

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

THURSDAY, 7 JUNE 2007
9.35 A.M.
TRIAL

TRIAL CHAMBER I

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

1 [RUF07JUN07A - MC]
2 Thursday, 7 June 2007
3 [Open session]
4 [The accused present]
5 [The witness entered court]
6 [Upon commencing at 9.35 a.m.]

trial

7 PRESIDING JUDGE: Good morning, learned counsel, the
8 is resumed. I now call upon the Prosecution to reply to the
9 response on behalf of the first accused by Mr Jordash. Do we
10 have something to do preliminary before we --

11 MR JORDASH: Well, only that I want to, and I think the
12 Prosecution are going to, but I was wanting to correct a
13 misapprehension that I was disabused of yesterday.

14 PRESIDING JUDGE: Very well. Let's hear it.

She

15 MR JORDASH: It is my submission that in fact Mr Sesay's
16 wife was in Prosecution protective custody. It appears that
17 myself and Mr Petit have actually got it wrong. She wasn't.

say

18 was in witness and victims' protection. So it was my
19 misapprehension, and Mr Petit's misapprehension and we would

20 Mr Sesay's misapprehension that somehow it was the Prosecution
21 who were controlling that protective custody.

22 I spoke to a member of the witness and victims' unit

Mr

23 yesterday who said no. In fact, the Prosecution applied for
24 Sesay's wife to be in their protective custody insofar as Mr
25 Sesay was supposed to be a witness and, therefore, Mr Sesay's
26 wife was in the protection of the witness and victims' unit at
27 the behest of the Prosecution. That would appear to be the
28 situation.

29 PRESIDING JUDGE: So the records will reflect the

SCSL - TRIAL CHAMBER I

1 correction.

2 MR JORDASH: Yes. The submissions, of course, stay
exactly
3 the same.

4 PRESIDING JUDGE: Yes. Mr Harrison, your rely.

5 MR HARRISON: Yes. Just so that I can just complete
that
6 point, I have given four copies of a letter from the deputy
chief
7 of witness and victims' services to the legal officer of the
8 Trial Chamber which simply confirms the advice that has been
9 provided by Mr Jordash, and I put copies of the same document
in
10 front of Mr Touray and Mr Cammegh this morning.

11 PRESIDING JUDGE: Thank you.

12 MR HARRISON: If I could just try to clarify what I
think
13 might just be minor errors and wording. There can be no
14 application to anyone with respect to a person being taken
into
15 the care of witness and victims' services. What happens is a
16 simple request is made and then an independent assessment is
made
17 because witness and victims' services unit is an independent
18 unit, functioning solely under the discretion of the Registrar
19 and even the power of the Registrar over the chief of that
unit

of
forward, a
So

20 is, I think, somewhat circumscribed. So it is not a question
21 any kind of an application being made. A request goes
22 review and assessment undertaken independently and then a
23 decision is made by the witness and victims' services unit.
24 there can be no suggestion that in any respect the Prosecution
25 had any control over the wife of Mr Sesay. Any control to be
26 exercised would solely be under that of witness and victims'
27 services and, should the wife make a determination to do away
28 with those, that would be between her and witness and victims'
29 services.

1 PRESIDING JUDGE: Thank you.

2 JUDGE ITOE: But, Mr Harrison, would you confirm that
she
3 was in the witness and victims' unit at their request?

4 MR HARRISON: Yes, it's --

5 JUDGE ITOE: At the request of the Prosecution?

6 MR HARRISON: Yes.

7 JUDGE ITOE: Is it fair to say that?

8 MR HARRISON: That's true. That's exactly right.

9 JUDGE ITOE: Thank you.

10 MR HARRISON: The Prosecution would convey the
information
11 directly to the chief of witness and victims' services.

12 PRESIDING JUDGE: So the distinction here is, clearly,
that

13 in terms of being in protective custody, it was in the custody
of

14 the victims and witness unit but then this was at the instance
of
15 the Prosecution.

16 MR HARRISON: Yes.

17 PRESIDING JUDGE: That's fine.

18 MR HARRISON: The Prosecution would initiate the
process.

19 PRESIDING JUDGE: Very well; thanks. Thank you.

20 MR HARRISON: And the Prosecution does have that
document.

that
may
that
comments
assist
assistance

21 I am a little bit concerned about all of the loose documents
22 are before the Court. The Prosecution would suggest that it
23 be more orderly for it to be made an exhibit but I realise
24 the Court may think that is unnecessary because of the
25 that have been put on the transcript.
26 PRESIDING JUDGE: But if you think it's -- it will
27 the Court, we certainly would have no disposition to resist
28 receiving it in evidence, if it is going to be of some
29 for us. We are not in any way intimidated by the voluminous

1 nature of the exhibits.

Prosecution

2 MR HARRISON: Having heard your comments, the
3 therefore makes an application that the document dated 6 June
4 2007, addressed to "To whom it may concern," and signed by the
5 deputy chief of WVS be made an exhibit in the trial.

6 PRESIDING JUDGE: Mr Jordash, do you and learned counsel
7 have any objection?

8 MR JORDASH: No objections.

have

9 PRESIDING JUDGE: Quite. The gentlemen on that side
10 no interest in this matter so the document will be received in
11 evidence and marked exhibit?

12 MR GEORGE: 218, Your Honour.

13 PRESIDING JUDGE: Thank you.

14 [Exhibit No. 218 was admitted]

15 PRESIDING JUDGE: Mr Harrison, go ahead.

the

16 MR HARRISON: Sorry, I was negligent in not passing up
17 original signed copy to the Chamber's officer.

your

18 JUDGE ITOE: Mr Harrison, we saw Exhibit 216 and 217
19 yesterday. Are you able to complete them before you start
20 reply? So that we have a complete documentation, because that
21 was what you said you would do today, if you found it

necessary.

22 MR HARRISON: Yes.

23 JUDGE ITOE: I am asking if you are able to do that, so
24 that we have a complete document.

25 MR HARRISON: Yes. What the Prosecution would prefer to
26 advise the Court of is this: That everything that Mr Jordash
27 said with respect to those two documents yesterday was

accurate

28 and correct in all respects.

29 JUDGE ITOE: I see. So what Mr Jordash said about 216

and

1 217 was accurate?

2 MR HARRISON: Yes, in particular, if we were to --

3 JUDGE ITOE: In effect, you're confirming the accuracy
of
4 the contents of 216 and 217?

5 MR HARRISON: I can certainly say that he has provided
you
6 with the copies that were given by the Prosecution, that's
true.

7 But just what I wanted to make sure the Court understood is
that
8 Mr Jordash was right when he said that with respect to Exhibit
9 216, those are pages from what amount to, if the entire
statement
10 was brought in, probably I think he said four binders. I
would
11 have said maybe six or seven. It is a massive document. And
the
12 Prosecution sees no prejudice to it by simply having, for the
13 purpose that Mr Jordash advanced yesterday, the document go
in,
14 in the abbreviated form that he described.

15 PRESIDING JUDGE: Yes, that was my understanding that,
for
16 the limited purpose for which Mr Jordash was arguing
yesterday,
17 that amount or portion of the document that he was tendering
18 would suffice and I thought you concurred in that.

19 JUDGE ITOE: And he added by saying that well, if by
today
20 he feels that there would be a necessity for him to complete
them
21 he would.
22 PRESIDING JUDGE: Yes.
23 JUDGE ITOE: That is where the question had come from,
from
24 me. Yes.
25 MR HARRISON: And with respect to the second exhibit
that
26 you referred to, which I think has the number 217, all the
27 Prosecution wanted to say with respect to that is that the
pages
28 that have been given a number, the number was put on by
Defence
29 counsel, and they certainly do reflect the Prosecution's

second
intention
is
6,
to

1 understanding of the page numbers. But they are from the
2 tape and so it's only slightly misleading. There is no
3 to mislead here at all and it has not been suggested, but it
4 only slightly misleading. The page numbers are, I think, 5,
5 7, 8, 9, 10. In reality it's 5, 6, 7, 8, 9, 10 of the second
6 tape. The first tape is about 100 pages where there is a long
7 interview taking place. But, again, the Prosecution is taking
8 the position here that we don't think it's helpful ultimately
9 the Court to go and bring in an exhibit, the entire statement,
10 because we understand there is a somewhat limited purpose for
11 which they're being relied upon.

12 JUDGE ITOE: I'm satisfied. I'm satisfied.

13 PRESIDING JUDGE: Well, then, let's proceed.

Court
and
upon

14 MR HARRISON: There was a reference made yesterday to
15 documents to do with the perfecting of the arrest, and the
16 will remember that Mr Hardaway kindly went out and photocopied
17 certain documents that had been filed with Court Management
18 they were distributed to everyone and they were never relied
19 later on.

those
although
find
has

20 The Prosecution says that it may be helpful to review
21 documents now and, ultimately, the Prosecution says that
22 it is not necessary for them to be an exhibit, because they
23 already are filed with Court Registry and Court Management and
24 have document numbers, it may be something the Court would
25 helpful in its deliberation. So that document which was
26 circulated yesterday is Court Management document 5, and it
27 the title: "Registrar's request to the authorities of Sierra
28 Leone for the execution of arrest warrant pursuant to Rule
29 55(C)."

the

1 And, in effect, the Prosecution says this constitutes
2 legal regime under which the arrest was perfected.

the

3 The document has Court Management page numbers 40 to 62.
4 And at page 41 in the top right corner, it simply has the
5 contents of all the documents contained therein of this matter
6 which was filed by the Registrar. And I think at page 42, in
7 part, the questions raised by, or matters raised by Mr Justice
8 Itoe yesterday, are answered because that is a document from
9 Registrar addressed directly to the Attorney-General and the
10 Minister of Justice of Sierra Leone, whereby he transmits the
11 warrant for arrest directly to the Attorney-General and also
12 attaches the warrant of arrest, which is pages 42 to 45.

48

and

is

Leone

13 Page 46 is the decision approving the indictment. Page
14 is an excerpted version of the relevant provisions of statute
15 Rules 42 and 43 of the Rules of Procedure. Pages 50 forward
16 the entirety of the Statute of the Special Court for Sierra
17 as it existed at that time.

is

police

18 Then at pages, or at page 59, there is a document which
19 an inventory which presumably would have be filled out by

which

20 on perfecting arrest. At page 60 you will find a document

the

21 Mr Jordash referred to briefly yesterday, and this is with the
22 title: "Statement relating to the transfer of an accused to
23 custody of the Special Court for Sierra Leone pursuant to Rule
24 47."

and

25 So the arrest was perfected by the Sierra Leone Police

officer

26 then there is a subsequent transfer of custody from the Sierra
27 Leone Police to the Special Court, and the final completion of
28 that took place at Bonthe Island. There was always a CID

and

29 with the accused until they actually arrive at Bonthe Island,

Lethol
the
or
statute
Keith
come
by
acknowledgement
a
and
Special

1 the particular individual involved in this document is Mr
2 Lamin, who at that time was the assistant superintendent of
3 Sierra Leone Police and he makes it clear that this document,
4 set of documents, are transferred at Bonthe Island. And he
5 indicates that the documents transferred are the warrant of
6 arrest, a copy of the rights of suspects, a copy of the
7 establishing the Special Court and it's dated 10 March 2003.
8 The next page is from the then Inspector General, Mr
9 Biddle, indicating that he had received all these various
10 documents from the Registrar, and presumably they would have
11 from the Attorney-General, through the -- beginning from the
12 Registrar. And then the final page is an acknowledgement of
13 receipt, that is page number 62. And it is a document signed
14 Mr Sesay and dated 10 March 2003. And that is an
15 of receipt of, first of all, the warrant of arrest; secondly,
16 copy of the rights of the accused (Article 17 of the Statute
17 Rules 42 and 43). Three, is a copy of the statute of the

an

18 Court. Four, is a copy of the approved indictment. Five, is

19 acknowledgment of receipt by an accused form.

in

20 The Prosecution says that's a document that need not
21 necessarily be exhibited because it is already before Court
22 Management but, ultimately, the Court may find it beneficial
23 assessing the evidence.

that

24 JUDGE BOUTET: On that last issue, pardon me, the fact

sure

25 it is with Court Management does not necessarily mean it is in
26 evidence. But I don't want to confuse the issue, I am not

some

27 yesterday how we dealt with Mr Jordash when he referred to

as

28 of these documents and gave some of them, not this one, but

29 similar or the same nature. Mr Jordash, you didn't file them

1 exhibits, if I am not mistaken. I know we asked you to file
some 2 but the warrant of arrest or some other documents that you
3 referred to, they were not filed as exhibits.

4 MR JORDASH: No, they weren't. Perhaps --

5 JUDGE BOUTET: I'm not trying to confuse issues. I just
6 want to make sure there is no confusion as to what is and what
is 7 not because the mere fact that documents may be with the Court
8 Management doesn't mean that they are in evidence, so that's
why 9 we raised that issue with you yesterday.

10 MR JORDASH: Certainly. Perhaps I can propose reviewing
11 our documents and then making a request for consistency
purposes 12 for those documents to be exhibited. And maybe it would be
13 easier for all concerned if any documents we are seeking to
rely 14 upon is exhibited.

15 JUDGE BOUTET: That's my view. But I haven't had the
16 occasion to discuss that with the Presiding Judge, so I don't
17 want to take this initiative or decision away from you.

18 PRESIDING JUDGE: Well, we've always acted on the
19 presumption that it is procedurally tidy to do that,
regardless 20 of the particular issues being addressed. That if documents
are

21 referred to in respect of certain particular issues, that the
22 Court is to be fully apprised of the issues and also the
23 submissions. If these documents are of relevance, whether
24 directly or obliquely, the better approach is to exhibit them
and
25 that would be our judicial preference.

26 MR JORDASH: Certainly. We'll give you our documents
and
27 indicate at the end when the Prosecution have completed.

28 PRESIDING JUDGE: Very well. Mr Harrison, I'm sure
you've
29 got the message from the Bench.

1 MR HARRISON: Yes, I've got the message. The
Prosecution
2 is applying for this document which has the title:
"Registrar's
3 request to the authorities of Sierra Leone for the execution
of
4 arrest warrant pursuant to Rule 55(C)" to be the next exhibit
in
5 these proceedings.

6 PRESIDING JUDGE: Thank you. Mr Jordash, what is your
7 disposition?

8 MR JORDASH: No objection.

9 PRESIDING JUDGE: The document is received in evidence
and
10 marked exhibit?

11 MR GEORGE: 219, Your Honour.

12 PRESIDING JUDGE: Thank you.

13 [Exhibit No. 219 was admitted]

14 JUDGE ITOE: What about item 5 on page 62? I'm coming
back
15 to that because an acknowledgement of receipt by an accused in
a
16 form appears to be, from the comments which have been made by
17 your colleagues, I think they appear to be relevant to
18 proceedings and if we could have the form exhibited as well,
19 perhaps that would be -- to enable us to assess the compliance
20 with the procedures which are in section 55(C) which has been

21 referred to.

22 MR HARRISON: Yes, I guess I was unclear. What I meant
to
23 say, and obviously didn't do it adequately, was that it was
the
24 Prosecution's hope that pages 40 to 62 would all be part of
that
25 same exhibit.

26 JUDGE ITOE: Pages 40 to.

27 MR HARRISON: Forty, 4-0, up to and including 62,
because
28 the Prosecution understands the entire document to be one
filing
29 made by the Registrar to Court Management.

1 PRESIDING JUDGE: In other words, what I'm holding in my
2 hand is clearly the document that you're tendering.

3 MR HARRISON: That's what I failed to make clear.

document

4 PRESIDING JUDGE: Very well. So it is this entire

62.

5 that we have designated Exhibit 219, comprising pages 40 to

6 You may proceed with your arguments.

7 MR HARRISON: And there's one final document which is in
8 the Court Management records, and that's an affidavit of the
9 Deputy Registrar at that time, Robert Kirkwood. This is Court
10 Management document 006 and it's dated the 9th day of March

2003.

11 I gave copies to the Chamber's legal officer this morning and
12 also to each Defence counsel. I left copies on their table.

13 Again, this is just simply trying to respond to what the
14 Prosecution understood to be a concern to the Court, and this
15 brief affidavit simply says:

Robin

16 "I, Robert Kirkwood, Deputy Registrar, Special Court for
17 Sierra Leone, have today spoken with the Registrar,

18 Vincent, at 2100 with regard to written material to be
19 served inter alia on the inspector-general of police and
20 the Honourable Attorney-General.

21 I have, during the course of this conversation been

to 22 informed by the Registrar that the intention in relation
23 the service of these documents was always to be primary
be 24 service upon the inspector-general of police, who would
25 the national authority for the purpose of effecting
arrest 26 of those indicted and, of course, in order that the
27 Attorney-General be fully informed as to the above
matters 28 that he should receive a copy of all materials served
upon 29 the inspector-general of police."

1 I think that, in part, explains why there's a document
from
2 the then inspector-general, Keith Biddle, attached to the
3 Registrar's filing as opposed to a document from someone in
the
4 Attorney-General's office.

5 PRESIDING JUDGE: Hence?

6 MR HARRISON: And the Prosecution would make an
application
7 that this filing by the Deputy Registrar, be the next exhibit
in
8 the proceedings.

9 PRESIDING JUDGE: Mr Jordash, your response?

10 MR JORDASH: No objection.

11 PRESIDING JUDGE: The document will be received in
evidence
12 and marked 220?

13 MR GEORGE: 210.

14 PRESIDING JUDGE: 210.

15 MR GEORGE: 220. Your Honour.

16 PRESIDING JUDGE: 220. The last one was 219.

17 MR GEORGE: Yes, Your Honour. 220.

18 [Exhibit No. 220 was admitted]

19 MR HARRISON: I'm not sure if I've given a copy to the
20 Chamber's officer, but I have one here.

21 PRESIDING JUDGE: Yes.

22 MR HARRISON: There are two or three smaller issues the
23 Prosecution would prefer to deal with firstly and then move on
to
24 some more substantive issues.

25 The first of the smaller issues has to do with some
26 representations made involving Mr John Berry signing or, I
should
27 say, witnessing a document and the document is attached in the
28 bundle or first book of documents prepared by Mr Sesay, and
the
29 page number that has been given to it by Court Management is

1 29649.

2 Firstly, the date is of some significance; it's 24
March.

3 It's entered with the Court records of the Special Court on
the

4 same day by virtue of that stamp that has been impressed upon
the

5 document. What the Prosecution wants to convey to the Court,
6 though, are some of the facts involved.

7 This is an instance where -- there is a transcript for
the

8 interview taking place on the 24th -- somewhere around the
lunch

9 hour, a member of the Principal Defender's Office attends at
the

10 interview site. That member of the Principal Defender's
Office

11 is given freedom and confidentiality to meet with --

12 MR JORDASH: Sorry. Objection.

13 PRESIDING JUDGE: What is the objection?

14 MR JORDASH: The objection is that Mr Harrison is giving
15 evidence, which has obviously been obtained from members of
the

16 investigation team who were present during this incident. The

17 whole point of this application, from our point of view, is to

18 exclude the statement or to have the Prosecution call the

19 evidence, not convey the evidence through Mr Harrison, where
it

with 20 can only be dealt with by submissions. It can only be dealt
evidence. 21 by a proper testing of the evidence, not hearsay of the
explanation 22 I mean that with no disrespect to Mr Harrison, but an
submission 23 for Mr Berry conveyed to Mr Harrison only supports our
24 that evidence is required.

25 PRESIDING JUDGE: Mr Harrison, your reply to that?

was 26 MR HARRISON: Yesterday, the Prosecution's recollection
Defence 27 that quite a bit of evidence was put before the Court by
28 counsel and we had understood that this is something that the
29 Ntahobali case endorsed, that submissions could be made on the

about

trying

need

upon

1 full range of topics and issues, including representations
2 what took place. And the Prosecution sees it as being
3 appropriate to respond to the factual matters that were raised
4 yesterday. And, in fact, the Prosecution can -- it's not
5 to be coy here. The lawyer involved is sitting here in the
6 courtroom; Ms Jallow was the lawyer involved. If there is a
7 for her to respond, the Prosecution would not object. As an
8 officer of the Court, she can make representations, should any
9 party deem it to be appropriate, or the Court wish to call
10 her to do so.

11 PRESIDING JUDGE: Yes, Mr Jordash. In other words --

12 MR JORDASH: What I did yesterday --

trying

13 PRESIDING JUDGE: -- counsel is then saying what's the
14 difference, between what you did yesterday and what he's
15 to do now.

there

make

observed

signed

16 MR JORDASH: Well, there is a big difference in that
17 is evidence before this Court on paper. What I did was to
18 comments about that evidence. If Your Honours will have
19 in relation to this particular incident, whereby Mr Berry

20 this document, I did not give any comment about what
21 Ms Kah-Jallow may or may not remember about that incident. I
22 intentionally didn't, because it's a matter for evidence.
It's
23 not a matter for Defence to give that evidence while the
witness
24 sits either in the Prosecution camp or on the Defence row.
25 Secondly, in response to Mr Harrison's suggestion that
26 Ms Kah-Jallow is here and she can give evidence, the burden is
on
27 the Prosecution. Mr Berry is not so far away either, and he
can
28 give and discharge the burden.
29 It is wholly unsatisfactory for the Prosecution, and
this

1 is what it amounts to, a movement to put these facts into the
2 Ntahoboli situation so that they can, at the end of it, say,
3 "Well, they've had their voir dire," this is what effectively
the
4 Prosecution are seeking to do. What we did yesterday was make
5 comments on the evidence which is here, not bring in new
evidence
6 which has been obtained overnight from witnesses who are
7 pertinent to these issues.

8 PRESIDING JUDGE: Well, would he be acting improperly if
he
9 were to cite some of these factual scenarios in support of the
10 legal submissions that he's making?

11 MR JORDASH: He would be acting in a way which is not
fair
12 if he introduces evidence obtained from Mr Berry last night,
13 which cannot be contested by the Defence in an effective way.
We
14 have a right under Article 17 to confront the witnesses and
not
15 simply have that evidence adduced in a form which enables the
16 Prosecution to benefit from it but doesn't enable the Defence
to
17 challenge it.

18 PRESIDING JUDGE: But he would not be -- would he be out
of
19 the borderline if he were to just use some factual scenarios
in

20 respect of which he is in possession to buttress or reinforce
21 some legal submissions that he -- as long as they're not
22 evidence.

23 MR JORDASH: The submission we made yesterday was
something
24 went wrong. There was obviously some interference with
25 privileged conversations. We didn't seek to say what had
26 happened.

27 PRESIDING JUDGE: Yes.

28 MR JORDASH: We simply said this is the face of the
29 document, there isn't evidence as to what happened, but
something

1 clearly went wrong. That's why, at the very least, there
should
2 be a calling of evidence. The Prosecution clearly agree, but
3 want to do it through the back door, which is by doing it
through
4 counsel rather than through a means by which Defence can
properly
5 confront that evidence.

6 JUDGE BOUTET: May I ask you: I just would like to have
7 clarification from both of you, but from you first, as you're
8 standing up now, Mr Jordash. In your presentation yesterday,
you
9 referred to what you have described as evidence that are in
the
10 transcripts of these interviews. And you've used some of
these
11 transcripts to say, well, on this particular occasion at this
12 particular time, you're going to see there's a break, there's
no
13 break, and at that break, we don't know what happened. These
14 kind of -- that's the kind of evidence that you've used.

15 You have relied on the face of the transcript to make
your
16 argument to say, "We have no information as to what may have
17 transpired." And you used that argument, on the face of the
18 transcript, to say, "We don't know." All we know is there
19 appears to be a breach privilege because Berry did this or
didn't

20 do that.

saying. 21 I don't know what the transcript is saying or not

his 22 I thought, and I'll get to Mr Harrison on that last part --

evidence 23 argument was -- that he was presenting today was based on the
24 transcript as well and not from external information or

be 25 to those transcripts. So that's my understanding. But I may

26 wrong in my understanding of what Mr Harrison is attempting to
27 do.

an 28 MR JORDASH: If Mr Harrison is a simply going to offer

29 alternative scenario by which Mr Berry could have signed this

1 document and it remained proper, and it does not support the
2 Defence submissions, then to that limited extent we have no
3 objection. But if he's seeking to introduce evidence of what
4 actually happened, then there is an objection.

suggested

5 JUDGE BOUTET: I'll ask him the question, but he
6 to the Court that you can see from the transcript that Ms
7 was there at this particular time, and so-and-so. That's what
8 mean by this. As I say, I haven't looked at the transcript.

Jallow

I

If

show

been

be.

9 the transcript shows that, at least there's some evidence to
10 that at the time and place and date, as such, she may have
11 there or not. I'm not going beyond that. I'm just talking of
12 what I heard and perceived the position of the Prosecution to
13 If that is the case, you have no objection, I take it? If it
14 goes beyond that, you do have objection.

15 In other words, if that position is based on their own
16 interpretation of what the transcript is showing, you have no
17 objection. If they go beyond that that's where you have
18 objection; am I --

introduced

19 MR JORDASH: That's -- absolutely. If what is

Berry, 20 when that line is crossed is something that was said by Mr
21 an explanation last --

22 JUDGE BOUTET: Which is not in the transcript.

discernible 23 MR JORDASH: Which is not in the transcript or
24 from the face of the document, then we object.

25 JUDGE BOUTET: Thank you. Mr Harrison.

26 MR HARRISON: Yes, I should make clear, there's no
27 reference in the transcript. If I left that impression with
the

28 Court, I apologise; I had no intention to do so. From the
29 transcript, you would not divine that Mr Berry met with

1 Ms Kah-Jallow or that there was a meeting with Ms Kah-Jallow
and
2 Mr Sesay on the 24th. You would learn that from the document
3 that has been referred to frequently, which is the memorandum
of
4 John Berry, which was filed as an attachment to the response
back
5 in 2003, which is before the Court, I think at tab 6.

6 JUDGE BOUTET: So in answer to my question to Mr
Jordash,
7 you're saying you're not making your argument on the
transcript
8 but on the other evidence. The objection is, essentially, if
you
9 are to use and you're attempting to use evidence which was not
10 there, either in transcript or other the documents that have
been
11 filed with the Court, and it's external to that, that's the
12 objection.

13 MR HARRISON: Yes.

14 JUDGE BOUTET: So, I don't know what is what.

15 MR HARRISON: And I'm not sure if you wish to hear me to
16 fill out a response or if you wish to have Mr Jordash complete
17 his comments.

18 PRESIDING JUDGE: Oh, I think he's stated his position.

I

19 think the burden is on you to seek to persuade the Court that

20 what he's saying is meretricious.

21 MR HARRISON: The allegations that there was an
22 interference in solicitor/client privilege or solicitor/client
23 relations, the Prosecution says that's wholly untrue, in every
24 respect.

25 The Prosecution also reminds the Court that numerous
26 references were made to factual matters, such as talking about
27 the brandishing of arms in Bonthe; the hooding, or so-called
28 hooding of the accused people; the regime of torture that
existed
29 at Bonthe; the lack of various other types of proper conduct

1 which one might normally associate with detention facilities.
So

2 there was a whole range of factual assertions being made, none
of

3 which are part of any documentary material before the Court.
But

4 the Prosecution never objected and the Prosecution, frankly,
5 doesn't see anything offensive about it.

6 We are not trying to limit either the Court's ability to
7 understand the issues or circumscribe the Defence in what they
8 see as being significant issues that ought to be advanced
before

9 the Court. The Prosecution wasn't trying to be facetious when
10 saying that Ms Kah-Jallow is in court. If the Court does want
to

11 undertake an inquiry, the Prosecution sees her as an officer
of

12 the Court, and so be it. So the Prosecution is not at all
13 sharing the view that this in any way offends any rule with
14 respect to how this matter ought to proceed.

15 PRESIDING JUDGE: Yes, Mr Jordash.

16 MR JORDASH: There are two significant differences. We
say

17 Mr Sesay ought to give evidence about what happened. We're
not

18 seeking to put evidence into this courtroom through the back
19 door. We're saying Mr Sesay, if given an opportunity, will
give

20 this evidence.

21 The second issue is the burden of proof. There is no
point

22 in the Prosecution encouraging the Court to have Ms Kah-Jallow
evidence

23 give evidence. There is a willingness on this side for

24 to be called. There is a hope evidence will be called. The
not

25 Prosecution want it both ways. Let's put in our evidence but

26 allow it to be tested and let's encourage the Court to have
We

27 Defence representatives give evidence. That cannot be right.

28 are entitled, we submit, to put submissions about what
happened

29 before, during and after the interviews because we are willing
to

1 put that evidence before the Court. We want it to be tested.

2 PRESIDING JUDGE: We'll have a short stand down.

3 [Break taken at 10.27 a.m.]

4 [Upon resuming at 10.50 a.m.]

5 PRESIDING JUDGE: This is the ruling of the Court. The

--

6 it is that no factual matters extrinsic of the records should
be

7 alluded to by the Prosecution in its reply. Counsel is,
however,

8 at liberty to put forward suggestions in the form of
submissions

9 to the Court, based on his appreciation and understanding of
the

10 records. Let's proceed.

11 MR HARRISON: The Prosecution -- if the Court still has
the

12 document available, the Prosecution wholly rejects any
suggestion

13 of any impropriety in any respect on the part of Mr Berry and
the

14 writing of this document which has court number 29649. The

15 Prosecution wishes to be frank with the Court and not resile
from

16 anything. The Prosecution admits that the signature adjacent
to

17 the word "witness" is that of John Berry. But what is wholly

18 denied is any attempt to interfere in any respect with

19 solicitor/client privilege or any other type of privilege or
20 confidentiality that may in any respect be relevant.

instances

21 And if I can advise the Court, there are numerous

a

22 where a detainee, taken into custody, might say to the police
23 officer involved: "Do you have a list of lawyers that I could
24 contact? Do you have any phone numbers I could contact?" And

25 police officer who responds in any way to that is not doing an
26 illegal act or an improper act.

some

27 But all that you have before you is simply a document
28 prepared by an unknown person, if discussed by unknown people,
29 and all you know is that it was signed by Mr Sesay twice for

1 reason. There is two dates and two times beside Mr Sesay's
name,
2 and there's only one signature from Mr Berry on that document
3 with the date.

4 JUDGE ITOE: Do we have the original of this document?

5 MR HARRISON: No. This would be a document that must
have
6 gone into Court Management by virtue of the seal on it.

7 JUDGE ITOE: With the original, one can be able to make
8 some assessment. It could be possible. It mightn't be
possible
9 but looking at the original, it could be possible to make
certain
10 conclusions, you know, on that document.

11 MR HARRISON: This is not a Prosecution document. The
12 Prosecution has never been in control of this. This is
attached
13 to the Sesay book of materials and we assume that they must
have
14 got it from court records by virtue of the stamp.

15 PRESIDING JUDGE: Mr Jordash, do you want to throw some
16 light on that?

17 MR JORDASH: I do apologise for interrupting Mr
Harrison.

18 PRESIDING JUDGE: Yes.

19 MR JORDASH: Where we got it from was Defence Office

or
the
we
20 records. I can't remember as now whether it was an original
21 not but it was in Defence Office records. We can check over
22 break and if it's the original and Your Honours want to see it
23 can bring it to court.

24 PRESIDING JUDGE: Very well.

fact
now
it
document?
25 JUDGE ITOE: It can also be interesting if -- if that
26 can provide to us as who the author of this document was. We
27 know from what Mr Harrison is saying that the signature is
28 incontestably that of Mr John Berry, but who prepared it? Was
29 a third party? Was it a third party who prepared the

1 I wouldn't ask for an answer, you know.

2 MR JORDASH: I can say I don't know, is my answer to
that.

3 We do not know.

4 PRESIDING JUDGE: Mr Harrison, please continue.

5 MR HARRISON: I wanted to make a couple of comments
about

6 submissions to do with the arrest warrant that were advanced
7 yesterday. And the Prosecution wants to tell the Court that
it

8 sees no merit whatsoever in the suggestion that there were
9 breaches of the instructions or directives contained in the
10 search warrant. Where the search warrant uses the term "a
member

11 of the Prosecution may be present" in no way is that a
mandatory

12 order that only one person could be present. It is simply a
13 permissible order saying that member or members of the
14 Prosecution could be present.

15 And what is of more import for the Court is that the
arrest

16 warrant has nothing to do with the voluntariness of the
17 statement. There is another document that is before the Court
18 that certain representations were made and that is a document
of

19 Beatrice Ureche and copies of that were included in the
20 Prosecution binder, and it's at tab 5 you will find that

21 document. The representation that was made was that the
22 Prosecution prevented or obstructed communication between a
23 member of the Principal Defender's Office and Mr Sesay. And
from
24 the document itself it's clear that that is not the case.

25 This is a document which, again, was filed with Court
26 Management. It's document 009 in the Sesay file. And it's
27 titled
numbered 67 and then 68, 69 by Court Management, and it's
28 as an interoffice memorandum. It's dated 12 March 2003, and
it's
29 from Beatrice Ureche. Subject is: Rights advisement. And
the

1 paragraphs then provide the information that she is submitting
it
2 pursuant to a rule. The Court, she says at paragraph 2: "On
11
3 March 2003 the accused Issa Sesay was brought for questioning
to
4 the office the Prosecutor." Paragraph 3: "The Registry was
5 informed that Mr Sesay waived his right to counsel."
Paragraph
6 4: "The same day, at the request of Ms Mariana Goetz, legal
7 adviser to the Registrar, I went to OTP in order to obtain the
8 abovementioned waiver as well as a tape recording of the
waiver."
9 Paragraph 5: "Mr Luc Cote, chief of prosecutions, gave me a
10 waiver initialised by Mr Sesay herein after attached." And it
is
11 attached to the document.
12 There is no suggestion whatsoever that at any point in
time
13 was there an attempt made to be obstruct, prevent or in any
way
14 impede an attempt by Ms Rekky to see the accused.
15 As a result --
16 MR CAMMEGH: I am so sorry to interrupt.
17 PRESIDING JUDGE: Yes.
18 MR CAMMEGH: Would Your Honour please give me leave to
19 leave the room for just five minutes?

20 PRESIDING JUDGE: Leave is granted.

21 MR CAMMEGH: Thank you very much.

22 MR HARRISON: The Prosecution would then apply for this
23 document to become an exhibit in the proceedings.

24 PRESIDING JUDGE: Mr Jordash, what is your response?

25 MR JORDASH: No objections.

26 PRESIDING JUDGE: We'll receive it in evidence and mark
it
27 exhibit?

28 MR GEORGE: 221, Your Honour.

29 PRESIDING JUDGE: Thank you.

1 [Exhibit No. 221 was admitted]

2 MR HARRISON: Certain representations were made
yesterday
3 to do with the declaration of Mr Morissette and I wanted just
4 to -- I think it was simply, perhaps, an error in reading the
5 judgment or just an oversight, but a representation was made
to
6 you that one of the cases which Mr Morissette said that he was
7 involved in, that being Kajelijeli, that in that case there
was a
8 finding of an illegal or unlawfully taken statement, but I
think
9 upon reading that decision that doesn't square.

10 The decisions -- it's the Appeals Chamber decision that
was
11 handed up to you. It was one of the loose documents handed up
to
12 you yesterday by Mr Jordash. But at any rate, there was a
13 representation made. I'll just give you the transcript. That
is
14 the transcript of yesterday, at page 39, where it was pointed
out
15 that Kajelijeli, which we have here the interview, the arrest
was
16 ruled illegal because the tribunal Prosecution investigators
or
17 the Prosecution had failed to properly inform the accused of
the
18 reasons for his arrest and then a copy was given to the Court.

Chamber, 19 But at paragraph 236 of the decision, the Appeals
no 20 there had been a Trial Chamber decision saying that there was
236: 21 difficulty. Appeals Chamber decision reads as follows, at
not 22 "The Appeals Chamber finds that the Trial Chamber did
23 err in finding that there was no violation of the
24 appellant's rights during the interrogation of 12 June
25 1998. The Appeals Chamber notes that on appeal the
conclusion 26 appellant did not challenge the Trial Chamber's
of 27 that there had been voluntary waiver or his concession
28 the same, and only summarily stated that his right to
29 counsel had been violated under Rule 42. The Appeals

1 Chamber sees no reason to further discuss the apparently
2 undisputed question whether the waiver was voluntary."

3 I think a fair reading of that was that there was a
4 half-hearted attempt made by the appellant late in the day to
5 make an allegation that his right to counsel had been violated
6 but the Appeals Chamber saw no significant merit or no merit
7 whatsoever.

8 PRESIDING JUDGE: So what was the decision then at the
9 appeals level?

10 MR HARRISON: That there was -- there is no violation.
11 Now, the Prosecution wants to take you through three of the
cases
in
of
12 and, in doing so, show you how, on a closer reading of them,
13 applying the particular facts of this case, that the concerns
14 the Defence are simply not, in any way, significant.

15 The first case is that of Bagosora and the Prosecution
sees
16 that case as standing for quite a different proposition than
what
17 was advanced. The accused in that case was given a notice of
the
18 suspect's rights and he was asked if he has any questions, and
19 this is at paragraph 15 of the decision. And this, again, is
--

20 I'm not sure if there is a particular binder that was prepared

up
21 for you by Mr Jordash or one of his colleagues, but it ended
22 being given Court Management number 29787.
23 JUDGE BOUTET: Would you please repeat the number again,
24 29?
25 MR HARRISON: Yes. The number is 29787.
26 JUDGE BOUTET: Thank you.
of
27 MR HARRISON: Perhaps I should just say, for the benefit
28 the Court Reporter, it is The Prosecutor v Bagosora. The name
29 being spelled B-A-G-A-S-O-R-A [sic]. What you will see at

1 paragraph 9 is a statement by the Court that the accused had
2 demonstrated that Kabiligi did not understand that he had had
an
3 immediate right to the assistance of counsel. And the Trial
4 Chamber then went on to say in paragraph 20, that Kabiligi did
in
5 fact invoke the right to counsel at the beginning of the
6 interview, and that's paragraph 20. So there is a positive
7 finding of fact that Kabiligi actually makes clear or
8 sufficiently clear that he was invoking his right to counsel,
9 before the interview takes off.

10 And the Prosecution says that that's wholly different
from
11 the circumstances before you, because the transcripts and the
12 audiotape and videotape, make amply clear that Sesay never had
a
13 misunderstanding and Sesay made clear that he was prepared to
be
14 interviewed. Now, Sesay -- sequence of events and you can
follow
15 it from the transcript, but I'll try to summarise it for you.
16 The sequence of events was that, once in the interview room,
17 Sesay is shown the arrest warrant and it's read out to him and
18 the material part of the arrest warrant was that it was
ordering
19 "your arrest and detention in regards to offences committed
over

20 the mandate of the Special Court", that's page 28333 of the
21 transcript.

that
22 The second thing that's done is, he is told the rights
23 are to be afforded to him as an accused. That is at 28333 to
24 28335. And then at three, the whole arrest warrant is read to
25 him, and that's in the next pages, from 28336 to 28340.

of
26 They then read the rights of the accused and the right
27 the suspect. And then, in the next page, it's said:

28 "Q. Now, the rights that I'll read to you. So far you
29 understand what I'm saying?"

counsel

then

right

You're

1 "A. Yes, sir, I'm getting you."
2 That's page 28341.
3 Then Sesay is told of the right to be assisted by
4 or to have legal assistance assigned. It's read to him and
5 he's asked:
6 "Q. Do you understand?
7 "A. Yes."
8 Page 28342.
9 The seventh thing that happens is he is told of the
10 to remain silent. And he's asked:
11 "Q. Do you understand these rights?"
12 "A. Yes."
13 There is then a document used, which is a rights
14 advisement, which is before the Court, and that's signed and
15 initialed.
16 The ninth thing that happens is, he's asked:
17 "Q. So this is a right for assistance by counsel.
18 saying you understand the right of free assistance,
19 interpreter, and the right to remain silent?
20 "A. Yes.
21 "Q. Good. Now we continue, Hassan, are you willing to

interview 22 waive the right to counsel and proceed with the
other 23 in preparation of a witness statement; yes or no? In
involvement; 24 words, are you willing to discuss with us your
know 25 are you willing to tell us what happened and what you
26 of these events?
27 "A. Yes, sir."
and 28 He is then told that the entry would be audio recorded
29 then he's asked:

willingness

1 "Q. I understand that you have indicated your
2 to talk with the investigator for the Special Court and
3 discuss your involvement and your collaboration with us.

4 "A. Yes, sir."

5 "Q. Is that what you want to do?

6 "A. Yes, sir."

7 Then at pages 28346 to 28347:

making

8 "Q. And I wanted you to understand that we are not
9 any promises to you.

10 "A. Yes, sir.

of

11 "Q. Whatever cooperation you are offering to the Office
12 the Prosecutor, will be taken into full consideration.

13 "A. Yes, sir.

to

14 "Q. Then it will be passed on at the appropriate time
15 the judge to be taken into consideration with -- for the
16 intention to use this collaboration or to take into
17 consideration this collaboration, whenever, you know, if
18 found guilty of any offence, whenever sentencing occurs,

it

judge

19 will be the position of the Prosecutor to request the

sentence

20 to take into consideration, you know, whatever the

that

21 could be. I want to make sure that it is quite clear

22 there is no promise made to you here in regards to a

23 negotiation of sentencing, place of sentencing, or

24 whatever. It will be up to the judge to take this into

25 consideration."

26 JUDGE ITOE: Mr Harrison, what page is that?

27 MR HARRISON: 28346.

28 JUDGE ITOE: 47 -- 28346, 28347?

29 MR HARRISON: Yes.

1 JUDGE ITOE: This is where that dialogue --

2 MR HARRISON: Yes.

judge

3 JUDGE ITOE: -- appears as to the eventuality of the

4 intervening in terms of sentencing if he were found guilty?

5 MR HARRISON: Yes.

6 JUDGE ITOE: Thank you.

the

7 MR HARRISON: If I could just continue, I'll just redo

8 last sentence:

9 "It will be up to the judge to take this into

10 consideration.

11 "A. Yes, sir.

12 "Q. Do you understand that?

13 "A. Yes, sir."

14 Then there is a long persuasive and compelling set of

15 evidence which shows that there is absolutely no difficulty in

16 Sesay understanding the content of subsequent questions,

17 responding appropriately meaningfully or in any way having any

or

18 lack of appreciation for linguistic issues, contextual issues

19 the significant matters of fact.

20 JUDGE ITOE: And what can you remind me of the dates of

21 28346 to 28347?

22 MR HARRISON: Yes, that's the first interview, 10 March

23 2003.

24 JUDGE ITOE: 10 March 2003.

25 MR HARRISON: That's why, the Prosecution says, we read
26 Bagosora.

27 JUDGE ITOE: Is there any indication as to the time when
28 the interviews started then?

29 MR HARRISON: Yes, I can -- the interview, as stated in

the

SCSL - TRIAL CHAMBER I

have

1 transcript, commenced at 3.03 p.m., and the passage that I
2 been reading --

3 JUDGE ITOE: It commenced at 3.03 p.m.?

been

4 MR HARRISON: Commences. And the passages that I have
5 reading from are from the first ten pages of the transcript of
6 that date. So although, unlike the transcripts which we have
7 here, there will be an indication of particular times when

things

8 are said. In the transcript, there is no such markings in the
9 margins.

is

10 JUDGE ITOE: May I have the benefit of this fact: If it
11 indicated on the records, we note that he was arrested on the
12 10th. At what time was he arrested? On this date, when the
13 interviews started?

this

14 MR HARRISON: What I can tell you is that the memo of
15 Mr Berry, which was referred to quite a bit yesterday by
16 Mr Jordash, I think the time is indicated there. And, from
17 document, it says that he arrived at 12 noon at CID --

18 JUDGE ITOE: At CID headquarters.

19 MR HARRISON: At CID.

and

20 JUDGE ITOE: And that was where he was met by Mr Berry

21 Mr Morissette also?

22 MR HARRISON: Yes, I think that's right.

23 JUDGE ITOE: Yes.

24 MR HARRISON: But if I -- I just want to make clear from

it

25 what I was -- the purpose of the earlier exhibit was to show

26 was CID, the Sierra Leone Police, who carried out the arrest.

27 And they would have --

28 JUDGE ITOE: At what time, please? I'm sorry. At what

29 time was that again?

SCSL - TRIAL CHAMBER I

arrived

1 MR HARRISON: The time that I have is that Mr Berry
2 at CID at 12 noon but I can't tell you right now from this
3 document the exact time that CID took Mr Sesay into custody.

CID

4 As far as timing goes, the only other information that I
5 can give you at this present moment is that, in that same memo
6 from Mr Berry, it says that the arrests had been made by the

Barracks,

7 and the three suspects were transported to Jui Police

1300

8 arriving at 1300. So, presumably, if they arrive at Jui at

9 and the arrest took place at CID. It must have been a
10 significant number of minutes before 1.00 p.m. that the actual
11 arrest took place.

have

12 JUDGE ITOE: From what you're saying, the arrest must

13 taken place some time before 1300?

14 MR HARRISON: Yes, precisely.

15 JUDGE ITOE: Thank you.

that

16 MR HARRISON: Having turned up this document, as I
17 understand, the Court's guidance, perhaps it's appropriate

in

18 at this time I ask that this document become the next exhibit
19 the proceedings, and this document being one, again, with the
20 title "Interoffice Memorandum." It's addressed to a Brenda

21 Hollis and Gilbert Morissette from John Berry, dated 17 April
22 2003, with the subject, "Contact with Issa Sesay." I should
also
23 indicate that this has Court Management numbers 309 to 312.
And
24 if I could just crave the indulgence of the Chamber's legal
25 officer, I have a marked-up copy. I should get a clean copy,
and
26 if I could give it to them to be the exhibit.
27 PRESIDING JUDGE: Very well. Mr Jordash, do you have
any
28 objection?
29 MR JORDASH: I object to it being served as an exhibit
for

exhibited

1 the truth of its contents. I don't object to it being
2 as a statement which was sent by Mr Morissette to the parties
3 mentioned.

4 JUDGE BOUTET: Berry to Morissette.

5 MR JORDASH: Sorry. Was it the Berry interoffice
6 memorandum. I don't object to it being exhibited for that
7 purpose, but it must be clear that we do not accept that it
8 accurately depicts the events.

in

9 PRESIDING JUDGE: Very well. We'll receive the document
10 evidence and mark it exhibit?

11 MR GEORGE: 223, Your Honour.

12 PRESIDING JUDGE: 223. Thank you.

13 [Exhibit No. 223 was admitted]

14 PRESIDING JUDGE: You were about to --

I'm

15 JUDGE BOUTET: We did have a copy of that yesterday?
16 not sure whether we've got it.

17 MR HARRISON: Yes, it was provided to all the parties.

18 PRESIDING JUDGE: Yes.

Management

19 MR HARRISON: I can just give this to the Court
20 officer, just for his convenience now. But you'll find it at
21 tab 6 of the Prosecution book of authorities. And I should

22 probably just explain that the reason why it's there is that,
23 originally, that document was attached to the Prosecution
24 response to the motion that was filed in 2003 by the Principal
25 Defender. If you look at 309, in the top right corner,
hopefully
26 it will still be there.

27 PRESIDING JUDGE: Continue, counsel. You were about to
--

28 MR HARRISON: Bagosora case.

29 PRESIDING JUDGE: Yes, you wanted to give us a
proposition

1 which is authority for --

questioning

2 MR HARRISON: Yes. It's clear that it stands for the
3 authority that if you invoke your right to counsel,

make

4 should stop. Because that's the finding in Bagosora. They

that

5 a finding that Bagosora invoked his right to counsel. And

6 is certainly consistent with national law jurisdictions and, I

7 suppose, it must be consistent with all international

8 jurisdictions.

9 PRESIDING JUDGE: So that's the proposition of law.

facts

10 MR HARRISON: And it's wholly inconsistent with the

in

11 that I've read out to you from the transcript of what happened

12 the Sesay interview. There was never --

did

13 JUDGE ITOE: You're saying that Bagosora did what Sesay

14 not.

15 MR HARRISON: Precisely. Again, just for the Court's

16 benefit, the finding of the statement of the Court is at

to

17 paragraph 20, where it said that Kabaligi did invoke the right

18 counsel at the beginning of the interview.

19 PRESIDING JUDGE: So it was cited yesterday for what

20 authority? What was the proposition?

21 MR HARRISON: I think it was cited for the general
22 authority that whenever there's improper conduct of any type -

23 PRESIDING JUDGE: Yes.

24 MR HARRISON: -- a statement should be ruled
inadmissible.

25 At any rate, it should be ruled involuntary.

26 PRESIDING JUDGE: Very well.

27 MR HARRISON: Normally inadmissibility would be the next
28 step.

29 PRESIDING JUDGE: Thanks.

1 MR HARRISON: If I could just do one more housekeeping
2 matter. Mr Justice Itoe was posing questions about the timing
of
3 the arrest, and I'll inform the Court that there is also a
4 declaration from Gilbert Morissette, which is part of the same
5 bundle that was given to the Court by the Prosecution. And
what
6 it says there, in the first paragraph, is that, "I first saw
Issa
7 Sesay on 10 March 2003 at approximately 1200 hours when I
8 attended to CID HQ for his arrest."

9 And, again, the Prosecution applies to have this
document
10 become the next exhibit. This document is dated 22 April
2003.
11 It has the heading "Declaration," and then it is signed by
12 Gilbert Morissette. And, again, Court Management gave this
13 document a number and the number is from pages 344 to 346.

14 PRESIDING JUDGE: Mr Jordash, do you have any objection
to
15 the document being exhibited for the same -- yeah, go ahead.

16 MR JORDASH: The same position as regards the Mr Berry -
-

17 PRESIDING JUDGE: The last one. Very well. The
document
18 will be received in evidence and marked Exhibit 223.

19 MR GEORGE: 223, Your Honour.

20 PRESIDING JUDGE: Yes.

21 [Exhibit No. 223 was admitted]

22 MR HARRISON: If the Chamber's legal officer requires a
23 copy, I can provide him with one. The second decision upon
which
24 some reliance was made yesterday is that of Delalic, and the
25 Prosecution wants to make some comments on that.

26 JUDGE ITOE: Is that the second of your three cases
you're
27 referring to?

28 MR HARRISON: Yes. Again, this was handed up, I think,
in
29 the first bundle provided by Mr Jordash. At any rate, the
first

some

with

decision

92,

the

18

largely

lawyer

1 page has Court Management number 29800. And this case left
2 ambiguity about Rule 92 and there was a bit of a discussion
3 the Court.

4 All I can say is that Rule 92 was not cited in the
5 at all. Almost all of the other rules are cited and quoted in
6 full in the decision, but Rule 92 was not. And I can only
7 suggest to the Court that what happened was that this was a
8 Defence motion for exclusion, so the Defence would not be
9 interested in trying to invoke Rule 92. But, at any rate, the
10 decision is wholly silent on the proper construction of Rule
11 as it exists in the ICTY.

12 This is a case where it's of crucial significance that
13 Court found two separate statements: One admissible; one not.
14 And the reason for that, the accused in this case was called
15 Mucic. And Mucic gave a statement to the Austrian police on
16 March '96. That statement was found to be inadmissible,
17 because under Austrian law there is no right to have your
18 present for an interview, and the tribunal found that would be
19 contrary to the rules of the ICTY, and it simply could not be

20 upheld. But that statement is on the 18th. On the 19th, 20th
21 and 21st of March, the three subsequent days, Mucic talked to
the
22 OTP and gave a statement. That statement was found
admissible.
23 And at paragraph 20, the Trial Chamber talks about the two
24 different interviews.
25 And what was being alleged by the Defence about the
Mucic
26 statements was, firstly, that the accused had an imperfect
27 understanding of the meaning and scope of his rights because
of
28 the difference in cultures and legal systems. The second
thing
29 that was alleged was, they challenged the waiver that Mucic
had

1 made.

2 JUDGE ITOE: An imperfect understanding of?

3 MR HARRISON: The rights, legal rights, because of the
4 difference in cultures and legal systems. Mucic being, as I
5 think about it now, I'm not sure if he was Serbian or

Croatian.

6 At any rate, he's not Austrian. So there's Austrian rules and

7 law and there's also the ICTY law and, presumably, the
suggestion

8 was that Mucic wasn't familiar with either. But the second

9 challenge was that to the waiver of the right to counsel. And

10 they did this by trying to point to a missing link in the

11 evidence, a gap in time, a silence in the tape. The third

12 challenge was to the oppressive nature of the questioning.

13 Now, you'll find the Court dismissing each of these in
the

14 decision. In the first one, the cultural argument was

rejected

15 at paragraph 59. And, frankly, I think that's a pretty easy

one

16 to dismiss and I won't say much about it.

17 The second one, there is an argument that there was a

18 discussion when there was no recording going on. And that was

19 the allegation. Now that was dismissed, that allegation, and
it

20 was found that the accused understood he had a right to

counsel

21 during the interview. He was aware of that right to waive his
22 right to counsel. And that's at paragraph 62 and 63. And
what
23 the Court said there was that, reading from 62, the challenge
by
24 the Defence of the waiver of the right to counsel is based on
25 speculation of what might have transpired between Mr Aribat
and
26 the accused in an unrecorded part of the interview. Defence
27 counsel has not suggested exactly what was said, but infers
that
28 the exercise of the right to counsel must have been discussed
at
29 the meeting. This is inferred from the expression, "in

of 1 accordance with our previous conversation," on the first day
2 questioning.

3 The Prosecution denies that they entered into any such
4 discussion. Mr Abribat, who was alleged to have held the
evidence 5 unrecorded discussion, has denied such discussion. His
6 was that he merely asked the suspect, through an interpreter,
7 whether the accused would agree to the recording of the
interview 8 by both audio and video.

9 And the third argument that was advanced was that of
to 10 oppressive conduct. Now, this is something which I understand
11 be significant in English law. I don't know that it's
12 significant anywhere else. But the way I understand it is
that 13 it refers to oppressive conduct as the most recent addition to
14 English law of evidence, of grounds enabling the exclusion of
15 statements. And this discussion takes place at paragraph 66
to 16 69 of the Delalic decision and, ultimately, the Trial Chamber
17 said there was no evidence whatsoever of oppressive
questioning.

18 And, again, the Prosecution here is telling the Court
that 19 there was no oppressive questioning, at any point in time.

taken;
20 Breaks were taken, appropriately: Cigarette breaks were
looking
21 lunch breaks were taken; washroom breaks were taken. By
22 at the videotape, you can see that the interview took place in
23 comfortable surroundings, comfortable chairs, tables in front
24 there of all the people. There is nothing to suggest that
there
25 was even a hint of an attempt at oppressive questioning.

26 PRESIDING JUDGE: Did it give particulars of oppressive,
27 samples of oppressive questioning in that case?

I
28 MR HARRISON: In this particular case they did not, but
29 can tell you --

global

1 PRESIDING JUDGE: In other words, it was a kind of
2 kind of allegation lacking in particulars.

the

3 MR HARRISON: Yes. What is said in the statement or in
4 decision, rather, particular reference is made to a decision
5 the English Court of Appeal.

of

6 PRESIDING JUDGE: Yes.

7 MR HARRISON: Regina v Prager from 1972.

8 PRESIDING JUDGE: Prager. Yes.

9 MR HARRISON: And I think that's simply put in to give a
10 definition of what the English courts treat as oppressive.

English

11 PRESIDING JUDGE: Oppressive questioning. But the

what

12 courts would never want to give an exhaustive definition of

the

13 an oppressive questioning would be. It's not consistent with
14 pragmatic approach of the judges.

questioning,

15 MR HARRISON: What you do find at 69 is really a
16 description of what the Prosecution did during the

inordinate

17 such as, there is evidence that, notwithstanding the

18 duration of the interview, there was nothing oppressive. The

19 accused was given refreshments during the exercise, and he had

the
any
statements

20 opportunity to rest at intervals. There was no evidence that
21 duration of the interview excited in him hopes of release or
22 fears which made his will crumble, thereby prompting
23 he otherwise would not have made.

24 PRESIDING JUDGE: Perhaps we should take a break at this
25 point and come back and hear you further.

26 [Break taken at 11.35 a.m.]

27 [RUF07JUN07B - MD]

28 [Upon resuming at 12.15 p.m.]

29 PRESIDING JUDGE: Mr Harrison, please, continue.

yesterday
have
a
done
you
is
is
complete
absolutely

1 MR HARRISON: I believe there was a resubmission
2 with respect to instances in the transcript where what may
3 been recorded would be something like "mmm-hmm" as opposed to
4 clear affirmative "yes" or "no."
5 JUDGE ITOE: Mr Harrison, before you get there, you were
6 treating us to three cases. You had done Bagosora, you've
7 Delalic. Was there a third one?
8 MR HARRISON: Indeed there is. I'm intending to keep
9 in suspense for one more minute.
10 JUDGE ITOE: All right. Okay.
11 MR HARRISON: What the Prosecution wanted to make clear
12 that instances where that may exist in the transcript, there
13 always recourse to the videotape to observe the full and
14 context where the information being conveyed becomes
15 clear.
16 And the Prosecution says that, by looking at the video,
17 there can be absolutely no ambiguity whatsoever as to the
18 understanding of Sesay and the content of his communication.

19 And the third decision is Halilovic, which was referred
to
20 yesterday and, again, I believe that was contained in the
first
21 bundle of authorities prepared by Mr Jordash and Ms Ashraph.
For
22 the benefit of the reporter, Halilovic is H-A-L-I-L-O-V-I-C.
23 Although there is a Trial Chamber decision contained in the
24 bundle, I'm only going to refer to the Appeals Chamber
decision,
25 which you will find at 29824.
26 The Prosecution certainly agrees that this is a
significant
27 case and it's one of the only other Appeals Chamber decisions
28 that's being put before you. And we also say that, on a close
29 reading of the case, it entirely supports the submissions that

1 we're making.

issue

2 The first issue and, in fact, ultimately for the
3 development of law in this area, perhaps the most important

its

4 the Trial Chamber dealt with was a procedural one because what
5 happened in the Trial Chamber is that the Prosecution simply
6 stood up at the Bar table, holding the accused's statement in

Prosecution

7 hand. There's no witness in the courtroom, and the
8 simply tendered the entire statement of the accused. And the
9 Trial Chamber allowed that process and, ultimately, the Trial
10 Chamber said that the statement was admissible. Now, things
11 change at the Appeals Chamber. But what stays the same is

that

12 the Appeals Chamber made clear that the procedure for
13 the statement was lawful.

admitting

this

14 For the benefit of the Court, I'll just tell you that

7,

15 first issue about the procedural matter is stated at paragraph

take

16 and then the answer given by the Appeals Chamber, which I'll
17 you to, is at paragraphs 14, 16 and 19.

do

18 What the Appeals Chamber said, at paragraph 14, is that
19 with respect to the appellant's first argument, that the Rules

20 not permit a record of an interview with the accused to be
21 tendered into evidence unless the accused has chosen to
testify,
22 or has consented to the tender. The Appeals Chamber does not
23 agree that the Rules impose such a categorical restriction.

24 It then goes on in 15, 16, 17 and 18 with some further
25 discussion but, at paragraph 19, the Appeals Chamber says

this:

26 "The Appeals Chamber is not satisfied that the Trial
27 Chamber breached its own guidelines for application of
the
28 best evidence Rule that witnesses must always be called.
29 The guidelines reflect the large measure of discretion
that

whether

of a

a

Chamber

the

caution

2005.

with

from

1 the Trial Chamber has to determine under the Rule
2 or not it is necessary in the particular circumstances
3 case to call witnesses to establish the authenticity of
4 document as the best evidence. Where that document is a
5 record of interview with an accused and the Trial
6 is satisfied that the interview has been conducted in
7 compliance with Rule 63, which includes application of
8 recording procedure of Rule 43 and adherence to the
9 requirements of Rule 42A(iii), it is well within the
10 discretion of the Trial Chamber not to require further
11 evidence of the circumstances of that interview to
12 establish its authenticity."

13 So we say -- and the timing of this case is that this
14 precedes Ntahobali by one year. This decision is 19 August
15 The Appeals Chamber decision in Ntahobali is October 2006. So
16 we --

17 JUDGE BOUTET: Mr Harrison, if I may, I'm not familiar
18 all the procedure they follow at ICTY, but it would appear,
19 the reading of these paragraphs you've just referred to, that

20 they have, as part of their procedure, what they call
guidelines
21 about rules of evidence, as such. It would appear, from my
22 reading of this, that in dealing with whether it's
admissibility
23 of evidence or any other matter of an evidentiary matter, that
24 they have guidelines that they do follow.

25 Now, whether or not it's they must follow or not, and it
26 may be what they are discussing, so I'm just trying to seek
some
27 clarification on that because they appeared, the Appeals
Chamber,
28 seemed to be discussing the compliance or non-compliance of
these
29 guidelines and if -- in light of the discretion that a court
may

of

1 have or may not have. So I'm just trying to see if my reading
2 this is relatively accurate.

v

3 MR HARRISON: I think that is accurate. I'll forward to
4 the Chamber's legal officer a case which is called Prosecution
5 Martic, M-A-R-T-I-C, and the date of the decision is 19

January

6 2006. You will see attached to it a document called "Annex A

-

Evidence."

7 Guidelines on the Standards Governing the Admission of

submissions

8 And I understand it's a common practice at the beginning of a
9 case for the Trial Chamber to ask the parties to make

10 on what they think should be the appropriate standards or
11 practices for the admission of evidence. And then a Trial

12 Chamber can draft those guidelines as it deems appropriate for

is a

13 the case. And this would be -- I can tell you that this one

14 statement of 12 guidelines.

15 PRESIDING JUDGE: For my benefit, could you give me the
16 precise ground of appeal in the Halilovic case to which the
17 Appeals Chamber provided a precise answer?

18 MR HARRISON: Well, there were two grounds of appeal.

19 PRESIDING JUDGE: Yes [overlapping speakers].

20 MR HARRISON: The first one was that the accused said it

21 was impermissible for the Prosecution to tender the accused's
22 statement from the Bar table without admitting it through a
23 witness.

24 The second issue was the voluntariness of the interview.

25 PRESIDING JUDGE: Thank you, very much. Did they answer
26 the second question?

27 MR HARRISON: Yes. And I'll take you to that right now.

28 What was being alleged was that at least two inducements
29 had been made to Halilovic. The first inducement was that the

1 accused had relied upon a letter from the Prosecutor, which
2 stated that full cooperation could have a positive influence
on
3 Halilovic's provisional release.

4 And, secondly, there were alleged agreements with the
5 Prosecution that were referred to in an interview on the
6 transcript, and the Prosecution did not respond to these
7 allegations as they came up in the interview. So, there is a
8 statement made about an agreement and silence from the
9 Prosecution as to: Do you agree, don't agree, whatever.

10 Now, this second issue was compounded for the
Prosecution
11 because it was again raised at a status conference, in court,
12 where the Defence counsel said that the indictment would be
13 withdrawn and, again, the Prosecution does not respond to that
in
14 a way satisfactory to limit or persuade the Appeals Chamber
that
15 it had acted appropriately.

16 Now, what's different about Halilovic is that there is
no
17 suggestion here, on the evidence before you in Sesay, that any
18 inducement has been made to Sesay, at any point in time. And
19 there is important reasoning in Halilovic which, even though,
20 ultimately, the trial -- the Appeals Chamber excluded

Halilovic's

used 21 statement, there is important reasoning which also should be
22 in this case.
23 JUDGE ITOE: Let me get this very clearly: You are
24 asserting affirmatively, and I would say relatively clearly,
that 25 in the submissions that have been made by Mr Jordash,
including 26 the records and the transcripts and all that we have before us
in 27 the exhibits, no inducement has been made to Mr Sesay; is that
28 what you are affirming?
29 MR HARRISON: Yes, that's the Prosecution's position.

1 JUDGE ITOE: Thank you.

2 MR HARRISON: But Halilovic is important because of what
it
3 does decide about this issue of voluntariness of a statement
4 because this is --

5 JUDGE ITOE: If I may come in. I don't know, we'll go
6 through the Halilovic case later. What would you say about a
7 letter, the letter, or what did the Appeals Chamber say about
the
8 letter that was written by the Prosecution to Mr Halilovic,
9 giving him the impression that cooperation might facilitate
his
10 application for a provisional release?

11 MR HARRISON: Yes. And what the Appeals Chamber said is
at
12 paragraphs 38 and 39.

13 JUDGE ITOE: Yes.

14 MR HARRISON: And they said:
15 "While the statement may have provided an incentive to
the
16 appellant to cooperate, it is not unreasonable to
conclude
17 that it did not have the effect of rendering that
18 participation involuntary."

19 So there is a distinction between an incentive and
20 something which is an inducement which does render
participation

21 involuntary.

22 And the Appeals Chamber goes on a bit more to say the
23 following -- it goes on to say and, again, this is -- I am now

at

24 the bottom of paragraph 38, and it's the last full sentence.

It

25 says:

26 "In other cases, however, the inducement is simply an
27 incentive. The fact that the accused may have taken

this

28 incentive into account when deciding whether to

cooperate

29 does not mean that the defendant was not acting

1 voluntarily. Under the circumstances of this case, the
2 Appeals Chamber is not satisfied that the Trial Chamber
3 erred in finding that the statement of the Prosecution,
4 that the appellant's cooperation could have a positive
5 influence on the Prosecution's position in respect of an
6 application for provisional release, did not have the
7 effect of rendering the appellant's participation in the
8 interview involuntary. While that statement may have
9 provided an incentive to the appellant to cooperate, it
is
10 not unreasonable to conclude that it did not have the
11 effect of rendering that participation involuntary."
12 Then at paragraph 39:
13 "However, although the Prosecution's statement may not
have
14 been of such a nature as to coerce the appellant into
15 cooperating with the Prosecution, it does not undermine
its
16 nature as an inducement understood as an incentive to
17 cooperate. This was a relevant factor to be considered
by
18 the Trial Chamber in considering whether to permit the
19 tender of the record of interview from the Bar table and
20 the Trial Chamber erred in failing to take into
21 consideration when exercising its discretion to admit
the

22 record of interview."

23 That's the error made by the Trial Chamber. It didn't

24 consider it. It threw it out. The baby went with the bath
water

25 and the Trial Chamber said: No problem. The Trial Chamber
ought

26 to have at least considered it as a factor in its ultimate

27 decision.

28 JUDGE ITOE: And the Appeals Chamber did not think that
it

29 could, of its own motion, visit that particular aspect that
was

1 not conceded by the Trial Chamber? Of course, it did not.

2 MR HARRISON: No, of course they did visit it because --

3 JUDGE ITOE: They didn't visit it because they feel that
4 the Trial Chamber did not raise it.

5 MR HARRISON: No, no, the Appeals Chamber -- that's the
6 reason, or one of the factors why they overturned the Trial
7 Chamber decision. That was the error made by the Trial
Chamber,
8 that it did not consider the incentive as a factor.

9 PRESIDING JUDGE: I'm also interested in [indiscernible]
10 quite frankly, when you -- those passages that you've cited
did

11 not leave me convinced that the Appeals Chamber did
articulate,
12 in a very convincing and persuasive way, one, the distinction
13 between an incentive in such circumstances, and an inducement.
14 And then, secondly, the legal effects of, one, an incentive as
15 distinct from the legal effects of an inducement. It was
really

16 a little of more there is a distinction, one is an incentive
and
17 one is inducement. So here we have a recipe for clear debate
as

18 to what really -- and particularly when they got to the point
of
19 even suggesting that an incentive may not even have amounted
to

delicate

20 an inducement. Virtually they are saying this is a very

come

21 borderline, ill-defined and perhaps some guidance could have

22 from them as to exactly where an incentive ends and where an

23 inducement begins.

24 MR HARRISON: Fortunately for all of us, I don't write

25 them, I just try to read them.

that's

26 PRESIDING JUDGE: We're all learning, Mr Harrison,

27 all.

can

28 MR HARRISON: I understood your comment but I think I

29 give you a little bit more assistance.

1 PRESIDING JUDGE: Yes.

because,
2 MR HARRISON: By continuing on with the decision
3 as I indicated earlier, there were two arguments or two
4 complaints being made. One has to do with this assertion
that,
5 if you cooperate, we'll consider provisional release, we'll
6 consider bail.

where
7 The second one had to do with this alleged agreement
8 the indictment would actually be withdrawn, if you cooperated,
9 and this comes up out of the interview and the Trial Chamber
10 deals with it in the very next paragraph, 40. And what had
11 happened was, the interview was taking place. There's a break
in
12 the interview and, after the break in the interview, without
any
13 clarification on the record of what these agreements
supposedly
14 were. There is simply no reference to it. And at paragraph
40,
15 this is what the Trial Chamber says. It says:

16 "This break in the record and the statements made by the
17 appellant and his counsel prior to that break provides
some
18 support to the appellant's argument that he would not
have

is
take
the
minute
that
its

19 cooperated absent those agreements. The Appeals Chamber
20 satisfied that the Trial Chamber erred in failing to
21 this factor into account in its assessment of the
22 voluntariness of the interview."
23 So again, we have got a first factor. We have now got
24 second factor. I will take you to the third factor in a
25 but, this alone, does not lead the Appeals Chamber to rule
26 the statement's involuntary. It's another factor to be
27 considered.
28 And again, the Prosecution wishes to make clear that in
29 view there is nothing similar in the Sesay tapes to what took

1 place in Halilovic. In Halilovic, if I can just read part of
2 paragraph 40, and this is the fourth line down, the second
3 sentence, it says:

4 "In dealing with this allegation the Trial Chamber noted
5 that at one point in the interview the appellant and his
6 Defence counsel raised the issue of certain agreements
7 reached with the Prosecutor and asked for a break in the
8 interview in order to clarify whether those agreements
9 reached with the Prosecution were to be respected.

After

10 the break the interview continued without any

clarification

11 on the record of what those alleged agreements were.

The

12 Trial Chamber placed no emphasis upon this break in the
13 interview and the Appeals Chamber finds that it erred in
14 failing to do so."

15 We say that there is nothing akin to that in the Sesay
16 transcripts.

17 And the third factor, which is a very significant one in
18 the Appeals Chamber's reasoning, is that they found that the
19 Trial Chamber failed to take into account the inadequate
20 representation of the appellant by Defence counsel. That is
21 discussed at quite some length from paragraphs 55 to 62. But

the

22 conclusion can only be that counsel was incompetent.

23 It's on the basis of these three separate factors all
24 existing in Halilovic that the Appeals Chamber overturned the
25 Trial Chamber's decision and ruled the statement to be
26 inadmissible. The Appeals Chamber still agreed with the
27 procedure adopted; it was only the admissibility of the
statement
28 that was overturned.

bound
29 The Prosecution wants to advise the Court, and feels

1 to do so, that the transcript of 31 March 2003, although being
2 accurate, does not include a brief conversation during the
lunch
3 break between Mr Morissette, Mr Berry and Mr Sesay, during
which
4 Mr Morissette --

5 MR JORDASH: Objection.

6 PRESIDING JUDGE: What is the objection, Mr Jordash?

7 MR JORDASH: Well, I anticipate Mr Harrison is about to
say
8 what Mr Berry or Mr Morissette told him last night to explain
the
9 conversation off tape which would breach, we would submit, the
10 order of this Court which gave -- Your Honours delivered this
11 morning.

12 PRESIDING JUDGE: Yes. What is your response to that,
that
13 you are about to cross the red line, so to speak?

14 MR HARRISON: Well, the Prosecution understands that it
has
15 an ethical obligation because representations had been made
16 previously.

17 PRESIDING JUDGE: But we have said you are at liberty to
18 make suggestions and in the forms of submission provided you
stay
19 within the records, and our ban this morning was that you are
not

and

20 supposed to import any extrinsic material in support of your
21 submissions, but that you are perfectly at liberty within the
22 context of the records to make suggestions in the form of
23 submissions, or vice versa to the Court. And of course the
24 question really now is whether you are crossing the red line,
25 whether what you want to -- you are referring to now is
26 extrinsic.

27 MR HARRISON: Yes.

28 PRESIDING JUDGE: It is extrinsic?

29 MR HARRISON: Yes.

1 PRESIDING JUDGE: Then it certainly infringes upon our
2 ruling this morning, except you can persuade us that perhaps
the
3 particular point that you want to submit to the Court clearly
is
4 permissible within the confines or the limits of our ruling
this
5 morning. Let's hear what you --

6 MR HARRISON: The Prosecution -- we simply understand an
7 ethical obligation to exist and if the Court releases us from
8 that then --

9 PRESIDING JUDGE: In other words, you have an ethical
10 obligation to say something?

11 MR HARRISON: That is the rules, I think, I am bound by,
12 but I am not seeking to challenge the Court's ruling and I
accept
13 it.

14 PRESIDING JUDGE: Yes. Well, persuade us.

15 MR HARRISON: I understand the rule to be that if
anything
16 has been said to mislead or potentially cause a misleading
17 understanding --

18 PRESIDING JUDGE: You have a duty --

19 MR HARRISON: -- that the Prosecution --

20 PRESIDING JUDGE: Has a duty to correct that.

21 MR HARRISON: That is my understanding.

22 PRESIDING JUDGE: Mr Jordash, would that be something
23 outside his scope? If something has been said here, which may
24 well amount to a misrepresentation, either inadvertent or not
25 inadvertent, wouldn't there be an ethical duty to correct
this,
26 both sides?

27 MR JORDASH: Well, perhaps Mr Harrison could give
further
28 and better particulars as to who has done the misleading, what
29 the statement was which was the misleading statement, and from

1 that we might be able to infer what his ethical duties upon
which
2 he relies, in fact, are. But to simply say: I've got an
ethical
3 duty because of some unspecified misleading, leaves us all
4 somewhat in the dark.

5 PRESIDING JUDGE: But if there is, if he is convinced
that
6 something that had been said here ought to be corrected, or
7 probably was said inadvertently or probably with intention to
8 mislead, is he discharged from his ethical obligation to
9 highlight that?

10 MR JORDASH: Well, it depends what it is.

11 PRESIDING JUDGE: Yes.

12 MR JORDASH: We don't have enough information to know
what
13 it is.

14 PRESIDING JUDGE: In other words, you need further and
15 better particulars?

16 MR JORDASH: Well, yes, because it might, by adhering to
17 that ethical duty, it might breach another ethical duty; that
is,
18 the duty to follow the orders of the Court.

19 PRESIDING JUDGE: Yes.

20 MR JORDASH: So unless we have further and better
21 particulars as to --

collision 22 PRESIDING JUDGE: Because when the two come into
23 we certainly expect to -- the Bench will have to reconcile --
24 MR JORDASH: Yes.
25 PRESIDING JUDGE: -- this difficulty.
26 MR JORDASH: It's unclear as to whether the statement
which
27 misled came from this side of the room or from that side of
the
28 room, and what the contents of that statement were.
29 PRESIDING JUDGE: Yes.

1 MR JORDASH: So whilst I trust Mr Harrison to judge his
own
2 ethical duties, what I would like to know is where are we
going
3 so that we don't end up adducing evidence which ought to be
4 properly adduced through the mouths of Mr Berry and
5 Mr Morissette.

6 PRESIDING JUDGE: Well, perhaps we need to know what was
7 the so-called misleading statement; is that a way -- a way of
8 beginning and see whether that could help us out of this
impasse?

9 MR HARRISON: Yes. Frankly, I would not be able to
capture
10 it on -- off the transcript.

11 PRESIDING JUDGE: I see. But give us a summary, a kind
of
12 nutshell.

13 MR HARRISON: I think I may have left the impression --

14 PRESIDING JUDGE: Yes.

15 MR HARRISON: -- with the Court --

16 PRESIDING JUDGE: Yes.

17 MR HARRISON: -- that the transcripts contained every
word
18 ever uttered on the days between a Prosecution person and
19 Mr Sesay.

20 PRESIDING JUDGE: And that is what you now seek to
rectify?

was
21 MR HARRISON: I think I've uttered the words that there
22 a meeting during the lunch break.
23 PRESIDING JUDGE: Yes.
24 MR HARRISON: And I feel as if I've complied with my
25 professional obligation.
difficulty
26 PRESIDING JUDGE: Yes. Is that -- what is the
impression
27 about that Mr -- if there has been some kind of false
28 created in the Court on an issue, these issues which are so
29 important, and counsel now says he feels obliged to correct
them

1 by presenting some factual scenario, would that really border
2 upon the impermissibility that you are alleging here?

3 MR JORDASH: Well, perhaps it's me, but perhaps I'm not
4 following, but if the Prosecution now are seeking to describe
the
5 contents of a conversation off tape, during lunch-time, then
it
6 breaches the Court's order. I cannot see how that relates to
the
7 statement just made, that the transcripts don't -- isn't
8 completely verbatim. I don't follow the connection between
the
9 two. If a conversation was had at lunch-time off tape, and
10 Mr Harrison wants to refer to it, by his own argument it's
11 irrelevant because what's relevant is what's on the
transcript.

12 If there are matters on the transcript, or there are
13 matters which ought to have found their way onto the
transcript
14 but the transcribers didn't transcribe them, then that's a
15 different matter. Then of course we -- if they are relevant
we
16 need to know what they are. So, there are two separate issues
17 and I'm not sure how the two relate at this given moment, if
at
18 all.

19 JUDGE BOUTET: I think you are talking of different
issue.

20 My understanding is not to try to introduce the nature and/or
21 content of whatever discussion may have taken place but simply
to
22 rectify the record that Mr Harrison -- where Mr Harrison would
23 have stated that the transcript contains all of the
conversations
24 that may have taken place at any given time between the
accused
25 and the Prosecutors or the investigators. He is now saying
that,
26 well, if he said so, it's not accurate because there is at
least
27 one occasion where it was not the case without the reporting
the
28 words that were discussed or said at that time.
29 MR JORDASH: Well, if all that the Prosecution want to
do

1 is put into this Court words which ought properly have found
2 their way into the transcript --

simply

3 JUDGE BOUTET: No, it's not words, Mr Jordash, it's

thinks

4 to rectify the record if he has -- in his recollection he

have

5 he has stated to this Court that all conversation with Sesay

discovered

6 been recorded and are in the transcripts. He has now

is

7 that at least one is not there. That is all he is saying. He

8 not reporting that conversation at all.

9 MR JORDASH: If that's the sum total --

is

10 JUDGE BOUTET: Well, that's my understanding of what he

11 trying to do.

I

12 MR JORDASH: That is not where we were going at the time

13 objected.

14 JUDGE ITOE: That is true.

15 MR JORDASH: Thank you, Your Honour.

position

16 JUDGE BOUTET: Mr Harrison, have I described your

17 correctly?

18 MR HARRISON: Yes. That's, I feel as if I have conveyed

19 the information, and that concludes it.

20 The Prosecution would like to finish before 1.00 and, in
21 doing so, I would like to refer to what the Prosecution
22 understood to be some of the specific references being made by
23 Sesay.

even

24 JUDGE BOUTET: Without interrupting you, Mr Harrison,
25 at the risk of delaying you, I would like you to address on
26 Halilovic at page 29835, the very last line of paragraph 46,
27 where they discuss voir dire, because that was an issue

related

28 to the very first issue, as such. They concluded this does

not

29 necessarily require the holding of a voir dire, although there

1 might be -- there may be certain advantages in doing so.

2 MR HARRISON: Yes. And the Prosecution accepts that as
3 being a reasonable and appropriate statement of law. We don't
4 see that as being in any way different from the finding of the
5 Appeals Chamber in Ntahobali, where the -- I think if there is

a

6 quibble between those two Appeal Chamber's decisions it may
7 simply be that Ntahobali seemed to have a somewhat greater
8 aversion to the notion of voir dire as a term but, as for the
9 content, I don't think they were adverse to it either. What

goes

10 on in a voir dire.

11 There are four brief allegations that I can cover off
12 quickly. The Prosecution understood that at page 29355 of the
13 transcript there was some form of improper conduct. The
14 Prosecution denies that entirely. There is absolutely nothing
15 improper. There is no inducement suggested of any kind there.

16 The same comments would be made with respect to a
17 suggestion made at page 29348, which refers to Sesay saying
18 something during the break, but this is what makes it

different

19 from Halilovic. In Halilovic, something was said during a

break

20 but everyone forgot about it; no one discusses it. At 29348

you

21 see the investigator doing the right thing. He says: "During

22 the break I heard you say this. What is it you want to say?"
23 And he is given the opportunity to do it. That is
appropriate.

24 And, at page 29357 to 58, again, there is absolutely
25 nothing inappropriate and, if I can just advise the Court, or
26 turn the Court to a couple of lines there. It's at 29358, and
at
27 this juncture the interview is taking place, and there is a
28 question at the top of 29358.

29 "Q. The other day we spoke about credibility in regards
to

to

1 you telling the truth so that somebody else is not going
2 get up on the stand and testify that what you're saying
3 not true and they can prove it by providing other
4 witnesses.

is

5 "A. Yeah.

is

6 "Q. That's why it's important that whatever we discuss
7 the truth.

of

8 "A. That's why I'm always saying that whatsoever I told
9 you, you know, it's recorded and you are taking minutes
10 what we are discussing, you know. That okay, like, for
11 example, these charges that came in, you know.

12 "Q. Which ones?

13 "A. The charges. I have 17 charges.

14 "Q. Yes.

15 "A. From the Special Court.

16 "Q. Yes.

I

17 "A. That I'm responsible for what happened in Freetown.

18 was not in Freetown."

that

19 There is never a time when the accused was not aware

20 he was the indictee.

21 JUDGE ITOE: What page is that again, please?

22 MR HARRISON: I was reading from 29358. It's the

23 transcript from 31 March 2003. The Prosecution makes a
similar

24 representation to the earlier ones at page 29535 where we

25 understood a complaint was made of improper conduct. That
there

26 is absolutely nothing improper in what took place. I wanted

to

27 take you to, very briefly, 29388.

28 JUDGE ITOE: 29?

29 MR HARRISON: 29388, just so the Court has a bit more

1 appreciation for the dynamics and the environment that was
2 existing. This is the beginning of the interview on 14 April
3 2003. And the rights advisement was again read this day, as
it
4 was read every day, and as it's read out the transcript
records
5 the first accused responding to whether he understands these,
6 saying "Of course. He says, he indicates stating "of course"
7 when he's referring -- asked about the right to, or his choice
of
8 whether to waive counsel. And there is absolutely no
ambiguity
9 in any of these of the first accused's willingness to take
part
10 in the interview. Nor is there any evidence of any coercion
of
11 any kind.

12 And the context is also demonstrated on the following
page.
13 At 29389, where Mr Berry says, "I'll have you initial there
for
14 me, please", referring to the document, the rights advisement,
15 and Mr Sesay says, "Yeah, but this, I'm not doing it without
16 breakfast, you know. You can't start a job when you people
have
17 breakfast and I don't have breakfast, you know." Mr Berry,
"No,
18 breakfast is coming but we can go through the paperwork while
we

19 are waiting."

very

20 Then on the following page Mr Sesay again says, "It's

you

21 important to have breakfast in the morning before go to job,

22 know" and it's provided to him, as are all his other requests.

23 PRESIDING JUDGE: We have no intention of rushing you.

24 MR HARRISON: I am going to finish.

of

25 PRESIDING JUDGE: But if you want to finish then we will

26 just let you have your way but I was thinking that you might,

some

27 course, be -- also the possibility exists that we may have

all

28 questions from the Bench, but if you want to finish now, it's

29 right.

1 MR HARRISON: Five minutes is all I need.

2 MR JORDASH: I should say I have got, sorry to
interrupt, I
3 would be seeking a ten minute rejoinder.

4 PRESIDING JUDGE: Well, that is another point and I
think
5 perhaps we -- I think it's time.

6 JUDGE ITOE: We have no end to the process.

7 PRESIDING JUDGE: Yes.

8 JUDGE ITOE: I mean, there will be no end to this
process.

9 There has to be an end to this process. We have to end it
10 somewhere, somehow, because we can't be -- it will be an
endless
11 ramboire, you know, of the ball in the tennis court here.

12 PRESIDING JUDGE: Gentlemen, we certainly are minded to
13 take our lunch break now. We will recess for lunch, come
back,
14 give the Prosecution a chance to wind up and then, in case
there
15 are some questions from the Bench but, of course, in case
16 Mr Jordash wants leave, we may hear an appropriate application
at
17 that point. Did you want to say something? All right. We
will
18 recess for lunch. We resume at 2.30 p.m.

19 [Luncheon break taken at 1.03 p.m.]

20 [RUF07JUN07C - CR]

21 [Upon resuming at 2.56 p.m.]

their

22 PRESIDING JUDGE: The Prosecution will continue with

23 reply.

24 MR HARRISON: Yes, I will just continue on making a few

25 brief points. One of the arguments that the Prosecution

26 understood being advanced was that the accused's inexperience

27 with the legal system should be a factor to be taken into

28 consideration. That may well be part, in the Court's view, of

Delalic

29 the so-called cultural argument that was advanced in the

relied
shrift
of

1 case that I referred to earlier, in one of the cases being
2 upon by the Defence. That was dealt with in quite short
3 and dismissed as being without any strong basis, and we simply
4 say the same thing: That the witness clearly understood all
5 the significant features and there is no linguistic difficulty
6 whatsoever. There's also, I think --

I
who

7 JUDGE ITOE: What do you say to Mr Jordash's argument?
8 just want to bring it up at this stage, that this was a man
9 was in the bush for so many years, and he was arrested. Spent
10 his time in the bush. He did not have a clear or proper
11 understanding of the procedures that he was going through.

How
Halilovic

12 would you contextualise that with the decision in the
13 case?

14 MR HARRISON: Halilovic or Delalic?

15 JUDGE ITOE: Delalic, I'm sorry, Delalic.

same
of

16 MR HARRISON: I think the context is this is also the
17 person who was with President Obasango, President Konare,
18 President Kabbah, attending UN meetings, attending all kinds
19 high -level meetings where sophisticated --

20 JUDGE ITOE: In some he delegated people.

21 MR HARRISON: Well, he has already said though, you have
22 heard the evidence that he was the person who went to these
23 significant meetings of heads of state. And this shows the
other
24 context --

25 JUDGE ITOE: You're suggesting that he had the
intellectual
26 capacity to interact with those huge elephants?

27 MR HARRISON: Well, he's saying he did do it.

28 JUDGE ITOE: In that context?

29 MR HARRISON: Yes.

1 JUDGE ITOE: All right. Okay.

2 MR HARRISON: In addition, there was some reference
being
3 made to signs of distress. I take it there's a reference to
the
4 first accused crying during -- I think it's the first
interview.
5 The Court recalls witnesses here who came forward were crying
in
6 court, suffering great distress, and yet within moments were
able
7 to continue on in this environment and we suggest that's
simply
8 not a significant factor.

9 We'd suggest that on any reading of the transcripts that
10 it's clear that the first accused knew exactly what was going
on
11 throughout the interviews, and there can be no suggestion
that,
12 in any respect, he was misled.

13 There are other allegations that we understood to have
been
14 put forward. The Prosecution would like to say globally that
it
15 rejects them and says they are not significant and ought not
to
16 be countenanced by the Court.

17 I'll conclude my remarks at that point. I've also been

Court's 18 instructed, however, to advise the Court that if it's the
and 19 view to hear witnesses, I had previously asked Mr Morissette
20 Mr Berry not to go anywhere this week, and they did not. They
locations 21 have currently made arrangements to go to two separate
22 next week out of the country. We all realise the pressures
the 23 currently imposed upon the Court and what we're asking is if
its 24 Court could give an indication, as soon as it can, as to what
25 intentions might be, that would be of great assistance to the
26 parties. Those are the only remarks I wish to make.
like 27 PRESIDING JUDGE: Thank you. Before you sit down, I'd
to 28 to pursue the metaphor of lifting the veil a stage further and
29 ask you to briefly address me, of course, having regard to the

ground
interests
if
so
The
the
in
is
the
of

1 reply that you've given this morning, whether there's any
2 or objection in principle, given the nature of the allegations
3 from the Defence, why the Tribunal should not, in the
4 of justice, be able to look behind the veil, or lift the veil,
5 we're not satisfied that the Defence has raised an almost
6 irrebuttal presumption of involuntariness of the alleged
7 statements. In other words, why should we not, in case we are
8 disposed, look behind the videos and the audios? Thank you.

9 MR HARRISON: Yes, I think the Court should, in short.
10 interests of justice would require that.

11 PRESIDING JUDGE: Thank you.

12 JUDGE ITOE: Not looking at the videos, I mean behind
13 videos.

14 MR HARRISON: No. If that's the Court's view that it is
15 the interests of justice, then the Prosecution accepts --

16 PRESIDING JUDGE: I want it to be quite clear that this
17 the view that I hold. I said that if I'm not satisfied that
18 other side has raised an honest irrebuttal presumption, that

19 involuntariness of the alleged statements, then why should not
20 the Court, in the interests of justice, lift the veil and see
21 what's behind the veil?

reason

22 MR HARRISON: Yes, the Prosecution can see no good
23 to say why it should not.

24 PRESIDING JUDGE: Thank you.

coercion

25 JUDGE ITOE: Yes, Mr Harrison. We raised issues this
26 morning relating to oppressive questioning and issues of
27 were also raised by the Defence in making its submissions. I
28 want to be very brief on this, and I would like you to look at
29 Exhibit 216 page 4, where, I suppose, the answer "Yeah" is

1 provided by Mr Sesay with his --

2 MR HARRISON: I don't think this is the accused. This
is
3 something from another protected witness. And, frankly, I'm
not
4 100 per cent sure if it's a person who is still protected.

5 JUDGE ITOE: I see. Now, is it the same with Exhibit
217?

6 MR HARRISON: Yes, a different -- again, this would be a
7 third interviewee. That one, I believe, is protected.

8 JUDGE ITOE: Is protected?

9 MR HARRISON: Yes.

10 JUDGE ITOE: I see. Okay. All right. I'll leave it at
11 that.

12 MR HARRISON: Actually, I better be a little bit more
13 cautious. I may have got 216 and 217 confused, and if someone
14 else can correct me. My understanding --

15 PRESIDING JUDGE: Mr Courtroom Officer, will you help us
16 there. Which is 216?

17 MR HARRISON: Yes, 216, I'm relatively sure remains a
18 protected witness. 217 is definitely a protected person. In
19 view of that, I wonder if the Court would agree that both of
20 those exhibits could be filed as confidential ones?

21 PRESIDING JUDGE: It's so directed.

those 22 JUDGE ITOE: I [indiscernible] with my questioning on
23 two exhibits for those reasons.
24 PRESIDING JUDGE: Mr Jordash, are you --
are 25 MR JORDASH: May I apply for a brief rejoinder? There
26 a number of discrete issues which, in my respectful
submission,
27 would assist Your Honours. Firstly, there's an issue which is
28 relatively new, and that's the issue of the warrant of arrest.
29 We hadn't heard the Prosecution's position on that, and we
would

1 like to comment, and it is hugely significant.

2 PRESIDING JUDGE: Right. We'll grant you leave to argue
3 for a brief rejoinder.

4 MR JORDASH: Thank you, Your Honour. I'll be as quick
as I
5 can. The point about --

6 JUDGE BOUTET: But only on this issue.

7 MR JORDASH: Well, I have -- there are a number of
8 errors --

9 PRESIDING JUDGE: Yes, for a brief rejoinder. Leave,
why
10 we should let you, in other words, enter this rejoinder.

11 MR JORDASH: Sorry, I'm not --

12 PRESIDING JUDGE: It's a technical issue. We want you
to
13 persuade us that you should, in fact, be entitled -- well, not
14 entitled, be given leave to make this brief rejoinder.

15 MR JORDASH: Well, with the greatest of respect to the
16 Prosecution, they've made, we would submit, some errors of
both
17 fact and law, -- which we'd like to correct, and the corrections
--

18 PRESIDING JUDGE: Slowly, Mr Jordash, so that we're able
to
19 get you right. They've made some errors of fact and law?

20 MR JORDASH: Yes. And the corrections would take no
more

in 21 than around 15 or so minutes, but it would assist Your Honours

22 focusing on the issues at hand.

23 In addition, the issue of the warrant of arrest was not
24 properly before Your Honours yesterday. The documents were
25 served through Mr Hardaway and then I didn't return to the
26 subject but waited to hear from the Prosecution. An important
27 issue arises from that warrant of arrest, and the service or
28 otherwise of the documents referred to therein.

29 So it's really to correct what we see as
misapprehensions

1 about the law and the facts, and to deal with this new issue
2 which we haven't had an opportunity to deal with. It's
finally
3 this: That the Prosecution's understanding and interpretation
of
4 the cases upon which we rely, specifically Bagosora, Delalic
and
5 Halilovic, we hadn't heard their explanation about these
6 documents until today and yesterday so --

7 JUDGE BOUTET: What explanation are you talking about?

8 MR JORDASH: Well, their interpretation of these
documents.

9 JUDGE BOUTET: I mean, it's their interpretations, just
10 like you gave yours yesterday. I mean --

11 MR JORDASH: Yes, but they had an opportunity to comment
on
12 ours, and I'd like an opportunity to comment on their
13 interpretation which, we would submit, would enhance the
process.

14 It would put before you the real issues in the dispute between
15 the parties. It would probably take no more than 15 or so
16 minutes. Perhaps not much longer than the application.

17 PRESIDING JUDGE: So your application is supported by
three
18 grounds, according to you: To correct errors of fact and law
in
19 the Prosecution's presentation, and also to address an issue
in

20 relation to the warrant of arrest, which is a reason
21 ex-improviso?

22 MR JORDASH: Yes, it has.

23 PRESIDING JUDGE: Very well. Then, third, to respond to
24 some interpretations on the part of the Prosecution of the
cases
25 they cited?

26 MR JORDASH: Yes.

27 PRESIDING JUDGE: Which you could not have had the
28 opportunity of dealing with at the stage when you argued in
29 response?

1 MR JORDASH: Yes, we didn't know what they were going to
2 say.

3 [The Trial Chamber conferred]

4 PRESIDING JUDGE: The ruling of the Bench is that leave
is
5 not granted.

6 MR JORDASH: Well, Your Honour, there is a real issue on
7 this warrant of arrest. It really isn't before Your Honours
in a
8 fair way. And it's significant and substantial, and we
haven't
9 had an opportunity to comment on it. Now, I concede why
10 Your Honours -- although I don't concede the point will not
want
11 to be addressed on the cases again, although there are serious
12 errors of law, but the warrant of arrest, we have not had an
13 opportunity to engage with the adversarial process on that.

14 PRESIDING JUDGE: Why don't you trust the Bench? If we
are
15 seized of all the material here, and I remember when you were
16 arguing, I would say, in my own estimation of your arguments,
17 that you came up with quite, as I said at that time, a
formidable
18 array of submissions supported by various factual scenarios
and
19 you put before the Bench quite a comprehensive amount of
material

judgment

And

consider

nature.

I

point

20 for us to deliberate on, and you did, in fact, touch upon some
21 aspects of the warrant of arrest. And if any new material has
22 emerged from the other side on that, why not trust the

23 of the Bench to factor everything into this entire process.

24 remember that, also, we -- even though we don't descend the
25 arena, we hold the scales of justice. We're supposed to

26 almost everything exhaustively in an application of this

27 MR JORDASH: The difficulty is I didn't spot this point.

28 didn't spot it because I didn't know what the Prosecution's

29 was on it.

1 JUDGE ITOE: Mr Jordash, to be fair to this Bench, the
2 Bench has given a ruling. Do you want the Bench to overrule
3 itself after giving a ruling on this point, and grant your
4 application after granting the ruling?

5 MR JORDASH: Your Honour --

6 JUDGE ITOE: To be very fair to the Bench; is that what
7 you want?

8 MR JORDASH: Well, I'm asking Your Honours to just
9 one reconsider just the one point, because I can refer you to the
10 about page of the transcript which answers the Prosecution point
11 in when and if the indictment and the other documents were served
12 and the warrant of arrest. One page of the transcript answers it
13 it answers in favour of the Defence.

14 JUDGE ITOE: It is -- it doesn't change my position on
15 this, Mr Jordash. It's fairness. The Chamber has given a
16 decision on this.

17 MR JORDASH: But it's --

18 JUDGE ITOE: You don't want the Chamber, you know, to
19 see overrule itself soon after it has given a decision. I don't
20 to which court will comport itself, you know, the way you want us

21 go.

22 MR JORDASH: Can I simply say the page number then?

trust

23 PRESIDING JUDGE: Mr Jordash, I think, also, you must

24 the judgment of the Bench. There are issues that may not even

can

25 have been brought to our attention by both parties, which we

26 spot out. Remember we're here to do justice.

27 MR JORDASH: If --

28 PRESIDING JUDGE: We're here to do justice.

29 MR JORDASH: It is --

say,

1 PRESIDING JUDGE: And clearly, clearly, I mean, as I
2 this is like flogging a dead horse for us. Our ruling stands,
3 but you need to be assured that here is a Bench that can spot
4 things that you've not even mentioned.

5 MR JORDASH: Well, I'll leave it at that.

6 [The Trial Chamber conferred]

7 PRESIDING JUDGE: We'll stand the Court down for a brief
8 moment.

9 [Break taken at 3.16 p.m.]

10 [Upon resuming at 3.25 p.m.]

11 PRESIDING JUDGE: At this stage, the Bench just needs to
12 thank counsel on both sides for the able way in which they
13 presented their arguments. The Chamber will -- is considering
14 the advisability of adjourning this proceeding to 2.30 p.m.
15 tomorrow afternoon. So the Court is adjourned to 2.30 p.m.
16 tomorrow.

p.m.,

17 [Whereupon the hearing adjourned at 3.26

June

18 to be reconvened on Friday, the 8th day of

19 2007, at 2.30 p.m.]

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SCSL - TRIAL CHAMBER I

EXHIBITS:

Exhibit No. 218

5

11

Exhibit No. 219

13

Exhibit No. 220

25

Exhibit No. 221

33

Exhibit No. 223

35

Exhibit No. 223