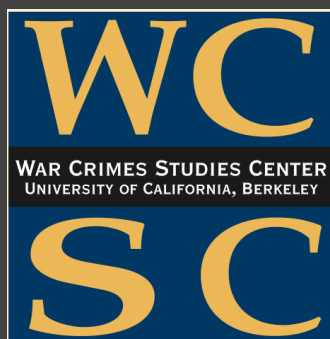


# EFFECTIVE, EFFICIENT, AND FAIR?

## AN INQUIRY INTO THE INVESTIGATIVE PRACTICES OF THE OFFICE OF THE PROSECUTOR AT THE SPECIAL COURT FOR SIERRA LEONE



BY PENELOPE VAN TUYL

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BERKELEY

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## EXECUTIVE SUMMARY

“Techniques—investigative techniques and intelligence techniques—that were followed by our office, that didn’t have to be written down. It’s part of the way things are done... I called it dancing with the devil.”<sup>1</sup>

- *Former Prosecutor, David Crane, describing the ‘tradecraft’ used to identify and secure insider witnesses cooperation at the Special Court for Sierra Leone*

“He would come and say, ‘Issa, we are just trying to help you. But what we have been hearing, if you don’t confirm these things, how will we be able to help you?’ He said, ‘So you have to confirm the things that we have heard. That’s the only way we’d be able to help you, so that you will be out of this problem.’”<sup>2</sup>

- *The first RUF accused, Issa Sesay, describing ‘off-the-record’ conversations with investigators during his custodial interviews at the Special Court for Sierra Leone*

This report began with a series of troubling insights into Prosecution investigative protocol at the Special Court for Sierra Leone (the **Special Court** or **SCSL**). During the summer 2007 trial session of the *Prosecutor v. Sesay, Kallon, and Gbao*, Trial Chamber I called a *voir dire* to determine the admissibility of post-arrest statements made by the first accused, Issa Sesay, during eleven days of custodial interviews in March and April of 2003. During the *voir dire*, documentary evidence and Prosecution witnesses confirmed, among other things, that for days immediately following his arrest, Mr. Sesay was isolated in Prosecution custody, questioned at length outside the presence of counsel, offered the prospect of an insider deal without fully understanding the charges against him, and subjected to various forms of off-the-record pressure and inducement.<sup>3</sup> The deeper the Court inquired into the circumstances surrounding Mr. Sesay’s arrest and interrogation, the more evidence of irregularities it revealed. These revelations were compounded by the defensive, evasive, and internally inconsistent testimony of senior investigators, through which they impeached their own credibility. When taken together and considered alongside the testimony of the accused, the *voir dire* proceedings raised some serious questions about the work quality and oversight provisions maintained within this powerful section of the Special Court.

Based on the evidence presented during the *voir dire* proceedings, Trial Chamber I ruled in favor of the Defense. The unanimous decision rendered over a thousand pages of custodial interrogation transcripts inadmissible on the grounds that the statements had been obtained involuntarily from the accused “by fear of prejudice and hope of advantage, held out by persons in authority.”<sup>4</sup> Beyond the individual piece of jurisprudence it produced, the *voir dire* was noteworthy insofar as it exposed the OTP and its Investigations Section to greater public scrutiny. By shedding light on the



internal management of this particularly opaque section of the SCSL, the proceedings offered a rare opportunity for reflection on certain institutional practices which had, up till that point, remained largely impenetrable to outside observers. The Special Court's founding Prosecutor, David Crane has insisted that, "the Special Court for Sierra Leone is showing the international community that international justice can be fairly, efficiently, and effectively delivered to a war-torn part of the world in a way that allows the people to see that the rule of law is more powerful than the rule of the gun."<sup>5</sup> However, the *voir dire* proceedings raised several questions and doubts about investigative procedure at the SCSL: Why did investigators feel at liberty to maintain ongoing off-the record custodial contacts with an unrepresented accused person? Why didn't the OTP have more explicit internal operating procedures to govern the conduct of its investigators and to guarantee both consistency and transparency in investigative practices? To whom were investigators accountable, and were those supervisors aware of the protocol followed and the tactics being employed off-the-record by their subordinates? How did the organ's overall prosecution strategy affect the approach to investigations?

The *voir dire* offered a rare opportunity for outside observers to scrutinize the OTP's internal operations and to judge how well this particular institutional model serves the fair, efficient, and effective administration of justice. This report seizes upon that opportunity by using public court filings, insights from past and present OTP personnel, and the official record of the *voir dire* to craft a limited analysis of one section within the OTP—the Investigations Section. The key focus and findings from each of Parts II, III, IV and V of this report are as follows:

## **II) Institutional Framework for Analysis: Prosecutions Investigations Section in Context.**

Part II of this report begins with an overview of the institutional framework within which the OTP Investigations Section operates. This context lays a foundation for explaining certain root institutional problems that appear to have contributed to the procedural breaches at issue. After briefly introducing readers to the mandate of the OTP and the responsibilities of the Prosecutor, Part II describes the parallel hierarchies of authority that exist within the office, and explores the extent to which the office has formally instituted "checks and balances" to ensure meaningful cooperation and oversight between these two hierarchies. The section further reflects upon the core principles and statutory documents that govern the work of the OTP, explaining how these instruments have shaped of the work conducted by the Investigations and Prosecutions sections.

## **III) The Story of Issa Sesay's Arrest and Interrogation.**

Having established the underlying premises upon which the OTP operates (both structurally and through close analysis of the SCSL's foundational documents), Part III recounts a specific incident that occurred during the early investigations process at the

SCSL—the 2003 arrest and interrogation of Issa Sesay. This section of the report provides the reader with a detailed description of the protocol followed during the Sesay investigation and offers insights from Prosecution testimony as to how investigators understood various duties and why they dispensed with particular formalities. The detailed description is required in order to lay the foundation for the analysis which follows in Part IV of this report. By looking closely at the departmental protocol followed during Issa Sesay’s interrogation and further exploring the circumstances in which his rights were clearly breached, this section offers new grounds upon which to assess the impact of the institutional reforms and operational imperatives currently motivating the establishment of “second generation” (or post-*ad hoc*) international criminal tribunals.

#### **IV) Critical Analysis of the Investigative Policy and Practice at the Special Court’s OTP.**

Part IV analyzes the individual actors and institutional forces that caused and/or facilitated these procedural breaches. Some of the breaches exposed during the *voir dire* appear to be linked to inadequate or unclear formal procedural standards. In other cases, individuals bear the primary responsibility for violating unambiguous rules, contrary to existing protocol. To explain how those breaches went completely unaddressed until the *voir dire*, Part IV offers a critical assessment of the extent of the training OTP investigators received, the quality of supervision and oversight, and the clarity of operational guidelines under which investigations proceeded. At best, these elements contributed to the creation of an office which, on paper, lacks adequate “checks and balances” to review the quality of investigative work and correct misguided or otherwise problematic behavior. At worst, they fostered an environment ripe for abuse of certain fundamental procedural due process rights. Furthermore, as becomes apparent through the analysis, these institutional flaws had consequences beyond the Sesay breaches, in certain instances rendering OTP investigative work less effective and less efficient, as well. This section explores the possibility that, despite the best intentions to create a tribunal that would be both lean *and* fair, many of the efficiency-minded structural and procedural elements of the SCSL may, in fact, have functioned to the Court’s detriment. On balance, the section illustrates how the SCSL model for prosecutorial investigation contains too few institutional safeguards to simultaneously promote effective investigations, forestall procedural abuse, and guarantee the overall integrity of the process.

#### **V) Conclusion**

If the Special Court is to be replicated elsewhere, these institutional flaws must be addressed. The final section of this report, Part V, distills some of the “lessons learned” and draws limited conclusions regarding what institutional changes merit consideration at future international criminal tribunals.



**DEFENSE COUNSEL:** *You would say that that is proper and legitimate investigative tactics?*

**CHIEF OF INVESTIGATIONS:** *In this type of crime, yes, Your Honor.*

**DEFENSE COUNSEL:** *For you, it all comes down to the seriousness of the crime, doesn't it? That, if it is so heinous—the charge—that kind of tactic is legitimate?*

**CHIEF OF INVESTIGATIONS:** *Legitimate, depending also the type of crime, but also, with the person that— to whom this deal, if you want to, or these offers are made.<sup>6</sup>*

## **I. INTRODUCTION**

This report began with a series of troubling insights into Prosecution investigative protocol at the Special Court for Sierra Leone (SCSL). During the summer 2007 trial session of the *Prosecutor v. Sesay, Kallon, and Gbao*, Trial Chamber I called a *voir dire* to determine the admissibility of transcripts containing prior statements made by the first accused, Issa Sesay. The statements in controversy were taken by Prosecution investigators during eleven days of custodial interviews in March and April of 2003, immediately following Mr. Sesay's arrest on serious international criminal charges.<sup>7</sup> The panel of judges presiding over Mr. Sesay's trial called the *voir dire* to determine whether or not the accused freely waived both his right to remain silent and his right to counsel during the interviews, and voluntarily made the statements in question. The Office of the Prosecutor (OTP) sought to admit the transcripts for impeachment purposes only, arguing that investigators legitimately obtained waivers and questioned Mr. Sesay in accordance with the procedural rights of the accused. Defense counsel argued that OTP investigators used legally impermissible trickery, threats, and other coercive methods to obtain the waivers and further elicit involuntary statements in breach of Article 17 of the Statute of the Special Court, as well as Rules 42, 43, and 63 of the Rules of Procedure and Evidence.<sup>8</sup> These breaches would amount to violations of the fundamental rights of the accused and render the transcripts inadmissible pursuant to the Rule 95 mandate that, "No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute."<sup>9</sup>

In oral arguments, counsel for the Prosecution, Peter Harrison, initially urged the Court to determine admissibility of the transcripts on the face of the papers alone—without inquiring into the attendant circumstances. Mr. Harrison advanced the theory that Issa Sesay wanted to cooperate with investigators, and that he eagerly agreed to do so upon arrest, in full cognizance of his rights.<sup>10</sup> As evidence, the Prosecution relied heavily upon the fact that Mr. Sesay signed a *pro forma* rights waiver prior to each audio or video recorded interview.<sup>11</sup> Mr. Harrison insisted that investigators never subjected the accused to any improper promises, inducements, or threats which could possibly vitiate the voluntariness of Mr. Sesay's decision to waive his rights and speak.<sup>12</sup> The Bench could accordingly forego a *voir dire*, counsel argued, and determine admissibility based simply

upon the text of the transcripts, the existence of the waivers, and the apparently compliant demeanor of the accused on tape.<sup>13</sup> Had the Court followed this approach, the numerous salient details regarding Prosecution investigative protocol that form the basis for this report might never have entered into the public record. However, counsel for the accused, Wayne Jordash, pressed the Court to inquire beyond the face of the transcripts in a formal *voir dire*, arguing that ample *prima facie* evidence of investigative irregularities warranted closer judicial review by the Trial Chamber.

Mr. Jordash argued that his client's technical waiver of legal representation must be considered in the context of how the right was explained to the accused, and whether Mr. Sesay in fact understood.<sup>14</sup> Mr. Jordash cataloged numerous instances on the face of the interview transcripts where Mr. Sesay displayed ignorance of the charges against him, expressed confusion over what it meant to sign the rights waivers, and demonstrated a fundamental misunderstanding of the defense resources that should have been available to him.<sup>15</sup> At each instance, counsel argued, OTP investigators either compounded the confusion, or did nothing to disabuse Mr. Sesay of his false impressions.<sup>16</sup> The accused appears not to have understood for instance, that defense lawyers known as "duty counsel" could provide immediate, free legal representation, subject to full attorney-client privilege, during the custodial interviews.<sup>17</sup> Instead, the transcripts reflect Mr. Sesay's ongoing concern that duty counsel, if present during the interviews, would convey details to those Special Court detainees incriminated by his statements.<sup>18</sup> Counsel for the accused pointed to evidence on the transcripts that, although Mr. Sesay communicated his misunderstanding during interviews, investigators never corrected him.<sup>19</sup> Instead of making clear to the accused that duty counsel could temporarily serve exactly the same role as a private defense attorney, investigators appear to have perpetuated Mr. Sesay's confusion by repeatedly distinguishing between the two—"this is the duty counsel here we're talking about, not your lawyer."<sup>20</sup> In light of these facts, Mr. Jordash argued that the Trial Chamber could not reasonably conclude Mr. Sesay had knowingly and willfully waived his rights.

Defense also challenged the Prosecution claim that Mr. Sesay's apparent cooperation with investigators provided meaningful evidence of voluntariness. Mr. Jordash urged the Court not to rely simply upon the superficial demeanor of the accused on video because, "Sophisticated modes of persuasion can be designed, in unscrupulous hands, to ensure acquiescence of an accused on a tape."<sup>21</sup> Counsel submitted that this is precisely what happened to his client. Pointing to circumstantial evidence on the transcripts, Mr. Jordash alleged that senior OTP investigators illegitimately secured Mr. Sesay's ongoing cooperation by engaging in a sustained campaign of trickery and coercion between interviews.<sup>22</sup> Counsel for the accused argued forcefully that these Prosecution investigators must be called to explain their interrogation procedure, including the manner of any questioning they conducted off the record, before the Court could admit Mr. Sesay's statements as voluntary. "The Prosecution submission that the technical waiver is

somehow the beginning and end of the submission,” Mr. Jordash argued, “is, of course, not right, because the burden is a heavy one on the Prosecution.”<sup>23</sup>

After reviewing the record and considering submissions from both sides, the three judge panel ultimately agreed with the Defense. On June 8, 2007, Trial Chamber I unanimously chose to order a formal *voir dire*—a so-called “trial within a trial”—so that the Bench could hear more detailed evidence before determining whether Mr. Sesay gave his statements voluntarily.<sup>24</sup> The subsequent hearing, which lasted two weeks, allowed the Court to more closely scrutinize the investigative protocol employed by the OTP. The Court considered evidence from six witnesses and 47 exhibits.<sup>25</sup> The testimonial evidence was as troubling as it was illuminating. Even before the accused took the stand to give his own account of the custodial interviews, Prosecution witnesses confirmed, among other things, that for days immediately following his arrest, Mr. Sesay was isolated in Prosecution custody, questioned at length outside the presence of counsel, offered the prospect of an insider deal without fully understanding the charges against him, and subjected to various forms of off-the-record pressure and inducement by then-Deputy Chief of Investigations, Gilbert Morissette.<sup>26</sup> The deeper the Court inquired into the circumstances surrounding Mr. Sesay’s arrest and interrogation, the more troubling evidence of irregularities it uncovered, and the less convincing the Prosecution position on admissibility turned out to be. On June 22, 2007, Trial Chamber I ruled against the Prosecution, concluding that Mr. Sesay’s statements had been taken in breach of Article 17 as well as various Rules of Procedure and Evidence. This unanimous ruling rendered over a thousand pages of custodial interrogation transcripts inadmissible on the grounds that the statements had been obtained involuntarily from the accused “by fear of prejudice and hope of advantage, held out by persons in authority.”<sup>27</sup>

The Trial Chamber’s decision in the *voir dire* represents a new jurisprudential contribution to an underdeveloped area of international criminal law.<sup>28</sup> The oral pronouncement from the bench did not detail the Court’s factual findings or legal conclusions, however, then-Presiding Judge Bankole Thompson pledged on June 22, 2007 that, “A detailed reasoned decision will be published in due course.”<sup>29</sup> Regrettably, the Trial Chamber allowed more than a year to pass before rendering its detailed written decision. When finally published, the decision became one of only a handful of international criminal tribunal judgments to consider, as a matter of legal admissibility, what constitutes “voluntariness” in the context of specific investigative protocol and detention conditions.<sup>30</sup> Specifically, the decision considers: (i) under what conditions the statements of a suspect or accused person can (and should) be determined to have been given “voluntarily”; and (ii) whether, if given involuntarily, such statements should be rendered inadmissible. Although the written decision gives very little weight to significant portions of the factual record when assessing whether investigators discharged their procedural duties and whether the conditions required for “voluntariness” were met in Sesay’s case, the Court does articulate and affirm a few clear legal principles regarding proper investigative conduct, an accused person’s right to silence, and what constitutes

“improper inducement” under certain circumstances of interrogation.<sup>31</sup> In this regard, this piece of jurisprudence may contribute to fostering clearer and more consistent standards of investigative procedure at future international tribunals.

However, perhaps more significant than the individual piece of jurisprudence it produced, the *voir dire* was noteworthy insofar as it exposed the OTP to greater public scrutiny. By shedding light on the internal management of this particularly opaque section of the SCSL, the proceedings offered a rare opportunity for reflection on certain institutional practices which had, until then, gone largely undetected by outside observers. Prosecution witnesses revealed, for instance, that OTP investigations had proceeded for the previous five years without a uniform department policy on investigative note taking, and absent any formal Standard Operating Procedures (SOPs) for certain core investigative functions.<sup>32</sup> These revelations were compounded by defensive, evasive, and internally inconsistent testimony that impeached the credibility of several senior OTP investigators during the *voir dire*.<sup>33</sup> On balance, these proceedings raised serious questions about the work quality and oversight provisions maintained within this powerful section of the Special Court.

The OTP is an institution that purports to operate “in accordance with high standards of professionalism and ethics, and in accord with the law.”<sup>34</sup> David Crane, the founding SCSL Chief Prosecutor who served from 2002 to 2005, has touted the Special Court’s approach to prosecution as a model for replication. According to him, “the Special Court for Sierra Leone is showing the international community that international justice can be fairly, efficiently, and effectively delivered to a war-torn part of the world in a way that allows the people to see that the rule of law is more powerful than the rule of the gun.”<sup>35</sup> The *voir dire* offered a rare opportunity for outside observers to scrutinize the OTP’s internal operations and to judge how well this particular institutional model serves the fair, efficient, and effective administration of justice. This report seizes upon that opportunity by using public court filings, insights from past and present OTP personnel, and the official record of the *voir dire* to craft a limited analysis of one section within the OTP—the Investigations Section.

Not everyone will agree that, based on the *voir dire*, the practices of investigators at the Special Court should be the subject of further inquiry. Some will argue that the procedural breaches committed during the Sesay investigation were simply unintentional blunders, incidental to a somewhat chaotic arrest process, and perhaps reflective of the inevitable organizational and supervisory problems one will encounter in a nascent Investigations Section. This report posits, however, that there is merit in exploring the procedural breaches exposed during the *voir dire*, even if they arose in the course of good faith investigative conduct or in the context of understandably challenging managerial circumstances. While ultimately very critical of certain OTP investigative practices, this report does not seek to simply tear the institution down or lightly dismiss its potential. Quite the opposite; this critique is motivated by a sincere commitment to the Special

Court's mission and to its core principles of accountability and the rule of law. Internationally backed criminal tribunals can, and must, be expected to achieve the highest professional standards. To the extent that this report focuses on the failures and troubles of the OTP's Investigations Section, it does so believing that frank, constructive criticism from earnest, objective observers is indispensable to building stronger more legitimate institutions in the long run. The author endeavors to provide fair, but rigorous analysis by holding the OTP to nothing less than its own self-proclaimed standards of integrity and professional achievement.

This report is divided into five parts. Part II begins with a brief overview of the institutional framework within which the OTP Investigations Section operates. This context lays a foundation for explaining certain root institutional problems that appear to have contributed to the procedural breaches at issue. Part III recounts the details of the Sesay investigation, as exposed during the *voir dire*. Part IV analyzes the individual actors and institutional forces that caused and/or facilitated these procedural breaches. Some of the breaches exposed during the *voir dire* appear to be linked to inadequate or unclear formal procedural standards. In other cases, individuals bear the primary responsibility for unambiguously violating existing protocol. To explain how those breaches went completely unaddressed until the *voir dire*, Part IV offers a critical assessment of the extent of the training OTP investigators received, the quality of supervision and oversight, and the clarity of operational guidelines under which investigations proceeded. On balance, the section illustrates how the SCSL model for prosecutorial investigation contains too few institutional safeguards to simultaneously promote effective investigations, forestall procedural abuse, and guarantee the overall integrity of the process. If the Special Court is to be replicated elsewhere, these institutional flaws must be addressed. The concluding section of this report, Part V, distills some of the "lessons learned" and discusses what institutional changes that may merit consideration in future international criminal tribunals.



## **II. INSTITUTIONAL FRAMEWORK FOR ANALYSIS: OTP INVESTIGATIONS SECTION IN CONTEXT**

The Special Court was established by treaty in 2002 under a mandate to seek justice for atrocities committed during a complex civil conflict in Sierra Leone.<sup>36</sup> To this end, the Statute of the Court provides for an Office of the Prosecutor (OTP) which acts “independently as a separate organ of the Special Court.”<sup>37</sup> The office has been described by its leadership as a lean, productive professional environment, effectively managed through internal delegation of authority, *ad hoc* review mechanisms, and an “open door” leadership style.<sup>38</sup> These claims, however, are difficult to meaningfully evaluate. An internal policy prevents currently employed OTP staff from being interviewed formally about their work without permission.<sup>39</sup> This makes it virtually impossible for an outside monitor to fully explore certain aspects of OTP policy and practice as it is currently being administered. Informally, at least some current OTP personnel complain that there have been persistent problems with factionalism inside this organ of the Court—a factionalism which they claim has been counterproductive to work practices in certain respects. Without greater OTP transparency, it is impossible to thoroughly evaluate and objectively reconcile these contradictory characterizations of the institution. Nevertheless, in order to lay a foundation for subsequent analysis, this section of the report endeavors to sketch as clear and candid a portrait as possible of the institutional framework within which the SCSL’s Prosecution investigators have operated since 2002. After briefly introducing readers to the mandate of the OTP and the responsibilities of the Prosecutor, this section describes the parallel hierarchies of authority that exist within the office, and explores the extent to which the office has formally instituted “checks and balances” to ensure meaningful cooperation between these two hierarchies, and attorney oversight of investigative work. The section further reflects upon the core principles and statutory documents that govern the work of the OTP, explaining how these instruments have shaped of the work conducted by the Investigations and Prosecutions sections.

### **A) Hybrid Institutional Mandate of the OTP**

In structure and in mandate, the OTP was intended to reflect a “hybrid” approach to international criminal justice—combining domestic and international elements in one institution. Pursuant to Article 1 of the Statute of the Court, the Prosecutor is given the task of investigating and prosecuting “persons who bear the greatest responsibility” for serious atrocities committed in the territory of Sierra Leone since 30 November 1996. At least in theory, these include international crimes as well as violations of the domestic criminal code.<sup>40</sup> In practice, however, none of the indictments has charged any crime under the Article 5, Sierra Leonean law provision of the Statute.<sup>41</sup> Like the legal mandate, the staff composition was also meant to reflect the tribunal’s “hybrid” identity, and has done so with a somewhat greater degree of success. The OTP employs national as well as international personnel in legal, investigative, and administrative positions,<sup>42</sup>

although the higher up the chain of command one looks, the less hybrid the institution appears. Pursuant to Article 15 of the SCSL Statute, the most senior OTP officer, the Prosecutor, was to be a UN appointed official, while his Deputy should have been from Sierra Leone.<sup>43</sup> According to the current Prosecutor Stephen Rapp, however, Article 15(4) was “interpreted in an exchange of letters between the UN and the Government of Sierra Leone as meaning that the Deputy Prosecutor is nominated by the government of Sierra Leone, but need not be Sierra Leonean.”<sup>44</sup> Since the first SCSL appointees began work in 2002, foreign nationals have exclusively and invariably filled all the most senior OTP posts.<sup>45</sup>

## **B) Role of the Prosecutor**

The chief Prosecutor’s position is at once legal, administrative and political. While statutorily responsible for managing the investigation and prosecution of serious crimes, practically speaking, the serving individual must also discharge a variety of political, diplomatic, and administrative duties. In terms of legal responsibilities, the Prosecutor crafts the overall Prosecution strategy, determines target suspect lists, approves and signs-off on indictments, and directs legal policy on questions such as whether to treat child soldiers as victims or perpetrators, and how vigorously to pursue the investigation of sexual violence crimes. The Prosecutor has also delivered the opening statement in each of the four SCSL trials, usually together with a Sierra Leonean counterpart, in a symbolic display of the Court’s hybridity. Thereafter, a Senior Trial Attorney and teams of prosecution lawyers led the vast majority of the evidence and conducted the majority of cross examinations in each of these trials.

Founding Prosecutor, David Crane, came to the post with legal training and qualifications, but he notes that his nomination likely had a great deal to do with his administrative experience inside the U.S. federal government, and what he describes as his reputation for “leadership, management and creating new organizations.”<sup>46</sup> As the first head of the OTP, Crane was essentially responsible for “creating a new organization out of whole cloth”<sup>47</sup>—a formidable task in any event, but particularly so in a post-conflict society, on a tight budget, under tremendous pressure to work fast. Crane conceived of the OTP administrative structure and developed a prosecution strategy prior to his July 2002 departure for Freetown. Cash for set-up operations first became available July 1, 2002, when the founding SCSL Registrar opened a New York bank account with one dollar in the Special Court’s name, and began to transfer international donor state contributions from the SCSL trust fund.<sup>48</sup> Upon arrival in Sierra Leone, Crane had to execute his prosecutorial plans amidst rapid, phased institutional growth and in a manner responsive to the conditions on the ground as he found them. The former chief Prosecutor has described working seven days a week, 12 hours a day for his first six months in Sierra Leone, overseeing investigations and developing the indictments while dealing with a long list of logistical hurdles. Physically, the OTP had to set up temporary functioning offices while awaiting construction of the permanent court facility.<sup>49</sup> Staff

needed to be hired, and newly arrived personnel needed help adjusting to the difficult conditions of life in Freetown. Energy also had to be devoted to developing internal procedures, including security protocol and information management systems, as well as fostering productive working relationships with the diplomatic corps, civil society, and non-governmental organizations (NGOs) in Sierra Leone.

As others have documented, the Prosecutor was left to build his own institutional support networks in Freetown primarily because the UN Mission in Sierra Leone (UNAMSIL) was uncooperative with the start-up operations at the Special Court. According to UN Special Rapporteur, Antonio Cassese's 2006 review of efficiency at the Special Court, "UNAMSIL was uniquely situated to assist the Special Court in its early days, and its failure to help cost the Court valuable months."<sup>50</sup> Instead of relying on assistance from UNAMSIL, the Prosecutor and his staff turned to other international and locally based organizations for logistical support as well as advice in crafting a target list of suspects to investigate and indict. Crane and his Chief of Investigations formed a very close working relationship with the Inspector General of Police in Sierra Leone, who at the time was a seconded British officer named Keith Biddle. They also sought the input of people Crane describes as "NGOs and civil society policy makers in various governments" and local human rights advocates such as Corinne Dufka, who was the head of Human Rights Watch in Sierra Leone at the time.<sup>51</sup>

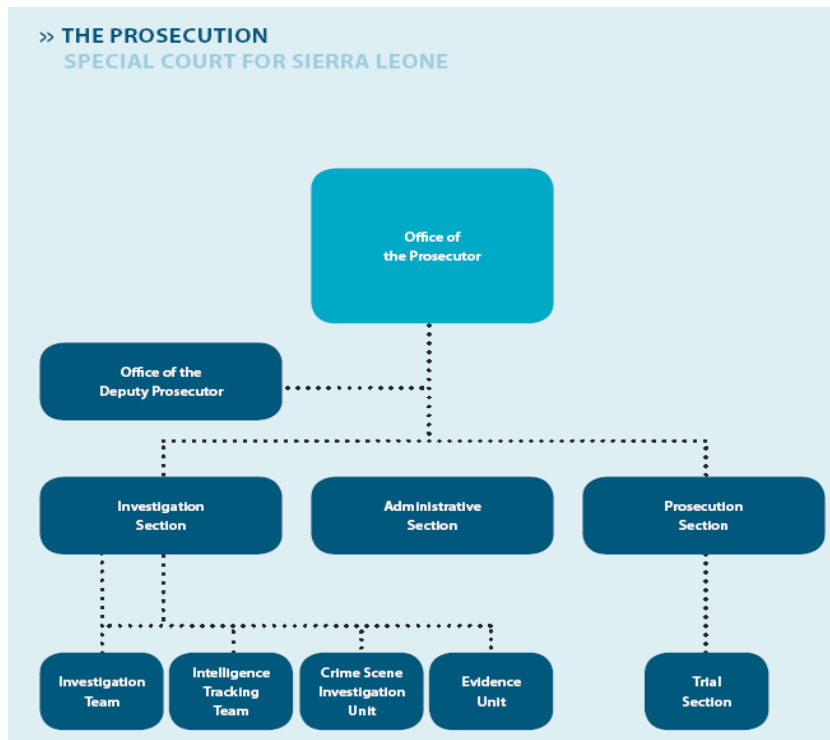
In addition to building the organization, overseeing operations, and logistically managing institutional development, the head of the OTP has always borne tremendous responsibility for promoting the SCSL to various stakeholder groups. As the public face of the Court's most high profile organ, it is incumbent upon the Prosecutor to deliver the institutional message to donor states, the international media, and the people of Sierra Leone. "That's just a reality of being a chief Prosecutor," according to David Crane. "To keep the world's interest, to keep money coming in, and to ensure you have political buy-in...you've got to be on the road talking to people or you'll lose the political support and interest that is so critical in a tribunal."<sup>52</sup> During Crane's tenure, the OTP dealt with considerable pressure to issue indictments quickly and thereby show the international community that the Court was on the move toward delivering justice. The current head of the OTP, Stephen Rapp, faces similar pressures and obligations vis-à-vis donor states. While the OTP remains a facially independent, non-political organ, there can be no doubt that the Prosecutor bears a heavy public relations burden to convey a positive message to those whose voluntary financial support keeps the Court alive. As the SCSL moves into its seventh year in existence, Rapp and other senior SCSL officials must assure donor states through the Court's "Management Committee" that the SCSL is moving at a reasonable pace toward its completion strategy, and that the OTP will have successful convictions to show for all the money and time invested in the Court.<sup>53</sup>

The diplomatic and public relations part of the job is time consuming, and often requires the Prosecutor to be away from the office. As such, every Prosecutor to have

served at the Special Court has spent a great deal of time traveling. Crane estimates that, beginning about six months into his tenure, seventy percent of his time “was politics and diplomacy.”<sup>54</sup> Much of this work took him outside the country, or away from the OTP offices in Freetown. For instance, the founding chief Prosecutor participated in extensive SCSL outreach efforts around rural parts of Sierra Leone. He describes these efforts as, “walking the countryside, standing in front of the people of Sierra Leone, my client, listening to them tell me what took place and allowing them to ask questions about this new justice mechanism in West Africa.”<sup>55</sup> Crane’s immediate successor, Desmond de Silva, also devoted considerable time and effort to matters away from Freetown during his one year term as Prosecutor. When de Silva took over from Crane in 2005, the Court’s most high profile indictee, former Liberian President Charles Taylor, was still at large. Because of the Court’s treaty-based origins and lack of Chapter VII powers under the UN Charter, it reportedly took years of “intense diplomacy by many in the sub-region and abroad” to physically apprehend Taylor, who resided outside Sierra Leone and therefore outside the Court’s jurisdictional powers of arrest.<sup>56</sup> De Silva focused a great deal of energy on the effort to detain Taylor, pledging when he took up his post to “strain every nerve and every sinew to bring Charles Taylor to trial before the Special Court for Sierra Leone.”<sup>57</sup> As he noted when stepping down from his post in 2006, “I leave the Court with that pledge fulfilled.”<sup>58</sup> The current Prosecutor, Stephen Rapp, reports being in Freetown more often than his predecessors were, but still estimates that a little under fifty percent of his tenure has been spent away “on mission” in North America, Europe, and in other parts of Africa.<sup>59</sup>

### **C) Organizational Structure: Parallel Hierarchies of Authority**

Below the Prosecutor, the OTP bifurcates into two parallel hierarchies of authority—an Investigations Section and a Prosecutions Section.<sup>60</sup> The Chief of each Section reports directly to the Prosecutor. This arrangement differs from organizational structures in at least one of the SCSL’s institutional predecessors—the International Criminal Tribunal for Rwanda (ICTR). At the ICTR, the Chiefs of Section historically reported up to the Deputy Prosecutor. In 2006, an additional layer of investigative supervision was added, when the Investigations Section became subordinate to and supervised by the Chief of Prosecutions.<sup>61</sup> The reform, according to some, reflected an institutional response to the fact that a majority of the ICTR’s investigative work shifted in 2006 toward being in support of trials.<sup>62</sup> At that point, the OTP reportedly abolished the position of the Chief of Investigations.<sup>63</sup> By contrast, the Special Court’s OTP has retained a D-2 salary level Chief of Investigations throughout the life of the institution, even after the investigative work would appear to have been primarily in support of trials.<sup>64</sup> The SCSL’s Chief of Investigations has always been co-equal to the Chief of Prosecutions, and has supervised the Investigations Section as a separate and autonomous wing within the OTP.



SOURCE: Annual Report of the Special Court for Sierra Leone, 2005-2006 (pg. 43)

Each of the two major OTP sections is organized differently. On the Prosecution side, international and local trial attorneys, case file managers, and special legal advisors have been divided amongst, and sometimes shifted between, four trial teams prosecuting the cases pending before the SCSL. These have, depending on the date, included the Revolutionary United Front (**RUF**) case,<sup>65</sup> the Civil Defence Forces (**CDF**) case,<sup>66</sup> the Armed Forces Revolutionary Council (**AFRC**) case,<sup>67</sup> and the trial of former Liberian President, Charles Taylor.<sup>68</sup> One Senior Trial Attorney (**STA**) has overseen each of these trial teams and become, effectively, the master of that case. A Chief of Prosecutions ranking at a D-2 UN pay grade is charged with supervising trial attorneys and is supposed to provide “expert and detailed advice on all aspects of the trial preparation.”<sup>69</sup>

The Investigations side, by contrast, is organized around departmental units rather than cases. The number and category of investigative units has shifted and evolved over the life of the OTP, but SCSL annual budgets fairly consistently identify an evidence unit, a criminal intelligence unit, a witness management unit, and a general investigation team within the Investigations Section.<sup>70</sup> Early in the OTP’s existence, before any trials were underway, when the organ was still building capacity and drafting indictments, the Prosecutor assigned investigators to work alongside Prosecutions Section lawyers in special task forces arranged by combatant groups (either RUF, AFRC, or CDF). According to the founding Chief of Investigations, Alan White, he and founding Prosecutor David Crane modeled the task force system on the manner in which U.S.

federal law enforcement agencies and U.S. federal prosecutors work together—“Prosecutors are not allowed to get involved in the actual conduct of investigations and need to keep an arms length so they themselves don't get called as a defense witness. We set up operations the same way.”<sup>71</sup> The temporary task forces were meant to ensure that attorneys and investigators worked “side-by-side” on the nascent investigations, with attorneys providing advice and requesting completion of certain leads, but otherwise keeping an arms length while being “kept abreast” of the developing cases.<sup>72</sup>

The task force arrangement did not alter the OTP's fundamental supervisory authority, which always reflected a clear and deliberate division between the two sections.<sup>73</sup> As early as the first SCSL Annual Report, the OTP organogram illustrated this formal split between Prosecutions and Investigations personnel, with each section subject to distinct channels of supervision.<sup>74</sup> For the first several years of the OTP's existence, the Chief of Investigations had a deputy below him, directly managing the logistics of investigative missions carried out by criminal investigators from Sierra Leone and various foreign jurisdictions. The OTP eliminated the position, however, sometime after the founding Deputy Chief of Investigations, Gilbert Morissette, succeeded Alan White as Chief of Investigations.<sup>75</sup> In its place, the OTP created a new position, called “Investigations Commander,” with a similar function. John Berry, a formerly seconded officer from the Royal Canadian Mounted Police who, incidentally, had conducted the majority of Issa Sesay's custodial interviews, was hired into this P-5 salary leadership position in June of 2005.<sup>76</sup>

According to the official job description and informal accounts by colleagues, the Chief of Investigations has always enjoyed a great deal of power and discretion within the OTP. The Chief “supervises, plans and organizes” all intelligence tracking activities, controls intelligence analysis, assesses investigative budgetary needs, manages a sizeable budget in conjunction with the Chief of Legal Operations,<sup>77</sup> directs paid informants and agents, selects and supervises all subordinate investigators, and “establishes overall direction and strategy of the Section.”<sup>78</sup> The job description further entrusts the Chief of Investigations to represent the OTP in direct meetings with senior government ministers and heads of state, and to provide “policy advice” to the Prosecutor and his Deputy.<sup>79</sup> The founding Chief of Investigations, Alan White, reportedly exercised this authority in full during the OTP's early years, conducting secret operations at a level above the task forces and generally outside the supervision of anyone except the Prosecutor. According to David Crane, he and his Chief of Investigations oversaw the handling of all the OTP's most sensitive “information assets,” regardless of which combatant group they provided information about.<sup>80</sup> These were insider witnesses and spies who helped the OTP infiltrate the inner political circles of several West African leaders in order to build a case around the prosecution theory of a West African joint criminal enterprise. The Chief of Prosecutions and/or the SCSL Registrar were reportedly informed about these operations only on a “need-to-know” basis.<sup>81</sup> According to Crane, this extremely small group of people “developed probably the finest information assets system—far better than MI6

and the CIA. Of course the CIA was largely completely ineffective in that area. They didn't have a clue what was going on."<sup>82</sup> The Prosecutor delegated a great deal of responsibility to his Chief of Investigations in terms of contacting witnesses, taking statements, and negotiating relocation deals to countries outside of Africa along with support payments for the witnesses and their families. White reportedly secured these secret insider contacts personally, and managed them through what David Crane calls "eyeball to eyeball" intelligence work.<sup>83</sup> These closely held sources were, according to Crane, "witnesses that were going to really give us the keys to the kingdom."<sup>84</sup> They and the statements they provided were of vital significance to the Prosecution in all four Special Court trials. Many became lead witnesses or helped identify key insider witnesses for the OTP.

With respect to less sensitive aspects of OTP investigations, the nature of the working relationship between investigators and prosecuting attorneys is difficult to discern. By most accounts, lateral cooperation between sections has varied over the life of the institution and has been sensitive to such factors as high staff turnover,<sup>85</sup> major changes in senior OTP leadership,<sup>86</sup> organizational growth, and progression of the four cases through trial and appeal. It can be very difficult to get a straightforward response from senior OTP officials regarding the internal distribution of power across the Investigations/Prosecutions divide, and the justification for organizing the organ as such. The founding Prosecutor conceived of the OTP organogram, and maintains that it was simply more "efficient and effective" to organize personnel into two parallel hierarchies, rather than subsume investigations within the Prosecutions Section.<sup>87</sup> While the OTP created the combatant group task forces to facilitate close collaboration between investigators and lawyers working together to build a handful of indictments, the founding Chief Prosecutor resisted creating an organizational structure where attorneys on the prosecution side would supervise investigators, *per se*. "The Chief of Investigations and Chief of Prosecutions were my senior managers in two distinct areas of criminal prosecutions, and they were my advisors... From an administrative point of view, it was important for an investigator to monitor the work of the investigators, and a chief prosecutor to monitor substantively the work of trial counsel."<sup>88</sup>

The OTP continues to justify its reporting structure based on a similar rationale: "There remain different areas of expertise and career patterns, and therefore an internal division is appropriate."<sup>89</sup> Yet even as the current Prosecutor defends the discrete, parallel hierarchies of authority, he makes a concerted effort to down-play the practical impact of the internal OTP division. On the one hand, Stephen Rapp insists that a managerial hierarchy that empowers the investigations wing is desirable because "investigators bring valuable expertise and experience to the process. Attorneys do not 'know it all.'"<sup>90</sup> On the other hand, the current Prosecutor has repeatedly emphasized his preference for "attorney-run investigations" and described internal OTP supervision as though investigators were effectively subordinate to the prosecuting trial attorneys: "Fundamentally, it's the involvement of attorneys and the direction of attorneys that is

key to this.”<sup>91</sup> Rapp has insisted that the Senior Trial Attorneys, backed by the Chief of Prosecutions and himself, call the shots with regard to planning, supervising and debriefing all OTP investigations. “No [investigative] missions take place without the knowledge of the Prosecutor or OIC [Officer in Charge], the Chief of Prosecutions, and without the go-ahead of the STA.”<sup>92</sup> However, given the lack of direct, formal mechanisms for Prosecution-side attorneys to supervise Investigation-side activities, it is not at all clear how trial teams are meant to assert this kind of control. When asked to explain, in concrete terms, what channels a trial attorney would go through if he or she wished to assert authority over an investigation, the Prosecutor initially offered the following vague answer:

They would basically deal with that by--in the process of consulting here, I mean, and making sure that everything was happening, uh, they would--and you know, a direct line would be developed between them and the Chief of Investigations, essentially, with, with the, by the request of the Prosecutor, Chief of Prosecutions, to make this happen.<sup>93</sup>

Upon reading a draft circulation of this report, the OTP added the following written statement as a “more accurate reflection” of the Prosecutor’s views on this matter:

“The Trial Attorney could raise the matter with the Chief of Prosecutions who could ask the Chief of Investigations to obtain the cooperation of the investigators. If this was not successful the Prosecutor could be asked to intervene. This is similar to the practice in his domestic experience (in the United States) where investigative agencies are often not in the same government departments as prosecutors, and where they are in the same departments (as in the US Department of Justice), the chiefs of the investigative agencies are subordinate only to the most senior prosecution officials, such as the Attorney General.”<sup>94</sup>

If the Special Court’s Chief of Investigations is expected to consult with or take instructions, directly or indirectly, from Senior Trial Attorneys, this is not reflected anywhere in his job description. While expressly mandated to carry out all his duties “under the direction of the Prosecutor,”<sup>95</sup> there is no language whatsoever in the Chief of Investigations’ job description directing him to collaborate laterally with trial attorneys, or even the Chief of Prosecutions. The Chief of Prosecutions’ official job description mandates that he, “advise and liaise with the Chief of Investigations on all legal issues arising from investigations to ensure a consistent and solid basis for decision-making.”<sup>96</sup> While this language tends to suggest a cooperative relationship can and should exist between the Prosecutions and Investigations Sections, it should be noted that the Chief of Investigations has no reciprocal obligation to consult with the Chief of Prosecutions.<sup>97</sup> Hence, even if the Chief of Prosecutions directs the Chief of Investigations to ensure his team submits to lateral oversight from STAs on an *ad hoc* basis, the Chief of Investigations is at liberty to determine whether s/he should agree to this oversight. In the absence of any formal recognition of a tiered hierarchical relationship between the



conduct and management of the investigations and the conduct and management of the cases at trial, the degree to which investigative work is attorney supervised appears to be largely dependent upon the will of the Chief of Investigations, and the extent to which the Prosecutor himself scrutinizes the work of the Investigations Section.

According to at least one former senior OTP member, this approach to supervision was deliberate. Founding Chief of Investigations, Alan White, has noted that, after visiting and assessing OTP structures at the ICTY and the ICTR, he and David Crane intentionally took a different approach. In White's words, "It was clear from our visits that having the investigators work directly for some of the Senior Trial Attorneys was not an effective and/or efficient way to conduct investigations."<sup>98</sup> White has remarked that the practices they observed at the ICTR and the ICTY led to inconsistent investigative activities, created problems in court, and caused tension between the sections. According to him, at the *ad hoc* tribunals, the "Chief of Investigations had the responsibility to ensure the investigations were conducted properly, however, in practice he had no authority to supervise those actions as they had been relegated to the Senior Trial Attorneys, all of whom had their own style and practice."<sup>99</sup> Accordingly, at the Special Court, White and Crane developed an organization wherein the Chief of Investigations had decidedly more authority and independence to direct investigations.

#### **D) Role of the Deputy Prosecutor**

The Chiefs of Section on both sides of the OTP report directly to the Prosecutor, even though there is also a Deputy Prosecutor who, by UN pay grade, technically outranks them.<sup>100</sup> The Deputy Prosecutor is the only OTP official, besides the Prosecutor, who sits above the Investigations/Prosecutions Section divide. Although one might presume that the Deputy would therefore provide an additional layer of direct supervision and oversight, in practice he has remained formally outside the regular chain of command.<sup>101</sup> This curious arrangement makes it difficult to ascertain precisely what the official role of the Deputy Prosecutor is meant to be. Unlike the Prosecutor, the Deputy's supervisory authority over Investigations and Prosecutions staff was not clearly articulated in the Statute of the Court. When asked to provide a concrete job description, including core duties and obligations, the OTP responded in writing that "the job description of the Prosecutor and the Deputy Prosecutor exist on the Statute."<sup>102</sup> While it is true that Article 15 of the Statute outlines the Prosecutor's basic responsibilities, there is nothing resembling a job description for the Deputy Prosecutor anywhere in that document. The sole reference to the Deputy Prosecutor is a single sentence in Article 15(4) mandating that the Prosecutor "shall be assisted by a Sierra Leonean Deputy Prosecutor."<sup>103</sup> Article 3(2) of the Agreement Between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (**SCSL Agreement**) similarly states that the Deputy shall "assist the Prosecutor in the conduct of the investigations and prosecutions."<sup>104</sup> Unfortunately, it is nowhere made clear precisely how the Deputy is supposed to assist, nor does either of these statutory documents explain why the Deputy

Prosecutor has been marginalized from administrative oversight. The most information Article 3 provides is a clear articulation in Paragraph 3 of minimum competence required for the post: “The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases... [they] shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.”<sup>105</sup>

By all accounts, both men to have served as Deputy Prosecutor—Sir Desmond de Silva and Mr. Christopher Staker—have been highly qualified individuals with impressive credentials and extensive legal experience.<sup>106</sup> It is therefore particularly confounding that their role within the organization has not been more transparently defined. The current Prosecutor describes the job of the Deputy Prosecutor as though it were an *ad hoc* legal role, akin to employing a consultant on matters of international criminal law, rather than the second most senior position in the organ: “The concept here was to have... him as essentially a legal adviser and appeals person—the ‘legal eagle’ that assists various teams, etcetera, as opposed to an administrator.”<sup>107</sup> Under this somewhat opaque arrangement, the Deputy Prosecutor’s direct supervision of Investigations personnel appears to have been extremely limited through the life of the institution. Despite holding an Assistant Secretary General UN pay grade and serving directly below the Prosecutor, the Deputy was not generally considered a “need-to-know” individual during David Crane and Alan White’s covert investigative operations.<sup>108</sup> Furthermore, although he has nominally been appointed “Officer in Charge” when the Prosecutor is away from Freetown, by most accounts, the Deputy Prosecutor has primarily worked with a limited number of attorneys on the Prosecutions side of the OTP coordinating appellate matters.<sup>109</sup>

### E) Core Operational Principles and Governing Instruments

The core documents governing the conduct of OTP personnel include the Statute of the Special Court (**SCSL Statute**),<sup>110</sup> the Rules of Procedure and Evidence (**RPE** or **the Rules**),<sup>111</sup> the SCSL Agreement,<sup>112</sup> and the Special Court Agreement 2002 Ratification Act.<sup>113</sup> For lawyers working in the OTP, there is also a “Code of Professional Conduct for Counsel,” which serves as an ethical code unifying the core principles of a diverse number of bar associations.<sup>114</sup> No such code exists for investigators, who also come from diverse jurisdictions. In order to fully appreciate how these instruments have affected the conduct of OTP investigations, it is important to consider the context in which they were negotiated and the expectations this fostered at the Special Court. The Statute and Rules of Procedure for the SCSL emerged in the shadow of critical response to the protracted proceedings, enormous expense, and uncertain impact of the ICTR and the ICTY. With the *ad hoc* international tribunals, vocal critics lamented the resources devoted to prosecuting relatively minor perpetrators. Many also doubted the relevance these proceedings had for distant victim populations.<sup>115</sup> By the time Sierra Leone requested

UN assistance setting up its own tribunal, some within the UN had begun to question whether international criminal justice was worth all the effort and expenditure.<sup>116</sup>

The structure and governance of the SCSL was negotiated accordingly. The tribunal's statutory documents established a narrower prosecutorial mandate,<sup>117</sup> limited temporal jurisdiction,<sup>118</sup> a shoestring budget,<sup>119</sup> and what, in hindsight, was clearly an overly ambitious calendar for completion.<sup>120</sup> The tribunal was established by treaty rather than by Security Council Resolution specifically so that UN member states could avoid mandatory contributions to the institution. Largely independent of the UN bureaucracy, and operating without the Chapter VII powers of the Security Council, the Special Court has had to raise and manage its own funds, while submitting to the financial oversight of an independently established "Management Committee."<sup>121</sup>

These institutional reforms purported to create a leaner tribunal that would be expeditious and cost effective. At the same time, many hoped that by locating the tribunal *in situ*, the SCSL could make a more meaningful contribution than the remotely located *ad hoc* tribunals had been able to make towards peace, reconciliation and local capacity building in the justice sector of a post-conflict society. To this end, the SCSL was expected to set an example by meeting high international standards of procedural integrity and due process. The Court initially adopted its Rules of Procedure and Evidence wholesale from the ICTR,<sup>122</sup> and the fundamental rights of accused persons before the SCSL essentially mirror those guaranteed at the ICTY and the ICTR.<sup>123</sup> The provision of such rights at the *ad hoc* tribunals has drawn pointed criticism from certain outside commentators who feel that the cost of international justice is unacceptably high in part because of the time consuming procedural safeguards guaranteed in these proceedings. According to one such critic, "The international courts for the former Yugoslavia, Rwanda, and the new ICC in the Hague operate under civilian law and provide generous protections to defendants. The result is a ballooning of the courts' timelines and costs. It took the ICTR ten years to complete the same number of trials that Nuremberg conducted in less than a year."<sup>124</sup> Notwithstanding this line of criticism and the Special Court's preoccupation with expediting proceedings, the protections guaranteed to SCSL defendants on paper reaffirmed an earlier declaration by the UN Secretary General that it "is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings."<sup>125</sup>

Some have lauded the Special Court's efficiency-minded, hybrid approach as a model for international justice worthy of replication. The former head of the OTP has touted the speed with which his office moved from administrative set-up, to full-blown criminal investigation, to indictment.<sup>126</sup> Antonio Cassese, the official UN rapporteur commissioned to conduct an independent review of institutional efficiency at the Special Court has acknowledged and praised this expediency. Cassese called the Special Court a "remarkable achievement" in part because the OTP carried out its initial investigations

“quickly and in a targeted manner.”<sup>127</sup> According to Crane, thanks to “good leadership” and “effective delegation,” neither scant resources nor the extremely tight calendar for completion had any adverse impact on fairness of process or the quality of OTP work.<sup>128</sup> “The international community got it right with the Special Court,” Crane has insisted,<sup>129</sup> and he is not alone in his endorsement of the hybrid tribunal model. In the years since the Special Court began its work, the UN has continued to demonstrate a preference for this model, signing treaties with both Cambodia and Lebanon for special tribunals.<sup>130</sup> Temporary hybrid tribunals funded on voluntary contribution schemes, with ever tighter budgetary constraints, are becoming the international justice mechanism of choice, it seems.<sup>131</sup> And yet, as this report illustrates, the dogged pursuit of efficiency and economy has extracted its own cost in terms of effective realization of the Court’s multifold mandate and fairness of process along the way.

In many ways, the institutional modifications meant to remedy an older generation of tribunal pitfalls have become the source of a new set of troubles. As a 2005 Special Court monitoring report observed, “the very elements which mark [the SCSL] as a novel development in post-conflict justice – its location, tight budget, and pressure to complete its mandate quickly – also challenge the court’s ability to deliver on its aspirations.”<sup>132</sup> Various scholars and commentators have addressed this point, including James Cockayne, who has pointed out that there are risks and tradeoffs involved in asking the Special Court to effectively do more with fewer and less stable resources.<sup>133</sup> In a 2005 article entitled “The Fraying Shoestring,” he illustrated numerous ways in which the institution has struggled to meet stakeholder expectations. “Unless we lower our expectations of hybrid tribunals or increase the resources, time and support we are prepared to give them, we must prepare for disappointment,” he concluded.<sup>134</sup> Similarly, in a 2004 article about the Special Court, Beth Dougherty roundly criticized many of the novel institutional reforms as a misguided and ill-advised attempt to “right-size” international criminal justice.<sup>135</sup> Dougherty was particularly harsh in her criticism of the tenuous funding scheme: “The lofty goals which [the Court] seeks to uphold deserve better than a court built on the cheap.”<sup>136</sup> Dougherty called the “experiment with voluntary funding” a failure, quoting then-SCSL Registrar, Robin Vincent’s characterization of the Court as not so much “mean and lean” as it was “anorexic.”<sup>137</sup> In order to alleviate the “terrific pressure” on senior court personnel to prioritize fiscal and political imperatives over noble institutional aspirations and core legal principles, Dougherty called for a more flexible operational timeline with guaranteed funding. As she pointed out, “Considerations of justice—the rights of the accused, the integrity of the institution—must be given more weight than budgetary concerns.”<sup>138</sup>

This report builds on the body of critical analysis, using information revealed during the *voir dire*. The report discusses several ways in which the SCSL’s novel structure and mandate may have adversely impacted the quality of investigative work sponsored by the OTP, and thereby contributed to the due process violations exposed during the *voir dire*. The remaining sections of this report explore the possibility that,

despite the best intentions to create a tribunal that would be both lean *and* fair, many of the efficiency-minded structural and procedural elements of the SCSL may, in fact, have functioned to the Court's detriment. At best, these elements have contributed to the creation of an office which, on paper, lacks adequate "checks and balances" to review the quality of investigative work and correct misguided or otherwise problematic behavior. At worst, they have fostered an environment ripe for abuse of certain fundamental procedural due process rights. By looking closely at the departmental protocol followed during Issa Sesay's interrogation and further exploring the circumstances in which his rights were clearly breached, this report offers new grounds upon which to assess the impact of the institutional reforms and operational imperatives currently motivating the establishment of "second generation" (or post-*ad hoc*) international criminal tribunals.

Although the Trial Chamber ultimately deemed certain aspects of the Sesay interrogation immaterial to the narrow legal question of evidentiary admissibility,<sup>139</sup> this report does not limit its factual discussion to the scope of the Court's analysis. Rather, the author treats every detail of the Sesay investigation as worthy of close scrutiny, because it is all relevant to determining, more broadly, whether the OTP in fact operates "in accordance with high standards of professionalism and ethics, and in accord with the law."<sup>140</sup> Section III offers an in-depth account of the procedural breaches and investigative practices exposed during the *voir dire*. Thereafter, Part IV explores the causal forces at work. While it is fair to say that Mr. Sesay's interrogation is only one example of the OTP investigations section "in action," it remains the richest source of detailed, objectively verifiable information about internal management and operational protocol to have emerged from the OTP since its inception. Moreover, when the *voir dire* proceedings are examined in conjunction with the independent interviews conducted for this report, a clearer picture of general OTP investigative practices begins to emerge. This picture is by no means complete or conclusive. Nevertheless, Sections III and IV of this report endeavor to shed light on the inner workings of the OTP such that outside observers may better understand some of the challenges the Prosecution has faced when balancing the needs for efficiency, efficacy, and fairness at the Special Court.

### **III. STORY OF ISSA SESAY’S ARREST AND INTERROGATION**

The previous section of this report described both the organizational structure and the mandate of the Special Court’s OTP. In particular, it revealed a bifurcated OTP structure of authority whereby OTP investigations proceed with little or no direct attorney oversight, and the Chief of Investigations retains considerable power and autonomy. It further demonstrated how, as a key organ within “second generation” international criminal tribunal model, the OTP faces competing pressures to ensure that it lives up to its multifold institutional mandate. Having established the underlying premises upon which the OTP operates, this report now turns to a specific incident that occurred during the early investigations process at the SCSL—the 2003 arrest and interrogation of Issa Sesay. This detailed description lays the foundation for subsequent analysis in Section IV.

#### **A) Circumstances of Arrest**

Issa Sesay was apprehended in Freetown on March 10, 2003 during a multi-suspect, coordinated arrest effort dubbed “Operation Justice” by the OTP. On that day, officers from the Sierra Leone Police (SLP), accompanied by OTP investigators, executed the first Special Court warrants, including several against members of the RUF. Because prosecutors were apprehensive about suspects planning to leave the country, the warrants and indictments remained a closely guarded secret within the OTP, and investigators deliberately sought to surprise the accused. The strategy was effective. Mr. Sesay was, according to Prosecution and Defense testimony, shocked when SLP officers placed him under arrest.<sup>141</sup> Having been summoned to the headquarters of the SLP’s Central Investigations Division (CID) under false pretenses,<sup>142</sup> the accused had no idea that he would face arrest pursuant to a Special Court indictment. According to arresting officer, Litho Lamin, Mr. Sesay began crying uncontrollably when confronted with the warrant.<sup>143</sup> He submitted to arrest, but conveyed betrayal and bewilderment, asking “is this the peace I signed for? Is this the peace?”<sup>144</sup> The accused later explained during the *voir dire* that he was confused at the time the SCSL “captured” him, because the President of Sierra Leone had advised him only a few weeks earlier that he need not fear prosecution by the newly established Special Court.<sup>145</sup> President Kabbah allegedly assured Mr. Sesay that he would be spared due to the role he played as interim RUF leader, orchestrating a successful peace and disarmament process.<sup>146</sup> The President, of course, would have had no formal authority to make promises about which individuals the independent OTP chose to prosecute. Nevertheless, the meeting contributed to Mr. Sesay’s misapprehension and surprise upon arrest—he did not suspect that a 17 count indictment had already been drafted against him, and a warrant of arrest signed by SCSL Judge Bankole Thompson.

## **B) Plan to Secure Issa Sesay as an Insider Witness**

Notwithstanding the President's lack of authority to promise Mr. Sesay protection, there was some element of truth to the assurances he allegedly made to the accused. Most senior OTP officers privy to the Sesay investigation confirm that there *was* a plan to approach the accused during "Operation Justice" and secure him as an insider witness for the Prosecution. As Gilbert Morissette testified during the *voir dire*, investigators decided weeks before "Operation Justice" to target Mr. Sesay because his particular role within the RUF made him someone likely to "give us the most information—the most intelligence in regard to this investigation."<sup>147</sup> Curiously, John Berry, the principal investigator in charge of Mr. Sesay's custodial interviews, denies knowing anything about a preconceived plan to target the accused.<sup>148</sup> However, the founding Prosecutor, David Crane, has corroborated Mr. Morissette's testimony.<sup>149</sup> Prior to "Operation Justice" the OTP had been using what David Crane refers to as "intermediaries" and "other surreptitious means" to "reach out" to Mr. Sesay and determine if he would be willing to speak with them.<sup>150</sup> "He was very willing to talk to us," the former Prosecutor explained in an interview for this report. "We had already worked that out before [the arrest] even happened."<sup>151</sup> Crane would not disclose how, specifically, the OTP received such assurances, but he did confirm that Mr. Sesay remained totally unaware of his impending arrest: "We led him on... that's all an appropriate part of criminal investigations."<sup>152</sup> At one point in the interview for this report, Crane seemed to suggest that the arrest itself was a ruse, intended to prevent others from identifying the accused as a cooperating witness. "We made it look like he was being arrested with everybody, but at the time we thought that Issa Sesay was going to work with us... it turned out that finally he changed his mind, and we dropped the matter and he was prosecuted."<sup>153</sup>

## **C) Disregard for Procedural Requirements on the Face of the Warrant**

Although Mr. Sesay was detained during the very first wave of Special Court arrests, there was a protocol, articulated on the face of the warrant, for how things ought to have proceeded.<sup>154</sup> During the *voir dire*, Mr. Jordash called the Court's attention to repeated investigative failure to comply with this protocol, which drew upon the statutory obligations outlined in Rule 55 of the Special Court's Rules of Procedure and Evidence. The warrant allowed, for instance, that "a member of the OTP may be present for the arrest,"<sup>155</sup> yet the ratio of OTP investigators to accused at CID was at least two or three to one, and testimony from the arresting SLP officer indicates these OTP investigators played more than a mere observational role in the arrest. Pursuant to the treaty establishing the Special Court, SCSL investigators are empowered to conduct criminal investigations within the territory of Sierra Leone, but regular police powers, including the authority to arrest suspects, remain vested exclusively in the SLP.<sup>156</sup> Under these terms, the SLP was authorized to detain Mr. Sesay, and should thereafter have exercised control over him until the formal transfer into SCSL custody at the temporary detention facility on Bonthe Island. The reality of what transpired is somewhat different.

According to the evidence given by the OTP investigators and SLP officers who testified during the *voir dire*, it was the OTP, and not the SLP who exercised effective control over the accused from the time of his arrest forward. The arresting officer, Litho Lamin described taking direction from OTP investigators as to where and when he should take the accused.<sup>157</sup> This is how investigator John Berry gained access to the accused and was able to solicit him for insider collaboration within an hour of the arrest, while Mr. Sesay was still in transit to the detention facility.<sup>158</sup> It is also how the Deputy Chief of Investigations was able to bring the accused to the OTP office for an entire afternoon of custodial interviewing before the SLP completed Mr. Sesay's formal transfer into Court custody at Bonthe. The detour failed to comply with Paragraphs B and D of the arrest warrant—mandating that the accused be transferred into the custody of the Special Court, “without delay” and specifying that, “the transfer shall be arranged between/with the relevant national authorities of the Government of Sierra Leone and the Registrar of the Special Court.”<sup>159</sup> It bears explaining, Mr. Jordash submitted during the *voir dire*, why the Prosecution didn't leave it to the Registry (a neutral, administrative organ of the Court) to take the accused into custody, and *then* approach Mr. Sesay as a clearly identified adversarial party. On its face, counsel argued, the move to get the accused isolated in OTP custody as quickly as possible after his arrest appeared to be inherently coercive. David Crane, who authorized the diversion in advance, described it as a deliberate part of the plan to achieve cooperation from the accused: “We knew that Issa Sesay, through other means, had agreed to talk, so as soon as he was arrested, he was pulled out of the system and while they were moving people to Bonthe Island, Sesay was taken to our office.”<sup>160</sup> When asked how he squares this decision with the procedural requirements on the face of the warrant, Crane simply insists that this was a relatively brief detour and therefore “it wasn't without delay.”<sup>161</sup> Counsel for the accused, however, made the compelling argument during the *voir dire* that the length of time is not the relevant consideration—it's what transpired during the delay that matters.

Because of the delay, Mr. Sesay was approached at Juri Barracks<sup>162</sup> and solicited for an interview by investigator John Berry without ever being read his rights or given access to his indictment.<sup>163</sup> Once in Prosecution custody at the OTP compound for questioning, Gilbert Morissette read Mr. Sesay the rights advisement, but this interview with the Deputy Chief of Investigations proceeded without Mr. Sesay knowing the charges against him. Not until he arrived at Bonthe in the evening was Mr. Sesay served with a packet of documents containing his indictment.<sup>164</sup> This was a plain breach, Mr. Jordash argued, of the Article 17 right, rearticulated by Judge Thompson on the face of the arrest warrant, to have a copy of the warrant, the rights advisement, and the indictment, “served on the accused at the time of his arrest or as soon as is practicable immediately following his arrest in English, or have read to him in a language he understands.”<sup>165</sup> The delay of several hours “might not be significant in some cases,” the Defense conceded, “but it is significant when the Prosecution say, during this period, Mr. Sesay's cooperation was obtained. In our respectful submission, we cannot gain the



cooperation of an accused without reading the basic rights, without adhering to the warrant of arrest.”<sup>166</sup>

The officer who ultimately served the charging documents on the accused testified during the *voir dire* that he did not know what was in the packet, even as he handed it over to Mr. Sesay. On the helicopter ride between the mainland and Bonthe, an OTP investigator purportedly told Officer Lamin to serve the packet of documents on the accused.<sup>167</sup> He did so at the detention facility. According to Lamin, at the time he served the accused, Mr. Sesay remained distraught, as he had been upon arrest and continuously throughout the half hour helicopter ride. “Still he was not comfortable. He was in tears, repeating the same conversation as earlier, that he has been deceived.”<sup>168</sup> Neither Officer Lamin nor anyone else ever explained to the accused the import of the papers, nor asked if he was able to understand the indictment. This formal legal document, containing serious charges under a complex joint criminal enterprise theory of liability, was made available exclusively in English. While Mr. Sesay speaks English, it is his third language after Temne and Krio. Moreover, his formal education extends only through seventh grade. As Mr. Sesay testified during the *voir dire*, even if he had had adequate facilities and time to review the charging documents prior to his interviews, he was not equipped to understand the formal language and legal terminology in his indictment without assistance.<sup>169</sup>

#### **D) Detrimental Impact of a Delayed Notice of Charges**

OTP investigators interviewed Issa Sesay every day between his March 10<sup>th</sup>, 2003 arrest and his initial court appearance on March 15<sup>th</sup>.<sup>170</sup> During his appearance before Judge Benjamin Itoe, the accused had access to an interpreter, heard the charges in his indictment for the first time, asked for a lawyer, and entered a plea of not guilty on each of the seventeen counts. On the tape of the proceeding, counsel for the Prosecution acknowledges to the Court that the accused appears not to understand the charges against him,<sup>171</sup> and Judge Itoe is obliged to lead the accused carefully through the charges in his indictment, with the assistance of an interpreter.<sup>172</sup> At no point during the initial appearance was the Judge made expressly aware of Mr. Sesay’s daily custodial interviews, although the accused did obliquely acknowledge them at one point; When Judge Itoe inquired into the reason for Mr. Sesay’s ignorance of the charges, the accused alluded to the fact that his time in OTP custody kept him away from Bonthe island, while the overall conditions of his detention (including the lack of electricity) made reading his indictment impossible at night: “For the whole of the day I was not in Bonthe. And, during the night, there was no light in the room, in the cell, where I was.”<sup>173</sup> Based on this, Mr. Jordash argued that what might have been a minor, technical breach of the Article 17(b) mandate, became a significant deprivation of a fundamental right.<sup>174</sup> This factored heavily into the argument for exclusion. Mr. Jordash argued that any voluntary waiver of rights must be based upon an informed understanding of one’s own legal status. “Voluntariness is not simply about force. Voluntariness is about being properly informed

of your charges, promptly, so that you can make an informed choice about whether to be interviewed.”<sup>175</sup>

**E) Promises, Inducements, and Threats: Evidence of Tactics Employed by Senior OTP Investigators to Achieve Compliance from the Accused**

In the month after Mr. Sesay’s initial appearance, the accused submitted to six more custodial interviews—each time, without counsel.<sup>176</sup> There is no dispute that investigators read the obligatory rights advisement to Mr. Sesay at the beginning of each custodial interview, and secured his initials on the necessary waivers before proceeding. However, as the Trial Chamber ultimately affirmed in its *voir dire* judgment, investigators appear to have illegitimately secured Mr. Sesay’s involuntary cooperation by using improper pressure and inducement behind the scenes.<sup>177</sup> All four investigators called by the OTP to testify during the *voir dire* denied that any professional misconduct or procedural abuse occurred during the days of custodial interrogation. Each categorically denied ever having “heard or made any promises, threats or inducements to Mr. Sesay.”<sup>178</sup> Yet, they went on to give evidence, in direct and cross examination, which largely corroborated Defense allegations that investigators pressured and induced the accused into cooperating with the OTP, and either carelessly or deliberately undermined the procedural safeguards that should have been available to him. Despite attempts by the counsel for the Prosecution to highlight on-the-record points of procedural regularity and compliance with the Rules, Peter Harrison’s very first witness, Gilbert Morissette, severely undermined the effort by volunteering information about previously undisclosed “confidence-building” efforts he undertook with the accused throughout March and April of 2003.<sup>179</sup> Mr. Jordash explored Mr. Morissette’s investigative strategy in detail on cross examination, adducing a considerable amount of factual evidence favorable to the Defense. Mr. Morissette’s testimony was particularly damaging to Prosecution credibility, because Mr. Harrison had been denying the existence of *any* substantive off-the-record communications up until the day the now-Chief of Investigations took the stand.<sup>180</sup> Thus, even as John Berry testified about repeatedly reading the accused his rights advisement and about Mr. Sesay’s apparent compliance with questioning, the impact of Mr. Morissette’s role off the record loomed large throughout the *voir dire*.

The current Chief of Investigations defended his behind-the-scenes efforts, likening them to an undercover operation. He told the Court he saw no problem with the covert “confidence building” measures he undertook and the off-the-record *quid pro quo* offers he used to achieve compliance from the accused.<sup>181</sup> “You can use things like this when you’re in an undercover role operation,” Morissette testified “and you could use it also when you’re interviewing suspect [*sic*]. To my knowledge, there’s nothing wrong with it.”<sup>182</sup> John Berry, by contrast, claims to have remained entirely ignorant of Mr. Morissette’s covert endeavors. Mr. Berry testified that, if he were aware of any such measures being used, he would have felt compelled to speak with his superiors about

it.<sup>183</sup> In his professional opinion, any conversation or deals being made with Mr. Sesay during breaks should have been referenced on the record upon resumption of the formal interview “to ensure the integrity of the process.”<sup>184</sup> When questioned hypothetically about the kind of tactics Mr. Morissette testified to using, Mr. Berry expressed misgivings. It struck him as an unacceptable investigative technique to deliberately and proactively approach an accused with incentives you’re willing to offer in exchange for continued cooperation, “because you’re making a promise.”<sup>185</sup> While Mr. Berry explained that he would be perfectly comfortable answering a suspect’s direct inquiries with any assurances he was expressly authorized to make, he would not approach a suspect with unsolicited *quid-pro-quo* offers. Nor would he, as a rule, make assurances to a wavering cooperator that material witness support benefits could be provided in exchange for testimony. Mr. Berry was very clear on this point, “Not for an exchange for testimony.”<sup>186</sup>

Notwithstanding Gilbert Morissette’s self-described “undercover”<sup>187</sup> campaign to secure the ongoing compliance of the accused with Prosecution questioning, Counsel for the Prosecution continually suggested throughout the *voir dire* that Mr. Sesay was a rational, willing, and even eager collaborator.<sup>188</sup> The accused flatly refuted this theory when he took the stand, testifying that he was in fact a captive participant, unacquainted with the powers and procedures of the court, and unaware he had any real choices in the beginning. “During that time, I had no knowledge about the Special Court, its functioning, there was absolutely no idea. I have never appeared before any court of law in this country before. So, the people who have captured me, it wasn’t even an hour, they turned around and telling me that [talking to OTP investigators] was the only way I could get myself free. That was why I did what they ask of me.”<sup>189</sup> Defense described Sesay’s off-the-record interactions with OTP investigators as rife with promises, inducements, and threats.<sup>190</sup> According to the accused, this behavior reached as high as the Chief of Investigations, Alan White, who allegedly joined Gilbert Morissette periodically during his so-called “confidence building” efforts, to reinforce a coercive message: “Issa, there is no hope left for you. This is the only way forward. You talk to us. This is the only way out.”<sup>191</sup>

Mr. Sesay was far more explicit than Gilbert Morissette had been in his testimony about the content of their off-the-record conversations. According to the accused, Mr. Morissette engaged in a relentless campaign to keep him talking throughout the interviews, using the same manner of pressure and threats that Mr. Sesay claims investigators used to secure his cooperation in the first place.<sup>192</sup> Mr. Sesay testified that, whenever he gave information that displeased the investigators, he would hear about it from Morissette during the breaks.<sup>193</sup> The Deputy Chief of Investigations would allegedly warn the accused that he was effectively wasting his opportunity to cooperate as a witness for the Prosecution.<sup>194</sup> According to the accused, Mr. Morissette “piled pressure”<sup>195</sup> on him to be more forthcoming whenever the investigators felt his

account didn't match information they were getting from other insider sources:<sup>196</sup>

He would come and say, 'Issa, we are just trying to help you. But what we have been hearing, if you don't confirm these things, how will we be able to help you?' He said, 'So you have to confirm the things that we have heard. That's the only way we'd be able to help you, so that you will be out of this problem.'<sup>197</sup>

Mr. Sesay testified that he began to tell "half-truths" in the custodial interviews, because Mr. Morissette so frequently came to him during the breaks and told him that his version of events was not "measuring up to their expectations."<sup>198</sup> Mr. Morissette reportedly warned the accused that he would be dropped as a witness and left to face the consequences if he did not confirm the information the investigators wanted him to confirm.<sup>199</sup> This pressure became particularly acute, Mr. Sesay testified, during an hour and forty-five minute lunch break on the 31<sup>st</sup> of March.<sup>200</sup> Mr. Morissette and Mr. Berry both confirmed speaking with the accused off-tape during this break about the substance of his answers, but they described the interaction in more innocuous terms.<sup>201</sup> By Mr. Sesay's account, he spent a solid hour alone with Mr. Morissette, during which time the Deputy Chief allegedly threatened to drop him as a witness unless he confirmed specific allegations involving the wife of AFRC leader Johnny Paul Koroma.<sup>202</sup> Mr. Morissette reportedly pressured the accused to "help himself" by admitting to an alleged crime.<sup>203</sup> Mr. Sesay testified that he didn't want to be dropped as a witness, so he felt compelled to lie and confirm the version of events alleged by Morissette and Berry.<sup>204</sup> Just a few sentences into the post-lunch interview session, Mr. Sesay can be heard on tape confessing to a crime he had previously repeatedly denied.<sup>205</sup>

Mr. Sesay further testified during the *voir dire* that he was misled about his official status and repeatedly promised imminent release in exchange for speaking freely with the OTP.<sup>206</sup> No such express promises appear in the transcripts of official interviews, but investigators do appear to have left considerable ambiguity on the record about Mr. Sesay's legal status. The terms "defendant" and "accused" seem to have been conspicuously absent from the vocabulary of OTP investigators during interviews, who often referred to Mr. Sesay only as a "suspect."<sup>207</sup> It is hard to say if investigators were simply careless about legal distinctions, or if they deliberately sought to mislead Mr. Sesay into believing that investigators had more discretionary authority to release him than they really did. It is worth noting that the current Chief of Investigations demonstrated considerable difficulty on the stand distinguishing between the rights owed to a suspect versus those owed to an accused person.<sup>208</sup> Mr. Jordash questioned Mr. Morissette at length about why he repeatedly referred to Mr. Sesay as a "suspect" during the custodial interviews when Mr. Sesay had, in fact, already been indicted.<sup>209</sup> Mr. Morissette denied that it was a deliberate scheme, and defended his persistent choice of the word "suspect" by pointing to the language in Rules 42 and 43, which investigators used to caution detainees.<sup>210</sup> However, the rule most relevant to interviewing a post-

indictment individual should have been Rule 63—“Questioning of an Accused.” Curiously, from the moment he began his testimony, Mr. Morissette never independently made reference to Rule 63 or commented on its applicability to the Sesay interrogation.<sup>211</sup> When Defense Counsel asked the Chief of Investigations if he was familiar with Rule 63, Mr. Morissette paused and replied, “Vaguely.”<sup>212</sup>

The impact of the misrepresentation of Mr. Sesay’s status formed a key basis for the Trial Chamber’s finding of improper inducement by OTP investigators:

It is our view... that the statements were a product of improper inducements made by the investigators emanating from the implanted belief in the mind of the Accused that he was to be a witness and not an accused. Significantly, we are equally strongly of the view that, because the Accused was persuaded to give self-incriminating statements while under this misapprehension, this amounts to a breach of the Accused’s right not to be compelled to testify against himself and his right to silence under [Article 17(4)(g)]<sup>213</sup> of the Statute and Rule 42(A)(iii) of the Rules.<sup>214</sup>

Although the Court concluded in paragraphs 58 and 60 of its written decision that it did not believe the recorded interviews took place under coercive or oppressive circumstances,<sup>215</sup> the judgment did find significant cause for concern in the nature of the ongoing, off-the-record contacts between senior OTP investigators and the accused.<sup>216</sup> These contacts, the Court concluded, left the accused “laboring under a misapprehension that his cooperation would clear him of the charges against him.”<sup>217</sup> At paragraph 51, the Court concluded that the OTP investigative “role in this process borders on a semblance of arm twisting and holding out promises to the accused in the course of the interrogation and particularly during the unrecorded conversations in the course of the break in order to sustain the Accused’s cooperation with the Prosecution.”<sup>218</sup>

#### **F) Disregard for Special Vulnerabilities: Physical and Psychological Ailments of the Accused**

Contemporaneous medical records, admitted into evidence during the *voir dire*, tend to corroborate and compound the gravity of Mr. Sesay’s claim that he was confused, distraught, and taken advantage of by OTP officials while in a very vulnerable position. The official detention log confirms that the accused was suffering from numerous physical and psychological ailments during his initial detention, including malaria, depression, anxiety, “extreme and inappropriate” suicidal thoughts, confusion, frequent bloody stools, dysentery, insomnia, and severe dental pain.<sup>219</sup> In sharp contrast to Mr. Morissette and Mr. Berry’s insistence that the accused didn’t want to see an attorney, medical staff noted in the detention log that Mr. Sesay voiced “concern about his parents and the fact that he has not got a lawyer at present.”<sup>220</sup> By late April, shortly after what would be Mr. Sesay’s final custodial interview, the detention facility doctor observed, “Issa needs to be assessed by a psychiatrist. He's very confused and needs to be looked after by appropriately trained personnel for the benefit of both staff, himself and other

inmates. He appears to have a lot of problems, both psychological and physical, and he needs to be looked after.”<sup>221</sup> Remarkably, in its written judgment on the *voir dire*, the Trial Chamber dismissed Mr. Sesay’s medical ailments as “not sufficiently grave to render the manner of questioning oppressive.”<sup>222</sup> If Mr. Sesay’s ailments do not reach that threshold, one wonders what sort of medical problems ever *would* be sufficiently grave in the Trial Chamber’s view.

The record clearly indicates that OTP Investigators were aware of Mr. Sesay’s anxiety about his family—the accused broke down crying during his first interview and explained to investigators that he “got so shattered” out of concern for his family who “don’t even know my whereabouts.”<sup>223</sup> Nevertheless, the OTP investigators who brought Mr. Sesay into the mainland office day after day neglected to put the accused in contact with his wife or even to inform his family that he had been indicted and detained by the Special Court. There is no affirmative rule on the record requiring that investigators facilitate such contact, but Counsel for the accused framed this as part of what amounted to incommunicado detention, intended to assert improperly coercive control over the accused and ensure his ongoing cooperation.<sup>224</sup> Mr. Morissette didn’t allow Mr. Sesay to call his wife until midway through the fifth custodial interview, after an agreement was reached that the family of the accused would be taken into temporary protective custody in exchange for Mr. Sesay’s continued cooperation with investigators.<sup>225</sup> For weeks thereafter, Mr. Sesay reportedly remained under the impression that the OTP exclusively controlled his contact with his wife and children.<sup>226</sup> During the *voir dire*, Counsel for the accused cited to evidence on the record that, at least once, OTP investigators arranged for Mr. Sesay to see his wife on the condition he met and spoke with U.S. agents from the FBI.<sup>227</sup> Mr. Jordash submitted that this was evidence the OTP used the protective custody arrangement for coercive rather than legitimate purposes.<sup>228</sup> Under cross examination, Mr. Morissette agreed that it is customary police practice in most jurisdictions (including his home jurisdiction of Canada) to give a detainee a phone call.<sup>229</sup> The current Chief of Investigations acknowledged that it would have been the “humane”<sup>230</sup> thing to do in light of Mr. Sesay’s obvious distress over his family, but when asked pointedly by Defense counsel, “*Why* did you not do it?” Mr. Morissette simply shrugged dismissively and responded, “I did not do it.”<sup>231</sup>

#### **G) Deliberate and Incidental Curtailment of Issa Sesay’s Access to Duty Counsel**

Throughout March and April, despite Mr. Sesay’s physical and psychological ailments, the accused was never apparently given a choice in the detention facility to decline traveling to Freetown for an interview. Unlike the other detainees on Bonthe, Mr. Sesay was forcibly removed from his cell each interview day, handcuffed, and then either blindfolded or hooded before being taken to a waiting helicopter.<sup>232</sup> Interviews lasted the entire day, getting him back to the detention facility in the evening.<sup>233</sup> Whether deliberate or incidental, these daily trips initially prevented Mr. Sesay from consulting

with any of the Defense Office lawyers or advisors who came to Bonthe; the same chartered helicopter that brought duty counsel to the island would immediately carry Mr. Sesay away on the return flight.<sup>234</sup> Even if transportation arrangements had been more flexible, it is not clear Mr. Sesay would have been given access to counsel at that time. Duty counsel, Claire Carlton-Hanciles, who testified for the Defense during the *voir dire*, confirmed, for instance, that she was sent to Bonthe by the SCSL Registrar<sup>235</sup> on 17 March 2003 to explain the legal aid scheme to the detainees. According to Ms. Carlton-Hanciles, Deputy Registrar Robert Kirkwood told her as she was on her way out of the Court bound for Bonthe, “By the way Claire, don’t bother with Mr. Issa Sesay. He signed a waiver to duty counsel.”<sup>236</sup> Ms. Hanciles visited all the detainees that day except for Mr. Sesay. She reportedly passed the accused on the helipad at Bonthe, but he was unrecognizable due to hooding, so she only knew his identity after the fact.<sup>237</sup>

Beyond the circumstantial interference with Mr. Sesay’s access to duty counsel, the record contains troubling evidence that the OTP may have initially used Mr. Sesay’s signed rights waivers to actively prevent defense representatives from meeting with the accused at all in the first few days of his detention.<sup>238</sup> Mr. Sesay was scheduled to make his preliminary appearance before a judge on the 15<sup>th</sup>, and had the right to prepare for this hearing with legal assistance, notwithstanding any waiver he signed to forego counsel during a custodial interview. Moreover, according to the Court’s former Registrar, Robin Vincent, the Registry insisted after Mr. Sesay’s arrest that duty counsel be permitted to speak with the accused on Bonthe to explain the upcoming hearing to him.<sup>239</sup> Nevertheless, certain members of the OTP seem to have treated the interview-specific rights waivers as a waiver of counsel altogether, and collaborated with the security staff at the detention facility to ensure the accused did not consult with duty counsel at first. As Vincent noted in a contemporaneous memo, security staff at the SCSL detention facility “had been given clear instruction that the Registry was not to enter into contact with Mr. Sesay... as he had waived his rights to see counsel.”<sup>240</sup> When the Registry subsequently sent an intern by the name of Beatrice Ureche to the OTP offices on March 11<sup>th</sup> she was not given access to the accused either.<sup>241</sup> The Registrar noted in his memo that Ms. Ureche was sent to the OTP expressly to await Mr. Sesay’s arrival, and to ensure that he understood the distinction between his right to legal aid in general and his right to have counsel present during questioning.<sup>242</sup> Gilbert Morissette testified, however, that Ms. Ureche only asked for a copy of the waiver when she arrived, and did not ask to see Mr. Sesay.<sup>243</sup> Whatever the circumstances that prevented Ms. Ureche from speaking with the accused, Mr. Morissette made clear in his testimony that he took Mr. Sesay’s waiver of immediate assistance of counsel to mean that Defense Office representatives should not meet with the accused at all. By checking off the boxes on the waiver “Mr. Sesay had told us that he did not want to see a lawyer,” Mr. Morissette testified during the *voir dire*, “and he did not want to have a lawyer present.”<sup>244</sup> The OTP gave Ms. Ureche a copy of the waiver Mr. Sesay had initialed and sent her away without speaking to the accused.<sup>245</sup> On the insistence of Registry legal advisor Mariana Goetz, the OTP reportedly agreed thereafter that that accused could meet with duty counsel to be briefed about legal

procedures for his initial appearance.<sup>246</sup> According to the Registrar’s memo, duty counsel Haddijatou Kah-Jallow did gain access to the accused for this purpose, however the record remained unclear as to the specific content of this meeting and the circumstances under which it took place (i.e. the exact date, time, place and persons involved).<sup>247</sup>

#### **H) Questions About the Adequacy of OTP Explanations of Fundamental Rights**

With respect to Mr. Sesay’s understanding of his rights, two of three Judges agreed with the Prosecution’s argument that investigators bore no affirmative obligation “to go beyond reading his rights to an Accused in a language that he or she understands.”<sup>248</sup> Throughout the *voir dire*, Mr. Harrison maintained that investigators fully discharged this duty by simply reading the English text of Rules 42 and 43 to the accused at the beginning of each recorded interview.<sup>249</sup> Thereafter, the Prosecution insisted, investigators had no further obligation to elaborate on the powers and prerogatives of the Court, explain Mr. Sesay’s rights in greater detail, or offer translation into Mr. Sesay’s first language.<sup>250</sup> Calling the rights in the advisement “neither ambiguous nor difficult to understand,”<sup>251</sup> Mr. Harrison argued that the accused was sophisticated enough to participate in high level peace negotiations and to have had prior dealings with the President of Sierra Leone and other international leaders, and was therefore sophisticated enough to understand the basic incantation of rights he received from OTP investigators.<sup>252</sup> Defense strongly disagreed on these points, and sought to impeach the legitimacy of Mr. Sesay’s waivers by alleging that OTP investigators explained defense rights in a grossly inadequate and misleading fashion, deliberately sought to diminish the import of the waivers before they were presented to the accused, and failed to react appropriately to on-the-record instances where the accused was demonstrably confused about the meaning and scope of his rights.

Defense argued that, in light of Mr. Sesay’s isolation in OTP custody from almost the moment of arrest, “the Prosecution had a duty to explain what the role of duty counsel was, and had a duty to explain accurately. They can’t have it both ways: Whisk Mr. Sesay away into the custody of the Prosecution, but then don’t take efforts to explain what rights lie outside of that office.”<sup>253</sup> Had the accused properly understood the role of SCSL duty counsel, Mr. Jordash submitted, he could have asked for temporary representation during the interviews, and hypothetically continued cooperating with the OTP without waiving his rights. However, Defense maintained that inadequate and misleading rights explanations from senior OTP investigators hindered Mr. Sesay’s ability to understand the consequences of signing the waivers each day. By way of illustration, Mr. Jordash confronted Gilbert Morissette with a particularly baffling excerpt from the day of Mr. Sesay’s arrest, wherein the Deputy Chief conflated the act of cooperation with a willingness to waive the right to counsel—as if making a statement to police and asserting one’s right to legal assistance were mutually exclusive options:



Mr. Morissette: Are you willing to waive the right to counsel and proceed with the interview in preparation of a witness statement; yes or no? In other words, are you willing to discuss with us your involvement; are you willing to tell us what happened and what you know of these events?”<sup>254</sup>

Mr. Jordash relied on this passage in support his argument that Prosecution investigators failed to discharge their duty to adequately explain Mr. Sesay’s rights to him before they sought a waiver. Because the accused was deliberately isolated, he initially “relied wholly upon the information passed to him by Prosecution investigators,”<sup>255</sup> Mr. Jordash pointed out, and what little information they gave him was misleading. “This is the only explanation on record offered by the investigators as to the right to counsel...Your Honors can go through the interviews. There is no other explanation *ever* offered to this accused as to the meaning of whether he's willing to waive the right to counsel.”<sup>256</sup> Because the Prosecution maintained that no further elaboration was necessary or required, Mr. Harrison did not challenge these factual assertions made by the Defense. Prosecution witness, John Berry, conceded under cross examination that he did the “bare minimum” each day by simply reading the rights advisement script verbatim and moving on without elaboration.<sup>257</sup> Mr. Jordash further inquired whether investigators felt it was incumbent upon them to specifically ensure that Mr. Sesay understood the particular aspect of Article 17 that would guarantee *immediate* assistance of counsel, on demand and without charge, if the accused so wishes. Gilbert Morissette didn’t seem concerned with making this point especially clear to Mr. Sesay:

Mr. Jordash: Did you see it as part of your investigative protocol to be confident at any time that Mr. Sesay understood that he had a right to counsel there and then?

Mr. Morissette: No.

Mr. Jordash: You didn't see that as an obligation?

Mr. Morissette: No.<sup>258</sup>

According to the Defense, investigators did more than simply neglect to explain the scope of Mr. Sesay’s rights—they actively sought to mislead the accused about the import of the rights waivers he signed. Prior to his first interview, investigators allegedly told the accused, off-the-record, that there would be papers read to him at the beginning of the interview, and that he should just say “yes” to the questions they asked.<sup>259</sup> Mr. Sesay claims that the Deputy Chief repeated his advice to disregard the waiver on the 11<sup>th</sup> of March— “John will be reading a document to you. Don’t mind them... Those documents are just procedures.”—and that Mr. Berry said words to this effect on March 12<sup>th</sup>, as well.<sup>260</sup> Although Mr. Sesay followed instructions each day and initialed the forms, he later testified during the *voir dire* that he didn’t understand the English term “waiver”, and wasn’t aware until later that it meant he was giving up rights.<sup>261</sup> He also testified that he misunderstood the word “counsel” to mean “consul,” (an English phrase he had picked up during the Abidjan peace talks, where a consul took the place of an

ambassador who could not attend a meeting), so he did not understand at first that the rights advisement had anything to do with a lawyer.<sup>262</sup> The *voir dire* judgment surveyed these Defense arguments briefly in its summary of the submissions of the parties,<sup>263</sup> however the Court ultimately issued no findings whatsoever regarding the evidence of a language barrier or the allegations that investigators urged the accused to disregard the papers he was signing.<sup>264</sup> Perhaps even more surprising, the Court did not issue any findings as to what effect the isolation of the accused in Prosecution custody might have had on his ability to understand his rights and his decision to sign the waivers. Presumably the Judges either found the evidence presented unreliable, or thought the circumstances to be irrelevant, but there is no explanation either way. Instead, citing the comfortable surroundings of the interview room and the polite mannerism of Mr. Berry during recorded interviews, the Trial Chamber simply declared categorically that it was “satisfied that the interviews did not take place under coercive or oppressive circumstances.”<sup>265</sup>

In light of all the evidence Defense presented to demonstrate Mr. Sesay’s ignorance and confusion, it is difficult to understand why the Trial Chamber declined to issue more detailed findings on the matter in its final judgment. Mr. Sesay’s testimonial account of his own confusion was partially corroborated by statements he made on the record during his custodial interviews. The record reflects that, while the accused expressed confusion and sought clarification a few times, he never appears to have received an adequate explanation from investigators. For example, at one point, several days into the interview process, Mr. Sesay stopped Mr. Berry as the investigator was ticking through each clause in the rights waiver. Mr. Sesay asked Mr. Berry to clarify what it meant each time he affirmed and initialed the statements on the waiver: “So, all these days I’m saying ‘yes,’” Mr. Sesay explained, “meaning ‘yes, I’m not guilty.’”<sup>266</sup> Mr. Berry responded, “No, no, you’re not admitting guilt... you’re being advised that you are a suspect and that as a suspect you’re entitled to these rights.”<sup>267</sup> The investigator never attempted to explain to the accused that his initials on the form, far from being the proclamation of innocence Mr. Sesay thought them to be, indicated a willingness to relinquish the rights listed on the form.

Both Mr. Morissette and Mr. Berry deny ever having noticed the accused express any confusion over the professional obligations of duty counsel or the scope of Mr. Sesay’s right to immediate legal representation. Mr. Morissette testified categorically, “Mr. Sesay never demonstrated to me any lack of understanding of his right.”<sup>268</sup> Mr. Berry echoed this sentiment, claiming that he did everything “to the best of [his] ability” to ensure that Mr. Sesay understood his rights.<sup>269</sup> Under further cross examination, however, Mr. Morissette conceded that he failed to take corrective action on several occasions where Mr. Sesay articulated a belief that SCSL duty counsel had no obligation to maintain confidentiality with the accused:

Mr. Jordash: So he was saying to you, effectively: Well, duty counsel are not like my lawyer because they won't be private to me; is that right?

Mr. Morissette: That's correct.

Mr. Jordash: Do you correct that misapprehension?

Mr. Morissette: No.<sup>270</sup>

...

Mr. Jordash: So when you're offering him duty counsel, you're not offering him a lawyer, according to him?

Mr. Morissette: According to him, you're correct.

Mr. Jordash: And did you correct that misapprehension?

Mr. Morissette: You mean with him?

Mr. Jordash: Yes.

Mr. Morissette: No.<sup>271</sup>

Mr. Berry testified that he “honestly felt that [Mr. Sesay] did understand everything that we had said to him,”<sup>272</sup> however he also acknowledged that he never affirmatively explained the concept of attorney-client privilege to the accused or made clear that duty counsel would be bound to respect it.<sup>273</sup> As it turns out, Mr. Berry himself was not entirely sure either whether duty counsel was bound to offer attorney-client privilege.<sup>274</sup> Nevertheless, he did not see it as his obligation to inquire with the Defense Office and properly advise the accused.<sup>275</sup> He simply left it to duty counsel to discover and rectify any misconceptions Mr. Sesay might have about their role.<sup>276</sup> Mr. Sesay was interviewed four times by the OTP before anyone from the Defense Office was permitted to speak with the accused.<sup>277</sup> As late as March 15<sup>th</sup>, when the accused first appeared in Court, he remained verifiably ignorant of the purpose duty counsel were meant to fulfill. During his appearance, when asked by Judge Itoe whether he had a lawyer, Mr. Sesay stood in front of three Defense Office personnel and responded through an interpreter, “This is my first time I've been in court so I don't have any lawyer.”<sup>278</sup> As Mr. Jordash later pointed out in oral arguments leading up to the *voir dire*, the initial appearance transcript obviously reflects that Mr. Sesay did not perceive the duty counsel seated behind him during the hearing to be his advocates, much less know that he could trust them to hold private communications in strict confidence.<sup>279</sup>

The Trial Chamber split during the *voir dire* over whether investigators had an affirmative duty to explain these rights to the accused more thoroughly. After acknowledging some of the elements of Mr. Sesay’s circumstances and background that may have affected his subjective understanding of the powers of the OTP and his rights as a detainee,<sup>280</sup> the majority applied an objective standard from the *Prosecutor v. Delalic*,<sup>281</sup> and concluded as a matter of law that a simple incantation of the rights without further explanation was sufficient in this case, because the accused “had the facility of interpretation of the rights involved in a language which he understands.”<sup>282</sup> Surprisingly, the Court did not distinguish between the circumstances of the accused in *Delalic* (where the defendant was familiar with a body of contradictory procedural norms

in a foreign justice system, and claimed that his personal knowledge of another system left him confused about the scope of his legal rights)<sup>283</sup> and Mr. Sesay’s situation (where Defense argued that the circumstances of the war torn society Mr. Sesay grew up in left him totally unacquainted with *all* formal mechanisms for the administration of justice, and therefore ill equipped to understand his rights after only a perfunctory reading of the Rule 42 advisement).<sup>284</sup> The Court concluded that “the cultural background of the accused is not relevant,”<sup>285</sup> even though the standard articulated in *Delalic* specifically contemplates that an individual totally unacquainted with judicial administration of any kind might be entitled to more robust advice and explanation during a custodial interview—“what is considered oppressive with respect to a child, old man, invalid, or person inexperienced with the administration of justice may not be oppressive to a mature person who is familiar with the judicial process.”<sup>286</sup>

There is no dispute that, like everyone in Sierra Leone at that time, the accused was completely unfamiliar with the powers and prerogatives of the Special Court when arrested. The first three OTP personnel had begun quietly working from a house in Freetown just seven months prior to “Operation Justice.” In March of 2003 the physical Court complex was still under construction, the Trial Chamber had yet to convene on Sierra Leonean soil, no individual had yet been arrested, and the SCSL outreach office was busy preparing to host town hall meetings all over the country to explain the role and powers of this new institution to the Sierra Leonean public. In oral submissions, Mr. Jordash argued that these factors rendered the circumstances inherently more oppressive to any accused person, and thereby ought to have heightened the burden on Prosecution investigators to take affirmative steps in protection of the procedural rights of the accused.<sup>287</sup> Nevertheless, two of three judges in Trial Chamber I remained unconvinced by the Defense argument. According to this majority decision, the Court found “no relevance” in the fact that Mr. Sesay spent his entire adolescence and young adulthood fighting in the bush and had an education only to the age of thirteen.<sup>288</sup> The Chamber likewise found “no merit” in the facts that Mr. Sesay was interrogated in his third language,<sup>289</sup> had limited literacy, no experience with formal criminal justice systems, and no concept of defense rights or legal aid provisions.<sup>290</sup> The majority affirmed the Prosecution view that the cursory explanation of rights was sufficient in these circumstances,<sup>291</sup> despite the fact that the investigators represented a recently established, experimental, hybrid institution of international criminal justice in a post-conflict society.<sup>292</sup>

Departing from the majority on the issue of an accused person’s right to counsel and the investigative burden to explain this right, Judge Benjamin Itoe concluded in a partially dissenting opinion that Prosecution investigators should indeed be held to more exacting standards to ensure the rights of the accused are scrupulously respected:

It is clear that for the waiver [of the right to counsel] to be deemed to have been voluntarily given, the Prosecution must show and prove that it fully and comprehensively explained not only the nature of the document but also the consequences that go with its signature by the suspect. It is not enough just to rattle through the textual reading of the waiver, but to really make a comprehensive explanation of its contents and implications of signing of the waiver.<sup>293</sup>

Judge Itoe rejected the notion that the Trial Chamber could reasonably conclude, based on the “situation and the prevalent circumstances” of Mr. Sesay’s interrogation, that he voluntarily waived his right to counsel.<sup>294</sup> In light of the Chamber’s unanimous agreement on the illegal circumstances that rendered Mr. Sesay’s waiver of his right to silence involuntary, Judge Itoe declared that it was, in his opinion, “erroneous to conclude in another breath,” that waivers of the right to counsel elicited under the same circumstances were voluntary and informed.<sup>295</sup>

#### **H) Interference with Issa Sesay’s Request for Specific Legal Representation**

As mentioned before, testimonial and documentary evidence from the *voir dire* reflects that a Gambian duty counsel by the name of Haddijatou Kah-Jallow did apparently gain access to the accused twice in March (both brief meetings at the OTP offices), but Mr. Sesay claims that when he met her, he didn’t understand exactly what her role was vis-à-vis the Prosecution and the investigators questioning him.<sup>296</sup> Moreover, the accused testified that during several off-the-record conversations, Mr. Morissette told Mr. Sesay that he was forbidden from divulging the content of the interviews to duty counsel when she visited him in the OTP trailers.<sup>297</sup> The record is unclear, and contains contradictory evidence as to the precise circumstances of the meetings (i.e. whether the meetings were entirely private and whether the accused understood that Mrs. Kah-Jallow was a defense lawyer representing an organ of the Court separate from the Prosecution).<sup>298</sup> At least one of these meetings raised more concerns than it settled as to the propriety of OTP procedure. On the 24<sup>th</sup> of March 2003, Mr. Sesay clearly requested a lawyer in writing when duty counsel came to see him at the OTP compound.<sup>299</sup> The request for a specific lawyer, handwritten by Mr. Sesay, was witnessed and signed by investigator John Berry.<sup>300</sup> Mr. Sesay claims that he made the request on instructions from Mr. Morissette and Mr. Berry, who told him that morning that a woman would be coming to ask him about choosing a lawyer. Mr. Sesay testified that Morissette was very pointed with him that morning before the duty counsel arrived. He reportedly told the accused that he should not take any Sierra Leonean lawyer—particularly not Mr. Edo Okanya, a locally available lawyer retained by other SCSL detainees.<sup>301</sup> Instead, Mr. Sesay told the court, he was instructed to ask for a white man named “Robertson.”<sup>302</sup>

Mr. Morissette and Mr. Berry both flatly deny they ever had any such discussions with the accused. However, internally inconsistent testimony Mr. Berry gave during the *voir dire*, and specific information he included in a contemporaneous memo, seriously

impeached his credibility on the matter. In this author's opinion, evidence clearly suggests that OTP investigators were in fact coercively involved in some aspect of the defendant's initial choice of counsel.<sup>303</sup> Mr. Berry's signature on the choice of counsel document further raised concerns about why an OTP investigator was present for what should have been a privileged communication. Moreover, Mr. Berry never adequately explained why he continued interviewing Mr. Sesay that afternoon, despite the Rule 42 and Rule 63 mandates that questioning cease if an accused who has waived his rights "subsequently expresses a desire to have counsel."<sup>304</sup>

#### **I) OTP Refusal to Respect Defense Office Intervention on Behalf of the Accused**

Acting head of the Defense Office, John Jones, learned about the ongoing custodial interviews sometime in April, shortly after his arrival in Sierra Leone. Concerned about the legitimacy of the protocol followed, Jones intervened on behalf of the accused in an April 14<sup>th</sup> letter to David Crane.<sup>305</sup> The acting Principal Defender had met with the accused briefly at the detention facility when he traveled there to introduce himself to the detainees and discuss the Court's legal aid scheme. He explained in his letter to the OTP that he was "extremely concerned about the circumstances surrounding the apparent waiver of Mr. Sesay's right to remain silent and to have a lawyer present during his investigation by your office."<sup>306</sup> He asked the OTP to refrain from interviewing Mr. Sesay, effective immediately, so as to allow him time to discuss matters with legal counsel and make an informed decision about whether to continue speaking with the Prosecution.<sup>307</sup> The OTP did not refrain. Instead, they interviewed Mr. Sesay on the 14<sup>th</sup> and the 15<sup>th</sup> of April, and had Mr. Sesay sign what appear to be hastily drafted additional waivers.<sup>308</sup>

Mr. Morissette confirmed during the *voir dire* that the Prosecution received Mr. Jones' letter while Mr. Sesay was at the OTP interviewing on the 14<sup>th</sup> of April.<sup>309</sup> Instead of suspending the interviews, as requested, Mr. Morissette confronted the accused with the letter midway through the day. The accused claims that Mr. Morissette first confronted him off-the-record, during a break, and subsequently had him sign the additional rights waiver *on* the record. As Mr. Sesay described it, Mr. Morissette entered the interview room furious about the fact that the accused had told a lawyer the details of his OTP collaboration:

He was vexed, saying that -- why I should tell John Jones what transpired between I and them. He was angry. He hit the table. He was walking around the room... I want my Honors to excuse me for the words. He said, "Issa, this is not John Jones' fucking business. He had no fucking business in your case." He said-- he was just crazy. "In fact, the case is not his business." He blasted John Jones' name. He said I had no right to tell John Jones what transpired between I and them.<sup>310</sup>

Mr. Morissette denies that any outburst ever took place.<sup>311</sup> However, he impeached his own credibility testifying about the letter, when he tried to claim that he had never even seen a copy of the letter at all.<sup>312</sup> Several members of the Bench pointed out that Mr. Morissette's claim could not be true, because the transcript of his interaction with Mr. Sesay captured the Deputy Chief reading the letter *verbatim* to the accused, before laying down the additional waiver for Mr. Sesay to sign. When confronted by the Court on this point, Mr. Morissette backtracked, claimed to have forgotten that part, and conceded that he apparently did have a copy of the letter in hand when he spoke with the accused on the record.<sup>313</sup> Mr. Sesay initialed the additional rights waivers, but explained during the *voir dire* that the Deputy Chief's outburst had confused and panicked him. According to Mr. Sesay, it was apparent that his decision to consult with defense counsel had seriously angered "the man who said he was going to free me."<sup>314</sup> When Mr. Morissette produced the sheet of paper entitled "Specific Rights Advisement,"<sup>315</sup> and told the accused he would be dropped as a witness if he did not proceed with the interview immediately, Mr. Sesay complied.<sup>316</sup> The accused claims that the Deputy Chief was very explicit about consequences, including removal of his family from protective custody, and years of detention while awaiting trial.<sup>317</sup> Mr. Sesay agreed to continue with the interview. He initialed statements on the form denying that he had told John Jones he wanted to reconsider collaboration with the OTP, affirming that he wanted to keep talking to investigators, and denying that he wanted duty counsel to be present.<sup>318</sup>

Mr. Sesay's had one final custodial interview with the OTP on the 15<sup>th</sup> of April 2003, but any prospect for cooperation between the accused and the OTP broke down after that.<sup>319</sup> Mr. Sesay claims that Mr. White and Mr. Morissette contacted him by telephone at the detention facility in May. The Chief of Investigations allegedly gave Mr. Sesay one last opportunity to "cooperate" with the Prosecution, offering to drop the indictment if he agreed to be a witness against Charles Taylor.<sup>320</sup> By this time, Mr. Sesay had retained a Canadian lawyer through the Defense Office. Having not seen the OTP deliver on what Mr. Sesay claimed were previous promises, the accused was suspicious. He reportedly told Mr. White that he would only continue speaking with OTP if his lawyers, who were present in Freetown, were involved.<sup>321</sup> He gave the Chief of Investigations his attorneys' names and said the OTP should approach them about his cooperation.<sup>322</sup> According to Mr. Sesay, Mr. White ended the phone call and never contacted the accused again.<sup>323</sup> Also according to the accused, Mr. Berry attempted to contact him one last time thereafter.<sup>324</sup> Shortly after the detainees were transferred to the detention facility at the present Special Court complex in Freetown, Mr. Sesay claims Mr. Berry approached his wife outside the complex and asked her to help convince Mr. Sesay to cooperate with the OTP on the Taylor trial. She, like the accused, told Mr. Berry that her husband had a lawyer now, and they should contact him through counsel.<sup>325</sup> Based on *voir dire* testimony, it appears that neither Mr. Berry nor any other OTP investigator ever did so.

The Judges of Trial Chamber I split over whether OTP investigators violated Mr. Sesay's right to counsel. While Judge Benjamin Itoe concluded in a separate, partially concurring and partially dissenting opinion that violations of the Rule 42 and Rule 63 rendered Issa Sesay's alleged waivers of counsel involuntary, two of three Judges summarily concluded the opposite—that there was no breach of this particular right and therefore no grounds for exclusion based on involuntary waiver of the right to counsel. Unfortunately, the section of the Court's majority judgment discussing Issa Sesay's right to counsel can have little jurisprudential value in future tribunals. With due respect to the judges, this section of the judgment seems largely ill-supported by the *voir dire* record and may do more to confuse than to clarify the law regarding voluntary waivers of the right to counsel. The majority judges affirm, for instance, that OTP investigators had a duty, "where there are indications that a witness is confused," to take additional steps "to ensure that the suspect does understand the nature of his or her rights."<sup>326</sup> However, the decision subsequently neglects to apply this finding of law to the facts on the record. Thus, there is no discussion of Gilbert Morissette's admission that he repeatedly neglected to correct Mr. Sesay's misapprehensions about his right to counsel. The Court likewise ignored evidence that Issa Sesay mistakenly believed (and communicated his belief to investigators) that duty counsel was not the same thing as his lawyer, that duty counsel would not honor attorney-client confidentiality, or that his initials on the rights advisement constituted declarations of innocence rather than informed waivers of the right to legal assistance.

Elsewhere in its decision, the majority acknowledges the Rule 63 requirement that "once an accused person has requested the assistance of Counsel, questioning should immediately cease and shall only resume when the Accused's counsel is present."<sup>327</sup> In the following sentence, the Court conclusively determines that Mr. Sesay made at least two such requests for counsel during the period in question.<sup>328</sup> Nevertheless, the majority decision summarily (and without explanation) concludes that the OTP investigators somehow fulfilled their obligations under Rule 63. Simply put, this conclusion does not follow logically from the Court's own factual findings and statements of law. Not only did the OTP repeatedly fail to unilaterally suspend interviews as required by Rule 63, evidence suggests that investigators went out of their way to continue interviewing the accused despite an unequivocal request by the acting Principal Defender, on behalf of the accused, that they cease. Instead of respecting Mr. Sesay's clear request for legal assistance, OTP investigators ignored their obligation to suspend the interview, and instead chose to pressure the accused into re-waiving his rights on an additional form. As Judge Itoe concluded in his separate opinion, the facts on record point inescapably to the conclusion that Issa Sesay's alleged waiver of the right to counsel was involuntary as a matter of law, having been obtained in plain breach of Article 17, Rule 42 *and* Rule 63.<sup>329</sup>



#### **IV. CRITICAL ANALYSIS OF INVESTIGATIVE POLICY AND PRACTICE IN THE OTP**

As previously suggested, this section turns to causal analysis, exploring the underlying institutional forces that either facilitated or failed to correct the illegitimate investigative conduct exposed during the *voir dire*. It also further explores investigative practices at the OTP. The information brought to light during the *voir dire* presents a valuable opportunity for the Special Court and outside observers to confront certain institutional weaknesses at the SCSL and extract the lessons to be learned for the future. To that end, this section scrutinizes three problematic institutional characteristics of the OTP Investigations Section that were brought to light during the *voir dire* and confirmed in subsequent interviews conducted by the author of this report. These characteristics are:

- (1) Ill articulated affirmative professional obligations for prosecution investigators;
- (2) Inadequate formal training of Investigations personnel; and
- (3) Poor internal oversight mechanisms within the OTP.

In this author's opinion, each of these elements played a role in furthering the kind of procedural abuse that occurred during the Sesay investigation. Moreover, as this section of the report explores, these institutional flaws have had consequences beyond the breaches exposed during the *voir dire*; Inadequate training, unclear protocol, and ill enforced professional standards have, in many respects, rendered OTP investigative work less effective and less efficient, as well. These issues merit earnest reflection by those who wish to avoid unnecessary repetition of the SCSL's mistakes.

Before delving into the prosecution-side critique, it is worth noting that basic inadequacies of the SCSL's legal aid provision contributed to at least some of the breaches that occurred immediately following Mr. Sesay's arrest. Judging by evidence adduced during the *voir dire*, there can be no doubt that omissions of the fledgling SCSL Defense Office compounded certain post-arrest violations of Mr. Sesay's rights. Registry legal advisors and duty counsel were in a unique position to inquire about the circumstances surrounding the custodial interviews, and to advocate on behalf of the accused, yet they initially failed to do so. Some of the blame for Mr. Sesay's ignorance must fall on the shoulders of Defence Office personnel who ceded too much control to OTP investigators, and, according to Mr. Sesay, neglected to properly explain the rights and privileges of an accused under the Court's legal aid structure. For whatever reason, Defense Office personnel who came into contact with the accused in OTP custody during the first month of his detention apparently failed to ask the right questions and did an inadequate job advocating for the rights of an individual plainly in a vulnerable situation.<sup>330</sup>

Not until John Jones joined the Court as acting Principal Defender did any Defense Office personnel intervene meaningfully on behalf of the accused. This was partly due to a serious structural flaw in the SCSL from its inception—while the OTP

began operations in Freetown eight months prior to “Operation Justice,” the defense organ was not staffed until much later. The Special Court’s legal aid scheme was barely a month old at the time of Issa Sesay’s indictment and arrest in March 2003. The OTR’s first duty counsel and “defense advisors” didn’t arrive in Freetown until February of 2003, and they were left to take instructions from the Registrar, who was an administrative court management officer, not a lawyer. The Defense Office didn’t have any legal leadership until John Jones became acting head several weeks after the first wave of arrests. It would be another full year before the United Nations Secretary General appointed the Court’s first permanent Principal Defender. To protect the integrity of the process, the UN ought to have ensured that the SCSL’s Defense Office was fully staffed, trained, and operational *prior* to the execution of arrest warrants. In previous interviews with the War Crimes Studies Center, the Special Court’s founding Registrar Robin Vincent acknowledged that, in an ideal world, this would have been the case.<sup>331</sup> UN failure to prioritize the needs of the defense left duty counsel ill-equipped to intervene in a timely and effective manner on behalf of the accused. Nevertheless, this report focuses on the structural flaws in the OTP Investigations Section and objectionable acts of certain Prosecution personnel, rather than on the omissions of the Court’s under-prepared defense mechanism.

What becomes clear when evaluating the problematic institutional characteristics of the OTP Investigations Section is that they are linked to the efficiency imperatives under which the SCSL operates. Seeking to distance itself from the notoriously expensive and seemingly unwieldy prosecutions at the *ad hoc* tribunals in Arusha and The Hague, the SCSL’s OTP set its sights on adopting a much more streamlined approach to delivering international justice. Unfortunately, the desire both *to be* and *to be seen as* cost-effective, led the OTP to adopt policies that sometimes prioritized economy and speed over quality, preparation, and oversight. As discussed below, senior OTP personnel relied heavily on *ad hoc* procedural guidelines and prior investigative training, while trusting subordinates with a great deal of individual discretion in the course of their work. To a certain extent, such beliefs are laudable for the faith they place in the human capacity to take initiative, act in good conscience, and cooperate inside a relatively small institution. Nevertheless, as this section demonstrates, the approach was not without consequences for the quality and integrity of investigative work at the OTP. Notwithstanding the merits of trusting one’s staff and avoiding excessive bureaucracy, the OTP paid too little attention to creating the kinds of institutional safeguards necessary to guard against good faith misjudgment and reckless misconduct alike.

#### **A) Scope and Clarity of OTP Investigators’ Affirmative Professional Duties**

The OTP has never developed or recorded a comprehensive set of Standard Operating Procedures or SOPs for its investigators. Instead, according to senior OTP personnel, investigative conduct has been internally governed by whatever relevant procedural guidelines exist in the Rules of Procedure and Evidence, incidental instructions conveyed

during pre-mission briefings,<sup>332</sup> and miscellaneous written practice guidelines the Investigations Section developed “on the fly”<sup>333</sup> as they began conducting investigations in 2002 in the midst of rapid institutional growth. Formalized SOPs, it seems, were a casualty of the time pressure, human resource constraints, and the immense logistical burden the OTP leadership faced as it tried to get a new organization on its feet. According to the founding Prosecutor, to the extent the OTP did develop written procedures, they “weren’t perfect. They weren’t in a nicely bound book... It would have been nice, but at the time there was no time, so we developed as we went and worked it that way.”<sup>334</sup> The approach to development of protocol was neither systematic nor comprehensive. Over time, the Investigations Section reportedly developed a database of internal administrative procedures to assist investigators preparing for missions, but according to Gilbert Morissette, “there are no such thing as... what anybody else would call a standard operational procedure.”<sup>335</sup>

Limited efforts to draft comprehensive operational guidelines were reportedly abandoned by the Investigations Section before anything was ever finalized,<sup>336</sup> and notable gaps have remained in the body of articulated protocol. At the time the OTP commenced major arrest operations, for instance, there were no written SOPs for investigators observing the execution of arrest warrants, nor were there SOPs for conducting interviews. While prototypes do exist in other international tribunals for some of the operational protocol the Special Court lacks, the OTP has not adopted any outside guidelines for its own Investigations Section. The ICTR, for instance, reportedly developed an investigator handbook for taking statements in 2001,<sup>337</sup> but the Special Court didn’t adopt any portion of this when it began operations in 2002. Founding Prosecutor, David Crane, has spoken disapprovingly of how inefficient his predecessor institutions were and has remarked how eager he was to “develop something that was fresh and efficient,”<sup>338</sup> so perhaps he was less keen to replicate work from one of the *ad hoc* criminal tribunals. Current Prosecutor, Stephen Rapp, suggests that the OTP has declined to adopt guidelines like the ICTR handbook because they may be less necessary in a small institution: “This organization has always been mean and lean, and a much smaller kind of thing that hasn’t followed every rule of bureaucracy and organization that’s followed by much larger organizations.”<sup>339</sup> Investigators have, of course, always been bound to abide by the relevant Rules of Procedure and Evidence, but where the Rules are silent, ambiguous, or lacking in detail, protocol has effectively been a matter of discretion for investigators.<sup>340</sup> According to the current Chief of Investigations, the “sum total” of the operating procedures for interviewing a suspect or accused person has always been simply to inform the subject of the rights in Rules 42 and 43.<sup>341</sup> Beyond that, there is nothing written down about how investigators conducting the interview are to stay on the right side of the line in terms of investigating fairly, while efficiently and effectively getting the information they need.<sup>342</sup>

Protocol governing the most sensitive and controversial type of OTP investigations—intelligence gathering and negotiation with insider witnesses—is even

more opaque than regular investigative procedure. Investigators involved in covert missions to gather evidence from sources abroad or secure the cooperation of an insider witness have been expected to adhere only to a set of vague, un-enumerated standards referred to by the founding Prosecutor as “tradecraft.”<sup>343</sup> David Crane describes tradecraft as, “Techniques—investigative techniques and intelligence techniques—that were followed by our office, that didn’t have to be written down. It’s part of the way things are done... I called it dancing with the devil.”<sup>344</sup> The need for secrecy with regard to identifying and managing sensitive insider witnesses and informants is self-evident. However, it is not clear why the general professional protocol followed by investigators in the course of approaching, interviewing and negotiating with these types of witnesses could not be memorialized somewhere within the institution for the sake of transparency and reviewability. These are hallmarks of legal legitimacy. In an international tribunal established to model good institutional governance and promote the rule of law in a post-conflict society, investigative techniques cloaked in shadowy euphemisms inevitably arouse suspicion and thereby work at cross-purposes with the Court’s noble goals.

On at least one covert investigative mission abroad, reliance on “tradecraft” apparently got the OTP into trouble. In March of 2004, the Chief of Investigations was stopped by Togolese police in Lomé, Togo, while allegedly trying to arrest Benjamin Yeaten (the former special assistant to Charles Taylor) without a warrant and without notifying or seeking the cooperation of the Togolese government. According to an Associated Press report about the incident, “officials claiming to be from the U.N.-backed tribunal tried to force Yeaten onto a waiting aircraft at Lomé airport, but Togolese security forces intervened.”<sup>345</sup> The government told the Associated Press reporter that it prevented Yeaten's arrest because the SCSL had failed to inform authorities of their intentions beforehand. When news of the incident broke, the OTP declined to comment. During the *voir dire*, however, Gilbert Morissette testified about the failed operation, confirming that Alan White had initiated a botched attempt to fly Yeaten out of Togo without papers and bring him to Sierra Leone. Mr. Morissette denied personal involvement in the incident, but said that he spoke to Mr. White about it after-the-fact:

- Mr. Jordash:                      And when [Mr. White] came back, did he say to you that he had been prevented from arresting Yeaten by the Togolese authorities because Yeaten was saying that he was being kidnapped?
- Mr. Morissette:                 He told me that he had been prevented from -- I don't know if you use the word ‘arresting’ Yeaten -- but he had been prevented to bring Yeaten back with him, that's correct.<sup>346</sup>

Mr. Morissette confirmed that he had never seen or known of any arrest warrant for Benjamin Yeaten, so it is possible the Chief of Investigations was trying to secure Yeaten as an insider witness. However, because the protocol followed during operations such as

these remains shrouded in secrecy, there is no way to know on what authority or for what purpose the OTP sought to bring Yeaten into Sierra Leone.

At the Special Court, negotiation protocol with insider witnesses and covert sources remains largely impenetrable to outside observers and opposing counsel alike. As such, suspicion about the existence of improper inducement of OTP sources has generated controversy at trial. Defense teams have filed motions seeking more transparency and better disclosure of information about witness support provisions from the Prosecutor's witness management team. The Trial Chamber has generally rebuffed these motions, however, insisting that Defense can seek the information it desires through cross examination.<sup>347</sup> The Sesay *voir dire* was a rare instance where the Court publicly explored the contours of certain strategies pursued by senior OTP investigators seeking cooperation from a high-value witness. The fact that the Deputy Chief of Investigations unabashedly crossed the line into the realm of improper inducement indicates that the OTP did not adequately articulate legitimate operational protocol to its investigators.

When interviewed for this report, David Crane declined to comment on the revelations about Mr. Morissette's off-the-record conversations with the accused, except to say that he didn't know at the time that anything like that was going on between interviews. He stands by his decision to trust the judgment and discretion of his investigators with respect to interview protocol. "These are experienced, professional investigators who have been doing their work for decades," Crane insists. "They have their techniques. And they know the results if it's inappropriate or illegal."<sup>348</sup> This confidence in the prior training of OTP officers seems misplaced, however, since investigators won't necessarily know what "inappropriate or illegal" means in a *sui generis*, hybrid international criminal tribunal. Procedural rules are not uniform across jurisdictions, and what is acceptable practice in one domestic system, may be a breach of protocol in another. For example, there are sharp policy differences across jurisdictions over what must be recorded during insider witness negotiations, who needs to be involved in the solicitation of a guilty plea, and how an investigator can offer material incentives to potential sources. Protocol that an investigator became accustomed to in his or her home jurisdiction will not necessarily comport with the standard adopted by international tribunals. Furthermore, it is unlikely that an investigator's prior training included instruction in the international standards of criminal procedure that have been developing in *ad hoc* tribunal jurisprudence for over a decade. These standards should be applicable to investigative operations at the Special Court, yet prosecution investigators would not necessarily be apprised of them. As a result, it was incumbent upon the OTP to familiarize investigators with these standards via some formal institutionalized mechanism, such as a detailed set of SOPs that could guide investigative conduct.

While critics might argue such measures are unrealistic given the pressures the OTP was facing, evidence from the *voir dire* suggests that these measures were clearly needed. Investigators who testified during the *voir dire* admitted that they had not always

faithfully measured the appropriateness of their actions against standard protocol from their home jurisdictions – a fact that tends to suggest some baseline guidance was called for. All four investigators involved in the Sesay arrest admitted disregarding various standard police practice from their home jurisdictions simply because the OTP did not explicitly require them to discharge these duties. These choices contributed to abuse of Mr. Sesay’s rights in a number of different respects. Gilbert Morissette’s refusal to afford the accused a phone call rendered Mr. Sesay’s initial detention effectively incommunicado and thereby exacerbated the involuntary conditions of his interrogation. Likewise, investigative failure to correct Mr. Sesay’s misapprehensions about the scope and meaning of his rights perpetuated confusion for the accused and hindered his ability to make an informed decision about whether or not to speak with the Prosecution. Finally, failure by all four investigators to produce notes from the operation hindered oversight and judicial review by depriving the Court of valuable evidence regarding investigative procedure.

Despite being a common professional practice across jurisdictions, none of the investigators who testified during the *voir dire* could produce contemporaneous notes from “Operation Justice”. Mr. Morissette and Mr. Berry both confirmed that it was standard practice in their decades of professional experience, for investigators to carry notebooks and take contemporaneous notes during an arrest or when discussing a case with a suspect or accused. Both men agreed that an investigator’s notes are often used in court to confirm precise times and dates, and to establish the truth about an impugned investigation. Mr. Lamin and Mr. Saffa confirmed that the same protocol was expected of the Sierra Leone Police. Nevertheless, not one of the investigators provided any supporting notes from the operation in question during the *voir dire*. Their excuses for the omission varied widely. Mr. Berry testified that he did take some notes at the time but, “there was no requirement to turn notes in to anybody and, when I left [to return to Canada], I didn’t take the notes with me. I have no idea where they are now.”<sup>349</sup> Mr. Morissette testified that he simply did not keep a notebook of any kind in relation to the Sesay investigation. Despite the OTP’s effective control over the arrest and transfer of the accused, Morissette claimed that the SLP were in charge of executing the arrest warrant, so it was their responsibility, not his, to keep notes of the operation. He testified that, “They were doing their notes. They were making their note.”<sup>350</sup> If this is true, then the OTP apparently failed to convey its procedural expectations to the arresting officer, Litho Lamin, who testified that he didn’t take any notes at all. In fact, Mr. Lamin insisted that senior SLP officers like himself are categorically not expected to carry a notebook or take detailed notes of arrests or investigative activities. The officer’s testimony was flatly contradicted by thirteen-year SLP veteran Joseph Saffa, who testified that “all police officers have notebooks” in the SLP, no matter what their rank or position.<sup>351</sup> Nonetheless, Saffa, like the other three, could not produce notes from his involvement in Mr. Sesay’s arrest.

The former Deputy Chief of Investigations further neglected to keep any contemporaneous record of his ongoing custodial contacts with Mr. Sesay, during which time he was effectively negotiating and securing the insider collaboration of the accused. In his *voir dire* testimony, Mr. Morissette explained that he deliberately shunned note-taking during these interactions, because it would have signaled to the accused that the conversations were part of an investigation, and inhibited the accused from speaking freely. Accordingly, Mr. Morissette dispensed with notes in furtherance of a covert investigative strategy to get “on the inside” with the accused, build trust, and elicit evidence of conspiracy. Perhaps this disregard for careful documentation of insider witness negotiation somehow comported with the standards of “tradecraft” that the OTP followed during sensitive operations. It is impossible to know, since the protocol is nowhere recorded and therefore un-reviewable. Based on his *voir dire* testimony, Mr. Morissette appears to have inferred that his approach was appropriate in light of the overall push to indict suspects under a joint criminal enterprise theory of liability. This, to him, rendered undercover investigative techniques, even during post-indictment custodial interviews with an unrepresented accused person, both necessary and desirable:

Everybody has been saying that these operation, these crimes that were committed were of a joint criminal enterprise nature. Everybody is saying that it's a conspiracy. Everybody's saying that, you know, there had to be a plan and everything... To me, investigating this type of offence is the same thing as if I was to investigate a drug cartel, a Mafia organization. Any conspiracy case means that it has to be investigated from the inside. It means the way to get to these type of criminal operation, criminal investigation... the best way to investigate these type of offence is from the inside.<sup>352</sup>

As the Trial Chamber ultimately concluded, the improper nature of investigators' ongoing covert contacts violated Mr. Sesay's right to silence and to be free of compelled self-incrimination.<sup>353</sup> Unfortunately, with no clear OTP operational protocol to direct him to behave otherwise, the Deputy Chief proceeded on an apparently good faith belief that the procedure he followed was neither inappropriate nor illegal. “You can use things like this when you're in an undercover role operation,” Morissette testified. “And you could use it also when you're interviewing suspect [*sic*]. To my knowledge, there's nothing wrong with it.”<sup>354</sup>

More explicit operational procedures might have been relevant to other instances of questionable witness handling as well. Evidence presented during the *voir dire* suggests the tactics Gilbert Morissette employed behind the scenes during the Sesay investigation were not part of an isolated incident. Rather, counsel for the accused confronted Mr. Morissette with transcripts from other interrogations, including one interview he and Alan White conducted together with a suspect who later became a protected Prosecution insider witness. The interview occurred around the time of Mr. Sesay's arrest, while the potential witness was incarcerated by the government of Sierra Leone on charges unrelated to the Special Court. On the transcript, Mr. Morissette can be

observed making thinly veiled threats by implying that the only way for this man to save himself almost certain death in the Sierra Leonean justice system is to collaborate with the OTP:

From my side, there is one thing I would like you to think about very seriously at the time we come back, and I am serious about this, that I spent six years in the international criminal tribunal in Rwanda where you know about the genocide thing that happened, and the people have been put away for life. You are, my friend, you are not going to be put away for life. You are going to be found guilty. They are going to take your life away if you are found guilty, and that amounts to death penalty. Now, think about that. There is a big difference, the government court here and the Special Court. One of the big difference is I am not saying anything to threaten you, I just want to inform you of the big difference at the Special Court if the case -- they are going to take on the maximum is life in prison -- life in jail. This is the maximum penalty. And the Government of Sierra Leone law, the penalties, as you know, is death, and those who are aware of -- help themselves, you know, that will be taken into consideration in -- by the Prosecutor and by the judge.<sup>355</sup>

During the *voir dire*, Mr. Morissette initially tried to deflect questions about his behavior during this interview by claiming that the transcript contained errors. However, he couldn't specify what part of the transcript was inaccurate,<sup>356</sup> and he ultimately confirmed that he was indeed communicating to the detainee: either collaborate with us or face the death penalty in the Sierra Leonean justice system.<sup>357</sup> Mr. Morissette further acknowledged that, at the time he offered this bargain to the prospective witness, he had no actual authority to promise relief from the death penalty under the domestic courts of Sierra Leone. Nonetheless, Mr. Morissette testified that, in his estimation, this type of pressure tactic was a proper and legitimate way to elicit information from a witness given the seriousness of the crimes they were investigating.<sup>358</sup> By contrast, when asked hypothetically about this exact situation, Investigations Commander John Berry testified that offering a prospective witness relief from the death penalty in exchange for making a statement would breach what he personally understood to be proper investigative protocol, because it would amount to a promise the investigator was not authorized to make.<sup>359</sup> Again, clear and comprehensive SOPs might have bridged the gap between these divergent views, and promoted consistent use of legitimate techniques.

Notwithstanding the problems revealed during the Sesay *voir dire*, past and present OTP leaders claim that the *ad hoc* approach to developing and enforcing professional investigative protocol has worked out well enough for the institution. Former Prosecutor, David Crane, insists that during his tenure the lack of written SOPs “was not detrimental to the overall arrests, indictments and prosecutions. We did not have any trouble related to any of that.”<sup>360</sup> In fact, the former chief Prosecutor has stood by the way “Operation Justice” —including the Sesay arrest and interviews—proceeded, declaring, “I would not have done it any other way.”<sup>361</sup> Current Prosecutor, Stephen Rapp acknowledges that there were missteps with regard to how investigators approached



the accused for insider cooperation, but has made clear that, because the SCSL is so close to the end of its mandate, he will not be devoting resources to developing or adopting clear and comprehensive SOPs at this point. The *voir dire*, in the current Prosecutor's words, dealt with "a particular issue where the barn door is already open and the horses have gone. I can only deal with what I can deal with, which is figuring out how to restructure the barn in a way to avoid any kind of analogous or, similar problems."<sup>362</sup> Mr. Rapp further acknowledges that clear procedural guidelines are sometimes necessary to ensure uniformity in a diverse OTP: "To the extent that written procedures may be valuable in areas where there are certain cultural differences and different approaches in different countries... then I think that's probably a good idea to get that down."<sup>363</sup> He remarked at the conclusion of the *voir dire* that he might consider developing more detailed written procedures in a few limited areas, such as witness proofing, where the OTP is still actively engaged in extensively re-interviewing witnesses and taking supplemental statements in preparation for trial. However, the Prosecutor also insists that the relatively small size of the OTP may ultimately obviate the need to memorialize written operating procedures: "What I've indicated from the beginning is that the cure for problems in a small organization—just like in a family, where you don't write things down, etc.—is to know what's going on and to be consulted, and to have the appropriate people involved in the decision making."<sup>364</sup> This argument clearly presupposes the existence of close, effective internal supervision and adequate training of the subordinate personnel to whom vital tasks are delegated. Because the Prosecutor would not allow the author of this report to solicit interviews from currently employed OTP personnel, it is not possible to objectively assess the extent to which this accurately describes the OTP's current operations. Historically, however, as the next two subsections illustrate, neither institutionalized oversight nor robust training has featured prominently in the OTP's investigative operations.

## **B) Form and Extent of Investigative Training**

In light of the challenging circumstances under which early OTP investigations took place—amidst rapid institutional growth, with no SOPs, in a country foreign to most investigators—there was a special need for strong training to educate investigators about the dynamics of the civil conflict in Sierra Leone, and to impart clear and consistent operational standards to the officers hired. Diversity within the OTP only heightened the need for uniform training. The founding Chief of Investigations was an American with a background similar to the Prosecutor in U.S. criminal intelligence work and government administration. He and his French Canadian Deputy supervised a Section that included local Sierra Leonean Police officers stationed at the OTP on temporary appointments, Swiss investigative judges (trained in a civil/inquisitorial legal tradition) sent by the Swiss government as an in-kind contribution to the Court, Royal Canadian Mounted Police officers loaned to the Tribunal on an annual rotation by the Canadian government, and a handful of human rights specialists from various countries with little to no criminal

investigative experience, but considerable expertise in areas relevant to the conflict in Sierra Leone.<sup>365</sup>

By design, these investigative personnel almost invariably come to the OTP without any experience in international criminal investigations. The founding Prosecutor deliberately eschewed hiring individuals with professional experience in the other tribunals, because he feared personnel recruited from those institutions would replicate inefficiency at the SCSL. “What I wanted to do was bring in fresh ideas and bring in people who had a background in prosecuting crimes in their domestic jurisdictions, so my initial hiring was people who were not inside the other tribunals. I wanted to develop something that was new, fresh and efficient, because the other tribunals were highly inefficient and costing too much money.”<sup>366</sup> Cost-cutting took several forms at the SCSL’s OTP, and included the Investigations Section coming to rely heavily on secondment programs. The in-kind contribution of domestic investigators from several jurisdictions alleviated a budgetary burden and allowed the Prosecution to staff its Investigations Section at “significant savings to the court.”<sup>367</sup> This approach to hiring meant that the OTP almost exclusively recruited investigators and attorneys unfamiliar with international humanitarian law. The founding Prosecutor didn’t perceive much “value added” from hiring personnel with this kind of substantive qualification:

You don’t need experts in international humanitarian law. I didn’t hire anybody other than Corinne Dufka as my international humanitarian law advisor. You know, people who are interested in humanitarian law are wonderful as far as perspectives, but can’t try a case at all. They have very little experience. So I hired very few people from the international humanitarian law community... because at the international criminal level, it’s not rocket science.”<sup>368</sup>

Incidentally, although Dufka is referred to by former Prosecutor David Crane as an “international humanitarian law expert,” she herself notes that she was never legally trained. Dufka was a former psychiatric social worker who spent many years working in war zones as a photojournalist before she became a human rights researcher for Human Rights Watch. She was a human rights researcher and a Sierra Leone specialist more than she was a legal expert. In 1999, Dufka had opened an HRW field office in Sierra Leone to track, investigate and report ongoing atrocities. She took a one year leave of absence from Human Rights Watch (October 2002-October 2003) to advise and assist OTP investigations, working alongside the various seconded investigators. The only person initially hired on the investigations side who had prior experience working in an international tribunal was Gilbert Morissette, the Deputy Chief of Investigations.

Whatever the merits of this approach to institution building, it triggered a human resources deficiency that ought to have been addressed.<sup>369</sup> By shunning the experience and expertise of personnel from pre-existing international tribunals, the Prosecutor built an organization around people who, no matter their skills as detectives or investigative

judges in their home jurisdictions, needed additional training and guidance to effectively apply those skills in the context of a war crimes tribunal in a foreign jurisdiction. Circumstances required that the OTP develop its own course of training for these investigators. According to the former Prosecutor, “There were no manuals at all at the time that we started, and we had to develop it as we went as far as the prosecution plan. It would have been very nice if there would have been a place I could send them for a week or two weeks or whatever appropriate length of time to train them in perspectives as to prosecuting at the international level.”<sup>370</sup> Unfortunately, no such institute existed at the time the Special Court began operations. David Crane reports that he is now working with other former international prosecutors to develop an “international legal practice institute” where anyone hired in the early stages of a new tribunal can enroll in a course of practical training—how to set up an investigation, how to interview a witness, etc. Crane recognizes that, “the big challenge in international law is standardizing the practice of all of this,” and he envisions an institute in the future that could impart standardized training in internationally recognized protocol.<sup>371</sup> Regrettably, however, the training the OTP has offered its own investigators since 2002 falls short of this threshold.

Investigative training at the Special Court has always been fairly *ad hoc*. Despite the diverse professional and cultural backgrounds the OTP drew upon to staff its Investigations Section, the institution never made any meaningful effort to normalize professional standards of conduct through a formal training program. Early budgetary and time constraints, including political pressures to rapidly produce visible achievements, created an imperative for investigators to “hit the ground running,” with minimal investment in training or education. To the extent that the OTP trained its investigators, it did so through briefing-based orientations, informal mentorship, and what the former Prosecutor calls “lots of continuing legal education and continuing side work.”<sup>372</sup> According to David Crane, his staff “learned as they went,”<sup>373</sup> and the OTP relied heavily on the prior training and qualifications that each investigator brought to the Court.

We did not have time to develop training programs that would take them out of the system. We hired people who had already been there and done that, and in most cases they hit the ground and learned by doing. I mean, we had orientation programs and whatnot, but substantively, they hit the ground running. There wasn’t time to have an institute, because people were being phased in 1 or 2 persons at a time, depending on the plan, so that they came in as needed, were oriented, were briefed, given overviews as to what the situation was, what their place was, how they were going to help us, and thrown right into the battlefield, so to speak.<sup>374</sup>

Even after the OTP issued its indictments, when external political pressures to produce immediate results had subsided somewhat, the OTP still didn’t turn its attentions toward developing a rigorous course of training. Six years after the OTP first began to operate, the Investigations Section still has no training manual or formal training program for the

regular waves of new investigators it absorbs into its ranks each year. Newly seconded officers are briefed and then given on-the-job training by whichever colleagues arrived at the Court before them. However, pursuant to the secondment rotations, the OTP also loses a group of officers each year, and with them goes whatever experience they had amassed.

Over the years, some of the OTP's orientation efforts may have been more thorough than others. Prosecution Section attorneys reportedly offered detailed briefings on the fundamental elements of various crimes under international humanitarian law. Likewise, several former OTP personnel have noted that investigators received very clear direction on the importance of always asking about child soldier recruitment and sexual violence, because these were investigative priorities for the Prosecutor. To this end, David Crane made sure investigators received orientation, "as far as understanding and appreciating the cultural way people deal with trauma, atrocity and crime."<sup>375</sup> Crane put together a specialized team of investigators, advisors and psychosocial support staff to interview particularly vulnerable witnesses with appropriate tact. Other training has been more cursory. Investigators receive copies of the Rules of Procedure and Evidence, and are briefed generally on the relevant rules, including the rights of suspects and the obligation to retain any exculpatory evidence gathered in the course of investigation. They are also briefed generally on how to take statements and given background materials about the historical context of the conflict in Sierra Leone. However, one of the problems with this approach to training is that it lacks any sort of accountability mechanism to guarantee that investigators read their packets and master whatever information they receive in the briefing.

Crane relied on his Sierra Leone specialist, Corinne Dufka, to educate investigators on the basic history of the conflict and orient them to Sierra Leonean society. During the year Dufka worked for the OTP, she compiled a great deal of information to enhance training and equip her colleagues with the context necessary to conduct crime-base investigations. However, according to Dufka, many investigators simply neglected their briefing materials, and faced no consequences from the leadership for doing so. With no formal accountability mechanisms in place, it was left to the diligence of each individual investigator to decide how closely he or she studied the information provided. The OTP defends its relatively lax approach to training by noting that, "investigators that come to the OTP through secondment programs are highly trained, qualified and experienced investigators. They go through a competitive selection process in order to ensure that only the best qualified investigators are assigned to the Court."<sup>376</sup> This report does not seek to impugn the general professional competency and skill of OTP investigators. By all accounts, many talented individuals have contributed to OTP investigations over the years. Nevertheless, even talented detectives need additional training when they transfer units, begin investigating a new type of crime, or move to a foreign jurisdiction. Dufka does not doubt that the Swiss and Canadian investigators who joined the OTP "came in as well trained criminal investigators, but

they lacked the historical background of the conflict, and some appeared to lack enthusiasm for familiarizing themselves with the historical elements of the conflict, and they lacked management from above to ensure that they were equipped with the proper contextual information.”<sup>377</sup>

In Dufka’s experience, certain crucial briefing materials received very little notice—such as an atrocity-mapping project she completed to assist investigators with the geographic and temporal distribution of various incidents that occurred during the lengthy civil war. To Dufka’s dismay, many of the foreign investigators seconded to the Court in its first few years remained unfamiliar with the basic geographical lay of the land in Sierra Leone, and never quite mastered the political power divisions and nature of the conflict between the RUF, the AFRC and the CDF. Dufka was available to personally assist investigators with the steep learning curve, but she was surprised and disappointed when so few investigators took the initiative to educate themselves about the facts:

Some of them just didn’t even really know the basics, really. They came in having done very little reading about the history of the armed conflict or about the country. I gave them orientation packets which they didn’t read and then they would go out and do investigations, and they were ill equipped to be doing proper criminal investigation, because they hadn’t done their homework.<sup>378</sup>

Judging from the procedural breaches exposed during the *voir dire*, it would appear that at least some investigators also failed to master the Rules of Procedure and Evidence. Under cross examination, Mr. Morissette could not clearly explain the scope of the right to counsel as laid out in Article 17 of the Statute,<sup>379</sup> and admitted being only “vaguely” familiar with the Rule 63, which governs “Questioning of the Accused.”<sup>380</sup> Moreover, his belief that the use of pseudo-undercover methods would be acceptable practice in custodial interactions with an accused person displayed a clear disregard for the Rule 42 protection against compelled self-incrimination and the recording requirements laid out in Rule 43. If the most senior and longest serving member of the OTP Investigations Section is struggling to grasp the scope and content of the few written rules governing investigative conduct, lower ranking officers presumably have similar gaps in knowledge—especially considering that the OTP relies so heavily on mentorship and briefing by superiors as a key source of training.

The knowledge gaps left by the OTP’s *ad hoc* approach to training rendered investigations less effective and less efficient. Because the OTP did not take the time to adequately train its personnel in international criminal investigative techniques, and to impart sufficient background knowledge about the civil conflict, the Investigations Section produced substandard work. When taking witness statements, for instance, investigators didn’t necessarily know what questions to ask and what pieces of information to follow up on. This not only weakened the quality of the statements they

took, it also hampered the progress of investigations. As Dufka points out, part of investigation, in addition to taking a statement, is being able to tease out leads. “If you don’t know what you’re trying to investigate, you can’t find good leads.”<sup>381</sup> Dufka further remarked that investigators new to Sierra Leone also needed cultural training on how to effectively elicit information from Sierra Leoneans without improperly leading the witness. Unfortunately, they never received any such guidance, beyond what Dufka and a few others tried to share in briefings. As a result, many of the initial statements investigators took were flawed.

According to attorneys who later reviewed the case files, there were widespread problems with the reliability of early investigative statements. Kevin Tavener (the sole STA available for comment about his Special Court experience<sup>382</sup>) was surprised by how poor the body of pre-indictment investigative work appeared to be. According to Tavener, the OTP failed to observe many basic investigative practices common to every jurisdiction in the world. He found that investigators working during the pre-indictment phase had almost uniformly produced witness statements with little or no corroboration. There was no cross referencing between witness statements and police diaries, no photographs of scenes or the individuals who had been interviewed, no cross-referencing investigations with maps, and extremely scarce forensic evidence. According to Tavener, “All we got from the investigation was a collection of statements—some of which were useful, most of which had to be re-done... Really all we ended up with were names of people and the potential statement.”<sup>383</sup> Because the quality of witness statements was so poor, the CDF trial team was obliged to conduct wholesale re-interviews of nearly every witness they led in evidence. In effect, Tavener and his trial team re-investigated the entire case themselves. When they contacted witnesses whose names they found in their files, some had no recollection of ever giving a statement to an investigator, so it was extremely difficult to reconcile inconsistencies with the statement on file.

Junior attorneys and interns engaged in re-taking statements focused on separating what the witness actually knew firsthand from things they’d merely heard. However, because many investigators had failed to do this in the beginning, impeachment was a serious problem at trial. There remained enormous gaps between the content of initial statements and witness testimony in court. In several instances, Prosecution witnesses found it difficult or impossible to verify that a particular statement was theirs.<sup>384</sup> Moreover, Defense counsel took issue with the form of the statements the OTP ultimately disclosed. Counsel for the accused argued that the form of the statements they received in anticipation of witness testimony made it impossible for the Defense to accurately test the veracity of the witnesses’ evidence at trial.<sup>385</sup> Defense teams complained that they sometimes received only an English translation of statements (despite the fact that several of the witnesses exclusively spoke one of Sierra Leone’s tribal languages), and were often furnished notes from interviews rather than statements.<sup>386</sup> In one instance, Defense went so far as to ask the Prosecution’s investigators to take the stand to explain the discrepancy between a witness’ written statements and his *viva voce* testimony.<sup>387</sup> The

Chamber agreed with Defense that the discrepancies were so grave as to warrant this further enquiry.<sup>388</sup>

In addition to the obvious drag on efficiency, witness re-interviewing has continued to raise fairness issues at the Special Court. In the RUF case, the form and extent of witness re-interviewing has given rise to allegations of procedural abuse and material prejudice. Defense teams have filed numerous complaints concerning the manner in which the OTP “proofs” its witnesses before trial. The defense has not objected to the practice of proofing witnesses *per se*. Prosecution and Defense both agree that it is normal and acceptable to prepare a witness by reviewing previous statements and seeking clarification where necessary. In practice, however, what the OTP has reported doing with its witnesses in RUF proofing sessions goes beyond mere clarification. According to Prosecution briefs in the RUF case, interviews are designed to cover “not only issues that are dealt with in the witness’ previous statements, but also other issues that may be within the witness’ knowledge and which are pertinent to the case.”<sup>389</sup>

Defense contends that the OTP re-interviewing process is so extensive, and goes so in-depth, that it has given prosecutors a back door mechanism to ameliorate earlier investigative weaknesses and compensate for the lack of specificity in the RUF indictment. These interviews have frequently uncovered brand new corroboration for evidence after it has been led in court, and generated more specific allegations that the Prosecution then discloses to the Defense in supplemental witness statements. The Prosecution maintains that it is justified in relying upon newly discovered information to support its case so long as it discloses this information to the accused. Defense, however, has vigorously objected that “rolling disclosure” of supplemental witness statements requires the accused to defend himself against new allegations without proper notice of the charges. This, according to the Sesay defense team, is prejudicial because it allows the Prosecution to “mould its case to suit the evidence as it unfolds”<sup>390</sup> and thereby requires the Defense to “hit a moving target.”<sup>391</sup> Trial Chamber I has repeatedly ruled against these Defense motions, although the Chamber has declined to inquire into the merits of the issue. Instead, the Judges have dismissed the motions on a threshold issue, finding that the Defense objections fail to make the “*prima facie* showing of foul play, either deliberate or negligent, by the Prosecution in order to justify an inquiry by the Chamber into the said process.”<sup>392</sup> Regardless of the ultimate merits on either side of the rolling disclosure issue, the Prosecution could perhaps have avoided the time consuming task of defending itself against these motions if it had simply offered more robust substantive and procedural training from the beginning. Better training could have produced more thorough and productive investigations, which in turn might have allowed the Prosecution to plead its indictments with a greater degree of particularity, based on detailed, reliable witness statements and corroborating evidence.

It is worth noting that UN Rapporteur, Antonio Cassese touched upon related issues in his efficiency audit of the SCSL. While the report did not address the practice of witness re-interviewing in particular, Cassese did imply that the lack of particulars in the indictments left the door open for the OTP to rely too much on subsequently gathered evidence throughout the trials. The Cassese report remarked that “the breadth of the charges and the lack of particulars in the indictments have opened the door to an expansion of the Prosecution’s case during the trial.”<sup>393</sup> Moreover, he acknowledged that the Trial Chamber’s tendency toward admitting evidence “concerning allegations that may not have been originally intended by the indictments, but which could fall within the four corners of a broad interpretation of the indictment” had broadened the case even further and contributed to the protraction of trials.<sup>394</sup> The supplemental statements disclosed by the Prosecution on a rolling basis logically fall within the purview of Cassese’s commentary on efficiency, as heavy reliance on these statements would seem to have rendered each case more unwieldy and less efficient. Certainly reliance on this practice has led to some protraction of the proceedings, considering the time spent litigating the issue during the trial phase. Had OTP investigators been better informed about the history of the conflict, or received more thorough instruction on following leads, gathering evidence and taking statements in a post-war context, perhaps the Prosecution would not have had needed to re-interview witnesses as extensively as it did, and perhaps its cases would have proceeded through trial in a more efficient and less controversial manner.

### **C) Leadership, Supervision and Internal Oversight Provisions**

In the absence of a meaningful training program, and clear, reviewable operational standards, the prosecuting organ of a criminal justice institution should at least have strong leadership and effective internal accountability mechanisms, such as close attorney supervision, to promote professionalism and ensure the propriety of investigative work. The current Prosecutor has acknowledged as much, remarking that, “the answer to when the rule book doesn’t deal with [something] is to have, in my view, attorney direction for these operations.”<sup>395</sup> Former Chief of Prosecutions, Luc Cote, agrees that legal oversight of investigations is “absolutely essential.”<sup>396</sup> He has remarked that, from a managerial standpoint, this can be achieved several different ways. For example, some Prosecuting bodies in international tribunals have hired a Chief of Investigations with a legal background, more focused on supervising investigators than on conducting firsthand police work. The OTP at the International Criminal Court is one such example, according to Cote. Likewise, some OTPs have granted the Deputy Prosecutor (a lawyer) more supervisory authority over the Investigations Section. Cote has further suggested that, supervisory structures aside, an OTP can better ensure legal influence over investigative work if it staffs its Investigations Section with a mix of police investigators and legal officers. Working side-by-side to gather evidence, the lawyers could, in Cote’s estimation, ensure that “everything is done by the rules, that you are getting what you need in terms of evidence, and that the statements are of better quality.”<sup>397</sup>



Unfortunately, attorney supervision of (and involvement in) the OTP's investigative operations has not been as strong as it could during crucial periods of the Special Court's existence. According to Rapp, Prosecutions Section attorneys preparing cases for trial have discovered numerous past operations where the Investigations Section undertook investigative work without sufficient attorney oversight:

At the early stages of this institution there was certainly things that didn't have attorney input and guidance to the extent that they were needed. I've been looking into a variety of these things where, you know, to some extent you say, 'Now where's the record of what we did here on this? Which attorney was involved in this?' And they say, 'Well that was run by *Investigations*, etc., they're the ones that have the record, on that.' But now, you know, the way that *I* run things—and the way I've *always* done them—is that attorneys are involved in these practices.<sup>398</sup>

Because the OTP managerial chart grants the Investigations Section so much autonomy, the extent to which investigative work is attorney supervised depends upon how closely the Prosecutor himself scrutinizes the work of the Section, or how diligent the head of the OTP is about directing investigators to submit to lateral oversight from STAs or the Chief of Prosecutions on an *ad hoc* basis. In this respect, the parallel hierarchies of authority that the founding prosecutor designed to make the OTP more efficient and effective appear to have hindered rather than facilitated attorney supervision of investigative activities. The resulting lack of meaningful oversight has been detrimental to fairness, efficiency, and efficacy alike.

Stephen Rapp acknowledges that there are dangers involved in giving investigators too much autonomy. He notes, for instance, that foreign investigators coming to work at the Court often chafe at close attorney supervision. "Obviously it's fair to say that police from large national investigative organizations, etc.—major metropolitan organizations—will come into the attitude, which is, the less attorneys know, the better... people will come in and they'll say, 'well we'll run this show, and we'll go do this or we'll do that.'<sup>399</sup> The Prosecutor says he disapproves of this attitude, and always prefers that investigations be "attorney run." This would comport more closely with the manner of supervision at the ICTR, where the Prosecutor served as a Senior Trial Attorney and then Chief of Prosecutions before coming to the Special Court. In Arusha, Rapp recalls supervising investigative practices very closely, particularly when it came to handling witnesses. "*I* ran that [investigation process], and told the investigators how to proceed and review documents, and met the individuals in their presence."<sup>400</sup> However, the parallel hierarchies of authority within the Special Court's OTP don't necessarily afford STAs the same degree of control over investigative practices that Rapp enjoyed at the ICTR. Instead, lateral disputes between OTP personnel require the intervention of the only person above the sectional divide—the Prosecutor.

The current Prosecutor insists that he takes this supervisory responsibility seriously. By way of illustration, he shared an anecdote about how he settled a particular internal OTP dispute in favor of attorney control. While his account certainly demonstrated an instance where STA views took precedence over Investigations Section preferences, it also confirmed what remarkable clout and independence the Investigations Section asserts, absent intervention by a higher ranking officer. According to Rapp, a disagreement arose between the Investigations Section and the *Taylor* trial team over whether investigators should have to comply with an STA's request that they attend witness re-interviews and take responsibility for ensuring that an accurate statement is recorded. According to the Prosecutor, the priorities of the Investigations Section lay elsewhere, and the leadership reportedly felt that their investigators were too busy to assist with the *Taylor* re-interviews. This is curious, since at the time, *Taylor* was one of only two trials still in session at the Special Court, and it was the only trial with a Prosecution case in progress. It is unclear what other priorities the fully staffed Investigations Sections could possibly have had at such a late stage in the life of the institution. Nevertheless, investigators initially refused the STAs request, relenting only upon the intervention of the Prosecutor.

During his tenure as STA for the CDF case, Kevin Tavener reportedly ran into similar difficulty from RCMP investigators who were resistant to taking lateral direction from a trial attorney: "They always insisted we go through channels which, as you know, report up/down."<sup>401</sup> Rather than go through the effort of seeking intervention from above, Tavener found it easier to just rely upon assistance from the independent WVS unit as well as some of the local Police officers attached to the OTP. In contrast to his experience with foreign investigators, Tavener found several SLP officers very willing to assist with tracking down witnesses and bringing them to his team. In his experience, these local officers were "extremely diligent and professional in assisting prosecutors."<sup>402</sup> However, beyond tracking down witnesses, the CDF trial team only used investigative officers for limited functions. Tavener directed his own Prosecution side team of lawyers and interns to conduct re-interviews and prepare witness statements for trial. As a result, the former STA had virtually "nothing to do with the investigators" throughout the two year trial in Freetown. The Section, according to him, "appeared to do work, but they didn't do much work for us... I honestly don't know what they were doing."<sup>403</sup>

If disdain for direct attorney supervision is so pervasive at the Special Court, it is difficult to understand why the OTP has maintained an organizational management hierarchy that gives so much independence to the investigations wing. Rather than structure the chain of authority in a way that grants STA supervision over investigators as a matter of course, the organizational chart promotes and reinforces investigative autonomy. The Prosecutor purports to mitigate investigative disregard for attorney supervision through "constant communication" and oral directives. "What is important," Rapp explains, "is that the chief prosecution official makes clear to the chief investigation official that all investigators need to follow the direction of the relevant senior prosecutor

regarding case-related issues.”<sup>404</sup> Considering OTP investigators are charged with a very narrow professional mandate, however, it is not at all clear what these officers would possibly be working on that’s *not* a “case-related” issue.<sup>405</sup> More to the point, if it is so important for the Chief of Investigations and his subordinates to follow the direction of the senior prosecuting attorneys, it is hard to understand why the OTP relies on *ad hoc* communications that require facilitation by the Chief of Prosecutions and the most senior OTP officer who is, by his own account, often busy attending to matters away from Freetown.

Weak oversight was partly to blame for the procedural abuses that occurred during the Sesay investigation. Unlike the public position Stephen Rapp has taken on the matter, the founding Prosecutor never purported to prioritize close attorney supervision of investigative operations. Indeed, as the only attorney with direct supervisory authority over the Investigations Section, David Crane emphasized trusting delegation over objective oversight and reviewability. “You give people authority, and trust and support them, and they never let you down,” Crane has declared. “I did not get into the daily work minute-by-minute, line-by-line. There’s not a Chief Prosecutor in the world who does that. You do rely on the professionalism of the people you hire.”<sup>406</sup> During the pre-indictment investigative phase, the Prosecutor met with his staff on a regular basis, and required weekly briefings from each of the combatant group task forces, but when asked what sort of formal mechanisms he used to objectively review the quality of the work and ensure compliance with the Rules of Procedure and Evidence, Crane insisted that, “you can’t, as chief Prosecutor, get into people’s business at that level of detail. It’s ridiculous. It’s poor management.”<sup>407</sup>

Regrettably, this hands-off approach ensured that senior OTP officials who violated unambiguous rules of Procedure and Evidence during the Sesay investigation faced no consequences until the Trial Chamber excluded Mr. Sesay’s statements from evidence nearly five years after the offending conduct occurred. Crane was briefed in advance about the general steps that his senior investigators were going to take during Operation Justice, and in his mind “they were appropriate and legal.”<sup>408</sup> He was briefed again afterward, and was satisfied by what he heard: “We went over the entire day, and it looked like things had worked very well—there wasn’t a shot fired and we got all the bad guys.”<sup>409</sup> Apparently, since there were no investigative notes to review from the operation, and Gilbert Morissette neglected to brief David Crane on the strategy he was pursuing between recorded interviews, the Prosecutor simply never subjected his Deputy Chief’s conduct to any sort of close scrutiny. During an interview for this report, Crane refused to answer questions about the particulars of the Sesay interviews. He would not confirm whether he was aware of investigative blunders with regard to the reading of Mr. Sesay’s rights, the service of his indictment, or the delay in allowing the accused to contact his family or speak with duty counsel. His terse reply was simply, “Let’s move on. It is what it is.”<sup>410</sup>

The Prosecutor's reliance on delegation is perhaps understandable in light of his numerous other responsibilities. Certainly David Crane had to contend with relentless and formidable logistical hurdles while trying to establish a brand new international institution under less than ideal circumstances. Considering his many diplomatic, administrative, political and public relations obligations, it is understandable that the Prosecutor might not have the time or the resources to personally conduct a close review of investigative work. Nevertheless, it bears explaining why he did not empower any other attorney within the institution to conduct this sort of oversight as a matter of course. As the organization is structured, if the Prosecutor does not serve as a check on investigative conduct, no other lawyer is expressly empowered to do so. Crane claims that, with all the things going on during the pre-indictment phase of investigations, he delegated oversight to his Chief of Investigations: "There was lots of things going on, and it's up to the Chief of Investigations to ensure that things are run properly and within the law."<sup>411</sup> While the Chief of Investigations is certainly obliged to ensure that his subordinates carry out their duties with the utmost professionalism, integrity and care, this does not obviate the need for the kind of checks and balances that attorney oversight provides. After all, the Chief, himself, conducted numerous sensitive investigative missions. Was he to conduct oversight of his own conduct as well?

Irrespective of the prospects for attorney supervised operations, the distribution of responsibility within the Investigations Section didn't exactly facilitate the kind of close administrative oversight the former Prosecutor says he expected from his Chief of Investigations. With Alan White tasked to "information asset" management, undertaking covert operations all over the West African region, and personally overseeing the investigation against Charles Taylor, it hardly seems reasonable to have expected that he could maintain close administrative supervision of subordinate investigators as well. By most accounts, he in fact did not maintain this kind of oversight. Because the Chief of Investigations was so frequently absent from the Court, there was, according to some, an acute leadership vacuum in the Investigations Section that hurt the quality and efficiency of pre-indictment investigations. In the Chief's absence, the Deputy was burdened with articulating operational protocol and organizing the logistical administrative details of investigations carried out by subordinate officers. This arrangement, which appeared to some of Gilbert Morissette's colleagues to frustrate him, also seems fairly counterintuitive, since the Chief of Investigations was the one with the organizational management background, while Morissette was a career police officer.

One senior Investigations team member who requested anonymity in order to speak more candidly remarked that the Section seemed at times to be operating "like a ship without a rudder. You know it was just sort of sailing away." In this individual's estimation, the OTP suffered a "lack of strategic vision" for the process of investigation, and it hindered their ability to effectively follow leads, gather the strongest evidence, and put together indictments accordingly. "What was missing" according to this investigator, "was the management element which would have overseen the work of the investigators,

and the strategic work of ‘where are we going with our investigation?’ ‘What do we have?’ ‘What are we missing?’ ‘Have our investigations led up to anyone we *haven’t* been investigating?’ ‘Do we have adequate information about those we *have* indicted?’ ‘Have we indicted the right people?’” Others in the OTP noticed the same problem. According to Kevin Tavener, the lack of clear direction was apparent in the investigative files he received when he took over the CDF case in 2004: “I was enormously impressed by the witnesses. I thought they were very good, but they were just a random selection of people. I was getting people who had somehow fallen into the net. There was no rhyme or reason to it.”<sup>412</sup>

In general, it seems, there was a lack of appreciation amongst the founding OTP leadership for the oversight problems and leadership vacuums that can develop when you delegate authority to subordinate investigators with so few operational guidelines and so little formal training. The founding Prosecutor approached his mandate with the attitude that building a successful prosecution unit wasn’t that difficult. “It was just a matter of taking the mission that you’re given by the Security Council, the money and the people that you will probably have, and making it happen. I’d been doing that for three decades prior to that, so for me it wasn’t really hard.”<sup>413</sup> As the previous sections of this report have demonstrated, however, the task of integrating personnel from a variety of professional backgrounds and jurisdictions into the complex and, for many participants, unfamiliar world of a hybrid international tribunal in a devastated, post-conflict zone is perhaps more challenging and more complex than the OTP leadership has been willing to acknowledge. In such a situation, it is vital to develop appropriate, robust training and oversight mechanisms at the inception of the tribunal. Such mechanisms are necessary to ensure efficient and effective investigations while helping to forestall the kinds of procedural breaches that occurred during the Sesay investigation.

## **V. CONCLUSION**

The Special Court has been aptly described as an “experiment” in international justice.<sup>414</sup> At the time of its inception, the SCSL was the only treaty-based tribunal in the world, and it was one of the first international tribunals to proceed with operations *in situ*. As a result, the Court’s staff was in many respects pioneers and innovators—attempting to break new ground as a “second generation” tribunal. The challenge they faced was formidable. In a post-conflict society, the founding OTP leadership sought to deliver justice that could be meaningful to the people of West Africa, compliant with international fair trial standards, and cost-effective from the perspective of donor states. In hindsight, more prudent choices in some areas could have improved OTP performance, but of course hindsight is always 20/20. The point of this report is not to dwell on past mistakes for the sake of recrimination. Given the enormity of the task and the novelty of this experiment, it is only fair to expect and allow for some margin of error with respect to the administrative and structural choices various SCSL leaders made along the way. Nevertheless, fairness and integrity demand that we honestly confront past mistakes and avoid replicating them in the future. This report shines a light on past institutional missteps at the Special Court in order to extract useful and constructive lessons to be learned for the future.

As discussed throughout this report, circumstantial hardships and the pressures of launching a successful international criminal tribunal on a short calendar led the OTP to dispense with such procedural formalities as standard operating procedures, comprehensive training, and objective internal oversight mechanisms. This was a mistake. It took a toll on efficiency, efficacy and fairness alike. Lean and efficient justice is no justice at all if it degrades the quality of investigative work or comes at the expense of procedural fairness. Inadequate training was a particularly costly oversight at the Special Court. Whether appointed, hired, or borrowed through *gratis* secondment, all investigative officers representing a high profile, internationally supported tribunal must be expected to meet the highest standards of professionalism and competence while conducting investigations. To achieve this standard, investigators require substantive legal training in the crimes they will investigate and procedural training in the court’s rules of procedure, as well as whatever other protocol the Prosecution has memorialized. Investigators also need context-specific education about the history of the country or countries involved in their investigations and the nature of the conflict being investigated. No matter how clever or diligent, investigators cannot effectively gather evidence of war crimes unless they understand the nature of the conflict, the players involved, the relationship between different groups, the political context for the events that unfolded, and the geographic scope within which the crimes occurred. Furthermore, as this report illustrates, investigators need legal oversight. Training programs should be accompanied by some sort of review and accountability mechanism to ensure investigators have mastered vital knowledge before they begin to work. Procedurally, lawyers should also be involved in reviewing the protocol investigators employ on missions, since it will

impact the quality of the evidence attorneys must lead in court, and there may be problems with procedural abuse or case mismanagement that attorney review could correct before it causes too much harm. If an institution is serious about attorney oversight and supervision of investigative operations, then its organizational management hierarchy should reflect this commitment.

Formal institutional safeguards such as SOPs and effective oversight are desirable elements for any organization conducting high stakes criminal investigative work. However, they become particularly important in a *sui generis* international tribunal, where external accountability mechanisms are generally less powerful than they would be in the domestic criminal law setting. In national common law jurisdictions, for instance, judicial review and the enforcement of exclusionary rules ostensibly serve as a check on police conduct and ensure that individual rights are protected from abuse.<sup>415</sup> Judicial review further promotes transparency, and helps clarify the scope of proper operational protocol over time. Unfortunately, in a self-contained, temporary international tribunal, unique structural constraints and competing institutional priorities don't allow judicial review to play as prominent or influential a role in terms of influencing the conduct of investigative officers. The SCSL's predecessor institutions set a high bar for exclusion of evidence, following the principle that even evidence obtained illegally may be admissible so long as its admission does not "seriously damage" the proceedings.<sup>416</sup> This vague standard offers little in the way of bright line rules or credible courtroom consequences for procedural missteps or investigative misconduct. As an ICTY Trial Chamber concluded in the *Brdanin* case:

Before this Tribunal, evidence obtained illegally is not, *a priori*, inadmissible, but rather the manner surrounding circumstances in which evidence is obtained, as well as its reliability and effect on the integrity of the proceedings, will determine its admissibility. Illegally obtained evidence may, therefore, be admitted under Rule 95 since the jurisprudence of the International Tribunal has never endorsed the exclusionary rule as a matter of principle.<sup>417</sup>

Rule 95, which is identical in the Statute of the Special Court, the ICTY and the ICTR, calls for the exclusion of any evidence that would "bring the administration of justice into serious disrepute."<sup>418</sup> Because the violation of Mr. Sesay's Article 17(4)(g) right amounted to a violation of what the Trial Chamber called, "unquestionably an international human right promoted in law," the *voir dire* judgment concluded that the "serious disrepute" threshold had been met.<sup>419</sup> However, there is no apparent exclusionary remedy through judicial review for those procedural breaches that fall short of "serious disrepute." Moreover, the Special Court's high procedural threshold for interlocutory appeals further limits whatever impact the threat of judicial review might have on OTP behavior. Like the ICTR, the Special Court limits the right of appeal on general motions decided by the Trial Chamber. Prosecution and Defense alike must seek special leave to appeal from the same judges whose decision the appealing party contests.

The Rules of the ICTR dictate that decisions rendered on such motions are, by default, without appeal, unless the Trial Chamber chooses to “certify” an appeal to the superior Chamber. The Trial Chamber may do this if:

the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and [if] in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.<sup>420</sup>

At the SCSL, the standard for interlocutory appeal is even more stringent:

Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal.<sup>421</sup>

This conjunctive standard of “exceptional circumstances” *and* “irreparable prejudice” makes it very difficult to achieve interlocutory appellate review of a motion. The founding Prosecutor has said that he felt comfortable trusting his subordinates to use their own judgment when it came to protocol: “They have their techniques. And they know the results if it’s inappropriate or illegal.”<sup>422</sup> In light of the inherent limitations on judicial review at the Special Court, however, it should have been incumbent upon the OTP to create its own internal institutional safeguards and accountability mechanisms that would promote oversight and proactively seek to ensure compliance with the highest standards of professionalism and due process.

The former SCSL Prosecutor explains the OTP decision not to memorialize written investigative procedures as a management choice: “I wasn’t into form. I was into substance.”<sup>423</sup> These two things are not mutually exclusive, however. In a criminal tribunal like the Special Court, the former is an essential part of guaranteeing the latter. Rather than dismiss SOPs as time-consuming, bureaucratic formalities, prosecuting bodies in international tribunals should recognize the substantial benefits they may reap from memorializing and enforcing clear professional standards for investigative operations. Had adequate protocol been agreed upon and memorialized before investigative operations commenced at the Special Court, the OTP might have produced stronger, more reliable witness statements and generated more meaningful leads. This could have alleviated some of the pressure to rely on information from insider witnesses, which in turn might have affected the way the OTP chose to approach such witnesses. No doubt, in a conspiracy investigation, the prosecution would have needed to approach insiders, regardless. However, in this author’s opinion, had investigators done so pursuant to transparent and reviewable standards of conduct, their work could have appeared outwardly more legitimate, been procedurally more fair (by avoiding the kind of illegitimate, off-the-record dealings and involuntarily elicited statements exposed during the Sesay *voir dire*), and been substantively more reliable (by guarding against the



kind of unreliable statements that material inducements and coercive pressures often produce).

Predetermined, comprehensive SOPs would curtail opportunities for discretionary abuse by establishing less vague, more easily reviewable standards. This doesn't have to mean a total loss of discretion for investigators. It simply provides a uniform standard against which conscientious professionals and their supervisors can measure the legitimacy of specific conduct. SOPs limit investigators insofar as they proscribe certain investigative behavior. However, written rules also empower investigators to proceed with confidence when particular protocol has been institutionally endorsed and promoted. Because this approach requires senior officers to assume responsibility for publicly approving certain procedures or practices in writing, it promotes greater transparency and institutional accountability. Moreover, written SOPs allow the leadership to ensure that departmental protocol is firmly rooted in prevailing national and international jurisprudence, with due consideration for various competing interests of justice and the unique circumstances of a *sui generis* tribunal. Any balancing between the rights of the accused and the practical needs of investigators or exigencies of the situation should be determined as a matter of transparent departmental policy, according to reasoned, reviewable analysis, rather than *ad hoc* investigator judgment. An *ex ante* focus on developing SOPs could have ensured that the OTP proactively *made* policy rather than letting policies develop through happenstance as investigations progressed. As demonstrated in *voir dire* testimony, one of the most senior OTP investigators, left to his own procedural discretion, concluded, incorrectly, that certain covert investigative techniques might be acceptable when balanced against the seriousness of the crimes with which Issa Sesay was charged:

Defense Counsel: You would say that that is proper and legitimate investigative tactics?

Chief of Investigations: In this type of crime, yes, Your Honor.

Defense Counsel: For you, it all comes down to the seriousness of the crime, doesn't it? That, if it is so heinous—the charge—that kind of tactic is legitimate?

Chief of Investigations: Legitimate, depending also the type of crime, but also, with the person that—to whom this deal, if you want to, or these offers are made.<sup>424</sup>

Prosecuting organs of international criminal tribunals must take special precautions to guard against this type of attitude. A war crimes tribunal, by definition, deals with some of the most serious kinds of criminal offenses. Some scholars have observed that, “when weighed against the gravity of these horrific offenses, the otherwise compelling mandate to enforce criminal procedure protections may lose some of its urgency.”<sup>425</sup> However true this observation may be, it is incumbent upon international prosecutors and the investigators they supervise to resist the temptation to adopt an ends-justify-the-means approach to investigative protocol. Such an approach seems in direct conflict with the

presumption of innocence, which is fundamental to protecting the rights of the accused and to honoring and upholding international fair trial standards. Institutions like the Special Court are charged with bringing justice to a post-conflict society where heinous crimes occurred *because* of a complete break down in the rule of law. These circumstances only heighten the imperative to safeguard procedural integrity, if the international institution is to serve as a model for domestic reform and reconstruction. Due process is not a gratuitous entitlement or privilege of the accused—it is the *sine qua non* of this entire “experiment” with international criminal justice. Without the utmost regard for procedural integrity and scrupulous respect for the rights of the accused, a tribunal cannot seriously claim to demonstrate how “the rule of law is more powerful than the rule of the gun.”<sup>426</sup>

**APPENDIX A**  
**ACRONYMS AND TERMS**

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<b>Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone</b>	<b>SCSL</b>
<b>Agreement</b>	
<b><i>Ad Hoc</i> Tribunals</b>	<b>ICTY/ICTR</b>
<b>Armed Forces Revolutionary Council</b>	<b>AFRC</b>
<b>Central Investigations Department</b>	<b>CID</b>
<b>Civil Defence Forces</b>	<b>CDF</b>
<b>International Criminal Tribunal for Yugoslavia</b>	<b>ICTY</b>
<b>International Criminal Tribunal for Rwanda</b>	<b>ICTR</b>
<b>Office of the Prosecutor</b>	<b>OTP</b>
<b>Office of the Registrar</b>	<b>OTR</b>
<b>Revolutionary United Front</b>	<b>RUF</b>
<b>Royal Canadian Mounted Police</b>	<b>RCMP</b>
<b>Rules of Procedure and Evidence</b>	<b>RPE</b>
<b>Sierra Leone Police</b>	<b>SLP</b>
<b>Senior Trial Attorney</b>	<b>STA</b>
<b>Special Court for Sierra Leone</b>	<b>SCSL</b>
<b>Standard Operating Procedures</b>	<b>SOPs</b>
<b>Statute of the Special Court</b>	<b>SCSL Statute</b>
<b>United Nations</b>	<b>UN</b>
<b>United Nations Mission in Sierra Leone</b>	<b>UNAMSIL</b>
<b>Witness and Victim Support Unit</b>	<b>WVS</b>

## **APPENDIX B**

### **Biographical Sketches of Principal Voir Dire Participants**

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#### **JUDGES**

##### **JUDGE BANKOLE THOMPSON (PRESIDING)**

Judge Thompson came to the Special Court from his position as a professor in the Department of Criminal Justice and Police Studies and Dean of the Graduate school for Eastern Kentucky University (USA). Prior to that, between 1981 and 1987, Judge Thompson was a Sierra Leone High Court Judge. At the time of the *voir dire*, he was serving as Presiding Judge of the Trial Chamber (a position assumed by each judge on a one year rotation).

##### **JUDGE PIERRE BOUTET**

Prior to his appointment by the United Nations as a Special Court Judge in December, 2002, Judge Boutet had served in the Canadian Forces as a Legal Officer, occupying various positions, including Chief Military Trial Judge, Judge Advocate General (JAG) of the Canadian Forces and legal advisor to the Department of National Defence and the Canadian Forces. He completed his career at the rank of Brigadier-General.

##### **JUDGE BENJAMIN ITOE**

Judge Itoe was Deputy Chief Justice of the Supreme Court of Cameroon and President of the Court's administrative branch before he accepted his current position with Trial Chamber I at the Special Court for Sierra Leone. Prior to his appointment to the Supreme Court of Cameroon, Judge Itoe held a series of ministerial positions in the Cameroon Government, including Minister of Transport, Minister of Justice and Minister of Tourism.

#### **SENIOR ATTORNEYS**

##### **PETER HARRISON (Prosecution)**

Mr. Harrison is the Senior Trial Attorney for the case of the RUF accused. Mr. Harrison is Canadian national.

##### **WAYNE JORDASH (Defense)**

Mr. Jordash is Lead Counsel representing the first RUF accused, Issa Hassan Sesay. Mr. Jordash is a British national.

## **WITNESSES**

### **GILBERT MORISSETTE (Prosecution)**

Mr. Morissette has been the OTP's Chief of Investigations at the Special Court for Sierra Leone since July 2005. Between October 2002 and July 2005, he was Deputy Chief of Investigation. Prior to that, Morissette worked on investigations for over six years with the International Criminal Tribunal for Rwanda. From 1996 to 2000, he served as a team leader in the Intelligence and Tracking Unit. From 2000-2002, Mr. Morissette was Commander of the Special Investigations Unit. He also served in 1995 and 1996 with the International Commission of Inquiry for Burundi, and the United States Department of Justice training program for the new Haitian National Police Force. Prior to 1995, Morissette was an officer for 25 years with the Royal Canadian Mounted Police. Morissette conducted the first custodial interview with the accused at OTP headquarters on the day of Issa Sesay's arrest. He was further involved in ongoing efforts on and off the record to maintain Issa Sesay's cooperation. Morissette testified in English.

### **JOHN BERRY (Prosecution)**

Mr. Berry has been a member of the Royal Canadian Mounted Police since May of 1980. From November 2002 to November 2003, he worked as a seconded RCMP officer with the Investigations Unit of the Special Court's OTP. After 18 months back at work in Canada, Berry returned to the Special Court in June of 2005 to become the OTP Investigations Commander. Berry was the first OTP investigator to come into contact with Issa Sesay after his arrest. He secured initial cooperation from the accused and conducted the majority of Issa Sesay's custodial interviews. Berry testified in English.

### **LITHO LAMIN (Prosecution)**

Mr. Lamin is a superintendent of police in Magburaka, Sierra Leone. He was working in Freetown at the Central Investigations Department of the Sierra Leone Police when the SLP executed the Special Court arrest warrant against Issa Sesay. Lamin was the arresting officer. He testified in English.

### **JOSEPH SAFFA (Prosecution)**

Mr. Saffa is a detective superintendent of police who has been with the Sierra Leone Police for 13 years. For the last five years, he has been working on secondment as a special attaché to the OTP Investigations unit at the Special Court. Saffa accompanied John Berry to meet with the accused on the day of his arrest and secure Issa Sesay's consent to be interviewed by the OTP. Saffa testified in English.

### **ISSA SESAY (Defense)**

Mr. Sesay is the first accused in the RUF trial. He testified in Krio.

**CLAIRE CARLTON HANCILES (Defense)**

Ms. Hanciles is duty counsel working in the office of the Principal Defender at the Special Court. She was employed in this capacity at the time of Mr. Sesay's arrest and custodial interviews in March and April of 2003. Ms. Hanciles testified in English.

**NAEEM AHMED (Defense)**

Mr. Ahmed has been the Deputy Chief of Witness and Victim Support (WVS) since 2005. His unit oversees the management and protection of witnesses secured to testify in Special Court proceedings. Mr. Ahmed began testifying in English, but was prevented by the court from completing his testimony.

**APPENDIX C**  
**Key Rules of Procedure and Evidence**  
**Pertaining to the Due Process Rights of the Accused**

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**Article 17 of the Statute of the Special Court for Sierra Leone articulates the following rights of the accused:**

1. All accused shall be equal before the Special Court.
2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
  - a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
  - b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
  - c. To be tried without undue delay;
  - d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
  - e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
  - f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
  - g. Not to be compelled to testify against himself or herself or to confess guilt.

**Rule 55 Details the protocol to be followed in the execution of arrest warrants:**

- (A) A warrant of arrest shall be signed by the Designated Judge and shall bear the seal of the Special Court. It shall be accompanied by a copy of the indictment, and a statement of the rights of the accused
  - (B) The Registrar shall transmit to the relevant authorities of Sierra Leone in whose territory or under whose jurisdiction or control the accused resides, or was last known to be, three sets of certified copies of:
    - (i) The warrant for arrest of the accused and an order for his transfer to the Special Court;
    - (ii) The approved indictment;
    - (iii) A statement of the rights of the accused; and if necessary a translation thereof in a language understood by the accused.
  - (C) The Registrar shall request the said authorities to:
    - (i) Cause the arrest of the accused and his transfer to the Special Court;
    - (ii) Serve a set of the aforementioned documents upon the accused;
    - (iii) Cause the documents to be read to the accused in a language understood by him and to caution him as to his rights in that language; and
    - (iv) Return one set of the documents together with proof of service, to the Special Court.
  - (D) When an arrest warrant issued by the Special Court is executed, a member of the Prosecutor's Office may be present as from the time of arrest.
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**Rule 42 of the Special Court's Rules of Procedure and Evidence enumerates the rights of suspects during Prosecution investigations:**

- (A) A Suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands
  - (i) The right to legal assistance of his own choosing, including the right to have legal assistance provided by the Defense Office where the interests of justice so require and where the suspect does not have sufficient means to pay for it;
  - (ii) The right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning; and
  - (iii) The right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.
- (B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

**Rule 63 states the protocol for questioning of an accused by Prosecution investigators:**

- (A) Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present.
- (B) The questioning, including any waiver of the right to counsel, shall be audio-recorded and, if possible, video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of questioning, caution the accused in accordance with Rule 42(A)(iii).

**Rule 43 enumerates the protocol which must be followed whenever the Prosecutor questions a suspect or an accused:**

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

- (i) The suspect shall be informed in a language he speaks and understands that the questioning is being audio-recorded or video-recorded
- (ii) In the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded.
- (iii) At the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything he has said, and to add anything he may wish, and the time of conclusion shall be recorded
- (iv) The content of the recording shall then be transcribed as soon as practicable after the conclusion of questioning and a copy of the transcript supplied to the suspect, together with a copy of the recording or, if multiple recording apparatus was used, one of the original recorded tapes; and
- (v) After a copy has been made, if necessary, of the recorded tape for purposes of transcription, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect.

**Rule 92 guides the admissibility of confessional statements:**

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

**Rule 95 guides the exclusion of evidence:**

"No Evidence shall be admitted if its admission would bring the administration of justice into serious disrepute."



## APPENDIX D

### Reproductions of Rights Waivers Used During the Sesay Investigation

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#### RIGHTS ADVISEMENT<sup>\*</sup>

In accordance with Rule 42 of the International Criminal Tribunal for Rwanda Rules of Evidence and Procedure applicable to Special Court for Sierra Leone you are hereby advised that you are suspected of being a participant involved in International War Crimes and/or Crimes Against Humanity and as such you are advised as follows:

- The right to be assisted by counsel of your choice or to have legal assistance assigned to you without payment if you do not have sufficient means to pay for it;
- The right to have the free assistance of an interpreter if you cannot understand or speak the language to be used for questioning; and
- The right to remain silent, and to be cautioned that any statement you make shall be recorded and may be used in evidence.
- Do you understand these rights? Yes/No \_\_\_\_\_ (initials) “*Yes, IHS*”
- Are you willing to waive your right to counsel and proceed with the interview and/or preparation of a written statement? Yes/No \_\_\_\_\_ (initials) “*Yes, IHS*”

In Accordance with Rule 43 of the International Criminal Tribunal for Rwanda Rules of Evidence and Procedure applicable to Special Court for Sierra Leone you are hereby advised that the questioning of a suspect shall be audio-recorded or video recorded, in accordance with the following procedure:

- That you will be informed in a language you speak and understand that the questioning is being audio-recorded or video-recorded;
- In the event of a break in the course of questioning, the fact and time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded;
- At the conclusion of questioning, you shall be offered the opportunity to clarify anything you have said, and to add anything you may wish, and the time of conclusion shall be recorded;
- The content of the recording shall then be transcribed as soon as practicable after the conclusion of questioning and a copy of the transcript supplied to you, together with a copy of the recording or, if multiple recording apparatus was used, one of the original recorded tapes; and
- After a copy has been made, if necessary, of the recorded tape for purposes of transcription, the original recorded tape or one of the original tapes shall be sealed in your presence under the signature of yourself and the Prosecutor/designee.
- I understand these requirements and agree to have my interview recorded— Yes/No \_\_\_\_\_ (initials) “*Yes, IHS*”

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<sup>\*</sup> Voir Dire Exhibit A. (First version of the OTP Rights Advisement, as administered to Issa Sesay on March 10th 2003. “*Yes, IHS*” represents circled response and handwritten initials of Issa Hassan Sesay)

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## **RIGHTS ADVISEMENT\***

In accordance with Rule 43 of the Special Court for Sierra Leone, you are hereby advised that the questioning of a suspect shall be audio-recorded or video-recorded.

In accordance with Rule 42 of the Special Court for Sierra Leone you are hereby advised that you are suspected of being a participant involved in International War Crimes and/or Crimes Against Humanity and that you have the following rights:

- The right to be assisted by counsel of your choice or to have legal assistance assigned to you without payment if you do not have sufficient means to pay for it;
- The right to have the free assistance of an interpreter if you cannot understand or speak the language to be used for questioning; and
- The right to remain silent, and to be cautioned that any statement you make shall be recorded and may be used in evidence.

**Do you understand these rights? Yes/No \_\_\_\_\_ (initials) “Yes, IHS”**

**Are you willing to waive your right to counsel and proceed with the interview and/or preparation of a written statement? Yes/No \_\_\_\_\_ (initials) “Yes, IHS”**

## **RULES CONCERNING THE RECORDING**

In Accordance with Rule 43 of the Special Court for Sierra Leone the following procedure will be followed:

- In the event of a break in the course of questioning, the fact and time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded;
- At the conclusion of questioning, you shall be offered the opportunity to clarify anything you have said, and to add anything you may wish, and the time of conclusion shall be recorded;
- The content of the recording shall then be transcribed as soon as practicable after the conclusion of questioning and a copy of the transcript supplied to you, together with a copy of the recording or, if multiple recording apparatus was used, one of the original recorded tapes; and
- After a copy has been made, if necessary, of the recorded tape for purposes of transcription, the original recorded tape or one of the original tapes shall be sealed in your presence under the signature of yourself and the Prosecutor/designee.
- I understand these requirements and agree to have my interview recorded—  
Yes/No \_\_\_\_\_ (initials) “Yes, IHS”

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\* See Voir Dire Exhibits D, T, Z, W, and A3. (Revised OTP Rights Advisement as administered to Issa Sesay at interviews subsequent to arrest. “Yes, IHS” represents circled response and handwritten initials of Issa Hassan Sesay)

14 April 2003

**SPECIFIC RIGHTS ADVISEMENT\***

1. WE HAVE JUST RECEIVED A LETTER TODAY FROM JOHN JONES, A DEFENCE ADVISOR AND DUTY COUNSEL, TELLING US THAT YOU WANTED TO RE-CONSIDER YOUR COLLABORATION WITH THE PROSECUTOR.
2. YOU UNDERSTAND THAT UNDER THE RULES OF THE SPECIAL COURT OF SIERRA LEONE:
  - a. YOU HAVE THE RIGHT TO REMAIN SILENT
  - b. YOU HAVE THE RIGHT TO BE ASSISTED BY A COUNSEL DURING THE INTERVIEW
  - c. THAT ANY STATEMENT YOU MAKE TO US SHALL BE RECORDED AND MAY BE USED AS EVIDENCE AGAINST YOU.

3. DID YOU ~~TOLD~~<sup>TELL</sup> ^ JOHN JONES, THE DUTY COUNSEL(*sic*)/~~LEGAL~~<sup>DEFENCE</sup> ^ ADVISER THAT YOU WANT TO RE-CONSIDER YOUR COLLABORATION WITH US?

YES OR NO                      *"No IHS"*

4. DO YOU WANT TO RE-CONSIDER YOUR COLLABORATION WITH US?

YES OR NO                      *"No IHS"*

5. DO YOU WANT TO STOP TALKING TO US RIGHT NOW?

YES OR NO                      *"No IHS"*

6. DO YOU WANT YOUR DUTY COUNSEL TO BE PRESENT DURING THE INTERVIEW?

YES OR NO                      *"No IHS"*

7. DO YOU WANT US TO TELL THE DUTY COUNSEL THAT YOU ARE TALKING AND COLLABORATING WITH US EVERYTIME WE INTERVIEW YOU?

YES OR NO                      *"Yes IHS"*

8. DO YOU WANT US TO GIVE A NOTICE TO YOUR DUTY COUNCIL (*sic*) OF ALL FUTURE INTERVIEWS IF YOU STILL WANT TO COLLABORATE WITH US?

YES OR NO                      *"No IHS"*

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\* Voir Dire Exhibit E. (Particularized rights waiver procured from Issa Sesay on April 14, 2003 after Acting Principal Defender, John Jones, wrote a letter to the OTP requesting that they suspend custodial interviews with the accused. This reproduction of the advisement reflects original strikeouts, edits, and typographical errors as drafted by OTP investigators. *"Yes, IHS"* or *"No, IHS"* represents handwritten response and initials of Issa Hassan Sesay)

**15 April 2003**

**PRECISIONS (*sic*) ON QUESTION 7 AND 8\***

7. DO YOU WANT US TO TELL THE DUTY COUNSEL THAT YOU ARE TALKING AND COLLABORATING WITH US EVERYTIME WE INTERVIEW YOU?

YES OR NO            *"No IHS"*

8. DO YOU WANT US TO GIVE A NOTICE TO YOUR DUTY COUNCIL (*sic*) OF ALL FUTURE INTERVIEWS IF YOU STILL WANT TO COLLABORATE WITH US?

YES OR NO            *"Yes IHS"*

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\* Voir Dire Exhibit G. (Second particularized rights waiver procured from Issa Sesay on April 15, 2003, seeking clarification to answers given by the accused on the first particularized rights waiver the day before. "*Yes, IHS*" or "*No, IHS*" represents handwritten response and initials of Issa Hassan Sesay)

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## VII. ENDNOTES

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<sup>1</sup> Telephone Interview with David Crane, September 24, 2007.

<sup>2</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 47 (Lines 28-29) and Page 48 (Lines 1-4).

<sup>3</sup> See detailed account *infra*, Part III of this Report “Story of Issa Sesay’s Arrest and Interrogation”, particularly at parts B, C, and D.

<sup>4</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 22 June 2007, Page 2-3. (Oral ruling as pronounced from the Bench.)

<sup>5</sup> David M. Crane, *Dancing With the Devil: Prosecuting West Africa’s Warlords, Current Lessons Learned and Challenges*, Address before the Colloquium of International Criminal Tribunals. November 25-27 2004. <http://69.94.11.53/ENGLISH/colloquium04/Crane.htm>

<sup>6</sup> Testimony of Mr. Gilbert Morissette, under cross examination by Mr. Wayne Jordash during a *voir dire* inquiry into Prosecution investigative protocol at the Special Court for Sierra Leone. See *Prosecutor v. Sesay, Kallon, and Gbao*, Case No. SCSL 04-15-T. Trial Transcript. 12 June 2007, Page 103 (Lines 15-23). [Hereinafter “*Prosecutor v. Sesay et al*”]

<sup>7</sup> In his original indictment, the SCSL Prosecutor charged Issa Sesay as a former Revolutionary United Front (RUF) commander with 17 counts of “crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and other serious violations of international humanitarian law.” *Prosecutor v. Issa Hassan Sesay*, “Indictment” (7 March 2003). <http://www.sc-sl.org/sesayindictment.html>. Upon joinder of three RUF cases, the charges against Mr. Sesay were consolidated into an 18-count joint indictment of Issa Sesay, Morris Kallon and Augustine Gbao. See *Prosecutor v. Sesay et al*, “Corrected Amended Consolidated Indictment” (2 August 2006). <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-619.pdf>

<sup>8</sup> See Appendix C for full text of rules pertaining to the due process rights of the accused.

<sup>9</sup> See Appendix C.

<sup>10</sup> See e.g. oral submissions by Counsel for the Prosecution, Peter Harrison, in *Prosecutor v. Sesay et al*, Trial Transcript, 5 June 2007, Page 39 (Lines 18-21); 7 June 2007, Page 58 (Lines 6-11).

<sup>11</sup> See references, *inter alia*, to waivers signed by the accused during custodial interviews. Oral submissions by the Prosecution in *Prosecutor v. Sesay et al*, Trial Transcript, 5 June 2007 and 7 June 2007.

<sup>12</sup> See e.g. *Prosecutor v. Sesay et al*, Trial Transcript, 7 June 2007, Page 60 (Lines 2-16).

<sup>13</sup> See e.g. *Prosecutor v. Sesay et al*, Trial Transcript, 5 June 2007, Page 14 (Lines 5-22).

<sup>14</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 6 June 2007, Page 29.

<sup>15</sup> Addressed, *inter alia*, by defense counsel in *Prosecutor v. Sesay et al*, Trial Transcript, 6 June 2007, Page 28-36.

<sup>16</sup> *Id.*

<sup>17</sup> Duty counsel are defense lawyers operating under the Office of the Registrar (OTR), mandated by the Statute of the Special Court to represent the accused in the absence of retained counsel. According to information taken from the Defense Office page on the official SCSL website [www.sc-sl.org/defence.html](http://www.sc-sl.org/defence.html), the Special Court’s legal aid scheme was barely a month old at the time of Issa Sesay’s indictment and arrest in March 2003. The OTR’s first duty counsel and “defense advisors” didn’t arrive in Freetown until February of 2003. A British lawyer named John Jones became acting head of the Defense Office several weeks after Issa Sesay was first detained, and the first permanent Principal Defender was sworn-in March of 2004—one full year after the OTP’s first wave of arrests.

<sup>18</sup> See e.g., *Prosecutor v. Sesay et al*, Trial Transcript, 6 June 2007, Pages 31-36.

<sup>19</sup> See e.g. *Prosecutor v. Sesay et al*, Trial Transcript, 6 June 2007, Page 31-33.

<sup>20</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 6 June 2007, Page 34 (Lines 13-14).

<sup>21</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 14 June 2007, Page 80 (Lines 26-28).

<sup>22</sup> See e.g. oral submissions by counsel for the accused in *Prosecutor v. Sesay et al*, Trial Transcript, 6 June 2007, Pages 36-39.

<sup>23</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 5 June 2007, Page 58 (Lines 25-29).

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<sup>24</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 8 June 2007, Pages 2-3.

<sup>25</sup> The Prosecution called Chief of Investigations Gilbert Morissette, investigations commander John Berry, and SLP investigators Litho Lamin and Joseph Saffa. The Defense called Issa Sesay and SCSL duty counsel Claire Carlton-Hanciles. A third Defense witness, Naeem Ahmed, Deputy Chief of the Witness and Victims Support unit, was sworn in but not permitted to complete his testimony. Although Mr. Ahmed was called to the stand to give evidence about investigative protocol-related misrepresentations Mr. Morissette made to the Court during the *voir dire*, the Trial Chamber dismissed his testimony as a “multiplication of the issues.” Remarkably, the Court concluded that the credibility of the Prosecution’s lead witness in the *voir dire* was “entirely collateral” to a fair determination of the facts. See *Prosecutor v. Sesay et al*, Trial Transcript, 20 June 2007, Page 53-54.

<sup>26</sup> See *infra* Section III (pages 16-30) for detailed discussion of *voir dire* testimony pertaining to Mr. Sesay’s arrest and interrogation.

<sup>27</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 22 June 2007, Page 2-3. (Oral ruling as pronounced from the Bench.

<sup>28</sup> See *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>

<sup>29</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 22 June 2007, Page 3 (Lines 12-13).

<sup>30</sup> Compare *Prosecutor v. Théoneste Bagosora, et al.*, Decision on the Prosecutor’s Motion for the Admission of Certain Materials under Rule 89(c), ICTR Trial Chamber I, 14 October 2004; *Prosecutor v. Zejnil Delalic Zdravko Mucic*, ICTY Trial Chamber, Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence, 2 September 1997; *Prosecutor v. Sefer Halilovic*, Decision on Admission into Evidence of Interview of the Accused, ICTY Trial Chamber I, Section A, 20 June 2005; *Prosecutor v. Sefer Halilovic*, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, ICTY Appeals Chamber, 19 August 2005.

<sup>31</sup> See *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188, paragraphs 45 – 51 and 60 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>

<sup>32</sup> See detailed discussion of Standard Operating Procedures *infra* Part IV(A).

<sup>33</sup> For detailed account of Prosecution witness testimony, including reflections on witness box demeanor, see *Special Court Monitoring Program Update #100* (Week Ending June 15, 2007). <http://socrates.berkeley.edu/~warcrime/SL-Reports/Issa%20Sesay%20Trial%202.pdf>

<sup>34</sup> Interview with Prosecutor Stephen Rapp. July 15, 2007. Freetown, Sierra Leone.

<sup>35</sup> David M. Crane, *Dancing With the Devil: Prosecuting West Africa’s Warlords, Current Lessons Learned and Challenges*, Address before the Colloquium of International Criminal Tribunals. November 25-27 2004. <http://69.94.11.53/ENGLISH/colloquium04/Crane.htm>

<sup>36</sup> Statute of the Special Court for Sierra Leone, Article 1. [“SCSL Statute”] <http://www.sc-sl.org/documents.html>

<sup>37</sup> SCSL Statute, Article 15.

<sup>38</sup> Interview with Prosecutor Stephen Rapp. July 15, 2007. Freetown, Sierra Leone; Telephone Interview with David Crane, September 24, 2007; Response to written interview questions submitted to the OTP by the author, September 30, 2007.

<sup>39</sup> The current Prosecutor granted one in-person interview for this report, and answered a set of follow-up questions in writing. He would not, however, permit any interviews with the investigators involved in the Sesay investigation, nor with any other OTP trial attorneys or investigators. He communicated his unwillingness to approve further interviews through his special assistant, who explained that the Prosecutor was “not inclined” to grant broader access “given the nature and tone” of the inquiry thus far. This report does reflect the observations and reflections of several former OTP officials, who are not subject to the interview policy. Some granted on-the-record interviews, while others agreed to be interviewed for background research only, without attribution. The former Chief of Investigations, Alan White, declined to

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be interviewed all together. He explained that he expected to be called as a witness in the Charles Taylor trial (underway as this report was being researched and at the time it went to press) and would not be at liberty to discuss his past work with the court or any aspect of the Sesay investigation due to its overlap with the Taylor investigation.

<sup>40</sup> See SCSL Statute, Articles 2-5.

<sup>41</sup> In previous interviews with the War Crimes Studies Center, the then Prosecutor David Crane stated he chose not to prosecute crimes under Sierra Leonean law in order to avoid a ‘legal minefield’ that would have further complicated the Special Court’s response to jurisdictional challenges. See Sara Kendall and Michelle Staggs *First Interim Report on the Special Court for Sierra Leone* (War Crimes Studies Center, April 2005) at page 7.

<sup>42</sup> There are roughly two international positions for every one Sierra Leonean employee. As of September, 2007 the OTP was reporting twenty-one posts filled by Sierra Leoneans. Six of these personnel serve in legal positions, eleven in an investigative capacity, and four as local administrative staff members. (Numbers furnished by Chief of Prosecutions, Jim Johnson, in September 30, 2007 response to written interview questions submitted to the OTP by the author). According to the 2007-2009 Budget of the Special Court for Sierra Leone (p. 20), the OTP is comprised of sixty-one employees overall, including paid positions and *gratis* secondment officers (these include, for instance the special legal advisors funded by the Swiss government, and Canada’s *gratis* secondment program for Royal Canadian Mounted Police (RCMP) which has ensured that Canadian nationals dominate the international portion of the OTP’s investigative staff.)

<sup>43</sup> Article 15(3) of the SCSL Statute empowers the UN Secretary-General to appoint the Prosecutor for a three year, renewable term. Article 15(4) states that “The Prosecutor shall be assisted by a Sierra Leonean Deputy Prosecutor.”

<sup>44</sup> Response to written interview questions submitted to the OTP by the author, September 30, 2007.

<sup>45</sup> Sir Desmond de Silva, QC (British) was the Court’s founding Deputy Prosecutor. He was succeeded by Mr. Christopher Staker (Australian)—still serving at the time this report went to press. The government of Sierra Leone appointed each of these men. The three UN-appointed Prosecutors have been either British or American. Other senior non-appointed personnel, including Chief of Investigations, Chief of Prosecutions, Chief of Legal Operations, and most Senior Trial Attorney positions have gone to American, British, Australian, or Canadian nationals.

<sup>46</sup> Telephone Interview with David Crane, September 24, 2007.

<sup>47</sup> *Id.*

<sup>48</sup> Written comments from Alan White on draft circulation of this report. August 6, 2008.

<sup>49</sup> During the first months of its existence, the OTP operated out of makeshift offices set up in the lower level of the Prosecutor’s Freetown home (Written comments from Alan White on draft circulation of this report. August 6, 2008).

<sup>50</sup> Antonio Cassese, *Report on the Special Court for Sierra Leone*, 12 December 2006. [“Cassese Report”] ¶70.

<sup>51</sup> Telephone Interview with David Crane, September 24, 2007.

<sup>52</sup> *Id.*

<sup>53</sup> Article 7 of the SCSL Agreement describes the composition and mandate of the SCSL Management Committee. It provides that “interested States will establish a management committee to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested States. The management committee shall consist of important contributors to the Special Court. The Government of Sierra Leone and the Secretary-General will also participate in the management committee.” <http://www.sc-sl.org/Documents/scsl-agreement.html>

<sup>54</sup> Telephone Interview with David Crane, September 24, 2007.

<sup>55</sup> *Id.*

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<sup>56</sup> See OTP Press Release, “Trial of Charles Taylor Set for June 4 Opening,” May 7, 2007 <http://www.sc-sl.org/Press/prosecutor-050707.pdf>

<sup>57</sup> OTP Press Release, “Special Court Prosecutor to Step Down,” April 28, 2006. <http://www.sc-sl.org/Press/prosecutor-042806.pdf>

<sup>58</sup> Id.

<sup>59</sup> September 30, 2007 response to written interview questions submitted to the OTP by the author.

<sup>60</sup> Both major OTP sections are supported by an internal administrative assistance section referred to in budgetary reports as “Legal Operations.” Notwithstanding the name, this unit does not handle any legal prosecutorial matters. The administrator serving as “Chief of Legal Operations” is, like the other Chiefs of Section, a foreign national. He is paid at a level commensurate with most of the OTPs Senior Trial Attorneys (P-5 UN pay grade).

<sup>61</sup> See basic description of OTP structure within the ICTR at <http://69.94.11.53/ENGLISH/geninfo/otp.htm>.

<sup>62</sup> Point included in collective written comments from the OTP on a draft circulation of this report. August 22, 2008.

<sup>63</sup> Id.

<sup>64</sup> At the time of the *voir dire*, two of four SCSL trials had concluded (AFRC and CDF), the Prosecution had rested its case in the third (RUF), and trial had commenced in the case of *Prosecutor v. Taylor*. The Investigations Section remained as it had been since its inception, a largely autonomous section within the OTP, supervised by a D-2 Chief of Investigations, who remained formally accountable only to the OTP’s most senior official, the Prosecutor.

<sup>65</sup> *Prosecutor v. Sesay et al*, Case No. SCSL-04-15. (Trial commenced 5 July 2004. Closing arguments delivered August 4-5, 2008. Final verdict still forthcoming)

<sup>66</sup> *Prosecutor v. Norman et al*, Case No. SCSL-04-14 (Trial commenced 3 June 2004. Closing arguments heard 28-30 November 2006. Trial verdict rendered 2 August 2007. Appeals Decision rendered 28 May 2008)

<sup>67</sup> *Prosecutor v. Brima et al*, Case No. SCSL-04-16 (Trial commenced 7 March 2005. Closing arguments heard 7-8 December 2006. Trial verdict rendered 20 June 2007. Final judgment on appeal issued 22 February 2008.)

<sup>68</sup> *Prosecutor v. Taylor*, Case No. SCSL-03-01 (Trial commenced 4 June 2007 and is ongoing.)

<sup>69</sup> “Duties and Responsibilities” section of the official vacancy announcement for the Chief of Prosecution. Furnished to author directly by the OTP.

<sup>70</sup> When interviewed for this report, the current Prosecutor Stephen Rapp noted his intention to move the Evidence Unit out from under the Investigations Section, and place it within the Deputy Prosecutor’s purview instead. The Fifth Annual Report of the Special Court for Sierra Leone, released in May 2008, indeed reflects this adjustment. Under the new structure, the OTP is divided into three branches under the Prosecutor. An Investigations Section oversees the “Witness Management Unit” and an “Investigations Unit.” The Prosecutions Section remains divided into 4 trial teams—RUF, CDF, AFRC, and “The Hague Sub-Office: Charles Taylor trial team.” The Office of the Deputy Prosecutor has been moved from its previous location off to the side of the organogram. It now sits directly below the Prosecutor, at the same level as the other two Sections. According to the chart, this office oversees “Appeals” and an “Evidence and Archiving” unit. <http://www.sc-sl.org/Documents/specialcourtannualreport2007-2008.pdf>

<sup>71</sup> Written comments from Al White on draft circulation of this report. August 6, 2008.

<sup>72</sup> Written comments from Al White on draft circulation of this report. August 6, 2008.

<sup>73</sup> Written comments from Al White on draft circulation of this report. August 6, 2008.

<sup>74</sup> See Annual Report of the Special Court, 2002-2003 (page 34).

<sup>75</sup> Compare SCSL Annual Budget 2005-2006 (page 17) to SCSL Annual Budget 2007-2009 (page 22).

<sup>76</sup> The Investigations Commander is paid at a P-5 UN salary level. This is the same salary level most Senior Trial Attorneys make. The only STA paid above the P-5 level is Brenda Hollis, STA for the Taylor trial. Hollis is paid at the D-1 level, just below the Chiefs of Section.



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<sup>77</sup> The Chief of “Legal Operations” is a P-5 level director of the OTP’s internal administrative unit that handles all OTP budgetary matters separate from the Registry.

<sup>78</sup> See “Duties and Responsibilities” section of the official vacancy announcement for the Chief of Investigations. Furnished to author directly by the OTP.

<sup>79</sup> Id. The full text reads as follows:

“Under the direction of the Prosecutor, the incumbent:

- Supervises, plans & organizes all intelligence and tracking activities in the Sierra Leone investigative area (noting that such activities can be in the region, or worldwide, but usually within the African continent);
- Is responsible for gathering and analyzing intelligence collected from various sources and directs paid informants and agents;
- Supervises the work of the Investigations Section, through the Investigations Commander;
- Provides policy advice to the Prosecutor / Deputy Prosecutor;
- Assesses the needs and requirements of investigations, and, working with the Chief of Legal Operations, coordinates the budgetary inputs necessary to meet those requirements;
- Coordinates resources ethically, efficiently, and cost effectively;
- Selects staff with advice of Investigations Commander. Directly supervises Investigations Commander and Chief of Witness Management Unit and indirectly their staff;
- Establishes overall direction and strategy of the Section;
- Is responsible for the supervision, planning & coordination of arrest operations throughout the world;
- Supervises, plans & directs simultaneous sensitive tracking operations throughout the world;
- Meets with senior national and international officials at the highest levels to include heads of state and various ministers;
- Monitors specific intelligence and tracking activities by evaluating progress, identifying problems of adverse effect to Section;
- Ensures appropriate source / witness protection measures are in place.”

<sup>80</sup> Telephone Interview with David Crane, September 24, 2007.

<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> Id.

<sup>84</sup> Id.

<sup>85</sup> The majority of OTP investigators have been SLP and RCMP officers working on short-term *gratis* secondment programs for one year or less. (See e.g. SCSL Annual Budget 2007-2009 (Page 20)).

<sup>86</sup> Senior leadership turned over four times in the first five years of the OTP’s existence. Founding Prosecutor David Crane completed his three year appointment in July 2005. Sir Desmond de Silva succeeded Crane after the Prosecutor declined to seek renewal of his appointment. De Silva departed the Special Court just one year later, in July of 2006. For six months thereafter, Deputy Prosecutor Chris Staker served as acting head of the OTP while an internal political struggle ensued over who should succeed de Silva. Finally, in December of 2006, a compromise was reached whereby the Secretary General of the UN appointed a candidate from outside the Special Court— Former ICTR Chief of Prosecutions, Stephen Rapp.

<sup>87</sup> Telephone Interview with David Crane, September 24, 2007.

<sup>88</sup> Id.

<sup>89</sup> Response to written interview questions submitted to the OTP by the author, September 30, 2007.

<sup>90</sup> Id.

<sup>91</sup> Interview with Prosecutor Stephen Rapp. July 15, 2007. Freetown, Sierra Leone.

<sup>92</sup> Response to written interview questions submitted to the OTP by the author, September 30, 2007.

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- <sup>93</sup> Interview with Prosecutor Stephen Rapp. July 15, 2007. Freetown, Sierra Leone.
- <sup>94</sup> Collective written comments from the OTP on draft circulation of this report. August 22, 2008.
- <sup>95</sup> See “Duties and Responsibilities” section of the official vacancy announcement for the Chief of Investigations. Furnished to author directly by the OTP.
- <sup>96</sup> “Duties and Responsibilities” section of the official vacancy announcement for the Chief of Prosecution. Furnished to author directly by the OTP.
- <sup>97</sup> See “Duties and Responsibilities” section of the official vacancy announcement for the Chief of Investigations. Furnished to author directly by the OTP.
- <sup>98</sup> Written comments from Al White on draft circulation of this report. August 6, 2008.
- <sup>99</sup> Written comments from Al White on draft circulation of this report. August 6, 2008.
- <sup>100</sup> The Prosecutor is paid on an Under Secretary-General (USG) level equivalent to the SCSL Judges. The Deputy Prosecutor earns the next level down—Assistant Secretary-General (ASG) level pay. The Chiefs of Section are one step below ASG, as D-2 level employees. See SCSL Budget, 2007-2009 (p. 21).
- <sup>101</sup> See OTP personnel chart *supra* page 8. In collective written comments on a draft circulation of this report, the OTP leadership objected to the criticism that this report offers regarding the Special Court’s marginalization of its Deputy Prosecutor. The OTP acknowledged that the ICTR, unlike the Special Court, empowered its Deputy Prosecutor to supervise both its Chiefs of Section. However, the OTP responded that such an arrangement made more sense at the ICTR because, “Until September 2003, there was one Prosecutor for both the ICTY and ICTR who travelled back and forth between the two tribunals. It was therefore necessary that all OTP Chiefs of Section report to the Deputy Prosecutor, who also acted as a conduit to the Prosecutor.” (Collective written comments from the OTP on draft circulation of this report. August 22, 2008.) The author of this report stands by her critique, and respectfully submits that the SCSL has historically faced similar institutional challenges regarding Prosecutorial absences. In light of the Prosecutor’s demanding travel schedule, as well as his many fundraising, diplomatic, and public relations obligations, it would have been logical and prudent for the SCSL to follow the example of its predecessor institutions by empowering the Prosecutor’s Deputy to directly supervise the Chiefs of Section and, when necessary, act “as a conduit to the Prosecutor.”
- <sup>102</sup> Response to written interview questions submitted to the OTP by the author, September 30, 2007.
- <sup>103</sup> <http://www.sc-sl.org/Documents/scsl-statute.html>
- <sup>104</sup> <http://www.sc-sl.org/Documents/scsl-agreement.html>
- <sup>105</sup> <http://www.sc-sl.org/Documents/scsl-agreement.html>
- <sup>106</sup> See SCSL Press Release, “The New Prosecutor, Desmond de Silva, QC” (5 May 2005). Available electronically at <http://www.sc-sl.org/Press/prosecutor-biography050505.pdf>; SCSL Press Release, “New Deputy Prosecutor for the Special Court” (11 July 2005). Available electronically at <http://www.sc-sl.org/Press/pressrelease-071105.pdf>
- <sup>107</sup> Interview with Prosecutor Stephen Rapp. July 15, 2007. Freetown, Sierra Leone.
- <sup>108</sup> Telephone Interview with David Crane, September 24, 2007.
- <sup>109</sup> Christopher Staker has led the appeals arguments for the OTP in the CDF and AFRC cases. Likewise, Desmond de Silva has been described as leading interlocutory appeals during his tenure, defending “many legal challenges to the Court’s jurisdiction and existence.” (See April 2006 press release announcing Sir Desmond de Silva’s departure from the OTP. <http://www.sc-sl.org/Press/prosecutor-032806.pdf>)
- <sup>110</sup> <http://www.sc-sl.org/Documents/scsl-statute.html>
- <sup>111</sup> <http://www.sc-sl.org/Documents/rulesofprocedureandevidence.pdf>
- <sup>112</sup> <http://www.sc-sl.org/Documents/scsl-agreement.html>
- <sup>113</sup> <http://www.sc-sl.org/Documents/SCSL-ratificationact.pdf>
- <sup>114</sup> <http://www.sc-sl.org/Documents/counselcodeofconduct.pdf>
- <sup>115</sup> See e.g. Helena Cobban, “Think Again: International Courts.” *Foreign Policy*, 8 May 2006.
- <sup>116</sup> See discussion of Security Council reservations over establishing another tribunal according to the *ad hoc* model in Tom Perriello and Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny*, Case
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study of the International Center for Transitional Justice (March 2006).

<http://www.ictj.org/static/Prosecutions/Sierra.study.pdf>.

<sup>117</sup> By limiting the scope of prosecution to “persons who bear the greatest responsibility,” Article 1 of the SCSL Statute markedly narrowed the Court’s mandate from ICTY and ICTR’s broader “persons responsible” formulation.

<sup>118</sup> By statute, only crimes committed on the territory of Sierra Leone after 30 November 1996 fall within the temporal jurisdiction of the Court, despite the fact that the civil conflict in Sierra Leone dates back to 1991.

<sup>119</sup> During the SCSL’s first fiscal year in operation (July 2002– June 2003) the Court operated on a budget of US\$19 million (First Annual Report of the President of the Special Court for Sierra Leone, pg. 29). The budget in subsequent fiscal years has been between US\$32 and US\$36 million per year (See Second Annual Report of the President of the Special Court for Sierra Leone, pg. 41; Fourth Annual Report of the President of the Special Court for Sierra Leone, pg. 11). By comparison, the ICTY two year budget was US\$223 million for 2002-2003, US\$271 million for 2004-2005, US\$276 million for 2006-2007, and US\$310 million for 2009-2010 (See “Regular Budget” statistics posted electronically at <http://www.un.org/icty.glance-e/index.htm>). The ICTR has operated on a similar budget, with US\$280 million allotted for the two year period between 2008 and 2009 (See “Budget and Staff” data posted electronically under “General Information” at <http://www.ictt.org>).

<sup>120</sup> At the outset, the Secretary General estimated three years to be “the minimum time required for the investigation, prosecution and trial of a very limited number of accused.” *Letter dated 12 January 2001 from the United Nations Secretary General to the President of the Security Council*, (New York: United Nations, Jan. 2001), UN Doc. S/2001/40, para. 12. If the SCSL achieves its present completion goals, as set out in the 2007-2009 budget, the tribunal proceedings will have lasted more than twice as long as originally anticipated.

<sup>121</sup> Tom Perriello and Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny*, Case study of the International Center for Transitional Justice (March 2006). Available electronically at: <http://www.ictj.org/static/Prosecutions/Sierra.study.pdf>.

<sup>122</sup> See SCSL Statute, Article 14, providing for the use of ICTR Rules *mutatis mutandis*. According to this provision “The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.” The SCSL Rules have been amended ten times since originally adopted on January 16, 2002.

<sup>123</sup> Compare Article 17 of the SCSL Statute to Article 20 of the ICTR Statute, and Article 21 of the ICTY Statute.

<sup>124</sup> Helena Cobban, “Think Again: International Courts.” *Foreign Policy*, 8 May 2006.

<sup>125</sup> Secretary General’s Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia, U.N. SCOR, 48<sup>th</sup> Sess., Annex, U.N. Doc. S/25704 (1993).

<sup>126</sup> Kofi Annan, then Secretary General of the UN, appointed Crane to the chief OTP leadership position in April of 2002. Crane assembled a core investigative team shortly thereafter and arrived in Freetown by August, 2002. Seven months after Crane’s arrival, in March 2003, Judge Bankole Thompson of Trial Chamber I approved thirteen individual indictments, each charging over a dozen counts of war crimes and crimes against humanity.

<sup>127</sup> Cassese Report, ¶31. It should be noted that the special rapporteur’s mandate was limited to reviewing institutional efficiency, so the report he issued contained no meaningful reflections on the overall quality of the OTP’s investigative procedure, and only passing reference to the indictments it produced.

<sup>128</sup> Telephone Interview with David Crane, September 24, 2007.

<sup>129</sup> David Crane, “Dancing With the Devil: Prosecuting West Africa’s Warlords.” Address delivered to the ICTR *Colloquium of Prosecutors of International Criminal Tribunals*, November 25-27, 2004. Arusha, Tanzania.

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<sup>130</sup> The agreement between the UN and the Royal Government of Cambodia, laying the foundation for the Extraordinary Chambers in the Courts of Cambodia (ECCC) was signed June 6, 2003. Available electronically at:

[http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement\\_between\\_UN\\_and\\_RGC.pdf](http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf) More recently, on February 6, 2007, the UN Security Council and the government of Lebanon finalized an agreement for a “special tribunal of an international character to try all those alleged responsible for the attack of 14 February 2005 in Beirut that killed the former Lebanese Prime Minister Rafiq Hariri and 22 others.” Available electronically at:

<http://daccessdds.un.org/doc/UNDOC/GEN/N07/363/57/PDF/N0736357.pdf?OpenElement>

<sup>131</sup> The budget for the Lebanon Tribunal envisions three years of operations at a \$120 million cost. <http://www.un.org/apps/news/infocus/lebanon/tribunal/timeline.shtml>. The ECCC is expected to operate for three years on just \$56 million.

<http://www.un.org/apps/news/story.asp?NewsID=12775&Cr=cambodia&Cr1=>

<sup>132</sup> Michelle Staggs and Sarah Kendall, “From Mandate to Legacy: Interim Report on the Special Court for Sierra Leone.” April 2005.

<sup>133</sup> James Cockayne, “The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals.” 28 *Fordham Int’l L.J.* 616 (2004-2005).

<sup>134</sup> *Id.* at 680

<sup>135</sup> Dougherty criticized the restricted personal jurisdiction of the Court as allowing impunity for too many perpetrators of mass atrocity. She also pointed out that the original deadline for completion was unreasonable and unattainable, if the Court was to execute meaningful trials. She pointed to *Prosecutor v. Taylor* as an example where protracted delays proceeding to trial were directly attributable to institutional compromises over the funding structure. As a voluntarily funded treaty-based institution rather than Court established pursuant to Security Council Resolution, the Special Court lacked the Chapter VII powers necessary to execute warrants outside the territory of Sierra Leone. This seriously encumbered the OTP’s attempts to apprehend Charles Taylor. Beth Dougherty, “Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone.” *International Affairs* 80, 2 (2004) 311-328, 327.

<sup>136</sup> Beth Dougherty, “Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone.” *International Affairs* 80, 2 (2004) 311-328, 312.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 327.

<sup>139</sup> For instance, the Trial Chamber’s final judgment suggests that, to the extent tricks might have been used during the Sesay investigations, they did not reach the legal threshold necessary to merit exclusion of evidence: “the Chamber does not find that the conduct of the Investigators involved trickery rising to a level that ‘shocks the conscience of the community.’” (“Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶52 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>). Similarly, the Trial Chamber acknowledged in passing that OTP questioning proceeded despite various health and psychological problems suffered by the accused. However, the Court concluded summarily that “these were not sufficiently grave to render the manner of questioning oppressive.” (*Id.* at ¶59)

<sup>140</sup> Interview with Prosecutor Stephen Rapp. July 15, 2007. Freetown, Sierra Leone.

<sup>141</sup> See testimony of Officer Litho Lamin in *Prosecutor v. Sesay et al*, Trial Transcript, 15 June 2007, Pages 49-52; See also Mr. Sesay’s account in *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Pages 27-32.

<sup>142</sup> Mr. Sesay testified that he was called to CID to pick up \$60,000 belonging to the newly formed RUF political party. Mr. Sesay had previously filed a complaint over a failed real estate transaction with an overseas landlord. The Director of CID used this complaint as a pretext for at least two arrests linked to “Operation Justice.” He reportedly told Mr. Sesay and that CID had successfully reclaimed the money in dispute, and it was ready to be picked up. Morris Kallon and Issa Sesay traveled to CID together on foot on the morning of March 10<sup>th</sup>. Both men were arrested in Director Daboh’s office at CID.

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<sup>143</sup> See testimony of Officer Litho Lamin in *Prosecutor v. Sesay et al*, Trial Transcript, 15 June 2007 Pages 36-37 and 49-52.

<sup>144</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 15 June 2007, Page 36 (Lines 28-29); *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 29 (Line 24).

<sup>145</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Pages 27-32.

<sup>146</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 31 (Lines 22-29).

<sup>147</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 114 (Lines 13-14).

<sup>148</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 14 June 2007, Pages 83-85.

<sup>149</sup> Dr. Crane is no longer with the Special Court, so he was not called to testify during the *voir dire*. He did, however agree to be interviewed for this report.

<sup>150</sup> Telephone Interview with David Crane. September 24, 2007.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See *Voir Dire Exhibit A*, “Warrant of Arrest and Order for Transfer and Detention” (7 March 2003).

<sup>155</sup> See discussion of arrest warrant language in *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 108-109.

<sup>156</sup> See *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, Article 17. See also Rule 55(B) of the SCSL Rules of Procedure and Evidence, which states, in relevant part, “The Registrar shall transmit to the relevant authorities of Sierra Leone, in whose territory or under whose jurisdiction or control the accused resides...” Rule 55(C)(i), moreover, directs that “The Registrar shall request the said authorities to cause the arrest of the accused and his transfer to the Special Court.”

<sup>157</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 15 June 2007. Page 40 (Lines 18-21), Page 44 (Lines 10-11), and Page 59 (Lines 15-18).

<sup>158</sup> Prosecution and Defense witnesses agree that OTP investigators first solicited Mr. Sesay’s collaboration within an hour of arrest, while he awaited a chartered helicopter flight to the SCSL detention facility on an island off the coast of Freetown. Testimony differed sharply, however, as to the precise nature of the exchange between investigators and the accused. OTP investigator John Berry and seconded SLP officer Joseph Saffa agree they met Mr. Sesay in an empty office at Juri barracks for no more than five minutes. According to Berry’s recollection, he told a calm and collected Mr. Sesay that he and Saffa were investigators with the Special Court and that they wanted to give Mr. Sesay the opportunity to speak with the OTP if he so wished. Berry claims they made clear that they could not promise him anything and told him to “take his time as this is an important decision.” The accused reportedly replied “immediately” that he wanted to speak with OTP investigators. The investigators claim they then left the room and had Mr. Sesay transferred to the OTP office. Mr. Saffa claims he did not say a single word to Mr. Sesay the entire time. (See *voir dire* testimony of John Berry, *Prosecutor v. Sesay et al*, Trial Transcript, 14 June 2007, Pages 7-8. See also *voir dire* testimony of Joseph Saffa, *Prosecutor v. Sesay et al*, Trial Transcript, 15 June 2007, Page 79 (Line 22)). Mr. Sesay, by contrast, described the exchange with Mr. Berry and Mr. Saffa in more threatening, coercive terms. According to the accused, he was removed from his cell at Juri almost as soon as he was put into it, and taken to an office where Mr. Berry and Mr. Saffa were waiting. Mr. Sesay testified that he was still handcuffed behind his back and remained distraught and in tears. (His emotional state, at least, is corroborated by Prosecution witness, Litho Lamin, who testified that Mr. Sesay broke down sobbing upon arrest. There is evidence on the interrogation transcript that Mr. Sesay also cried during the first custodial interview, and Litho Lamin testified during the *voir dire* that the accused continued crying throughout the entire forty minute post-interview helicopter ride to Bonthe island.) Mr. Berry allegedly told Mr. Sesay he had gotten himself into “serious trouble” for which he was going to have to spend the rest of his life in prison. Mr. Saffa then spoke to him in Krio, telling him this was “no time for tears” and that he must stop crying and listen closely to what Mr. Berry was telling him. Mr. Saffa reportedly reminded Mr. Sesay that Sierra Leonean courts have the death penalty, and told the accused in

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Krio that he should talk with Mr. Berry, because it was “the only way you will be saved out of this situation.” Mr. Berry told Mr. Sesay that cooperation with investigators would be for his own good—if he chose not to, “I’m sorry, that is your end.” Mr. Sesay testified that he agreed to speak with investigators, saying, “what could I do? I’m in your hands, I’m in your hands.” (See *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 38-39.)

<sup>159</sup> Voir Dire Exhibit A, “Warrant of Arrest and Order for Transfer and Detention” (7 March 2003).

<sup>160</sup> Telephone Interview with David Crane. September 24, 2007.

<sup>161</sup> *Id.*

<sup>162</sup> Juri Barracks (also spelled “Jui” barracks in some court documents) is located in Freetown. The arrestees were removed immediately from what investigators described as the “total chaos” at CID, and taken here to await helicopter flights to Bonthe.

<sup>163</sup> See testimony of arresting officer, Litho Lamin, confirming that Mr. Sesay was read the face of his warrant upon arrest and nothing else. Lamin confirmed that Sesay was not served with a copy of his indictment until arrival at Bonthe, after his first custodial interview. (*Prosecutor v. Sesay et al*, Trial Transcript, 15 June 2007, Page 60 (Lines 1-16)). Testimony from John Berry and Joseph Saffa confirms that OTP investigators did not read any rights advisement to the accused until after he had agreed to speak with Prosecution investigators and been diverted to an interview room in the OTP compound. (See *Prosecutor v. Sesay et al*, Trial Transcript, 14 June 2007, Pages 7-8; 15 June 2007, Page 79).

<sup>164</sup> Moreover, there is evidence from transcripts of Mr. Sesay’s initial appearance before Judge Itoe that he never heard or understood the charges against him until Judge Itoe took him, painstakingly, through each count and explained the meaning of the charges through a translator in open court.

<sup>165</sup> SCSL Statute, Article 17.

<sup>166</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 6 June 2007, Page 13 (Lines 24-29).

<sup>167</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 15 June 2007, Page 60 (Lines 5-21).

<sup>168</sup> *Id.* at Page 41 (Lines 21-23).

<sup>169</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 20 June 2007, Page 30.

<sup>170</sup> The month after Mr. Sesay’s initial appearance, he submitted to six more OTP interviews—each time outside the presence of counsel. These interviews took place on March 17<sup>th</sup>, 18<sup>th</sup>, 24<sup>th</sup> and 31<sup>st</sup> and on April 14<sup>th</sup> and 15<sup>th</sup>.

<sup>171</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 6 June 2007, Page 30 (Lines 8-15).

<sup>172</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 6 June 2007, Page 30 (Lines 16-20).

<sup>173</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 66 (Lines 28-29).

<sup>174</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 6 June 2007, Page 14-15.

<sup>175</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 63 (Lines 11-17).

<sup>176</sup> These took place on March 17<sup>th</sup>, 18<sup>th</sup>, 24<sup>th</sup> and 31<sup>st</sup> and on April 14<sup>th</sup> and 15<sup>th</sup>. Medical detention logs note that the accused “returned angry” from his initial appearance. Mr. Sesay testified that he felt confused about his appearance in court, and conveyed this to Mr. Morissette before his next interview on March 17<sup>th</sup>. He did not understand why he was facing charges after investigators had promised he would be freed in exchange for cooperation. According to Mr. Sesay, when he sought clarification, Morissette dismissed the proceeding as a formality and assured him that he would eventually be released if he continued speaking. In the meantime, the Deputy Chief allegedly claimed he couldn’t do anything to avoid Mr. Sesay having to appear in court. The accused says he began to feel suspicious of the investigators, but continued speaking with them, believing it was his only option. Neither Mr. Berry nor Mr. Morissette acknowledges ever having discussed any aspect of Mr. Sesay’s initial appearance with him.

<sup>177</sup> *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶¶51 and 60 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>

<sup>178</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 29 (Lines 25-29); *Prosecutor v. Sesay et al*, Trial Transcript, 14 June 2007, Page 11 (Lines 6-14).

<sup>179</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 36 (Lines 1-12)

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<sup>180</sup> See generally, oral submissions by the prosecution in *Prosecutor v. Sesay et al*, Trial Transcript, 5 June 2007 and 7 June 2007.

<sup>181</sup> Mr. Morissette confirmed having discussed the following specific benefits of witness protective measures with Mr. Sesay as a form of *quid pro quo* aimed at ensuring Mr. Sesay would continue to be willing to talk: (1) Physical protection of Mr. Sesay's family by Witness and Victim Support (2) support payments for food, housing, and medical expenses (3) educational assistance (4) job training and (5) assistance relocating permanently outside Sierra Leone "to start a new life." See *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Pages 92-94. Mr. Sesay's wife and children were in fact brought into temporary WVS protective custody once the accused began cooperating, and Mr. Morissette used this fact as leverage thereafter to keep Mr. Sesay talking to the OTP. After approximately a year, the Prosecution removed Mr. Sesay's family from the WVS program, with the explanation that Mr. Sesay was no longer a witness or potential witness for the OTP. See copy of original OTP memorandum appended to *Prosecutor v. Sesay et al*, "Authorities to be Relied Upon in Oral Motion to Exclude Custodial Interviews of Mr. Sesay." (Annex C), SCSL-04-15-T-792 (1 June 2007).

<sup>182</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 84 (Lines 11-15).

<sup>183</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 14 June 2007, Page 111 (Lines 11-12).

<sup>184</sup> *Id.* at Page 104 (Lines 1-14).

<sup>185</sup> *Id.* at Page 78 (Lines 27).

<sup>186</sup> *Id.* at Page 76 (Line 19).

<sup>187</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 84 (Lines 11-15).

<sup>188</sup> See e.g. cross examination of Mr. Sesay, where counsel for the Prosecution says, "I'm going to suggest to you that you wanted to cooperate with the Prosecution, and that's the answer to all of this." (*Prosecutor v. Sesay et al*, Trial Transcript, 20 June 2007, Page 34 (Lines 18-20)). See also the repeated approach to direct examination whereby Mr. Harrison systematically asks investigators, "did you, at any point in time, utter any threats to Mr. Sesay or hear them uttered?... During this same period of time, did you utter or hear uttered any inducements to Mr. Sesay?" *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 22 (Lines 15-27). Through such lines of questioning, counsel for the Prosecution advanced the same argument made explicitly in prior oral submissions that Mr. Sesay was in no way pressured and that he was happy to cooperate with investigators initially. See e.g. oral submissions by Counsel for the Prosecution in *Prosecutor v. Sesay et al*, Trial Transcript, 5 June 2007, Page 39 (Lines 18-21) and Page 46 (Lines 21-27); See also *Prosecutor v. Sesay et al*, Trial Transcript, 7 June 2007, Page 58 (Lines 6-11).

<sup>189</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 40 (Lines 19-24).

<sup>190</sup> See generally, testimony of Issa Sesay, *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007.

<sup>191</sup> See testimony of Issa Sesay, *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 46 (Lines 11-13). Unlike the other OTP personnel involved in the investigation, Dr. White no longer works for the Special Court, so he was not cross-examined regarding these allegations during the *voir dire*. Gilbert Morissette has denied Alan White played any role in the off-the-record interactions that the Deputy Chief admitted initiating with the accused. Dr. White declined to be interviewed for any aspect of this report, citing his anticipated role as a Prosecution witness in *Prosecutor v. Charles Ghankay Taylor*, and overlap between the RUF and Taylor cases.

<sup>192</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 51 (Lines 3-12, 15-24); Page 38 (Lines 12-14); and Page 83 (Lines 28-29). See also *Prosecutor v. Sesay et al*, Trial Transcript, 20 June 2007, Page 34 (Lines 3-6). Issa Sesay's account of his first interactions with OTP investigators described in detail in footnote 133.

<sup>193</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 51 (Lines 3-12, 15-24).

<sup>194</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 83 (Lines 20-26).

<sup>195</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 38 (Lines 12-14) and Page 83 (Lines 28-29).

<sup>196</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 47 (Lines 26-29).

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<sup>197</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 47 (Lines 28-29) and Page 48 (Lines 1-4).

<sup>198</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 51(Lines 15-24).

<sup>199</sup> See e.g. *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 83 (Lines 20-26).

<sup>200</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 83.

<sup>201</sup> See Gilbert Morissette’s testimony in *Prosecutor v. Sesay et al*, Trial Transcript, 13 June 2007, Pages 40-42. See John Berry’s answers in *Prosecutor v. Sesay et al*, Trial Transcript, 14 June 2007, Pages 106-107.

<sup>202</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 83 (Lines 2-14) and (Lines 20-26).

<sup>203</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 83 (Lines 20-26).

<sup>204</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 83 (Lines 20-29) and Page 84 (Lines 1-2).

<sup>205</sup> See testimony of the John Berry regarding the questioning surrounding this break and Mr. Sesay’s subsequent confession, *Prosecutor v. Sesay et al*, Trial Transcript, 14 June 2007, Page 107. Custodial interview referenced in the testimony can be found in Voir Dire Exhibit A7, “Transcript of 31 March 2003 Prosecution Interview with Issa Sesay.”

<sup>206</sup> See e.g. *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 40 (Lines 22-24); Page 46 (Lines 11-14); Page 50 (Lines 13-16); Page 85 (Line 22).

<sup>207</sup> See cross examination on this topic in *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 120 (Lines 27-29); Page 121 (Lines 1-5).

<sup>208</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Pages 120-122.

<sup>209</sup> For instance, Mr. Morissette can be heard on the 10<sup>th</sup> of March saying to Mr. Sesay, “So being a suspect, which is the reason why there was an arrest warrant issued for you, and that’s why you are considered as a suspect, okay?” (*Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 120 (Lines 25-27).)

<sup>210</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 128.

<sup>211</sup> See two days of *voir dire* testimony by Gilbert Morissette in *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007 and 13 June 2007.

<sup>212</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 13 June 2007, Page 47 (Lines 29).

<sup>213</sup> The Judgment cites “Article 14(4)(g),” but this is plainly a typographical error, as Article 14 was not at issue during the *voir dire* and Article 14 has no section 4 nor any subsection g. The decision meant to cite the Article 17(4)(g) right of the accused “Not to be compelled to testify against himself or herself or to confess guilt.”

<sup>214</sup> *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶60 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>

<sup>215</sup> Based on the fact that “the Accused was questioned in comfortable surroundings, was fed and given water, was granted breaks throughout the interviews, and that the Investigators, in the process spoke professionally and politely to him” the Trial Chamber concluded that the recorded interviews “did not take place under coercive or oppressive circumstances.” *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶58, 60 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>.

<sup>216</sup> See *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶46-52 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>

<sup>217</sup> See *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶50 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>. The Trial Chamber adopted this language and reasoning from an ICTY Appeals Chamber decision in *Prosecutor v. Sefer Halilovic* which the SCSL judges found “logical, appropriate and persuasive.” (¶51)

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- <sup>218</sup> *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶51 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>
- <sup>219</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Pages 90-99. Full medical log entered under seal as Voir Dire Exhibit A17.
- <sup>220</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 94 (Lines 17-19).
- <sup>221</sup> Id. at Page 95 (Lines 21-29).
- <sup>222</sup> *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶59 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>
- <sup>223</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 13 June 2007, Page 65 (Lines 14-17).
- <sup>224</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 21 June 2007, Page 11 (Lines 21-26).
- <sup>225</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Pages 56-57.
- <sup>226</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Pages 75, 89.
- <sup>227</sup> This meeting occurred in on 2 June 2003, after Mr. Sesay had retained counsel. The FBI interview was arranged by the OTP without giving advance notice to Mr. Sesay’s attorneys. Neither of his defense representatives was able to attend the interview because the head of security at the detention facility, Mr. Bob Parnell, only alerted counsel to the meeting the day it was scheduled to happen. *Prosecutor v. Sesay et al*, “Authorities to be Relied Upon in Oral Motion to Exclude Custodial Interviews of Mr. Sesay.” (Annex A), SCSL-04-15-T-792 (1 June 2007).
- <sup>228</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 21 June 2007, Page 11 (Lines 19-29).
- <sup>229</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 13 June 2007, Page 65-66.
- <sup>230</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 13 June 2007, Page 66 (Lines 3-5).
- <sup>231</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 13 June 2007, Page 65 (Lines 28-29).
- <sup>232</sup> See generally voir dire testimony of Issa Sesay regarding the circumstances of his detention on Bonthe and periodic transport to the OTP offices for questioning. (*Prosecutor v. Sesay et al*, Trial Transcript, 19-20 June 2007). Unrefuted facts acknowledged by Trial Chamber in *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶45(i) <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>
- <sup>233</sup> Id.
- <sup>234</sup> See Testimony of Ms. Claire Carlton-Hanciles in *Prosecutor v. Sesay et al*. Trial Transcript, 20 June 2007, Pages 41-42.
- <sup>235</sup> The three duty counsel in the Defense Office took instructions from the Registrar’s office until defense attorney, John Jones, later took up post as acting Principal Defender. As administrative, court management officers, neither the Registrar nor his deputy were lawyers. They did have a legal advisor, however, but the name of Mariana Goetz.
- <sup>236</sup> *Prosecutor v. Sesay et al*. Trial Transcript, 20 June 2007 Page 43 (Lines 10-11).
- <sup>237</sup> *Prosecutor v. Sesay et al*. Trial Transcript, 20 June 2007 Page 42 (Lines 1-7).
- <sup>238</sup> *Prosecutor v. Sesay et al*, Case No. SCSL 04-15-T. Voir Dire Exhibit I. Interoffice Memorandum, “Judge Thompson’s Request for Information on the Questioning of Issa Hassan Sesay, dated 1 May 2003.” From Robin Vincent, Registrar, to Judge Bankole Thompson (13 May 2003). ¶¶13-15.
- <sup>239</sup> Id. at ¶14.
- <sup>240</sup> Id. at ¶14.
- <sup>241</sup> Id. at ¶15.
- <sup>242</sup> Id. at ¶15.
- <sup>243</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 13 June 2007, Page 21 (Line 20).
- <sup>244</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 13 June 2007, Page 22 (Lines 5-6).
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<sup>245</sup> *Prosecutor v. Sesay et al*, Case No. SCSL 04-15-T. Voir Dire Exhibit I. Interoffice Memorandum, “Judge Thompson’s Request for Information on the Questioning of Issa Hassan Sesay, dated 1 May 2003.” From Robin Vincent, Registrar, to Judge Bankole Thompson (13 May 2003). ¶15.

<sup>246</sup> *Id.* at 18.

<sup>247</sup> Voir Dire Exhibit I includes a contemporaneous memo authored by Haddijatou Kah-Jallow on 13 March 2003 describing contacts with SCSL detainees on the 12<sup>th</sup> of March. Her apparent claim to have seen Mr. Sesay on the 12<sup>th</sup> contradicts John Berry’s claim (also in a contemporaneous memo appended to Voir Dire Exhibit I) that duty counsel saw Mr. Sesay at the OTP offices on the 13<sup>th</sup> of March. (See Voir Dire Exhibit I, Interoffice Memorandum from John Berry to Gilbert Morissette and Brenda Hollis, “Contacts with Issa Sesay” (17 April 2003).) Mrs. Kah-Jallow’s memo describes having a private meeting with Issa Sesay away from the detention facility. As duty counsel’s memo comments, “the detainee was extremely emotional and broke down into tears several times during the interview. He said that he had a bout of malaria but had received medication and was recovering. Mr. Sesay also stated that he is well treated at the detention facility. He expressed his [*sic*] to see his family. He specifically stated that he wished to be represented by a Nigerian, American or European. I presented him with the list of defense counsel with their resumes he retained the resumes of the Nigerian and American Counsel.” (Voir Dire Exhibit I, “In Confidence Memorandum” from Haddijatou Kah-Jallow to Ibrahim S. Yihhal, Claire Carlton-Hanciles, Beatrice Ureche, and Mariana Goetz. (13 March 2003).) Mr. Sesay testified during the *voir dire* that he has no recollection of meeting duty counsel on that day, but corroborating evidence suggests some sort of contact was made with the accused on the 13<sup>th</sup> to secure his signature on a power of attorney form. The form was signed by the accused, detention center staff member Malcom Hutchinson, and Haddijatou Kah-Jallow. (Form mentioned in paragraph 5 of the “Extremely Urgent and Confidential Request of Defence Office for Order Regarding Contact with Accused.” (16 April 2003). Copy of signed form annexed to Request. For reference to document, *see* SCSL Transcript. 20 June 2007, Page 15.) Neither Berry’s memo nor his testimony included mention of anyone other than a female Gambian defense counsel visiting Mr. Sesay, leaving unexplained how and why a detention officer’s signature made it onto the paper as a witness. The Prosecution did not call the duty counsel in question to the stand to testify in detail about the circumstances of the meeting or explain whether a detention officer’s presence during the meeting could have breached attorney-client privilege.

<sup>248</sup> See *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶18 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf> (Trial Chamber summary of Prosecution submissions)

<sup>249</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 21 June 2007, Page 6 (Lines 20-22); Page 8 (Lines 26-29).

<sup>250</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 21 June 2007, Page 6 (Lines 20-22); Page 8 (Lines 26-29).

<sup>251</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 21 June 2007, Page 6 (Lines 18-19).

<sup>252</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 7 June 2007, Page 60 (Lines 16-29).

<sup>253</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 6 June 2007, Page 29 (Lines 9-14).

<sup>254</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 5 June 2007, Page 106 (Lines 10-14).

<sup>255</sup> *Id.* at Page 91 (Lines 10-12).

<sup>256</sup> *Id.* at Page 106 (Lines 15-21).

<sup>257</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 14 June 2007, Page 96 (Lines 4-7).

<sup>258</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 79 (Lines 4-10).

<sup>259</sup> *Prosecutor v. Sesay et al*. Trial Transcript, 19 June 2007, Pages 41-42.

<sup>260</sup> See *Prosecutor v. Sesay et al*. Trial Transcript, 19 June 2007, Page 46.

<sup>261</sup> See *Prosecutor v. Sesay et al*. Trial Transcript, 19 June 2007, Page 42 (Lines 2-3).

<sup>262</sup> See *Prosecutor v. Sesay et al*. Trial Transcript, 19 June 2007, Page 46 (Lines 6-7).

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- <sup>263</sup> *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶12-27 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>
- <sup>264</sup> *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. (Findings) ¶45-65 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>
- <sup>265</sup> *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶58-60 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf> The Court based its decision on the fact that “the Accused was questioned in comfortable surroundings, was fed and given water, was granted breaks throughout the interviews, and that the Investigators, in the process spoke professionally and politely to him.”
- <sup>266</sup> See *Prosecutor v. Sesay et al*, Trial Transcript. 15 June 2007, Page 4-5.
- <sup>267</sup> Id.
- <sup>268</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 79 (Lines 1-17).
- <sup>269</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 14 June 2007, Page 12 (Lines 21-22).
- <sup>270</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 13 June 2007, Page 55 (Lines 13-18).
- <sup>271</sup> Id. at Page 56 (Lines 15-21).
- <sup>272</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 14 June 2007, Page 96 (Lines 13-14).
- <sup>273</sup> Id. at Page 94 (Lines 27-28)
- <sup>274</sup> Id. at Page 94 (Lines 19-25).
- <sup>275</sup> Id. at Page 94 (Lines 26-28).
- <sup>276</sup> Id.
- <sup>277</sup> As discussed above in Footnote 244, Mr. Sesay’s first contact with duty counsel appears to have occurred sometime on his fourth day of interviews (13 March 2003).
- <sup>278</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 6 June 2007, Page 30 (Lines 3-4).
- <sup>279</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 6 June 2007, Page 30.
- <sup>280</sup> *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶55-57 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>
- <sup>281</sup> *Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-2, “Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence.” (2 September 1997).
- <sup>282</sup> *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶56 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf> (Quoting from *Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-2, “Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence.” ¶59 (2 September 1997).)
- <sup>283</sup> See *Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-2, “Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence.” (2 September 1997).
- <sup>284</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 5 June 2007, Page 91 (Lines 4-26).
- <sup>285</sup> Id. at ¶57.
- <sup>286</sup> <sup>286</sup> *Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-2, “Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence,” ¶67 (2 September 1997).
- <sup>287</sup> See e.g. oral submissions by counsel for the accused prior to the *voir dire* in *Prosecutor v. Sesay et al*, Trial Transcript, 5 June 2007, Page 91..
- <sup>288</sup> *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶56 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>
- <sup>289</sup> Mr. Sesay’s first language was Temne (his tribal language) followed by Krio, the *lingua franca* of Sierra Leone.
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<sup>290</sup> *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶56 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>

<sup>291</sup> *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶56 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>

<sup>292</sup> Effectively, the majority decision refused to analyze the procedural obligations of Court officers in the context of the SCSL’s unique institutional circumstances and the social and political realities of the population over whom the Court exercises jurisdiction. This approach stands in sharp contrast to a 2006 decision rendered by the same three judges in the CDF case. In that case, Trial Chamber I granted Defense witnesses a heightened degree of procedural protection based on the cultural context in which the Court was operating. Specifically, the Court acknowledged the negative and fearful public perception of police power in a post-conflict state like Sierra Leone, and accordingly limited to power of Prosecution investigators to approach and question Defense witnesses. Noting the risk that such direct questioning might be inherently oppressive, the Chamber resolved: “We find merit in the Defence submission that the general population might feel intimidated by being approached by the police directly, considering that this country has been through many years of armed conflict and that the social and political situation in Sierra Leone is such that it might reasonably lead to apprehension within the general population as to the role and power of the police.” (*Prosecutor v Norman et al.*, Case No. SCSL-04-15-T-629, “Decision on Joint Defence Motion Regarding the Propriety of Contacting Defence Witnesses” ¶23 (20 June 2006)). Based on this logic, the Trial Chamber agreed in 2006 to prohibit Prosecution investigators from directly approaching Defense witnesses and seeking interviews for the CDF case. To avoid the inherent risk of witness intimidation, the Court instead required that the SCSL’s neutral WVS unit make the initial contact, to “explain to a witness his or her right to refuse to be interviewed and to make sure that a proper consent for an interview was obtained.” (*Prosecutor v Norman et al.*, Case No. SCSL-04-15-T-629, “Decision on Joint Defence Motion Regarding the Propriety of Contacting Defence Witnesses” ¶23 (20 June 2006)). After reaching apparently contradictory conclusions in the RUF *voir dire*, the two judge majority did not explain why it thought accused persons before the Special Court were any less vulnerable than witnesses were to coercion and intimidation.

<sup>293</sup> *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T-1188 “Separate concurring and partially dissenting opinion of Hon. Justice Benjamin Mutanga Itoe on the decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) ¶42-43 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>

<sup>294</sup> *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T-1188 “Separate concurring and partially dissenting opinion of Hon. Justice Benjamin Mutanga Itoe on the decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) ¶52 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>

<sup>295</sup> *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T-1188 “Separate concurring and partially dissenting opinion of Hon. Justice Benjamin Mutanga Itoe on the decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) ¶52 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>

<sup>296</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Pages 80 (Lines 18-20).

<sup>297</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 76 (Lines 27-29).

<sup>298</sup> Compare John Berry’s testimony (*Prosecutor v. Sesay et al*, Trial Transcript, 14 June 2007, Page 59 (Lines 21-29)) with that of the accused, Issa Sesay (*Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 80 (Lines 14-16)). Although still employed by the SCSL Defense Office, and available in Freetown at the time of the *voir dire*, Mrs. Kah-Jallow was not called to testify about her contacts with the accused.

<sup>299</sup> See copy of original request appended to *Prosecutor v. Sesay et al*, “Authorities to be Relied Upon in Oral Motion to Exclude Custodial Interviews of Mr. Sesay.” (Annex B), SCSL-04-15-T-792 (1 June 2007).

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<sup>300</sup> Id.

<sup>301</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Pages 76-79. According to Mr. Sesay, he understood that Edo Okanya was Foday Sankoh's lawyer, but Prosecution investigators told him outright "we would not want him for you." They discouraged him from requesting Mr. Okanya, and insisted he pick a "white man" instead. The SCSL Defence Office noted in written comments on a draft version of this report that Mr. Edo Okanya was not included on the List of Qualified Counsel maintained by the Defence Office. Consequently, he was never assigned to represent any Suspect or Accused before the SCSL at any point in time.

<sup>302</sup> See narrative account by the accused at *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Pages 76-81.

<sup>303</sup> When duty counsel arrived midway through the morning on the 24<sup>th</sup> of March, the official transcript reflects that Mr. Berry suspended the formal interview for a short period of time. What transpired next is subject to dispute. Berry claims he left Mrs. Kah-Jallow and Mr. Sesay to speak in confidence, while the accused insists Mr. Berry remained in the room, by the door. According to Mr. Sesay, Mrs. Kah-Jallow greeted him and said, "I heard you wanted Mr. Roberson as a lawyer...the white man?" Mr. Sesay affirmed, but got the name wrong on the request for counsel that he handwrote: "I, Issa H. Sesay want Mr. Robinson to represent me and not Mr. Edo Okanya." (See *Prosecutor v. Sesay et al*, "Authorities to be Relied Upon in Oral Motion to Exclude Custodial Interviews of Mr. Sesay." (Annex B), SCSL-04-15-T-792 (1 June 2007).) If Mr. Berry were telling the truth about remaining totally uninvolved in Mr. Sesay's choice of counsel, then this sentence, which the investigator read before he signed the document as a witness, would be his only source of information about the preferences of the accused. Yet, in an internal OTP memo authored by Mr. Berry on 17 April 2003, he betrayed knowledge of additional details. Berry's contemporaneous memo describes the visit from Mrs. Kah-Jallow as follows: A female Gambian lawyer came to see Mr. Sesay on March 24<sup>th</sup>, 2003. She "spoke with him privately and had me witness a note which she had prepared indicating that Issa Sesay did not want a local lawyer to represent him but instead was requesting that they get him an American or a British lawyer by the name of Robertson." (See Voir Dire Exhibit I, Interoffice Memorandum from John Berry to Gilbert Morissette and Brenda Hollis, "Contacts with Issa Sesay" (17 April 2003).) Without either being present during duty counsel's visit with the accused, or speaking with Mr. Sesay previously about who he ought to request, Mr. Berry could not possibly have known the details he included in his 2003 memo. These details were not discernable from the one sentence, hand written note Mr. Berry signed as a witness. If, as he claimed, he and Morissette never suggested a particular lawyer to Mr. Sesay, he could not have known anything about Mr. Sesay's nationality preferences, and he would never have heard the name "Robertson" suggested. The only name he would have known would be "Robinson"—the name Mr. Sesay actually wrote on the March 24<sup>th</sup> note. The additional information Mr. Berry provided in his memo would tend to indicate that he was either present during the meeting with duty counsel (as Mr. Sesay claimed in his testimony) or had previously heard Mr. Morissette instruct Mr. Sesay to request a white man by the name of "Robertson" (a fact Mr. Sesay insists upon and Mr. Morissette denies).

<sup>304</sup> See SCSL Rules of Procedure and Evidence, Rule 63(A) and Rule 42(b).

<sup>305</sup> *Prosecutor v. Sesay et al*, Case No. SCSL 04-15-T. Voir Dire Exhibit F. Letter from Acting Chief of Defense, John Jones to Prosecutor, David Crane (14 April 2003).

<sup>306</sup> Id.

<sup>307</sup> Id.

<sup>308</sup> See *infra* Appendix D for a reproduction of the additional rights waiver Mr. Sesay signed.

<sup>309</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 45.

<sup>310</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 85 (Lines 10-19). John Berry denied this ever happened, testifying under cross examination last week "I don't recall that." *Prosecutor v. Sesay et al*, Trial Transcript, 15 June 2007, Page 29 (Line 2).

<sup>311</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Pages 43-48; 13 June 2007, Pages 48-50.

<sup>312</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 43 (Line 21).

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<sup>313</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Pages 43-48.

<sup>314</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 85 (Line 22).

<sup>315</sup> Voir Dire Exhibit E. “Specific Rights Advisement” (14 April 2003). See also Voir Dire Exhibit G, “Precision on Questions 7 and 8” (15 April 2003). Recreated at Appendix B. The original documents are rife with typographical errors and were plainly drafted in a rush.

<sup>316</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Pages 85-86.

<sup>317</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 87 (Lines 1-27).

<sup>318</sup> See Voir Dire Exhibit E. “Specific Rights Advisement” (14 April 2003). See also Voir Dire Exhibit G, “Precision on Questions 7 and 8” (15 April 2003). Recreated at Appendix B.

<sup>319</sup> Investigators suspended interviews with the accused after he twice answered essentially identical inquiries on the “Specific Rights Advisement” inconsistently. Prior to beginning the interview on April 15<sup>th</sup>, Mr. Morissette brought the accused a second specific rights advisement in order to clarify an ambiguity between two of his previous answers. On the 14<sup>th</sup> of April, Mr. Sesay answered “Yes” to question 7 and “No” to question 8 on the Specific Rights Advisement. Because the two questions posed essentially the same inquiry, the answers should have been consistent, were the questions properly understood. The document Mr. Morissette presented to Mr. Sesay on the 15<sup>th</sup> of April asked the accused to re-answer verbatim reproductions of questions 7 and 8. Mr. Sesay did so, again answering the two questions inconsistently with one another. This time, however, he inverted his “yes” and “no” answers—answering question 7 in the negative and question 8 in the affirmative. (See *infra* Appendix D for reproduction of the advisement entitled “Precisions on Questions 7 and 8.”)

<sup>320</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 19 June 2007, Page 89 (Lines 17-19).

<sup>321</sup> *Id.* at (Lines 19-21).

<sup>322</sup> *Id.* at (Lines 21-25).

<sup>323</sup> *Id.* at (Lines 28-29).

<sup>324</sup> *Id.* at Page 90 (Lines 1-5).

<sup>325</sup> *Id.*

<sup>326</sup> *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶63 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>

<sup>327</sup> *Id.* at ¶61.

<sup>328</sup> *Id.*

<sup>329</sup> See *Prosecutor v. Sesay et al*, “Separate concurring and partially dissenting opinion of Hon. Justice Benjamin Mutanga Itoe on the decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶¶37-41 <http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>

<sup>330</sup> Mr. Sesay’s ongoing ignorance about the availability of legal assistance and the role of duty counsel at the Special Court is evidenced in numerous contemporaneous documents, including the transcript of his March 15, 2003 initial appearance before Judge Itoe, (See *Prosecutor v. Sesay et al*, Trial Transcript, 6 June 2007, Page 30 (Lines 3-4)) as well as statements he made on the record during his ongoing custodial interrogation transcripts (See quoting references used during Defense cross examination of Gilbert Morissette: *Prosecutor v. Sesay et al*, Trial Transcript, 13 June 2007, Page 55 (Lines 13-18), Page 56 (Lines 15-21). See also discussion *supra* at Section III(h)(pg. 26-27). By logical deduction, Mr. Sesay was not adequately apprised of the defense resources that should have been available to him.

<sup>331</sup> See Sara Kendall and Michelle Staggs *First Interim Report on the Special Court for Sierra Leone* (War Crimes Studies Center, April 2005) at page 7.

<sup>332</sup> The Chief of Investigations testified during the voir dire that Special Court investigators were customarily briefed before particular investigative operations, and they would plan their interviews according to that briefing. *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 61 (Lines 13-16).

<sup>333</sup> Telephone Interview with David Crane. September 24, 2007.

<sup>334</sup> *Id.*

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<sup>335</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 60 (Lines 15-18).

<sup>336</sup> *Id.* at Page 59 (Lines 21-28).

<sup>337</sup> Interview with Prosecutor Stephen Rapp. July 15, 2007. Freetown, Sierra Leone.

<sup>338</sup> Telephone Interview with David Crane. September 24, 2007.

<sup>339</sup> Interview with Prosecutor Stephen Rapp. July 15, 2007. Freetown, Sierra Leone.

<sup>340</sup> As Gilbert Morissette testified during the voir dire, “the investigators have their tasks, and [the procedure] is worked out among themselves.” *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 61 (Lines 13-16).

<sup>341</sup> *Id.* at (Lines 5-12).

<sup>342</sup> *Id.* at (Lines 18-22).

<sup>343</sup> Telephone Interview with David Crane, September 24, 2007.

<sup>344</sup> Telephone Interview with David Crane, September 24, 2007.

<sup>345</sup> *Togo government says U.N.-backed court tried to arrest ex-Liberian general Benjamin Yeaten* (Lomé, Togo) Associated Press, 19 March 2004.

<sup>346</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 58 (Lines 17-22).

<sup>347</sup> See e.g. *Prosecutor v. Sesay et al*, “Motion to Request the Trial Chamber to Hear Evidence Concerning the Prosecution’s Witness Management Unit and its Payments to Witnesses.” (30 May 2008). Subsequent judgment rendered in “Decision on Sesay motion to request the Trial Chamber to hear evidence concerning the Prosecution’s Witness Management Unit and its payments to witnesses.” (25 June 2008) SCSL-04-15-T-1185.

It should be noted that the Witness Management Unit (WMU) is a separate entity from the independent Witness and Victims Support Unit (WVS). WMU is an OTP entity created pursuant to the Prosecutor’s powers under Rule 39(ii) to “take all measures deemed necessary for the purpose of the investigation, including taking of any special measures to provide for the safety, the support and the assistance of potential witnesses and sources.” According to the Special Court’s 2007-2009 budget report, OTP’s witness management unit “provides critical confirmation of witness evidence and provides support for persons required to give evidence.” SCSL Annual Budget 2007-2009 (Page 22).

<sup>348</sup> Telephone Interview with David Crane. September 24, 2007.

<sup>349</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 14 June 2007, Page 65 (Lines 3-6).

<sup>350</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 68 (Lines 8-9).

<sup>351</sup> *Id.* at Page 70 (Lines 24-25).

<sup>352</sup> *Id.* at Page 71 (Lines 1-15).

<sup>353</sup> *Prosecutor v. Sesay et al*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶46-52 and 60 <http://www.scsl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>).

<sup>354</sup> *Id.* at Page 84 (Lines 11-15).

<sup>355</sup> *Id.* at Page 100 (Lines 10-29).

<sup>356</sup> “Yes, Your Honor. On that, I think the whole -- in respect to the -- probably the whole transcript.” *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 101 (Lines 17-18).

<sup>357</sup> *Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 102 (Lines 27-29).

<sup>358</sup> *Id.* at Page 103 (Line 17).

<sup>359</sup> See *supra*, note 185.

<sup>360</sup> Telephone Interview with David Crane. September 24, 2007.

<sup>361</sup> *Id.*

<sup>362</sup> Interview with Prosecutor Stephen Rapp. July 15, 2007. Freetown, Sierra Leone.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> It should be noted that this report does *not* mean to suggest that the diversity of professional backgrounds found in the OTP was, itself, a root cause of investigative problems. Indeed, the mixed composition may well represent the best way to draw on various skill sets and professional expertise. The

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author of this report makes no claims to the contrary. Tribunals may legitimately (and wisely) staff an investigations section with a mix of lawyers, police investigators from domestic jurisdictions, international criminal investigators, human rights/NGO investigators, magistrates, expert regional scholars, and experts in vulnerable witnesses. That said, this report seeks to make the point that each of these individuals brings his or her own professional deficiencies (a regional expert knows a lot about the conflict zone but may be ill-equipped to follow proper investigative protocol on taking statements, while a foreign police investigator is trained in statement-taking, but will likely need help understanding the history of the conflict and the cultural context in which he finds himself newly employed). This report sees no problem hiring such individuals, *per se*, but the diversity and disparities between different investigators' prior training, professional experience, and cultural backgrounds should give rise to meaningful and robust training aimed at bridging any gaps that may exist. In this respect, an OTP may harness the benefits of a diverse staff, while ensuring that the Investigations Section operates according to uniform protocol, and produces consistently high quality work.

<sup>366</sup> Telephone Interview with David Crane, September 24, 2007.

<sup>367</sup> SCSL Annual Budget 2007-2009 (Page 21).

<sup>368</sup> Telephone Interview with David Crane. September 24, 2007.

<sup>369</sup> In a mild critique of OTP hiring strategy, the UN Rapporteur's report on the Special Court concluded that David Crane's reluctance to hire individuals with prior international law experience left gaps in the organ: "While the Registry and Chambers tried, where possible, to draw on staff with some experience at the other tribunals, the OTP had only two or three senior lawyers with previous tribunal experience. Only later did the OTP begin to recruit staff with significant working experience at the ICTR or the ICTY. These new staff members brought additional skills and experiences that were previously missing." (Cassese Report, ¶56)

<sup>370</sup> Telephone Interview with David Crane, September 24, 2007.

<sup>371</sup> Id.

<sup>372</sup> Id.

<sup>373</sup> Id.

<sup>374</sup> Id.

<sup>375</sup> Id.

<sup>376</sup> Response to written interview questions submitted to the OTP by the author, September 30, 2007.

<sup>377</sup> Telephone Interview with Corinne Dufka. September 21, 2007.

<sup>378</sup> Id.

<sup>379</sup> Mr. Jordash gave Mr. Morissette a copy of Article 17 for reference on the stand, asked him to review it, and then requested that the Chief explain his understanding of the right to counsel without looking at the paper. Mr. Morissette became extremely agitated, and answered, "What I understand it to be? That he is entitled to have a lawyer. If one cannot be provided to him, it would be provided to him, and what's the other one? There is another part-- I forget." (*Prosecutor v. Sesay et al*, Trial Transcript, 12 June 2007, Page 119 (Lines 26-28).) The Chief's answer left off the parts of Article 17 that describe an indigent detainee's entitlement to legal aid, the fact that an accused has a right to counsel of one's own choosing, and the existence of a right to adequate time and facilities for the preparation of one's own defense with the assistance of chosen or assigned counsel.

<sup>380</sup> See *Prosecutor v. Sesay et al*, Trial Transcript, 13 June 2007, Page 47 (Lines 29).

<sup>381</sup> Telephone Interview with Corinne Dufka. September 21, 2007.

<sup>382</sup> Of the four Senior Trial Attorneys to have prosecuted a case at the Special Court, only one, Kevin Tavener (former STA for the CDF case), was at liberty to speak about his experience for this report. Having returned to work full time in his home jurisdiction at the conclusion of the CDF case, Tavener is no longer employed by the OTP, and is therefore not subject to the OTP policy against interviews. Karim Agha (STA for the AFRC trial), Brenda Hollis (STA for the Taylor trial), and Peter Harrison (STA for the RUF trial) all still work for the SCSL. Pursuant to the OTP aforementioned policy, none could be solicited by the author for interviews.



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<sup>383</sup> Telephone Interview with Kevin Tavener. September 13, 2007.

<sup>384</sup> See War Crimes Studies Center, Special Court for Sierra Leone Monitoring Program, Update No.23.

<sup>385</sup> See War Crimes Studies Center, Special Court for Sierra Leone Monitoring Program, Updates No. 11, No.16, No. 21, No. 22, No.23, No.24, and No.41.

<sup>386</sup> See War Crimes Studies Center, Special Court for Sierra Leone Monitoring Program, Update No. 16.

<sup>387</sup> See War Crimes Studies Center, Special Court for Sierra Leone Monitoring Program, Update No. 16 (page 5, for the allegation from Defence) and No.24 (page 6, for a summary of the testimony of the investigator. During her testimony, she also disclosed that the translation taken of this particular witness was undertaken by a friend of the witness, and not a licensed translator) and No.41 (for a summary of a second investigator called to give evidence),

<sup>388</sup> See War Crimes Studies Center, Special Court for Sierra Leone Monitoring Program, Update No. 16.

<sup>389</sup> *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T-635 “Prosecution Response to Sesay Defence Application for Leave to Appeal the Decision of 1<sup>st</sup> August 2006.” (23 August 2006). ¶7).

<sup>390</sup> This practice has been condemned in rulings by the ICTY and Trial Chamber I of the Special Court. See *Prosecutor v. Kupreskic*, Case No. IT-95-16-A. “Appeal Judgment,” (23 October 2001) ¶82; and *Brdanin and Talic* (26 June 2001) ¶11; also *Prosecutor v. Sesay*, Case No. SCSL-03-05-080. “Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment,” (13 October 2003) ¶33.

<sup>391</sup> See *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T-765 “Defence Motion Seeking a Stay of the Indictment and a Dismissal of All Supplemental Charges (Prosecution’s Abuse of Process and/or Failure to Investigate Diligently).” (24 April 2007).

<sup>392</sup> *Prosecutor v. Sesay* Case No. SCSL-04-15-T-616, “Decision on the Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible.” (1 August 2006) ¶17.

<sup>393</sup> Cassese Report, ¶72

<sup>394</sup> *Id.*

<sup>395</sup> Interview with Prosecutor Stephen Rapp. July 15, 2007. Freetown, Sierra Leone.

<sup>396</sup> Written comments from Luc Cote on draft circulation of this report. August 11, 2008.

<sup>397</sup> Written comments from Luc Cote on draft circulation of this report. August 11, 2008.

<sup>398</sup> *Id.*

<sup>399</sup> Interview with Prosecutor Stephen Rapp. July 15, 2007. Freetown, Sierra Leone.

<sup>400</sup> *Id.*

<sup>401</sup> Telephone Interview with Kevin Tavener. September 13, 2007.

<sup>402</sup> *Id.*

<sup>403</sup> *Id.* Tavener’s observation raises interesting, but unanswered questions about the size and function of the Investigations Section over time. Presumably, even after the CDF, RUF and AFRC cases went to trial, there was still investigative work to be completed for the *Taylor* trial which started much later than the others. Nonetheless, it is curious that the Investigations Section never decreased in size, even as most cases progressed toward trial and even appeal.

<sup>404</sup> Response to written interview questions submitted to the OTP by the author, September 30, 2007.

<sup>405</sup> Unlike regular police, they are not empowered to investigate ongoing criminal activity within the jurisdiction, and they serve no regular patrol or public safety function.

<sup>406</sup> Telephone Interview with David Crane. September 24, 2007.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

<sup>412</sup> Telephone Interview with Kevin Tavener. September 13, 2007.

<sup>413</sup> Telephone Interview with David Crane. September 24, 2007.

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<sup>414</sup> Suzannah Linton, “Cambodia, East Timor and Sierra Leone: Experiments in International Justice” (*Criminal Law Forum* 12: 185-246, 2001)

<sup>415</sup> Even in a well established, functioning domestic system, exclusionary rules are often considered a poor safeguard of personal rights during criminal investigations. See e.g. discussion of U.S. exclusionary rules in Rachel Barkow, *Separation of Powers and the Criminal Law*, NYU Public Law and Legal Theory Working Papers, No. 8 (2005). In the international tribunal setting, broad rules of evidentiary admissibility make exclusionary tools an even less powerful way to control police behavior.

<sup>416</sup> See e.g. *Prosecutor v. Radoslav Brdanin*, Case Number IT-99-36-T, “Decision on Defence Objection to Intercept Evidence,” 3 October 2003, para. 55.

<sup>417</sup> *Id.*

<sup>418</sup> See SCSL Rules of Procedure and Evidence, Rule 95.

<sup>419</sup> *Prosecutor v. Sesay et al.*, “Written reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution.” (30 June 2008) SCSL-04-15-T-1188. ¶38 <http://www.scsl.org/Documents/RUF/SCSL-04-15-T-1188.pdf>

<sup>420</sup> ICTR Rules of Procedure and Evidence, Rule 73(B).

<sup>421</sup> SCSL Rules of Procedure and Evidence, Rule 73(B).

<sup>422</sup> Telephone Interview with David Crane. September 24, 2007.

<sup>423</sup> *Id.*

<sup>424</sup> Testimony of Mr. Gilbert Morissette, under cross examination by Mr. Wayne Jordash during a voir dire inquiry into Prosecution investigative protocol at the Special Court for Sierra Leone. See *Prosecutor v. Sesay, Kallon, and Gbao*, Case No. SCSL 04-15-T. Trial Transcript. 12 June 2007, Page 103 (Lines 15-23). [Hereinafter “*Prosecutor v. Sesay et al.*”]

<sup>425</sup> Gregory Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*. 45 COLUM. J. TRANSNAT'L L. 635, 639 (2007).

<sup>426</sup> David M. Crane, *Dancing With the Devil: Prosecuting West Africa's Warlords, Current Lessons Learned and Challenges*, Address before the Colloquium of International Criminal Tribunals. November 25-27 2004. <http://69.94.11.53/ENGLISH/colloquium04/Crane.htm>