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SCSL-03-01-T
(29235-29281)

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THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty
Justice El Hadji Malick Sow, Alternate

Registrar: Ms. Binta Mansaray

Date: 1 July 2010

Case No.: SCSL-03-01-T

SPECIAL COURT FOR SIERRA LEONE
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THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC, WITH ANNEXES A, B, C AND D

DEFENCE MOTION TO EXCLUDE CUSTODIAL STATEMENTS OF ISSA SESAY

Office of the Prosecutor:
Ms. Brenda J. Hollis

Counsel for Charles G. Taylor:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood

I. Introduction

1. The Defence will call DCT-172, Issa Hassan Sesay ("Sesay"), as its next witness. The Trial Chamber and the Prosecution are well aware that Sesay was the First Accused in the Special Court for Sierra Leone's prosecution of three Revolutionary United Front ("RUF") members in SCSL-04-15-T, *Prosecutor v. Sesay, Kallon and Gbao*.[1]
2. When Sesay was first arrested, the Prosecution attempted to secure Sesay as an insider witness.[2] In that regard, he was subjected to eleven involuntary custodial interviews by the Prosecution in which he gave statements without having (nor understanding his right to) legal representation.[3]
3. The Prosecution applied to use the statements to cross-examine Sesay for the purpose of impeaching his credibility.[4] Trial Chamber I then held that a *voir dire* should be conducted in order to determine the voluntariness of the Statements and Sesay's waiver of his rights in relation to those statements.[5] The Statements were ultimately excluded by Trial Chamber I on the basis that they were involuntary. Consequently, the Statements were not allowed into evidence during cross-examination, even for the limited purpose of impeaching Sesay.[6] Trial Chamber I ordered that all Statements given by Sesay during his interviews with the Prosecution must be excluded as their admission would bring the administration of justice into disrepute since they were obtained in violation of Article 17(4)(a), (d) and (g) of the Statute and Rules 42 and 63 of the Special Court Rules of Procedure and Evidence.

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[1] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T ("**RUF Trial**").
[2] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Trial Transcript, 12 June 2007, p. 114 ("**RUF Transcript**") (Gilbert Morissette, OTP Chief of Investigations, testified that because of Sesay's role in the RUF, they thought he was likely to "give us the most information – the most intelligence in regard to this investigation"). Former Chief Prosecutor David Crane confirmed the plan to target Sesay, stating in a phone interview to a Berkeley War Crimes Studies Center researcher, "We led him on...that's all an appropriate part of criminal investigations"). See Penelope van Tuyl, "Effective, Efficient, and Fair?: An Inquiry into the Investigative Practices of the Office of the Prosecutor at the Special Court for Sierra Leone", War Crimes Studies Center, University of California, Berkeley, September 2008, pg. 17 ("**Berkeley Repo rt**") [**Annex A**].
[3] The dates of the statements are: 10, 11, 12, 14, 17, 18, 24 and 31 March 2003 and 14 and 15 April 2003 ("**Statements**").
[4] RUF Transcript, 5 June 2007.
[5] RUF Transcript, 8 June 2007, p. 2. The *voir dire* was conducted from the 12th to the 20th of June 2007, and Trial Chamber I heard evidence from 4 Prosecution Witnesses and 2 Defence witnesses, in addition to Sesay. In addition, 47 exhibits were admitted.
[6] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-807, Oral Ruling on the Admissibility of Alleged Confessional Statements Obtained by Investigators of the Office of the Prosecutor from the First Accused, Issa Hassan Sesay, 5 July 2007 ("**Oral Ruling**") and *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-1188, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, 30 June 2008 ("**Written Decision**").

4. Trial Chamber I specifically found that "the alleged statements obtained from the First Accused during the interviews by the Prosecution were not voluntary in that they were obtained by fear of prejudice and hope of advantage held out by persons in authority".[7] The Justices of Trial Chamber I explained that the voluntariness of the Statements was cast into doubt because the Prosecution's role in the process "borders on a semblance of arm twisting and holding out promises and inducements to the Accused in the course of the interrogation and particularly during the unrecorded conversations in the course of the break in order to sustain the Accused's co-operation with the Prosecution".[8]
5. The prosecution has served the Defence with copies of Statements taken during these custodial interviews with Sesay. This is in compliance with their general duty of disclosure. The Prosecution has given no indication as to whether they intend to use these interviews in cross-examination of Sesay, but the Defence reasonably anticipates that the Prosecution will apply to use them to impeach Sesay during cross-examination. However, the question of the admissibility of the interviews raises complex legal issues, and the Defence takes the view that the Trial Chamber should determine these issues now, such that delay is not caused during the currency of Sesay's evidence. Furthermore, if the Prosecution intends and is permitted to use them during cross-examination, then the Defence must have the opportunity to deal with them during examination-in-chief.
6. The Defence submits that the eleven custodial interview statements should be excluded from evidence in the Taylor Trial. To admit such Statements would be an abuse of process and would allow gravely unreliable evidence into the record, bringing the administration of justice into disrepute. Thus the Defence requests the Trial Chamber to follow the lead of Trial Chamber I and likewise rule the statements inadmissible under Rule 95.
7. In the alternative, if the Statements are admitted for use during cross-examination of Sesay, the Defence requests that the entire *voir dire* record be admitted into evidence pursuant to Rule 92*bis*, as the Trial Chamber could not possibly ignore the circumstances under which the Statements were given, when determining what weight, if any, to afford the Statements.

II. Factual Background & Submissions

[7] Oral Ruling, para. 4.
[8] Written Decision, para. 51.

8. Sesay was arrested on 10 March 2003, having been summoned to the Sierra Leone Police's Central Intelligence Division ("CID") under false pretences.[9] The arresting officer testified that Sesay began crying uncontrollably when Sesay was confronted with the arrest warrant.[10] Before being read his rights or shown a copy of the Special Court Indictment against him, and within less than two hours of his arrest, Sesay was interrogated by the Prosecution for the first time, with the intention that the Prosecution could use him as an insider witness.[11]
9. This was done in contravention of the plain language of the arrest warrant, which mandated that Sesay was to be transferred into the custody of the Special Court "without delay" and 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".[12] Thus, other than having "a member" of the Prosecution present at the time of the arrest,[13] the Prosecution should have had nothing to do with Sesay until his transfer into SCSL custody was complete.
10. Prosecution investigators interviewed Sesay every day between his 10 March 2003 arrest and his first appearance before Judge Itoe in court on 15 March 2003 (during which the charges against him were explained in detail for the first time). Sesay was subsequently interviewed six additional times; all without counsel.[14] In each of the interviews, the Prosecution read the obligatory rights advisement statement and secured Sesay's initials on the necessary waivers before proceeding. However, on at least three occasions, Sesay expressed a desire for counsel, yet done was provided.[15] Furthermore, the *voir dire* transcripts suggest that Sesay had misgivings about the waivers and misunderstood the nature of the rights he was signing

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[9] RUF Transcript, 15 June 2007, p. 34-35; 19 June 2007, p. 30-42. For a useful summary of Key Dates, see [**Annex B**] , from *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-792, Authorities to be Relied Upon in Oral Motion to Exclude Custodial Interviews of Mr. Sesay, 1 June 2007.
[10] RUF Transcript, 15 June 2007, p. 36-37 and 49-52 (testimony of arresting officer Litho Lamin).
[11] See Prosecution Disclosure Receipt of 22 May 2003, listing dates of Interviews [**Annex C**]. See also RUF Transcript, 15 June 2007, p. 60. (According to the arresting officer, Sesay was not given a copy of his Indictment until after his arrival at the prison at Bonthe).
[12] Berkeley Report, p. 17-18. See also Rule 55 which details the protocol to be followed in the execution of arrest warrants, and Article 17(4)(a) which states that an accused must be "informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her".
[13] In fact, Gilbert Morissette interpreted this to mean that as many members of the Prosecution as he wanted could be present at the time of the arrest. RUF Transcript, 12 June 2007, p. 108-9.
[14] See Prosecution Disclosure Receipt of 22 May 2003 [Annex C]
[15] The three occasions were: 1) in a request form submitted on 13 March 2003 (See reference to such document in *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-03-05-I, Initial Appearance, 15 June 2003, p. 54); 2) during his Initial Appearance when he stated "I will get a lawyer" (Id, p. 55); and 3) in a 24 March 2003 letter witnessed and signed by Prosecution Investigator John Berry (Exhibit 4A of the *Voir Dire*). See further, *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Skeleton Argument: Exclusion of Mr. Sesay's statements to the OTP obtained in breach of Article 17 of the Statute, 20 June 2007, para. 6-10 ("**Skeleton Argument**").

away. The Prosecution appear to have conflated Sesay's waiver of his right to have a lawyer present during the interviews with a complete waiver of his right to see to a lawyer at all.[16] The Defence submits the lack of legal representation, which could have cleared any misunderstanding by Sesay, also impacted on the voluntariness of the statements.

11. The Prosecution employed promises, inducements and threats to ensure the continued cooperation of Sesay during these custodial interviews, especially during unrecorded breaks in the questioning.[17] Gilbert Morissette, Chief of Investigations for the Prosecution, talked to Sesay off the record during the interview process, continually restating and reaffirming what the Prosecution could do for him in exchange for his cooperation, as Mr. Morissette feared that Sesay would stop cooperating.[18] In this regard, Trial Chamber I found, *inter alia*, that:
    a. During the course of the interviews, the investigators, as persons in authority in the Special Court did indicate to the First Accused that he would be called as a witness for the Prosecution if he co-operated with them in their investigations of the alleged crimes charged in the Indictment;
    b. Investigators told the First Accused that they had the authority to speak [*sic*] the Judges for leniency for the First Accused if he co-operated with them and that the Judges would accept whatever they, the Investigators told the Judges;
    c. The co-operation of the First Accused in the investigation would also enable the Investigators to ask the Court for a reduced sentence for the First Accused;
    d. The Investigators also indicated that the Prosecution would take care of the family of the First Accused during the duration of his interrogation;
    e. Gilbert Morissette explicitly stated that the First Accused's family would be placed in protective custody and there would also be financial benefits and possible relocation of the family to another country.[19]

12. The Trial Chamber found that these *quid pro quo* assurances could have been understood by Sesay to mean that he might be able to avoid prosecution by being a witness for the Prosecution.[20] Indeed, Sesay has confirmed to the Defence during proofing sessions that that was his understanding. Sesay remained confused about whether he was an accused or a

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[16] RUF Transcript, 13 June 2007, p. 22. See also Berkeley Report, p. 23 and 24.
[17] Skeleton Argument, para. 2-5.
[18] Written Decision, para. 47.
[19] Written Decision, para. 45.
[20] RUF Transcripts, 19 June 2007, p. 50; 12 June 2007, p. 115 and 120-126; 14 June 2010, p. 85.

suspect throughout this entire process.[21] Gibril Morissette seemed unaware that more rights would attach to the questioning of an accused (Rule 63) than a suspect (Rules 42 and 43).[22]

13. In addition to pressure from the Prosecution to co-operate, detention logs show that Sesay suffered from numerous physical and psychological ailments during his initial detention, including malaria, depression, anxiety, "extreme and inappropriate" suicidal thoughts, confusion, frequent bloody stools, dysentery, insomnia and severe dental pain.[23]
14. In these circumstances, the Defence submits that the statements that were made by Sesay were not made freely and voluntarily. Admitting them into evidence or even allowing their use would thus amount to acquiescence by the Chamber to an abuse of process and would bring the administration of justice into disrepute.

III. Applicable Legal Principles

15. The rights of an accused, which Sesay enjoyed at the time of his interrogations, are protected in part by Article 17(4)(a), (d) and (g) of the Statute. These provisions stipulate that an accused must be "informed promptly and in detail" of the nature and cause of the charge against him, must be informed of his right to legal assistance, and must not be compelled to confess guilt. These are hallmarks of a fair criminal process.
16. Rules 54 and 55 specify the protocol to be followed when executing an arrest warrant. Rules 42, 43 and 63 govern the rights of suspects and accused persons, specifying various protocols to be followed when suspects and/or an accused are questioned.
17. Rule 92 guides the admissibility of confessional statements, stating that "a confession...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".[24]
18. Rule 95 makes evidence that would "bring the administration of justice into serious disrepute" inadmissible. Notably, none of the rules provide a caveat for evidence introduced solely for the purpose of impeachment during cross-examination.

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[21] Id.
[22] Written Decision, para. 46.
[23] RUF Transcript, 19 June 2007, p. 90-99.
[24] This Rule is supported by established principles of English criminal law: "[...] that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority". Lord Sumner, *Ibrahim v. R* [1914] AC 599.

IV. Submissions on Exclusion

19. The issue of involuntariness of the Statements goes to the admissibility, not the weight or the content, of the evidence. The common law in the United Kingdom has long insisted on an exclusionary rule for statements obtained by oppression or inducement.[25] The question of involuntariness should be resolved before the Prosecution even considers tendering the statements into evidence, as the issue here is the manner of their production, not the product itself. The Defence submits that the minds of the Honorable Justices should not be polluted by the introduction of material which is prima facie inadmissible and has been determined as such by Trial Chamber I. There is a danger that prejudice might accrue to the witness, and by extension to the Accused if the Trial Chamber reads the statements before ruling on their admissibility.

Trial Chamber I conducted an exhaustive voir dire *and deemed statements inadmissible*

20. Trial Chamber I has already determined that the Statements were involuntary, and given in breach of Articles 17(a), (d) and (g) and Rule 92, when read conjunctively with Rules 43 and 63.[26] This decision should stand due to basic principles of *stare decisis* and judicial economy.
21. The decision to exclude the statements was made after an exhaustive *voir dire* comprising two weeks of testimony from seven witnesses, and the admission of 47 exhibits. The time and expense of such a process, coupled with the complexity of the issues at stake, should not be played out for a second time during the Taylor trial, where such an issue, while significant, is ancillary to the current case.
22. The purpose for which the Prosecution would attempt to use the statements in the Taylor trial (impeachment during cross-examination of Sesay) was the same basis upon which the Prosecution applied to use them before. Therefore it makes no difference that Sesay is no longer an accused, but a witness. The improper way in which the Statements were obtained renders them unreliable and inadmissible in any form.
23. If the Trial Chamber is not inclined to rely upon the judgement of Trial Chamber I in this regard, the Defence submits that on the basis of the RUF *voir dire* proceedings, this Trial

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[25] *A and others v. Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221, para, 15.
[26] Oral Ruling, para. 4.

Chamber could not find that the Prosecution could meet its Rule 92 burden of proving that the Statements were obtained voluntarily. Thus the Statements are a result of an abuse of process and are gravely unreliable and should not be admitted.

Abuse of Process

24. Every exclusionary rule in the law of criminal evidence can be explained by reference to the protection of the accused from wrongful conviction and/or the protection of the moral integrity of the criminal process. According to *R. v. Oickle,* a decision by the Canadian Supreme Court, "holding out the possibility of a reduced charge or sentence in exchange for a confession would raise a reasonable doubt as to the voluntariness of any ensuing confession. An explicit offer [...] is clearly a very strong inducement and will warrant exclusion in all but exceptional circumstances".[27]
25. The SCSL is a court established with an expressed and publicly stated intent to leave behind a legacy of respect for the rule of law and the concept of justice. This intent acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfill its function. Consequently, where fairness is affronted, and decency is assailed, the conscience of the court must serve a higher societal interest than the proximate need to secure a conviction. For, "if the government becomes a lawbreaker, it breeds contempt for law, it invites every man to become a law unto himself, it invites anarchy".[28]
26. Nothing less than the integrity of the SCSL is at stake here, and this court cannot rely on an Executive to protect its process from abuse. There is no such Executive existing to provide such protection. In such a situation the court, through the judges themselves, has an inescapable duty to secure fair treatment for those who come or are brought before it. This court has a primary responsibility for seeing that the process of law is not abused, especially as there is no Executive to which this grave responsibility can be transferred.
27. This Trial Chamber should not allow the admission of Statements taken when an accused was in custody, had not spoken to a lawyer, was not clear about whether he was a suspect or

[27] *R. v. Oickle,* Supreme Court of Canada, 2000 SCC 38 (1999), para. 49.
[28] *Olmstead v. U.S.*, 277 U.S. 438 (1928), p. 485 (J. Brandeis, dissenting).

an accused, was not physically well, and was offered inducements in exchange for his co-operation. To do so would be an abuse of process.

Unreliability of Statements Obtained in Irregular Manner

28. One purpose of the voluntariness rule is to ensure that confessions are reliable.[29] As has long been established, "a confession forced from the mind by the flattery of hope or by the torture of fear, comes in so questionable a shape when it is to be considered as evidence of guilt, that no credit ought to be given to it, and therefore it is rejected".[30] Thus, the trier of fact should be aware of the factors indicating that a given item of evidence is unreliable.
29. Confession evidence is unique in that it is normally acquired by officials aware, at the time they acquire it, that it is very likely to be presented before a court. It is thus possible and necessary for those officials to take steps to ensure that the record is both accurate and reliable. That is the obvious purpose behind Article 17 and Rules 42, 43, 55 and 63. These steps were not followed by the Prosecution in their dealings with Sesay.[31]
30. The entire *voir dire* is available to Trial Chamber II, and this record should be considered carefully. An evaluation of this evidence should make it clear that the Statements obtained from Sesay have no indicia of reliability, as they were obtained during a situation in which Sesay was trying not to implicate himself, causing him to, at times, shift blame to others. That Sesay could help himself by implicating others was made very clear to him by the Prosecution. During the interview on 15 April 2007, Gibril Morissette gave Sesay one final opportunity to "cooperate" with the Prosecution, offering to drop his indictment if he agreed to be a witness against Charles Taylor.[32] Sesay testified on *voir dire* that because Morissette told Sesay that he was not "measuring up to their expectations" the Prosecution would not take him as a witness. Thus, Sesay says he began telling them the "half truth".[33]
31. It is clear that the investigators, at the time of their interviews with Sesay, must have been aware that the accused Charles Taylor was an indictee. Consequently, in the circumstances

[29] "The confessions rule should recognize which interrogation techniques commonly produce false confessions as to avoid a miscarriage of justice". *R. v. Oickle,* Supreme Court of Canada, 2000 SCC 38 (1999), para. 23.
[30] *R v. Warickshall* (1783) 1 Leach 263, 168 ER 234, p. 263-264. See also, *Prosecutor v. Delalic,* ICTY, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, 2 September 1997, para. 66 ("Similar to an involuntary confession, statements induced by coercion, force or fraud, or oppressive conduct...[make] the statement resulting from its exercise unreliable").
[31] See Skeleton Argument, para. 56 for a detailed explanation.
[32] RUF Transcript, 19 June 2007, p. 89.
[33] RUF Transcript, 19 June 2007, p. 51.

of the interview, the investigators were not merely interested in the guilt or complicity of the interviewee, but were further seeking, through his words, to implicate others. This occurred in a context where the person thus implicated was in no position to challenge the allegations being made. There is a clear and obvious temptation in such a context to shift the blame on to others in order to exonerate oneself. According to general principles of criminal law, where such an interview takes place, and the person thus interviewed remains a suspect and thereafter a defendant, the content of such an interview cannot be used as evidence against a co-defendant. Although Sesay and Charles Taylor are being tried separately, their situation is analogous to that of co-defendants due to the JCE and superior responsibility modes of liability with which they are charged.

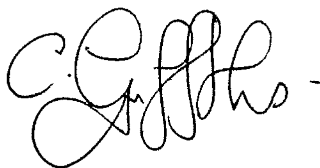
32. The breaches of conduct identified by Trial Chamber I implicate the general judicial discretion to protect the accused where the prejudicial effect of "evidence" outweighs its probative value.

V. Conclusion & Request for Relief

33. Consequently, the Defence respectfully requests that the Trial Chamber exclude all eleven custodial statements made by Sesay on the basis that Trial Chamber I has already determined them to have been made involuntarily. As such, the Statements result from an abuse of process and are unreliable.

34. Alternatively, if the Statements are used during cross-examination and/or admitted into evidence, the Defence requests that the transcripts and exhibits from the *voir dire* proceedings be admitted into evidence under Rule 92*bis*. This alternative request should not be viewed as a bar to any further relief which the Defence might seek.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 1st Day of July 2010
The Hague, The Netherlands

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Other Materials

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Annex A

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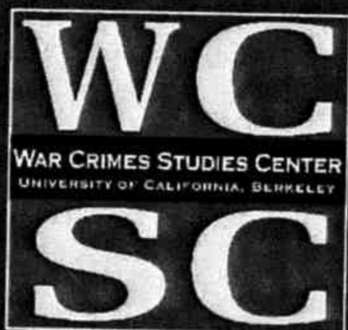
EFFECTIVE, EFFICIENT, AND FAIR?

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



BY PENELOPE VAN TUYL

WAR CRIMES STUDIES CENTER
UNIVERSITY OF CALIFORNIA,
BERKELEY

SEPTEMBER 2008

EFFECTIVE, EFFICIENT, AND FAIR?

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

By Penelope Van Tuyl

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EXECUTIVE SUMMARY

"Techniques—investigative techniques and intelligence techniques—that were followed by our office, that didn't have to be written down. It's part of the way things are done... I called it dancing with the devil."[1]

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

"He would come and say, 'Issa, we are just trying to help you. But what we have been hearing, if you don't confirm these things, how will we be able to help you?' He said, 'So you have to confirm the things that we have heard. That's the only way we'd be able to help you, so that you will be out of this problem."[2]

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

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

Based on the evidence presented during the *voir dire* proceedings, Trial Chamber I ruled in favor of the Defense. The unanimous decision rendered over a thousand pages of custodial interrogation transcripts inadmissible on the grounds that the statements had been obtained involuntarily from the accused "by fear of prejudice and hope of advantage, held out by persons in authority."[4] Beyond the individual piece of jurisprudence it produced, the *voir dire* was noteworthy insofar as it exposed the OTP and its Investigations Section to greater public scrutiny. By shedding light on the internal management of this particularly opaque section of the SCSL, the proceedings offered a rare opportunity for reflection on certain institutional practices which had, up till that point, remained largely impenetrable to outside observers. The Special Court's founding Prosecutor, David Crane has insisted that, "the Special Court for Sierra Leone is showing the international community that international justice can be fairly, efficiently, and effectively delivered to a war-torn part of the world in a way that allows the people to see that the rule of law is more powerful than the rule of the gun."[5] However, the *voir dire* proceedings raised several questions and doubts about investigative procedure at the SCSL: Why

did investigators feel at liberty to maintain ongoing off-the record custodial contacts with an unrepresented accused person? Why didn't the OTP have more explicit internal operating procedures to govern the conduct of its investigators and to guarantee both consistency and transparency in investigative practices? To whom were investigators accountable, and were those supervisors aware of the protocol followed and the tactics being employed off-the-record by their subordinates? How did the organ's overall prosecution strategy affect the approach to investigations?

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

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

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

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

Having established the underlying premises upon which the OTP operates (both structurally and through close analysis of the SCSL's foundational documents), Part III recounts a specific incident that occurred during the early investigations process at the SCSL—the 2003 arrest and interrogation of Issa Sesay. This section of the report provides the reader with a detailed description of the protocol followed during the Sesay investigation and offers insights from Prosecution testimony as to how investigators understood various duties and why they dispensed with particular formalities. The detailed description is required in order to lay the foundation for the analysis which follows in Part IV of this report. By looking closely at the departmental protocol followed during Issa Sesay's interrogation and further exploring the circumstances in which his rights were clearly breached, this section offers new grounds upon which to assess the impact of the institutional reforms and operational imperatives currently motivating the establishment of "second generation" (or post-*ad hoc*) international criminal tribunals.

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

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

V) Conclusion

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

III. Story of Issa Sesay's Arrest and Interrogation

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

A) Circumstances of Arrest

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

B) Plan to Secure Issa Sesay as an Insider Witness

Notwithstanding the President's lack of authority to promise Mr. Sesay protection, there was some element of truth to the assurances he allegedly made to the accused. Most senior OTP officers privy to the Sesay investigation confirm that there *was* a plan to approach the accused during "Operation Justice" and secure him as an insider witness for the Prosecution. As Gilbert Morissette testified during the *voir dire*, investigators decided weeks before "Operation Justice" to target Mr. Sesay because his particular role within the RUF made him someone likely to "give us the most information—the most intelligence in regard to this investigation."[147] Curiously,

John Berry, the principal investigator in charge of Mr. Sesay's custodial interviews, denies knowing anything about a preconceived plan to target the accused.[148] However, the founding Prosecutor, David Crane, has corroborated Mr. Morissette's testimony.[149] Prior to "Operation Justice" the OTP had been using what David Crane refers to as "intermediaries" and "other surreptitious means" to "reach out" to Mr. Sesay and determine if he would be willing to speak with them.[150] "He was very willing to talk to us," the former Prosecutor explained in an interview for this report. "We had already worked that out before [the arrest] even happened."[151] Crane would not disclose how, specifically, the OTP received such assurances, but he did confirm that Mr. Sesay remained totally unaware of his impending arrest: "We led him on... that's all an appropriate part of criminal investigations."[152] At one point in the interview for this report, Crane seemed to suggest that the arrest itself was a ruse, intended to prevent others from identifying the accused as a cooperating witness. "We made it look like he was being arrested with everybody, but at the time we thought that Issa Sesay was going to work with us... it turned out that finally he changed his mind, and we dropped the matter and he was prosecuted."[153]

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

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

According to the evidence given by the OTP investigators and SLP officers who testified during the *voir dire*, it was the OTP, and not the SLP who exercised effective control over the accused from the time of his arrest forward. The arresting officer, Litho Lamin described taking direction from OTP investigators as to where and when he should take the accused.[157] This is how investigator John Berry gained access to the accused and was able to solicit him for insider collaboration within an hour of the arrest, while Mr. Sesay was still in transit to the detention facility.[158] It is also how the Deputy Chief of Investigations was able to bring the accused to the OTP office for an entire afternoon of custodial interviewing before the SLP completed Mr. Sesay's formal transfer into Court custody at Bonthe. The detour failed to comply with Paragraphs B and D of the arrest warrant—mandating that the accused be transferred into the custody of the Special Court, "without delay" and specifying that, "the transfer shall be arranged between/with the relevant national authorities of the Government of Sierra Leone and the Registrar of the Special Court."[159] It bears explaining, Mr. Jordash submitted during the *voir dire*, why the Prosecution didn't leave it to the Registry (a neutral, administrative organ of the Court) to take the accused into custody, and *then* approach Mr. Sesay as a clearly identified

adversarial party. On its face, counsel argued, the move to get the accused isolated in OTP custody as quickly as possible after his arrest appeared to be inherently coercive. David Crane, who authorized the diversion in advance, described it as a deliberate part of the plan to achieve cooperation from the accused: "We knew that Issa Sesay, through other means, had agreed to talk, so as soon as he was arrested, he was pulled out of the system and while they were moving people to Bonthe Island, Sesay was taken to our office."[160] When asked how he squares this decision with the procedural requirements on the face of the warrant, Crane simply insists that this was a relatively brief detour and therefore "it wasn't without delay."[161] Counsel for the accused, however, made the compelling argument during the *voir dire* that the length of time is not the relevant consideration—it's what transpired during the delay that matters.

Because of the delay, Mr. Sesay was approached at Juri Barracks[162] and solicited for an interview by investigator John Berry without ever being read his rights or given access to his indictment.[163] Once in Prosecution custody at the OTP compound for questioning, Gilbert Morissette read Mr. Sesay the rights advisement, but this interview with the Deputy Chief of Investigations proceeded without Mr. Sesay knowing the charges against him. Not until he arrived at Bonthe in the evening was Mr. Sesay served with a packet of documents containing his indictment.[164] This was a plain breach, Mr. Jordash argued, of the Article 17 right, rearticulated by Judge Thompson on the face of the arrest warrant, to have a copy of the warrant, the rights advisement, and the indictment, "served on the accused at the time of his arrest or as soon as is practicable immediately following his arrest in English, or have read to him in a language he understands."[165] The delay of several hours "might not be significant in some cases," the Defense conceded, "but it is significant when the Prosecution say, during this period, Mr. Sesay's cooperation was obtained. In our respectful submission, we cannot gain the cooperation of an accused without reading the basic rights, without adhering to the warrant of arrest."[166]

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

D) Detrimental Impact of a Delayed Notice of Charges

OTP investigators interviewed Issa Sesay every day between his March 10th, 2003 arrest and his initial court appearance on March 15th.[170] During his appearance before Judge Benjamin Itoe, the accused had access to an interpreter, heard the charges in his indictment for the first time,

asked for a lawyer, and entered a plea of not guilty on each of the seventeen counts. On the tape of the proceeding, counsel for the Prosecution acknowledges to the Court that the accused appears not to understand the charges against him,[171] and Judge Itoe is obliged to lead the accused carefully through the charges in his indictment, with the assistance of an interpreter.[172] At no point during the initial appearance was the Judge made expressly aware of Mr. Sesay's daily custodial interviews, although the accused did obliquely acknowledge them at one point; When Judge Itoe inquired into the reason for Mr. Sesay's ignorance of the charges, the accused alluded to the fact that his time in OTP custody kept him away from Bonthe island, while the overall conditions of his detention (including the lack of electricity) made reading his indictment impossible at night: "For the whole of the day I was not in Bonthe. And, during the night, there was no light in the room, in the cell, where I was."[173] Based on this, Mr. Jordash argued that what might have been a minor, technical breach of the Article 17(b) mandate, became a significant deprivation of a fundamental right.[174] This factored heavily into the argument for exclusion. Mr. Jordash argued that any voluntary waiver of rights must be based upon an informed understanding of one's own legal status. "Voluntariness is not simply about force. Voluntariness is about being properly informed of your charges, promptly, so that you can make an informed choice about whether to be interviewed."[175]

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

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

The current Chief of Investigations defended his behind-the-scenes efforts, likening them to an undercover operation. He told the Court he saw no problem with the covert "confidence building" measures he undertook and the off-the-record *quid pro quo* offers he used to achieve compliance from the accused.[181] "You can use things like this when you're in an undercover role operation," Morissette testified "and you could use it also when you're interviewing suspect [*sic*]. To my knowledge, there's nothing wrong with it."[182] John Berry, by contrast, claims to have remained entirely ignorant of Mr. Morissette's covert endeavors. Mr. Berry testified that, if he were aware of any such measures being used, he would have felt compelled to speak with his superiors about it.[183] In his professional opinion, any conversation or deals being made with Mr. Sesay during breaks should have been referenced on the record upon resumption of the formal interview "to ensure the integrity of the process."[184] When questioned hypothetically about the kind of tactics Mr. Morissette testified to using, Mr. Berry expressed misgivings. It struck him as an unacceptable investigative technique to deliberately and proactively approach an accused with incentives you're willing to offer in exchange for continued cooperation, "because you're making a promise."[185] While Mr. Berry explained that he would be perfectly comfortable answering a suspect's direct inquiries with any assurances he was expressly authorized to make, he would not approach a suspect with unsolicited *quid-pro-quo* offers. Nor would he, as a rule, make assurances to a wavering cooperator that material witness support benefits could be provided in exchange for testimony. Mr. Berry was very clear on this point, "Not for an exchange for testimony."[186]

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

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

account didn't match information they were getting from other insider sources:[196]

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

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

Mr. Sesay further testified during the *voir dire* that he was misled about his official status and repeatedly promised imminent release in exchange for speaking freely with the OTP.[206] No such express promises appear in the transcripts of official interviews, but investigators do appear to have left considerable ambiguity on the record about Mr. Sesay's legal status. The terms "defendant" and "accused" seem to have been conspicuously absent from the vocabulary of OTP investigators during interviews, who often referred to Mr. Sesay only as a "suspect."[207] It is hard to say if investigators were simply careless about legal distinctions, or if they deliberately sought to mislead Mr. Sesay into believing that investigators had more discretionary authority to release him than they really did. It is worth noting that the current Chief of Investigations demonstrated considerable difficulty on the stand distinguishing between the rights owed to a suspect versus those owed to an accused person.[208] Mr. Jordash questioned Mr. Morissette at length about why he repeatedly referred to Mr. Sesay as a "suspect" during the custodial interviews when Mr. Sesay had, in fact, already been indicted.[209] Mr. Morissette denied that it was a deliberate scheme, and defended his persistent choice of the word "suspect" by pointing to the language in Rules 42 and 43, which investigators used to caution detainees.[210] However, the rule most relevant to interviewing a post-indictment individual should have been Rule 63—"Questioning of an Accused." Curiously, from the moment he began his testimony, Mr. Morissette never independently made reference to Rule 63 or commented on its applicability to the Sesay interrogation.[211] When Defense Counsel asked the Chief of Investigations if he was familiar with Rule 63, Mr. Morissette paused and replied, "Vaguely."[212]

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

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

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

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

Contemporaneous medical records, admitted into evidence during the *voir dire*, tend to corroborate and compound the gravity of Mr. Sesay's claim that he was confused, distraught, and taken advantage of by OTP officials while in a very vulnerable position. The official detention log confirms that the accused was suffering from numerous physical and psychological ailments during his initial detention, including malaria, depression, anxiety, "extreme and inappropriate" suicidal thoughts, confusion, frequent bloody stools, dysentery, insomnia, and severe dental pain.[219] In sharp contrast to Mr. Morissette and Mr. Berry's insistence that the accused didn't want to see an attorney, medical staff noted in the detention log that Mr. Sesay voiced "concern about his parents and the fact that he has not got a lawyer at present."[220] By late April, shortly after what would be Mr. Sesay's final custodial interview, the detention facility doctor observed, "Issa needs to be assessed by a psychiatrist. He's very confused and needs to be looked after by appropriately trained personnel for the benefit of both staff, himself and other inmates. He appears to have a lot of problems, both psychological and physical, and he needs to be looked after."[221] Remarkably, in its written judgment on the *voir dire*, the Trial Chamber dismissed Mr. Sesay's medical ailments as "not sufficiently grave to render the manner of questioning oppressive."[222] If Mr. Sesay's ailments do not reach that threshold, one wonders what sort of medical problems ever *would* be sufficiently grave in the Trial Chamber's view.

The record clearly indicates that OTP Investigators were aware of Mr. Sesay's anxiety about his family—the accused broke down crying during his first interview and explained to investigators that he "got so shattered" out of concern for his family who "don't even know my

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

G) Deliberate and Incidental Curtailment of Issa Sesay's Access to Duty Counsel

Throughout March and April, despite Mr. Sesay's physical and psychological ailments, the accused was never apparently given a choice in the detention facility to decline traveling to Freetown for an interview. Unlike the other detainees on Bonthe, Mr. Sesay was forcibly removed from his cell each interview day, handcuffed, and then either blindfolded or hooded before being taken to a waiting helicopter.[232] Interviews lasted the entire day, getting him back to the detention facility in the evening.[233] Whether deliberate or incidental, these daily trips initially prevented Mr. Sesay from consulting with any of the Defense Office lawyers or advisors who came to Bonthe; the same chartered helicopter that brought duty counsel to the island would immediately carry Mr. Sesay away on the return flight.[234] Even if transportation arrangements had been more flexible, it is not clear Mr. Sesay would have been given access to counsel at that time. Duty counsel, Claire Carlton-Hanciles, who testified for the Defense during the *voir dire*, confirmed, for instance, that she was sent to Bonthe by the SCSL Registrar[235] on 17 March 2003 to explain the legal aid scheme to the detainees. According to Ms. Carlton-Hanciles, Deputy Registrar Robert Kirkwood told her as she was on her way out of the Court bound for Bonthe, "By the way Claire, don't bother with Mr. Issa Sesay. He signed a waiver to duty counsel."[236] Ms. Hanciles visited all the detainees that day except for Mr. Sesay. She reportedly passed the accused on the helipad at Bonthe, but he was unrecognizable due to hooding, so she only knew his identity after the fact.[237]

Beyond the circumstantial interference with Mr. Sesay's access to duty counsel, the record contains troubling evidence that the OTP may have initially used Mr. Sesay's signed rights waivers to actively prevent defense representatives from meeting with the accused at all in the first few days of his detention.[238] Mr. Sesay was scheduled to make his preliminary appearance before a judge on the 15th, and had the right to prepare for this hearing with legal

assistance, notwithstanding any waiver he signed to forego counsel during a custodial interview. Moreover, according to the Court's former Registrar, Robin Vincent, the Registry insisted after Mr. Sesay's arrest that duty counsel be permitted to speak with the accused on Bonthe to explain the upcoming hearing to him.[239] Nevertheless, certain members of the OTP seem to have treated the interview-specific rights waivers as a waiver of counsel altogether, and collaborated with the security staff at the detention facility to ensure the accused did not consult with duty counsel at first. As Vincent noted in a contemporaneous memo, security staff at the SCSL detention facility "had been given clear instruction that the Registry was not to enter into contact with Mr. Sesay... as he had waived his rights to see counsel."[240] When the Registry subsequently sent an intern by the name of Beatrice Ureche to the OTP offices on March 11th she was not given access to the accused either.[241] The Registrar noted in his memo that Ms. Ureche was sent to the OTP expressly to await Mr. Sesay's arrival, and to ensure that he understood the distinction between his right to legal aid in general and his right to have counsel present during questioning.[242] Gilbert Morissette testified, however, that Ms. Ureche only asked for a copy of the waiver when she arrived, and did not ask to see Mr. Sesay.[243] Whatever the circumstances that prevented Ms. Ureche from speaking with the accused, Mr. Morissette made clear in his testimony that he took Mr. Sesay's waiver of immediate assistance of counsel to mean that Defense Office representatives should not meet with the accused at all. By checking off the boxes on the waiver "Mr. Sesay had told us that he did not want to see a lawyer," Mr. Morissette testified during the *voir dire*, "and he did not want to have a lawyer present."[244] The OTP gave Ms. Ureche a copy of the waiver Mr. Sesay had initialed and sent her away without speaking to the accused.[245] On the insistence of Registry legal advisor Mariana Goetz, the OTP reportedly agreed thereafter that that accused could meet with duty counsel to be briefed about legal procedures for his initial appearance.[246] According to the Registrar's memo, duty counsel Haddijatou Kah-Jallow did gain access to the accused for this purpose, however the record remained unclear as to the specific content of this meeting and the circumstances under which it took place (i.e. the exact date, time, place and persons involved).[247]

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

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

record instances where the accused was demonstrably confused about the meaning and scope of his rights.

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

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

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

Mr. Jordash:	Did you see it as part of your investigative protocol to be confident at any time that Mr. Sesay understood that he had a right to counsel there and then?
Mr. Morissette:	No.
Mr. Jordash:	You didn't see that as an obligation?
Mr. Morissette:	No.[258]

According to the Defense, investigators did more than simply neglect to explain the scope of Mr. Sesay's rights—they actively sought to mislead the accused about the import of the rights waivers he signed. Prior to his first interview, investigators allegedly told the accused, off-the-record, that there would be papers read to him at the beginning of the interview, and that he should just say "yes" to the questions they asked.[259] Mr. Sesay claims that the Deputy Chief repeated his advice to disregard the waiver on the 11th of March— "John will be reading a document to you. Don't mind them... Those documents are just procedures."—and that Mr. Berry said words to this effect on March 12th, as well.[260] Although Mr. Sesay followed instructions each day and initialed the forms, he later testified during the *voir dire* that he didn't understand the English term "waiver", and wasn't aware until later that it meant he was giving up rights.[261] He also testified that he misunderstood the word "counsel" to mean "consul," (an English phrase he had picked up during the Abidjan peace talks, where a consul took the place of an ambassador who could not attend a meeting), so he did not understand at first that the rights advisement had anything to do with a lawyer.[262] The *voir dire* judgment surveyed these Defense arguments briefly in its summary of the submissions of the parties,[263] however the Court ultimately issued no findings whatsoever regarding the evidence of a language barrier or the allegations that investigators urged the accused to disregard the papers he was signing.[264] Perhaps even more surprising, the Court did not issue any findings as to what effect the isolation of the accused in Prosecution custody might have had on his ability to understand his rights and his decision to sign the waivers. Presumably the Judges either found the evidence presented unreliable, or thought the circumstances to be irrelevant, but there is no explanation either way. Instead, citing the comfortable surroundings of the interview room and the polite mannerism of Mr. Berry during recorded interviews, the Trial Chamber simply declared categorically that it was "satisfied that the interviews did not take place under coercive or oppressive circumstances."[265]

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

Both Mr. Morissette and Mr. Berry deny ever having noticed the accused express any confusion over the professional obligations of duty counsel or the scope of Mr. Sesay's right to immediate legal representation. Mr. Morissette testified categorically, "Mr. Sesay never demonstrated to me any lack of understanding of his right."[268] Mr. Berry echoed this sentiment,

claiming that he did everything "to the best of [his] ability" to ensure that Mr. Sesay understood his rights.[269] Under further cross examination, however, Mr. Morissette conceded that he failed to take corrective action on several occasions where Mr. Sesay articulated a belief that SCSL duty counsel had no obligation to maintain confidentiality with the accused:

Mr. Jordash:	So he was saying to you, effectively: Well, duty counsel are not like my lawyer because they won't be private to me; is that right?
Mr. Morissette:	That's correct.
Mr. Jordash:	Do you correct that misapprehension?
Mr. Morissette:	No.[270]

...

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.[271]

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

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

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

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

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

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

Judge Itoe rejected the notion that the Trial Chamber could reasonably conclude, based on the "situation and the prevalent circumstances" of Mr. Sesay's interrogation, that he voluntarily waived his right to counsel.[294] In light of the Chamber's unanimous agreement on the illegal

circumstances that rendered Mr. Sesay's waiver of his right to silence involuntary, Judge Itoe declared that it was, in his opinion, "erroneous to conclude in another breath," that waivers of the right to counsel elicited under the same circumstances were voluntary and informed.[295]

H) Interference with Issa Sesay's Request for Specific Legal Representation

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

Mr. Morissette and Mr. Berry both flatly deny they ever had any such discussions with the accused. However, internally inconsistent testimony Mr. Berry gave during the *voir dire*, and specific information he included in a contemporaneous memo, seriously impeached his credibility on the matter. In this author's opinion, evidence clearly suggests that OTP investigators were in fact coercively involved in some aspect of the defendant's initial choice of counsel.[303] Mr. Berry's signature on the choice of counsel document further raised concerns about why an OTP investigator was present for what should have been a privileged communication. Moreover, Mr. Berry never adequately explained why he continued interviewing Mr. Sesay that afternoon, despite the Rule 42 and Rule 63 mandates that questioning cease if an accused who has waived his rights "subsequently expresses a desire to have counsel."[304]

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

Acting head of the Defense Office, John Jones, learned about the ongoing custodial interviews sometime in April, shortly after his arrival in Sierra Leone. Concerned about the legitimacy of the protocol followed, Jones intervened on behalf of the accused in an April 14th letter to David Crane.[305] The acting Principal Defender had met with the accused briefly at the detention facility when he traveled there to introduce himself to the detainees and discuss the Court's legal aid scheme. He explained in his letter to the OTP that he was "extremely concerned about the

circumstances surrounding the apparent waiver of Mr. Sesay's right to remain silent and to have a lawyer present during his investigation by your office."[306] He asked the OTP to refrain from interviewing Mr. Sesay, effective immediately, so as to allow him time to discuss matters with legal counsel and make an informed decision about whether to continue speaking with the Prosecution.[307] The OTP did not refrain. Instead, they interviewed Mr. Sesay on the 14th and the 15th of April, and had Mr. Sesay sign what appear to be hastily drafted additional waivers.[308]

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

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

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

Mr. Sesay's had one final custodial interview with the OTP on the 15th of April 2003, but any prospect for cooperation between the accused and the OTP broke down after that.[319] Mr. Sesay claims that Mr. White and Mr. Morissette contacted him by telephone at the detention facility in May. The Chief of Investigations allegedly gave Mr. Sesay one last opportunity to "cooperate" with the Prosecution, offering to drop the indictment if he agreed to be a witness

against Charles Taylor.[320] By this time, Mr. Sesay had retained a Canadian lawyer through the Defense Office. Having not seen the OTP deliver on what Mr. Sesay claimed were previous promises, the accused was suspicious. He reportedly told Mr. White that he would only continue speaking with OTP if his lawyers, who were present in Freetown, were involved.[321] He gave the Chief of Investigations his attorneys' names and said the OTP should approach them about his cooperation.[322] According to Mr. Sesay, Mr. White ended the phone call and never contacted the accused again.[323] Also according to the accused, Mr. Berry attempted to contact him one last time thereafter.[324] Shortly after the detainees were transferred to the detention facility at the present Special Court complex in Freetown, Mr. Sesay claims Mr. Berry approached his wife outside the complex and asked her to help convince Mr. Sesay to cooperate with the OTP on the Taylor trial. She, like the accused, told Mr. Berry that her husband had a lawyer now, and they should contact him through counsel.[325] Based on *voir dire* testimony, it appears that neither Mr. Berry nor any other OTP investigator ever did so.

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

Elsewhere in its decision, the majority acknowledges the Rule 63 requirement that "once an accused person has requested the assistance of Counsel, questioning should immediately cease and shall only resume when the Accused's counsel is present."[327] In the following sentence, the Court conclusively determines that Mr. Sesay made at least two such requests for counsel during the period in question.[328] Nevertheless, the majority decision summarily (and without explanation) concludes that the OTP investigators somehow fulfilled their obligations under Rule 63. Simply put, this conclusion does not follow logically from the Court's own factual findings and statements of law. Not only did the OTP repeatedly fail to unilaterally suspend interviews as required by Rule 63, evidence suggests that investigators went out of their way to continue interviewing the accused despite an unequivocal request by the acting Principal Defender, on behalf of the accused, that they cease. Instead of respecting Mr. Sesay's clear request for legal assistance, OTP investigators ignored their obligation to suspend the interview,

and instead chose to pressure the accused into re-waiving his rights on an additional form. As Judge Itoe concluded in his separate opinion, the facts on record point inescapably to the conclusion that Issa Sesay's alleged waiver of the right to counsel was involuntary as a matter of law, having been obtained in plain breach of Article 17, Rule 42 *and* Rule 63.[329]

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Annex B

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KEY DATES

2003

7th March 2003	Indictment signed Warrant of Arrest and Order for Transfer and Detention issued (HHJ Thompson)
10th March 2003	12 noon: Sesay arrested and transferred into the custody of the Special Court 1:25 pm: John Berry (JB) and Joseph Saffa spoke to IS and asked him to speak to them about his involvement during the war. He was "advised to take his time as it was an important decision". No advice as to right to Counsel or what his statements could be used for was given. 1:30pm: IS indicates willingness to cooperate IS 1st **interview** with OTP (3:03 pm – 4:37pm) IS taken to Bonthe.
11th March 2003	IS 2nd **interview** with JB of the OTP (taken from Bonthe) 11:55am – 3:30pm
12th March 2003	IS 3rd **interview** with JB of the OTP (taken from Bonthe) 11:16am – 3:30pm
13th March 2003	Request for Legal Assistance on behalf of IS filed. IS 4th **interview** with JB of the OTP (taken from Bonthe) 12:12pm – 3:30pm
14th March 2003	Order that Indictment and Warrant be made public on 15th March 2003 (HHJ Itoe) IS 5th **interview** with JB of the OTP (taken from Bonthe) 9:37am – 3:29pm
15th March 2003 **Annex A**	IS first appearance before HHJ Itoe [pg 1] HHJ Itoe: Do you have a lawyer? IS: "This is my first time I've been in court so I don't have any lawyer" HHJ Itoe: Do you want a lawyer or do you want to conduct your defence yourself? IS: Well, I will know when my charges shall be read [pg41]

OTP (Mr. Johnson): It also strikes me that perhaps the Accused does not fully understand that many of these charges and criminal responsibility is based on a theory of superior responsibility in that forces acting under him did these things.

[pg 55]
HHJ Itoe: Does he want to defend himself or he rests on his application for legal assistance?
IS: I will get a lawyer.

17th March 2003	IS 6th **interview** with JB of the OTP (taken from Bonthe) 11:37am – 4:30pm JB's memo to Brenda Hollis and Gilbert Morrisette
18th March 2003	IS 7th **interview** with JB of the OTP (taken from Bonthe) 10:48am – 4:35 pm
24th March 2003 **Annex B**	IS 8th **interview** with JB of the OTP (taken from Bonthe) 10:44am – 3:40pm 1pm: Sesay asks for a Mr. Robertson to represent him (see note signed by Mr. Sesay to that effect)
31st March 2003	IS 9th **interview** with JB of the OTP (taken from Bonthe) 10:02am –no time indicated
14th April 2003	IS 10th **interview** with JB of the OTP (taken from Bonthe) 10:29am –no time indicated 4:25pm: Gilbert Morrisette entered to have IS signed Specific Rights Advisement. JB present throughout. "Q7: Do you want us to tell the Duty Counsel that you are talking and collaborating with us everytime we interview you? A: Yes Q8: Do you want us to give a Notice to your Duty Counsel of all future interviews if you still want to collaborate with us? A: No"
15th April 2003	IS 11th **interview** with JB of the OTP 9:35am – 12:30pm 9:58am: Gilbert Morrisette entered to have IS signed Specific Rights Advisement. JB present throughout. "Q7: Do you want us to tell the Duty Counsel that you are talking and collaborating with us everytime we interview you? A: No Q8: Do you want us to give a Notice to your Duty Counsel of all future interviews if you still want to collaborate with us?

A: Yes"

16th April 2003	OPD file Extremely Urgent and Confidential Motion regarding OTP's contact with IS. In its reply, the OPD set out the main issues as follows: "Where an Accused has appointed a legal representative, is the OTP entitled to approach the Accused directly or should it approach the Accused through its legal representative?" The issue of whether Mr. Sesay's waiver of his right to Counsel was informed and voluntary was <u>not</u> placed before the Trial Chamber.
23rd April 2003	Prosecution Response
29th April 2003	Defence Reply
30th April 2003	Court granted the Motion and ordered that "further questioning of the Accused by the Prosecution shall temporarily cease, with immediate effect, and shall be suspended until a final decision on the Defence Motion has been rendered by the Court".
22nd May 2003	Incomplete transcripts of interview disclosed by the Prosecution to Mr. W. Hartzog. No audio/ video materials yet disclosed.
29th May 2003 **<u>Annex C</u>**	Extremely Urgent and Confidential Motion of Defence Counsel Requesting Permission to Intervene Regarding the Defence Office's Extremely Urgent and Confidential Motion. Request to bring forward "unique and different information that was no available to the Defence Office when it filed its Motion and Reply" while at the same time "recognising the merits of the arguments of the Defence Office". Para 16: ..the [interim] Order has been breached insofar as Mr. Sesay made several phone calls to the OTP which were rebuffed immediately by the OTP in each case. The purposes of the calls were to arrange a visit with his wife, which Mr. Sesay erroneously believed to be under the control or at the discretion of the OTP".
30th May 2003	Interim Order revoked.
2nd June 2003 **<u>Annex D</u>**	Note by then Co-Counsel, Ms. Marcil (dated 9th June 2003) stated that on 2nd June 2003, she was informed by Mr. Robert Parnell, Chief of Security, that Mr. Sesay was to meet with the FBI after having been removed from Bonthe and brought to the OTP. Mr. Parnell said that Mr. Sesay had agreed to meet the FBI and had been told he could see his wife on the same day. Mr. Parnell said

	Co-Counsel need not attend. It was, in any event, too late to be registered for the helicopter flight to Bonthe.
5th June 2003	Prosecution Response to Extremely Urgent and Confidential Motion of the Defence Counsel, stating Motion "should be dismissed since the issues raised have become moot in light of the final decision". [No Reply was filed]
23rd June 2003	HHJ Thompson held "no useful purpose could be served in granting leave to intervene since the other matters adverted to by Counsel in their Motion are peripheral to the core issue already decided by the Chamber…. The Chamber wishes to emphasise that it is always an option open to the Defence to raise any detriment of the nature alleged as an issue of inadmissibility of evidence before or during the trial".
18th Nov 2003	Copies of 22 audio tapes used in OTP's interviews with IS disclosed to Mr. W. Hartzog.
2004	
17th Feb 2004	Copies of 22 video tapes (copied on CD) used in OTP's interviews with IS disclosed to Mr. W. Jordash.
24th Feb 2004 **Annex E**	Mr. Petit (in an inter office memo to Mr. Clayson) indicated that they are going to disclose the i/vs to Co-D and AFRC Defs on 27th Feb 2004. Mr. Petit stated "As you know 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."
25th Feb 2004	Confidential motion filed seeking an immediate order prohibiting the Prosecution from disclosing any part of the interview materials conducted with Issa Sesay between 10th March 2003 and 15th April inclusive until further order and expedited filing timetable. It noted that there would be a future argument as to admissibility at the appropriate time.
26th Feb 2004	Order for expedited filing
27th Feb 2004	Prosecution Response
3rd March 2004	Defence Reply

29th April 2004	Confidential Order to Specify Redactions and to Specify Timeline for Full Disclosure
4th May 2004	Sesay Defence Reply to the Order (cannot access on CMS)
17th June 2004	Unredacted video recording (copied on CD) of 17th March 2003 disclosed to Sesay team. Redacted transcripts 10th – 16th March, 18th March – 15th April 2003 disclosed
23rd June 2004	Complete, unredacted transcripts of IS i/vs disclosed to MK, AG, ATB, IBK and Kanu.
5th July 2004	Start of Prosecution case
12th October 2004	In response to applications from Co-def, TC orders that all confidential filings regarding the interviews be made available to AFRC and RUF defence teams

2006

2nd August 2006	Close of Prosecution case

2007

3rd May 2007	Start of Sesay Defence case and of IS testimony
17th May 2005	Prosecution files transcripts of interviews with the Accused with Court Management

29277

Annex C

29278 877

SPECIAL COURT FOR SIERRA LEONE

29642

OFFICE OF THE PROSECUTOR
1A SCAN DRIVE • OFF SPUR ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7100 or +39 0831 257100 or +232 22 236527
FAX: Extension: 174 6998 or +39 0831 236998 or +232 22 295998

22 May 2003

PROSECUTOR Against ISSA SESAY
CASE NO. SCSL-2003-05-PT

RECEIPT

Pursuant to the Prosecution's obligation to supply a copy of the transcript of interview with the Accused after the conclusion of questioning, under Rule 63 and 43, the following interview transcripts were submitted to William Hartzog, assigned DEFENCE COUNSEL representing the Accused, ISSA SESAY, on 22 May 2003:

DATE OF INTERVIEW	PAGES
10-March-03	50
11-March-03	109
12-March-03	149
13-March-03	94
14-March-03	138
17-March-03	139
18-March-03	158
24-March-03	54
31-March-03	44
14-April-03	59
15-April-03	92

Each interview transcript submitted is accompanied with a copy of the Rights Advisement read and signed by the Accused at the commencement of every interview session.

Pursuant to Rules 63 and 43, the Prosecutor is obligated to provide the Accused with an audio or video copy of each interview. At present, the Prosecution is undertaking duplication of such audio and video materials. The Accused/Defence Counsel agrees to receive interview transcripts without copies of the audio/video materials, with the understanding that such materials will be submitted to the Accused/Defence Council as soon as duplication is completed.

I, William Hartzog, assigned DEFENCE COUNSEL representing the Accused, ISSA SESAY, acknowledge receipt of the interview transcripts and Rights Advisement listed above.

Signature_____________________
William Hartzog

Date: 22 May 2003, Freetown

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Annex D

*235 The King v Jane Warickshall

1 January 1783

(1783) 1 Leach 263

168 E.R. 234

1783

Case CXXXI.

(Confessions obtained in consequence of promises or threats cannot be given in evidence; but any facts, though resulting from such inadmissible confession, may be received.)

[S. C. 2 East, P. C. 658. Referred to, *R.* v. *Wheater* , 1838, 2 Mood. C. C. 45; *R.* v. *Thompson* , [1893] 2 Q. B. 12; *R.* v. *Booth and Jones* , 1910, 74 J. P. 75; *Ibrahim* v. *R.* , [1914] A. C. 599.]

At the Old Bailey in April Session 1783, Thomas Littlepage was indicted before Mr. Justice Nares, present Mr. Baron Eyre, for grand larceny; and the same indictment charged Jane Warickshall as an accessary after the fact, with having received the property, knowing it to have been stolen.

The accessary had made a full confession of her guilt; and in consequence of it the property was found in her lodgings, concealed between the sackings of her bed. The confession, however, having been obtained by promises of favour, the Court refused to admit it in evidence against her; and it was contended by her Counsel, that as the fact of finding the stolen property in her custody had been obtained through the means of an inadmissible confession, the proof of that fact ought also to be rejected; for otherwise the faith which the prosecutor had pledged would be violated, and the prisoner made the deluded instrument of her own conviction.

The Court. It is a mistaken notion, that the evidence of confessions and facts which have been obtained from prisoners by promises or threats, is to be rejected from a regard to public faith: no such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled to credit. *236 A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the **[264]** mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected. [1] This principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source; for a fact, if it exist at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false. Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession from which they may have been derived; and the impossibility of admitting any part of the confession as a proof of the fact, clearly shews that the fact may be admitted on other evidence; for as no part of an improper confession can be heard, it can never be legally known whether the fact was derived through the means of such confession or not; and the consequences to public justice would be dangerous indeed; for if men were enabled to regain stolen property, and the evidence of attendant facts were to be suppressed, because they had regained it by means of an improper confession, it would be holding out an opportunity to compound felonies. The rules of evidence which respect the admission of facts, and those which prevail with respect to the rejection of parol declarations or confessions, are distinct and independent of each other. It is true, that many able Judges have conceived, that it would be an exceeding hard case, that a man whose life is at stake, having been lulled into a notion of security by promises of favour, and in consequence of those promises has been induced to make a confession by the means of which the property is found, should afterwards find that the confession with regard to the property found is to operate **[265]** against him. But this subject has more than once undergone the solemn consideration of the Twelve Judges; and a majority of them were clearly of opinion, That although confessions improperly obtained cannot be received

in evidence, yet that any acts done afterwards might be given in evidence, notwithstanding they were done in consequence of such confession. [2]

Leach

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1. Three men were tried and convicted for the murder of Mr. Harrison, of Campden, in Gloucestershire. One of them, under a promise of pardon, confessed himself guilty of the fact. The confession therefore was not given in evidence against him, and a few years afterwards it appeared that Mr. Harrison was alive. MS.

2. In February Session 1784, Dorothy Mosey was tried on the statute 10 & 11 Will. III. c. 23, for shop-lifting, and a confession had been made by her, and goods found in consequence of it, as in the above case. Mr. Justice Buller, present Mr. Baron Perryn, who agreed, said, "Whatever acts are done, are evidence; but if those acts are not sufficient to make out the charge against the prisoner, the conversation or confession of the prisoner cannot be received, so as to couple it with those acts, in order to make out the subject-matter of proof. A prisoner was tried before me (Mr. Justice Buller), where the evidence was just as it is here. I stopped all the witnesses when they came to the confession. The prisoner was acquitted. There were two learned Judges on the bench, who told me, that although what the prisoner said was not evidence, yet that any facts arising afterwards must be received. This point, though it did not affect the prisoner at the bar, was stated to all the Judges; and the line drawn was, that although confessions improperly obtained cannot be received in evidence, yet that the acts done afterwards may be given in evidence, though they were done in consequence of the confession." See also *Lockhart's* case, *postea* , June Session, 1785.—But it should seem thet so much of the confession as relates strictly to the fact discovered by it may be given in evidence; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been thereby induced to say what is false; but the fact discovered shews that so much of the confession as immediately relates to it is true. *Rex* v. *Butcher* , Maidstone Summer Assizes, 1798.—But it seems, says Mr. East, 2 C. L. 658, "that this opinion must be taken with some grains of allowance; for even in such case the most that is proper to be left with the Jury is the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly; but not the acknowledgment of the prisoner having stolen or put them there, which is to be collected or not from all the circumstances of the case: and this is now the more common practice."

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