SPECIAL COURT MONITORING PROGRAM UPDATE # 100
TRIAL CHAMBER I – RUF TRIAL
WEEK ENDING JUNE 15, 2007

BY PENELOPE VAN TUYL
SENIOR RESEARCHER

SUMMARY

The Investigations Section of the Office of the Prosecutor (OTP) came into serious disrepute this week during a special voir dire hearing to determine the admissibility of post-arrest statements made in 2003 by first accused, Issa Sesay. The four investigators called by the Prosecution to testify in this "trial within a trial" denied any professional misconduct or procedural rights violations during Mr. Sesay's arrest, detention, and interrogation. However, they went on to give evidence in direct and cross examination which, to varying degrees for each witness, largely corroborated the Defense allegations that Mr. Sesay's statements were taken in breach of Article 17 of the Statute of the Court and the Rules of Procedure and Evidence. The testimony further confirmed numerous irregular, unexplained investigative practices of the OTP unit.

Beyond the impact this week's proceedings may have on the narrow question of evidentiary admissibility, the testimony delivered by OTP's own investigators would appear to impeach the integrity and professionalism of certain senior members of the Investigations section. It remains to be seen whether OTP or Registry officials will launch any sort of administrative inquiry into the general investigative protocol followed by Prosecution investigators. Neither OTP nor the Registry wished to comment when formally asked to do so by the author of this report. Both cited a policy of withholding remarks on matters *sub judice* in the Special Court.

WITNESS PROFILES AT A GLANCE

GILBERT MORISSETTE: 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 (RCMP). He testified in English.

JOHN BERRY: Mr. Berry has been a member of the RCMP 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 testified in English.

LITHO LAMIN**:** Mr. Lamin is a superintendent of police in Magburaka. 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 first accused, Issa Sesay. Lamin was the arresting officer. He testified in English.

JOSEPH SAFFA**:** 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 testified in English.

VOIR DIRE ON THE MATTER OF VOLUNTARINESS WITH REGARD TO POST-ARREST STATEMENTS MADE BY ISSA SESAY

This week, Peter Harrison called Chief of Investigations Gilbert Morissette, Investigations Commander John Berry, and investigators Litho Lamin and Joseph Saffa to testify for the Prosecution during a specially ordered voir dire. Trial Chamber I ordered the "trial within a trial" at the end of last week in order to gather additional factual evidence to assist the Judges in determining the admissibility of statements Mr. Sesay made to OTP investigators during eleven days of custodial interrogation following his March 2003 arrest. From Tuesday through Friday of this week, Counsel for the Prosecution and the Defense examined Mr. Morissette, Mr. Berry, Mr. Lamin and Mr. Saffa. These witnesses were asked about the circumstances surrounding Sesay's arrest and the details of their personal involvement with the subsequent custodial interviews. All four men asserted at some level of abstraction that they had carried out proper, professional investigations, in full compliance with Mr. Sesay's procedural rights. However, the investigators' specific factual testimony largely confirmed Defense allegations of unexplained procedural irregularities and behavior by Investigators which would plainly appear to be in breach of certain basic rights of the accused. Testimony by Prosecution witnesses confirmed, among other things, that Mr. Sesay was arrested and solicited for insider collaboration without knowing the charges against him or his rights as an accused. Moreover, for the days immediately following his arrest, Mr. Sesay was held incommunicado, questioned at length without representation, and subjected to various forms of off-the-record coercion by then-Deputy Chief of Investigations, Gilbert Morissette.

On direct examination, Mr. Harrison led his witnesses chronologically through events—beginning with Mr. Sesay's March 10th 2003 arrest, and ending with his final custodial interview on the 15th of April.[1] Mr. Harrison sought to highlight points of procedural regularity and compliance with the Rules, however, his very first witness, Gilbert Morissette, severely undermined this effort by volunteering information about repeated off-the-record conversations he had with the accused throughout March and April. Thus, even as John Berry testified about repeatedly reading the rights advisement to the accused, and about Mr. Sesay's apparent on-the-record compliance with questioning, Mr. Morissette's role *off*-the-record loomed large throughout the voir dire. This revelation immediately vitiated the Prosecutor's position from last week—that inquiry into the admissibility need proceed no further than the face of the transcript—and raised serious questions about whether Mr. Sesay's statements were involuntarily elicited through fear of prejudice or hope for advantage held out by figures of authority. Mr. Jordash explored this subject in detail on cross examination, adducing a considerable amount of factual evidence favorable to the Defense. In addition to clear technical breaches of Article 17, Rule 43 and Rule 63, Mr. Jordash uncovered persuasive evidence that Prosecution investigators compelled the accused to waive his rights through deliberately coercive off-the-record conduct, including promises, inducements and threats.

[1] See Annex to this Report for a comparative, chronological outline of these events as recounted by Prosecution witnesses on direct and cross examination.

NATURE AND EXTENT OF ALLEGED OFF-THE-RECORD COERCIVE CONDUCT

According to the Prosecution case, Mr. Sesay willingly agreed to cooperate with investigators at 1:25pm on March 10th 2003 and was never thereafter subjected to any improper promises, inducements, or threats which could possibly vitiate the voluntariness of his decision to waive his rights and speak. Mr. Morissette conducted Mr. Sesay's first custodial interrogation on the day of his arrest. After that date, John Berry took over the interviewing, and became the principle investigator appearing on the interview transcripts. Primarily through the testimony of these two witnesses, Counsel for the Prosecution advanced the case that Mr. Sesay *wanted* to speak with investigators and eagerly agreed to do so when John Berry approached him in detention on the 10th. Mr. Harrison took Mr. Morissette and Mr. Berry methodically through the days of recorded interviews and repeatedly inquired, "At any point, did you utter or hear uttered any threats, promises, or inducements?" The investigators invariably responded no, they *never*, at any point during the eleven days of custodial interrogation, "heard or made any promises, threats or inducements to Mr. Sesay." However, the force of these assertions began to crumble even before Defense Counsel cross examined the first witness. Under direct examination, Mr. Morissette volunteered a description of his ongoing investigative strategy, which included initiating off-the-record conversations with the accused in order to "bond with him," and make clear to him that the only way he was going to get an advantageous deal with the Prosecution was if he spoke candidly and gave them useful information. This revelation raised serious questions about the specific content and propriety of these conversations—made all the more suspicious by the fact that the Prosecution had been adamantly denying their existence up until the moment Mr. Morissette took the stand. Mr. Morissette confirmed on cross examination that his substantive role in the interrogation process did not end after the 10th—Far from it. By his own account, he appears to have secured Mr. Sesay's ongoing cooperation with the OTP by dangling incentives and articulating consequences in a manner which could easily be construed as inducements, promises, and threats. Counsel for the accused advanced the case, throughout cross examination, that "sophisticated modes of persuasion can be designed, in unscrupulous hands, to ensure acquiescence of an accused on a tape,"[2] and that this is precisely what happened to Mr. Sesay.

Promises and Inducements

Mr. Morissette testified that his "main role from March 11th onward" was to engage in what he describes as "witness confidence building." This entailed talking informally to Sesay outside the interview room about the benefits of cooperation as well as the risks of "holding back" in his statements to investigators. Mr. Jordash inquired why it was necessary to dispatch such a senior OTP officer to the task of keeping Mr. Sesay "on-side," if, as the Prosecution assert, Mr. Sesay had volunteered to cooperate. Mr. Morissette appeared to clearly undermine his earlier statement about promises by testifying that his task was, "Just to re-emphasize, you know, what we were doing and that we would be keeping our word. We would keep our word."[3] When Mr. Jordash sought to crystallize the point, Mr. Morissette didn't retreat:

Mr. Jordash:	And reassuring him that you would do what had been promised?
Mr. Morissette:	That's correct.
Mr. Jordash:	And so it was his -- well, it's his cooperation for – in exchange for the promise?
Mr. Morissette:	His collaboration in exchange to what we could do for him, yes.[4]

Mr. Morissette confirmed that he used trickery insofar as he presented himself to Mr. Sesay off-the-record as a friend of sorts. Mr. Morissette drew an analogy between undercover police work and the tactics he used in his off-the-record interactions with Mr. Sesay. "I'm an old undercover operator and, as it's been

[2] SCSL Transcript. 14 June 2007, Page 80 (Lines 26-28).
[3] SCSL Transcript. 13 June 2007, Page 28 (Lines 22-23).
[4] SCSL Transcript. 13 June 2007, Page 29 (Lines 5-11).

brought up too, in Canada, [tricks are] allowed. You can use things like this when you're in an undercover role operation, and you could use it also when you're interviewing suspect[s]. To my knowledge, there's nothing wrong with it."[5] By gaining the confidence of the accused, outside the interrogation room, off-the-record, he sought to more effectively persuade Mr. Sesay that it would be in his best interest to speak candidly with the OTP:

Mr. Jordash:	And you have to persuade them that you are a friend who is looking after, to a certain extent, their interests?
Mr. Morissette:	Yes.
Mr. Jordash:	And, by that manner of persuasion, they slowly understand that their interests may be looked after by collaborating with you?
Mr. Morissette:	Yes.
Mr. Jordash:	And so, by persuading them that if they collaborate and say what you find useful, they will receive something for their efforts; is that fair?
Mr. Morissette:	Yes.[6]

Mr. Morissette insisted that his covert investigative strategy was not to "induce" the accused to confess. Nevertheless, under cross examination, Mr. Morissette confirmed discussing various quid pro quo arrangements that the OTP was purportedly willing to make with Sesay *if* and only if he was sufficiently forthcoming in interviews:

Mr. Jordash:	And 'collaboration,' as you explained to him was, basically giving an account which would mean he could become a witness?
Mr. Morissette:	Yeah.
Mr. Jordash:	Yes. So 'collaborating' meant, effectively: Tell us something to support our case and then these issues might—these considerations might happen; correct?
Mr. Morissette:	Correct. That was the only exercise.[7]

According to Mr. Morissette, the incentives OTP investigators presented to Sesay included material support and protective custody for his family, as well as possible sentencing recommendations the Prosecutor would be willing to make on Mr. Sesay's behalf, for the Judges to "take into consideration."

Because Mr. Sesay had been living in the bush, engaged in a guerilla war since early adolescence, he had no experience with formal judicial systems. As such, Mr. Jordash pressed Mr. Morissette to admit that Mr. Sesay must have asked for clarification as to what it meant for a Judge to "take into consideration" the recommendations of a Prosecutor. The witness was generally evasive and vague in his answers. With no contemporaneous notes of the verbal exchanges, he could not give a very clear account of what he specifically told the accused or how many times they discussed various matters. Nonetheless, Mr. Morissette ultimately testified that he did recall Mr. Sesay seeking further clarification, and he did indeed elaborate on the different things judicial "consideration" could possibly mean for the accused—"I think so. I did. Yes."[8] Mr. Morissette insisted he remained "very vague with him," but conceded that he did discuss options such as reduced sentence and other forms of judicial leniency on charges, as well as the possibility that Mr. Sesay would "roll over" and become a witness for the Prosecution.[9]

---

[5] SCSL Transcript. 12 June 2007, Page 84 (Lines 11-15).
[6] SCSL Transcript. 13 June 2007, Page 26 (Lines 3-13).
[7] SCSL Transcript. 12 June 2007, Page 92 (Lines 8-14).
[8] SCSL Transcript. 12 June 2007, Page 91 (Line 27).
[9] Both Mr. Morissette and Mr. Berry were extremely unforthcoming about this underlying motivation for interrogating Mr. Sesay. When questioned about why the OTP approached Mr. Sesay on the day of his arrest (i.e. to

Mr. Morissette further confirmed having discussed the following specific benefits of witness protective measures with Mr. Sesay, both on and off tape, 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."[10] Mr. Jordash asked Mr. Morissette directly whether he considered his behavior "inducement". Mr. Morissette insisted it was not.

On cross examination, Mr. Berry abstractly condemned the behavior Mr. Morissette described, but claimed to have been completely ignorant of it. He denied knowing anything about Mr. Morissette's ongoing efforts to speak to Mr. Sesay off the record about his collaboration and to actively endeavor keep Mr. Sesay "on-side." He testified that, had he known Mr. Morissette was engaged in such an effort, he would have felt obliged to speak with his superiors about it. Furthermore, he would have made reference to these conversations each time recording resumed, pursuant to Rule 43. When Mr. Jordash pressed the matter further, Mr. Berry testified that, as a rule, he would not use witness protective measures as a quid-pro-quo, nor would he make assurances to a wavering cooperator that the things Mr. Morissette offered would be provided in exchange for testimony. Mr. Berry was very clear on that point, "Not for an exchange for testimony."[11] Witness protective measures are subject to disclosure at the Special Court precisely so the opposing party can cross examine the recipient as to whether the incentive induced him or her to testify. Provision of such support is not intended to reward testifying witnesses. It is simply supposed to remove barriers to testifying and ensure that no witness is made *worse* off by his or her participation in the process. As such, it is entirely inappropriate for any investigator on either the Defense or the Prosecution side to deliberately frame witness protective measures as a quid pro quo—amounting to a payment or reward in exchange for testifying.

Mr. Morissette's admitted use of witness protective measures for Mr. Sesay's family took on particular salience when Mr. Jordash crossed the investigators about Mr. Sesay's anxiety and distress with respect to the security and well-being of his family after his arrest. According to Mr. Morissette and Mr. Berry, the accused was held incommunicado for the first several days after his arrest—not permitted to speak with any friends or relatives. Mr. Jordash used this fact to make the point that Mr. Sesay's family was a particularly ripe coercive tool. With his questions, Counsel explored the extent to which investigators strategically capitalized upon Mr. Sesay's vulnerability in their dealings with him. Mr. Morissette freely admitted that investigators made no effort to put Mr. Sesay in touch with his family via telephone until several days after his arrest. Mr. Morissette's only justification was to say that they didn't know where the family was, but he conceded that no one so much as offered the accused access to a phone to try calling his home on the day of his arrest. Mr. Morissette acknowledged being aware at the time that Mr. Sesay was "extremely anxious" about his family. At one point on the afternoon of his arrest, the accused broke down crying and explained to investigators he "got so shattered" when they mentioned his children

---

what end they sought his "cooperation") both men resisted being pinned down to a specific answer. Mr. Berry described the objective in vague terms—simply "to gather information" about the events which occurred during the conflict. When pressed, he acknowledged that the "final objective" would be to have Mr. Sesay testify as an insider witness specifically, he conceded, against Ex-Liberian President Charles Taylor. Mr. Berry insisted that no promises or plea agreements were made and he tendered no offers on the 10th to Mr. Sesay to become a witness. He claims he simply offered Mr. Sesay "the opportunity to speak with the Office of the Prosecutor" and Mr. Sesay agreed without any further assurances.

[10] For approximately a year, Mr. Sesay's wife and children were in fact brought into temporary WVS protective custody, but support payments were later discontinued by the Prosecution with the explanation that Mr. Sesay was no longer a witness or potential witness for the OTP.

[11] SCSL Transcript. 14 June 2007, Page 76 (Line 19).

because "presently, they don't even know my whereabouts. That's what caused me to cry."[12] Mr. Jordash confronted Mr. Morissette with this passage from the transcript. The Chief of Investigations agreed that it is customary police practice in most jurisdictions to give the detainee a phone call, and acknowledged that it would have been "the humane thing to do" in light of Mr. Sesay's obvious distress over his family. When asked pointedly, "*Why* did you not do it?" Mr. Morissette simply shrugged and responded, "I did not do it."[13] In fact, Mr. Morissette did not allow Mr. Sesay to call his wife until midway through his fifth custodial interview, once an agreement had been reached that Mr. Sesay's family would be taken into temporary protective custody in exchange for his continued collaboration with the OTP.

Threats

In addition to promises and inducements, Mr. Jordash advanced the case that Mr. Morissette may have threatened the accused in their discussions off-tape in order to secure Mr. Sesay's acquiescence on tape. Mr. Jordash confronted Mr. Morissette with transcribed evidence of his past interrogation tactics, beginning with an interview he and Alan White conducted with another suspect (who later became a protected Prosecution insider witness) around the same time as Mr. Sesay's arrest. The interview occurred 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 witness to save himself almost certain death in the Sierra Leonean justice system is to collaborate with the Office of the Prosecutor at the Special Court:

> 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, are those who are aware of -- help themselves, you know, that will be taken into consideration in -- by the Prosecutor and by the judge.[14]

When asked to explain what exactly he was doing in this interview, Mr. Morissette deflected the substance of the inquiry by suggesting that there were errors on the transcript. However, when the Bench asked Mr. Morissette to identify and explain what parts he thought contained errors, he could not answer with any specificity at all: "Yes, Your Honor. On that, I think the whole -- in respect to the -- probably the whole transcript."[15] Nevertheless, when Counsel renewed his original substantive inquiry, Mr. Morissette confirmed that he was indeed saying to the witness: either collaborate with us or face the death penalty in the Sierra Leonean justice system.

Mr. Morissette became defensive when Mr. Jordash accused him of employing trickery to secure the witness' cooperation. "Your opinion," he stonewalled. But Mr. Jordash pressed forward, challenging Mr. Morissette to explain on what authority he, as a Special Court investigator, could possibly relieve people in Sierra Leone of the death penalty. Mr. Morissette could not explain. He finally relented and agreed that he had no such authority when he made those statements in the witness interview. Mr. Morissette

[12] SCSL Transcript. 13 June 2007, Page 65 (Lines 14-17).
[13] SCSL Transcript. 13 June 2007, Page 65 (Lines 28-29).
[14] SCSL Transcript. 12 June 2007, Page 100 (Lines 10-29).
[15] SCSL Transcript. 12 June 2007, Page 101 (Lines 17-18).

testified that he felt this type of investigative tactic was proper and legitimate way to elicit information from a witness "in this type of crime, yes, Your Honor."[16] Moreover, he confirmed without hesitation that the OTP valued Issa Sesay's collaboration far more than they did the subject of the interview in question.

There's no record of Mr. Morissette using any death penalty-related trick or threat against Mr. Sesay, but Mr. Morissette did admit to using his confidence-building exercise to make clear to Mr. Sesay the severity of the consequences he could face if put on trial at the Special Court. Mr. Morissette admits that, from his position of having "bonded" off-the-record with the accused, he put it to Mr. Sesay (in so many words) that if he collaborated, the OTP would "see what it could do" to help him. If he chose not to speak, and to end his "cooperation" with investigators, Mr. Morissette made clear to him that he would face a life sentence on trial before the Special Court:

Mr. Jordash:	So you effectively said: If you collaborate with us you can save yourself perhaps the life sentence?
Mr. Morissette:	Yes, that's correct.[17]

When cross examined on the same topic, Mr. Berry testified that he would only use this tactic—telling an accused that, by speaking, he could save himself from a life sentence—if he had properly ensured that the subject knew the final decision did not lie with the investigator, but rather with a judge. It is impossible to know whether Mr. Morissette made such assurances, since all his conversations occurred off the record, and Mr. Morissette was admittedly eager to ensure that Mr. Sesay trusted the OTP and believed Mr. Morissette would follow through on what was being offered.

PROBLEMS WITH THE RIGHTS ADVISEMENT AND ALLEGED WAIVER OF COUNSEL

On direct examination, Mr. Harrison made a great deal of the fact that Mr. Sesay was read his rights each day and compliantly signed a waiver before proceeding to speak outside the presence of counsel. However, revelations about Mr. Morissette's off-the-record conduct cast considerable doubt on the voluntariness of these waivers. Moreover, Mr. Jordash made a persuasive case on cross examination that Mr. Sesay cannot have knowingly and willfully waived his right to counsel, because he never understood his rights in the first place. Counsel for the accused made this point by systematically confronting the witnesses with (1) evidence of their own failure to adequately explain the rights of the accused to Mr. Sesay and (2) evidence that Mr. Sesay's clear misunderstanding of the scope of his right to legal representation (including his belief that "Duty Counsel" was not a lawyer) went uncorrected.

Inadequate and Misleading Explanations of Mr. Sesay's Rights

The testifying investigators emphatically asserted that Mr. Sesay understood his rights and knowingly waived them. Mr. Morissette conceded the rights afforded by Rules 42, 43 and 63 were all brand new to Mr. Sesay but insisted, "In my conscience, he clearly, clearly understood what the rights were, what his options were. He clearly understood it."[18] Mr. Berry maintained the same. However, when Mr. Jordash inquired into the reasons *why* the two men were so sure Mr. Sesay understood his options, neither was able to articulate concrete indicia or a rational bases for this certainty. In fact, both men claimed to arrive at this emphatic conclusion within a few minutes of superficial contact with the accused. This, despite the

[16] SCSL Transcript. 12 June 2007, Page 103 (Line 17). By contrast, when asked hypothetically about this exact situation, Mr. Berry later testified that he would not employ a trick such as this one because it would breach proper investigative protocol and potentially lead to the evidence being excluded in Court.
[17] SCSL Transcript. 13 June 2007, Page 27 (Lines 19-21).
[18] SCSL Transcript. 12 June 2007, Page 77 (Lines 26-29).

fact that neither Litho Lamin (the arresting officer) nor John Berry read Mr. Sesay his rights or explained the charges against him before Mr. Berry approached the accused in detention and secured his agreement to collaborate with the OTP. In all the interviews that occurred between March 10th and April 15th, neither Mr. Berry nor Mr. Morissette ever explained the various organs of the Court to Mr. Sesay,[19] and Mr. Berry conceded that he did the "bare minimum" by simply reading the rights advisement script each morning and moving on without further explanation. It appears that the only time an investigator did explain the rights of the accused beyond the text of the pro-forma script was the 10th of March, when Mr. Morissette erroneously conflated "cooperation with investigators" with a willingness to waive the right to counsel—as if making a statement and asserting one's right to counsel were mutually exclusive:

> 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?[20]

When confronted with the transcript of his own muddled explanation, Mr. Morissette refused to accept that it could be confusing to anyone—even to an accused person being interviewed in his third language, who had never encountered the English term "waive" before. Mr. Morissette also challenged Mr. Jordash's suggestions that Mr. Sesay's particulars (i.e. his education level, his language skills, or his lack of familiarity with any formalized system of criminal justice[21]) left him ill equipped to grasp the meaning of his legal procedural rights. Mr. Morissette apparently concluded that the accused was capable of understanding his rights, because he had been a "winner" for ten years, surviving in the bush—"I think you have to be pretty smart to do that"[22] Mr. Morissette explained. When Mr. Jordash suggested that street smarts do not necessarily equip you with the legal terminology necessary to understand and effectively exercise your rights upon arrest, Mr. Morissette shot back, "well I'm not very much equipped with legal terminology either."[23] This self-assessment later came back to haunt the witness, when he indeed demonstrated a very poor understanding of the scope of the Article 17 right to assistance of counsel.

Defense Counsel conducted a simple test to undermine the Prosecution case that Mr. Sesay "was in full cognizance of his rights" after a single perfunctory reading of Article 17 and the rights advisement script. Mr. Jordash asked Mr. Morissette to read the text of Article 17 once through in Court, and then explain his understanding of the right to counsel without looking at the paper. Mr. Harrison objected to the test, but was overruled after Mr. Jordash pointed out that "Mr. Morissette has had years of working with these rights. He ought to be able to read them and then tell us an aspect of those rights. If he cannot, it is powerful evidence that somebody such as Mr. Sesay couldn't have had a hope in the world of understanding the rights from a single reading."[24] Mr. Morissette became extremely irritable 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."[25]

---

[19] For instance, no one ever explained the particular role of the OTP to Mr. Sesay, nor alerted him to the novel legal aid office set up for indigent accused persons under the auspices of the Registry.
[20] See SCSL Transcript. 12 June 2007, Page 127.
[21] Mr. Sesay stopped attending school at 13. He was shortly thereafter forcibly conscripted into the RUF and spent the next ten years living in the bush engaged in guerilla warfare. English is his third language after Temne and Krio.
[22] SCSL Transcript. 12 June 2007, Page 82 (Line 1).
[23] SCSL Transcript. 12 June 2007, Page 82 (Line 7).
[24] SCSL Transcript. 12 June 2007, Page 118 (Lines 19-25).
[25] SCSL Transcript. 12 June 2007, Page 119 (Lines 26-28).

In addition to his poor command of Article 17, Mr. Morissette demonstrated considerable difficulty on the stand distinguishing between a suspect and an accused person. Mr. Jordash questioned him at length about why he repeatedly referred to Mr. Sesay as a suspect during the interviews when Mr. Sesay had, in fact, already been indicted.[26] Mr. Jordash suggested that the reason Mr. Morissette used the term "suspect" rather than "accused" was to confuse Mr. Sesay about his options and lead him into believing that by talking to the OTP, he stood a chance of saving himself from being indicted and put on trial. Morissette tried to defend his persistent choice of the word suspect over the word accused by pointing out that Rules 42 and 43 say "Rights of the Suspect" rather than "Rights of the Accused." Defense Counsel responded by asking Mr. Morissette if he was familiar with Rule 63. The Chief of Investigations paused and replied, "Vaguely." Mr. Jordash made his point clear when he took Mr. Morissette to the text of Rule 63, which explicitly provides for certain rights during "Questioning of the Accused." This rule incorporates all the rights articulated in Rules 42 and 43 and adds the following additional burden on investigators:

> 63(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.

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.

Failure to Correct the Misapprehensions of the Accused

Mr. Morissette and Mr. Berry both accepted that they had an obligation to correct any clear misapprehensions if Mr. Sesay appeared confused about his rights. However, Mr. Morissette insisted categorically, "Mr. Sesay never demonstrated to me any lack of understanding of his right."[27] Mr. Berry echoed this sentiment in his testimony, claiming that he did everything "to the best of [his] ability" to ensure that Mr. Sesay understood his rights. As Defense Counsel uncovered in cross examination, however, these blanket assertions are not ultimately supported by the facts. Mr. Jordash confronted both men with evidence from the interview transcripts where Mr. Sesay demonstrates consequential misconceptions of his rights and is not corrected. For instance, Mr. Morissette conceded that Mr. Sesay appeared to be under the misconception that Duty Counsel had no duty of confidentiality. Mr. Jordash read off a key passage from the interrogation transcript where Mr. Sesay articulates this belief, and proceeded to question Mr. Morissette about what the comment meant to him and how he handled the situation:

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.[28]

…

[26] For instance, Mr. Morissette can be heard on the 10th 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?" See SCSL Transcript. 12 June 2007, Page 120 (Lines 25-27).
[27] SCSL Transcript. 12 June 2007, Page 79 (Lines 1-17).
[28] SCSL Transcript. 13 June 2007, Page 55 (Lines 13-18).

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.[29]

When confronted with the same exchange about duty counsel, Mr. Berry also conceded that the accused appeared to be confused about whether or not duty counsel would maintain confidentiality. However, he further testified that he didn't feel it was his obligation to correct the potential misapprehension. Mr. Berry noted that he wasn't entirely sure either about the scope of the ethical and professional obligations of Duty Counsel to the accused. He presumed they would have attorney-client privilege, since Duty Counsel were meant to provide effective temporary legal representation to accused persons. However, he never explained this to Mr. Sesay.[30] He simply left it to the Duty Counsel themselves to rectify any misconceptions Mr. Sesay might have about their role. Mr. Sesay was interviewed four times by the OTP before he was given access to Duty Counsel.

Mr. Jordash also questioned Mr. Morissette and Mr. Berry about their respective understanding of the scope of the waivers Mr. Sesay signed. Both men claimed to understand that signing a waiver to have counsel present during an interview is not the same thing as refusing legal representation altogether. Nevertheless, when the Registry sent Ms. Beatrice Ureche to the OTP on March 11th to explain this distinction to the accused, she was not taken to see him. Mr. Morissette affirmed that Mr. Sesay never said he didn't want a lawyer, per se. Nevertheless, he took Mr. Sesay's waiver of immediate assistance of counsel to mean that Ms. Ureche 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 insisted, "and he did not want to have a lawyer present."[31] Mr. Jordash inquired whether Mr. Morissette or Mr. Berry felt it was incumbent upon them to specifically ensure that Mr. Sesay understood the particular aspect of the Article 17 rights which would guarantee *immediate* assistance of counsel, on demand and without charge, if the accused so wishes. Mr. 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.[32]

Mr. Jordash suggested to the witness that his response did not comport with standard police procedure in his home jurisdiction of Canada. Mr. Morissette confirmed that in Canada, there is an affirmative duty placed on investigators to provide detainees with the phone number of defense counsel they can access immediately if they wish. He went on to confirm that Mr. Sesay received nothing more than a single reading of his rights. Mr. Jordash put a simple comparative proposition to Mr. Morissette: "So, in that respect, you didn't go as far as you would have done in Canada?" The witness became extremely agitated

[29] SCSL Transcript. 13 June 2007, Page 56 (Lines 15-21).
[30] SCSL Transcript. 14 June 2007, Page 96 (Line 4).
[31] SCSL Transcript. 13 June 2007, Page 22 (Lines 5-6).
[32] SCSL Transcript. 12 June 2007, Page 79 (Lines 4-10).

and suggested in his response that his behavior was appropriate in light of the seriousness of the crimes for which Mr. Sesay stood accused:

> That's wrong. That's not true. That's not what I said. I said that in the type of offence that we were facing, and the type of investigation that I was doing, dealing with here, that this is the way, and it is standard across police force that do investigate organized crime, drug cartels, or whatever you want to do, that when you're dealing with this type of operation, this is the way you would, especially when you have a suspect that comes forward on his own and informs the investigation that he wished to collaborate with the investigators, that's the way you proceed with it.[33]

Mr. Jordash pressed Mr. Morissette to admit that he was wrong—that it would make no difference in Canada whether the investigation was of drug cartels or petty theft. You would have to inform the accused of how to access free and immediate legal advice. Counsel for the Prosecution unsuccessfully tried to intervene by objecting that the question called for an expert witness. The Bench overruled the objection, observing that Mr. Morissette had 38 years experience in criminal investigations, primarily in Canada. He should, they reasoned be extremely well equipped to answer Mr. Jordash's inquiry, especially since it had to do with procedure, not substantive law. Mr. Morissette maintained that he thought it was proper to decide on a "case-by-case scenario" whether it was incumbent upon him to go beyond perfunctory reading of the rights before proceeding to interview an unrepresented accused person.

Mr. Jordash also cross examined Mr. Berry about a specific incident on the 24th of March, when he failed to seek clarification from Mr. Sesay after witnessing the accused signing a request for legal assistance. Mr. Berry testified that he was fully aware of the contents of the written request, but didn't take it to mean that Mr. Sesay was "expressing a desire to have counsel present" right then and there. Neither did he contemplate the possibility that Mr. Sesay was confused about whether his right to choose a lawyer included the right to have a lawyer with him while he was interviewed. Mr. Jordash called Mr. Berry's attention to the procedural guarantees of Rule 63,[34] and pressed Mr. Berry to explain: "Did you not seek clarification from him as to whether what he was saying was: "I'd like a lawyer now; as soon as possible?"[35] Mr. Berry confirmed that he never discussed the request with Mr. Sesay, and felt no need to clarify whether Mr. Sesay understood he had a right to *immediate* assistance of counsel if he wished. Mr. Berry continued questioning the accused without the presence of counsel, because he reportedly did not think Mr. Sesay's request for a *specific* lawyer triggered the provision in Rule 63 that would have obliged Mr. Berry to unilaterally suspend the interview. According to Mr. Berry, even after Mr. Sesay expressed a desire to obtain counsel, he felt it was incumbent upon Mr. Sesay or his Duty Counsel to request that questioning cease until that lawyer could be retained.

GENERAL IMPEACHMENT OF WITNESS CREDIBILITY

In addition to adducing specific facts favorable to his case, Counsel for the accused sought to broadly undermine the Prosecution by impeaching witness credibility and impugning the professionalism of the OTP. He questioned Mr. Morissette at length about alleged incidents of past investigative misconduct. Mr. Jordash also adduced a considerable amount of evidence of specific procedural irregularities and generally questionable investigative practices. This evidence implicated each testifying witness to some

[33] SCSL Transcript. 12 June 2007, Page 73 (Lines 6-15).
[34] Rule 63(A) provides, "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." (emphasis added)
[35] SCSL Transcript. 15 June 2007, Page 13 (Lines 8-9).

degree and impeached the overall integrity and professionalism of the Sesay investigation. Litho Lamin and Joseph Saffa further impeached their own credibility through inconsistent testimony, evasive answers, and defensive witness box demeanor.[36]

Past Investigative Misconduct

Hoping to show a past practice of disregard for proper investigative protocol and due process rights, Mr. Jordash cross examined Mr. Morissette about an incident in March 2004 when investigators from the OTP allegedly went to Togo arrest Benjamin Yeaten (the former special assistant to Charles Taylor) under color of authority. Mr. Morissette denied personal involvement in the incident, but confirmed that it occurred. According to him, the former Chief of Investigations, Alan White, did go to Togo in 2004 in an aborted attempt to bring Yeaten to Sierra Leone. He said that he spoke to Mr. White about the incident after-the-fact, but insisted the Chief of Investigations had embarked upon the mission alone, without reference to anyone else in the Investigations section of the Special Court. Mr. Morissette was evasive about the details he learned, but ultimately Defense counsel got the confirmation he was seeking when he asked:

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.[37]

Mr. Morissette confirmed that he had never seen or known of any arrest warrant for Benjamin Yeaten.

Counsel for the first accused also impeached Mr. Morissette's skills and integrity as a professional investigator by asking him a series of questions about his prior experience as the Coordinator of Operation NAKI—a 1997 ICTR mission to arrest multiple indictees in Nairobi and bring them to Tanzania. Mr. Morissette testified that he was responsible for arranging the cross-border transport of persons arrested during Operation NAKI. He called the operation "well carried out and a success," but Mr. Jordash confronted him with a 1998 Amnesty International Report which criticized certain particularly egregious procedural blunders.[38] Mr. Morissette ultimately confirmed the majority of the facts reported in the publication. He testified that he was personally involved in the arrest and transfer of Jean Kambanda, who was held in "an unrecognized place of detention" where Mr. Morissette met with the detainee "a number of times." Mr. Morissette also confirmed that a Mr. Esdras Twagirimana was

[36] On direct examination, Litho Lamin narrated the chronology of Sesay's arrest clearly and with confidence. He demonstrated no difficulty understanding questions or needing repetition. However, on cross examination his demeanor changed markedly. He took long pauses and frequently asked Defense Counsel to go back over even very short, straightforward questions. Mr. Lamin appeared so concerned about getting trapped by Defense Counsel's questions that he resisted confirming or accepting even the most mundane suppositions put to him by Mr. Jordash. For instance, when Counsel asked whether the accused appeared "shocked and surprised" by his arrest, the witness responded "I cannot determine that." Counsel rephrased, "Did he seem extremely distressed?" The witness avoided answering this by repeating earlier testimony about statements Mr. Sesay made. The exchange continued with Mr. Lamin avoiding all negative adjectives until Mr. Jordash simply asked Mr. Lamin to confirm that Mr. Sesay appeared "upset" during the 45 minute helicopter ride where the witness had testified the accused was crying continuously. Even then, Mr. Lamin gave a long pause before responding, "Well, if you call that upset." Mr. Lamin's answers to questions about specific facts and general protocol alike became evasive to the point of impeaching his credibility.

[37] SCSL Transcript. 12 June 2007, Page 58 (Lines 17-22).

[38] *The International Criminal Tribunal for Rwanda: Trials and Tribulations*, AI Index: IOR 40/03/98, Amnesty International (April 1998).

mistakenly arrested in Nairobi during the operation and brought across the border to Tanzania—apparently without any papers, since the officers did not realize they had the wrong man until three days after they arrived in Arusha. Mr. Twagirimana remained in the ICTR detention facility in Arusha, Tanzania for nearly two months before he was released and returned to Kenya. Mr. Morissette testified that the situation "became a total nightmare for the Registrar" because Mr. Twagirimana had been living in Kenya illegally as a Rwandan citizen at the time he was mistaken for an ICTR indictee, detained, and taken out of the country. Mr. Morissette testified that he was not physically present at the time of arrest, but he was involved since he coordinated the mission and the post-arrest transport for the detainees. According to the Amnesty Report on the incident, Mr. Twagirimana was denied access to a lawyer during the entire period of his detention.

General Procedural Irregularities

Mr. Jordash questioned all four witnesses about standard investigative protocols followed by OTP investigators at the Special Court. This line of questioning uncovered troubling evidence of lax (sometimes non-existent) protocol completely out of step with standard practices in the investigators' home jurisdictions. Mr. Morissette and Mr. Berry both confirmed that the Investigations Section has never had or followed any written Standard Operating Procedures. According to the Chief of Investigations, Special Court investigators are briefed before particular investigative operations, and plan their interviews according to that briefing. However, as Mr. Morissette put it, "the investigators have their tasks, and it is worked out among themselves."[39] He confirmed Counsel's understanding that "there is nothing written down beyond the Rules of Procedure and Evidence about how to stay on the right side of the line in terms of investigating fairly, but investigating efficiently and effectively."[40] The "sum total of the operating procedures" for Prosecution investigators conducting suspect interviews at the Special Court, he testified, is "simply just that you must inform the accused of the rights" in Rule 42 and 43.[41]

Mr. Jordash also questioned all four witnesses about why no contemporaneous investigative notes appear to exist from the Sesay arrest and subsequent days of interrogation. When questioned about general note-taking protocol, 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 confirmed that an investigator's notes are often used in court to confirm precise times and dates and establish the truth about an impugned investigation. They agreed that contemporaneous note taking was considered "good practice" in international investigations as well as in their home jurisdiction of Canada. Mr. Lamin and Mr. Saffa confirmed that the same protocol was expected of the Sierra Leone Police, and in fact investigators' notebooks contain a short caution on the inside cover which they are obliged to read to a suspect or detainee. It warns a detainee that statements he makes may be taken down in writing in the notebook and the notes used against him in court. Having established the object and the import of the practice, Mr. Jordash proceeded to inquire as to why none of the investigators had provided *any* notes from the operation in question during this voir dire.

The investigators' stories varied widely as to why they cannot produce contemporaneous notes of their own involvement in the operation. 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 were now."[42] Mr. Morissette testified that he simply did not keep a notebook of any kind in relation to Mr. Sesay's arrest and custodial interviews. He became rather flustered when asked to explain why not. He claimed that the Sierra Leone Police were in charge of

[39] SCSL Transcript. 12 June 2007, Page 61 (Lines 13-14).
[40] SCSL Transcript. 12 June 2007, Page 61 (Lines 18-21).
[41] SCSL Transcript. 12 June 2007, Page 62 (Lines 4-12).
[42] SCSL Transcript. 14 June 2007, Page 65 (Lines 3-6).

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."[43] However, arresting officer, Litho Lamin, who testified that he didn't take any notes at all. In fact, Mr. Lamin insisted that senior investigating officers like himself are categorically not expected to carry a notebook or take detailed notes of arrests or investigative activities. According to him there should be a "custody diary" on file with CID, but neither he nor Mr. Harrison made reference to it on direct examination or thought to bring it to Court in support of the investigators' testimony. Mr. Lamin's testimony was flatly contradicted by 13 year SLP veteran, Joseph Saffa, who testified that "all police officers have notebooks" in the SLP, no matter what their rank or position. Nonetheless, he, like the other three witnesses, claims to have no notes to corroborate his brief account from the 10th of March. When asked why not, he had only a cryptic explanation, "Because I was involved in operations that morning, I could not carry my notebook."[44]

Mr. Jordash pressed Mr. Morissette to explain why he didn't make any notes of the numerous conversations he admitted having with the accused outside the presence of a court reporter. Mr. Morissette explained that he didn't think it was necessary to keep a record of the interactions because, "the objective of my intervention with Mr. Sesay was not to interview him; it was not to question him. It was to develop a rapport with him, to build up confidence and encourage him in order to agree to collaborate with us. So the content of the conversation to me had no relevance."[45] Mr. Morissette went on to imply that taking notes while talking to Mr. Sesay would have impeded his strategy and investigative objective, which was to get "on the inside" with Mr. Sesay and win his trust so he could more effectively seek evidence of conspiracy. He once again raised his analogy to undercover police work:

> 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. [46]

PROCEDURAL PROBLEMS ARISING OUT OF THE VOIR DIRE

The Rules of Procedure make no specific provision for calling or conducting a voir dire. It was left to the discretion of the judges to determine the procedural entitlements of the parties, the types of witnesses to be called, and the format of submissions to be heard. Counsel and Judges coming from different home jurisdictions have varied understandings of what a voir dire normally entails. Rather than normalizing party expectations by laying basic procedural ground rules at the outset, the Bench dealt with individual issues as they arose. This procedurally unexacting manner in which the Court conducted the voir dire caused administrative inefficiency and legal confusion throughout the week. At its most benign, the confusion caused periodic interruptions and administrative delays.[47] At its most problematic, the Trial

[43] SCSL Transcript. 12 June 2007, Page 68 (Lines 8-9).
[44] SCSL Transcript. 12 June 2007, Page 70 (Lines 24-25).
[45] SCSL Transcript. 12 June 2007, Page 70 (Lines 18-23).
[46] SCSL Transcript. 12 June 2007, Page 71 (Lines 1-15).
[47] Most notably, there were administrative efficiency problems arising out of the Trial Chamber's decision to develop a special designation system, on the fly, for evidence exhibited within the voir dire. For examples of delays and confusion caused by the haphazard development of this system, see SCSL Transcript. 12 June 2007, Pages 25-26, 55, 98-100, and 105-107. Another, more contentious point of administrative frustration arose with respect to the question of whether the Court would be willing to call *sua sponte* witnesses in the voir dire. Defense Counsel sought to have the Court call Mrs. Kah-Jalloh, the Gambian Defense lawyer who allegedly visited Mr. Sesay twice

Chamber's undisciplined approach to voir dire procedure gave rise to opaque and seemingly arbitrary bench rulings on legal submissions made by the parties concerning whether or not the procedural entitlements provided for in Rules 68 and 98 should apply to the "trial within a trial."

RULE 68: EXCULPATORY EVIDENCE AND THE SCOPE OF REQUIRED DISCLOSURE

In the course of the voir dire, Defense twice applied for the Court to compel the Prosecution to disclose, pursuant to Rule 68, certain information pertaining to the credibility of the testifying witnesses. Rule 68 requires the Prosecutor to:

> Make statements under this Rule disclosing to the defense the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may effect the credibility of prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material.

Defense first raised the disclosure issue at the outset of the voir dire, when Mr. Jordash called the Court's attention to an unsatisfactory written exchange he had with Mr. Harrison the previous day. Counsel for the first accused sought disclosure, with respect to all four of the Prosecution witnesses called, of any criminal records, disciplinary findings, complaints, or known investigative breaches of protocol during the course of their professional careers. In a one sentence written reply to the request, Mr. Harrison responded, "I can advise that Mr. Morissette has no criminal record, nor have any civil proceedings been initiated against him." Defense submitted that this reply did not discharge the Prosecution's Rule 68 duty. First, it offered no information whatsoever about Mr. Berry, Mr. Saffa, or Mr. Lamin. Second, it omitted any mention of general professional misconduct as regards Mr. Morissette. According to Mr. Jordash, this was a calculated, lawyerly omission, which allowed the Prosecution to avoid disclosing any information without being forced to explain *why*. Several members of the Bench expressed concern that the disclosure request would send the Prosecution on an unreasonable "fishing expedition." One judge speculated that perhaps Mr. Harrison *had* no such knowledge in his possession. However, they never put the question plainly to the Prosecutor, and Mr. Harrison never positively denied knowledge in writing or in his oral submissions to the court on this matter. Instead, Mr. Harrison suggested the Defense application was procedurally misguided: "The Prosecution is simply not clear why this is something that falls within Rule 68."[48]

The Bench treated these disclosure applications in much the same way as it treated Mr. Jordash's Rule 66 motion at the close of proceedings last week. Rather than exploring the scope of the entitlement articulated in Rule 68, and ruling upon whether or not the Prosecution had properly discharged its obligation to disclose under that rule, the Judges side-stepped consideration of the Rules of Procedure and Evidence altogether. The first time Defense Counsel moved for disclosure, Judge Thompson asked Mr. Jordash why he couldn't seek the desired information through cross examination of the witnesses rather than by asserting a right to disclosure. Mr. Jordash replied that he indeed planned to cross examine the witnesses, but pointed out, again, that Rule 68 is an entitlement and he cannot be expected to effectively cross examine a witness on certain topics without *prior* full disclosure from the Prosecution. Upon cross examination, it became clear that there was indeed undisclosed information (know to members of the Prosecution) which Defense Counsel argued amounted to prima facie evidence of past investigative misconduct. Nevertheless, when Mr. Jordash re-asserted the Defense right to have full disclosure under

---

during his weeks of OTP interviews. Mr. Jordash suggested that since the Prosecution had declined to call this ostensibly favorable witness, the Court ought to call her itself before Defense called its own witnesses. The Bench flatly refused, expressed concern that this would "derail the process," and appeared agitated that Defense had even made the suggestion. See SCSL Transcript, 15 June 2007, Page 101-102.

[48] SCSL Transcript. 12 June 2007, Page 9 (Lines 17-18).

Rule 68, the Bench continued to side-step the text of the rule itself, and resist Counsel's application on other grounds.

The Judges suggested, inter alia, that Counsel's submissions lacked specificity, lacked relevance to the voir dire inquiry, risked inefficiency by "multiplying the issues,"[49] and relied too technically upon the Rules of Procedure. On several occasions, the Bench appeared to suggest that it was not bound to enforce specific procedural entitlements while engaged in a voir dire. As Judge Thompson put it, "Remember that we indicated that we were going into this exercise with a global telescope that we are not going to compartmentalize things into rule this, rule that or rule that."[50] Mr. Jordash repeatedly addressed the Judges' concerns about specificity[51] and relevance,[52] and objected strenuously to the suggestion that the Rule 68 entitlement could be ignored simply because the Bench deemed witness credibility "tangential" or "peripheral" to the core inquiry of the voir dire. "Rule 68 is not qualified in that way," Counsel argued. "Rule 68 deals with evidence which suggests the innocence or mitigates the guilt of the accused, or *may affect the credibility of the Prosecution evidence*. May evidence of Mr. Morissette's wrongdoing in Sierra Leone or bad character affect the credibility of his evidence?"[53] Counsel pointed out, in any event, that he was not asking the Bench to investigate collateral issues or "order a fishing expedition." He simply sought an order for the Prosecution to disclose whatever information it already had in its possession about three specific incidents germane to investigative integrity and witness credibility. "Rule 68 cannot simply be abandoned as an issue by the Court,"[54] he argued, when there is prima facie evidence that OTP investigators engaged in professional misconduct. Before the Court stood down for deliberation, Mr. Harrison spoke on behalf of the Prosecution, briefly disputing that the testimony before the Court amounted to prima facie evidence of disclosable misconduct.

Ultimately, the Court denied Defense Counsel's disclosure motions without reference to the evidence before the Chamber. Instead of agreeing with one side or the other as to whether the prima facie burden had been met, the Bench simply announced that, "the application on behalf of the first accused is meretricious. We're firmly of the view that the issue is a classic example of what the law regards as collateral. To grant the application would be tantamount to a multiplication of the issues."[55] The Court's ruling appeared arbitrary insofar as the articulated rationale had less to do with the legal merits of the

[49] The Judges seemed to confuse Mr. Jordash's request for compelled disclosure with an attempt to litigate the facts of an alleged incident unrelated to Mr. Sesay's arrest. A visibly exasperated Judge Itoe asked, "Do you want us to go to Lomé, Mr. Jordash, or to call Benjamin Yeaten, who we've not been able to lay hands on... I think there must be an end to litigation." SCSL Transcript. 15 June 2007, Page 87 (Lines 13-14, 20). Counsel made clear that he did not wish to argue the facts of what did or did not transpire when the Chief of Investigations was prevented from putting a suspect on a plane in Lomé. Rather, he wanted the Prosecution to be compelled, pursuant to Rule 68, to either disclaim specific knowledge of the incident or disclose what they know to be true about it.
[50] SCSL Transcript. 15 June 2007, Page 89 (Lines 26-29), Page 90 (Line 1).
[51] Mr. Jordash cited three pieces of evidence regarding specific incidents the Prosecution ought to be compelled to disclose: (1) the Amnesty report indicating Mr. Morissette's involvement in an unlawful arrest and detention operations while employed by the ICTR (2) Mr. Morissette's testimony confirming that the Mr. White, the Chief of Investigations, was involved in an apparently unsanctioned arrest operation in Lomé, Togo and (3) Mr. Berry's testimony that the off-the-record investigative conduct Mr. Morissette engaged in throughout the Sesay interrogation occurred secretly, without reference to Mr. Berry, and was out of line with Mr. Berry's understanding of ethical professional conduct and standard investigative protocol.
[52] As Mr. Jordash argued, "There is prima facie evidence before this Court that Mr. Morissette is responsible for significant breaches of investigative protocol. And if that's right, and if the evidence, more evidence exists which clarifies the evidence already given, and the Prosecution have it, then they ought to disclose it, because it may be it's that evidence which enables Your Honors to decide that you cannot rely upon Mr. Morissette and you cannot rely upon that investigation team that was working at that time." SCSL Transcript. 15 June 2007, Page 92 (Lines 18-26).
[53] SCSL Transcript. 15 June 2007, Page 98 (Lines 13-17)
[54] SCSL Transcript. 15 June 2007, Page 90 (Lines 19-20).
[55] SCSL Transcript. 15 June 2007, Page 99 (Lines 21-25).

application and more to do with the Judges' desire to move along expeditiously with the voir dire. With this decision, the Trial Chamber has glossed over its own established Rule 68 jurisprudence, which entitles the Defense to compelled disclosure wherever it can establish, by prima facie evidence, that the information sought is (a) exculpatory in nature, as defined by Rule 68 (b) material to the Defense case (c) information which the Prosecution has in its possession and (d) information the Prosecution has clearly failed to disclose. Presuming this standard applies to voir dire motions the same as it would apply to applications made during the main trial, one would have expected the Trial Chamber to dispose of the motion by specifically referencing which of the four prongs Defense Counsel's application failed to meet.

RULE 98: CONFLICTING PARTY EXPECTATIONS OVER THE ROLE OF SUMMARY JUDGMENT IN A VOIR DIRE

The second major procedural dispute in the voir dire arose immediately following the Trial Chamber's judgment on the Rule 68 motions, and was similarly colored by the Court's eagerness to move on with the voir dire as quickly as possible. At the close of Prosecution evidence in the voir dire, Mr. Jordash wanted to seek immediate judgment in favor of the Defense on the grounds that the Prosecution had definitively failed to discharge their burden of proof as to the question of voluntariness. However, before making any substantive submissions, Counsel sought clarification on a point of procedure—He explained to the Court that he wished to reserve the right to call defense witnesses subsequently if his summary judgment motion was unsuccessful. The motion he wished to bring, as Judge Thompson pointed out, was effectively a "Rule 98 analogy" within the voir dire.[56]

There were markedly differing responses from the Bench as to Rule 98's applicability in voir dire proceedings. Judge Thompson said he was open to hearing arguments as to why a Rule 98-like motion midway through the voir dire was appropriate and desirable. However, Judge Itoe didn't acknowledge that there might be a procedural entitlement at issue, and chided Mr. Jordash for wanting to "send feelers" to know how the Court is leaning on its decision. Judge Boutet was the most exercised in his opposition to the Rule 98 analogy. According to him, Canadian courts hear all the submissions in a voir dire, with no summary judgment option midway through. When solicited, Counsel for the accused informed the Court British practice *does* permit exercise of a Rule 98 option without foreclosing Defense counsel's right to subsequently call evidence in a voir dire. However, because this was not a voir dire practice Judge Boutet was familiar with in his home jurisdiction, he shrugged at the submission and maintained an absolute unwillingness to entertain the idea that Defense might be entitled to assert such a procedural right. He made clear from the Bench that Defense Counsel had two, mutually exclusive choices—either call witnesses or go to closing arguments and submit the matter for final judgment to the Trial Chamber. Mr. Jordash protested, to no avail, that this is "no choice at all," since the burden of proof lies with the Prosecution, not the Defense. Judge Boutet held firm in his opposition while the Presiding Judge reasserted, "my mind is open to it. I'm not saying that the Rule 98 analogy cannot be transplanted into this process. I'm saying I need some time to organize my thoughts and to see whether it would be procedurally appropriate, or if it would be in the overall interests of justice."[57] Mr. Jordash settled for an

[56] Rule 98 provides: "If, after the close of the case for the Prosecution, there is no evidence capable of supporting a conviction on one or more counts of the indictment, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgment of acquittal on those counts." Rule 98 is a procedural entitlement for the Defense which flows from the fact that the accused is presumed innocent, and the burden is on the Prosecution to prove its case beyond a reasonable doubt. In this voir dire, the burden is, likewise, on the Prosecution to prove the accused waived his rights and made the prior statements voluntarily. If they have not done so by the close of the Prosecution case, the Defense should be relieved from having to answer the unproven charges. In a regular trial, a party bringing an unsuccessful Rule 98 motion would never, by merit of having exercised the procedural option, be foreclosed from subsequently calling evidence in its defense.

[57] SCSL Transcript. 15 June 2007, Page 113 (Lines 2-6).

adjournment to give the Judges time to consult on the matter. Upon resumption of proceedings, the Bench effectively denied Defense Counsel's motion when it ruled against "transplanting into the voir dire process the Rule 98 decision."[58]

It was apparent to the author of this report that each of the Judges and the advocates came to Court with sharply divergent expectations as to what would be fair procedure in a voir dire. All parties would have benefited if the Trial Chamber had sought to normalize procedural expectations *prior* to commencing the "trial within a trial." Unfortunately, instead of making a principled procedural decision in the abstract before proceedings began, the Court became embroiled in a rather acrimonious exchange and then pronounced a general rule in reference to a specific motion. If the Trial Chamber had been more exacting in its approach to voir dire procedure, this heated exchange between Defense Counsel and the Bench could have been avoided and considerable time could have been saved. Moreover, the Court's ultimate decision would have had more of an air of fairness about it because Defense Counsel's motion would have been decided on the merits or never raised in the first place.

When Court resumes next week, the Defense phase of the voir dire will commence. Mr. Jordash did not advise the Court how many witnesses he intends to call in addition to the first accused.

[58] SCSL Transcript. 19 June 2007, Page 1 (Lines 16-18).

ANNEX

BASIC CHRONOLOGY OF EVENTS PER PROSECUTION WITNESS TESTIMONY

March 10th 2003→ First Custodial Interview

11:00am

Joseph Saffa, Gilbert Morissette, John Berry and other Special Court Investigators are called into a meeting by Alan White (then-Chief of Investigations at the Special Court) and dispatched to the Sierra Leone Police (SLP) Criminal Investigations Department (CID) headquarters for "investigative duties."

12:00pm

Special Court investigators Morissette, Berry, White, Saffa, Yohan Peleman and Thomas Lahun arrive at CID around 12:00pm after having reportedly received a phone call alerting them that certain RUF indictees had shown up for a planned meeting with the Director if CID. According to arresting officer, Litho Lamin, Sesay and others have been told to come to CID to pick up some money, when in fact the SLP are prepared to arrest them on Special Court warrants.

*Note about Witness Credibility: as soon as Defense Counsel suggested that Mr. Sesay was "effectively tricked to come to CID" Lamin backpedaled sharply, recanted what he said about the money, and then denied he'd ever said anything at all about Sesay coming to pick up money. The Judges cautioned the witness to think carefully about his answers and reminded him that the transcripts would reflect what they had all heard him very clearly say—that Mr. Sesay came to CID under the impression that he was to pick up some money.

According to SCSL Investigators, the arrests are already completed by the SLP by the time the SCSL investigators arrive at noon. Lamin executes Issa Sesay's arrest in the office of the CID Director, Mr. Daboh. Lamin has no investigative notes or custody diary from the 10th so he cannot say exactly what time he actually arrests Mr. Sesay. According to Lamin, the office is crowded with SLP officers, including the Director and Deputy Director, Mr. Alfred Carew Kamara. Lamin informs Sesay he has a Special Court warrant for his arrest. He reads the accused the text of the warrant but does not administer any rights advisement nor does he serve Mr. Sesay with his indictment. Sesay breaks down crying. He sobs continuously and says, "Is this the peace I signed for? Is *this* the peace?" Lamin handcuffs Sesay and reports remaining in the office roughly 20-30 minutes before taking the accused downstairs to awaiting vehicles.

According to Morissette, CID is a scene of "total mass confusion" when they arrive, with press starting to gather. According to Berry there are over 100 uniformed and plainclothes officers milling around and many vehicles outside. Saffa claims the number is lower—between 20-30 officers. Stories diverge as to the purpose for the OTP Investigative presence at CID:

- Morissette resists clearly articulating what the SCSL investigators' objective is on the 10th. He says they went simply, "To be there in case something happened." However, after assiduously dancing around the question, Morissette ultimately admits that, by the time they arrested Sesay, a decision had already been made to target him for collaboration. It was reportedly discussed by in the Investigations section "weeks earlier…with my staff"[59] that Sesay would be a person from whom to seek collaboration because he was likely to "give us the most information, the most intelligence in regard to this investigation."[60] However, because the arrests are reportedly made before the SCSL investigators arrive at CID, "The decision was not implemented, because we didn't get a chance to talk to him."[61]

[59] SCSL Transcript. 12 June 2007, Page 114 (Line 8).
[60] SCSL Transcript. 12 June 2007, Page 114 (Lines 13-14).
[61] SCSL Transcript. 12 June 2007, Page 113 (Lines 21-22).

- By contrast, Berry categorically denies there is an advanced plan to target Sesay as a potential OTP collaborator and denies knowing anything about this or having instructions to that effect when they arrive at CID. He testifies that the plan is simply to arrest and transfer the detainees to Bonthe via Juri Barracks. The first he claims to know of the plan to talk with Sesay is later, when he allegedly receives telephone instructions from Morissette to approach Sesay at Juri and ask if he wishes to collaborate with the OTP. Berry goes so far as to say that he doesn't believe any sort questions have even been drafted for Sesay in advance of the arrest. However, the transcript from the first day of custodial interviews reflects Morissette telling the accused he has a list of questions prepared he would like to ask Sesay.
- Saffa claims he is sent to CID with no instructions whatsoever as to his purpose. He is told simply that they are going to perform "investigative duties. He says he doesn't know anyone is to be arrested until after they arrive at CID.

The record is exceedingly vague as to where each investigator goes and what role each of them plays upon arrival at CID:

- Morissette says he is not sure what Berry or Saffa are doing at this time, but he says he knows Berry is somewhere with the SLP "getting organized to transfer these people to Juri."[62] Morissette is more sure of Alan White's whereabouts during their time at CID (he says they are together), but Morissette claims Mr. White "didn't do anything" at all while at CID. He claims that neither he nor Alan White sees or speaks to Sesay at CID. Morissette is extremely vague about the particulars of what he himself does while at CID. The third time he is asked about the arrival at CID, Morissette testifies that he recalls seeing the CID Chief of Section and telling him "we need to move them out now."
- Berry describes his own role at CID not as a logistics coordinator but as an observing bystander—he says he goes upstairs, sees Gilbert Morissette, is "informed the arrests had been made," goes straight back outside and simply waits by his vehicle until the detainees are brought out to the cars. He cannot recall who, if anyone, he is with when inside CID. He claims to have no contact with any of the arrestees at CID
- Saffa says he remains outside until he is instructed to follow a convoy to Juri with Berry.

According to Morissette, arrestees are being kept in separate rooms when the SCSL officers arrive at CID HQ.[63] However, this contradicts the testimony of the arresting officer. According to Lamin, Sesay is never moved from the point of arrest (Director Daboh's office) until they depart CID bound for Juri Barracks. Stories are also inconsistent as to how many men have actually been arrested at this point:

- In an April 2003 memo narrating the arrest, Berry wrote "I attended to CID HQ with Alan White, Yohan Peleman, Thomas Lahun, and Joseph Saffa for the arrest of Gibril Massaquoi, Issa Sesay and Morris Kallon. The arrests had been made by the CID and the three suspects were transported to Juri Police Barracks arriving at 13:00 hr."[64] On the stand, Berry phrased his testimony so as not to quantify the number of arrestees or individually name them, besides Sesay. He used passive phrases such as "arrests had been made."

[62] SCSL Transcript. 13 June 2007, Page 3 (Lines 15-25).
[63] It is unclear how he knows this, since he claims he never saw any of the arrestees while at CID.
[64] See Voir Dire Exhibit I. Interoffice Memorandum "Contacts with Issa Sesay." From John Berry to Brenda Hollis and Gilbert Morissette (April 13, 2003). Gibril Massaquoi, the unacknowledged third arrestee named in Berry's report, acted as RUF spokesman during the conflict period. He was never indicted by the Special Court, and he ended up testifying publicly as an insider witness for the Prosecution in the trial of the AFRC accused.

- ❖ Contradicting the information in Berry's contemporaneous memo, Gilbert Morissette testified on the stand that only two men—Sesay and Kallon—were arrested that day. He explained, "As a matter of fact, we expected three, but only two were there."[65] Joseph Saffa likewise testified that Sesay and Kallon were the only two RUF arrested that day.

- ❖ According to Lamin, he never heard of *any* other men besides Sesay being arrested that day from the RUF.[66] The veracity of this statement is impeached by evidence from both Berry and Saffa that Kallon and Sesay came out of CID in custody together for transport to Juri Barracks. Lamin testified that he accompanied Mr. Sesay on this trip and all the way from his point of arrest to his final transfer at Bonthe. It is simply not plausible that he didn't notice Mr. Kallon being escorted in handcuffs beside Mr. Sesay. [67]

SPL arresting officers bring Sesay and Kallon downstairs to a vehicle convoy for transport to Juri Barracks en route to SCSL detention facility on Bonthe island, where official handover into court custody is supposed to happen. According to Morissette, the original plan would have been for Sesay and Kallon to go in same helicopter to Bonthe, but this plan changes once Berry and Saffa approach Sesay in detention at Juri.

1:00pm

Detainees arrive at Juri Barracks. Stories Diverge as to what happens next:

- ❖ Berry claims he calls Morissette to inform him that they have arrived safely, and is instructed on the phone to approach Sesay and ask him if he wants to collaborate with the OTP. He claims this is the first news he hears of a plan to target Sesay for cooperation. Berry's 2003 memo makes no mention of this phone call.

- ❖ Saffa contradicts Berry's account. He claims that Berry doesn't speak to anyone on the phone between CID and Juri. Just after he and Berry arrive at Juri, Berry turns to him and informs him that they are to approach Sesay about speaking with OTP. "He told me that he was under instruction to talk to Issa Sesay and I should be with him to talk to him."[68] By Saffa's account, Berry must have known, in advance, of the plan to target Sesay.

- ❖ Morissette's testimony also contradicts Berry's claims. According to Morissette, Berry calls him only once—*after* securing Mr. Sesay's consent to interview, not before. He never mentions anything about instructing Berry via telephone to approach Sesay at Juri. Under cross examination, Morissette did confirm that "Mr. Berry was asked to ask Mr. Sesay if he wanted to collaborate with us."[69] However, the testimony is entirely ambiguous as to the timing and source of this request. According to Morissette, when Berry received the instruction, there was no direction given to him "as to how he should approach, specifically." It was left to Berry to "find the right time" and the "right words" to approach Sesay.[70]

1:25pm

Berry and Saffa go together to meet Sesay in an empty office. They have an interaction with Sesay lasting no more than five minutes where, according to Berry's recollection, he tells Sesay that he and Joseph Saffa are investigators with the Special Court and they want to give Sesay the opportunity to speak with the OTP if he wants. According to Berry, they make clear they cannot promise him anything and tell him to "take his time as this is an important decision." Sesay reportedly replies

[65] See SCSL Transcript. 12 June 2007, Page 110.
[66] See SCSL Transcript. 15 June 2007, Page 46.
[67] SCSL Transcript. 15 June 2007, Page 63 (Lines 3-13).
[68] SCSL Transcript. 15 June 2007, Page 75 (Lines 15-16).
[69] SCSL Transcript. 12 June 2007, Page 115 (Lines 14-15).
[70] SCSL Transcript. 12 June 2007, Page 116 (Lines 13-19).

"immediately" that he wants to speak with OTP investigators. Berry tells Mr. Sesay they will not speak any further, but that arrangements will be made for an interview. The investigators then leave the room. Saffa claims he does not say a single word to Sesay this entire time. Counsel for the Defense challenged Saffa on this point, suggesting he in fact threatens Sesay in Krio when they arrive at Juri, but Saffa firmly denies speaking to Sesay, in any language, until they arrive at the OTP office.

Although Lamin is the officer in charge of Sesay's custody until the official transfer at Bonthe, he claims to have been entirely unaware of Sesay meeting with anyone while detained at Juri Barracks.

1:30pm

Morissette and White arrive back at the OTP office. Morissette receives a call from Berry, "advising me that Mr. Issa Sesay had expressed his wishes to communicate -- to collaborate, to talk to the Office the Prosecutor."[71] Morissette and White tell Berry they will arrange for the motorcade to split and bring Sesay to the OTP while Kallon proceeds to Bonthe. Stories diverge as to the timing of the transfer and the amount of time Sesay is at the OTP office before the formal interview begins:

- Morissette thinks the phone call from Berry happens around 2:00pm and the motorcade arrives at the OTP office just before 3:00pm.
- According to Berry, he makes the call immediately after he concludes his five minute interaction with Sesay at 1:30. They leave Juri "within the half hour" and arrive at the OTP office where the interview is to take place by approximately 2:30pm. The interview transcript does not commence until 3:03 pm. What happens during these 30 minutes remains unaccounted for.

Morris Kallon proceeds in custody to Bonthe. Issa Sesay is brought by SLP arresting officer, Lamin, and others in motorcade to the OTP office. Berry has no further interaction with Sesay on the 10th. Lamin hands Sesay over to Saffa's custody and waits in his vehicle while Sesay is taken into a room in an OTP trailer. Morissette meets Sesay in Trailer 4.

3:03pm

Interview recording begins. Morissette, Saffa and a court reporter are present. Morissette is not aware what type of rights advisement or reading of charges, if any, Sesay has received thus far. Morissette reads Mr. Sesay the Rights Advisement according to a script, explains that the interview is being audio recorded, and reads Mr. Sesay the warrant of arrest. Mr. Morissette does not give Mr. Sesay a copy of his indictment before the interview begins, nor does he explain the specific charges against Sesay. Rather, he tells the accused he will be receiving the indictment later "as soon as the official turnover takes place." According to Morissette, he does not offer Sesay the opportunity to be a witness at this yet: "Basically, at this stage, I wanted to conduct an assessment of what did Mr. Sesay know and as he had offered his full collaboration, I wanted to see if -- you know, what it is that he was going to provide us with."[72] Morissette does not explain anything to Mr. Sesay about the Special Court and its institutional mandate—Mr. Sesay remains ignorant about the structure and function of the tribunal's various organs (Registry, OTP, Chambers). In particular, he is not informed of the Defense legal aid structure set up under the auspices of the Registry.

4:37pm

Recorded interview concludes. Morissette charters a helicopter flight to take Mr. Sesay to the Special Court detention facility on Bonthe island. Lamin is told to take Sesay to the helipad where a helicopter is waiting. According to Lamin, Sesay is very upset and crying continuously on the helicopter flight. He is saying he feels deceived by the authorities after having gone through the peace process and

[71] SCSL Transcript. 12 June 2007, Page 17 (Lines 11-13).
[72] SCSL Transcript. 12 June 2007, Page 28 (Lines 23-26).

believing things were going to be normalized. He is also especially upset about having been abruptly separated from his family and his young children. He is very concerned about them. After arriving on Bonthe, Lamin receives a packet of documents from "a representative of the Special Court." He is instructed to serve this packed upon Sesay. Lamin hands the documents to Sesay without reading or explaining what is inside the packet. The packet contains a copy of Sesay's warrant of arrest, the text of the Article 17 Rights of the Accused, and the certified indictment, all in English. Sesay is still very upset and crying as he is handed the documents. He continues crying.

It is too late for a helicopter to make a return flight by this time. Lamin, Saffa and other SLP escorting officers remain on the island overnight. Testimony is sketchy as to the conditions of detention on Bonthe. It is unclear whether Sesay has proper facilities to read any of the documents he has been served at this point:

- Morissette testified that he thought there was electricity on Bonthe but he could not say whether or not there were functioning lights which one could use to read in the prison, because he only ever went in the daytime. Morissette also testified that at the time of Mr. Sesay's arrest there was no "detention unit" yet, so Special Court "security officers" who wore civilian dress were in charge of securing the detention facility. He testified that, to his knowledge, at least one of them was armed.
- Berry testified based on what he knew of Bonthe from "a much later period of time," that he thinks there was a generator of some sort at the detention facility by the time he visited the site.
- Although both Saffa and Lamin visited Bonthe with the detainee his first night of incarceration, and they likely would have had pertinent knowledge, neither Lamin nor Saffa was asked by the Prosecutor to comment on the electricity provision or the security arrangement at the detention facility.

March 11th 2003→ Second Custodial Interview

Berry is one of two OTP Investigators who travel to Bonthe to collect Sesay and Bring him by helicopter back to OTP office for interview. To keep his identity secret, Mr. Sesay is hooded when being taken from the detention facility to the helicopter and then again from the helicopter to the vehicle on the mainland. Stories diverge as to whether or not the Defense Office is rebuffed at this point in its attempts to contact the accused:

- According to a May 2003 memo from the Registrar (exhibited as evidence in the voir dire), Duty Counsel Claire Carlton-Hanciles arrives at Bonthe on the same helicopter which subsequently returns to the mainland with Sesay on board. The Registry has reportedly insisted that Ms. Carlton-Hanciles be given the opportunity to talk to Mr. Sesay, either in Bonthe or Freetown, so she can explain the Court's legal aid scheme and make clear to the accused the full scope of his rights. However, the Registry memo reports that "Security staff had been given clear instruction that the Registry was not to enter into contact with Mr. Sesay as he waived his rights—as he had waived his rights to see counsel."[73]
- Morissette denies knowing anything about a deliberate effort to prevent Duty Counsel from coming into contact with the accused. However, he *is* aware that Ms. Beatrice Ureche, an intern with the Registry comes around midday on the 12th to await the arrival of the accused. She meets with then Chief of Prosecutions, Mr. Luc Cote. According to the May 2003 Registry report, she, like Ms. Carlton-Hanicles, is instructed by Ms. Marianna Goetz, legal

[73] 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). Para. 14.

assistant to the Registrar "to ensure that Mr. Sesay was aware of his rights to Defense counsel and legal aid, this being different from the specific right to a counsel being present during questioning."[74] Ms. Ureche is not given access to the accused to explain these things. Morissette disputes that Ms. Ureche asks to see the accused and disputes that he or Mr. Cote intimidates her into staying out of the interview room. According to Morissette, she simply asks for a copy of the signed waiver. Morissette is sent into the interview room by Luc Cote to obtain a copy of Sesay's initialed rights waiver to give to Ms. Ureche.

According to Morissette, Sesay is sitting with the court reporter and Berry when Morissette enters the room. Morissette introduces Berry to Sesay as the investigator who is going to conduct the interview. He remains to go through the Rights Advisement script again and get the waiver signed. The recording begins at 12:25pm and captures the rights advisement, but not the introductions. The tone the used for the rights advisement (as observed on the video played in court) is flat and perfunctory. The accused is backlit in the video, so it is impossible to judge demeanor based on facial expression. Sesay nods and says "yeah" when asked if he understands his rights. He and the investigators initial the form. Morissette leaves the room to take the form to Ms. Ureche. Berry proceeds with the interview.

Morissette does not participate in the interviewing, but goes into the interview room during breaks "on a regular basis" to meet with Mr. Sesay and engage in "confidence-building with him… bonding, if you want to call it that."[75] This includes speaking to Sesay about what the OTP needed out of him if he was going to be a useful collaborator. "I would mention to him that we were -- we have no problem with that, but that what he had to understand, that if this was going to happen he had to come straightforward and tell us everything that he knew and not just little bits and pieces."[76] It also includes discussions about material assistance and protection OTP can provide to Sesay's family through the Witness and Victim Support program in exchange for his testimony.

March 12th 2003→ Third Custodial Interview

Sesay is transported from Bonthe in essentially the same manner as the day before and brought to OTP offices for another interview with Berry. Berry takes Sesay through the rights advisement again and gets the initials of the accused on the rights waiver. The interview atmosphere is not tense, Berry claims. As with the 11th, he calls it "easy-flowing… Mr. Sesay was cooperative… We developed a good working relationship in regards to the information."[77]

Morissette does not participate in the interview this day, but continues to appear during the breaks. Morissette testified that he could not recall specifically each instance and each date of his numerous break time contacts with Sesay, but he said they occurred on a "regular basis" and testified, "My main role, from the 11th on, was to establish a rapport, like it was with Mr. Sesay, and to encourage him in his continued wishes to collaborate with the Court, with the Office of the Prosecutor."[78]

March 13th 2003→ Fourth Custodial Interview

Essentially the same Scenario as March 12th except that on this day, Sesay is visited at the OTP office by Duty Counsel Berry describes as "a legal defense lawyer, a Gambian female lady." According to Berry, he steps out of the interview room to give Sesay and Duty Counsel privacy. Upon resuming his interview with Sesay, Berry re-administers the rights advisement script to Sesay.

---

[74] Ibid at Para. 15.
[75] SCSL Transcript. 12 June 2007, Page 36 (Lines 3-6).
[76] SCSL Transcript. 12 June 2007, Page 36 (Lines 10-11).
[77] SCSL Transcript. 15 June 2007, Page 1 (Lines 27-29).
[78] SCSL Transcript. 12 June 2007, Page 40 (Lines 5-8).

March 14th 2003→ Fifth Custodial Interview

Essentially the same scenario as March 12th, except that Sesay can be seen on tape studying the rights advisement form more closely before he initials it. Sesay hesitates and expresses confusion. Before initialing the waiver, he attempts to explain to Mr. Berry what he understands his signature to mean: "So, all these days I'm saying 'yes' meaning 'yes, I'm not guilty.'" Instead of clarifying to Mr. Sesay that his initials on the form actually mean, "yes I understand my rights *and waive them*," Mr. Berry tells Mr. Sesay, "No, no, no you're not admitting guilt… you're being told you're a suspect and as a suspect you're entitled to these rights."[79] Mr. Berry does not clarify that Mr. Sesay's initials on the form mean he is waiving all the rights which Mr. Berry has just read. (On the stand, Mr. Berry did not accept Mr. Sesay was expressing a clear misunderstanding of the meaning of the waiver. As he testified "Obviously, Mr. Jordash, I must have missed his confusion."[80])

1:07pm

Morissette arranges for Sesay to call his wife on this day for the first time. The accused uses Morissette's cell phone to place the call. Mr. Sesay speaks with his wife briefly in order to inform her he has been arrested and let her know that Special Court officials are going to come to the house that day to take the family into protective custody. Mr. Sesay's falls under the clear impressions thereafter that the OTP exercises complete controls his access to visitation with his wife and children.

March 17th 2003→ Sixth Custodial Interview

Essentially the same scenario as March 12th.

March 18th 2003→ Seventh Custodial Interview

Essentially the same scenario as March 12th.

March 24th 2003→ Eighth Custodial Interview

Essentially the same scenario as March 12th, except that Sesay meets with Duty Counsel again during lunchtime. According to Berry, Sesay is visited by "the same female Gambian lawyer" from the Defense Office. She meets privately with Sesay while Berry waits just outside the door. According to Berry, after she has been in there approximately 15 minutes, Duty Counsel asks him to come in the room and "witness a document." The document in question is an express request for counsel, stating, "I Issa H. Sesay I want Mr. Robinson to represent me and not Mr. Edo Okanya." According to Mr. Berry's testimony, he enters the room, reads the document, and signs it as a witness. He initially testifies that he thinks he watches Sesay sign the document before he does. However, upon looking at the signature times noted on the document (1:07pm-Sesay, and 1:15pm-Berry), Berry testifies that Sesay must have already signed it before he entered the room.

1:34pm

Upon resuming the interview, Berry notes on the record that Sesay had a visit from Duty Counsel, but makes no mention on tape of Sesay's request for legal representation, nor does he revisit the question of the waiver or discuss the request with Sesay.

[79] See excerpts read onto record by Counsel. SCSL Transcript. 15 June 2007, Page 5-6.
[80] SCSL Transcript. 15 June 2007, Page 6 (Line 14).

March 31st 2003→ Ninth Custodial Interview

12:45pm

On direct examination, Morissette and Berry both testify that the interview this day proceeds in essentially the same manner as the previous eight days of custodial interviews. However, on cross examination, Mr. Jordash adduces evidence of a consequential lunchtime conversation between Morissette, Berry, and Sesay conducted off-the-record. Although neither man had volunteered any information about this incident on direct examination, admit to having the off-record conversation when Mr. Jordash broaches the topic on cross. The transcript reflects an hour and forty-five minute lunch break is taken (roughly twice as long as the typical lunch break). Morissette confirms that he initiates a fairly lengthy conversation off the record with Mr. Sesay about the statements he has made to investigators thus far. According to Morissette:

> "We felt that at this stage we were not sure whether it was worthwhile to continue the collaboration because we felt that he was holding back on us and that's why the break was a little longer because I had a conversation with Mr. Sesay… And had a frank discussion with him that, from what I could see, and what we were -- from our discussion with the investigation and Prosecution, you know, he was holding back and we knew that, that he was holding back, and I explained to Mr. Sesay that this could not work that way; that it had to work both ways."[81]

Mr. Morissette speaks to Mr. Sesay about OTP concerns that the collaboration will not work unless he starts corroborating certain things the investigators have outside information about. Morissette explains that they are not confident that he is credible, and he needs to share with the investigators "if he had done thing wrong" so they can ensure he will not be vulnerable to surprise attack on the witness stand. Mr. Jordash sought clarification from Mr. Morissette on this testimony:

Mr. Jordash:	Basically what you were saying was: Confess to what you've done. Then you will be useful to us. If you don't confess to what you have done, you won't be?
Mr. Morissette:	Yep.[82]

According to Mr. Berry, he is away from the room, eating his lunch, when this conversation begins, but it is still in progress when he returns to the interview room. He takes part in some latter portion of the conversation. Mr. Berry is vague about what particulars he hears from Mr. Morissette. He testifies only that Mr. Morissette is talking about truthfulness and witness credibility when he enters the room and the three of them continue discussing these matters.

2:31pm

Recording Resumes. No reference is made to any conversation whatsoever during the lunch hour. Berry immediately begins questioning Sesay about a particular crime the accused had repeatedly denied committing over the past eight interviews. The accused recants immediately after this lunch break and makes several incriminating statements.

April 14th 2003→ Tenth Custodial Interview

Essentially the same scenario as March 12th except that there is an additional rights advisement on tape in the afternoon

[81] SCSL Transcript. 13 June 2007, Page 40 (Lines 17-20) and Pg. 41 (Lines 1-6).
[82] SCSL Transcript. 13 June 2007, Page 42 (Lines 20-24).

4:21 pm

Morissette appears on tape and explains to Sesay that the OTP received a letter that day from John Jones, Defense Advisor. In response to the letter, the OTP drafts a document entitled "Specific Rights Advisement" consisting of a series of yes/no questions.

*Note about witness credibility: When Morissette first made reference to the Jones letter in his testimony, Judge Itoe asked him to elaborate on the details of the letter. The witness claimed to be unable, having never seen a copy of the letter:

Judge Itoe: May we know what the content of the letter was, please?
Morissette: I don't know, sir. I never saw it.
Judge Itoe: You never saw it?
Morissette: No.

However, Judge Boutet immediately called Morissette's attention to the fact that he not only *saw* a copy of the Jones letter—he must have had it in hand when he spoke to Sesay on the record. The transcript from the April 14th interview captures Morissette reading portions of the letter verbatim to the accused before he conducts the specific rights advisement. When faced with this evidence, Morissette apologized and said, "I forgot."

On tape, Morissette reads portions of the Jones letter to Sesay. The letter explains that Mr. Jones is concerned to learn that Sesay has been repeatedly interviewed by the OTP without advance notice to the Defense Office or invitation to Counsel to be present during the interviews. Mr. Jones says he met with Sesay to discuss the matter and "asked him to consider whether he wishes to have further contact with the OTP. In light of this consideration, I would ask the OTP not to conduct any further interviews with Mr. Sesay until he has made a final decision as to his position in this regard, which he has indicated he will provide within a week or so." After reading excerpts from Mr. Jones' letter to Sesay, Morissette reads the questions from the "Specific Rights Advisement" and has the accused write "yes" or "no" and initial by each of his six answers. The Specific Rights Advisement reads as follows (original typographical errors and handwritten strikeout corrections included in reproduction below):

14 April 2003

SPECIFIC RIGHTS ADVISEMENT[83]

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. YOUR 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.

   TELL DEFENCE

3. DID YOU ~~TOLD~~ ^ JOHN JONES, THE DUTY COUNCEL(*sic*)/~~LEGAL~~ ^ 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"

[83] Voir Dire Exhibit E.

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"

April 15th 2003→ Eleventh Custodial Interview

9:58am

Prior to Berry beginning his interview, Morissette takes a second specific rights advisement to Sesay in order to clarify an ambiguity between two of his previous answers. On the 14th of April, 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 Morissette presents to Sesay on the 15th of April asks the accused to re-answer verbatim reproductions of questions 7 and 8. Sesay does so, again answering the two questions inconsistently with one another. This time, however, he inverts his "yes" and "no" answers—answering question 7 in the negative and question 8 in the affirmative:

PRECISIONS (*sic*) **ON QUESTION 7 AND 8**[84]

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"

On the stand, both Berry and Morissette acknowledged that the questions don't make much sense and the answers make even less sense. Morissette testified he could not recall who drafted the questions or why, after Mr. Sesay had demonstrated repeated misapprehension about the role of Duty Counsel, the OTP didn't seek to clarify Mr. Sesay's rights with him using the phrase "lawyer" or "attorney."

[84] Voir Dire Exhibit G.

WSD**HANDA**CENTER
FOR HUMAN RIGHTS & INTERNATIONAL JUSTICE
Stanford University

This publication was originally produced pursuant to a project supported by the War Crimes Studies Center (WCSC), which was founded at the University of California, Berkeley in 2000. In 2014, the WCSC re-located to Stanford University and adopted a new name: the WSD Handa Center for Human Rights and International Justice. The Handa Center succeeds and carries on all the work of the WCSC, including all trial monitoring programs, as well as partnerships such as the Asian International Justice Initiative (AIJI).

A complete archive of trial monitoring reports is available online at:

http://handacenter.stanford.edu/reports-list

For more information about Handa Center programs, please visit:

http://handacenter.stanford.edu