



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

WEDNESDAY 6 JUNE, 2007  
10.00 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 Charles Hardaway  
Ms Amira Hudroge (Case

manager)

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

1 [RUF06JUN07A - CR]

2 Wednesday, 6 June 2007

3 [The accused present]

4 [The witness entered court]

5 [Open session]

6 [Upon commencing at 10.00 a.m.]

7 WITNESS: ISSA HASSAN SESAY [Continued]

8 PRESIDING JUDGE: The trial is resumed. Mr Jordash,  
please

9 continue with your submissions.

10 MR JORDASH: Your Honour, thank you. Could I --

11 JUDGE ITOE: Mr Jordash, how much more time do you think  
12 you might require to round up your submissions on this?

13 MR JORDASH: I would have thought about an hour.

14 JUDGE ITOE: Thank you.

15 MR JORDASH: Could I take you straight to the 12 March  
2003

16 interview, which I was trying to find yesterday, which  
contains

17 another reference to a conversation off tape. 28576. 12  
March,

18 28576, question from Mr Berry, halfway down the page:

19 "If that's okay, what I'd like to do first of all is I'd  
20 like to follow-up with -- you had mentioned the other  
day

21 you had transferred diamonds probably on at least 12

22           different occasions."

23           There is no mention in any of the transcripts prior to  
this

24   of 12 -- well, I see Mr Harrison shaking his head.  If I'm  
wrong,

25   I'm sure he'll correct me.

26           MR HARRISON:  I can do it now or I can do it later.

27           MR JORDASH:  Please.

28           PRESIDING JUDGE:  Yes, you can intervene now, yes.

29           MR HARRISON:  I should then indicate that there was an

SCSL - TRIAL CHAMBER I

1 error made yesterday with respect to a comment that at 28330,  
2 something comes up for the very first time. At 28330, the  
3 reference was made to the second question yesterday, and the  
4 question that was brought to the Court's attention was:

"There

5 was an incident you brought to his attention in regards to  
6 your  
7 witnessing or" --

page

8 JUDGE BOUTET: Mr Harrison, I am sorry, I missed the  
9 you're reading from, is?

10 MR HARRISON: 28830.

11 JUDGE BOUTET: 830?

12 MR HARRISON: Yes. This is a reference from yesterday.

13 JUDGE BOUTET: Yes, yes.

other.

14 MR HARRISON: And if I'm correcting one, I'll do the

15 The question was: "There was an incident you brought to his  
16 attention in regards to your witnessing or having knowledge of  
17 killing of four or 500 civilians. Can you elaborate a little  
18 more on that for me." And I think what was represented

yesterday

19 was this was the first time this was ever referred to. But

the

20 way you can find out the answer was, the question immediately  
preceding that refers to: "When you spoke with Gilbert," that

21 presumably being a reference to Gilbert Morissette, and his  
22 interview actually took place on 10 March, and you'll find at  
23 page 28381 --

24 MR JORDASH: Sorry, can I just have the page again,  
please.

25 MR HARRISON: 28381.

26 JUDGE ITOE: Is it 288 or 283?

27 MR HARRISON: This particular reference is 28381. And  
it's

28 at the bottom of the page where there's a question:

29 "Q. That's what I want to know, the commitment of  
others."

1 "A. Yes, sir.

2 "Q. Okay. And I guarantee you will answer. I know why  
3 they killed four, 500 people, the spot and who did that.

I

4 mean, what took place, all these things."

5 And we say that's a direct reference to the latter  
6 question. And what happened in the very next question makes  
7 clear that, the questioner says:

you.

8 "Okay, that's fine. That's what I want to hear from

9 Unfortunately I'm very sorry, and I apologise we have to  
10 rush it there, because we have to get moving."

the

11 So the entry was just cut off right at that point after  
12 witness had raised the matter.

13 PRESIDING JUDGE: Thank you, we note that.

will

14 MR HARRISON: And the other reference from today, this

15 be found at C -- sorry, this will be found at -- on 12 March  
16 2003. That transcript begins at page 28494. When you get to

the

17 what is around page 28587, there's a number of references to  
18 certain trips to Monrovia. And if you continue on looking at

19 subsequent pages, there is ongoing references to the number of  
20 trips that took place and --

it

21 MR JORDASH: Sorry, I can assist; 123 to 149. I accept

22 does say 12 trips. I can accept both errors.

23 PRESIDING JUDGE: Which bit is that?

24 MR JORDASH: The 12 trips are dealt with --

25 PRESIDING JUDGE: At what page?

26 MR JORDASH: Page 28617, all the way to --

27 PRESIDING JUDGE: 286.

28 MR JORDASH: -- 28642. I accept those two errors.

29 PRESIDING JUDGE: Very well.

SCSL - TRIAL CHAMBER I



1 MR JORDASH: I'll just rely on the first one I indicated  
2 yesterday which remains --

3 JUDGE ITOE: 286 what?

4 MR JORDASH: 28642, which, I think, just leaves 31 March  
5 indication yesterday of a conversation held off tape. I  
6 apologise for the error. Our point, nevertheless, remains the  
7 same.

8 PRESIDING JUDGE: Let's proceed.

9 MR JORDASH: Can I also indicate an error I made  
yesterday,  
10 which concerns the burden of proof applicable to Rule 92, as  
11 pointed out to me by my learned assistant, Mr Berkman.

12 Your Honours will see from the case of Delalic, and I'll  
13 take Your Honours there; it's important we get it right.

Delalic  
14 which is in the Defence bundle at page 29800. Paragraph 41,  
15 29811.

16 Our essential submission is this: That contrary to what  
17 I'd submitted yesterday, the burden under Rule 92 on the

Defence  
raise  
18 is not on the preponderance of evidence. It is a burden to

19 evidence. We have searched the jurisprudence, and there is no  
20 statement in any of the jurisprudence that the burden is on

the  
21 preponderance of evidence. That was a slip by me yesterday.

Paragraph 22                    29811 sets out the position with some clarity.

23                    41 --

24                    PRESIDING JUDGE:    So the burden is merely to raise

25                    evidence?

26                    MR JORDASH:    Indeed, Your Honour, yes.

27                    PRESIDING JUDGE:    Not to -- not on the preponderance of

28                    evidence?

29                    MR JORDASH:    Certainly not.

1           PRESIDING JUDGE: Right.

2           MR JORDASH: And this is clear, we submit, from  
paragraph

3           41 and 42 of Delalic, and I read from halfway down the page:

4           "For evidence to be reliable it must be related to the  
5           subject matter of the dispute and be obtained in  
6           circumstances which cast no doubt on its nature and  
7           character and the fact that no rules of the fundamental  
8           right has been breached. This can be done if the  
evidence

9           is obtained in accordance with Rule 95 by methods which  
are

10           not antithetical to and would not seriously damage the  
11           integrity of the proceedings. There is no doubt  
statements

12           obtained from suspects which are not voluntary or which  
13           seem to be voluntary are obtained by oppressive conduct  
14           cannot pass the test under Rule 95."

15           Obviously we rely upon that statement.

16           42, the burden of proof of voluntariness or absence of  
17           oppressive conduct in obtaining a statement is on the  
18           Prosecution. So Delalic is clear. The burden, in fact, rests  
19           upon the Prosecution, both pursuant to 42 and 92. The  
difference

20           with 92 is that the Defence have an obligation to raise  
evidence

21 such that the Prosecution's burden of proof comes into play.

22 PRESIDING JUDGE: In the case of the question raising  
23 evidence, on what scale, in the standard of proof scale does

that

24 fall? It's a much lower standard, isn't it?

25 MR JORDASH: Certainly.

26 PRESIDING JUDGE: Because the preponderance of evidence  
27 would something be a little above balance of probabilities,  
28 beyond balance of probabilities, but the raising evidence just  
29 means, what, merely raising evidence?

1 MR JORDASH: Merely raising the issue.

2 PRESIDING JUDGE: Prima facie showing?

3 MR JORDASH: We would submit less than a prima facie  
4 showing.

5 PRESIDING JUDGE: Facie showing, yes.

6 MR JORDASH: Simply evidence which puts the Prosecution  
to  
7 its burden so it's some evidence, but not trifling evidence.

8 PRESIDING JUDGE: Yes.

9 MR JORDASH: We can see, following on in that paragraph:  
10 "Since these are essential elements of proof fundamental  
to  
11 the admissibility of a statement the Trial Chamber is of  
12 the opinion that the nature of the issue demands for  
13 admissibility of the most exacting standard consistent  
with

14 the allegation. Thus the Prosecution claiming  
15 voluntariness on the part of the accused suspect or  
16 absence" --

17 THE INTERPRETER: Your Honours, will the learned  
attorney  
18 be asked to slow down a little bit so that the interpreters  
can  
19 keep pace with him.

20 PRESIDING JUDGE: He's taking your advice.

21  
voluntariness

MR JORDASH: "Thus the Prosecution claiming

22 on the part of the accused suspect or absence of oppressive  
23 conduct is required to prove it convincingly and beyond  
24 reasonable doubt."

25 We agree with the Defence that this is the required  
26 standard.

92  
with

JUDGE BOUTET: But how does that fit with 92? Because

28 establishes a presumption of -- that once you have complied

29 Rule 43 and 63, I'm just reading from 92, if it were complied

1 with, it says: Shall provided the requirements are to be  
2 presumed to have been free and voluntary. So what you're  
saying  
3 is you can rebut, obviously, that presumption. But once it  
has  
4 been shown by the Prosecution, you say, by being shown, it  
must  
5 be beyond reasonable doubt by showing. Under 43 and 63 then  
92  
6 establishes the presumption that it has been free, this, the  
7 confession has been free and voluntary. Am I --

8 MR JORDASH: Yes.

9 JUDGE BOUTET: But you say you can rebut that. Once you  
--  
10 if the Prosecution meets that standard, under 43 and 63, 92  
11 creates a presumption that it has been free and voluntary?

12 MR JORDASH: Yes.

13 JUDGE BOUTET: But you can rebut that.

14 MR JORDASH: Yes.

15 JUDGE BOUTET: And this -- your argument has to do with  
the  
16 rebuttal, how much -- what's the level of evidence you need to  
17 call to rebut that presumption; is this your argument?

18 MR JORDASH: That's the argument.

19 JUDGE BOUTET: Okay.

20 MR JORDASH: And it's sufficient, we would submit, to  
raise

21 evidence which makes the issue a live one. It is difficult to  
22 define, but, like an elephant, you know it when you see it.  
If  
23 evidence is raised by the Defence, then the Prosecution, as in  
24 most things, must move to then prove voluntariness beyond a  
25 reasonable doubt. If it was a preponderance of evidence, it  
26 would create such a burden on the Defence to prove that it was  
27 more likely than not involuntary. That cannot be the purpose  
of  
28 Rule 92 when Rule 92 is predicated upon such serious issues  
which  
29 are so closely entwined with proof of the Prosecution case.



1 JUDGE BOUTET: I'm not sure I follow you, honestly. I  
2 mean, looking at 92, I mean, 92 reads that the confession  
shall,  
3 provided the requirements of 43 and 63 were complied with be  
4 presumed to have been free and voluntary.

5 MR JORDASH: Yes.

6 JUDGE BOUTET: It doesn't mean that once they have done  
7 that, that nothing can be done about it. That presumption  
that  
8 is created under 92 can be rebutted. But are you saying that  
9 once you have rebutted that, then the Prosecution must, after  
10 that, come back, and try then to establish that such  
confession  
11 was done freely and voluntarily beyond reasonable doubt?

12 MR JORDASH: Beyond a reasonable doubt as -- sorry,  
13 Your Honour. It's -- this Rule, as we read it, is one  
designed  
14 to ensure that the Defence simply cannot assert it was  
15 involuntary, plus placing the Prosecution into the position of  
16 having to prove beyond a reasonable doubt every single  
statement  
17 or confession from an accused; hence why a burden is placed  
upon  
18 the Defence to raise some evidence.

19 If the burden of proof did shift so categorically beyond  
a  
20 reasonable doubt, on the preponderance of evidence to the

It  
of  
such  
which  
be

21 Defence, in my respectful submission, it would have said so.  
22 would have been a clear and concise definition that the burden  
23 proof shifts, and there would be jurisprudence to suggest that  
24 that burden shifted to a particular standard. There isn't  
25 jurisprudence. What we have is Delalic, which makes it quite  
26 clear that the burden is on the Prosecution to prove  
27 voluntariness, and not just voluntariness of the waiver of the  
28 right to counsel, but the voluntariness of the statement,  
29 of course must logically be right because why would a burden

counsel  
whereas  
a

1 placed on the Prosecution simply to prove the waiver to  
2 was voluntary which, on some view, is a procedural rule,  
3 the burden wouldn't be placed on the Prosecution to prove that  
4 statement, a confession, was voluntary.

exactly

5 JUDGE BOUTET: Is 92 on ICTY the very same wording,  
6 the same wording as our 92?

consult,  
it  
at

7 MR JORDASH: No, it's not. I think -- can I just  
8 please? We are having a disagreement here. Mr Berkman thinks  
9 is exactly the same but my recollection of it is that it says  
10 the ICTY, "unless the contrary is proven."

specie

11 PRESIDING JUDGE: Isn't the presumption in Rule 92 a  
12 of the presumption of regularity?

13 MR JORDASH: It must be, I think.

words,

14 PRESIDING JUDGE: It must be a kind of -- in other  
15 when you go back to the legislative history of 92, wasn't  
16 time when, perhaps, they began with the other presumption,  
17 presumption of involuntariness?

there a

18 MR JORDASH: That would be my reading of this Rule, that

it

19 simply is creating a presumption that all is well, unless  
20 something is raised to indicate otherwise.

and

21 PRESIDING JUDGE: But 92 is, as construed in its plain  
22 ordinary sense, is a presumption in favour of the Prosecution,  
23 provided certain conditions are complied with.

24 MR JORDASH: Well, I suppose it is.

25 PRESIDING JUDGE: In a sense.

26 MR JORDASH: In a sense, it is. It's a presumption of  
27 regularity.

28 PRESIDING JUDGE: Precisely.

29 MR JORDASH: Which I suppose, in some ways, there is

1 neither a presumption for or against. It's simply, this is a  
2 confession. All is well, unless an issue is raised.

3 PRESIDING JUDGE: Yes. Probably the ideal would have  
been  
4 to begin with no presumptions at all, but the law, in its  
wisdom,  
5 has decided to begin with the praesumuntur rite esse acta kind  
of  
6 thing. That there must be -- in other words, it must be  
presumed  
7 that in the process of taking a statement from an accused  
person,  
8 all the necessary procedural safeguards were followed.

9 MR JORDASH: Yes.

10 PRESIDING JUDGE: Unless the contrary is proved.

11 MR JORDASH: And a useful rule it is because it prevents  
12 unscrupulous accused simply saying --

13 PRESIDING JUDGE: Quite right.

14 MR JORDASH: -- I challenge it and putting the  
15 Prosecution --

16 PRESIDING JUDGE: Frivolous and vexatious complaints.

17 MR JORDASH: Yes, huge proof without evidence of  
anything  
18 going wrong.

19 JUDGE ITOE: Well, and notwithstanding all this, I think  
we  
20 all agree that 92 raises a presumption of regularity but that,

21 you know, if there is evidence provided by the Defence, this  
22 presumption under 92 is rebuttable. It remains rebuttable.  
And  
23 if there is evidence adduced or there is evidence provided or  
24 furnished by the Defence that there is reason for this  
rebuttal,  
25 then it is for the Prosecution to prove beyond reasonable  
doubt  
26 that the statement was taken voluntarily, and that the waiver  
to  
27 the presence of counsel was also voluntary on the part of the  
28 accused persons. I think this is what we appear to be saying.  
29 PRESIDING JUDGE: Yes, I think that's my understanding  
of

1 the law. I don't think there is any -- unless there are some  
2 nuances here which we are not really getting, probably --  
unlike  
3 the analogy of the elephant, if you are a blind man you don't  
4 really see the elephant.

5 MR JORDASH: Well, I will leave it at that. Delalic is,  
it  
6 appears to us to be authority on this subject, and we'll leave  
it  
7 at that.

8 May I return, very briefly, to the warrant of arrest,  
which  
9 we found yesterday. Could I ask Your Honours to take a copy,  
10 please. I gave a copy to your learned officer. Your Honours  
11 will recall I referred to this yesterday and referred to the  
fact  
12 that it's been breached by the Prosecution insofar as the last  
13 sentence says: "A member of the Office of the Prosecutor may  
be  
14 present from the time of arrest," and there had in fact been I  
15 think five Prosecutors for three arrests.

16 Would we raise that point alone? No. Do we raise it as  
an  
17 indication of a course of conduct? Yes. In addition, there  
has  
18 been further breaches of this warrant of arrest, which we  
would  
19 ask Your Honours to take into account.

warrant 20 On Court Management page numbers 44, page 2 of the  
the 21 (C) to cause to be served on the -- sorry, let me start with  
ordering 22 order. "Hereby" -- this is the learned Judge Thompson  
23 the Registrar of the Special Court, paragraph (C):  
24 "To cause to be served on the accused at the time of his  
following 25 arrest or as soon as is practicable immediately  
he 26 his arrest in English, or have read to him in a language  
a 27 understands, a certified copy of the warrant of arrest,  
rights 28 certified copy of the indictment, a statement of the  
29 of the accused and to caution the accused that any



1 statement made by him shall be recorded and may be used  
in  
2 evidence against him in coordination with the national  
3 authorities of the state concerned."

4 We rely upon the following breaches: One, Mr Sesay did  
not  
5 have the warrant of arrest, the indictment, statements of his  
6 rights, or a caution at the time of his arrest, nor did he  
7 have  
8 those rights adhered to as soon as is practicable immediately  
9 following his arrest.

9 JUDGE ITOE: You say he didn't have the indictment?

10 MR JORDASH: He didn't have the indictment.

11 JUDGE ITOE: No caution?

12 MR JORDASH: No caution, no warrant of arrest, no  
13 arrest,  
14 statements of the right of the accused at the time of his  
15 arrest.  
16 or as soon as was practicable immediately following his

17 In fact, this should have been done at 12.00 or soon  
18 thereafter  
19 when, in fact, Mr Sesay appears to have been arrested.

20 JUDGE ITOE: Please remind me again: On what date was  
21 Mr Sesay arrested?

22 MR JORDASH: 10 March, Your Honour. There is no  
evidence  
23 from -- let me put it differently. Mr Berry and Mr Morissette

his  
21 give no evidence whatsoever of this happening at the time of  
22 arrest or as soon as was practicable immediately following his  
hours  
23 arrest. That there was, in effect, a delay of over three  
24 from 12.00 until the first interview. That delay might not be  
25 significant in some cases, but it is significant when the  
was  
26 Prosecution say, during this period, Mr Sesay's cooperation  
27 obtained. In our respectful submission, we cannot gain the  
28 cooperation of an accused without reading the basic rights,  
be  
29 without adhering to the warrant of arrest. If cooperation can

1       obtained during that period, then that must be a period in  
which  
2       the Court must decide it was practicable to adhere to this  
3       warrant of arrest.  
4                JUDGE BOUTET: Are you saying that it was not done  
because,  
5       from what you are looking at, Berry and Morissette are saying  
6       that this was done at the particular time and, therefore, it  
was  
7       not done before, or you're saying he was -- the accused says  
it  
8       was not done before? I'm just trying to follow what you're  
9       saying here.  
10               MR JORDASH: Certainly. It's our case it wasn't done.  
11               JUDGE BOUTET: Okay.  
12               MR JORDASH: Secondly, looking at Mr Berry's statement  
at  
13       309, there is no evidence to suggest it was done, either by  
CID  
14       nor by Mr Berry, at 1325 when he seeks the cooperation of  
15       Mr Sesay or claims to have. And looking at Mr Morissette's  
16       statement, at paragraph 1344, when he attended, he claims at  
17       paragraph 1, there was no communication with Sesay at the time  
of  
18       his arrest, and then he's told at 1330 that Mr Sesay has  
19       indicated his willingness to talk with the investigator. So

it  
20 certainly it wasn't done by Mr Morissette, and it looks as if  
21 wasn't done by Mr Berry. One would have expected, if it had  
been  
22 done, then they would have said so.

23 JUDGE BOUTET: Are they the ones that arrested him?

24 MR JORDASH: No, they're not the ones who arrested him.  
25 Mr Sesay was arrested by -- it appears, although we haven't  
been  
26 told -- CID. But there is no evidence from them as to what  
was  
27 said upon arrest.

28 JUDGE BOUTET: So they would have arrested him on 10  
March  
29 at what time, CID? You say that Berry would have talked to  
the

1 accused at 1325; is that what you're saying, according to the  
2 statement you have?

3 MR JORDASH: Actually, I've got it slightly wrong.

4 Mr Berry says in his statement, at page 309, 10 March 2003, at  
5 12.00:

6 "I attended to CID HQ with Allan White, Gilbert

Morissette,

7 Johan Peleman, Thomas Lahun, Joseph Saffa for the arrest

of

8 the three. The arrest had been made by the CID and the  
9 three suspects were transported to Jui Police Barracks,  
10 arriving at 1300. 1325, Mr Berry and Mr Saffa spoke to  
11 Issa Sesay."

12 There, Your Honours can see the conversation that took  
13 place where they informed him he had been arrested in relation

to

14 charges laid by the Special Court, and so on.

15 There is no evidence before this Court that these rights  
16 were adhered to. It cannot be the case that the CID -- let me  
17 start that again. It cannot be the case that the prosecuting  
18 investigators could leave that to the CID. The order was to

the

19 Registrar of the Special Court in this regard, and it was  
20 incumbent upon the Prosecution investigators to ensure that it  
21 was complied with. It may be that if they came to court they

22 would say it was complied with but, at the moment, we do not  
23 know. But we submit it wasn't. And when one -- sorry, Your  
24 Honour.

25 JUDGE BOUTET: Are you suggesting -- I don't know the  
facts  
26 so I'm just trying to understand what you're getting at --  
27 because are you suggesting and saying that the arrest by CID  
was  
28 done pursuant to the arrest -- warrant of arrest issued by  
29 Justice Thompson at the time? Because he could have been

SCSL - TRIAL CHAMBER I

1 arrested under the authority of the police of Sierra Leone at  
2 that time, CID, whatever it is. I say this because if you  
look  
3 at the order issued by Justice Thompson, the second part:  
Hereby  
4 orders relevant authorities of the Government of Sierra Leone  
to  
5 do (a), (b), (c). So it depends who is doing what. So, if  
6 you're talking of the Registrar, I think the Registrar cannot  
7 necessarily impose or order the police of Sierra Leone to do  
8 certain things. I'm just trying to follow your reasoning,  
9 Mr Jordash; I'm not challenging you. I'm just trying to  
10 understand what it is that happened and what it is that you're  
11 saying took place.

12 JUDGE ITOE: I merely want to speculate that if he was  
13 arrested on 10 March, and the warrant is dated 7 March, well,  
it  
14 could well be it was in execution of the warrant signed by  
15 learned Justice Thompson. But, here again, we need to inform  
16 ourselves, you know, as to how it was done. The CID arrested  
17 him. Morissette and Berry met him and picked him up from the  
18 CID. Certainly this must have been in execution of this  
warrant  
19 which was signed on 7 March 2003, unless they arrested him for  
20 some other offence, soon after the signature of this warrant,  
21 which is a fact that is difficult for us to determine here.

impossible. 22 MR JORDASH: Yes; without evidence, it's almost

23 PRESIDING JUDGE: Yes, Mr Harrison.

24 MR HARRISON: I apologise for intervening, but there  
25 actually is a court filing sent in by the Registrar, and it's  
the  
26 fifth court filing in the Sesay trial, and it's pages 40 to  
62.

27 I think what I'll do is I'll ask Mr Hardaway to perhaps go and  
28 make ten photocopies right now, because it seems to be the  
29 information that Mr Jordash would find helpful in making any



1 further comments.

2 PRESIDING JUDGE: Mr Jordash; you find that helpful?

3 MR JORDASH: We [overlapping speakers].

4 JUDGE ITOE: But can you give us a resume of what might  
5 interest Mr Jordash?

Jordash

6 MR HARRISON: I was just going to suggest that Mr

7 might want to have the benefit of reading it before I gave a  
8 resume.

9 JUDGE ITOE: That's all right. That's okay.

10 PRESIDING JUDGE: Out of an abundance of caution.

content

11 MR HARRISON: I leave it to Mr Jordash. I'm quite

12 to make ten copies first and then he can look at it.

13 PRESIDING JUDGE: Mr Jordash, would you prefer to have a  
14 resume before or --

15 MR JORDASH: I'd like to see it first.

16 PRESIDING JUDGE: Quite.

turn

17 MR JORDASH: But could I have a quick look at it now,  
18 please? Yes, I'd like a copy. I'm not sure that much will

19 on this. What it seems to indicate is that the arrests --

you

20 JUDGE ITOE: Mr Jordash, may we also have copies before

21 comment on it?

22 MR JORDASH: I'll leave this point and --

23 PRESIDING JUDGE: I'd rather that you reserve that for  
24 later until you've digested the material.

25 MR JORDASH: Certainly. If I may briefly say, though,  
it

26 does look as though the arrest took place by the CID, and that  
27 was the order, but the point does remain that there's no

28 evidence -- there is evidence that on 10 March Mr Sesay signed  
to

29 indicate that he'd received warrant of arrest, and I think the

was.

Island,

the

to

back

worked

the

must

1 indictment, but that isn't timed. So it's unclear when that

2 There is some indication that that took place on Bonthe

3 which presumably would have been after his interview, given

4 statements of Mr Berry and Mr Morissette, who whisked him away

5 the OTP office straight after his detention. But I'll come

6 to those submissions when I've had a chance to look at them

7 properly.

8 JUDGE ITOE: I didn't see, from the way things were

9 out between the Government of Sierra Leone and the United

10 Nations, the arrest could only have been effected under the

11 [indiscernible] agreement by the local police.

12 MR JORDASH: Yes.

13 JUDGE ITOE: The arrest is by them and then they hand

14 person over to the Special Court, and I'm sure that's what

15 have happened. I don't think it is Morissette or Berry who

16 arrested Mr Sesay directly. No, I don't think so.

17 MR JORDASH: But the point -- well, I will leave it at

18 that, but I think the point will still remain that there's no

19 evidence that -- in fact, I'm going to leave it there until I

20 read those documents properly.

21 There is another point which is raised by the warrant of  
22 arrest and Your Honours will find that --

23 JUDGE ITOE: You are through with all the issues you had  
to  
24 raise with (C)?

25 MR JORDASH: With (C) until I've read the -- that  
document.

26 JUDGE ITOE: All right.

27 MR JORDASH: But there is another issue I would seek to  
28 raise, which is paragraph (B), at the bottom, whereby the  
29 relevant authorities of the Government of Sierra Leone were

may

1 ordered to transfer the accused to the custody of the Special  
2 Court without delay, or to such other place as the President  
3 decide.

of

is

The

4 We would submit that taking Mr Sesay straight to the  
5 Prosecution Office was a breach of that order. He should have  
6 been taken to the custody of the Special Court and the point  
7 about that is that he would have been then under the auspices  
8 the Registry, not under the auspices of the Prosecution, which  
9 where he was when taken straight to the Prosecution Office.  
10 reasons for that, we submit, are obvious.

part

11 JUDGE ITOE: Mr Morissette and Mr Berry are not part of  
12 that structure of the Special Court in relation to these  
13 particular transactions?

14 MR JORDASH: I beg your pardon; sorry, Your Honour.

15 JUDGE ITOE: Messrs Berry and Morissette, are they not  
16 of the structure of the Special Court for these purposes?

office

raised,

17 MR JORDASH: Well, let me answer that in this way: If  
18 Mr Sesay had been whisked away by the Defence Office to an  
19 outside of the Court, eyebrows would certainly have been  
20 and we submit the same eyebrows would raise if a party to an

21 adversarial proceeding --

be

22 THE INTERPRETER: Your Honours, would learned attorney

23 asked to repeat what he said.

24 PRESIDING JUDGE: Counsel, they are asking you kindly to  
25 repeat what you've just said.

26 MR JORDASH: Let me answer it more simply: I think  
27 Your Honours understood where I was going. If the Prosecution  
28 were a party to an adversarial proceedings, the arrest was  
29 effected on behalf of the Registrar, the parties ought to have

1 then made their approaches to the Registrar. Mr Sesay ought  
to  
2 have been protected by the Registrar; he should not have been  
3 whisked away to a party in the adversarial proceedings without  
4 first receiving the protection of the Registry.

5 If he had been whisked away by the Principal Defender,  
if  
6 there had been one at the time, it would have been a problem,  
and  
7 no -- but less of a problem in terms of securing Mr Sesay's  
8 rights, than whisking him away to the protection -- so-called  
9 protection of the OTP.

10 JUDGE BOUTET: But this is not the question, if I may,  
with  
11 due respect; my learned brother Justice Itoe just asked you if  
12 they were a member of the Special Court. Whether or not -- I  
13 mean, I would argue with you the Defence Office is also part  
of  
14 the Special Court. I mean, it's just the plain wording of  
that.

15 You are alleging here a violation. There was a breach of this  
16 provision (B). The question that was asked of you, simply  
was:

17 Isn't Morissette and Berry not part of the Special Court.  
That's

18 the question. There is no conclusion as to whether there was  
a

by  
is  
that

19 breach or not. And you answered, "Well, if it had been done  
20 the Defence, it wouldn't have been acceptable." Your position  
21 not whether it is acceptable or not. You say there has been a  
22 breach because they were taken by Berry and Morissette, and  
23 provision reads, the Special Court -- return to the custody of  
24 the Special Court.

25 MR JORDASH: The custody of the Special Court is not the  
26 same as the custody of the Prosecution.

27 JUDGE BOUTET: That's okay. If this is your position,  
28 that's fine.

29 MR JORDASH: It's not my position, it is the position.



1           JUDGE ITOE: Mr Jordash, the Special Court has three  
2           statutory organs: Chambers, the Prosecution, and the  
Registry.  
3           Forget about the Principal Defender. He's not one of the  
arms,  
4           you know. Would it have made a difference? You know, if he  
went  
5           to Court here, it's a question of transferring him to the  
Special  
6           Court. It is not transferring him to the Registrar, certainly  
7           not to Chambers, anyway. So there we are.  
8           MR JORDASH: One has to look at the purpose of this  
9           provision. What was the purpose of ordering that the accused  
be  
10          transferred to the custody of the Special Court without delay,  
or  
11          to such other place as the President may decide? That  
provision  
12          can also be read alongside the provision that a member of the  
13          Office of the Prosecutor may be present from the time of  
arrest.  
14          What would be the point of an order such as this to transfer  
him  
15          into the custody of the Special Court?  
16          JUDGE ITOE: I was just making the remark, the Special  
17          Court is, to borrow your words, a big elephant, You know; it  
is  
18          divided into parts.

Second

19 MR JORDASH: Perhaps I'm not putting my arguments very  
20 well. Perhaps the best way to put my arguments is this:

21 paragraph D:

relevant

22 "The transfer shall be arranged between/with the

and

23 national authorities of the Government of Sierra Leone

24 the Registrar of the Special Court."

involved

25 Therein lies the breach. Why wasn't the Registrar

Court?

26 in transferring the accused to the custody of the Special

27 Why was it that it was the CID of Sierra Leone and the

custody

28 Prosecution who were involved in transferring him to the

29 of the Prosecution Office?

1 JUDGE ITOE: Again, we do not know. I mean, these are  
2 things -- we didn't leaf through what actually happened on the  
3 ground.

4 MR JORDASH: Exactly.

know,

5 JUDGE ITOE: We can only speculate. Could it be, you

arrested

6 that the Registrar, upon being informed that he had been

7 decided to dispatch the competent organ to go and take care of  
8 all that, instead of he himself doing it.

9 MR JORDASH: Well --

I

10 JUDGE ITOE: As I say, this can only be a speculation.

Registrar

11 don't think -- but it will also be the reality that the

was

12 did not think that he should get involved in this and that it

13 the Office of the Prosecutor that was supposed to take care of

by

14 those particular procedures, the accused having been arrested

15 the local authorities.

that

16 MR JORDASH: Well, we don't know. That's the problem

17 we have, because we don't have the evidence. Can I --

determine

18 JUDGE ITOE: We don't have the evidence either, and it's

19 difficult to determine the breach. It's difficult to

20 whether there has been a breach or not.

21 MR JORDASH: And in light of the Prosecution burden of  
22 proof, Your Honours must conclude, in the light of that  
23 difficulty, that the Prosecution haven't discharged their  
burden  
24 of proof.

25 Could I ask the learned legal officer, please, to give  
26 Mr Sesay his skeleton back, which I think was removed from him  
27 last night.

28 JUDGE ITOE: Your skeleton reads Honourable Justice  
Pierre  
29 Boutet presiding.

1 MR JORDASH: I did mean to raise this yesterday,  
actually.  
2 It was an old template which I -- no disrespect to the present  
3 presiding judge.  
4 JUDGE ITOE: No, no, no. That's all right. We know it  
was  
5 an error.  
6 PRESIDING JUDGE: Sometimes it's good to take us back in  
7 time like Star Trek.  
8 MR JORDASH: I'm not sure I --  
9 JUDGE ITOE: You're reminding us of history.  
10 MR JORDASH: Just returning, I want to try to move as  
11 quickly as I can. The Prosecution referred yesterday to the  
12 visit to Mr Sesay of three lawyers, one lawyer from the  
Registry,  
13 one lawyer -- or duty counsel. The situation --  
14 JUDGE ITOE: Mr Jordash, what paragraph is that, please?  
15 MR JORDASH: This was part of the Prosecution's  
submissions  
16 yesterday.  
17 JUDGE ITOE: Oh, okay. All right. Sorry.  
18 MR JORDASH: In summary, it was, well, he was seen by  
19 lawyers, therefore, one can -- they didn't complain. One can  
20 therefore infer from that that what the Defence now say cannot  
be  
21 true or cannot be relied upon. The situation is a little more

22 complex than that.

23 Firstly, if I can ask Your Honours to turn to page 311,

24 Mr Berry's statement, the bottom paragraph, the first time  
that

25 there's a discussion there, in the second bottom paragraph:

26 "In relation to contact by Defence counsel with Issa  
Sesay

27 while at the OTP office, there have been three occasions

28 when the Defence came. Yeah. The first time was by

29 Beatrice Urech."

1 I think her name is Utrech, but it doesn't matter.  
2 "Defence lawyer from the Office of the Registry, who  
came  
3 to have a rights advisement form signed by Issa Sesay.  
She  
4 did not have the form signed in front of herself, but  
was  
5 done by Gilbert and returned to her."  
6 It is quite clear this lawyer did not see Mr Sesay,  
wasn't  
7 present during the obtaining of the waivers, which, of course,  
8 raises an issue itself: Why not? Why was it done by  
9 Mr Morissette and Mr Berry in this way? What would have been  
the  
10 harm in allowing this lawyer access to Mr Sesay, proper  
access?  
11 That was on 11 March, I think.  
12 Now, according to Mr Berry, going over the page: "The  
13 second time was on 13 March when a female Gambian lawyer from  
the  
14 Registry attended and spoke privately with Issa Sesay." And  
then  
15 you have the assertion there, "No time did she indicate to  
me,"  
16 and so on.  
17 Well, let me read it, in fairness: "At no time did she  
18 indicate to me that she had any concern about the fact that  
Issa

present

19 Sesay was speaking to an investigator from the Office of the  
20 Prosecutor and never requested that she be allowed to be  
21 during the interview."

22 JUDGE BOUTET: What are you reading from, Mr Jordash?

23 MR JORDASH: Mr Berry's statement, at page 312, 17 April  
24 2003. Does Your Honour not have a copy?

copy.

25 MR HARRISON: I can tell you where you can find the

26 In the Prosecution's book of authorities, if you go to tab 5 -

-

27 sorry, tab 6.

28 JUDGE ITOE: Mr Harrison, your green book?

29 MR HARRISON: We'll just call it OTP book of authorities



1 from now on, I think. It's tab 6. I can't recall the page  
2 number, but I think the Court Management page number is on  
there.

3 MR JORDASH: Thank you. That was on 13 March. I make  
no  
4 comment at this stage about the assertion there concerning  
what  
5 the female Gambian lawyer did, which was almost certainly  
6 Mrs Kah-Jallow.

7 But what I would submit is this: There follows from  
here a  
8 real problem. This was on 13 March. If I can ask Your  
Honours  
9 to turn to the waivers for the 14th. Sorry. I beg your  
pardon.  
10 I will try to do this in chronology. The next time was 24  
March:

11 "Again, same lawyer attended (according to Mr Berry) and  
12 had him witness a note which she had prepared,  
indicating  
13 that Issa Sesay did not want a local lawyer to represent  
14 him, but instead was requesting that they get him an  
15 American or British lawyer by the name of Robertson. At  
no  
16 time did she raise any issue with me or indicate she had  
17 any concern of Issa Sesay speaking with an investigator  
18 from the Office of the Prosecutor with request to be  
19 present."

20            Now, whatever the intervention of the duty counsel, it's  
21            quite clear on the available evidence that a huge problem  
arose.

22            And the huge problem is evidenced by a note, which Your  
Honours  
23            will find in the Defence bundle at annex B. This may be the  
most  
24            powerful piece of evidence, aside from the comment made by  
25            Mr Sesay in his interview, indicating why he had been saying  
yes  
26            to the waivers in this whole issue.

27            Your Honours, page 29649. 29649.

28            JUDGE BOUTET: Of what?

29            MR JORDASH: Of annex B.

1 JUDGE BOUTET: It's not bundle B, it's annex B.

2 MR JORDASH: Annex B of the Defence main bundle. This  
3 document, more than any other document, demonstrates that

there

4 was something wrong with how Mr Sesay was treated and  
5 demonstrates that the protections which ought to be afforded

to

6 an accused in this situation were almost wholly denied. It's

a

7 statement which reads: "I, Issa Sesay, I want Mr Robertson to  
8 present me and not Mr Edo Okanya."

9 Signed by Issa Sesay, witnessed by John Berry. Not  
10 witnessed by duty counsel, but by a member of the Prosecution.

I

11 cannot conceive, and I'd ask this Court to consider the same  
12 question, of any situation where it would be proper for a

with

13 Prosecution investigator to have anything to do whatsoever

place

14 an accused's choice of counsel. Whatever discussions took

discussions

15 around this document, they were privileged. Whatever

the

16 took place around this document should not have been heard by

17 Prosecution.

impropriety

18 This demonstrates, more than any document, the

19        which the Prosecution were engaged with.  They placed  
themselves  
20        into de facto custodians for Mr Sesay, and de facto  
21        representation of a quasi legal nature.  That's the only  
22        reasonable explanation for why a member of the Prosecution  
would  
23        be witnessing a statement dealing with Mr Sesay's legal  
24        representation.  
25                This alone, we would submit, requires explanation from  
the  
26        Prosecution investigators, as to how this situation arose.  
They  
27        cannot assert on the one hand that Mr Sesay voluntarily waived  
28        his right to counsel and, on the other hand, be intervening  
with  
29        his choice of counsel, or certainly being involved in some  
way,

1 peripheral or otherwise, in his choice of counsel. And with  
no  
2 disrespect to the duty counsel, whatever role was played by  
the  
3 duty counsel must be seen in that light.

4 The fact that Mr Berry sees or saw no problem with that  
is  
5 also indicative of where he was operating when dealing with  
6 Mr Sesay. It's quite clear from the available evidence, we  
would  
7 submit, that Mr Sesay was not protected in this situation.

8 This becomes clearer from the -- well, this is fortified  
by  
9 the transcripts. If I can ask Your Honours to turn to the 14  
10 April interview. In fact, actually, I'm going to ask  
11 Your Honours to turn to the 14 April waivers where,  
12 notwithstanding the fact that Mr Sesay has now been  
interviewed  
13 nine times, there arises a problem on the waivers. A problem  
14 which, again, we would submit, requires explanation from the  
15 Prosecution.

16 Your Honours, page 28328, 14 April, specific rights  
17 advisement. Therein, John Jones has obviously made contact  
with  
18 the Prosecution and indicates that Mr Sesay has asked to  
19 reconsider any collaboration with the Office of the  
Prosecutor.

20 We would say at this time the Defence Office, John Jones, is  
21 starting to intervene, and Mr Sesay is starting to appreciate  
22 that, in fact, a trick has been played upon him.

23 Your Honours, at page 28329, paragraphs 7 and 8.

24 "Q. Do you want us to tell the duty counsel that you  
are  
25 talking and collaborating with us every time we  
interview  
26 you?

27 "A. Yes.

28 "Q.8. Do you want us to give notice to your duty  
counsel  
29 of all future interviews if you still want to  
collaborate

1 with us.

2 "A. No."

3 The two questions don't make sense and the two answers  
4 don't make sense. The two answers seem to contradict each  
other.

5 Again, demonstrating confusion in the mind of Mr Sesay.

6 Turning the next page to 28330, Mr Morissette arrives  
for

7 this interview, which is the next day, on 15 April 2003.

8 Mr Morissette makes a second appearance in this process,  
having

9 stayed away, it would appear, from the actual interviewing

10 process since 10 March. Mr Morissette arrives and his role

11 appears to be to try to firm up, we would say, Mr Sesay, who's

12 now starting to realise the trick has been played.

13 He's then asked two questions to try to clarify the  
answers

14 from the day before:

15 "Q.7. Do you want us to tell the duty counsel that you  
are

16 talking and collaborating with us every time we  
interview

17 you? Yes or no?

18 "A. No."

19 The next question:

20 "Q. Do you want us to give a notice to your duty  
counsel

collaborate 21 of all future interviews if you still want to  
22 with us?  
23 "A. Yes."  
These 24 Two answers in complete contradiction to each other.  
25 require explanation, we would submit. Because, on the face of  
26 it, it shows further confusion in the mind of Mr Sesay.  
with 27 Bearing in mind the intervention and the interference  
28 privileged conversations earlier, this ought to put the Court  
on  
29 notice that further explanation, at the very least, is  
required.



rebutted

were

has

counsel

rights

so

1 We would submit, in fact, that this evidence cannot be  
2 by the Prosecution. They cannot explain why these answers  
3 given. They cannot explain why Mr Berry's signing privileged  
4 documents.

5 I'm coming to an end, Your Honour, as fast as I can, but  
6 there is just so much. It is clear that Mr Sesay does not  
7 appreciate the role of a duty counsel. It matters not what  
8 been explained to him by duty counsel. What matters is his  
9 understanding of it. What matters is also this: That the  
10 Prosecution had a duty to explain what the role of duty  
11 was, and had a duty to explain accurately. They can't have it  
12 both ways: Whisk Mr Sesay away into the custody of the  
13 Prosecution, but then don't take efforts to explain what  
14 lie outside of that office.

15 Can I ask Your Honours to turn to the first appearance  
16 transcript. I don't know if Your Honours have that.

17 PRESIDING JUDGE: If we don't, we'll go along with you  
18 that we don't --

19 MR JORDASH: Let me deal with it --

20 PRESIDING JUDGE: We have it here.

21  
Prosecution.

MR JORDASH: I did send a belated email to the  
22 I apologise if they didn't get it. It was quite late in the  
23 morning.

24 Perhaps I can deal with it quite swiftly in that we've  
25 attached a skeleton to our bundle which refers to this.  
26 Your Honours will see from the skeleton, page 1, on 15 March  
27 2003, Mr Sesay had his first appearance.

I'll

28 I can see the Prosecution don't have the transcript.  
29 refer to the chronology which refers to the transcript of the

1 first appearance. 15 March 2003, first appearance before His  
2 Honour Judge Itoe. Mr Sesay, in response to a question by the  
3 learned judge, "Do you have a lawyer?" Mr Sesay says, "This  
is  
4 my first time I've been in court so I don't have any lawyer."  
5 When Mr Sesay said that, he had, I think, three members of the  
6 Defence Office sitting behind him, but it would appear that he  
7 didn't perceive them to be lawyers for him.

8 Moreover, it is clear from his answers and it was clear  
to  
9 prosecuting counsel, Mr Johnson, at the time, going over the  
10 page, Mr Sesay did not have a clear understanding of the  
charges.

11 Now, Mr Sesay had been in the Prosecution custody from  
10  
12 to 15 March. He had been interviewed four times -- five times  
by  
13 them, and yet Mr Johnson felt compelled to get to his feet and  
14 say that the accused did not understand the charges. Yet,  
15 Mr Sesay has been interviewed, rigorously, by the Prosecution.

16 Your Honours will also understand or recall, perhaps  
17 certainly Judge Itoe will recall, that the indictment had to  
be  
18 read to Mr Sesay because he said at the time, and this was  
19 before, in his mind, he had a lawyer, that he hadn't read the  
20 indictment. The reason he hadn't read the indictment was  
because

him  
be

21 of the conditions in Bonthe, which made it very difficult for  
22 to read at night, and during the day he was being taken out to  
23 interviewed. But that's his understanding on 15 March --  
24 sorry -- yes, 15 March; that he doesn't have a lawyer,  
25 notwithstanding the presence of the Defence Office.

26 If I can take Your Honours to the interview of 14 April.  
27 There is further evidence that Mr Sesay has no clue what the  
28 Defence Office are supposed to be doing, or that he can access  
29 them to protect his rights in interview.

I

1 Your Honour, page 29521. Mr Morissette has turned up.

2 beg your pardon, no, he hasn't. This is Mr Berry. On page

3 29520, there is a question by Mr Berry:

or

4 "Q. Do you want to stop talking to us right now? Yes

5 no?

6 "A. I have things to still clarify with you people. I

7 have said things to people that I still need to clarify,

8 you know, then there is no need for me to say I'll stop

9 talking with you.

10 "Q. Okay, so the answer is no; am I correct.

11 "A. Yes, you are right, sir."

12 Then this is the key aspect:

the

13 "Q. Do you want your duty counsel to be present during

14 interview? Again, it's either yes or no.

15 "A. My?

16 "Q. A lawyer to be present when we interview you.

17 "A. Well, my lawyer is not yet -- I don't have a lawyer

18 yet.

19 "Q. Okay. That's why I said duty counsel. The duty

20 counsel would be a lawyer that's appointed temporarily,

beginning

21 like the person that came and saw you here at the

22           there. Remember the lady that came and see you, she's a  
23           duty counsel. This person is also a duty counsel. Do  
you  
24           want any duty counsel to be present?  
25           "A. No."  
26           Of course, that answer, if it was left alone, would  
enable  
27           the Prosecution to say, "Well, there you have it. The  
28           Prosecution investigator said to him, 'You have a right to  
duty  
29           counsel, they're your lawyers.'" If it ended there, there  
would

1 be nothing wrong with that. But it doesn't end there.

2 Reading on, question at line 25:

us

3 "Q. There's a couple more questions here. Do you want

4 to tell the duty counsel that you're talking and collaborating  
5 with us every time we interview you? Do you want us to inform  
6 them, to tell them?

thing, I

7 "A. Well, that -- they will not inform my friends over  
8 there, so that I will not be -- I mean, they will not be  
9 looking at me awkward, you know, because the whole

think

10 don't -- the date, the trial, okay, but, you know, I

11 it's too early now for these guys to know that: Oh, our  
12 man is going against us, he is telling a story about us,  
13 you know."

mind

14 So Mr Sesay thinks the duty counsel have no duty of  
15 confidentiality. That's not access to a lawyer. Why was it  
16 Mr Berry didn't take steps at that point to reassure Mr Sesay  
17 that they had a duty of confidentiality. A duty of  
18 confidentiality which had been significantly eroded in the

just

19 of Mr Sesay, since Mr Berry had signed that document we've  
20 looked at.

21 Then, over the page, the misrepresentations continue.

22 Number 9:

As

23 "Q. Okay, it's important that we have a clear answer.

you

24 you know, it's your right to have a duty counsel. If

your

25 want to have a right duty counsel to be present, it's

to

26 right. But if you don't want, it's a decision you have

27 make."

28 There is no attempt by Mr Berry to correct the

29 misapprehension. Why would Mr Sesay have said, "Well, I want



1 duty counsel to be present, even though I think that they're  
2 going to tell everybody else what I'm doing." That is not  
access  
3 to a lawyer.

4 Then we go over the page to 29523, question halfway down  
5 the page: "I don't follow," says Mr Berry. Sorry, let me go  
6 further up. No, I won't. I beg your pardon. 29522, the  
bottom  
7 of the page. Mr Sesay is asked at line 3 there:

8 "Q. And the last question, number 8, do you want us to  
9 give notice to your duty counsel of all future  
interviews  
10 if you still want to collaborate with us? Yes or no?

11 "A. So every interview we have?

12 "Q. So every time we talk, we'll inform them and every  
13 time, in the future, like today, we'll inform them and  
if  
14 we talk again tomorrow or next week, or whenever, we'll  
15 inform the duty counsel.

16 "A. Yes."

17 So whatever we discuss here, Mr Sesay is asking whether  
18 that means, by informing the Defence counsel, will the  
19 Prosecution be informing them of the contents of the  
interview?

20 Mr Berry says:

21 "Q. Not of what we've discussed no, no, no. What we're

22 discussing here is in straight confidence with us. But  
23 we'll tell them that we're discussing with you.

24 "A. Okay.

25 "Q. If you want us to do it, it's your decision.

26 "A. But I'm seeing interviews. Now they're going to go  
27 through the interviews we're having."

28 Mr Sesay still doesn't understand that his fellow  
detainees  
29 are not going to find out about the contents of the interview.

1 "Q. Excuse me.

2 "A. They're going to go through the interview we're  
3 having?"

4 Mr Berry feigns misunderstanding:

5 "Q. I don't follow. Do you mean they'll be present or  
6 they're going to -- remember we're talking about a duty  
7 counsel. This is not your permanent lawyer, your

appointed

8 lawyer, because you don't have an appointed lawyer yet.  
9 He's telling us in the letter (this is referring to the  
10 John Jones letter) that he hopes to have a letter

appointed

11 for you."

12 Then further down the page:

13 "So this is the duty counsel here we're talking about,  
14 your lawyer."

not

15 So this doesn't clarify the situation for Mr Sesay.

This

16 simply reinforces his notion that he has to wait for his

lawyer

17 to be able to disclose anything. This misapprehension is not  
18 corrected by the Prosecution investigators. Why didn't they  
19 simply say, "Duty counsel are the same as your counsel. They  
20 cannot say anything to anyone about what you are doing or  
21 saying."

22           Then Mr Sesay shows further lack of understanding at the  
23 bottom of the page, when he says, "But he's not the one who is  
24 going to choose a lawyer for me." Then the answer over the  
page,  
25 "No, you choose the lawyer."

26           Mr Sesay doesn't even know he has the right to choose a  
27 lawyer. He believes that right lies within the realms of John  
28 Jones, the Acting Principal Defender.

29           And it goes on, unfortunately, into 15 April, at page

1 29529. Looking at this interview, Mr Morissette has turned up  
2 and is now purporting to be clarifying the questions we saw  
3 earlier on the waiver. One can see from page 28529  
4 Mr Morissette's attempt, if it be that, to clarify the two  
5 questions. I would ask Your Honours to read that explanation  
and  
6 consider whether that is an adequate explanation to an accused  
7 such as Mr Sesay at that time, with all his characteristics  
and  
8 his lack of experience, whether that is an adequate  
explanation  
9 for the issues at hand. Personally, I submit, I can't  
understand  
10 what he says. This is Mr Morissette's attempt to explain his  
11 rights to somebody -- the rights to Mr Sesay, whose language  
is  
12 not first -- whose first language is not English.  
13 Then Mr Sesay says, at line 21, again showing lack of  
14 understanding, "But by informing them," meaning the Defence  
15 Office, "I mean, they will not know what we are discussing?"  
16 Mr Morissette, "No. Your lawyer will know. Eventually, when  
we  
17 have a lawyer appointed to you, we'll disclose the material to  
18 your lawyer."  
19 Again, another lost opportunity from the Prosecution to  
say  
20 to Mr Sesay, "They are your lawyers. You can use them as your

21 lawyers, until you get a permanent lawyer. They are the same.  
22 They must be confidential."

23 Then going down the page, Mr Sesay shows what his  
24 understanding of the role of the duty counsel's role is, "And  
the  
25 duty counsel, they have -- they have the authority by, you  
know,  
26 allowing visitors like my families, especially mother, aunty,  
27 uncle." That's Mr Sesay's understanding of the lawyers, of  
duty  
28 counsel.

29 Over the page, 29530, Mr Morissette, at the top of the

1 page, then tells the first accused that the privilege for  
2 visiting, that's done under the Rules of the Tribunal and  
comes  
3 under the Registrar, so tries to correct that misapprehension,  
4 telling that -- he corrects that misapprehension, but not the  
5 others. The interviewee, Mr Sesay, "Well, when bringing me, I  
6 mean, you don't need to inform them. But if I'm here, then if  
7 they can be informed, no problem." It doesn't make sense,  
8 because it makes no sense to Mr Sesay.

9 I, at this point, refer Your Honours to the case of  
10 Bagosora, which we looked at yesterday, where there was an  
11 indication from the accused that he didn't understand when  
12 counsel could be brought into the frame, that he expressed a  
13 statement which indicated that he thought he might have to be  
14 told the charges and, at that point, that he could have a  
right  
15 to counsel.

16 These misunderstandings go much further than the case of  
17 Bagosora. These misunderstandings go right to the heart of  
his  
18 legal privilege, right to the heart of his understanding of  
his  
19 access to a lawyer through the Defence Office, and go right to  
20 the issue of him requesting and lawyer and being told they're  
not  
21 available. That is just one aspect of our submissions. One

a 22 single statement in the case of Bagosora led to exclusion, not  
23 voir dire, but exclusion.

24 There is one other aspect I want to draw Your Honours'  
25 attention to. There is a confession on these statements and

it

would 26 relates to an offence against Johnny Paul Koroma's wife. I

27 ask Your Honours to consider the transcripts about how this  
28 confession comes about.

29 On 18 March -- I won't take Your Honours to it, because



1 Your Honours can look at it --

2 JUDGE ITOE: Where is the page again? What page is that  
3 confession?

4 MR JORDASH: On 18 March -- let me find it. It's page -

5 what I was going to take you to first was the denials, which  
6 preceded the confession, if I may just do it in that way.

7 get straight to the confession after the two denials.

8 PRESIDING JUDGE: We'll accede to your preference.

9 MR JORDASH: The point is this: There is a huge amount

10 pressure being placed upon Mr Sesay, we submit, behind the  
11 scenes. This is the heart of our submissions, this is why it  
12 cannot be considered on the transcript alone.

13 Now, on 18 March, page -- I beg your pardon; I don't

14 to make an error. Yes, on 18 March, Mr Sesay, at page 29137,

15 won't ask Your Honours to turn it up, I can do it quite

16 Mr Sesay denies any wrongdoing or that anything happened to  
17 Johnny Paul Koroma's wife.

18 On 31 March, the same questions are put as pressure is  
19 piled upon Mr Sesay, we say, to confess to something he hasn't  
20 done in relation to Johnny Paul Koroma's wife. And Your

21 will find that --

22 JUDGE ITOE: You started off with 29137?

23 MR JORDASH: I beg your pardon?

24 JUDGE ITOE: You started off with 29137?

25 MR JORDASH: Yes. There is a discussion there, you'll  
see,

26 what is happening with Johnny Paul Koroma and his wife when  
they

27 arrive in Kailahun. You see, what we submit is that the

28 Prosecution had information which related to an offence  
against

29 Johnny Paul Koroma's wife. What they wanted was a confession

1 from Mr Sesay. We say the confession that they eventually  
2 obtained was false and was involuntary. The point is simply  
made  
3 that on 18 March he denies it. On 31 March, notwithstanding  
huge  
4 pressure, he denies it.

5 JUDGE ITOE: This is on page what, again, please, the  
6 second denial?

7 MR JORDASH: The second denial is 29363 and it goes on  
to  
8 29376. Actually, I think I've got this. I think that is  
9 where -- I beg your pardon for this. My notes are -- it's  
10 actually on this date where the confession comes, on 31 March.

11 The point is this: Just before the break, just before  
the  
12 confession comes about, page 29362, you have a break before  
that  
13 confession from 12.45 to 2.31, a break of one hour 45 minutes,  
14 and that's when the pressure was really piled on. That's when  
15 the threats were made, that's when the coercion was turned up.

I  
16 urge Your Honours to compare that to other breaks at page  
17 28424 --

18 JUDGE ITOE: Please, we are not yet -- we are not  
keeping  
19 the rhythm of your paging.

20 MR JORDASH: Sorry, 29362, Your Honour.

21 JUDGE ITOE: Where is -- there were two denials. We  
didn't  
22 quite sort out the second, then you went on to the confession.  
23 Is the confession on 29362?  
24 MR JORDASH: Let me just find the denial.  
25 JUDGE ITOE: And the pressure you're talking of, you  
know.  
26 MR JORDASH: 13 March, page 33 of the interview, there  
is a  
27 denial.  
28 JUDGE BOUTET: You say 13 of March now?  
29 MR JORDASH: There is a denial of a general nature in  
the

1 13 March interview at page 33.

2 PRESIDING JUDGE: Was there a denial on 18 March, also?

3 MR JORDASH: On 18 March --

4 PRESIDING JUDGE: At page 29137?

5 MR JORDASH: There is another denial. A more specific  
6 denial in relation to Johnny Paul Koroma's wife.

7 PRESIDING JUDGE: Alleged crime against her.

8 MR JORDASH: Then, eventually, on 31 March, after an  
hour  
9 and 45 minutes had been taken for lunch, immediately  
thereafter,

10 there is the confession. We would submit --

11 JUDGE ITOE: And this is on page what?

12 MR JORDASH: What's on page what, Your Honour?

13 PRESIDING JUDGE: 31 March, which page is that?

14 JUDGE ITOE: What page is that, that confession?  
Because  
15 we've been working on the pages.

16 MR JORDASH: 31 March --

17 JUDGE BOUTET: 29376?

18 MR JORDASH: -- is 29364 all the way to 29376.

19 PRESIDING JUDGE: Perhaps we can take the break now.  
When

20 we come back, you can gather the threads all over again in the  
21 form of a summary.

usual

22 MR JORDASH: I'm just about to get to that summary.

23 PRESIDING JUDGE: Very well. We'll break now for the

24 morning break.

25 [Break taken at 11.33 a.m.]

26 [RUF06JUNE07B - MC]

27 [Upon resuming at 12.05 p.m]

28 PRESIDING JUDGE: Mr Jordash, let's proceed.

29 MR JORDASH: Thank you, Your Honour. I'm moving to the

SCSL - TRIAL CHAMBER I

1 end.

2 You will, Your Honours will see from Mr Morissette's  
3 statement, he refers at the end of that statement to a number  
4 cases which he has -- it is difficult to see what he is saying  
5 but he's personally aware, he says, at page 345, of numerous  
6 interviews of ICTR suspects who waive their right to counsel.  
7 This is offered by Mr Morissette as proof of his experience.  
8 From that, we are expected to infer something.

9 But it is right to note, if Mr Morissette was involved  
10 these cases, there is something which ought to be brought to  
11 Honours' attention that of these cases mentioned by Mr  
12 Ruggiu pleaded guilty, Kambanda pleaded guilty, so there is no  
13 issue arose in relation to the interview.

14 Kabiligi, the issue was, as we've seen in the Bagosora  
15 case, and the interview was ruled inadmissible, Kajelijeli,  
16 we have here, the interview, the arrest was ruled illegal  
17 the tribunal Prosecution investigators or the Prosecution had  
18 failed to properly inform the accused of his reasons for his  
19 arrest, and I provide the copy to Your Honours.

20 So, Mr Morissette's assertions as to good practice need

of

in

Your

Morissette

which

because

to

into 21 be contextualised. And, interestingly, when a search is put  
to 22 Westlaw about involuntary interviews, the two cases which come  
23 mind, or which come up on that search are Kajelijeli and  
24 Kabiligi, both of which it appears Mr Morissette was involved  
25 with.

important 26 And there is another aspect, and I do think it is  
27 that the professional conduct of these investigators is  
the 28 considered in the round. This is not simply to sling mud in  
29 hope that some of it will stick; this is putting their past



1 practices into context and asking Your Honours to infer from  
that  
2 that along with the available evidence which is significant,  
we  
3 would say, that these are not investigators who acted  
properly.  
4 And I would like Your Honours, please, to have a look at the  
way  
5 in which they treated another interviewer, interviewee at the  
end  
6 of 2002.

7 JUDGE BOUTET: By the way, what did you do with the  
8 transcript of another interview yesterday? Whatever it was.

9 MR JORDASH: Well, nothing has been done with it. I  
10 suppose what I will do at the end, if I may, is just ask for  
11 everything I have relied upon to be before Your Honours,  
either  
12 as an exhibit or simply for Your Honours' consideration,  
13 including all the cases mentioned in skeleton argument, even  
if I  
14 have not referred to them in oral submissions, and all the  
15 materials supplied in the two bundles.

16 Your Honours, do Your Honours have a copy of the  
interview?  
17 That's the one. The name will be instantly familiar. Morris,  
18 refers to Gilbert Morissette. Alan, refers to Alan White and  
19 it's right to note that Alan White was in charge of these

20 investigators at the time when Mr Sesay was interviewed. We  
21 would say he can cast some light on the issues at hand.

can

22 This interview took place on 17 October 2002, and if I  
23 briefly refer you to portions of it. At page 5, at the  
24 beginning, at the bottom of the page there, Mr White says:

25 "Okay. We have been lenient with you. Just write the  
26 whole statement right. You've got time and opportunity  
27 think yourself and talk about what happened."

28 Over the page, there is increased pressure placed on the  
29 witness, or the suspect, as he was. "Now, I know" -- second

1 line:

2 "Now, I know you don't want us to walk out of here and  
3 think that this man did not tell us the truth especially  
4 like you believe in God like you said you did."

5 Gilbert Morissette then asked the questions further down  
6 the page, and a good deal of pressure is put on and we

wouldn't

7 submit that that pressure is necessarily wrong, up until page

8,

8 8 at the right-hand corner. Gilbert Morissette:

9 "We would be coming back to you and explain as we said

we

10 would bring a copy of the transcript. For my side there

is

11 one thing I'd like you to think about very seriously at

the

12 time we come back, and I'm serious about this, that I

spent

13 six years in the International Criminal Tribunal in

Rwanda,

14 where you know about the genocide thing that happened.

And

15 the people have been put away for life. You are my

friend.

16 You are not going to be put away for life. You are

going

17 to be found guilty. They're going to take your life

away

18 if you are found guilty. That amounts to death penalty.

19 Now think about that. There is a big difference, the  
20 government court here and the Special Court, but one of  
the  
21 big differences is, and I'm not saying anything to  
threaten  
22 you, I just want to inform you of the big difference  
with  
23 the Special Court is the case that they're going to take  
on  
24 the maximum is life in gaol. This is the maximum  
penalty  
25 and the Government of Sierra Leonean law, the penalties  
as  
26 you know is death. Now, those who are aware have helped  
27 themselves, you know, that will be taken into  
consideration  
28 by the Prosecutor and by the judge. So you know the  
29 difference between spending so many years in gaol or

1 spending all your life in gaol and there are people like  
2 this. They are there and they exist and they are very  
much  
3 interested spending the rest of their life in gaol.  
These  
4 people are the ones like we are collaborating. Is like  
I  
5 explained to you there is a chance. Think about that my  
6 friend."  
7 We submit that that is a clear incident of Mr Morissette  
8 effectively coercing a suspect, using the threat of death  
9 penalty, the threat of life imprisonment, in order to obtain  
the  
10 information he seeks. In order to breach the right to  
11 self-incrimination. And it goes on, page 9, the bottom of the  
12 page. Mr White then comes in.  
13 "People would know you and know you and soon want you to  
14 die. And, and you have a chance, you have a chance  
right  
15 now to tell the truth. For once, tell the truth and  
sleep  
16 off what you did. And, and perhaps help yourself, okay.  
17 People don't make these facts, okay. We would not be  
here  
18 if we don't have information about you."  
19 Then over to page 11. But The witness says:

be 20 "Please sir, before the Special Court would meet I would  
21 noticed back, if there at that time I would be able to  
22 provide a lawyer for myself. I -- I don't want you I  
give 23 accept because to come to me and plead to me. Just to  
24 in in confidence that I'm not the man that they're  
talking 25 about. That's why I spoke to you myself, my lawyer, so  
26 maybe before that I would find a lawyer for myself."  
27 Inveigling, we would say, a suspect into some kind of  
28 improper confidence where a suspect is somehow confused about  
the 29 role of Mr Morissette. And then page 14, Mr Morissette,  
second

1 statement:

2 "Yes, again think about it, you know, justice can be  
done,

3 yes. And it can done and get this private. It can be  
done

4 so that everybody is a winner. They want justice and  
you

5 get also part of this by collaborating with us and you  
save

6 your life."

7 Mr White, appreciating Mr Morissette has gone a little  
too

8 far on tape, he says: "Anyway, just save yourself the rest of  
9 your life in prison."

10 In our respectful submissions, it is as clear as day  
what

11 is going on here.

12 Over the page to page 15, I think six or seven lines  
down:

13 "Forget about what you just said and move forward." This is

14 Mr White:

15 "And tell me the truth and sparing your family  
unnecessary

16 grief that they're going through months of trial that

17 everybody in Sierra Leone would hear and read. And the

18 world and all the newspapers here because believe you,

19 believe you me, the world is watching to see. The world  
is

20 watching so people would know you, the whole, but if you  
21 want to give out the truth, save your family and a lot  
of  
22 grief. I am talking to you, think about, it because if  
you  
23 cooperate and tell us the truth about your involvement,  
and  
24 others, given an opportunity to obviously plead, you may  
25 not, you may not spend the rest of your life in prison."  
26 Mr Morissette:  
27 "And, more important, we can take care of the family.  
We  
28 can take care of your wife. We can take care of your  
29 children. We can bring them anywhere in the world and  
make



done

--

we

good,

is

I

the

nobody,

wrong.

1           sure that the rest of their lives you don't have to be  
2           bothered."

3           Mr White:

4           "We have done this at the other tribunal. They have  
5           this. People that have done similar things that thought

6           denied. This, the game, get away with it. Okay. Think  
7           about it. I wouldn't be here or we wouldn't be here if

8           didn't have good information. Good information from

9           honest, reliable people. For a woman to step out and be  
10          courageous enough to go far at the world to say: 'This

11          what I saw. I am a Sierra Leonean. I ask for this and  
12          am going to do.'"

13          And then the final remark I want to bring Your Honours'  
14          attention to is the next one. Mr Morissette:

15          "Now, let me give you before we send, let me give you  
16          perfect example. This is the best example and it's

17          the Prime Minister, the Prime Minister of Rwanda accepts  
18          and is my case, accept that, 'Yes, I did something

19          We did wrong. And I have to pay for my crimes that I am

the  
his  
are  
the  
talking  
do

20 willing to pay for my crimes, and I am willing to tell  
21 truth to the whole world,' and he did, and we protected  
22 wife and his two children. And they are some -- they  
23 in somewhere in the world today. Changed over. Nobody  
24 knows who they are and he is willing to do his time, and  
25 when his time is finished he is going to join his family  
26 again. Prime Minister Messa so."  
27 These instances, on tape with this witness, are exactly  
28 tenor of character of the kind of pressure which we are  
29 about. And if these investigators considered it was proper to

1 that on tape, we would respectfully ask you to infer with the  
2 rest of the evidence that what was said off tape with Mr Sesay  
3 was much worse.

4 The investigators involved in this case cannot assert  
they  
5 haven't used these techniques in the light of that transcript.  
6 And so, just to summarise, can i just take -- consult my  
learned  
7 friend?

8 PRESIDING JUDGE: Leave granted.

9 MR JORDASH: Before I just move off the interview with  
this  
10 suspect, it's right to note that when life sentences are  
passed  
11 in Rwanda, there life meaning life, the remainder of life, so  
not  
12 only is it pressure, it's improper pressure because Mr  
Morissette  
13 is lying. The Prime Minister of Rwanda isn't going anywhere.

14 PRESIDING JUDGE: It means exactly, mathematically,  
life.

15 MR JORDASH: It means life --

16 PRESIDING JUDGE: Not like the American system of parole  
or  
17 probation, or that kind of thing.

18 MR JORDASH: They're given on the basis of being  
remainder  
19 of life sentences.

20 PRESIDING JUDGE: Yes; okay.

to

21 MR JORDASH: So it's not possible for the Prime Minister  
22 be travelling anywhere.

23 PRESIDING JUDGE: Quite.

is

24 MR JORDASH: So, to summarise, we would say that there  
25 evidence of Mr Sesay's inexperience and distress in interview.  
26 There is evidence that that was due to the whereabouts of his  
27 family not -- him not being aware of his family -- there is --  
28 and where they are. There is evidence that no reassurance or  
29 information was provided by the investigators at that time.

the  
There  
that  
his  
that

1 There is evidence that he does not understand the waiver of  
2 right to counsel; in fact, completely misunderstands it.  
3 is evidence that there was no effort by the investigators at  
4 time to correct the misunderstanding. There is evidence that  
5 wife, that Mr Sesay's wife, has been taken into Prosecution  
6 protective custody and used as leverage. There is evidence  
7 there was no court authority for that. There is evidence that  
8 her movements are controlled by the Prosecution. There is  
9 evidence that Mr Sesay was not seen by a Registry lawyer on 11  
10 March. There is evidence that duty counsel, when visiting Mr  
11 Sesay, did not provide the information which was necessary.  
12 There is evidence that Mr Berry interfered with privileged  
13 conversations. There is evidence that Mr Sesay did not  
14 understand the charges by the first --

15 MR HARRISON: Could we just slow down? We are having to  
16 respond to each of these, I think we have to go back to the  
17 beginning. I'm trying to keep up but I wasn't able.

18 MR JORDASH: I beg your pardon.

it

19 PRESIDING JUDGE: That's okay. Thanks. Let's go over  
20 again.

21 MR JORDASH: All of it?

22 PRESIDING JUDGE: No. From where you started, "There is  
23 evidence, there is evidence, there is evidence."

24 MR JORDASH: Okay. There is evidence that Mr Sesay was  
25 inexperienced with this system. There is evidence that he was  
26 clearly distressed in the first interview. There is evidence  
27 that that distress emanated from the fact that the  
whereabouts,  
is  
28 his whereabouts had been kept secret from his children. There  
29 evidence that despite that stress and distress the Prosecution

1 investigators did not offer any reassurance.

his  
2 There is evidence that when Mr Sesay purported to waive  
3 right to counsel he didn't understand what he was doing.

There  
4 is evidence that Mr Morissette, when asked to explain the  
waiver  
5 of the right to counsel, explained it incorrectly. There is  
6 evidence that there was no efforts made by the investigators  
to  
7 clarify the meaning of the waive of the right to counsel,  
8 notwithstanding Mr Sesay's obvious lack of understanding.

9 There is evidence that Mr Sesay's wife was taken into  
is  
10 Prosecution protective custody. There is evidence that there  
11 no obvious authority for that. There is evidence that it was  
12 used as leverage to ensure cooperation. There is evidence  
that

13 her movements were controlled by the Prosecution. There is  
14 evidence that the first lawyer from the Registry was kept away  
15 from Mr Sesay. There is evidence that the duty counsel who  
16 attended did not explain the rights to an extent which would  
have

Sesay  
17 enabled Mr Sesay to follow them. There is evidence that Mr  
18 did not understand that the duty counsel were effectively his  
de  
19 facto lawyers. There is evidence that Mr Sesay requested a

20 lawyer.

privileged

21 There is evidence that Mr Berry interfered with

first

22 legal conversations. There is evidence, by 15 March, the

23 appearance, that Mr Sesay had not read his indictment; that he

24 did not understand the charges. There was evidence then, and

25 ongoing, that he certainly didn't regard the duty counsel as

26 fulfilling the role of a lawyer.

evidence

27 There is evidence of a conversation off tape, during the

28 course of the interviews, about the evidence. There is

29 that cooperation was obtained, according to the Prosecution,



the  
of

1 within five minutes, a wholly unrealistic proposition. And  
2 only evidence the Prosecution offer to discharge their burden  
3 proof is the technical waivers and the accused's demeanour on  
4 tape.

given

5 We would respectfully submit that that is insufficient.  
6 And we would respectfully submit this: That the evidence is  
7 overwhelming that something has gone very wrong here. The  
8 evidence proves beyond a reasonable doubt that Mr Sesay was  
9 denied essential rights. We submit that the Prosecution,  
10 the weight of problems, cannot possibly rebut or discharge --  
11 they can't possibly discharge their burden. It's just  
12 impossible, even with the investigators being called. There's  
13 too many problems with too many explanations required.

issues

14 And may I simply finish by pointing out a number of

really

15 concerning the authorities; Your Honours will see it in the  
16 skeleton. The Prosecution rely on Ntahobali. That that's

were

17 the height of their authority. It's important to note they

cases,

18 not dealing with confessions, unlike here where the total is  
19 certainly having the flavour of confessions and, in some

20 complete confessions.

21           Two, there was never a challenge to the voluntariness of  
22           the statement in that case. Three, there was a procedure  
which  
23           was judged to be akin to a voir dire, and the accused was  
given  
24           an opportunity to give evidence. And four, the appeal  
judgment  
25           simply found that there was nothing wrong with the procedure.  
26           There's nothing in there which amounts to judicial approval.  
The  
27           standard is, of course, quite high on an appeal. And we  
submit  
28           the issue is a serious one at hand. To the best of our  
29           knowledge, no case before any international tribunal has ever

the  
discharge

1 ruled against a challenge to the voluntariness of a waiver of  
2 right to counsel and the voluntariness of confessions, without  
3 requiring the Prosecution, either to call evidence to  
4 their burden, or allowing the accused to give evidence. It's  
5 never before been done.

and  
a  
it.

6 And Your Honours will see from the end of the skeleton,  
7 I want to go back and finish on this point; that Ntahobali is  
8 bad decision. It's a bad decision. There's no doubt about  
9 It's replete with inaccuracies, and one obvious inaccuracy is  
10 this: If I take Your Honours to the authority very quickly,  
11 I have almost finished.

and  
one?

12 PRESIDING JUDGE: At what level is the decision a bad

decision

13 MR JORDASH: It's a bad one at the Trial Chamber

14 and it's a bad one at the Appeal Chamber decision.

15 PRESIDING JUDGE: Very well.

of  
it's

16 MR JORDASH: It's out of kilter with Bagosora; it's out  
17 kilter with Delalic; it's out of kilter with Halilovic; and  
18 replete with mistakes. For example, the distinction the

in  
of  
it  
to

19 Prosecution try to make about confessions. The Appeal Chamber  
20 seemed to consider that the Trial Chamber's decision hadn't,  
21 large part, been predicated upon the fact that the statements  
22 the accused were not confessions. The Appeal Chamber seems to  
23 have ignored that in its ruling, when the Trial Chamber stated  
24 clearly, the issue for them was, in large part, the fact that  
25 these statements were not confessional.

26 PRESIDING JUDGE: So the Trial Chamber was wrong and the  
27 Appeal Chamber compounded the wrong?

28 MR JORDASH: The Appeal Chamber of course was in a  
29 difficult position. The standard is very high and they have

1 give due deference to the Trial Chamber's discretion.

2 PRESIDING JUDGE: All right.

3 MR JORDASH: That's why I say they didn't approve the  
4 procedure; they simply couldn't say it was so wrong. It's

quite

5 different. But if I can take you, very briefly, to Ntahobali.  
6 Ntahobali refers to, and my learned friend relied upon this  
7 paragraph, and asserted -- and I want to make sure I get this  
8 right -- asserted that -- paragraph 54 the Chamber, in the

Trial

9 Chamber judgment: The Chamber recalls that in the cases of  
10 Bagosora, Bizimungu, Kabiligi and Ntabakuze, Trial Chambers at  
11 the Tribunal perused the transcript of the interviews in which  
12 custodial statements of the respective accused were taken and  
13 made determinations as to whether the Prosecution complied

with

14 the relevant articles. Article 18 and 20 and the relevant

rules,

15 i.e., Rules 42, 43, 63 and 92. The Prosecution relied upon

that

16 and said, "Well, in these cases it was decided on the issue."

17 THE INTERPRETER: Your Honours, would the learned

attorney

18 be asked to go a little bit slow so as to be able to get the  
19 reference recited?

20 MR JORDASH: Sorry, I'm just trying -- I'm conscious of

the

21 time, I am sorry. The Chamber recalls that in the cases of  
22 Bagosora et al, Bizimungu et al, Kabiligi and Ntabakuze, this  
is  
23 why I submit it's a bad decision, and why it's not a forceful  
24 submission to rely upon that to say Your Honours should just  
25 consider the transcripts.

26 Firstly, Kabiligi and Bagosora are the same case, and  
yet  
27 the Trial Chamber appears to deal with them as different  
cases;  
28 they're not.

29 Bagosora, the interview was excluded, and the accused  
under

which

to

case

being

he

that

say:

just

saying

and

go

1 consideration there was Kabiligi. Bizimungu was a case in  
2 the interview was ruled admissible, but the challenge was only  
3 Rule 40, 42 and 43 and not Rule 92. And the issue could be  
4 decided on the transcripts, because the only issue in that  
5 was: When the accused said, in response to a -- his rights  
6 read and being asked whether he waived the right to counsel,  
7 said, "Not completely but for the moment I accept to talk to  
8 you." That was the sole issue in Bizimungu. And of course  
9 could be judged on the transcript because the tribunal can  
10 Well, we think that was a full and unequivocal waiver.

11 JUDGE BOUTET: What's was wrong in paragraph 54? I'm  
12 trying to -- you're saying they were wrong. All they're  
13 in that paragraph is that the Trial Chamber is -- in Bagosora  
14 so on, perused the transcript of the interviews. They didn't  
15 into a voir dire and so on. That's what they're saying, so  
16 they're just talking procedure. And I don't think that that  
17 paragraph it says anything to any substantial issue. I may be  
18 wrong but that's the way I read it.

explore  
and

19 MR JORDASH: Well, the Chamber relied upon this to say:  
20 Well, we don't have to explore further. As they didn't  
21 further in Bagosora or Bizimungu and Kabiligi. But Kabiligi  
22 Bagosora, they're the same case. The burden was on the  
23 Prosecution. They couldn't discharge it. On the transcripts  
24 they couldn't discharge it and the interviews were ruled  
25 inadmissible. And that's why we say there's never been a case  
26 where transcripts have been used only to be able to allow the  
27 Prosecution to discharge their burden and rule against the  
28 voluntariness of the statement.  
29 If I can take you, finally, to the end of the skeleton.



1       There is a brief run-through the cases that we found.  
2       we've dealt with at length; Delalic, we've dealt with at  
3       Halilovic, we've dealt with at length; Bizimungu, we've just  
4       dealt with and then, finally, two cases. One from the ICTR,  
5       Ziriranyirazo, I will spell that, Z-I-R-I-R-A-N-Y-I-R-A-Z-O,  
6       where a voir dire was ordered, even after the OTP investigator  
7       had testified, to decide the admissibility of the accused's  
8       not an interview, but the CV of the accused. And, even then,  
9       challenge was only to Rule 42.  
10       And then, finally, the Prosecutor in Oric, interview  
11       admissible but, again, no challenge to the voluntariness of  
12       interview. It's never been done and what the Prosecution are  
13       asking you to do is make bad law. Those are my submissions.  
14       PRESIDING JUDGE: Let me ask you one -- what we have,  
15       my perspective, what we have here is quite a formidable array  
16       submissions from you, in terms of the issue before us.  
17       for myself, I need some enlightenment on two specific  
18       that I'll put to you. One is, are you alleging professional

you

19 misconduct on the part of the investigators during the  
20 interviewing process, and all the antecedent processes? Are  
21 alleging professional misconduct?

22 MR JORDASH: Well, I don't know what the professional  
23 duties of an investigator are.

24 PRESIDING JUDGE: Well, but some of your submissions  
25 clearly have virtually been predicated upon deviations and  
26 departures from professional standards. Go ahead, I give you  
27 leave. That will be my first question.

which

28 MR JORDASH: I don't know what their duties are, but I  
29 cannot conceive that the duties involve the kind of conduct

1 we say occurred in this instance.

2 PRESIDING JUDGE: Yes.

3 MR JORDASH: And we would submit that threats of that  
4 nature, coercion of that nature --

5 PRESIDING JUDGE: Fall short of a high degree of  
6 professionalism.

7 MR JORDASH: And intentionally so, we would submit.

8 PRESIDING JUDGE: Yes. That's the point I want to know,  
9 because here, we certainly all have our own, as lawyers,  
10 understanding of what high degree or high quality  
professionalism

11 entails in various endeavours. And I just want to know  
whether

12 you put some of these alleged deviations and departures and  
13 irregularities that they've crystallised into what one might  
14 describe as professional misconduct on their part.

15 MR JORDASH: Without a doubt.

16 PRESIDING JUDGE: Cumulatively.

17 MR JORDASH: Cumulatively. Well, on their own, some of  
18 them, such as threats concerning the capital punishment,  
19 certainly, on its own, is deeply, professionally, improper.

But

20 that, removing an accused wife into so-called protective  
custody,

21 all the acts which we have accused the Prosecution of, by

22 themselves, amount to improper behaviour and many of them, in  
23 fact, serious professional misconduct.

24 PRESIDING JUDGE: Right.

25 MR JORDASH: We accept, as realistic Defence teams, that  
26 there is attention at the point of the arrest of an accused.

27 PRESIDING JUDGE: Yes.

28 MR JORDASH: Attention between the desire of the  
29 Prosecution authorities to get the information they need and

the

there's

1 rights which must be afforded to an accused. Of course,  
2 some subtleties which [overlapping speakers] this is not a --

with

3 PRESIDING JUDGE: Well, I understand. I am satisfied  
4 that kind of response. My second one would be, then, if you

make

5 this allegation, then are you also submitting that such

alleged

6 professional misconduct vitiated the entire interviewing

process,

7 and antecedent formalities and thereby invalidating the

8 voluntariness of the alleged statements? Would that be your

here.

9 submission too? I just want to get everything crystallised

today

10 MR JORDASH: We say the interview should be excluded

11 without more.

further

12 PRESIDING JUDGE: But of course you're not moving

we

13 than that. And that would be my last question to say that if

part

14 agree with you that there was professional misconduct on the

15 of the investigators, such professional misconduct should, by

16 some degree of attribution, spill over to the Prosecution and

17 probably say there's prosecutorial misconduct too.

18 MR JORDASH: Well, it's not obviously a personal issue.

these  
19           PRESIDING JUDGE: No, no. I'm talking about -- and  
20           are concepts I'm using; professional misconduct, prosecutorial  
21           misconduct. I'm just saying if we agree that there may well  
have  
22           been professional misconduct on the part of the investigators,  
23           I'm speaking for myself here, do we necessarily also have to  
say  
24           that by force of logic there was prosecutorial misconduct?  
25           MR JORDASH: Yes, yes, we do. They're an agent for the  
26           Prosecution.  
27           PRESIDING JUDGE: Thanks. I'm satisfied. I just wanted  
my  
28           own enlightenment.  
29           JUDGE ITOE: Mr Jordash, I would like to find out from  
you

1 again, we have put this question to you and you've thrown the  
2 ball back into our court, but I think you have to make a  
decision  
3 as to what you would do with two documents which you tendered.  
4 One was tendered yesterday. It's dated -- this is about John  
5 Berry and the interviews and so on. It's dated 25 February  
2003.  
6 And there is this one which you have just exhibited to us,  
7 which  
8 is dated 17 October 2002, where you allege coercion and so on  
and  
9 so forth. That was -- that is apparent on the face of these,  
10 that you allege is apparent on the face of these documents.  
What  
11 do you intend to do with these documents?

12 MR JORDASH: Please, could I exhibit them? Because,  
13 irrespective of whatever decision is made, in due course we'll  
14 rely upon them for our overall submissions concerning the  
15 integrity issues, which we've raised on a number of occasions.  
16 So, could I please exhibit them?

17 PRESIDING JUDGE: Of course the one methodology that was  
18 probably open to you was to have annexed them to something.  
But  
19 let me just have a -- Mr Jordash, may I have your attention?  
How  
20 many documents are involved; two?

MR JORDASH: May I consider that over lunch, as to which

21 documents I've used and which we'd like to have --

22 PRESIDING JUDGE: Well, then we'll -- all right. Well,

23 probably you need to -- we wanted to give the Prosecution  
their

24 turn to reply tomorrow morning.

25 MR JORDASH: No. I'll exhibit them now. I don't want

26 to --

27 PRESIDING JUDGE: You can do that, yes, certainly.

28 MR JORDASH: -- wait until tomorrow morning, if at all

29 possible.



1           PRESIDING JUDGE: This is a Wednesday, isn't it?

2           MR JORDASH: I think it might be.

3           PRESIDING JUDGE: So why not tidy things up  
straightaway,

4           so that the Prosecution can start afresh first thing tomorrow  
5           morning.

6           JUDGE BOUTET: Mr Jordash, we're concerned here about  
two,

7           two transcripts. Not everything is --

8           PRESIDING JUDGE: Is it two? Two.

9           JUDGE BOUTET: The two transcripts of interviews, other  
10          than those with the accused. So that's what we are  
considering.

11          PRESIDING JUDGE: Right. Let's go through the ritual.

12          MR JORDASH: Could I apply to exhibit the interview of  
25

13          February 2003?

14          PRESIDING JUDGE: Very well. Mr Touray, any objection?

15          MR TOURAY: No objection, Your Honour.

16          PRESIDING JUDGE: Mr Cammegh?

17          MR CAMMEGH: No, thank you.

18          PRESIDING JUDGE: And, Mr Prosecutor?

19          MR HARRISON: I am sorry, I don't recall what that  
20          interview is.

21          PRESIDING JUDGE: Well, Mr Jordash, would you give some

22 more particulars?

23 MR JORDASH: It's a bit difficult to do that in public.

24 PRESIDING JUDGE: Oh, I see.

25 MR JORDASH: But it's the one we referred to yesterday  
as  
26 similar in its technique.

27 JUDGE BOUTET: It's not the one of this morning, that's  
the  
28 one of yesterday, Mr Harrison, by the witness that has not  
been  
29 called, I think.

1 MR HARRISON: In principle, the Prosecution is not  
2 objecting to either one of these documents becoming exhibits.  
3 The only question that I have is: Looking at the one from  
today,  
4 it appears to be an incomplete document, and the Prosecution  
is  
5 just suggesting if the Court wants, the Prosecution can go and  
6 try to find the complete document.

7 PRESIDING JUDGE: Very well, that would be helpful.

8 MR HARRISON: I don't know what happened to the one  
9 yesterday; I just don't have it. It may be complete. If it's  
10 not --

11 PRESIDING JUDGE: Yes. Well, we can admit it  
tentatively  
12 and then, pending the production of a complete document, we'll  
do  
13 that, yes.

14 MR JORDASH: Can I assist in this way: That the  
interview  
15 from yesterday was TF1-046. Perhaps the learned Court Officer  
16 could --

17 MR HARRISON: I'm not objecting. I'm just saying that's  
18 fine, but if the Court prefers to have a full document, I'll  
go  
19 and try to find the full documents.

20 PRESIDING JUDGE: Would it be, then, a better option to

21 receive these documents in evidence tomorrow morning?

22 MR JORDASH: Well, not really, because this interview is  
23 about four lever arch files long, so the full document is not  
24 strictly necessary.

25 PRESIDING JUDGE: I see.

26 MR JORDASH: What we've introduced is -- part of the  
27 document, we say, is probative of our submissions. We don't  
28 think that the rest of the interview assists one way or  
another.

29 And the same with the interview of today which was witness

1 TF1-340.

2 PRESIDING JUDGE: Mr Harrison, what do you say to that  
3 explanation?

4 MR HARRISON: That's fine. They can be exhibited. The  
5 Prosecution will go and look and if it decides that there may  
6 relevant information, we can just exhibit that tomorrow.

be

7 PRESIDING JUDGE: Very well. Yes. Well, we can go

ahead.

8 MR JORDASH: Sorry, it just occurred to me that Mr Sesay  
9 was also given a witness number, which is TF1-030, which Your  
10 Honours might want to bear in mind when considering whether he  
11 was being treated as a witness or a suspect.

12 PRESIDING JUDGE: Very well. We'll receive the  
13 in evidence.

documents

14 JUDGE ITOE: TF1-030?

15 MR JORDASH: Yes, one of the early ones.

16 PRESIDING JUDGE: The first document is received in  
17 evidence and marked exhibit?

18 MR GEORGE: 216, Your Honour.

19 PRESIDING JUDGE: 216.

20 [Exhibit No. 216 was admitted]

21 PRESIDING JUDGE: The second is also received in

evidence

22 and marked exhibit?

23 MR GEORGE: 217.

24 PRESIDING JUDGE: Right. Mr Jordash.

25 [Exhibit No. 217 was admitted]

26 JUDGE BOUTET: Mr Jordash, I do have before, before you

27 relax too much, I have a few questions for you. I want to  
make

28 sure that I do understand, and I won't ask you to go through

29 everything you have just submitted, but looking at your  
skeleton

SCSL - TRIAL CHAMBER I

1 arguments, as such, coupled with what you have presented this  
2 morning, I'm just trying to make sure that I can reconcile the  
3 two. But your skeleton arguments seem to be to the effect  
that  
4 before any decision is made we should go on a voir dire and  
hear  
5 the totality of the evidence, so that is the way I seem to  
read  
6 your submission, in this skeleton argument. I'm trying to  
7 reconcile that because the -- especially the authorities you  
are  
8 quoting, and citing, seems to suggest that.

9 But this morning, but at the same time you say, and I  
just  
10 want to make sure that I'm not misunderstanding your position,  
11 I'm not quoting you here, I'm just giving you my understanding  
of  
12 your submission: That based upon the facts that you have  
alluded  
13 to, and described in ample details this morning, in your views  
14 that would be sufficient to determine now without even going  
on a  
15 voir dire that there has been violation of his, of the rights  
of  
16 the accused and therefore a right to counsel and more.  
17 Therefore, that would suffice to say: Don't admit this, don't  
18 proceed any further with these documents.

seems 19 But, as I say, I'm looking at your document and that  
20 to be dealing with -- we should go on a voir dire type of a  
Jordash. 21 scenario without -- I'm trying to reconcile all that, Mr  
22 If you can assist me, I would appreciate it.  
23 MR JORDASH: The issue is dealt with in paragraph 8 of  
the 24 skeleton where it says: It is submitted that Mr Sesay's  
25 treatment by the Prosecution's investigators raises  
fundamental 26 issues of human rights abuses and fair trial rights which  
require 27 the most exacting of enquiries. In the event that the Trial  
28 Chamber does not exclude the statements, it is submitted that  
a 29 voir dire or a procedure akin to a voir dire, must be held.



1 JUDGE BOUTET: That summarises your position; that's  
fine.

2 Thank you.

3 MR JORDASH: That's the position. In a sense the  
question  
4 cannot be answered without reference to burden of proof.

5 JUDGE BOUTET: No, no. That's why I say, I was not  
trying  
6 to put everything back to you; I just wanted to understand  
your  
7 position. But that is suffice to my understanding for the  
time  
8 being, so that's fine. I'm satisfied with that response. If  
you  
9 want to add to it, that's fine.

10 MR JORDASH: Well, I do, because it is important because  
11 it is not the same as saying the issue can be decided against  
us  
12 with reference to the available evidence. That's my concern.  
13 The issue can be decided in favour of us because of the burden  
of  
14 proof, because we would say the evidence we have raised is so  
15 weighty that Your Honours could conclude that there could  
never  
16 be anything other than a reasonable doubt about the  
Prosecution's  
17 case, and that they would be unable to prove otherwise.

18 The same cannot be said to rule against our submissions

must

this

no

but

proof.

19 because we don't have a burden. So, in order to deal with all  
20 the problems, if Your Honours believe the Prosecution might be  
21 able to nevertheless answer those problems, then a voir dire  
22 be held. But it can't be, we would say, given the weight of  
23 evidence, possible to say beyond a reasonable doubt there were  
24 problems, the waiver was voluntary, the statements were  
25 voluntary. On the basis of that evidence, when compared to  
26 Bagosora, when compared to Delalic and compared to Halilovic  
27 also when compared to a reasonable notion of the burden of

28 PRESIDING JUDGE: Are you saying that you have raised an  
29 almost irrebuttable presumption of involuntariness?

1 MR JORDASH: Yes.

2 PRESIDING JUDGE: All right.

3 JUDGE ITOE: If I got your submissions earlier on,  
you're

4 saying that even if we went into a voir dire, and we went into

5 determining the circumstances, it would be difficult for the

6 Prosecution to surmount the allegations, to explain off all  
the

7 allegations that you have made.

8 MR JORDASH: Yes.

9 JUDGE ITOE: And that, in the circumstance, it isn't  
even

10 necessary for the Court to go into a voir dire?

11 MR JORDASH: Absolutely.

12 JUDGE ITOE: This is what you're saying. This is what  
you

13 said in your submission. I'm not inventing it.

14 MR JORDASH: No, no, I don't. In the cases --

15 JUDGE ITOE: You said it.

16 MR JORDASH: -- referred to and relied upon, one single  
17 problem is to be sufficient for the tribunal to be satisfied

18 Prosecution cannot discharge their burden. The Prosecution  
will

19 not find another case internationally where there has been so

20 many problems on the face of the transcript. If one problem  
in

21 another case is enough, we've listed in excess of ten  
fundamental

22 problems.

23 PRESIDING JUDGE: So this is a case of first impression.

24 MR JORDASH: First impression?

25 PRESIDING JUDGE: First impression. In other words,  
novel.

26 MR JORDASH: Well, it's novel in its level of --

27 PRESIDING JUDGE: Never been nothing similar anywhere;  
28 that's what you're saying.

29 MR JORDASH: Similar but, sadly, in this case, much,  
much,

1 much more serious.

saying

2 PRESIDING JUDGE: Yes. Well, that's what we tried to  
3 understand. That's why I asked whether, in fact, you're

an

4 that your arguments and the points that you put forward raise  
5 almost irrebuttable presumption of involuntariness and  
6 invalidity?

7 MR JORDASH: Well, they do, but they certainly can't be  
8 rebutted by just looking at the demeanour of the accused.

9 PRESIDING JUDGE: Quite right, yes. Or looking at  
10 transcript.

11 MR JORDASH: Or the waiver. They can't.

12 PRESIDING JUDGE: Very well. Thank you. We'll hear the  
13 Prosecution tomorrow morning, so the Court is adjourned to  
14 tomorrow, 7 June 2007 at 9.30 a.m.

p.m.

15 [Whereupon the hearing adjourned at 12.57

16 to be reconvened on Thursday, the 7th day of  
17 June, 2007, at 9.30 a.m.]

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SCSL - TRIAL CHAMBER I

EXHIBITS:

59

Exhibit No. 216

59

Exhibit No. 217