



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

THURSDAY, 7 JUNE 2007  
9.35 A.M.  
TRIAL

TRIAL CHAMBER I

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

1 [RUF07JUN07A - MC]

2 Thursday, 7 June 2007

3 [Open session]

4 [The accused present]

09:22:49 5 [The witness entered court]

6 [Upon commencing at 9.35 a.m.]

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

09:46:16

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

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

09:46:34

15 MR JORDASH: It is my submission that in fact Mr Sesay's  
16 wife was in Prosecution protective custody. It appears that  
17 myself and Mr Petit have actually got it wrong. She wasn't. She  
18 was in witness and victims' protection. So it was my  
19 misapprehension, and Mr Petit's misapprehension and we would say  
20 Mr Sesay's misapprehension that somehow it was the Prosecution  
21 who were controlling that protective custody.

09:47:08

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

09:47:31

29 PRESIDING JUDGE: So the records will reflect the

1 correction.

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

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

09:48:03 5 MR HARRISON: Yes. Just so that I can just complete that  
6 point, I have given four copies of a letter from the deputy chief  
7 of witness and victims' services to the legal officer of the  
8 Trial Chamber which simply confirms the advice that has been  
9 provided by Mr Jordash, and I put copies of the same document in  
09:48:30 10 front of Mr Touray and Mr Cammegh this morning.

11 PRESIDING JUDGE: Thank you.

12 MR HARRISON: If I could just try to clarify what I think  
13 might just be minor errors and wording. There can be no  
14 application to anyone with respect to a person being taken into  
09:49:01 15 the care of witness and victims' services. What happens is a  
16 simple request is made and then an independent assessment is made  
17 because witness and victims' services unit is an independent  
18 unit, functioning solely under the discretion of the Registrar  
19 and even the power of the Registrar over the chief of that unit  
09:49:24 20 is, I think, somewhat circumscribed. So it is not a question of  
21 any kind of an application being made. A request goes forward, a  
22 review and assessment undertaken independently and then a  
23 decision is made by the witness and victims' services unit. So  
24 there can be no suggestion that in any respect the Prosecution  
09:49:46 25 had any control over the wife of Mr Sesay. Any control to be  
26 exercised would solely be under that of witness and victims'  
27 services and, should the wife make a determination to do away  
28 with those, that would be between her and witness and victims'  
29 services.

1 PRESIDING JUDGE: Thank you.

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

4 MR HARRISON: Yes, it's --

09:50:27 5 JUDGE ITOE: At the request of the Prosecution?

6 MR HARRISON: Yes.

7 JUDGE ITOE: Is it fair to say that?

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

9 JUDGE ITOE: Thank you.

09:50:37 10 MR HARRISON: The Prosecution would convey the information  
11 directly to the chief of witness and victims' services.

12 PRESIDING JUDGE: So the distinction here is, clearly, that  
13 in terms of being in protective custody, it was in the custody of  
14 the victims and witness unit but then this was at the instance of  
09:51:03 15 the Prosecution.

16 MR HARRISON: Yes.

17 PRESIDING JUDGE: That's fine.

18 MR HARRISON: The Prosecution would initiate the process.

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

09:51:11 20 MR HARRISON: And the Prosecution does have that document.

21 I am a little bit concerned about all of the loose documents that  
22 are before the Court. The Prosecution would suggest that it may  
23 be more orderly for it to be made an exhibit but I realise that  
24 the Court may think that is unnecessary because of the comments  
09:51:35 25 that have been put on the transcript.

26 PRESIDING JUDGE: But if you think it's -- it will assist  
27 the Court, we certainly would have no disposition to resist  
28 receiving it in evidence, if it is going to be of some assistance  
29 for us. We are not in any way intimidated by the voluminous

1 nature of the exhibits.

2 MR HARRISON: Having heard your comments, the Prosecution  
3 therefore makes an application that the document dated 6 June  
4 2007, addressed to "To whom it may concern," and signed by the  
09:52:12 5 deputy chief of WWS be made an exhibit in the trial.

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

8 MR JORDASH: No objections.

9 PRESIDING JUDGE: Quite. The gentlemen on that side have  
09:52:27 10 no interest in this matter so the document will be received in  
11 evidence and marked exhibit?

12 MR GEORGE: 218, Your Honour.

13 PRESIDING JUDGE: Thank you.

14 [Exhibit No. 218 was admitted]

09:52:40 15 PRESIDING JUDGE: Mr Harrison, go ahead.

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

18 JUDGE ITOE: Mr Harrison, we saw Exhibit 216 and 217  
19 yesterday. Are you able to complete them before you start your  
09:53:23 20 reply? So that we have a complete documentation, because that  
21 was what you said you would do today, if you found it necessary.

22 MR HARRISON: Yes.

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

09:53:39 25 MR HARRISON: Yes. What the Prosecution would prefer to  
26 advise the Court of is this: That everything that Mr Jordash  
27 said with respect to those two documents yesterday was accurate  
28 and correct in all respects.

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

1 217 was accurate?

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

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

09:54:08 5 MR HARRISON: I can certainly say that he has provided you  
6 with the copies that were given by the Prosecution, that's true.  
7 But just what I wanted to make sure the Court understood is that  
8 Mr Jordash was right when he said that with respect to Exhibit  
9 216, those are pages from what amount to, if the entire statement  
09:54:28 10 was brought in, probably I think he said four binders. I would  
11 have said maybe six or seven. It is a massive document. And the  
12 Prosecution sees no prejudice to it by simply having, for the  
13 purpose that Mr Jordash advanced yesterday, the document go in,  
14 in the abbreviated form that he described.

09:54:53 15 PRESIDING JUDGE: Yes, that was my understanding that, for  
16 the limited purpose for which Mr Jordash was arguing yesterday,  
17 that amount or portion of the document that he was tendering  
18 would suffice and I thought you concurred in that.

19 JUDGE ITOE: And he added by saying that well, if by today  
09:55:14 20 he feels that there would be a necessity for him to complete them  
21 he would.

22 PRESIDING JUDGE: Yes.

23 JUDGE ITOE: That is where the question had come from, from  
24 me. Yes.

09:55:23 25 MR HARRISON: And with respect to the second exhibit that  
26 you referred to, which I think has the number 217, all the  
27 Prosecution wanted to say with respect to that is that the pages  
28 that have been given a number, the number was put on by Defence  
29 counsel, and they certainly do reflect the Prosecution's

1 understanding of the page numbers. But they are from the second  
2 tape and so it's only slightly misleading. There is no intention  
3 to mislead here at all and it has not been suggested, but it is  
4 only slightly misleading. The page numbers are, I think, 5, 6,  
09:56:09 5 7, 8, 9, 10. In reality it's 5, 6, 7, 8, 9, 10 of the second  
6 tape. The first tape is about 100 pages where there is a long  
7 interview taking place. But, again, the Prosecution is taking  
8 the position here that we don't think it's helpful ultimately to  
9 the Court to go and bring in an exhibit, the entire statement,  
09:56:36 10 because we understand there is a somewhat limited purpose for  
11 which they're being relied upon.

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

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

14 MR HARRISON: There was a reference made yesterday to  
09:56:55 15 documents to do with the perfecting of the arrest, and the Court  
16 will remember that Mr Hardaway kindly went out and photocopied  
17 certain documents that had been filed with Court Management and  
18 they were distributed to everyone and they were never relied upon  
19 later on.

09:57:17 20 The Prosecution says that it may be helpful to review those  
21 documents now and, ultimately, the Prosecution says that although  
22 it is not necessary for them to be an exhibit, because they  
23 already are filed with Court Registry and Court Management and  
24 have document numbers, it may be something the Court would find  
09:57:37 25 helpful in its deliberation. So that document which was  
26 circulated yesterday is Court Management document 5, and it has  
27 the title: "Registrar's request to the authorities of Sierra  
28 Leone for the execution of arrest warrant pursuant to Rule  
29 55(C)."

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

3 The document has Court Management page numbers 40 to 62.

4 And at page 41 in the top right corner, it simply has the  
09:58:39 5 contents of all the documents contained therein of this matter  
6 which was filed by the Registrar. And I think at page 42, in  
7 part, the questions raised by, or matters raised by Mr Justice  
8 Itoe yesterday, are answered because that is a document from the  
9 Registrar addressed directly to the Attorney-General and the

09:59:08 10 Minister of Justice of Sierra Leone, whereby he transmits the  
11 warrant for arrest directly to the Attorney-General and also  
12 attaches the warrant of arrest, which is pages 42 to 45.

13 Page 46 is the decision approving the indictment. Page 48  
14 is an excerpted version of the relevant provisions of statute and  
09:59:42 15 Rules 42 and 43 of the Rules of Procedure. Pages 50 forward is  
16 the entirety of the Statute of the Special Court for Sierra Leone  
17 as it existed at that time.

18 Then at pages, or at page 59, there is a document which is  
19 an inventory which presumably would have be filled out by police  
10:00:14 20 on perfecting arrest. At page 60 you will find a document which  
21 Mr Jordash referred to briefly yesterday, and this is with the  
22 title: "Statement relating to the transfer of an accused to the  
23 custody of the Special Court for Sierra Leone pursuant to Rule  
24 47."

10:00:34 25 So the arrest was perfected by the Sierra Leone Police and  
26 then there is a subsequent transfer of custody from the Sierra  
27 Leone Police to the Special Court, and the final completion of  
28 that took place at Bonthe Island. There was always a CID officer  
29 with the accused until they actually arrive at Bonthe Island, and

1 the particular individual involved in this document is Mr Lethol  
2 Lamin, who at that time was the assistant superintendent of the  
3 Sierra Leone Police and he makes it clear that this document, or  
4 set of documents, are transferred at Bonthe Island. And he  
10:01:24 5 indicates that the documents transferred are the warrant of  
6 arrest, a copy of the rights of suspects, a copy of the statute  
7 establishing the Special Court and it's dated 10 March 2003.

8 The next page is from the then Inspector General, Mr Keith  
9 Biddle, indicating that he had received all these various  
10:01:49 10 documents from the Registrar, and presumably they would have come  
11 from the Attorney-General, through the -- beginning from the  
12 Registrar. And then the final page is an acknowledgement of  
13 receipt, that is page number 62. And it is a document signed by  
14 Mr Sesay and dated 10 March 2003. And that is an acknowledgement  
10:02:14 15 of receipt of, first of all, the warrant of arrest; secondly, a  
16 copy of the rights of the accused (Article 17 of the Statute and  
17 Rules 42 and 43). Three, is a copy of the statute of the Special  
18 Court. Four, is a copy of the approved indictment. Five, is an  
19 acknowledgment of receipt by an accused form.

10:02:43 20 The Prosecution says that's a document that need not  
21 necessarily be exhibited because it is already before Court  
22 Management but, ultimately, the Court may find it beneficial in  
23 assessing the evidence.

24 JUDGE BOUTET: On that last issue, pardon me, the fact that  
10:03:08 25 it is with Court Management does not necessarily mean it is in  
26 evidence. But I don't want to confuse the issue, I am not sure  
27 yesterday how we dealt with Mr Jordash when he referred to some  
28 of these documents and gave some of them, not this one, but  
29 similar or the same nature. Mr Jordash, you didn't file them as

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

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

10:03:39 5 JUDGE BOUTET: I'm not trying to confuse issues. I just  
6 want to make sure there is no confusion as to what is and what is  
7 not because the mere fact that documents may be with the Court  
8 Management doesn't mean that they are in evidence, so that's why  
9 we raised that issue with you yesterday.

10:03:56 10 MR JORDASH: Certainly. Perhaps I can propose reviewing  
11 our documents and then making a request for consistency purposes  
12 for those documents to be exhibited. And maybe it would be  
13 easier for all concerned if any documents we are seeking to rely  
14 upon is exhibited.

10:04:13 15 JUDGE BOUTET: That's my view. But I haven't had the  
16 occasion to discuss that with the Presiding Judge, so I don't  
17 want to take this initiative or decision away from you.

18 PRESIDING JUDGE: Well, we've always acted on the  
19 presumption that it is procedurally tidy to do that, regardless  
10:04:30 20 of the particular issues being addressed. That if documents are  
21 referred to in respect of certain particular issues, that the  
22 Court is to be fully apprised of the issues and also the  
23 submissions. If these documents are of relevance, whether  
24 directly or obliquely, the better approach is to exhibit them and  
10:04:55 25 that would be our judicial preference.

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

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

1 MR HARRISON: Yes, I've got the message. The Prosecution  
2 is applying for this document which has the title: "Registrar's  
3 request to the authorities of Sierra Leone for the execution of  
4 arrest warrant pursuant to Rule 55(C)" to be the next exhibit in  
10:05:26 5 these proceedings.

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

8 MR JORDASH: No objection.

9 PRESIDING JUDGE: The document is received in evidence and  
10:05:33 10 marked exhibit?

11 MR GEORGE: 219, Your Honour.

12 PRESIDING JUDGE: Thank you.

13 [Exhibit No. 219 was admitted]

14 JUDGE ITOE: What about item 5 on page 62? I'm coming back  
10:05:49 15 to that because an acknowledgement of receipt by an accused in a  
16 form appears to be, from the comments which have been made by  
17 your colleagues, I think they appear to be relevant to  
18 proceedings and if we could have the form exhibited as well,  
19 perhaps that would be -- to enable us to assess the compliance  
10:06:24 20 with the procedures which are in section 55(C) which has been  
21 referred to.

22 MR HARRISON: Yes, I guess I was unclear. What I meant to  
23 say, and obviously didn't do it adequately, was that it was the  
24 Prosecution's hope that pages 40 to 62 would all be part of that  
10:06:46 25 same exhibit.

26 JUDGE ITOE: Pages 40 to.

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

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

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

4           PRESIDING JUDGE: Very well. So it is this entire document  
10:07:21 5 that we have designated Exhibit 219, comprising pages 40 to 62.  
6 You may proceed with your arguments.

7           MR HARRISON: And there's one final document which is in  
8 the Court Management records, and that's an affidavit of the  
9 Deputy Registrar at that time, Robert Kirkwood. This is Court  
10:08:11 10 Management document 006 and it's dated the 9th day of March 2003.  
11 I gave copies to the Chamber's legal officer this morning and  
12 also to each Defence counsel. I left copies on their table.

13           Again, this is just simply trying to respond to what the  
14 Prosecution understood to be a concern to the Court, and this  
10:08:46 15 brief affidavit simply says:

16           "I, Robert Kirkwood, Deputy Registrar, Special Court for  
17 Sierra Leone, have today spoken with the Registrar, Robin  
18 Vincent, at 2100 with regard to written material to be  
19 served inter alia on the inspector-general of police and  
10:09:07 20 the Honourable Attorney-General.

21           I have, during the course of this conversation been  
22 informed by the Registrar that the intention in relation to  
23 the service of these documents was always to be primary  
24 service upon the inspector-general of police, who would be  
10:09:25 25 the national authority for the purpose of effecting arrest  
26 of those indicted and, of course, in order that the  
27 Attorney-General be fully informed as to the above matters  
28 that he should receive a copy of all materials served upon  
29 the inspector-general of police."

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

10:10:06 5 PRESIDING JUDGE: Hence?

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

9 PRESIDING JUDGE: Mr Jordash, your response?

10:10:20 10 MR JORDASH: No objection.

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

13 MR GEORGE: 210.

14 PRESIDING JUDGE: 210.

10:10:33 15 MR GEORGE: 220. Your Honour.

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

17 MR GEORGE: Yes, Your Honour. 220.

18 [Exhibit No. 220 was admitted]

19 MR HARRISON: I'm not sure if I've given a copy to the  
10:10:44 20 Chamber's officer, but I have one here.

21 PRESIDING JUDGE: Yes.

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

10:11:33 25 The first of the smaller issues has to do with some  
26 representations made involving Mr John Berry signing or, I should  
27 say, witnessing a document and the document is attached in the  
28 bundle or first book of documents prepared by Mr Sesay, and the  
29 page number that has been given to it by Court Management is

1 29649.

2 Firstly, the date is of some significance; it's 24 March.  
3 It's entered with the Court records of the Special Court on the  
4 same day by virtue of that stamp that has been impressed upon the  
10:13:02 5 document. What the Prosecution wants to convey to the Court,  
6 though, are some of the facts involved.

7 This is an instance where -- there is a transcript for the  
8 interview taking place on the 24th -- somewhere around the lunch  
9 hour, a member of the Principal Defender's Office attends at the  
10:13:35 10 interview site. That member of the Principal Defender's Office  
11 is given freedom and confidentiality to meet with --

12 MR JORDASH: Sorry. Objection.

13 PRESIDING JUDGE: What is the objection?

14 MR JORDASH: The objection is that Mr Harrison is giving  
10:13:56 15 evidence, which has obviously been obtained from members of the  
16 investigation team who were present during this incident. The  
17 whole point of this application, from our point of view, is to  
18 exclude the statement or to have the Prosecution call the  
19 evidence, not convey the evidence through Mr Harrison, where it  
10:14:18 20 can only be dealt with by submissions. It can only be dealt with  
21 by a proper testing of the evidence, not hearsay of the evidence.  
22 I mean that with no disrespect to Mr Harrison, but an explanation  
23 for Mr Berry conveyed to Mr Harrison only supports our submission  
24 that evidence is required.

10:14:38 25 PRESIDING JUDGE: Mr Harrison, your reply to that?

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

1 full range of topics and issues, including representations about  
2 what took place. And the Prosecution sees it as being  
3 appropriate to respond to the factual matters that were raised  
4 yesterday. And, in fact, the Prosecution can -- it's not trying  
10:15:23 5 to be coy here. The lawyer involved is sitting here in the  
6 courtroom; Ms Jallow was the lawyer involved. If there is a need  
7 for her to respond, the Prosecution would not object. As an  
8 officer of the Court, she can make representations, should any  
9 party deem it to be appropriate, or the Court wish to call upon  
10:15:48 10 her to do so.

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

12 MR JORDASH: What I did yesterday --

13 PRESIDING JUDGE: -- counsel is then saying what's the  
14 difference, between what you did yesterday and what he's trying  
10:16:01 15 to do now.

16 MR JORDASH: Well, there is a big difference in that there  
17 is evidence before this Court on paper. What I did was to make  
18 comments about that evidence. If Your Honours will have observed  
19 in relation to this particular incident, whereby Mr Berry signed  
10:16:19 20 this document, I did not give any comment about what  
21 Ms Kah-Jallow may or may not remember about that incident. I  
22 intentionally didn't, because it's a matter for evidence. It's  
23 not a matter for Defence to give that evidence while the witness  
24 sits either in the Prosecution camp or on the Defence row.

10:16:45 25 Secondly, in response to Mr Harrison's suggestion that  
26 Ms Kah-Jallow is here and she can give evidence, the burden is on  
27 the Prosecution. Mr Berry is not so far away either, and he can  
28 give and discharge the burden.

29 It is wholly unsatisfactory for the Prosecution, and this

1 is what it amounts to, a movement to put these facts into the  
2 Ntahoboli situation so that they can, at the end of it, say,  
3 "Well, they've had their voir dire," this is what effectively the  
4 Prosecution are seeking to do. What we did yesterday was make  
10:17:21 5 comments on the evidence which is here, not bring in new evidence  
6 which has been obtained overnight from witnesses who are  
7 pertinent to these issues.

8 PRESIDING JUDGE: Well, would he be acting improperly if he  
9 were to cite some of these factual scenarios in support of the  
10:17:43 10 legal submissions that he's making?

11 MR JORDASH: He would be acting in a way which is not fair  
12 if he introduces evidence obtained from Mr Berry last night,  
13 which cannot be contested by the Defence in an effective way. We  
14 have a right under Article 17 to confront the witnesses and not  
10:18:10 15 simply have that evidence adduced in a form which enables the  
16 Prosecution to benefit from it but doesn't enable the Defence to  
17 challenge it.

18 PRESIDING JUDGE: But he would not be -- would he be out of  
19 the borderline if he were to just use some factual scenarios in  
10:18:27 20 respect of which he is in possession to buttress or reinforce  
21 some legal submissions that he -- as long as they're not  
22 evidence.

23 MR JORDASH: The submission we made yesterday was something  
24 went wrong. There was obviously some interference with  
10:18:44 25 privileged conversations. We didn't seek to say what had  
26 happened.

27 PRESIDING JUDGE: Yes.

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

1 clearly went wrong. That's why, at the very least, there should  
2 be a calling of evidence. The Prosecution clearly agree, but  
3 want to do it through the back door, which is by doing it through  
4 counsel rather than through a means by which Defence can properly  
10:19:12 5 confront that evidence.

6 JUDGE BOUTET: May I ask you: I just would like to have  
7 clarification from both of you, but from you first, as you're  
8 standing up now, Mr Jordash. In your presentation yesterday, you  
9 referred to what you have described as evidence that are in the  
10:19:32 10 transcripts of these interviews. And you've used some of these  
11 transcripts to say, well, on this particular occasion at this  
12 particular time, you're going to see there's a break, there's no  
13 break, and at that break, we don't know what happened. These  
14 kind of -- that's the kind of evidence that you've used.

10:19:49 15 You have relied on the face of the transcript to make your  
16 argument to say, "We have no information as to what may have  
17 transpired." And you used that argument, on the face of the  
18 transcript, to say, "We don't know." All we know is there  
19 appears to be a breach privilege because Berry did this or didn't  
10:20:08 20 do that.

21 I don't know what the transcript is saying or not saying.  
22 I thought, and I'll get to Mr Harrison on that last part -- his  
23 argument was -- that he was presenting today was based on the  
24 transcript as well and not from external information or evidence  
10:20:22 25 to those transcripts. So that's my understanding. But I may be  
26 wrong in my understanding of what Mr Harrison is attempting to  
27 do.

28 MR JORDASH: If Mr Harrison is a simply going to offer an  
29 alternative scenario by which Mr Berry could have signed this

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

10:20:58 5 JUDGE BOUTET: I'll ask him the question, but he suggested  
6 to the Court that you can see from the transcript that Ms Jallow  
7 was there at this particular time, and so-and-so. That's what I  
8 mean by this. As I say, I haven't looked at the transcript. If  
9 the transcript shows that, at least there's some evidence to show  
10:21:18 10 that at the time and place and date, as such, she may have been  
11 there or not. I'm not going beyond that. I'm just talking of  
12 what I heard and perceived the position of the Prosecution to be.  
13 If that is the case, you have no objection, I take it? If it  
14 goes beyond that, you do have objection.

10:21:35 15 In other words, if that position is based on their own  
16 interpretation of what the transcript is showing, you have no  
17 objection. If they go beyond that that's where you have  
18 objection; am I --

19 MR JORDASH: That's -- absolutely. If what is introduced  
10:21:49 20 when that line is crossed is something that was said by Mr Berry,  
21 an explanation last --

22 JUDGE BOUTET: Which is not in the transcript.

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

10:22:03 25 JUDGE BOUTET: Thank you. Mr Harrison.

26 MR HARRISON: Yes, I should make clear, there's no  
27 reference in the transcript. If I left that impression with the  
28 Court, I apologise; I had no intention to do so. From the  
29 transcript, you would not divine that Mr Berry met with

1 Ms Kah-Jallow or that there was a meeting with Ms Kah-Jallow and  
2 Mr Sesay on the 24th. You would learn that from the document  
3 that has been referred to frequently, which is the memorandum of  
4 John Berry, which was filed as an attachment to the response back  
10:22:44 5 in 2003, which is before the Court, I think at tab 6.

6 JUDGE BOUTET: So in answer to my question to Mr Jordash,  
7 you're saying you're not making your argument on the transcript  
8 but on the other evidence. The objection is, essentially, if you  
9 are to use and you're attempting to use evidence which was not  
10:23:08 10 there, either in transcript or other the documents that have been  
11 filed with the Court, and it's external to that, that's the  
12 objection.

13 MR HARRISON: Yes.

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

10:23:19 15 MR HARRISON: And I'm not sure if you wish to hear me to  
16 fill out a response or if you wish to have Mr Jordash complete  
17 his comments.

18 PRESIDING JUDGE: Oh, I think he's stated his position. I  
19 think the burden is on you to seek to persuade the Court that  
10:23:33 20 what he's saying is meretricious.

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

10:23:51 25 The Prosecution also reminds the Court that numerous  
26 references were made to factual matters, such as talking about  
27 the brandishing of arms in Bonthe; the hooding, or so-called  
28 hooding of the accused people; the regime of torture that existed  
29 at Bonthe; the lack of various other types of proper conduct

1 which one might normally associate with detention facilities. So  
2 there was a whole range of factual assertions being made, none of  
3 which are part of any documentary material before the Court. But  
4 the Prosecution never objected and the Prosecution, frankly,  
10:24:46 5 doesn't see anything offensive about it.

6 We are not trying to limit either the Court's ability to  
7 understand the issues or circumscribe the Defence in what they  
8 see as being significant issues that ought to be advanced before  
9 the Court. The Prosecution wasn't trying to be facetious when  
10:25:12 10 saying that Ms Kah-Jallow is in court. If the Court does want to  
11 undertake an inquiry, the Prosecution sees her as an officer of  
12 the Court, and so be it. So the Prosecution is not at all  
13 sharing the view that this in any way offends any rule with  
14 respect to how this matter ought to proceed.

10:25:36 15 PRESIDING JUDGE: Yes, Mr Jordash.

16 MR JORDASH: There are two significant differences. We say  
17 Mr Sesay ought to give evidence about what happened. We're not  
18 seeking to put evidence into this courtroom through the back  
19 door. We're saying Mr Sesay, if given an opportunity, will give  
10:25:56 20 this evidence.

21 The second issue is the burden of proof. There is no point  
22 in the Prosecution encouraging the Court to have Ms Kah-Jallow  
23 give evidence. There is a willingness on this side for evidence  
24 to be called. There is a hope evidence will be called. The  
10:26:14 25 Prosecution want it both ways. Let's put in our evidence but not  
26 allow it to be tested and let's encourage the Court to have  
27 Defence representatives give evidence. That cannot be right. We  
28 are entitled, we submit, to put submissions about what happened  
29 before, during and after the interviews because we are willing to

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

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

3 [Break taken at 10.27 a.m.]

4 [Upon resuming at 10.50 a.m.]

10:52:59 5 PRESIDING JUDGE: This is the ruling of the Court. The --  
6 it is that no factual matters extrinsic of the records should be  
7 alluded to by the Prosecution in its reply. Counsel is, however,  
8 at liberty to put forward suggestions in the form of submissions  
9 to the Court, based on his appreciation and understanding of the  
10:53:42 10 records. Let's proceed.

11 MR HARRISON: The Prosecution -- if the Court still has the  
12 document available, the Prosecution wholly rejects any suggestion  
13 of any impropriety in any respect on the part of Mr Berry and the  
14 writing of this document which has court number 29649. The  
10:54:27 15 Prosecution wishes to be frank with the Court and not resile from  
16 anything. The Prosecution admits that the signature adjacent to  
17 the word "witness" is that of John Berry. But what is wholly  
18 denied is any attempt to interfere in any respect with  
19 solicitor/client privilege or any other type of privilege or  
10:55:03 20 confidentiality that may in any respect be relevant.

21 And if I can advise the Court, there are numerous instances  
22 where a detainee, taken into custody, might say to the police  
23 officer involved: "Do you have a list of lawyers that I could  
24 contact? Do you have any phone numbers I could contact?" And a  
10:55:42 25 police officer who responds in any way to that is not doing an  
26 illegal act or an improper act.

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

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

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

10:56:45 5 MR HARRISON: No. This would be a document that must have  
6 gone into Court Management by virtue of the seal on it.

7 JUDGE ITOE: With the original, one can be able to make  
8 some assessment. It could be possible. It mightn't be possible  
9 but looking at the original, it could be possible to make certain  
10:57:10 10 conclusions, you know, on that document.

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

10:57:28 15 PRESIDING JUDGE: Mr Jordash, do you want to throw some  
16 light on that?

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

18 PRESIDING JUDGE: Yes.

19 MR JORDASH: Where we got it from was Defence Office  
10:57:39 20 records. I can't remember as now whether it was an original or  
21 not but it was in Defence Office records. We can check over the  
22 break and if it's the original and Your Honours want to see it we  
23 can bring it to court.

24 PRESIDING JUDGE: Very well.

10:57:59 25 JUDGE ITOE: It can also be interesting if -- if that fact  
26 can provide to us as who the author of this document was. We now  
27 know from what Mr Harrison is saying that the signature is  
28 incontestably that of Mr John Berry, but who prepared it? Was it  
29 a third party? Was it a third party who prepared the document?

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

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

4 PRESIDING JUDGE: Mr Harrison, please continue.

10:58:51 5 MR HARRISON: I wanted to make a couple of comments about  
6 submissions to do with the arrest warrant that were advanced  
7 yesterday. And the Prosecution wants to tell the Court that it  
8 sees no merit whatsoever in the suggestion that there were  
9 breaches of the instructions or directives contained in the  
10:59:14 10 search warrant. Where the search warrant uses the term "a member  
11 of the Prosecution may be present" in no way is that a mandatory  
12 order that only one person could be present. It is simply a  
13 permissible order saying that member or members of the  
14 Prosecution could be present.

10:59:57 15 And what is of more import for the Court is that the arrest  
16 warrant has nothing to do with the voluntariness of the  
17 statement. There is another document that is before the Court  
18 that certain representations were made and that is a document of  
19 Beatrice Ureche and copies of that were included in the  
11:00:46 20 Prosecution binder, and it's at tab 5 you will find that  
21 document. The representation that was made was that the  
22 Prosecution prevented or obstructed communication between a  
23 member of the Principal Defender's Office and Mr Sesay. And from  
24 the document itself it's clear that that is not the case.

11:01:29 25 This is a document which, again, was filed with Court  
26 Management. It's document 009 in the Sesay file. And it's  
27 numbered 67 and then 68, 69 by Court Management, and it's titled  
28 as an interoffice memorandum. It's dated 12 March 2003, and it's  
29 from Beatrice Ureche. Subject is: Rights advisement. And the

1 paragraphs then provide the information that she is submitting it  
2 pursuant to a rule. The Court, she says at paragraph 2: "On 11  
3 March 2003 the accused Issa Sesay was brought for questioning to  
4 the office the Prosecutor." Paragraph 3: "The Registry was  
11:02:21 5 informed that Mr Sesay waived his right to counsel." Paragraph  
6 4: "The same day, at the request of Ms Mariana Goetz, legal  
7 adviser to the Registrar, I went to OTP in order to obtain the  
8 abovementioned waiver as well as a tape recording of the waiver."  
9 Paragraph 5: "Mr Luc Cote, chief of prosecutions, gave me a  
11:02:44 10 waiver initialised by Mr Sesay herein after attached." And it is  
11 attached to the document.

12 There is no suggestion whatsoever that at any point in time  
13 was there an attempt made to be obstruct, prevent or in any way  
14 impede an attempt by Ms Rekky to see the accused.

11:03:04 15 As a result --

16 MR CAMMEGH: I am so sorry to interrupt.

17 PRESIDING JUDGE: Yes.

18 MR CAMMEGH: Would Your Honour please give me leave to  
19 leave the room for just five minutes?

11:03:15 20 PRESIDING JUDGE: Leave is granted.

21 MR CAMMEGH: Thank you very much.

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

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

11:03:33 25 MR JORDASH: No objections.

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

28 MR GEORGE: 221, Your Honour.

29 PRESIDING JUDGE: Thank you.

1 [Exhibit No. 221 was admitted]

2 MR HARRISON: Certain representations were made yesterday  
3 to do with the declaration of Mr Morissette and I wanted just  
4 to -- I think it was simply, perhaps, an error in reading the  
11:04:15 5 judgment or just an oversight, but a representation was made to  
6 you that one of the cases which Mr Morissette said that he was  
7 involved in, that being Kajelijeli, that in that case there was a  
8 finding of an illegal or unlawfully taken statement, but I think  
9 upon reading that decision that doesn't square.

11:04:55 10 The decisions -- it's the Appeals Chamber decision that was  
11 handed up to you. It was one of the loose documents handed up to  
12 you yesterday by Mr Jordash. But at any rate, there was a  
13 representation made. I'll just give you the transcript. That is  
14 the transcript of yesterday, at page 39, where it was pointed out  
11:05:23 15 that Kajelijeli, which we have here the interview, the arrest was  
16 ruled illegal because the tribunal Prosecution investigators or  
17 the Prosecution had failed to properly inform the accused of the  
18 reasons for his arrest and then a copy was given to the Court.

19 But at paragraph 236 of the decision, the Appeals Chamber,  
11:05:49 20 there had been a Trial Chamber decision saying that there was no  
21 difficulty. Appeals Chamber decision reads as follows, at 236:

22 "The Appeals Chamber finds that the Trial Chamber did not  
23 err in finding that there was no violation of the  
24 appellant's rights during the interrogation of 12 June  
11:06:14 25 1998. The Appeals Chamber notes that on appeal the  
26 appellant did not challenge the Trial Chamber's conclusion  
27 that there had been voluntary waiver or his concession of  
28 the same, and only summarily stated that his right to  
29 counsel had been violated under Rule 42. The Appeals

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

3 I think a fair reading of that was that there was a  
4 half-hearted attempt made by the appellant late in the day to  
11:07:00 5 make an allegation that his right to counsel had been violated  
6 but the Appeals Chamber saw no significant merit or no merit  
7 whatsoever.

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

11:07:13 10 MR HARRISON: That there was -- there is no violation.  
11 Now, the Prosecution wants to take you through three of the cases  
12 and, in doing so, show you how, on a closer reading of them, in  
13 applying the particular facts of this case, that the concerns of  
14 the Defence are simply not, in any way, significant.

11:07:46 15 The first case is that of Bagosora and the Prosecution sees  
16 that case as standing for quite a different proposition than what  
17 was advanced. The accused in that case was given a notice of the  
18 suspect's rights and he was asked if he has any questions, and  
19 this is at paragraph 15 of the decision. And this, again, is --  
11:08:20 20 I'm not sure if there is a particular binder that was prepared  
21 for you by Mr Jordash or one of his colleagues, but it ended up  
22 being given Court Management number 29787.

23 JUDGE BOUTET: Would you please repeat the number again,  
24 29?

11:08:42 25 MR HARRISON: Yes. The number is 29787.

26 JUDGE BOUTET: Thank you.

27 MR HARRISON: Perhaps I should just say, for the benefit of  
28 the Court Reporter, it is The Prosecutor v Bagosora. The name  
29 being spelled B-A-G-A-S-O-R-A [sic]. What you will see at

1 paragraph 9 is a statement by the Court that the accused had  
2 demonstrated that Kabiligi did not understand that he had had an  
3 immediate right to the assistance of counsel. And the Trial  
4 Chamber then went on to say in paragraph 20, that Kabiligi did in  
11:09:33 5 fact invoke the right to counsel at the beginning of the  
6 interview, and that's paragraph 20. So there is a positive  
7 finding of fact that Kabiligi actually makes clear or  
8 sufficiently clear that he was invoking his right to counsel,  
9 before the interview takes off.

11:09:51 10 And the Prosecution says that that's wholly different from  
11 the circumstances before you, because the transcripts and the  
12 audiotape and videotape, make amply clear that Sesay never had a  
13 misunderstanding and Sesay made clear that he was prepared to be  
14 interviewed. Now, Sesay -- sequence of events and you can follow  
11:10:21 15 it from the transcript, but I'll try to summarise it for you.

16 The sequence of events was that, once in the interview room,  
17 Sesay is shown the arrest warrant and it's read out to him and  
18 the material part of the arrest warrant was that it was ordering  
19 "your arrest and detention in regards to offences committed over  
11:10:45 20 the mandate of the Special Court", that's page 28333 of the  
21 transcript.

22 The second thing that's done is, he is told the rights that  
23 are to be afforded to him as an accused. That is at 28333 to  
24 28335. And then at three, the whole arrest warrant is read to  
11:11:19 25 him, and that's in the next pages, from 28336 to 28340.

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

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

1 "A. Yes, sir, I'm getting you."

2 That's page 28341.

3 Then Sesay is told of the right to be assisted by counsel  
4 or to have legal assistance assigned. It's read to him and then  
11:12:06 5 he's asked:

6 "Q. Do you understand?

7 "A. Yes."

8 Page 28342.

9 The seventh thing that happens is he is told of the right  
11:12:19 10 to remain silent. And he's asked:

11 "Q. Do you understand these rights?"

12 "A. Yes."

13 There is then a document used, which is a rights  
14 advisement, which is before the Court, and that's signed and  
11:12:32 15 initialed.

16 The ninth thing that happens is, he's asked:

17 "Q. So this is a right for assistance by counsel. You're  
18 saying you understand the right of free assistance,  
19 interpreter, and the right to remain silent?

11:12:50 20 "A. Yes.

21 "Q. Good. Now we continue, Hassan, are you willing to  
22 waive the right to counsel and proceed with the interview  
23 in preparation of a witness statement; yes or no? In other  
24 words, are you willing to discuss with us your involvement;  
11:13:08 25 are you willing to tell us what happened and what you know  
26 of these events?

27 "A. Yes, sir."

28 He is then told that the entry would be audio recorded and  
29 then he's asked:

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

4 "A. Yes, sir."

11:13:32 5 "Q. Is that what you want to do?

6 "A. Yes, sir."

7 Then at pages 28346 to 28347:

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

11:13:50 10 "A. Yes, sir.

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

13 "A. Yes, sir.

14 "Q. Then it will be passed on at the appropriate time to  
11:14:05 15 the judge to be taken into consideration with -- for the  
16 intention to use this collaboration or to take into  
17 consideration this collaboration, whenever, you know, if  
18 found guilty of any offence, whenever sentencing occurs, it  
19 will be the position of the Prosecutor to request the judge  
11:14:27 20 to take into consideration, you know, whatever the sentence  
21 could be. I want to make sure that it is quite clear that  
22 there is no promise made to you here in regards to a  
23 negotiation of sentencing, place of sentencing, or  
24 whatever. It will be up to the judge to take this into  
11:14:49 25 consideration."

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

27 MR HARRISON: 28346.

28 JUDGE ITOE: 47 -- 28346, 28347?

29 MR HARRISON: Yes.

1 JUDGE ITOE: This is where that dialogue --

2 MR HARRISON: Yes.

3 JUDGE ITOE: -- appears as to the eventuality of the judge  
4 intervening in terms of sentencing if he were found guilty?

11:15:13 5 MR HARRISON: Yes.

6 JUDGE ITOE: Thank you.

7 MR HARRISON: If I could just continue, I'll just redo the  
8 last sentence:

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

11:15:23

11 "A. Yes, sir.

12 "Q. Do you understand that?

13 "A. Yes, sir."

14 Then there is a long persuasive and compelling set of  
15 evidence which shows that there is absolutely no difficulty in  
16 Sesay understanding the content of subsequent questions,  
17 responding appropriately meaningfully or in any way having any  
18 lack of appreciation for linguistic issues, contextual issues or  
19 the significant matters of fact.

11:15:33

20 JUDGE ITOE: And what can you remind me of the dates of  
21 28346 to 28347?

22 MR HARRISON: Yes, that's the first interview, 10 March  
23 2003.

24 JUDGE ITOE: 10 March 2003.

11:16:28

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

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

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

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

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

4 MR HARRISON: Commences. And the passages that I have been  
11:17:22 5 reading from are from the first ten pages of the transcript of  
6 that date. So although, unlike the transcripts which we have  
7 here, there will be an indication of particular times when things  
8 are said. In the transcript, there is no such markings in the  
9 margins.

11:17:42 10 JUDGE ITOE: May I have the benefit of this fact: If it is  
11 indicated on the records, we note that he was arrested on the  
12 10th. At what time was he arrested? On this date, when the  
13 interviews started?

14 MR HARRISON: What I can tell you is that the memo of  
11:18:17 15 Mr Berry, which was referred to quite a bit yesterday by  
16 Mr Jordash, I think the time is indicated there. And, from this  
17 document, it says that he arrived at 12 noon at CID --

18 JUDGE ITOE: At CID headquarters.

19 MR HARRISON: At CID.

11:18:49 20 JUDGE ITOE: And that was where he was met by Mr Berry and  
21 Mr Morissette also?

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

23 JUDGE ITOE: Yes.

24 MR HARRISON: But if I -- I just want to make clear from  
11:19:00 25 what I was -- the purpose of the earlier exhibit was to show it  
26 was CID, the Sierra Leone Police, who carried out the arrest.  
27 And they would have --

28 JUDGE ITOE: At what time, please? I'm sorry. At what  
29 time was that again?

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

4 As far as timing goes, the only other information that I  
11:19:48 5 can give you at this present moment is that, in that same memo  
6 from Mr Berry, it says that the arrests had been made by the CID  
7 and the three suspects were transported to Jui Police Barracks,  
8 arriving at 1300. So, presumably, if they arrive at Jui at 1300  
9 and the arrest took place at CID. It must have been a  
11:20:19 10 significant number of minutes before 1.00 p.m. that the actual  
11 arrest took place.

12 JUDGE ITOE: From what you're saying, the arrest must have  
13 taken place some time before 1300?

14 MR HARRISON: Yes, precisely.

11:20:48 15 JUDGE ITOE: Thank you.

16 MR HARRISON: Having turned up this document, as I  
17 understand, the Court's guidance, perhaps it's appropriate that  
18 at this time I ask that this document become the next exhibit in  
19 the proceedings, and this document being one, again, with the  
11:21:03 20 title "Interoffice Memorandum." It's addressed to a Brenda  
21 Hollis and Gilbert Morissette from John Berry, dated 17 April  
22 2003, with the subject, "Contact with Issa Sesay." I should also  
23 indicate that this has Court Management numbers 309 to 312. And  
24 if I could just crave the indulgence of the Chamber's legal  
11:21:48 25 officer, I have a marked-up copy. I should get a clean copy, and  
26 if I could give it to them to be the exhibit.

27 PRESIDING JUDGE: Very well. Mr Jordash, do you have any  
28 objection?

29 MR JORDASH: I object to it being served as an exhibit for

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

4 JUDGE BOUTET: Berry to Morissette.

11:22:21 5 MR JORDASH: Sorry. Was it the Berry interoffice  
6 memorandum. I don't object to it being exhibited for that  
7 purpose, but it must be clear that we do not accept that it  
8 accurately depicts the events.

9 PRESIDING JUDGE: Very well. We'll receive the document in  
11:22:43 10 evidence and mark it exhibit?

11 MR GEORGE: 223, Your Honour.

12 PRESIDING JUDGE: 223. Thank you.

13 [Exhibit No. 223 was admitted]

14 PRESIDING JUDGE: You were about to --

11:22:54 15 JUDGE BOUTET: We did have a copy of that yesterday? I'm  
16 not sure whether we've got it.

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

18 PRESIDING JUDGE: Yes.

19 MR HARRISON: I can just give this to the Court Management  
11:23:05 20 officer, just for his convenience now. But you'll find it at  
21 tab 6 of the Prosecution book of authorities. And I should  
22 probably just explain that the reason why it's there is that,  
23 originally, that document was attached to the Prosecution  
24 response to the motion that was filed in 2003 by the Principal  
11:23:33 25 Defender. If you look at 309, in the top right corner, hopefully  
26 it will still be there.

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

28 MR HARRISON: Bagosora case.

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

1 which is authority for --

2 MR HARRISON: Yes. It's clear that it stands for the  
3 authority that if you invoke your right to counsel, questioning  
4 should stop. Because that's the finding in Bagosora. They make  
11:24:18 5 a finding that Bagosora invoked his right to counsel. And that  
6 is certainly consistent with national law jurisdictions and, I  
7 suppose, it must be consistent with all international  
8 jurisdictions.

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

11:24:35 10 MR HARRISON: And it's wholly inconsistent with the facts  
11 that I've read out to you from the transcript of what happened in  
12 the Sesay interview. There was never --

13 JUDGE ITOE: You're saying that Bagosora did what Sesay did  
14 not.

11:24:50 15 MR HARRISON: Precisely. Again, just for the Court's  
16 benefit, the finding of the statement of the Court is at  
17 paragraph 20, where it said that Kabaligi did invoke the right to  
18 counsel at the beginning of the interview.

19 PRESIDING JUDGE: So it was cited yesterday for what  
11:25:20 20 authority? What was the proposition?

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

23 PRESIDING JUDGE: Yes.

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

11:25:37 25 At any rate, it should be ruled involuntary.

26 PRESIDING JUDGE: Very well.

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

29 PRESIDING JUDGE: Thanks.

1 MR HARRISON: If I could just do one more housekeeping  
2 matter. Mr Justice Itoe was posing questions about the timing of  
3 the arrest, and I'll inform the Court that there is also a  
4 declaration from Gilbert Morissette, which is part of the same  
11:26:20 5 bundle that was given to the Court by the Prosecution. And what  
6 it says there, in the first paragraph, is that, "I first saw Issa  
7 Sesay on 10 March 2003 at approximately 1200 hours when I  
8 attended to CID HQ for his arrest."

9 And, again, the Prosecution applies to have this document  
11:27:06 10 become the next exhibit. This document is dated 22 April 2003.  
11 It has the heading "Declaration," and then it is signed by  
12 Gilbert Morissette. And, again, Court Management gave this  
13 document a number and the number is from pages 344 to 346.

14 PRESIDING JUDGE: Mr Jordash, do you have any objection to  
11:27:46 15 the document being exhibited for the same -- yeah, go ahead.

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

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

19 MR GEORGE: 223, Your Honour.

11:28:07 20 PRESIDING JUDGE: Yes.

21 [Exhibit No. 223 was admitted]

22 MR HARRISON: If the Chamber's legal officer requires a  
23 copy, I can provide him with one. The second decision upon which  
24 some reliance was made yesterday is that of Delalic, and the  
11:28:47 25 Prosecution wants to make some comments on that.

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

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

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

4 All I can say is that Rule 92 was not cited in the decision  
11:29:31 5 at all. Almost all of the other rules are cited and quoted in  
6 full in the decision, but Rule 92 was not. And I can only  
7 suggest to the Court that what happened was that this was a  
8 Defence motion for exclusion, so the Defence would not be  
9 interested in trying to invoke Rule 92. But, at any rate, the  
11:30:04 10 decision is wholly silent on the proper construction of Rule 92,  
11 as it exists in the ICTY.

12 This is a case where it's of crucial significance that the  
13 Court found two separate statements: One admissible; one not.  
14 And the reason for that, the accused in this case was called  
11:30:41 15 Mucic. And Mucic gave a statement to the Austrian police on 18  
16 March '96. That statement was found to be inadmissible, largely  
17 because under Austrian law there is no right to have your lawyer  
18 present for an interview, and the tribunal found that would be  
19 contrary to the rules of the ICTY, and it simply could not be  
11:31:15 20 upheld. But that statement is on the 18th. On the 19th, 20th  
21 and 21st of March, the three subsequent days, Mucic talked to the  
22 OTP and gave a statement. That statement was found admissible.  
23 And at paragraph 20, the Trial Chamber talks about the two  
24 different interviews.

11:31:37 25 And what was being alleged by the Defence about the Mucic  
26 statements was, firstly, that the accused had an imperfect  
27 understanding of the meaning and scope of his rights because of  
28 the difference in cultures and legal systems. The second thing  
29 that was alleged was, they challenged the waiver that Mucic had

1 made.

2 JUDGE ITOE: An imperfect understanding of?

3 MR HARRISON: The rights, legal rights, because of the  
4 difference in cultures and legal systems. Mucic being, as I  
11:32:26 5 think about it now, I'm not sure if he was Serbian or Croatian.  
6 At any rate, he's not Austrian. So there's Austrian rules and  
7 law and there's also the ICTY law and, presumably, the suggestion  
8 was that Mucic wasn't familiar with either. But the second  
9 challenge was that to the waiver of the right to counsel. And  
11:32:50 10 they did this by trying to point to a missing link in the  
11 evidence, a gap in time, a silence in the tape. The third  
12 challenge was to the oppressive nature of the questioning.

13 Now, you'll find the Court dismissing each of these in the  
14 decision. In the first one, the cultural argument was rejected  
11:33:14 15 at paragraph 59. And, frankly, I think that's a pretty easy one  
16 to dismiss and I won't say much about it.

17 The second one, there is an argument that there was a  
18 discussion when there was no recording going on. And that was  
19 the allegation. Now that was dismissed, that allegation, and it  
11:33:53 20 was found that the accused understood he had a right to counsel  
21 during the interview. He was aware of that right to waive his  
22 right to counsel. And that's at paragraph 62 and 63. And what  
23 the Court said there was that, reading from 62, the challenge by  
24 the Defence of the waiver of the right to counsel is based on  
11:34:23 25 speculation of what might have transpired between Mr Abribat and  
26 the accused in an unrecorded part of the interview. Defence  
27 counsel has not suggested exactly what was said, but infers that  
28 the exercise of the right to counsel must have been discussed at  
29 the meeting. This is inferred from the expression, "in

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

3 The Prosecution denies that they entered into any such  
4 discussion. Mr Abribat, who was alleged to have held the  
11:35:09 5 unrecorded discussion, has denied such discussion. His evidence  
6 was that he merely asked the suspect, through an interpreter,  
7 whether the accused would agree to the recording of the interview  
8 by both audio and video.

9 And the third argument that was advanced was that of  
11:35:36 10 oppressive conduct. Now, this is something which I understand to  
11 be significant in English law. I don't know that it's  
12 significant anywhere else. But the way I understand it is that  
13 it refers to oppressive conduct as the most recent addition to  
14 English law of evidence, of grounds enabling the exclusion of  
11:35:58 15 statements. And this discussion takes place at paragraph 66 to  
16 69 of the Delalic decision and, ultimately, the Trial Chamber  
17 said there was no evidence whatsoever of oppressive questioning.

18 And, again, the Prosecution here is telling the Court that  
19 there was no oppressive questioning, at any point in time.  
11:36:23 20 Breaks were taken, appropriately: Cigarette breaks were taken;  
21 lunch breaks were taken; washroom breaks were taken. By looking  
22 at the videotape, you can see that the interview took place in  
23 comfortable surroundings, comfortable chairs, tables in front  
24 there of all the people. There is nothing to suggest that there  
11:36:46 25 was even a hint of an attempt at oppressive questioning.

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

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

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

3           MR HARRISON: Yes. What is said in the statement or in the  
4 decision, rather, particular reference is made to a decision of  
11:37:15 5 the English Court of Appeal.

6           PRESIDING JUDGE: Yes.

7           MR HARRISON: Regina v Prager from 1972.

8           PRESIDING JUDGE: Prager. Yes.

9           MR HARRISON: And I think that's simply put in to give a  
11:37:28 10 definition of what the English courts treat as oppressive.

11           PRESIDING JUDGE: Oppressive questioning. But the English  
12 courts would never want to give an exhaustive definition of what  
13 an oppressive questioning would be. It's not consistent with the  
14 pragmatic approach of the judges.

11:37:42 15           MR HARRISON: What you do find at 69 is really a  
16 description of what the Prosecution did during the questioning,  
17 such as, there is evidence that, notwithstanding the inordinate  
18 duration of the interview, there was nothing oppressive. The  
19 accused was given refreshments during the exercise, and he had  
11:38:07 20 opportunity to rest at intervals. There was no evidence that the  
21 duration of the interview excited in him hopes of release or any  
22 fears which made his will crumble, thereby prompting statements  
23 he otherwise would not have made.

24           PRESIDING JUDGE: Perhaps we should take a break at this  
11:38:28 25 point and come back and hear you further.

26                                   [Break taken at 11.35 a.m.]

27                                   [RUF07JUN07B - MD]

28                                   [Upon resuming at 12.15 p.m.]

29           PRESIDING JUDGE: Mr Harrison, please, continue.

1 MR HARRISON: I believe there was a resubmission yesterday  
2 with respect to instances in the transcript where what may have  
3 been recorded would be something like "mmm-hmm" as opposed to a  
4 clear affirmative "yes" or "no."

12:17:10 5 JUDGE ITOE: Mr Harrison, before you get there, you were  
6 treating us to three cases. You had done Bagosora, you've done  
7 Delalic. Was there a third one?

8 MR HARRISON: Indeed there is. I'm intending to keep you  
9 in suspense for one more minute.

12:17:31 10 JUDGE ITOE: All right. Okay.

11 MR HARRISON: What the Prosecution wanted to make clear is  
12 that instances where that may exist in the transcript, there is  
13 always recourse to the videotape to observe the full and complete  
14 context where the information being conveyed becomes absolutely  
15 clear.

12:17:56

16 And the Prosecution says that, by looking at the video,  
17 there can be absolutely no ambiguity whatsoever as to the  
18 understanding of Sesay and the content of his communication.

19 And the third decision is Halilovic, which was referred to  
12:18:42 20 yesterday and, again, I believe that was contained in the first  
21 bundle of authorities prepared by Mr Jordash and Ms Ashraph. For  
22 the benefit of the reporter, Halilovic is H-A-L-I-L-O-V-I-C.  
23 Although there is a Trial Chamber decision contained in the  
24 bundle, I'm only going to refer to the Appeals Chamber decision,  
12:19:16 25 which you will find at 29824.

26 The Prosecution certainly agrees that this is a significant  
27 case and it's one of the only other Appeals Chamber decisions  
28 that's being put before you. And we also say that, on a close  
29 reading of the case, it entirely supports the submissions that

1 we're making.

2 The first issue and, in fact, ultimately for the  
3 development of law in this area, perhaps the most important issue  
4 the Trial Chamber dealt with was a procedural one because what  
12:20:09 5 happened in the Trial Chamber is that the Prosecution simply  
6 stood up at the Bar table, holding the accused's statement in its  
7 hand. There's no witness in the courtroom, and the Prosecution  
8 simply tendered the entire statement of the accused. And the  
9 Trial Chamber allowed that process and, ultimately, the Trial  
12:20:45 10 Chamber said that the statement was admissible. Now, things  
11 change at the Appeals Chamber. But what stays the same is that  
12 the Appeals Chamber made clear that the procedure for admitting  
13 the statement was lawful.

14 For the benefit of the Court, I'll just tell you that this  
12:21:19 15 first issue about the procedural matter is stated at paragraph 7,  
16 and then the answer given by the Appeals Chamber, which I'll take  
17 you to, is at paragraphs 14, 16 and 19.

18 What the Appeals Chamber said, at paragraph 14, is that  
19 with respect to the appellant's first argument, that the Rules do  
12:21:55 20 not permit a record of an interview with the accused to be  
21 tendered into evidence unless the accused has chosen to testify,  
22 or has consented to the tender. The Appeals Chamber does not  
23 agree that the Rules impose such a categorical restriction.

24 It then goes on in 15, 16, 17 and 18 with some further  
12:22:28 25 discussion but, at paragraph 19, the Appeals Chamber says this:

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

1 the Trial Chamber has to determine under the Rule whether  
2 or not it is necessary in the particular circumstances of a  
3 case to call witnesses to establish the authenticity of a  
4 document as the best evidence. Where that document is a  
12:23:12 5 record of interview with an accused and the Trial Chamber  
6 is satisfied that the interview has been conducted in  
7 compliance with Rule 63, which includes application of the  
8 recording procedure of Rule 43 and adherence to the caution  
9 requirements of Rule 42A(iii), it is well within the  
12:23:41 10 discretion of the Trial Chamber not to require further  
11 evidence of the circumstances of that interview to  
12 establish its authenticity."

13 So we say -- and the timing of this case is that this  
14 precedes Ntahobali by one year. This decision is 19 August 2005.  
12:24:16 15 The Appeals Chamber decision in Ntahobali is October 2006. So  
16 we --

17 JUDGE BOUTET: Mr Harrison, if I may, I'm not familiar with  
18 all the procedure they follow at ICTY, but it would appear, from  
19 the reading of these paragraphs you've just referred to, that  
12:24:40 20 they have, as part of their procedure, what they call guidelines  
21 about rules of evidence, as such. It would appear, from my  
22 reading of this, that in dealing with whether it's admissibility  
23 of evidence or any other matter of an evidentiary matter, that  
24 they have guidelines that they do follow.

12:25:10 25 Now, whether or not it's they must follow or not, and it  
26 may be what they are discussing, so I'm just trying to seek some  
27 clarification on that because they appeared, the Appeals Chamber,  
28 seemed to be discussing the compliance or non-compliance of these  
29 guidelines and if -- in light of the discretion that a court may

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

12:25:56 3 MR HARRISON: I think that is accurate. I'll forward to  
4 the Chamber's legal officer a case which is called Prosecution v  
5 Martić, M-A-R-T-I-C, and the date of the decision is 19 January  
6 2006. You will see attached to it a document called "Annex A -  
7 Guidelines on the Standards Governing the Admission of Evidence."  
8 And I understand it's a common practice at the beginning of a  
9 case for the Trial Chamber to ask the parties to make submissions  
12:26:36 10 on what they think should be the appropriate standards or  
11 practices for the admission of evidence. And then a Trial  
12 Chamber can draft those guidelines as it deems appropriate for  
13 the case. And this would be -- I can tell you that this one is a  
14 statement of 12 guidelines.

12:27:09 15 PRESIDING JUDGE: For my benefit, could you give me the  
16 precise ground of appeal in the Halilović case to which the  
17 Appeals Chamber provided a precise answer?

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

19 PRESIDING JUDGE: Yes [overlapping speakers].

12:27:26 20 MR HARRISON: The first one was that the accused said it  
21 was impermissible for the Prosecution to tender the accused's  
22 statement from the Bar table without admitting it through a  
23 witness.

24 The second issue was the voluntariness of the interview.

12:28:01 25 PRESIDING JUDGE: Thank you, very much. Did they answer  
26 the second question?

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

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

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

4 And, secondly, there were alleged agreements with the  
12:29:04 5 Prosecution that were referred to in an interview on the  
6 transcript, and the Prosecution did not respond to these  
7 allegations as they came up in the interview. So, there is a  
8 statement made about an agreement and silence from the  
9 Prosecution as to: Do you agree, don't agree, whatever.

12:29:30 10 Now, this second issue was compounded for the Prosecution  
11 because it was again raised at a status conference, in court,  
12 where the Defence counsel said that the indictment would be  
13 withdrawn and, again, the Prosecution does not respond to that in  
14 a way satisfactory to limit or persuade the Appeals Chamber that  
12:30:17 15 it had acted appropriately.

16 Now, what's different about Halilovic is that there is no  
17 suggestion here, on the evidence before you in Sesay, that any  
18 inducement has been made to Sesay, at any point in time. And  
19 there is important reasoning in Halilovic which, even though,  
12:30:47 20 ultimately, the trial -- the Appeals Chamber excluded Halilovic's  
21 statement, there is important reasoning which also should be used  
22 in this case.

23 JUDGE ITOE: Let me get this very clearly: You are  
24 asserting affirmatively, and I would say relatively clearly, that  
12:31:10 25 in the submissions that have been made by Mr Jordash, including  
26 the records and the transcripts and all that we have before us in  
27 the exhibits, no inducement has been made to Mr Sesay; is that  
28 what you are affirming?

29 MR HARRISON: Yes, that's the Prosecution's position.

1 JUDGE ITOE: Thank you.

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

12:31:52 5 JUDGE ITOE: If I may come in. I don't know, we'll go  
6 through the Halilovic case later. What would you say about a  
7 letter, the letter, or what did the Appeals Chamber say about the  
8 letter that was written by the Prosecution to Mr Halilovic,  
9 giving him the impression that cooperation might facilitate his  
10 application for a provisional release?

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

13 JUDGE ITOE: Yes.

14 MR HARRISON: And they said:

12:32:37 15 "While the statement may have provided an incentive to the  
16 appellant to cooperate, it is not unreasonable to conclude  
17 that it did not have the effect of rendering that  
18 participation involuntary."

19 So there is a distinction between an incentive and  
12:33:03 20 something which is an inducement which does render participation  
21 involuntary.

22 And the Appeals Chamber goes on a bit more to say the  
23 following -- it goes on to say and, again, this is -- I am now at  
24 the bottom of paragraph 38, and it's the last full sentence. It  
12:33:33 25 says:

26 "In other cases, however, the inducement is simply an  
27 incentive. The fact that the accused may have taken this  
28 incentive into account when deciding whether to cooperate  
29 does not mean that the defendant was not acting

1 voluntarily. Under the circumstances of this case, the  
2 Appeals Chamber is not satisfied that the Trial Chamber  
3 erred in finding that the statement of the Prosecution,  
4 that the appellant's cooperation could have a positive  
12:34:09 5 influence on the Prosecution's position in respect of an  
6 application for provisional release, did not have the  
7 effect of rendering the appellant's participation in the  
8 interview involuntary. While that statement may have  
9 provided an incentive to the appellant to cooperate, it is  
12:34:31 10 not unreasonable to conclude that it did not have the  
11 effect of rendering that participation involuntary."  
12 Then at paragraph 39:  
13 "However, although the Prosecution's statement may not have  
14 been of such a nature as to coerce the appellant into  
12:34:53 15 cooperating with the Prosecution, it does not undermine its  
16 nature as an inducement understood as an incentive to  
17 cooperate. This was a relevant factor to be considered by  
18 the Trial Chamber in considering whether to permit the  
19 tender of the record of interview from the Bar table and  
12:35:17 20 the Trial Chamber erred in failing to take into  
21 consideration when exercising its discretion to admit the  
22 record of interview."  
23 That's the error made by the Trial Chamber. It didn't  
24 consider it. It threw it out. The baby went with the bath water  
12:35:37 25 and the Trial Chamber said: No problem. The Trial Chamber ought  
26 to have at least considered it as a factor in its ultimate  
27 decision.  
28 JUDGE ITOE: And the Appeals Chamber did not think that it  
29 could, of its own motion, visit that particular aspect that was

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

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

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

12:36:10 5 MR HARRISON: No, no, the Appeals Chamber -- that's the  
6 reason, or one of the factors why they overturned the Trial  
7 Chamber decision. That was the error made by the Trial Chamber,  
8 that it did not consider the incentive as a factor.

9 PRESIDING JUDGE: I'm also interested in [indiscernible]  
12:36:35 10 quite frankly, when you -- those passages that you've cited did  
11 not leave me convinced that the Appeals Chamber did articulate,  
12 in a very convincing and persuasive way, one, the distinction  
13 between an incentive in such circumstances, and an inducement.  
14 And then, secondly, the legal effects of, one, an incentive as  
12:37:03 15 distinct from the legal effects of an inducement. It was really  
16 a little of more there is a distinction, one is an incentive and  
17 one is inducement. So here we have a recipe for clear debate as  
18 to what really -- and particularly when they got to the point of  
19 even suggesting that an incentive may not even have amounted to  
12:37:29 20 an inducement. Virtually they are saying this is a very delicate  
21 borderline, ill-defined and perhaps some guidance could have come  
22 from them as to exactly where an incentive ends and where an  
23 inducement begins.

24 MR HARRISON: Fortunately for all of us, I don't write  
12:37:50 25 them, I just try to read them.

26 PRESIDING JUDGE: We're all learning, Mr Harrison, that's  
27 all.

28 MR HARRISON: I understood your comment but I think I can  
29 give you a little bit more assistance.

1 PRESIDING JUDGE: Yes.

2 MR HARRISON: By continuing on with the decision because,  
3 as I indicated earlier, there were two arguments or two  
4 complaints being made. One has to do with this assertion that,  
12:38:12 5 if you cooperate, we'll consider provisional release, we'll  
6 consider bail.

7 The second one had to do with this alleged agreement where  
8 the indictment would actually be withdrawn, if you cooperated,  
9 and this comes up out of the interview and the Trial Chamber  
12:38:39 10 deals with it in the very next paragraph, 40. And what had  
11 happened was, the interview was taking place. There's a break in  
12 the interview and, after the break in the interview, without any  
13 clarification on the record of what these agreements supposedly  
14 were. There is simply no reference to it. And at paragraph 40,  
12:39:11 15 this is what the Trial Chamber says. It says:

16 "This break in the record and the statements made by the  
17 appellant and his counsel prior to that break provides some  
18 support to the appellant's argument that he would not have  
19 cooperated absent those agreements. The Appeals Chamber is  
12:39:35 20 satisfied that the Trial Chamber erred in failing to take  
21 this factor into account in its assessment of the  
22 voluntariness of the interview."

23 So again, we have got a first factor. We have now got the  
24 second factor. I will take you to the third factor in a minute  
12:39:57 25 but, this alone, does not lead the Appeals Chamber to rule that  
26 the statement's involuntary. It's another factor to be  
27 considered.

28 And again, the Prosecution wishes to make clear that in its  
29 view there is nothing similar in the Sesay tapes to what took

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

4 "In dealing with this allegation the Trial Chamber noted  
12:40:35 5 that at one point in the interview the appellant and his  
6 Defence counsel raised the issue of certain agreements  
7 reached with the Prosecutor and asked for a break in the  
8 interview in order to clarify whether those agreements  
9 reached with the Prosecution were to be respected. After  
12:41:03 10 the break the interview continued without any clarification  
11 on the record of what those alleged agreements were. The  
12 Trial Chamber placed no emphasis upon this break in the  
13 interview and the Appeals Chamber finds that it erred in  
14 failing to do so."

12:41:20 15 We say that there is nothing akin to that in the Sesay  
16 transcripts.

17 And the third factor, which is a very significant one in  
18 the Appeals Chamber's reasoning, is that they found that the  
19 Trial Chamber failed to take into account the inadequate  
12:41:51 20 representation of the appellant by Defence counsel. That is  
21 discussed at quite some length from paragraphs 55 to 62. But the  
22 conclusion can only be that counsel was incompetent.

23 It's on the basis of these three separate factors all  
24 existing in Halilovic that the Appeals Chamber overturned the  
12:42:44 25 Trial Chamber's decision and ruled the statement to be  
26 inadmissible. The Appeals Chamber still agreed with the  
27 procedure adopted; it was only the admissibility of the statement  
28 that was overturned.

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

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

12:43:47 5 MR JORDASH: Objection.

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

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

12:44:04 10

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

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

12:44:17 15

17 PRESIDING JUDGE: But we have said you are at liberty to  
18 make suggestions and in the forms of submission provided you stay  
19 within the records, and our ban this morning was that you are not  
20 supposed to import any extrinsic material in support of your  
21 submissions, but that you are perfectly at liberty within the  
22 context of the records to make suggestions in the form of  
23 submissions, or vice versa to the Court. And of course the  
24 question really now is whether you are crossing the red line, and  
25 whether what you want to -- you are referring to now is  
26 extrinsic.

12:44:41 20

27 MR HARRISON: Yes.

28 PRESIDING JUDGE: It is extrinsic?

12:45:06 25

29 MR HARRISON: Yes.

1 PRESIDING JUDGE: Then it certainly infringes upon our  
2 ruling this morning, except you can persuade us that perhaps the  
3 particular point that you want to submit to the Court clearly is  
4 permissible within the confines or the limits of our ruling this  
12:45:55 5 morning. Let's hear what you --

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

9 PRESIDING JUDGE: In other words, you have an ethical  
12:46:12 10 obligation to say something?

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

14 PRESIDING JUDGE: Yes. Well, persuade us.

12:46:34 15 MR HARRISON: I understand the rule to be that if anything  
16 has been said to mislead or potentially cause a misleading  
17 understanding --

18 PRESIDING JUDGE: You have a duty --

19 MR HARRISON: -- that the Prosecution --

12:46:46 20 PRESIDING JUDGE: Has a duty to correct that.

21 MR HARRISON: That is my understanding.

22 PRESIDING JUDGE: Mr Jordash, would that be something  
23 outside his scope? If something has been said here, which may  
24 well amount to a misrepresentation, either inadvertent or not  
12:47:05 25 inadvertent, wouldn't there be an ethical duty to correct this,  
26 both sides?

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

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

12:47:43 5 PRESIDING JUDGE: But if there is, if he is convinced that  
6 something that had been said here ought to be corrected, or  
7 probably was said inadvertently or probably with intention to  
8 mislead, is he discharged from his ethical obligation to  
9 highlight that?

12:48:03 10 MR JORDASH: Well, it depends what it is.

11 PRESIDING JUDGE: Yes.

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

14 PRESIDING JUDGE: In other words, you need further and  
12:48:13 15 better particulars?

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

19 PRESIDING JUDGE: Yes.

12:48:27 20 MR JORDASH: So unless we have further and better  
21 particulars as to --

22 PRESIDING JUDGE: Because when the two come into collision  
23 we certainly expect to -- the Bench will have to reconcile --

24 MR JORDASH: Yes.

12:48:37 25 PRESIDING JUDGE: -- this difficulty.

26 MR JORDASH: It's unclear as to whether the statement which  
27 misled came from this side of the room or from that side of the  
28 room, and what the contents of that statement were.

29 PRESIDING JUDGE: Yes.

1 MR JORDASH: So whilst I trust Mr Harrison to judge his own  
2 ethical duties, what I would like to know is where are we going  
3 so that we don't end up adducing evidence which ought to be  
4 properly adduced through the mouths of Mr Berry and  
12:49:07 5 Mr Morissette.

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

9 MR HARRISON: Yes. Frankly, I would not be able to capture  
12:49:24 10 it on -- off the transcript.

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

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

14 PRESIDING JUDGE: Yes.

12:49:35 15 MR HARRISON: -- with the Court --

16 PRESIDING JUDGE: Yes.

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

12:49:56 20 PRESIDING JUDGE: And that is what you now seek to rectify?

21 MR HARRISON: I think I've uttered the words that there was  
22 a meeting during the lunch break.

23 PRESIDING JUDGE: Yes.

24 MR HARRISON: And I feel as if I've complied with my  
12:50:08 25 professional obligation.

26 PRESIDING JUDGE: Yes. Is that -- what is the difficulty  
27 about that Mr -- if there has been some kind of false impression  
28 created in the Court on an issue, these issues which are so  
29 important, and counsel now says he feels obliged to correct them

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

12:50:54 3 MR JORDASH: Well, perhaps it's me, but perhaps I'm not  
4 following, but if the Prosecution now are seeking to describe the  
5 contents of a conversation off tape, during lunch-time, then it  
6 breaches the Court's order. I cannot see how that relates to the  
7 statement just made, that the transcripts don't -- isn't  
8 completely verbatim. I don't follow the connection between the  
9 two. If a conversation was had at lunch-time off tape, and  
12:51:27 10 Mr Harrison wants to refer to it, by his own argument it's  
11 irrelevant because what's relevant is what's on the transcript.

12 If there are matters on the transcript, or there are  
13 matters which ought to have found their way onto the transcript  
14 but the transcribers didn't transcribe them, then that's a  
12:51:52 15 different matter. Then of course we -- if they are relevant we  
16 need to know what they are. So, there are two separate issues  
17 and I'm not sure how the two relate at this given moment, if at  
18 all.

19 JUDGE BOUTET: I think you are talking of different issue.  
12:52:12 20 My understanding is not to try to introduce the nature and/or  
21 content of whatever discussion may have taken place but simply to  
22 rectify the record that Mr Harrison -- where Mr Harrison would  
23 have stated that the transcript contains all of the conversations  
24 that may have taken place at any given time between the accused  
12:52:37 25 and the Prosecutors or the investigators. He is now saying that,  
26 well, if he said so, it's not accurate because there is at least  
27 one occasion where it was not the case without the reporting the  
28 words that were discussed or said at that time.

29 MR JORDASH: Well, if all that the Prosecution want to do

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

3 JUDGE BOUTET: No, it's not words, Mr Jordash, it's simply  
4 to rectify the record if he has -- in his recollection he thinks  
12:53:06 5 he has stated to this Court that all conversation with Sesay have  
6 been recorded and are in the transcripts. He has now discovered  
7 that at least one is not there. That is all he is saying. He is  
8 not reporting that conversation at all.

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

12:53:26 10 JUDGE BOUTET: Well, that's my understanding of what he is  
11 trying to do.

12 MR JORDASH: That is not where we were going at the time I  
13 objected.

14 JUDGE ITOE: That is true.

12:53:32 15 MR JORDASH: Thank you, Your Honour.

16 JUDGE BOUTET: Mr Harrison, have I described your position  
17 correctly?

18 MR HARRISON: Yes. That's, I feel as if I have conveyed  
19 the information, and that concludes it.

12:53:44 20 The Prosecution would like to finish before 1.00 and, in  
21 doing so, I would like to refer to what the Prosecution  
22 understood to be some of the specific references being made by  
23 Sesay.

24 JUDGE BOUTET: Without interrupting you, Mr Harrison, even  
12:54:08 25 at the risk of delaying you, I would like you to address on  
26 Halilovic at page 29835, the very last line of paragraph 46,  
27 where they discuss voir dire, because that was an issue related  
28 to the very first issue, as such. They concluded this does not  
29 necessarily require the holding of a voir dire, although there

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

2 MR HARRISON: Yes. And the Prosecution accepts that as  
3 being a reasonable and appropriate statement of law. We don't  
4 see that as being in any way different from the finding of the  
12:54:59 5 Appeals Chamber in Ntahobali, where the -- I think if there is a  
6 quibble between those two Appeal Chamber's decisions it may  
7 simply be that Ntahobali seemed to have a somewhat greater  
8 aversion to the notion of voir dire as a term but, as for the  
9 content, I don't think they were adverse to it either. What goes  
12:55:18 10 on in a voir dire.

11 There are four brief allegations that I can cover off  
12 quickly. The Prosecution understood that at page 29355 of the  
13 transcript there was some form of improper conduct. The  
14 Prosecution denies that entirely. There is absolutely nothing  
12:55:54 15 improper. There is no inducement suggested of any kind there.

16 The same comments would be made with respect to a  
17 suggestion made at page 29348, which refers to Sesay saying  
18 something during the break, but this is what makes it different  
19 from Halilovic. In Halilovic, something was said during a break  
12:56:28 20 but everyone forgot about it; no one discusses it. At 29348 you  
21 see the investigator doing the right thing. He says: "During  
22 the break I heard you say this. What is it you want to say?"  
23 And he is given the opportunity to do it. That is appropriate.

24 And, at page 29357 to 58, again, there is absolutely  
12:57:03 25 nothing inappropriate and, if I can just advise the Court, or  
26 turn the Court to a couple of lines there. It's at 29358, and at  
27 this juncture the interview is taking place, and there is a  
28 question at the top of 29358.

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

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

12:58:11 5 "A. Yeah.

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

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

12 "Q. Which ones?

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

14 "Q. Yes.

12:58:37 15 "A. From the Special Court.

16 "Q. Yes.

17 "A. That I'm responsible for what happened in Freetown. I  
18 was not in Freetown."

19 There is never a time when the accused was not aware that  
12:58:57 20 he was the indicted.

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

22 MR HARRISON: I was reading from 29358. It's the  
23 transcript from 31 March 2003. The Prosecution makes a similar  
24 representation to the earlier ones at page 29535 where we  
12:59:40 25 understood a complaint was made of improper conduct. That there  
26 is absolutely nothing improper in what took place. I wanted to  
27 take you to, very briefly, 29388.

28 JUDGE ITOE: 29?

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

1 appreciation for the dynamics and the environment that was  
2 existing. This is the beginning of the interview on 14 April  
3 2003. And the rights advisement was again read this day, as it  
4 was read every day, and as it's read out the transcript records  
13:00:33 5 the first accused responding to whether he understands these,  
6 saying "Of course. He says, he indicates stating "of course"  
7 when he's referring -- asked about the right to, or his choice of  
8 whether to waive counsel. And there is absolutely no ambiguity  
9 in any of these of the first accused's willingness to take part  
13:01:10 10 in the interview. Nor is there any evidence of any coercion of  
11 any kind.

12 And the context is also demonstrated on the following page.  
13 At 29389, where Mr Berry says, "I'll have you initial there for  
14 me, please", referring to the document, the rights advisement,  
13:01:43 15 and Mr Sesay says, "Yeah, but this, I'm not doing it without  
16 breakfast, you know. You can't start a job when you people have  
17 breakfast and I don't have breakfast, you know." Mr Berry, "No,  
18 breakfast is coming but we can go through the paperwork while we  
19 are waiting."

13:02:02 20 Then on the following page Mr Sesay again says, "It's very  
21 important to have breakfast in the morning before go to job, you  
22 know" and it's provided to him, as are all his other requests.

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

24 MR HARRISON: I am going to finish.

13:02:25 25 PRESIDING JUDGE: But if you want to finish then we will  
26 just let you have your way but I was thinking that you might, of  
27 course, be -- also the possibility exists that we may have some  
28 questions from the Bench, but if you want to finish now, it's all  
29 right.

1 MR HARRISON: Five minutes is all I need.

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

13:02:55

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

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

7 PRESIDING JUDGE: Yes.

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

13:03:08

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

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

13:03:35

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

14:35:18

20 [RUF07JUN07C - CR]

21 [Upon resuming at 2.56 p.m.]

22 PRESIDING JUDGE: The Prosecution will continue with their  
23 reply.

14:57:46

24 MR HARRISON: Yes, I will just continue on making a few  
25 brief points. One of the arguments that the Prosecution  
26 understood being advanced was that the accused's inexperience  
27 with the legal system should be a factor to be taken into  
28 consideration. That may well be part, in the Court's view, of  
29 the so-called cultural argument that was advanced in the Delalic

1 case that I referred to earlier, in one of the cases being relied  
2 upon by the Defence. That was dealt with in quite short shrift  
3 and dismissed as being without any strong basis, and we simply  
4 say the same thing: That the witness clearly understood all of  
14:58:13 5 the significant features and there is no linguistic difficulty  
6 whatsoever. There's also, I think --

7 JUDGE ITOE: What do you say to Mr Jordash's argument? I  
8 just want to bring it up at this stage, that this was a man who  
9 was in the bush for so many years, and he was arrested. Spent  
14:58:34 10 his time in the bush. He did not have a clear or proper  
11 understanding of the procedures that he was going through. How  
12 would you contextualise that with the decision in the Halilovic  
13 case?

14 MR HARRISON: Halilovic or Delalic?

14:58:58 15 JUDGE ITOE: Delalic, I'm sorry, Delalic.

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

14:59:14 20 JUDGE ITOE: In some he delegated people.

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

14:59:27 25 JUDGE ITOE: You're suggesting that he had the intellectual  
26 capacity to interact with those huge elephants?

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

28 JUDGE ITOE: In that context?

29 MR HARRISON: Yes.

1 JUDGE ITOE: All right. Okay.

2 MR HARRISON: In addition, there was some reference being  
3 made to signs of distress. I take it there's a reference to the  
4 first accused crying during -- I think it's the first interview.

14:59:54 5 The Court recalls witnesses here who came forward were crying in  
6 court, suffering great distress, and yet within moments were able  
7 to continue on in this environment and we suggest that's simply  
8 not a significant factor.

9 We'd suggest that on any reading of the transcripts that  
15:00:21 10 it's clear that the first accused knew exactly what was going on  
11 throughout the interviews, and there can be no suggestion that,  
12 in any respect, he was misled.

13 There are other allegations that we understood to have been  
14 put forward. The Prosecution would like to say globally that it  
15:00:49 15 rejects them and says they are not significant and ought not to  
16 be countenanced by the Court.

17 I'll conclude my remarks at that point. I've also been  
18 instructed, however, to advise the Court that if it's the Court's  
19 view to hear witnesses, I had previously asked Mr Morissette and  
15:01:19 20 Mr Berry not to go anywhere this week, and they did not. They  
21 have currently made arrangements to go to two separate locations  
22 next week out of the country. We all realise the pressures  
23 currently imposed upon the Court and what we're asking is if the  
24 Court could give an indication, as soon as it can, as to what its  
15:01:57 25 intentions might be, that would be of great assistance to the  
26 parties. Those are the only remarks I wish to make.

27 PRESIDING JUDGE: Thank you. Before you sit down, I'd like  
28 to pursue the metaphor of lifting the veil a stage further and to  
29 ask you to briefly address me, of course, having regard to the

1 reply that you've given this morning, whether there's any ground  
2 or objection in principle, given the nature of the allegations  
3 from the Defence, why the Tribunal should not, in the interests  
4 of justice, be able to look behind the veil, or lift the veil, if  
15:03:02 5 we're not satisfied that the Defence has raised an almost  
6 ir rebuttal presumption of involuntariness of the alleged  
7 statements. In other words, why should we not, in case we are so  
8 disposed, look behind the videos and the audios? Thank you.

9 MR HARRISON: Yes, I think the Court should, in short. The  
15:03:33 10 interests of justice would require that.

11 PRESIDING JUDGE: Thank you.

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

14 MR HARRISON: No. If that's the Court's view that it is in  
15:03:45 15 the interests of justice, then the Prosecution accepts --

16 PRESIDING JUDGE: I want it to be quite clear that this is  
17 the view that I hold. I said that if I'm not satisfied that the  
18 other side has raised an honest ir rebuttal presumption, that of  
19 involuntariness of the alleged statements, then why should not  
15:04:08 20 the Court, in the interests of justice, lift the veil and see  
21 what's behind the veil?

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

24 PRESIDING JUDGE: Thank you.

15:04:37 25 JUDGE ITOE: Yes, Mr Harrison. We raised issues this  
26 morning relating to oppressive questioning and issues of coercion  
27 were also raised by the Defence in making its submissions. I  
28 want to be very brief on this, and I would like you to look at  
29 Exhibit 216 page 4, where, I suppose, the answer "Yeah" is

1 provided by Mr Sesay with his --

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

15:05:55 5 JUDGE ITOE: I see. Now, is it the same with Exhibit 217?

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

8 JUDGE ITOE: Is protected?

9 MR HARRISON: Yes.

15:06:25 10 JUDGE ITOE: I see. Okay. All right. I'll leave it at  
11 that.

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

15:06:42 15 PRESIDING JUDGE: Mr Courtroom Officer, will you help us  
16 there. Which is 216?

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

15:07:33 21 PRESIDING JUDGE: It's so directed.

22 JUDGE ITOE: I [indiscernible] with my questioning on those  
23 two exhibits for those reasons.

24 PRESIDING JUDGE: Mr Jordash, are you --

15:08:04 25 MR JORDASH: May I apply for a brief rejoinder? There are  
26 a number of discrete issues which, in my respectful submission,  
27 would assist Your Honours. Firstly, there's an issue which is  
28 relatively new, and that's the issue of the warrant of arrest.  
29 We hadn't heard the Prosecution's position on that, and we would

1 I like to comment, and it is hugely significant.

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

15:08:39

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

6 JUDGE BOUTET: But only on this issue.

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

15:08:47

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

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

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

15:09:06

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

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

15:09:32

20 MR JORDASH: Yes. And the corrections would take no more  
21 than around 15 or so minutes, but it would assist Your Honours in  
22 focusing on the issues at hand.

15:09:58

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

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

1 about the law and the facts, and to deal with this new issue  
2 which we haven't had an opportunity to deal with. It's finally  
3 this: That the Prosecution's understanding and interpretation of  
4 the cases upon which we rely, specifically Bagosora, Delalic and  
15:10:53 5 Halilovic, we hadn't heard their explanation about these  
6 documents until today and yesterday so --

7 JUDGE BOUTET: What explanation are you talking about?

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

9 JUDGE BOUTET: I mean, it's their interpretations, just  
15:11:08 10 like you gave yours yesterday. I mean --

11 MR JORDASH: Yes, but they had an opportunity to comment on  
12 ours, and I'd like an opportunity to comment on their  
13 interpretation which, we would submit, would enhance the process.  
14 It would put before you the real issues in the dispute between  
15:11:29 15 the parties. It would probably take no more than 15 or so  
16 minutes. Perhaps not much longer than the application.

17 PRESIDING JUDGE: So your application is supported by three  
18 grounds, according to you: To correct errors of fact and law in  
19 the Prosecution's presentation, and also to address an issue in  
15:11:54 20 relation to the warrant of arrest, which is a reason  
21 ex-improvisi so?

22 MR JORDASH: Yes, it has.

23 PRESIDING JUDGE: Very well. Then, third, to respond to  
24 some interpretations on the part of the Prosecution of the cases  
15:12:14 25 they cited?

26 MR JORDASH: Yes.

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

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

3 [The Trial Chamber conferred]

15:13:19

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

15:13:40

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

15:14:01

14 PRESIDING JUDGE: Why don't you trust the Bench? If we are  
15 seized of all the material here, and I remember when you were  
16 arguing, I would say, in my own estimation of your arguments,  
17 that you came up with quite, as I said at that time, a formidable  
18 array of submissions supported by various factual scenarios and  
19 you put before the Bench quite a comprehensive amount of material  
20 for us to deliberate on, and you did, in fact, touch upon some  
21 aspects of the warrant of arrest. And if any new material has

15:14:34

22 emerged from the other side on that, why not trust the judgment  
23 of the Bench to factor everything into this entire process. And  
24 remember that, also, we -- even though we don't descend the  
25 arena, we hold the scales of justice. We're supposed to consider  
26 almost everything exhaustively in an application of this nature.

15:15:04

27 MR JORDASH: The difficulty is I didn't spot this point. I  
28 didn't spot it because I didn't know what the Prosecution's point  
29 was on it.

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

15:15:31 5 MR JORDASH: Your Honour --

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

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

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

17 MR JORDASH: But it's --

18 JUDGE ITOE: You don't want the Chamber, you know, to  
19 overrule itself soon after it has given a decision. I don't see  
15:16:19 20 which court will comport itself, you know, the way you want us to  
21 go.

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

23 PRESIDING JUDGE: Mr Jordash, I think, also, you must trust  
24 the judgment of the Bench. There are issues that may not even  
15:16:35 25 have been brought to our attention by both parties, which we can  
26 spot out. Remember we're here to do justice.

27 MR JORDASH: If --

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

29 MR JORDASH: It is --

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

15:16:58 5           MR JORDASH: Well, I'll leave it at that.

6   [The Trial Chamber conferred]

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

9   [Break taken at 3.16 p.m.]

15:24:53 10    [Upon resuming at 3.25 p.m.]

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

15:25:42

17   [Whereupon the hearing adjourned at 3.26 p.m.,  
18 to be reconvened on Friday, the 8th day of June  
19 2007, at 2.30 p.m.]

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EXHIBITS:

Exhibit No. 218	5
Exhibit No. 219	11
Exhibit No. 220	13
Exhibit No. 221	25
Exhibit No. 223	33
Exhibit No. 223	35