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SUMMARY

Trial Chamber I spent this week hearing detailed oral arguments on the admissibility of prior statements made by the first accused, Issa Sesay. The statements in controversy were taken by OTP Investigators during ten days of custodial interviews in March and April of 2003, immediately following Mr. Sesay's initial detention. At issue was the voluntariness of Mr. Sesay's statements and his alleged waivers of the right remain silent and the right to counsel. Prosecution sought to admit the transcripts, arguing that Investigators legitimately obtained the waivers and questioned Sesay in accordance with the procedural rights of the accused. Defense counsel argued that trickery, threats, and other improperly coercive methods were used to obtain the waivers and further elicit involuntary statements from the accused in breach of Rules 42, 63, and 92. These breaches would amount to violations of the fundamental rights of the accused and render the transcripts inadmissible pursuant to the Rule 95 mandate that, "No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute." The Chamber presided over three days of oral arguments on the matter before deciding, on Friday, to order a formal voir dire—a trial within a trial during which the Judges could hear testimonial evidence from witnesses involved in the 2003 custodial interrogation

ORAL ARGUMENTS ON THE PROSECUTION APPLICATION TO USE PRIOR STATEMENTS BY THE FIRST ACCUSED

Prosecutor Peter Harrison was given the opportunity to begin cross examining Issa Sesay this week. At the outset, Mr. Harrison formally advised the Court of his intention to use Mr. Sesay's prior statements for the limited purpose of impeaching the credibility of the accused. The Prosecution had not previously sought to admit these statements during its case in chief. In order to admit the statements at this point, Prosecution and Defense both agreed that the proper procedure, pursuant to ICTR jurisprudence, would be for Mr. Harrison to formally apply for leave to use these statements. This would prompt the Court to consider the admissibility of the statements and to issue a judgment on the questions of voluntariness raised by Counsel for the first accused midway through last week.[1] Unlike last week, when the Trial Chamber deemed it premature to consider the transcripts'

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[1] *See* SCSL Transcript, 29 May 2007, Page 54. Discussed in Special Court Monitoring Program Update #98.

admissibility, the three Judges agreed to hear oral arguments on the matter following Mr. Harrison's application.

During three full days of oral submissions, Prosecution and Defense made their respective arguments to the Court. Mr. Harrison advanced the Prosecution position that, on video and audio recordings of the interview sessions, the accused is under no apparent duress, and his statements and waivers plainly appear to have been tendered voluntarily. Accordingly, inquiry into evidentiary admissibility need not proceed further than the face of the transcript and the audiovisual recordings. Defense countered that the prior statements ought to be excluded because the face of the transcript reveals clear violations of Rules 42 and 63.[2] Mr. Jordash further argued that parts of the transcript suggest improperly coercive off-the-record communication between investigators and the accused, and that such coercion and off-camera discussions, if corroborated, would nullify the purportedly voluntary waivers Mr. Sesay signed.[3] In the course of his argument, Defense leveled serious allegations of professional misconduct at the Prosecution investigators who interviewed Mr. Sesay. Mr. Jordash asserted that Mr. Sesay was coerced and threatened off-the-record, deliberately misled about his rights as an indictee of the Special Court, questioned at length without knowing the charges against him, and improperly induced to waive his right to counsel and to make the statements in controversy.

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[2] Rule 42 of the Special Court's Rules of Procedure and Evidence enumerates the Rights of Suspects during Prosecution investigations:

(A) A Suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands
  (i) The right to legal assistance of his own choosing, including the right to have legal assistance provided by the Defense Office where the interests of justice so require and where the suspect does not have sufficient means to pay for it;
  (ii) The right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning; and
  (iii) The right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

Rule 63 of the Special Court's Rules of Procedure and Evidence states the protocol for Questioning of an Accused by Prosecution investigators:

(A) Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present.

(B) The questioning, including any waiver of the right to counsel, shall be audio-recorded and, if possible, video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of questioning, caution the accused in accordance with Rule 42(A)(iii).

[3] Rule 92 of the Special Court's Rules of Procedure and Evidence says that, "A confession by the suspect or the accused given during questioning by the Prosecutor shall, *provided the requirements of Rule 43 and Rule 63 were complied with*, be presumed to have been free and voluntary." (emphasis added) Rule 43 enumerates the protocol which must be followed whenever the Prosecutor questions a suspect (or an accused—Rule 43 was incorporated by reference into Rule 63(B)). The Rule mandates that all Prosecution questioning be audio-recorded or video-recorded, that the suspect be informed he is being recorded, that timing of breaks and resumption of questioning be stated on the recording, and that the suspect be offered the opportunity, at the conclusion of questioning, to clarify or add anything else he wishes to say on tape. The rule also provides for subsequent transcription of the recordings, and mandates particular archiving and disclosure protocol for the recordings and transcripts.

KEY PROSECUTION SUBMISSIONS

Oral arguments by the Prosecution covered points of law, procedure, and fact, in turn. (1) Mr. Harrison began by addressing the Court on the legal standard for admission of prior statements by an accused. (2) He then argued that a voir dire is not the proper procedure for determining admissibility of the transcript, because the question can be properly decided on the face of the papers. (3) Finally, he canvassed the factual circumstances weighing in favor of admission.

(1) Legal Standard for Admissibility: Rule 89(C) says, "A Chamber may admit any relevant evidence." Mr. Harrison argued that, even where the reliability of evidence has been called into question, Rule 89 favors the broadest approach to admissibility. Under such an approach, reliability concerns do not merit exclusion of evidence. Less reliable evidence should be admitted first, and *then* given as much or as little weight as the Bench sees fit. Mr. Harrison cited the Special Court's *Fofana* bail decision for language supporting the capacity of professional judges to weigh evidence appropriately. According to the *Fofana* decision, Rule 89's broad admissibility standard "ensures that the administration of justice will not be brought into disrepute by artificial or technical rules" and was designed to avoid "sterile legal debate over admissibility."[4] However, the Prosecutor went on to acknowledge that because the statements in controversy were made by an accused, and not simply an ordinary witness, threshold relevance is not the only admissibility consideration. Rule 92, governing confessions, must also be satisfied.[5] This means the Trial Chamber must additionally find that the statements were made *voluntarily*, before it can admit them into evidence.

(2) Procedural Submissions: Turning to procedural matters, Mr. Harrison argued that the Judges need not order a voir dire in order to reach a definitive determination of voluntariness. The Chamber, he submitted, could adequately and justly determine admissibility without exhaustively reviewing the circumstances surrounding the custodial interviews.[6] They could simply listen to the submissions of the parties, review the transcripts, watch the tapes, and see for themselves if the interviews appear voluntary.[7] "There can be no better evidence before the Court in assisting you in determining whether or not the statement is admissible than by looking at the videotape or listening to the audio taping."[8]

The Special Court's Rules of Procedure and Evidence offer no specific guidance as to when and if the Trial Chamber should call a voir dire. However, Rule 89(b) generally mandates that the Trial Chamber "shall apply the rules of evidence which will best favor a fair determination of the matter

[4] *Prosecutor v. Norman, Fofana, and Kondewa*, Case No. SCSL-04-14-T-371, "Fofana—Appeal Against Decision Refusing Bail," 11 March 2005, at ¶26.
[5] *See supra* note 3 outlining the Rule 92 standard for presumption of voluntariness in confessions.
[6] In these procedural submissions, Counsel for the Prosecution again referenced the *Fofana* bail decision. He argued, in effect, that a voir dire would inefficiently and unnecessarily divert the Court's attention with the kind of "sterile legal debate" the *Fofana* decision favored avoiding. "It appears to be the Appeals Chamber's decisions that this Trial Chamber… is expected to try to develop procedures which ensure justice for the accused and which are also efficient." SCSL Transcript. 5 June 2007, Page 36 (Lines 1-4).
[7] Counsel for the Prosecution acknowledged, "I perfectly understand the amount of hesitance that the Court may have in adopting a procedure which is not consistent with something which may be tried and true in national systems. But the Prosecution simply says that this is an international court; it's not a Common Law court." SCSL Transcript. 5 June 2007, Page 47 (Line 2-6). Mr. Harrison defended the Prosecution's preferred procedure as "a streamlined, yet fair and rigorous process" which is the "general rule" in inquisitorial systems and obviates the need for a voir dire. *See* SCSL Transcript. 5 June 2007, Page 47 (Line 7).
[8] SCSL Transcript. 5 June 2007, Page 14 (Lines 14-17).

before it and are consonant with the spirit of the Statute and the general principles of law."[9] Counsel for the Prosecution argued that the same general rule had been interpreted by the ICTR in support of dispensing with a voir dire in what Mr. Harrison submitted were similar circumstances. Counsel relied, in particular, upon Trial and Appeals Chamber decisions in *Prosecutor v. Ntahobali*.[10]

In *Ntahobali*, both the Prosecution and the co-accused, Kanyabashi, sought to impeach Ntahobali's credibility using the latter's prior custodial statements on cross. Like the present case, Counsel for Ntahobali sought to exclude the evidence on the grounds that Prosecution investigators violated certain fundamental rights of the accused when soliciting the statements from Mr. Ntahobali. The Judges presiding over that trial perused the transcripts in controversy, heard limited submissions of the parties, and concluded it was unnecessary to call a voir dire. They overruled the objection, and admitted the evidence for impeachment purposes only. Mr. Harrison broadly analogized *Ntahobali* to Mr. Sesay's case, concluding, "We say the same [procedure] ought to apply here." He noted that the *Ntahobali* Trial Chamber followed this path in reliance on the procedure followed in cases such as "*Bagosora et al*, *Bizimungu et al*, *Kabiligi*, and *Ntabakuze*."[11] He also cited to the Appeals Chamber decision in *Ntahobali*, which affirmed that the procedural decision to dispense with a voir dire had not been an abuse of process.[12]

In his oral submissions, Mr. Harrison highlighted factual parallels which would justify following the *Ntahobali* procedure. However, Counsel for the Prosecution only obliquely addressed the legal grounds upon which the ICTR Trial Chamber denied the voir dire in *Ntahobali*. This made his submissions difficult to follow at times—Without understanding the relevant legal principle, one cannot properly apply the ICTR precedent to the factual basis for Mr. Sesay's objection. In *Ntahobali*, the ICTR Trial Chamber denied a voir dire because the Defense had failed to present the prima facie evidence necessary to merit such a procedure. The Appeals Chamber affirmed this exercise of discretion, because the Trial Chamber found "no evidence of coercion or inducements attributable to the Prosecution investigators"[13] However the interlocutory appeal decision noted that the Trial Chamber may have been compelled to call a voir dire, had the Judges been presented with prima facie evidence of investigative misconduct. *Substantiated* allegations of threats and inducements, the Appeals Judges reasoned, would fall within the purview of Rule 95,[14] and could

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[9] SCSL Rules of Procedure and Evidence, Rule 89(b).

[10] *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Joint Case No. ICTR-98-42-T, "Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997," 15 May 2006. (citing also to *Prosecutor v. Bagosora, Prosecutor v. Bizimungu, Prosecutor v. Kabiligi,* and *Prosecutor v. Ntabakuze* at ¶54).

[11] *See* SCSL Transcript. 5 June 2007, Page 13 (Lines 26-29) and Page 14 (Lines 1-4). Mr. Jordash later called *Ntahobali* "repleat with errors" and pointed out, by way of illustration, that *Bagosora et al* and *Kabiligi* are the same case. Kabiligi was one of the joint defendants in *Bagosora et al*. SCSL Transcript. 6 June 2007, Page 52.

[12] *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Joint Case No. ICTR-97-21-AR73, "Decision on Appeal of Accused Arsène Shalom Ntahobali Against the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997," 27 October 2006.

[13] *Id.* at ¶ 5. The Appeals Chamber did not review the Trial Chamber's finding *de novo*. They merely reviewed whether or not the Trial Chamber abused its discretion when it denied the voir dire for lack of prima facie evidence. In other words, the Appeals Chamber decided as a matter of law that insufficient evidence of abuse was a legitimate reason for denying the voir dire. They did not review the submissions of the parties *de novo* and consider whether the evidence before the TC was *in fact* insufficient.

[14] Rule 95 of the ICTR Rules of Procedure and Evidence (which is identical to the Special Court's Rule 95) says, "No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute."

prompt "a need for further evidence on the matter."[15] Mr. Harrison read the relevant paragraph of the Appeals decision aloud to the Court, but spent surprisingly little time addressing this underlying legal principle before moving on to his factual submissions.[16]

(3) Factual Submissions: Mr. Harrison submitted that Issa Sesay's custodial interviews were, factually, substantially similar to those of the defendant in *Ntahobali*; On the record, investigators read the accused his rights, asked, according to the rights advisement script, if he understood them, and secured an affirmative answer along with a signed waiver of his rights to counsel and to remain silent. The *Ntahobali* Trial Chamber determined that the accused in that case never expressed confusion about his rights nor did he ever re-assert his right to counsel after having waived it at the beginning of the interview. His statements and waivers were found to be obtained in compliance with Rules 42, 43, and 63. Mr. Harrison argued that Mr. Sesay's statements were likewise obtained in compliance with the Rules and should therefore be deemed voluntary. The Rule 92 presumption of voluntariness "should apply here because Rules 43 and 63 were complied with…the presumption should be put in place, that the statement of Mr. Sesay is free and voluntary.[17]

Counsel for the Prosecution surveyed various pieces of evidence which, he argued, tend to corroborate presumptive voluntariness by proving "substantial compliance" with the Rules. He began by arguing that the Court had already ruled once on the question of Mr. Sesay's voluntariness—in a 2003 pre-trial decision by Judge Thompson. After studying a confidential Registry report on the subject of Mr. Sesay's arrest and interrogation, Judge Thompson wrote, "I find nothing therein to convince me that the waiver on the part of accused of his right to have counsel present at the interviews with the OTP was not voluntary and informed."[18] According to Mr. Harrison, this was a definitive judgment on the matter which favored the Prosecution position. "We rely upon the decision of Mr. Justice Thompson to the effect that there was an expressed waiver back in 2003 by Mr. Sesay."[19] Mr. Harrison also pointed out that the 2003 Defense Office motion, which gave rise to Judge Thompson's ruling, contained "absolutely no suggestion that Mr. Sesay, at any time, said that he did not want to speak to the Office of the Prosecutor."[20] By implication (although never expressly stated), Mr. Harrison offered this omission as circumstantial evidence that Mr. Sesay did, in fact, want to speak to the Prosecutor.

At several points during his submissions, Mr. Harrison argued that, even if the Trial Chamber finds slight flaws in the Investigators' compliance with the Rules, Mr. Sesay's statements may still be admissible. He noted, for instance, that the standard for deemed voluntariness is slightly less onerous

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[15] *Ntahobali*, *supra* note 12 at ¶17.
[16] *See* SCSL Transcript. 5 June 2007, Page 28-29.
[17] SCSL Transcript. 5 June 2007, Page 39 (Lines 19-21).
[18] SCSL Transcript. 5 June 2007, Page 37 (Lines 6-9). Quoting from *Prosecutor v. Issa Hassan Sesay*, Case No. SCSL-5-42, "Decision on Request of Defence Office for Order Regarding Contact with Accused." 30 May 2003.
[19] SCSL Transcript. 5 June 2007, Page 41 (Lines 7-9).
[20] Citing to *Prosecutor v. Issa Hassan Sesay*, Case No. SCSL-5-19, "Extremely Urgent Request of Defence for Order Regarding Contact with the Accused." 16 April 2003. According to Judge Thompson's decision, the motion sought judgment on the following question: "whether there exists under international law practice or within the parameters of universally recognised and accepted standard of justice, a right in favour of the counsel for an accused to require that contacts between his client and the Prosecution for the purposes of interviews be made only through him/her, and to interpose his subjective evaluation as to the propriety of the accused's choices where such an accused has voluntarily and knowingly waived his right to the presence of counsel at such interviews, such waiver being perceived by counsel as illogical and detrimental to the interests of the accused." SCSL Transcript. 5 June 2007, Page 30 (Lines 4-15).

under the Special Court's drafting of Rule 92. Unlike the ICTR and the ICTY which require "strict compliance" under Rule 92, the Special Court requires only "compliance" with Rules 43 and 63 to trigger a Rule 92 presumption of voluntariness. Mr. Harrison also relied upon an ICTR case, *Bizimungu*. "In a nutshell," Counsel argued, "this case stands for the proposition that there does not have to be perfect compliance with the Rules in order for a statement to be admissible."[21] He read a number of factual and legal findings from the *Bizimungu* decision. However, only one—concerning a technical breach of Rule 43—directly addressed investigative non-compliance with the Rules. The defendant in *Bizimungu* was never formally advised that his custodial interrogation was being taped, but the Court admitted his statements because the accused was clearly aware of the recording and its purpose. Thus, though the Rule was technically breached, the Court found that the evidence was admissible because "the rights of the accused were not prejudiced."[22]

Throughout his submissions, Mr. Harrison cataloged various indicia of reliability from the face of the Sesay interrogation transcripts. He surveyed the method by which the investigators executed the rights advisement each of the ten days they interviewed Mr. Sesay. He also urged the court to watch the tapes and pay close attention to the general demeanor of the accused, the appearance of his surroundings, and the tenor of the interview questions put to him. Mr. Harrison called it "manifestly obvious" that Mr. Sesay fully appreciated his circumstances and made an informed decision to cooperate with investigators. "The accused clearly understood what was taking place, and…he voluntarily agreed to give a statement to the Prosecution."[23] He noted that the interview records contain, "instances of the first accused correcting the interviewer on certain matters. You will find him explaining in more detail, then asked about on certain topics. And by viewing the videotape, it's obvious that there was, from body language alone, a willingness on the part of the first accused to take part in this interviewing process."[24]

DEFENSE COUNTER-ARGUMENTS

Before launching into his substantive arguments Mr. Jordash requested assurance from the court that Judge Thompson's May 2003 decision[25] did not pose any *res judicata* bar to Defense litigating the question of involuntary waiver of counsel. Mr. Jordash pointed out that the factual conclusions Judge Thompson drew in 2003 were based entirely on the written accounts of the Prosecution and the Registrar. Counsel for the accused argued that this was "a decision which was, by its very nature, having not heard from the Defense, a limited and restricted decision. This is the time, we would submit, for the Defense to provide their submissions on the issue.[26] The Bench agreed that Defense Counsel should be permitted to make factual and legal submissions as "fully and amply as possible," and that the 2003 decision should not preclude any avenues of oral argument Mr. Jordash wished to pursue on behalf of his client in this hearing.

Mr. Jordash began his submissions by attacking the Prosecutor's reliance on *Ntahobali* straight away. He argued that it is the "wrong starting point" because it deals with non-confessional prior statements by an accused, and because involuntariness was never alleged in that case (only technical breach of procedural rules). The case contains "no general principle which deals with the points which we seek

[21] SCSL Transcript. 5 June 2007, Page 42 (Lines 5-7).
[22] SCSL Transcript. 5 June 2007, Page 44 (Line 4).
[23] SCSL Transcript. 5 June 2007, Page 46 (Lines 16-20).
[24] SCSL Transcript. 5 June 2007, Page 46 (Lines 22-27).
[25] As referenced by Mr. Harrison (see discussion on p. 5 of this report) *Prosecutor v. Issa Hassan Sesay*, Case No. SCSL-5-42, "Decision on Request of Defence Office for Order Regarding Contact with Accused." 30 May 2003.
[26] SCSL Transcript. 5 June 2007, Page 49 (Lines 17-21).

to raise."[27] Although opposing Counsel would like the Chamber to adopt the *Ntahobali* Court's substantive findings, Mr. Jordash explained, they "are specific to the facts in that case which, in due course, we will submit are quite different. The starting point for any application to exclude statements of the accused is an examination of the relevant law and an examination of the facts at hand."[28]

Counsel argued that Mr. Sesay's prior statements were inadmissible pursuant to Rule 89 and 95 because they were taken in violation of the fundamental rights of the accused, guaranteed by Rules 42, 43, 63, 92 and Article 17 of the Statute of the Special Court.[29] Defense sought judgment in its favor through one of several procedural alternatives—Mr. Jordash articulated two separate justifications for immediate exclusion of the evidence. In the alternative, he advocated further judicial inquiry into the matter through a voir dire. At a minimum, he argued that the Bench must hear the accused testify about the circumstances of his arrest. In brief, Defense Counsel pled as follows: **(1)** Rights violations apparent on the face of the transcript are sufficiently grave to merit immediate exclusion of the evidence. In the face of these breaches, Prosecution cannot establish voluntariness, because they cannot discharge their burden to show that Mr. Sesay knew, understood, and legitimately waived his rights; **(2)** Breaches apparent on the face of the transcript at least constitute clear prima facie evidence in support of Defense allegations. This is legally sufficient to merit a voir dire and a calling of further evidence on the matter; **(3)** Even without a formal voir dire, the accused *must* be given the opportunity to testify about the circumstances of his detention and interrogation. Without hearing this evidence from the accused, the Court cannot make an informed judgment as to the admissibility of his prior statements; **(4)** All issues of voluntariness aside, the Bench should exclude the evidence because the Prosecution did not rely upon the statements during its case-in-chief and failed to give timely notice of intent to use the statements for impeachment.

(1) Primary Grounds for Immediate Exclusion: Mr. Jordash attacked the legal arguments presented by the prosecution and further presented what can only be described as an overwhelming amount of evidence to rebut the factual underpinnings of the Prosecution position (i.e. what Mr. Harrison called the "manifestly obvious" consent on the interrogation transcripts). "There is, we would say, ample evidence on the face of the transcripts that the accused did not voluntarily waive his right to counsel, nor voluntarily provide statements to the Prosecution."[30] In support of its application for immediate exclusion of the evidence, Defense emphasized that Prosecution bears a heavy burden of proof to get the prior statements admitted. Before opposing Counsel may claim a Rule 92 presumption of voluntariness, he must prove, *beyond a reasonable doubt* that the statements were taken in compliance with Rules 42, 43, and 63.[31] These Rules contain "stringent

[27] SCSL Transcript. 5 June 2007, Page 51 (Lines 3-4). Toward the end of his oral submissions, Mr. Jordash returned to *Ntahobali* and attacked its precedential value in light of prior and subsequent ICTR and ICTY cases. "*Ntahobali* is a bad decision. It's a bad decision. There's no doubt about it. It's replete with inaccuracies… It's out of kilter with *Bagosora*; it's out of kilter with *Delalic*; it's out of kilter with *Halilovic*." SCSL Transcript. 6 June 2007, Page 50 (Lines 7-17).

[28] SCSL Transcript. 5 June 2007, Page 51 (Lines 18-24).

[29] The primary theory of exclusion Defense advanced throughout its submissions revolved around the concept of voluntariness, but Mr. Jordash also raised the Rule 5 provision of relief where "non-compliance with the Rules or Regulations…has caused material prejudice to the objecting party." According to Mr. Jordash, "any cross-examination, we would submit, on statements such as these, in the face of these clear breaches… would cause material prejudice to the Defense." SCSL Transcript. 5 June 2007, Page 71 (Lines 20-24).

[30] SCSL Transcript. 5 June 2007, Page 52 (Lines 24-27).

[31] Counsel relied on *Delalic* for articulation of the burden. Mr. Jordash submitted that, based on this burden, the Court must reject the Prosecutor's suggestion that Mr. Sesay's statements could be deemed admissible on the basis

requirements," Defense submitted. "The Court must demand the most exacting standards."[32] Mr. Jordash argued emphatically that, based on the facts apparent in the transcripts *alone*, Prosecution cannot meet its burden. There is an overwhelming amount of evidence, he insisted, that Mr. Sesay didn't understand his rights, and that the OTP investigators secured the cooperation of the accused by perpetuating and compounding his confusion.

Counsel for the accused addressed the issue of signed rights waivers head-on, using case law from the ICTR and the ICTY to support his points. Mr. Jordash argued that "the technical waiver of counsel, which the Prosecution rely upon, must be considered in the context of how it was explained to Mr. Sesay."[33] He catalogued a number of instances on the face of the interview transcripts, where Mr. Sesay displays clear misunderstanding of what role Duty Counsel played[34] and what it meant to sign and initial the rights waiver.[35] At each instance, investigators either contributed to his confusion, or did nothing to disabuse him of his misapprehensions. As such, Mr. Jordash argued, "the Prosecution submission that the technical waiver is somehow the beginning and end of the submission… is, of course, not right because the burden is a heavy one on the Prosecution."[36] Counsel cited to *Prosecutor v. Bagosora et al*[37] and *Prosecutor v. Delalic*[38] for legal interpretation of the burden. Both cases recognize that investigators are bound to recite the Rule 42 rights advisement, but additionally, "where there are indications that a witness is confused, steps must be taken to ensure that the suspect does actually understand the nature of his or her rights."[39] Mr. Jordash argued that OTP investigators secured waivers from Mr. Sesay by explaining his rights to him in a grossly inadequate and misleading fashion. By way of illustration, he read a particularly baffling excerpt from the 10th of March, 2003—the day of Mr. Sesay's arrest, and the first time investigators asked him to sign a waiver of rights. As recorded on the transcript, Gilbert Morissette (then Deputy Chief of Investigations) conflates cooperation with investigators with willingness to waive the right to counsel, as if making a statement and asserting one's right to counsel were mutually exclusive:

> Mr. Morissette: "Are you willing to waive the right to counsel and proceed with the interview in preparation of a witness statement; yes or no? In other words, are you willing to discuss with us your involvement; are you willing to tell us what happened and what you know of these events?"[40]

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of the transcript alone, without calling further evidence. He explained that, while judges at the ICTR have ruled in favor of *excluding* evidence on the basis of interrogation transcripts alone, there has never been a case where an accused has challenged the voluntariness of a prior custodial statement and an international court has allowed the Prosecutor to discharge his (much heavier) burden of proof using the transcripts alone. Mr. Jordash argued, "It's never been done and what the Prosecution are asking you to do is make bad law." SCSL Transcript. 6 June 2007, Page 53 (Lines 12-13).

[32] SCSL Transcript. 5 June 2007, Page 58 (Lines 14-18).

[33] SCSL Transcript. 5 June 2007, Page 59 (Lines 8-10).

[34] See numerous issues surveyed by the Defense SCSL Transcript. 6 June 2007, Page 28-36.

[35] At one point, highlighted by Mr. Jordash in his submissions, Mr. Sesay stopped Mr. Berry as he was going through the rights waiver questions and tried to explain, "So all these days I'm saying 'yes,' meaning yes, I'm not guilty." *See* SCSL Transcript. 5 June 2007, Page 107 (Lines 11-12).

[36] SCSL Transcript. 5 June 2007, Page 58 (Lines 25-29).

[37] ICTR-98-41-T

[38] IT-96-21-T

[39] SCSL Transcript. 5 June 2007, Page 60 (Lines 21-24).

[40] SCSL Transcript. 5 June 2007, Page 106 (Lines 10-14).

Mr. Jordash pointed out that Mr. Morissette's explanation is made all the more problematic by the fact that the concept was never re-explained to Mr. Sesay in any other way. "This is the *only* explanation on record offered by the investigators as to the right to counsel…Your Honors can go through the interviews. There is no other explanation ever offered to this accused as to the meaning of whether he's willing to waive the right to counsel."[41] How, he argued, can Mr. Sesay have knowingly waived a right he didn't understand? The accused, Mr. Jordash pointed out, "relied wholly upon the information passed to him by Prosecution investigators," and that information was inaccurate and confusing (deliberately so, Defense alleged).[42] Rule 42(b) provides that questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. Pursuant to ICTR and ICTY jurisprudence, a violation of this right is, by itself, enough to merit exclusion of the statements. Mr. Jordash quoted the *Bagasora* court agreeing with *Delalic* that "it is difficult to imagine a statement taken in violation of the fundamental right of the assistance of counsel which would not require its exclusion under Rule 95 as being antithetical to and would seriously damage the integrity of the proceedings."[43]

Moving beyond the right to counsel, Defense alleged that the statements should be excluded because coercive investigative behavior breached Mr. Sesay's right to silence. One such allegedly coercive technique Defense focused on was the repeated use of Mr. Sesay's wife and child as an inducement to get Mr. Sesay to cooperate and speak with investigators. The record reflects that Mr. Sesay's family taken into Witness and Victim Support protective custody at the behest of OTP a few days after his arrest.[44] Mr. Jordash submitted that investigators clearly knew how distraught Mr. Sesay was over being held incommunicado, unable to reassure his family as to his whereabouts after his arrest. Indeed, he broke down crying during his first custodial interrogation, and told investigators, "You know, I said what got me so shattered when you ask me about my children, because presently they don't even know my whereabouts, you know. That caused me to cry."[45] The Defense suggested that the OTP took Mr. Sesay's family into protective custody so that Prosecution investigators could strategically control Mr. Sesay's access to his family and assert coercive authority over the accused. Mr. Jordash cited to evidence on the record that OTP investigators arranged for Mr. Sesay to see his wife on the condition he met and spoke with FBI investigators. Defense submitted that this was evidence investigators were using their control over Mr. Sesay's family as in improper tool for inducement, but also as a way to confuse Mr. Sesay about his status as either an insider witness or an accused. If the Prosecution has an alternate explanation, Mr. Jordash argued, they haven't asserted it. The burden is on the Prosecution, he insisted, not the Defense, to show that the protective custody arrangement was legitimate rather than coercive.

Mr. Jordash further argued that Mr. Sesay was particularly susceptible to improper coercion and inducement, and that the law requires his susceptibility be taken into consideration by investigators and by the Court. In line with *Delalic* and *Bagosora*, Mr. Jordash argued that the factual

[41] SCSL Transcript. 5 June 2007, Page 106 (Lines 15-21).
[42] SCSL Transcript. 5 June 2007, Page 91 (Lines 10-12).
[43] SCSL Transcript. 5 June 2007, Page 63 (Lines 3-8).
[44] Mr. Jordash relied upon a 2004 letter to Tim Clayson (Mr. Sesay's former attorney) from Senior OTP trial attorney, Robert Petit, advising, "because of his initial decision to give a statement to the OTP and the possibility of your client being a witness for the Prosecution, the OTP, under its budget, has been providing witness protection measures for your client's family for almost a year now." Mr. Sesay had not ultimately become an insider witness for the Prosecution, and Mr. Petit informed Mr. Clayson that "OTP's assistance to your client will cease" shortly. He advised Mr. Clayson to make his own arrangements with the Witness and Victims Support Unit directly if he wished to see what assistance they could provide Mr. Sesay's family.
[45] SCSL Transcript. 5 June 2007, Page 108 (Lines 19-21).

circumstances of a detainee must be factored into any determination of how coercive an interrogation was or was not, as well as how vulnerable the detainee was to inducement. "What may be regarded as oppressive with respect to a child, old man or invalid or someone inexperienced in the ways of the administration of justice may not be oppressive with a mature person, familiar with the police or judicial process."[46] Mr. Jordash pointed out that his client had an education only to the age of 13, after which point he spent a decade in the bush fighting a guerilla war. He had limited literacy, no experience with formal criminal justice systems, and no concept of defense rights. Moreover, he was being interrogated in his third language, by Prosecution investigators representing a recently established, experimental, hybrid institution of international criminal justice.

(2) Grounds for Calling a Voir Dire: As an alternative procedure to immediate exclusion, Defense requested that the Court call a voir dire. Comprehensive assessment of the circumstances and close scrutiny of the investigative conduct, Mr. Jordash argued, is the only way to definitively determine the reliability (and by extension the admissibility)[47] of the evidence. "In order to meet its burden that the waiver in the statement is free and voluntary, the Prosecution must put before the Court *all* the circumstances."[48] Mr. Jordash argued that the record, as presented by the Prosecution, was far from complete, and left numerous questions unanswered. It was incumbent upon the Trial Chamber to inquire further into the circumstances surrounding Mr. Sesay's arrest and interrogation. Determining the reliability of the prior custodial statements of an accused, Counsel argued, is "far, very far from sterile legal debate. This is about conduct which, if correct, is far more likely to bring the administration into disrepute than excluding evidence."[49] Such serious allegations of procedural abuse must be exhaustively examined by the court, he insisted.

Mr. Jordash buttressed his argument with ICTY case law. He relied primarily upon the Appeals decision in *Halilovic*,[50] holding that the Trial Chamber had erred when it admitted certain prior custodial statements of the accused. In the Trial Chamber decision, the *Halilovic* court had refused to inquire into the circumstances surrounding an impugned interrogation. The Appeals Chamber's error decision turned on the fact that the Trial Chamber ignored clear indicia of improper off-the-record inducement. In its judgment, the Appeals Chamber expounded upon the significance of off-the-record communications, the potentially detrimental effect they can have on reliability of the evidence, and the import of strict compliance with Rule 43. In Mr. Sesay's case, Mr. Jordash argued, there is clear evidence on the face of the transcript that unaccounted for, unexplained, off-the-record communications transpired. Where a Trial Chamber is not willing to exclude the statements outright, the jurisprudence clearly indicates that the Court must at least conduct a thorough factual inquiry in

[46] SCSL Transcript. 5 June 2007, Page 90 (Lines 27-29), Page 91 (Lines 1-2). (Quoting from *Delalic*).
[47] Contrary to Prosecution arguments, Defense submitted that reliability is an essential precursor to determining relevance under Rule 89(c). To that end, Mr. Jordash argued that the terms of Rule 89(c), as interpreted by *Fofana* and *Delalic* actually support the Defense position for exclusion, not the Prosecution position for admission. Mr. Jordash rejected the notion, advanced by Mr. Harrison, that Rule 89(c) permits a broad, undiscerning approach to admissibility. "Rule 89(C) ought not to become a provision which says that everything is included—everything must come in—because, in my respectful submission, *Fofana*, the Appeal Chamber decision, doesn't say that and neither does *Delalic*, which is what the Appeal Chamber based its decision, in some part, upon." *See* SCSL Transcript. 5 June 2007, Page 65 (Lines 28-29), Page 66 (Lines 1-3). Defense argued that the evidence is admissible under Rule 89(c) only if it's relevant, and it's relevant only if it's reliable. *Fofana* didn't obviate the need to assess either reliability or fairness. According to Mr. Jordash, both *Fofana* and *Delalic* say, at least implicitly, that the Court must consider reliability of evidence as *part of* its relevance assessment, not afterward. The reason for this, Defense explained, is that unreliable evidence cannot be relevant.
[48] SCSL Transcript. 5 June 2007, Page 99 (Lines 11-14).
[49] SCSL Transcript. 5 June 2007, Page 64 (Line 29), Page 65 (Lines 1-2).
[50] IT-01-48-A.

order to scrutinize potential impropriety in these off-the-record communications. Defense insisted that a full hearing on the matter goes to the very heart of due process and fair trial rights. "We don't submit you have to call it a voir dire. We do submit that Your Honors have no choice, when allegations which may amount to torture, if not torture, cruel and inhumane punishment, or treatment, are made by an accused, and there is evidence of that, that Your Honors have to explore in the widest possible way."[51]

Mr. Jordash went on to survey more than a dozen issues which, he submitted, demand, at a minimum, "further clarification" before the Court could even entertain the possibility of ruling in favor of the Prosecution. First, Defense argued that conspicuous gaps in the record required closer judicial scrutiny. Mr. Jordash pointed, in particular to the hours immediately following Mr. Sesay's March 10th 2003 arrest, when Defense alleges that the accused was subjected to various threats and improper inducements by Prosecution investigators. As Mr. Jordash pointed out, Prosecution evidence makes no attempt at all to explain what transpired during this period. Mr. Harrison did not produce a custody log, so it is unclear under what circumstances Mr. Sesay was moved from his point of arrest, to his initial detention location, to Prosecution offices for interrogation, and finally to the Special Court's temporary detention facility on Bonthe island. Mr. Sesay was arrested at 12:00pm, but the Prosecution has been silent as to the details of what transpired during the next (highly relevant) eighty-five minutes. According to a memo authored by OTP investigator, John Berry, he and a colleague first approached Mr. Sesay in custody at 1:25pm about "cooperation" with the Prosecution. The memo claims that Mr. Sesay consented within five minutes and was transported immediately to OTP offices for his first custodial interrogation with Deputy Chief of Investigations, Gilbert Morissette. Mr. Jordash argued that the Court cannot assess the voluntariness of Mr. Sesay's decision to cooperate, unless it understands what transpired during Mr. Sesay's first hour and a half in custody. "It does not have the hallmarks of truth, that he, Mr. Sesay, could sit there for an hour-and-a-half—with no evidence from the Prosecution as to what's going on—and then, in five minutes, he has decided to cooperate, in full cognizance of his rights. This requires, we would say, explanation."[52]

Defense argued that the Court knows more about what *didn't* happen after Mr. Sesay's arrest, than it knows about what *did* happen. Mr. Jordash called the Court's attention, in particular, to repeated investigative failure to comply with the terms of the arrest warrant. For instance, there is no indication, anywhere in the Prosecution evidence, that Mr. Sesay was read his rights, served his warrant, or served his indictment until at least three hours after his arrest.[53] These are plain breaches, Mr. Jordash argued, of Mr. Sesay's Article 17 right, rearticulated by Judge Thompson on the face of the arrest warrant, to have these key documents "served on the accused at the time of his arrest or as soon as is practicable immediately following his arrest in English, or have read to him in a language he understands." The three hour delay "might not be significant in some cases," the Defense

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[51] SCSL Transcript. 5 June 2007, Page 55 (Lines 19-24). Mr. Jordash relied on a standard articulated ICTY's Trial Chamber judgment in *Delalic*: "Inhumane treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture." Counsel also cited to *The Greek Case* (1969) from the European Court of Human Rights: "Inhumane treatment covers at least such treatment as deliberately causes severe suffering, mental or physical which, in the present situation, is unjustifiable. Torture is inhumane treatment which has a purpose such as the obtaining of information or confessions."

[52] SCSL Transcript. 5 June 2007, Page 102 (Lines 1-4).

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

conceded, "but it is significant when the Prosecution say, during this period, Mr. Sesay's cooperation was obtained. In our respectful submission, we cannot gain the cooperation of an accused without reading the basic rights, without adhering to the warrant of arrest."[54] Another breach Defense alleged arose out of Prosecution failure to comply with Paragraphs B and D of the arrest warrant. These paragraphs mandate that the accused be transferred into the custody of the Special Court, "without delay" and specified that, "the transfer shall be arranged between/with the relevant national authorities of the Government of Sierra Leone and the *Registrar* of the Special Court." (emphasis added) It bears explaining, Mr. Jordash submitted, why the Prosecution didn't leave it to the Registry to take the accused into custody, and *then* approach Mr. Sesay as an adversarial party once he had been booked into the Special Court's detention facility.

Moving on to the interrogation transcripts, Defense cataloged numerous problematic verbal exchanges between OTP investigators and the accused which beg clarification and raise doubts about the propriety of investigative conduct. For instance, Mr. Jordash raised unanswered questions about why, on the transcripts, investigators repeatedly tell Mr. Sesay he is a "suspect," rather than an accused, say things like "*if* we take a suspect statement," when they are *in fact* already taking a statement from the accused which can be used against him in court. Counsel for the accused suggested that this use of language indicates a trick or a deliberate attempt to confuse Mr. Sesay about his status (and, by extension, his rights). Defense further noted that interviewing investigators made on-the-record comments, inter alia, harkening back to what must have been off-the-record conversations with the accused (because there is no transcript recording the first time the topic was broached).[55] These off-the-record communications would be a clear violation of Rule 43, and could support Defense's broader allegations that investigators engaged in a concerted effort to confuse, threaten, and coerce the accused into waiving his rights and cooperating with the Prosecution.

Mr. Jordash argued that the mere risk that inducements, threats, or improper coercion occurred during these undocumented conversations, vitiates any presumption of voluntariness bestowed upon the accused's rights waivers. Defense alleged that this went beyond risk—"The point is this: There is a huge amount of pressure being placed upon Mr. Sesay, we submit, behind the scenes. This is the heart of our submissions, this is why it cannot be considered on the transcript alone."[56] Among the specific examples in support of this allegation, Defense called the Court's attention to a conspicuously long lunch break on the 31st of March (twice as long as usual), immediately after which Mr. Sesay admits to committing a certain crime he had repeatedly and consistently denied throughout all the other interviews. His change of story was the direct result, Mr. Jordash argued, of threats "piled on" during that lunch break on one of the final days of custodial interrogation before OTP severed relations with the accused at the insistence of John Jones, the acting Principle Defender who ultimately intervened on Mr. Sesay's behalf. Mr. Jordash points out that no reference is made on the record as to what transpired during that lunch break. If Defense allegations are true, this would be a violation of Rule 43 and 63 recording protocol. Counsel reminded the Court that the strict protocol is meant to be a procedural protection for the accused. As articulated in *Halilovic*: "The interview should recommence with a full explanation of what has occurred in the break and

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[54] SCSL Transcript. 6 June 2007, Page 13 (Lines 24-29).

[55] Defense pointed out three such instances which he happened to spot upon reading through the transcripts. He was later corrected as to two of those allegations by the Prosecutor, who located the earlier conversations *on* the record. The other comment, however , remained unexplained, and suggested that there had been an unreferenced substantive conversation about evidence off the tape. Pursuant to *Halilovic*, a single instance of this type of evidence of off-the-record communications should trigger further judicial inquiry.

[56] SCSL Transcript. 6 June 2007, Page 37 (Lines 9-12).

what understanding has been reached by the parties. It is only in this way that the Chamber can be satisfied that the rights of the accused are in fact protected."[57] Mr. Jordash cited to this decision (and a similar conclusion from *Bagosora*) for "clear principle of general application—that a *single* break in an interview, and evidence of conversations off tape which might have implicated the possibility of agreement to cooperate, were sufficient to render the interview involuntary."[58] The *Halilovic* appeals decision also declared that undocumented interview breaks raised the "reasonable possibility that the appellant, in giving the interview, was laboring under the misapprehension that his cooperation could lead to the withdrawal of the indictment against him."[59] Mr. Jordash argued that his client labored under precisely the same misapprehension as a result of investigator behavior.

Other issues for "further clarification" arose out of the evidence submitted beyond the interview tapes and transcripts. Mr. Jordash took particular issue with the fact that Prosecution opposed calling additional evidence through a voir dire, but relied on documents which reached beyond the face of the interrogation record. "The Prosecution have, in a sense, proven the importance of what we say by putting these statements into the bundle,"[60] Mr. Jordash pointed out. Prosecution reliance upon this extrinsic evidence amounted to an acknowledgment that the transcripts, alone, contain insufficient evidence for Prosecution to discharge its burden, Mr. Jordash submitted. If the Court is going to consider these additional investigative statements as evidence, Defense Counsel argued, fairness dictates that the Defense be allowed to cross examine the investigators in a voir dire proceeding. "It cannot be correct to simply allow statements which may well be self-serving, as we say they are, without them being tested by the Defense."[61]

Mr. Jordash made his point about the Prosecution memos clear by highlighting particular aspects which merit cross examination. For instance, Mr. Jordash questioned why the investigators didn't append copies of contemporaneous notes to their memos to corroborate the truth of their accounts. Do notes exist in official police diaries kept by OTP investigators? If so, what do they say? And why hasn't counsel for the Prosecution offered them to discharge its burden? The Court ought not simply allow the Prosecution to remain silent, Defense submitted. John Berry's memo places no fewer than six OTP officers at the scene of Mr. Sesay's arrest (including the Chief and the Deputy Chief of Investigations). The arrest warrant provides only that "a member of OTP may attend" the arrest, which was effectuated by Sierra Leone Police at the behest of the Special Court. "Why is that significant?" Mr. Jordash asked rhetorically. "Because this was part of the process of intimidation. Go mob-handed, inculcate the process, frighten the accused, bring him in, obtain his acquiescence."[62] Counsel for the accused called the investigative presence at his client's arrest a "mob-handed breach of a court order for no reason as yet explained by the Prosecution." He insisted that the investigators responsible should be called to account for the apparent breach of protocol before the Court awards their conduct a presumption of regularity.

Mr. Jordash also used Gilbert Morissette's memo to highlight why the Defense must be allowed to cross examine the investigators vouching for the integrity of Mr. Sesay's interrogation. Counsel for the accused impeached Mr. Morissette's competence as an investigator in two ways. First, he called the Court's attention to a handful of ICTR cases Mr. Morissette referenced in his memo. Mr.

[57] SCSL Transcript. 5 June 2007, Page 96 (Lines 25-29).
[58] SCSL Transcript. 5 June 2007, Page 98 (Lines 6-9).
[59] SCSL Transcript. 5 June 2007, Page 97 (Lines 8-13).
[60] SCSL Transcript. 5 June 2007, Page 100 (Lines 22-23).
[61] SCSL Transcript. 5 June 2007, Page 100 (Lines 25-27).
[62] SCSL Transcript. 5 June 2007, Page 102 (Lines 28-29).

Morissette had apparently pointed to these cases as examples of ICTR investigations he had been involved in, where the suspect waived his right to counsel during an interview. However, the references may have been counterproductive since, as Mr. Jordash pointed, two of the four cited cases (*Bagosora* and *Kajelijeli*) were marred by consequential procedural investigative blunders,[63] and the procedure in the other two cases (*Ruggiu* and *Kambanda*) was never scrutinized because the accused pled guilty. Mr. Jordash argued that "Mr. Morissette's assertions as to good practice have to be contextualized" by the fact that legal research databases such as Westlaw return *Bagosora* and *Kajelijeli* as case examples under the search term "involuntary interview."[64] As a second form of impeachment, Mr. Jordash took the court through the transcript of an October 17, 2002 interview Mr. Morissette and his then-Chief of Investigations, Alan White, conducted with a man who later became an insider witness for the Prosecution. The two investigators can be heard on record using extremely questionable forms of pressure and inducement with the interviewee. After reading lengthy excerpts from the transcripts, Mr. Jordash commented, "These instances, on tape with this witness, are exactly the tenor of character of the kind of pressure which we are talking about. And if these investigators considered it was proper to do that on tape, we would respectfully ask you to infer, with the rest of the evidence, that what was said *off tape* with Mr. Sesay was much worse."[65]

Finally, as for Mr. Sesay's contact with representatives of the Defense Office, Mr. Jordash insisted they do little to prove that Mr. Sesay voluntarily waived assistance of counsel. In fact, contrary to Prosecution submissions, Mr. Jordash argued that the three Defense Office contacts noted in Mr. Berry's memo actually weigh *against* voluntariness insofar as they arouse suspicion and suggest investigative misconduct (rather than compliance with the rights of the accused, as suggested by Mr. Harrison). During the first visit that Mr. Berry noted (11 March 2003), the OTP appears to have denied a Ms. Beatrice Ureche access to the accused. As Mr. Jordash read the evidence, Prosecution investigators inserted themselves between Counsel and the accused, rather than allow the Defense representative to confirm the waiver of rights with Mr. Sesay, face to face. Mr. Jordash alleged that an even more egregious example of OTP investigators intervening inappropriately between the accused and his counsel occurred on the 24th of March. As Mr. Berry noted in his memo, on that day Duty Counsel "attended and had me witness a note which she had prepared, indicating that Issa Sesay did not want a local lawyer to represent him, but instead was requesting that they get him an American or British lawyer by the name of Robertson."[66] Mr. Jordash produced said note, and challenged the Prosecution to come up with a reasonable explanation for Mr. Berry's involvement in what should have been a privileged communication between Duty Counsel and the accused: "I cannot conceive, and I'd ask this Court to consider the same question, of any situation where it would be proper for a Prosecution investigator to have anything to do whatsoever with an accused's choice of counsel."[67] This behavior, Mr. Jordash suggested, raises serious questions about what type of coercive authority investigators might have wielded over the accused, and how voluntary his assistance of counsel waivers truly were. Defense reminded the Trial Chamber, again, that the Prosecution bears the burden to eliminate all reasonable doubts before it is entitled to rely upon the prior statements as voluntary, admissible evidence.

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[63] According to Mr. Jordash, the interview of co-accused Kabiligi in *Bagosora* was deemed inadmissible, and the ICTR Trial Chamber ruled that the *Kajelijeli* arrest was illegal because the Prosecution failed to properly inform the accused of the reasons for his arrest.
[64] See SCSL Transcript. 6 June 2007, Page 40.
[65] SCSL Transcript. 6 Junes 2007 Page 45 (Lines 27-29) and Page 46 (Lines 1-3).
[66] SCSL Transcript. 6 June 2007, Page 25 (Lines 11-15).
[67] SCSL Transcript. 6 June 2007, Page 26 (Lines 10-14).

(3) Testimonial Rights of the Accused: As a third alternative procedure, Defense submitted that Mr. Sesay must, at least, be given the opportunity to testify about the circumstances of his arrest and interrogation. "To the best of our knowledge, no case before any international tribunal has ever ruled against a challenge to the voluntariness of a waiver of the right to counsel and the voluntariness of confessions, without requiring the Prosecution, either to call evidence to discharge their burden, or allowing the accused to give evidence. It's never before been done."[68] Mr. Jordash reminded the Court that, even if the Court were to determine that that the Prosecution discharged its burden of proof by showing, beyond a reasonable doubt, that investigators complied fully with Rules 43 and 63, the Prosecution would only enjoy a presumption of voluntariness pursuant to Rule 92. The presumption is a *rebuttable* presumption, he submitted, and in such a scenario, the burden shifts to the Defense to show, by a "some evidence" standard, that the statements were in fact involuntary and therefore inadmissible.[69] Mr. Jordash argued that Defense *must* be permitted, in that case to discharge its burden by calling the accused to the stand to testify. "We would submit," Mr. Jordash argued, "that Your Honors do not have discretion to *not* hear from the accused, nor do Your Honors have discretion to prevent other relevant evidence being called at some stage to deal with that burden."[70]

(4) Exclusion Based on Untimely Notice of Intent to Use Statements: Counsel submitted even if the Court set aside the issue of voluntariness, the statements would still be inadmissible due to the fact that the Prosecution never sought to rely upon the statements during its case-in-chief. Mr. Harrison waited until after Mr. Sesay began to testify on his own behalf to serve notice that the Prosecution would use the statements on cross examination for impeachment purposes. Mr. Jordash did not make detailed submissions on this fourth grounds for exclusion, but reserved the argument for after the Trial Chamber made a decision as to voluntariness.

PROSECUTION REPLY

On reply, Prosecution continued to assert that the Court's inquiry into voluntariness need not proceed any further than the face of the transcript. The majority of the points Mr. Harrison raised had to do with evidence on the transcripts Prosecution says weigh in favor of a finding of voluntariness, but Mr. Harrison made no serious attempt to confront the core Defense argument that, because of the gaps in the record and the burden of proof on the moving party, voluntariness categorically *cannot* be determined in Prosecution's favor on the face of the papers alone.

Mr. Harrison raised several minor points of factual clarification offered alternative interpretations of various pieces of evidence Mr. Jordash had submitted were clear breaches of the warrant of arrest or other types of investigative misconduct. However, these ultimately did little to definitively refute or even substantially mitigate against the tremendous amount of evidence of impropriety raised by the Defense. Mr. Harrison reviewed several Registry documents already on file with Court Management having to do with Mr. Sesay's arrest. One of these notes that Mr. Sesay was served a packet of documents (including his arrest warrant, a rights advisement, and a copy of his indictment) when he arrived at Bonthe Island the night of March 10, 2003. While this clarifies when Mr. Sesay first had access to information about the charges against him, the Defense point stands—that Mr. Sesay was apparently unaware of the charges against him at the point OTP investigators secured his cooperation

[68] SCSL Transcript. 6 June 2007, Page 49 (Lines 28-29) and Page 50 (Lines 1-5).
[69] Defense Counsel drew this standard of proof from *Delalic*. The same standard is applicable to the Special Court, Mr. Jordash argued because the ICTY has a nearly identical Rule 92 standard for presumption of voluntariness.
[70] SCSL Transcript. 5 June 2007, Page 73 (Lines 21-24).

and conducted the first of ten custodial interrogations. At another point in his Reply, Mr. Harrison argued that the permission on the warrant that "a member of the prosecution may be present" at the arrest didn't necessarily mean that *only a* member. Arguably, no breach occurred if one takes the warrant to mean a member *or more*, but, again, Prosecution failed to address the impact of the broader defense allegation—that OTP investigators had sought to deliberately intimidate the accused in order to secure his cooperation and get him to waive his right of silence.

Mr. Harrison devoted some energy to addressing the three major cases relied upon by the Defense—*Bagosora, Delalic* and *Halilovic*. However, his attempts to factually distinguish the cases from Mr. Sesay's circumstance often relied upon presumptions of fact which were narrowly limited to observations of what occurred on-the-record during Mr. Sesay's interviews. For example, Mr. Harrison called Kabiligi's suppression motion in *Bagosora* "wholly different from the circumstances before you, because the transcripts and the audiotape and videotape, make amply clear that Sesay never had a misunderstanding and Sesay made clear that he was prepared to be interviewed."[71] The Prosecutor's argument left entirely untouched the question of whether Mr. Sesay was coerced or induced off-the-record, despite appearing to say he understands and consents to be interviewed. Mr. Harrison also neglected to address any of the specific instances of apparent confusion Mr. Jordash raised in his own oral submissions reviewing the text of the transcripts.

Mr. Harrison touched upon *Delalic* second, making arguments in the same vein as he did with *Bagosora*—focusing on the factual outcomes of particular parts of the case rather than extracting the broadly applicable principles of law. For example, Mr. Harrison submitted that the Trial Chamber in *Delalic* found "no evidence whatsoever of oppressive questioning." He analogized this to Mr. Sesay's case, arguing, based upon the transcript record alone, that the same conclusion was called for. "Breaks were taken, appropriately: Cigarette breaks were taken; lunch breaks were taken; washroom breaks were taken. By looking at the videotape, you can see that the interview took place in comfortable surroundings, comfortable chairs… There is nothing to suggest that there was even a hint of an attempt at oppressive questioning."[72] Counsel for the Prosecution seemed to be asserting, again, that an apparent lack of oppressive conduct on-the-record means, definitively, there was no oppressive conduct in the course of the investigators' ongoing interactions with Mr. Sesay and attempts to get information out of him.

Mr. Harrison also used *Delalic* in an attempt to rebut Mr. Jordash's claim that it was incumbent upon investigators to go further than they did in explaining to Mr. Sesay what his rights meant. Mr. Harrison argued that *Delalic* rejects the "cultural defense" to a defendant misunderstanding his legal rights. He didn't take the point any further, concluding, "frankly, I think that's a pretty easy one to dismiss and I won't say much about it.[73] The point seemed to confuse two separate arguments Mr. Jordash had made, and was thus ineffective refuting either one. At one point, Defense cited to *Delalic* for the rule that individual factors (age, education, etc.) must be taken into consideration when one determines how vulnerable a detainee is to coercion (and thus how likely it is that he waived his rights involuntarily). Separately, Defense Counsel also argued that Mr. Sesay appeared to have no understanding of the rights afforded to him as an accused. Mr. Jordash invoked a cultural element in this argument, but focused much more heavily on what he alleged were affirmative, deliberate attempts by investigators to confuse the accused (i.e. the grossly inaccurate definition of

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[71] SCSL Transcript. 7 June 2007, Page 27 (Lines 11-14).
[72] SCSL Transcript. 7 June 2007, Page 38 (Lines 20-25).
[73] SCSL Transcript. 7 June 2007, Page 37 (Lines 15-16).

"waiver" Mr. Morissette gave Mr. Sesay on March 10th, or the instances where Mr. Sesay's articulated clear misapprehension about his rights and investigators did nothing to correct it.).

Mr. Harrison turned third to *Halilovic*. Relying upon distinction made in the case between illegitimate inducements and legitimate incentives, Mr. Harrison asserted, categorically, "there is no suggestion here, on the evidence before you in *Sesay*, that any inducement has been made to Sesay, at any point in time."[74] He conceded that "incentives" were used during the interview to secure Mr. Sesay's cooperation and get him to speak, but insisted these are, legally, different from "inducements." However, Mr. Harrison's arguments met with substantive challenges from a skeptical Bench. As the Presiding Judge pointed out, "those passages that you've cited did not leave me convinced that the [*Halilovic*] Appeals Chamber did articulate, in a very convincing and persuasive way, one, the distinction between an incentive in such circumstances, and an inducement. And then, secondly, the legal effects of, one, an incentive as distinct from the legal effects of an inducement."[75]

Opposing Counsel raised procedural challenges to a handful of Prosecution submissions during the Reply. Mr. Jordash objected, and the Bench twice agreed, that Mr. Harrison should not be permitted to make factual assertions about events extrinsic to the existing record in his reply. The Bench agreed with Defense that such submissions would be unfair, because the Prosecution was purporting to argue that the Court should contain its admissibility inquiry to the face of the papers already before it. As Mr. Jordash reasoned in his objection, Prosecution should not be allowed to plead against the relevance of extrinsic evidence and then bring such evidence "through the back door" in its legal submissions against the Defense. The information Mr. Harrison sought to communicate to the Court amounted to an improper conveyance of testimonial hearsay from the investigators who conducted the custodial interviews of the accused. The fact that Harrison would attempt to make such submissions, Mr. Jordash repeated, only supports the Defense argument that there should be a proper calling of evidence, in a formal voir dire, where witness testimony could be adequately tested through cross-examination. Mr. Harrison protested that Defense made numerous factual assertions extrinsic to the interview transcript in its own submissions, and the Court should not hold Prosecution to a different standard. Mr. Jordash countered that it was proper to allow Defense, and not the Prosecution, to make these factual submissions when the Defense was the party alleging off-the-record investigative misconduct and advocating broader consideration of evidence through a voir dire. The Court ruled in favor of the Defense. Mr. Harrison was advised that "no factual matters extrinsic of the records should be alluded to by the Prosecution in its reply."[76]

At the close of the Prosecution Reply, the Presiding judge asked Mr. Harrison whether he had any objection, on principle, with the Court "lifting the veil" and looking beyond the content of the video and transcripts of the interrogation. Surprisingly, after Counsel had just spent an entire morning reasserting the Prosecution insistence that further inquiry was unnecessary, Mr. Harrison replied, "Yes, the Prosecution can see no good reason why it should not."[77]

DEFENSE APPLICATION FOR BRIEF REBUTTAL

Defense Counsel unsuccessfully applied for leave to briefly address a few "discrete issues" from the Prosecution Reply. He was permitted to make oral submissions as to why the Court should grant him

[74] SCSL Transcript. 7 June 2007, Page 44 (Lines 16-18).
[75] SCSL Transcript 7 June 2007, Page 47 (Lines 10-15).
[76] SCSL Transcript 8 June 2007, Page 21 (Lines 6-7).
[77] SCSL Transcript 7 June 2007, Page 62 (Lines 22-23).

leave to rebut, but he was not actually permitted to articulate the substance of his rejoinders. The Bench prevented Mr. Jordash from even directing the Judges to a single page number on the record which he claimed would undermine a key factual Prosecution submission about service of certain documents related to the warrant of arrest. All tolled, the Court spent fifteen minutes disposing of an application for what Counsel estimated would be no more than a ten minute rebuttal. Defense was not permitted to present its Rebuttal.

JUDGMENT ON THE APPLICATION—ORDER TO CONDUCT A FORMAL VOIR DIRE

At the close of oral arguments, the Trial Chamber adjourned for twenty four hours to deliberate. Court reconvened on Friday afternoon, at which point the Judges issued the following oral decision from the bench:

> Considering that the Chamber is not satisfied that it has enough material before it at this stage to properly determine the voluntariness of the statements, noting that it is within the discretion of the Chamber to determine the best way of proceeding in line with Rule 89(B) of the Rules of Procedure and Evidence…the Trial Chamber orders that a voir dire be conducted.[78]

Beginning next Tuesday, Prosecution will call the four Investigators involved in Mr. Sesay's arrest and interrogation to give testimony and submit to cross examination on the Defense allegations of misconduct. The Trial Chamber did not advise the parties as to how they will conduct the voir dire procedurally, so it remains unclear whether the Defense will be permitted to call its own witnesses and/or whether the Court will call witnesses *sua sponte*.

UNADDRESSED LEGAL ISSUES IN THE BENCH RULING

In light of the serious allegations raised by Defense, the Trial Chamber's willingness to subject OTP investigative practices to judicial scrutiny in a voir dire is commendable. It demonstrates the Court's concern with protecting the rights of the accused in this instance. Unfortunately, the ruling was problematic insofar as it was procedurally opaque. The full judgment ordering the voir dire took just under three minutes to read from the Bench, and failed to substantively address any of the legal arguments advanced by the parties in the previous three days of oral argument. The decision did not reference any of the Rules that Defense alleged had been breached during the interviews, nor did it discuss the cases which both sides cited for sharply contrasting rules of law. No attempt was made to explain on what grounds the Prosecution had failed to meet it's burden of proof for admissibility on the face of the papers. Nor did the Chamber articulate what it found unconvincing about Defense case for immediate exclusion. The Judges simply announced a wish to gather more factual evidence through a voir dire. According to the oral judgment, "a comprehensive written decision will be issued in due course," however the Court will not have issued anything in time for the voir dire, which begins next Tuesday. Thus, after a week of detailed and contentious submissions on the legal standard for voluntariness, the Trial Chamber has declined to narrow the inquiry at all. When the parties call factual evidence in next week's voir dire, they will do so in something of a vacuum, having no articulated guidance from the Trial Chamber as to what legal standard it will apply.

[78] SCSL Transcript. 8 June 2007, Page 2 (Lines 24-29), Page 3 (Lines 1-4).

Witness Statement Disclosure Issues

Just before adjourning for the weekend, there was a very heated exchange between Mr. Jordash and the Bench over whether or not Defense can compel the four Prosecution voir dire witnesses to produce statements summarizing their anticipated testimony. The Bench expressed general mystification at the Defense request, saying they could not understand why Mr. Jordash felt entitled to such disclosure or how he could claim not to know what the witnesses were going to say. In defense of his request, Mr. Jordash made reference to the "standard practice" of disclosure, although he did not expressly cite any Rule of Procedure in his oral application. Rule 66, which governs disclosure of materials by the prosecutor, states in relevant part:

> Subject to the provisions of Rules 50, 53, 69 and 75, the Prosecutor shall… Continuously disclose to the Defense copies of the statements of all additional witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause shown by the Prosecution.[79]

Notwithstanding the statutory obligation to disclose witness statements, all three Judges expressed some version of the belief that the Defense should forego assertion of this right because it could ascertain the information it sought from the Prosecution by simply cross examining the witnesses.[80] For example, Judge Itoe told Defense counsel, "you have the latitude to cross-examine these two witnesses to the fullest extent… I don't see you being disadvantaged by not having a statement of what they're coming to say."[81] Mr. Jordash pointed out that this inverts the rationale behind the rule of required disclosure—in order to effectively cross examine a witness, it is necessary to *first* have disclosure of the witness' anticipated testimony. Lack of disclosure could effectively frustrate the purpose of the voir dire. He further submitted that the Defense was simply entitled to such disclosure as a matter of course. "We have a procedure in this Court. We followed it for two years. When Prosecution witnesses give evidence they give a statement. The question isn't: Why do you want a statement, Mr. Jordash. The question is: Why should we depart from the usual procedure?"

Prosecution opposed the motion without addressing the substance of Mr. Jordash's arguments. In lieu of witness statements, the Prosecutor offered two memos previously submitted into evidence.[82] The internal OTP memoranda had been authored by Mr. Morissette and Mr. Berry in 2003. Mr. Berry's memo described a basic chronology of events on the day of Mr. Sesay's arrest, noted three visits from Defense Office personnel, and gave a series of two sentence descriptions of each day of custodial interviews with OTP Investigators. Defense countered that the witness testimony will necessarily go beyond the contents of this memo because Mr. Berry and Mr. Morissette must address events which occurred between interviews. If the document does not fully apprise the cross examiner of the witness' anticipated testimony, Mr. Jordash argued, it cannot be sufficient to discharge the disclosure burden.

The Trial Chamber's ultimate decision on the matter was frustratingly opaque. After standing down for ten minutes, the Judges returned from deliberation and declared, "The Bench rules that the

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[79] Rule 66(A)(ii), Rules of Procedure and Evidence of the Special Court for Sierra Leone.
[80] *See* SCSL Transcript. 8 June 2007, Page 7 (Lines 2-3), Page 10 (Lines 26-29), Page 12 (Lines 18-20).
[81] SCSL Transcript. 8 June 2007, Page 9 (Lines 13-17).
[82] SCSL Transcript. 8 June 2007, Page 5 (Lines 20-23).

application by Mr. Jordash is meretricious and, accordingly, denies it."[83] Nothing more was said on the matter. The Bench did not address the frustration of purpose arguments raised by the Defense. Neither did they articulate any legal rejoinder to the submission that Defense is entitled to disclosure as a matter of course. When the Court elicits legal and procedural submissions from Counsel but fails to offer even a briefly reasoned rationale for its own judgment, the exercise of hearing oral submissions becomes a charade, and the Bench's decision appears arbitrary. The Judges of Trial Chamber I are fond of using erudite phrases such as "meretricious" to deny applications by Counsel, but they rarely explain *why* they find a motion meretricious. Learned vocabulary does not obviate the need for judges to articulate legally reasoned decisions. This ruling confused, rather than clarified, the scope of Rule 66 disclosure obligations. Without further explanation, one cannot know whether the Judges (1) disagree that disclosure is required, (2) agree that it is required normally, but wish to articulate a new standard for disclosure in voir dire proceedings, or (3) perhaps believe that the Prosecution has discharged its disclosure obligation through documents already on the record. In any event, when voir dire commences next week, the four Investigators called will be the only Prosecution witnesses to have testified in the RUF trial without first tendering formal witness statements pursuant to Rule 66.

[83] SCSL Transcript. 8 June 2007, Page 15 (Lines 11-12)

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