Defence. Certainly not a regular procedure to take a witness into Prosecution protective custody when there is a court, regular court body to do exactly that. And we have heard much from the Prosecution over the last two years about not impugning the regulations of the Court. Well, how much impugning

of the witness and victims' unit was occurred at that point by taking Mr Sesay's wife into their protective custody? It was part of a process designed to convince Mr Sesay that he was to be a witness and his interests lay with them and no one else.

I note the time. I can continue if Your Honour wishes.

PRESIDING JUDGE: Let's take the usual break now. This clock is ten minutes behind, I think.

[Break taken at 4.30 p.m.]

[RUF05JUN07D - MC]

[Upon resuming at 5.05 p.m.]

PRESIDING JUDGE: Mr Jordash, please continue.

MR JORDASH: Your Honour, thank you. Just picking up from the issue of what was happening with Mr Sesay's wife, Your Honours, could I ask you to turn, please, to --

JUDGE ITOE: Mr Jordash, when you say she was in the protective custody of the investigators or the Prosecution, are you saying that she was extracted from her home and kept somewhere for a period of time you are alleging?

MR JORDASH: Yes, we are saying that.

JUDGE ITOE: For what length of time, please?

MR JORDASH: Until around a year later, according to Mr Petit's letter. At that stage, we, and I was involved at that stage as co-counsel, indicated that we were happy to take --

JUDGE BOUTET: You made motions at that time.

MR JORDASH: Pardon?

JUDGE BOUTET: You made motions at that time about these documents.

MR JORDASH: I did.

JUDGE BOUTET: As a follow-up to that.

MR JORDASH: Yes, indeed. As Your Honour can see from Mr Petit's letter, there was an issue of Mr Sesay's wife no longer being in Prosecution protective custody, and soon after

that letter, actions were taken to take her out of that custody.

Details of that custody are a little murky to us because we obviously cannot question the Prosecution investigators and that information about what she was doing, how it was arranged, is a little murky. But we do know this: She was in protective custody and it was the Prosecution who controlled Mr Sesay's access to her. And I say that because those are my instructions, which are backed up by his counsel at the time.

I ask Your Honours to turn to annex D of the Defence bundle, which is at the beginning. And it's a -- I'm not sure of the page number but I'll find it in moment, but it's Defence counsel's extremely urgent and confidential motion, requesting permission to intervene regarding the Defence Office's extremely urgent and confidential motion. It is no longer confidential because these issues are now being aired in a public forum, but at the time it was extremely confidential.

But if Your Honours would turn to paragraph 16. Do Your Honours have that? I'm trying to find the number, page numbers. Sorry, I think it's in annex H. For some reason it is not in annex H in my bundle. Sorry, I don't think we've got page numbers for that. I don't know why.

MR HARRISON: I think I can -- I stand corrected, but it might be at 30066. It's a document entitled "Defence counsel's extremely urgent and confidence motion requesting permission to intervene regarding the Defence Office's extremely urgent and confidential motion."

MR JORDASH: Thank you. Paragraph 16 of that is instructive in that it provides a real insight into Mr Sesay's

state of mind on the -- even by May 2003 and it's noted by his then counsel, William Hartzog and Alexandra Marcel, paragraph 16:

> "Since the order to temporarily cease any questioning of accused rendered by the Honourable Judge Thompson on April 30, 2003, and despite its clear language, the order has been breached in so far as Mr Sesay made several phone calls to the OTP, which were rebuffed immediately by the OTP in each case."

This is the key:

"The purposes of the calls were to arrange a visit with his wife which Mr Sesay erroneously believed to be under the control or at the discretion of the OTP."

Now, first point is this: That it was Mr Sesay's state of mind that in order to see his wife he required permission from the OTP. And that had been his state of mind, we submit, from day one. And that was the purpose of taking her into protective custody. That was a part of the leverage employed to ensure cooperation was ongoing.

And quite intriguingly, his counsel at that time didn't even appreciate that that was the case. Because it was true that the control was at the hands of the Prosecution and Mr Sesay was correct in concluding that because she was in protective custody of the Prosecution. And the Prosecution had managed to inculcate a process which denied even his counsel in April, the end of April 2003, the information as to the way in which Mr Sesay could or could not see his wife.

Your Honours will see further evidence of that from the other document prepared by William Hartzog and Alexandra Marcel

upon which we rely, dated 9 June 2003, which is a confidential document. There is some French there, which I don't read, but:

"Decision on request Defence Office for order regarding contact with the accused."

I'm not sure whether this was filed or not, but we rely upon it and we rely upon it in this way, paragraph 14, 4th June 2003, co-counsel for Mr Sesay is being told by Mr Robert Parnell, chief of security, that a meeting will occur between the FBI and Mr Sesay on Saturday, 7 June 2003. Mr Sesay would be removed from the Bonthe detention centre and brought to the OTP.

Mr Parnell said that Mr Sesay had agreed to meet the FBI. Mr Parnell said during the same day Mr Sesay would be able to meet his wife. Mr Parnell insisted on saying there was no need for the co-counsel for Mr Sesay to be present at this meeting.

So Mr Sesay was correct. Access to his wife was controlled by the Prosecution, in some kind of collusion, and I use the word advisedly, with the detention staff, with the chief of the security. What kind of process was going on whereby an accused could only access his wife on the say so of the Prosecution with the agreement of the detention centre or the security chief, Robert Parnell. This is the leverage. It is clear, we submit, and it requires explanation from the Prosecution.

May I just briefly refer you to the interrogation techniques, referred to by the now infamous Rumsfield, Your Honours, page 29671, referring to the counter-resistance techniques in the war on terrorism, the process of interrogation which has been condemned in every civilised country, except for America and even, in large part, by Americans. But looking at the final paragraph of that document, interrogation technique of

isolation:

"Isolating the detainee from other detainees while still complying with basic standard of treatment. The use of isolation as an interrogation technique requires detailed implementation instructions," and so on.

Then over the page to the final paragraph, which I intended to read:

"Interrogation approaches are designed to manipulate the detainee's emotions and weaknesses to gain his willing cooperation. Interrogation operations are never conducted

in a vacuum; they are conducted in close cooperation with the units detaining the individuals. The policies established by the detaining units that pertain to searching, silencing, and segregating also play a role in the interrogation of a detainee. Detainee interrogation involves developing a plan tailored to an individual and approved by senior interrogators. Strict adherence to policies/standard operating procedures governing the administration of interrogation techniques and oversight is essential."

And that is the import of the collusion between the detention staff and Mr Sesay -- sorry, detention staff and the Prosecution. We would submit that if it was only the fact that the Prosecution controlled the access to his wife, it would be enough to require the Prosecution to call evidence to explain what was going on.

But when looked at in light of the intervention of the late Robert Parnell, when looked at in light of the lack of order from the Registry in removing him, we would submit the Prosecution are

unable to discharge their burden because it's the state of mind which then becomes important. What was Mr Sesay doing when talking? He was obtaining those inducements which, quite clearly, are inducements and, quite clearly, were meant, we would submit, to be so.

JUDGE BOUTET: The inducement at that particular moment would be what?

MR JORDASH: Access to Mr Sesay's wife being contingent upon the say so of the Prosecution. Quite telling, we would submit, in the document prepared by his previous counsel. On the

one hand you help us you out, go and see the FBI, they've got questions for you. At the same time, you would be able to see your wife. In our submission, it's a reasonable inference that the two were intimately connected.

Now, going back to the interview tapes and the interview transcripts, we put a lot of significance on that first interview, 10 March, that's when there's visible distress, that's when there's a failure by the Prosecution to explain correctly the waiver, or to offer any relief to that stress. It is the one tape which does not exist, the audiotape does not exist.

JUDGE BOUTET: The videotape.

MR JORDASH: Sorry, the videotape does not exist. I beg your pardon, the videotape does not exist.

JUDGE BOUTET: But there is an audiotape of that, I take it, based on what the Prosecutor has said.

MR JORDASH: Certainly, but the Prosecution ask Your Honours to take into consideration such things as demeanour, such things as the way he answered the question.

JUDGE BOUTET: Yeah, yeah. But not for the first one, obviously. I agree with you, that was the suggestion to the Court, that we should look at the body language in the video.

There is no video for the first one.

MR JORDASH: Which is the key one, we would submit. After that, the compliance is fully obtained. The waiver is fully obtained under the misapprehension that it is simply an agreement to continue speaking to the Prosecution. We say there is ample evidence of other conversations off tape. Can I just briefly refer Your Honours to, and I won't ask you to turn them up, but page 28576, 12 March 2003. I will ask Your Honours to turn it up

because it may not be immediately apparent what I'm referring to.

On 12 March 2003, 2856 -- 28576, I beg your pardon. I think I've given myself the wrong reference. So if I can ask Your Honours to turn to 13 March 2003, interview 28830.

JUDGE BOUTET: What's the date of that one, Mr Jordash?

MR JORDASH: 13 March 2003.

JUDGE BOUTET: That one would be video recorded?

MR JORDASH: It's video recorded, this one. But 28830, there is a question there, second question, and the first question -- and the second question says, "There was an incident you brought to his attention in regards to your witnessing or having knowledge of killing four to 500 civilians. Can you elaborate a little more on that for me?" There is no conversation prior to this on tape about the killing of four or 500 civilians. That discussion took place off tape.

29348, the 31 March 2003, which I seem to have lost. I can come back to that, but if one looks at 29348.

JUDGE ITOE: Does it start with, "Can I smoke, sir?"

MR JORDASH: I beg your pardon?

JUDGE ITOE: Does it start with, "Can I smoke, sir?"

"Yeah, go ahead." "No matches, no matches, no matches."

MR JORDASH: Does anyone else have a copy of Mr Sesay's interviews here, the Defence here at the Bar? No. I'll come back to that. Perhaps I could borrow that from the learned legal officer, who is far more diligent than I. Yes, there we go. Page 29348. Question halfway down the page, "You mentioned, just before we turn the tape on -- when I walked in you were saying something in regards to the way promotions kind of happened within the RUF." Conversations off tape about evidence.

MR HARRISON: I apologise what was the page we are looking for?

MR JORDASH: Sorry, 29348. And I will come back at another stage to a third time, when I've got the reference sorted out.

JUDGE BOUTET: Are you filing this as evidence? I mean, how are we to use this?

MR JORDASH: As evidence of the similarity of treatment between Mr Sesay, who is supposed to be a suspect -- in fact, he's not supposed to be a suspect, he's supposed to be an accused because his indictment has been approved, and the similarity of someone --

JUDGE BOUTET: You will file that as an exhibit?

MR JORDASH: Pardon?

JUDGE BOUTET: You will file that as an exhibit, presumably, if it is evidence.

MR JORDASH: Yes.

JUDGE BOUTET: I don't know, I'm just asking.

MR JORDASH: Yes.

JUDGE BOUTET: I'm just asking, because I don't know of this piece of paper. All of a sudden it shows up.

MR JORDASH: I would file it --

JUDGE BOUTET: As to what it is, I --

MR JORDASH: Well, I wouldn't necessarily file it as an exhibit, but I'd find it as part of the support for our argument. If it needs to be an exhibit, then it can be an exhibit. If not --

PRESIDING JUDGE: Well, for comparative purposes, it should be an exhibit, otherwise the Court would be deprived of the benefit of making the comparison.

MR JORDASH: To be honest, I don't mind if it is an exhibit or not, as long as Your Honours take it into account.

PRESIDING JUDGE: Well, it's not -- but you are trying to show a system here; not so?

MR JORDASH: Yes. I want Your Honours to take it into account.

PRESIDING JUDGE: Yes, proof of system.

MR JORDASH: Proof of system. Question at the top of page 8:

"That witness protection agreement that we signed is still in effect. We can do that. We can help you. We can protect you, but we need to have everything on the table. As I explained to you before, you know, when the day comes when people will be arrested, brought forward to trial, you know you're going to have a dozen people, maybe, who are going to be charged. They're all going to have one or two, three lawyers. And when you're there to testify on behalf of the Office of the Prosecutor, if something comes up in

court they have not told us about, there is nothing we can do to protect you. You're going to lose all your credibility. The Prosecutor's office is going to lose all its credibility," et cetera.

Same clause to confession for somebody who was most certainly a witness. The same; taking into protective custody family members of someone who is a witness, as with Mr Sesay.

I do have probably another hour, actually.

JUDGE ITOE: Mr Jordash, please, what are you doing with this document? Are you tendering it? It appears the Chamber, you know, would prefer to have the document tendered. Are you

tendering? You don't mind whether you tender it or not.

MR JORDASH: It forms part of the bundle that we've served.

JUDGE ITOE: It does not, because it isn't even paged. It's just a floating document amongst the papers that have been filed with Court Management and it's difficult to know where to place it.

MR JORDASH: Whatever Your Honours prefer. I --

JUDGE ITOE: No, it's not our case. I'm telling you that it's difficult for me to process this document, which is loose, you know, somewhere and it doesn't fit into any one of these. It stands on its own, the way I see it here.

JUDGE BOUTET: What you filed up to now, not as exhibits, but as authorities, as such, it's case law and so on. We are dealing with a transcript, obviously, and you refer to the status, but that comes as a different element here. You, as Justice Thompson has asked you, you're asking this Court to consider this document, to show a pattern or a consistency in the way questions were being asked of people. So, obviously -- and we don't have that, unless it is in evidence. This is quite

different than any other material you've given us in support of your arguments.

MR JORDASH: Well, it's the same, I would submit, as the motions submitted by Mr Sesay's previous counsel, the document relating to --

JUDGE BOUTET: It's all filed with the Court. These are documents that are, as Justice Itoe has just said, there's a number.

PRESIDING JUDGE: I am prepared to give you a break here. Let's give you that as homework and, when we come back in the

morning, you advise us properly, since the law of diminishing returns may be taking hold on all of us, and we'll adjourn the trial to tomorrow, Wednesday, 7 June 2007, at 9.30 a.m..

[Whereupon the hearing adjourned at 5.45 p.m.,

to be reconvened on Wednesday, the 7th day of

June 2007, at 9.30 a.m.]