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

THURSDAY, 21 JUNE 2007
9.55 A.M.
TRIAL

TRIAL CHAMBER I

Before the Judges:	Bankole Thompson, Presiding Pierre Boutet Benjamin Mutanga Itoe
For Chambers:	Mr Matteo Crippa Ms Nicole Lewis
For the Registry:	Ms Advera Kamuzora
For the Prosecution:	Mr Peter Harrison Mr Charles Hardaway Mr Vincent Wagona
For the accused Issa Sesay:	Mr Wayne Jordash Mr Tobias Berkman
For the accused Morris Kallon:	Mr Shekou Touray Mr Melron Nicol-Wilson
For the accused Augustine Gbao:	Mr Andreas O'Shea Mr John Cammegh

[RUF21JUN07A - MD]
Thursday, 21 June 2007
[Open session]
[The accused present]
[Upon commencing at 9.55 a.m.]

PRESIDING JUDGE: Good morning, counsel. We're resuming the trial, and we'll continue with the trial within a trial proceeding, and this morning we plan to hear closing submissions from counsel on both sides, and after that, we'll figure out how we'll go.

Yes, the Prosecution will begin.

MR HARRISON: This morning I'd handed up what is a Prosecution brief, a written one, which we hope will assist the Court. And there's also from two or three days ago, a blue book of authorities -- it's labelled OTP, which was handed up, but, what the Prosecution proposes to do, because we will be mindful of the 15 minutes we were allocated.

PRESIDING JUDGE: Well, we have indicated we can go on for 20. That is fine now.

MR HARRISON: At any rate, the Prosecution has simply

handed up that blue book of authorities for your assistance and we will not actually take you to any of the cases, we will simply refer to the written arguments.

PRESIDING JUDGE: Very well.

MR HARRISON: And try to summarise, as briefly as we can, what the Prosecution says are the relevant factors.

PRESIDING JUDGE: Thank you.

JUDGE BOUTET: Mr Harrison, what is the blue book?

MR HARRISON: It's a blue book of authorities --

JUDGE BOUTET: Okay.

MR HARRISON: -- that was given to the Chamber officer, I think on Tuesday.

JUDGE BOUTET: Because knowing your problem with colour, that's why I was just making sure it was the same book.

MR HARRISON: This time I confirmed it with Mr Wagona.

JUDGE ITOE: This time we're ad idem on the colour, Mr Harrison.

PRESIDING JUDGE: Yes, I say the same myself.

JUDGE ITOE: It's blue now.

PRESIDING JUDGE: Looks blue to me.

MR HARRISON: The preface I'd like to make is the Prosecution does rely upon the submissions it made earlier and will not be relying upon them. Those submissions were made before the Court, I guess, two weeks ago.

PRESIDING JUDGE: Right.

MR HARRISON: The brief is drafted in such a way as to try to set out what the Prosecution says are several of the legal considerations which ought to govern the Trial Chamber in forming its approach to the issues.

And we start out on the first page at paragraphs 3, going

forward, reminding the Court that it's the Rules that must govern here and, in particular, it's Rule 89(C) and 95, and that has to be dealt with in the framework of what is actually the issue before the Court.

And the issue before the Court is this: The Prosecution has applied for leave to cross-examine the first accused on prior statements and that application is restricted, so that any evidence would be for the limited purpose of impeaching

credibility.

And the Prosecution takes the position that it's only in cases where there's strong and clear evidence of unlawful conduct that can justify a finding of serious disrepute within the meaning of Rule 95; otherwise, it would be admissible. And in circumstances where the sole issue is admitting a statement for what the Prosecution says is a limited purpose of impeachment, and also bearing in mind that the weight that could be given to that evidence by the Court would only be assessed at the end of the day and, in fact, no weight could be given at all. That, in those circumstances, there could be no serious disrepute.

The Prosecution wants to remind the Court only briefly about the Ntahobali decision and the Trial Chamber decision is referred to at paragraph 5, as is the Appeals Chamber decision which, the Prosecution says, ought to govern the Trial Chamber in its deliberations.

And if I could just remind you of what actually happened briefly, and it's stated at paragraph 6, where the Prosecution quotes paragraphs 55, 79 and 80 of the Trial Chamber's decision

in Ntahobali. There they go through the analysis of 89(C) and of 95 and we say that the same analysis ought to be used today.

The Prosecution wishes to emphasise, in particular, that at paragraph 79, the Ntahobali Trial Chamber said:

"Rule 89(C) empowers the Chamber to admit evidence which is relevant to the subject matter before it and which has probative value, while Rule 89(D) deals with the Chambers powers to verify the authenticity of evidence obtained out of court."

There is no Rule 89(D) here. It then goes on to say:

"However, Rule 89 empowers the Chamber to exclude evidence which is obtained by methods casting substantial doubt on its reliability or if its admission is antithetical to and would seriously damage the integrity of the proceedings."

There is no such evidence, the Prosecution says, and the Court can be satisfied by looking at the videotapes and by reviewing the evidence that you have heard.

The Prosecution does not abandon what it said earlier about Rule 92. And reference is made to Rule 92 at paragraphs 8 and 9. And we also remind this Court that the Rule 92 drafted for the Special Court is a less onerous provision than the Rule 92 that exists at the ICTY and ICTR.

At the other two tribunals, the requirement to invoke Rule 92 is that the requirements of Rule 63 were strictly complied with. Here, the provision in Rule 92 has omitted the word "strictly," and it simply is a requirement that the Rules be complied with.

At paragraph 10 --

PRESIDING JUDGE: Remember, you said this implies

substantial compliance?

MR HARRISON: Yes.

PRESIDING JUDGE: Right.

MR HARRISON: That was a point that was debated at the last hearing.

PRESIDING JUDGE: Quite. Right.

MR HARRISON: Paragraph 10 and forward, at page 3 of the brief, deals with, I think, an issue that is being put forward by the Defence, where they seem to be suggesting there is an obligation to expand upon the meaning of what exists in Rule 42,

the rights advisement.

This matter has been determined by the ICTY Trial Chamber in Delalic and it's also been dealt with by the Appeals Chamber in Delalic. There, the Appeals Chamber made clear that there is absolutely no such obligation.

At paragraph 11, which is page 4, you'll see quotations from the Appeals Chamber decision in Delalic and, in particular, paragraphs 551 and 552 are quoted. If I can just I read from 551, it says:

"The Appeals Chamber again finds that Mucic has failed to satisfy the Appeals Chamber that the Trial Chamber erred in this reasoning. Rule 42 of the Rules provides that a suspect must be informed prior to questioning of various rights, including a right to be assisted during questioning by counsel of the suspect's choice."

It further provides that questioning must not continue in the absence of counsel unless a suspect has voluntarily waived the right to have counsel present. This right is neither ambiguous nor difficult to understand, as long as a suspect is

clearly informed of it in a language he or she understands, the Prosecution fulfils its obligations. Contrary to Mucic's submissions, an investigator is not obliged to go further."

Paragraph 552 continues on in the same vein. You will also see in the following paragraph, which is paragraph 12, quotes from the Bizimungu decision from ICTR which, again, is entirely on all fours with Delalic and what the Prosecution says is the law that should be applied here.

The next section is one of police trickery. The Prosecution maintains that this notion of trickery is condoned

and accepted by the Court. Now the Prosecution denies the existence of any trickery.

PRESIDING JUDGE: Will you repeat that first point?

MR HARRISON: The Prosecution says that the courts condone --

PRESIDING JUDGE: The courts condone.

MR HARRISON: -- and accept --

PRESIDING JUDGE: And accept.

MR HARRISON: -- police trickery.

PRESIDING JUDGE: And accept police trickery.

MR HARRISON: And that, in any event, the Prosecution says there is no such conduct in the case before you.

PRESIDING JUDGE: Before you go further on that, do you want to give us any authority for that?

MR HARRISON: Yes. I was just going to take you to paragraph 14.

PRESIDING JUDGE: Yes.

MR HARRISON: It's the case from the Supreme Court of Canada, Regina v Oickle, and as I recall, it's actually quoting a passage from an earlier Supreme Court of Canada's decision. And I think it's really summed up by the first sentence:

"The investigation of crime on the detection of criminals is not a game to be governed by the marque of Kingsbury Rules. The authorities in dealing with shrewd and often sophisticated criminals must sometimes, of necessity, resort to tricks or other forms of deceit and should not, through the rule, be hampered in their work."

The next proposition that the Prosecution wants to advance is one that was raised briefly when the Prosecution was

addressing the Court earlier and that had to do with the comment in the Halilovic appeal decision between an inducement and an incentive.

At paragraph 17 there is reference made there. It follows on at 18 where some guidance is given to the Court of how the Halilovic Appeals Chamber perceived the law. At 19 and the following paragraphs, the Prosecution as set out the law from Canada, England and the United States on the topic. And we suggest the law is consistent in all jurisdictions and, in fact, the law can be summed up from a passage at paragraph 22 on page 8.

This passage is from a very recent Supreme Court Canada decision, Regina v Spencer (2007) and it's affirming what had been the leading case Regina v Oickle. But here the court says:

"What occupies 'centre stage' is not the quid pro quo but voluntariness. It is the overarching subject of the inquiry and this should not be lost in the analysis. As discussed above, while a quid pro quo may establish the existence of a threat or promise, it is the strength of the alleged inducement that must be considered in the overall

contextual inquiry into voluntariness."

The Prosecution says the law is this: It's only on a reading of the totality of the circumstances in a case that a determination can be made whether conduct was such that it prevented the free will of an accused from expressing themselves.

The Prosecution relies upon the facts that, on every day of the interviews, the first accused was taken through the rights advisement. You can see it on the videotape, and on each and every day he accepted to cooperate.

There is a passage which the Prosecution thought was being perhaps put in issue by the Defence under the heading at the bottom of page 8, paragraph 26, "Confronting an accused with adverse evidence." The answer there, we say, is again found if Regina v Oickle, and the passage speaks for itself that the law is that you certainly can confront a person being interviewed with evidence that is contrary or not consistent with what the person is saying.

The last two sections that I will just inform the Court of briefly, first of all, there was a warrant of arrest and the indictment. The Prosecution says that, first of all, there is no mandatory term in the warrant. Secondly, the evidence is that members of the Prosecution were not in the room where the arrest took place. They may have been in the surrounding area, but they weren't present where the arrest took place. Secondly, the term "as soon as practicable" has been considered by other courts and as an example, in Bizimungu, there was a delay of eight days between the time of arrest and the delivery of a request for transfer and, in that case, the eight days was held to be

reasonable. The reference there is page 28.

Finally, the last section deals with what is paragraph 56 of the Defence brief. The Prosecution has tried to respond to many of those accusations and allegations, and we tried to do it in a clear way which would be of benefit to the Court.

We say, in general, that there is some inadvertent error simply where transcripts are not accurately identified and we've done that. But with respect to the others, we completely disagree, and say there is either a misstatement of the evidence or the evidence is read in a way which is not consistent with the

appropriate context in which the text should be read.

So the Prosecution does not accept the allegation stated in paragraph 56 of the skeleton brief. Those are the submissions the Prosecution says that Rule 89(C) governs. There is no violation of Rule 95. And, in addition, this Court can make a finding that the statement is voluntary and the Prosecution should be permitted to cross-examine, for the limited purpose of which the Court is aware, and being bound by this Court's earlier decision in Norman as to the appropriate procedure.

PRESIDING JUDGE: Thank you. Mr Jordash, your turn.

MR JORDASH: Thank you, Your Honour.

We submit that the statement -- before I begin, have Your Honours received the argument we put forward in skeleton form? It was scanned yesterday, 20 June, and it's our skeleton argument seeking exclusion of Mr Sesay's statements. We'll take a similar approach to Prosecution --

JUDGE ITOE: Did you file it with Court Management?

MR JORDASH: Yes, Your Honour.

JUDGE ITOE: That's it, I suppose.

MR JORDASH: That's the one.

JUDGE ITOE: Thank you.

MR JORDASH: We won't take you to most of it but we would ask you to take into account the law as set out, as we appreciate it.

We would submit that the statements must be excluded, excluded in their totality. We submit that, yes, the veil has been lifted and what is underneath is more than troubling: It's shocking. And this argument has become bigger than just the statement. It's about what kind of conduct is acceptable. What

kind of investigative protocol is permissible and ought to be permissible in an international court.

Of course, at the heart of this issue is the issue of voluntariness. Your Honours will see at paragraph 38 of our skeleton a very workable definition from the Canadian case of Oickle, which defines, with some nuance, the term voluntary, referring inter alia to a statement being involuntary if it is the result of either fear or prejudice, hope of advantage, for example, the hope of advantage such as the prospect of leniency in the courts, and so on.

It follows from that definition that this is not a borderline case. This is way, way over the line. And approaching the Prosecution evidence at its most favourable, taking it at its highest, accepting that it is true, we submit it's clear that Mr Sesay couldn't possibly have genuinely consented in this environment, and this Court could not be satisfied beyond a reasonable doubt that, in this environment, anyone could consent properly and in an informed way.

Mr Sesay was arrested, surrounded by up to 100 police officers; he was clearly distressed. Within a short time, whisked away into Prosecution custody, kept incommunicado for four days until Mr Morissette graciously allowed him to telephone

his wife, no support structures available to Mr Sesay for the first four days of his incarceration. And I use this term advisedly: What kind of inhumanity not to inform an accused's family where he is for four days?

And the Prosecution say only egregious conduct leads to statements being excluded. Well, without anything else, that four days shocks the conscience, shocks the public and ought to

shame the OTP.

Let me take Your Honours to paragraph 34 of the skeleton and what this Trial Chamber said about the way in which witnesses should be contacted in order to ensure that they're genuinely consenting to an approach by a party:

"We find merit in the Defence submission that the general population might feel intimidated by being approached by the police directly, considering that this country has been through many years of armed conflict and that the social and political situation in Sierra Leone is such that it might reasonably lead to apprehension within the general population as to the role and power of the police. The Chamber therefore accepts the Defence submission that the appropriate organ to contact witnesses would be WVS."

I miss out few lines:

"We opine, therefore, that the WVS, by virtue of their functions and objectives, namely to provide protection, security and support to witnesses and victims, is in the best position to determine how to approach a witness, who may otherwise feel intimidated, to explain to a witness his

or her right to be interviewed, and to make sure that a proper consent for an interview was obtained from a witness."

What the Prosecution are asking you to do is say that kind of protection for a witness should not be given to an accused: An accused who is trussed up in handcuffs, in police custody; an accused who is potentially facing the rest of his life in prison; an accused who has not had an opportunity to speak to friend, family or a lawyer. And, in the case of Mr Sesay, suffering at

the time of the arrest from malaria, dysentery, tooth decay and, all the while, while the interview process is going on, backwards and forwards, Bonthe to Scan office, handcuffed, blindfolded, isolated within the office.

This is not about the technical aspects of this law; this is about commonsense approach to what anybody could have done in that situation. And, that's right, there is jurisprudence which says, in some domestic situations, perhaps a case here, a case there, the Prosecution don't have to go further than reading the rights.

But the Prosecution are right, we have to look at the totality of the circumstance. And we have to ask ourselves: Should we have expected more from the Prosecution? Did they have an obligation to go further than reading the rights as they bundled an accused from pillar to post, without doing anything more than the bear minimum?

The facts remain that Mr Sesay was not told of his right upon arrest. He was not told what the charges were. He was bundled into an interview without having seen his indictment. He

was bundled into an interview, if the Prosecution are correct, without being told what cooperation meant. He was bundled into an interview without being told what the sentence might be. He was bundled into an interview without going into court custody and the Prosecution suggests: Well, the Prosecution custody is the same as court custody. Not for the rest of the accused it wasn't; court custody was Bonthe, where the transfer took place. Bundled into Prosecution custody, outside of judicial control, outside of any control, outside of Registry control into Prosecution control.

That is the due process which the Prosecution want this Court to approve of, and the Prosecution say: Well, okay, he didn't have his indictment the first day but he did have it delivered to him at 8.00 on 10 March. And delivered to him in a bundle of documents; a complicated indictment. The Prosecution say: Well, as long as we gave the indictment to him that's enough. It's okay that we're taking him out of his cell every day so he's not there during daylight and it's okay that we don't tell him what's in the bundle. It's okay that no one can explain to him the charges, that's okay; he got the documents and we did the bare minimum. That's okay. That's the international justice we approve of.

Who made these decisions? We don't know because Mr Morissette's saying he didn't make these decisions. We don't hear from Mr Cote, we don't hear from Mr White, we don't hear from Mr Craig, just separate investigators telling you different stories about what happened. The fact remains Mr Morissette misled Mr Sesay as to the meaning of his rights, misled him as to whether a suspect statement was being taken; misled him in

relation to the inducements and promises made.

It is, we submit, clear what happened here. Mr Morissette engaged in, as he admitted, some kind of undercover work, a good cop and bad cop routine; Mr Berry on the tape, Mr Morissette behind the scenes, and Mr Berry's assertions of not knowing just are not plausible.

Why is Mr Morissette doing this undercover? Why is he doing it on the quiet? Why doesn't he say anything on tape to indicate what he's doing. Why did he not put it into his statement which was filed as an exhibit in this Court?

If this Court had not ordered a voir dire these statements could have been admitted on the basis of Mr Morissette's statement which made no mention of any inducement, any approaches, any conversations off tape. Mr Morissette was willing for those statements to go into evidence. Mr Sesay be impeached. Mr Sesay be convicted on the basis of incomplete evidence. What does that tell this Court about the chief of investigations in this Court?

The fact remains Mr Sesay invoked his right to counsel on three separate occasions. The fact remains that Mr Berry signed a document which concerned Mr Sesay's representation and what was Mrs Kah-Jallow doing, allowing that to happen? The fact remains that on 31 March 2003 Mr Sesay confessed to a crime after an hour-and-a-half of pressure from Mr Morissette, admitted by Mr Morissette. The fact remains that after a week after his final interview Mr Sesay required psychiatric care. The fact remains the Prosecution have not kept a single note, except for Mr Berry's details of his times of attending to Mr Sesay.

Let me read, if I may, from the skeleton. Paragraph 31, an English case and one in which we submit properly exposes the

Prosecution's inability to be able to prove their position.

> "By failing to take contemporaneous notes or, indeed, any notes as soon as practicable, the officers deprived the Court of what was, in all likelihood, the most cogent evidence as to what took place during the process of obtaining Mr Sesay's cooperation and what induced him to confess. The Trial Chamber is pro tanto disabled from having the full knowledge on which to base its decision. The Trial Chamber is entitled to ask itself why the

investigators did not take notes. Was it mere laziness or something more devious?"

And I pause there to say Mr Lamin, claiming only junior officers had notes, Mr Morissette claiming: Well, I didn't take notes because I wasn't engaged in the interviews, whereas Mr Berry was. Mr Saffa: I left my notes. I wasn't on duty in the morning. It's pathetic. The notes weren't taken because these are investigators who want to do what they want and not have it held to account, because there's a chance that they can come here and give you an account and that you will believe it over that of Mr Sesay's. Notes might put that plan into some difficulty. The bottom line is the notes are not here and Your Honours have been deprived of the exact wording used by Mr Morissette.

We know that he has offered inducements. We know that he agreed on a quid pro quo basis; we know on an exchange-for-exchange basis. We know what those offers were. What we don't know is exactly how he put it at the time and we don't know that because there's no notes.

Now, that is to be held against the Prosecution, not the Defence. It's their burden. They've deprived the Court of the best evidence. And we would submit a doubt arises from the simple fact of the failure to keep the notes. Because you, Your Honours, cannot know what wording was exactly used. Absent that, you don't know the impact it had on Mr Sesay or could have had.

So we submit ground 1, the overall course of conduct was oppressive. Nothing more could have been done to Mr Sesay to have made this more oppressive. Everything was offered as a possibility. Everything was implicitly threatened as a possibility and all the while he's suffering from serious

physical ailments and a deteriorating mental state. International justice; international investigations.

Ground 2: Involuntariness of the statements and the waiver. No one could consent in these circumstances.

Breach of the right to counsel, paragraph 5 of the statement, skeleton. Paragraph 6, I beg your pardon. Mr Sesay invoked counsel on three separate occasions. I'd invite Your Honours to look at Rule 42 and I'll just read it very quickly. 42B:

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

Three times Mr Sesay invoked counsel and Mr Berry knew about that. And it's very telling, if I can refer you very briefly to Mr Berry's statement where he's exposed his own lack of credibility. His evidence was he was outside the room. Mrs Kah-Jallow asked him to step inside to sign the document. No

discussion took place and yet in his statement of 17 April 2003:

> "Third time I saw the lawyer -- that Mr Sesay saw a lawyer was on the 24th. A lawyer who spoke with him privately and had me witness a note she had prepared indicating that Issa Sesay did not want a local lawyer to represent him but instead was requesting that they get him an American or British lawyer by the name of Robertson."

The note says Robinson, Mr Berry says Robertson. The note

doesn't mention an American or British lawyer. Mr Berry's statement does, 17 April 2003. Maybe he did have a glass against the door, or maybe he is not quite being as candid with the Court as he would have you believe.

So, to sum up, my time is running out.

There couldn't have been, I submit, a more clear example of egregious behaviour and again I return to what I started with: Keeping a suspect in communicado, for four days, that alone, never mind not seeing the indictment, never mind not having things explained when you obviously show confusion, never mind his deteriorating health. I mean, everything is there, and this Court cannot rule these statements admissible. Rule 95 was made for this type of wrongdoing and I would respectfully submit the Court should give a detailed ruling which this type of conduct ought to be clearly condemned.

And may I finally say this: That if Your Honours find with us on this we would ask Your Honours to consider compensation, whether it's financial, or whether it's on sentence, if it gets to that stage, a reduced sentence because no one should have to

go through six weeks of that kind of conduct at the hands of a prosecuting body. Those are my submissions.

PRESIDING JUDGE: Let me get back to the law and probably just ask you a couple of questions or just one question and, of course, this is not intended to entrap you but it would seem that the plethora of case law authorities cited before the Chamber on this issue of the applicable test for voluntariness, in respect to statements obtained from accused persons in custodial settings is from the national criminal law jurisprudence.

In other words, I do agree that in this area of the law it

would seem that the national courts have developed very authoritative principles and almost a coherent body of legal principles on the question of voluntariness. I note specifically that the decision, the Canadian case of Oickle, applied the test as propounded by Lord Sumner in the English case of Ibrahim versus The King in 1914.

MR JORDASH: Yes.

PRESIDING JUDGE: Do we have any international criminal case law authorities, apart from those cited by the Prosecution, that clearly enunciate principles different from the ones that are found in the national criminal jurisprudence?

MR JORDASH: Well, the authorities we principally rely upon are the ones that we submitted. And they are at --

PRESIDING JUDGE: Quite right, yes. So there is a dirth of international case law authorities on the subject, apart from those cited by the Prosecution.

MR JORDASH: No. There are three cited by us. Delalic, Bagosora and we, both parties are using those.

PRESIDING JUDGE: And they rely also on the national principles.

MR JORDASH: Yes.

PRESIDING JUDGE: Very well, yes.

MR JORDASH: But the three important international cases we would submit are Bagosora, Delalic and Halilovic. They are the ones which state the principles of general application.

PRESIDING JUDGE: Yes.

MR JORDASH: But I would submit this: That this is a very undeveloped area of international law.

PRESIDING JUDGE: Yes.

MR JORDASH: And what appears to have happened is that the Prosecution have been successful in other courts in closing the issue down. Now, what is different here is that Your Honours have ordered a voir dire and actually looked at what was going on and, for the first time, it's been properly laid out, I would submit, evidentially. And I would respectfully submit that what Your Honours need to do is look at those international cases and their general principles, which are helpful but then go further and look at some of the national jurisdictions.

PRESIDING JUDGE: Using Oickel also, as the Canadian case is helpful, as I recall it, applied Ibrahim v The King, where the Lord Sumner indicated that what the tribunal should do is to determine whether the Prosecution has proved, beyond a reasonable doubt, that the statement was not obtained by fear or prejudice or hope or advantage held out by a person in authority.

MR JORDASH: Absolutely. That is the core of the Prosecution's task and it's the core of the facts in this case which prevent them from discharging that burden. If it was

simply Mr Morissette's evidence alone it's enough to prevent them from discharging the burden.

How could this Court be satisfied, beyond a reasonable doubt, that Mr Sesay didn't speak because of this orchestrated plan of Mr Morissette to keep the pressure on during the breaks, keep offering things. Doesn't matter whether they are caveat at all: Maybe we will be able to help you not get a life sentence; maybe we will get you financial assistance; maybe we will get you schooling; maybe we will get you health. It all adds up and the Prosecution is suggesting that in that environment an accused could genuinely exercise his consent, or free will? Unless I can

assist Your Honours further.

PRESIDING JUDGE: Thank you. That's all right.

JUDGE BOUTET: Mr Jordash, just one additional question: Are you suggesting that there's been no voir dire at any stage, at any time in the international criminal trials on this kind of issue? There might have been on other admissibility of evidence matters as such, but I seem to understand from what you are saying that this is the very first time the Court goes into a voir dire.

MR JORDASH: Well, I think it's not so much a voir dire hasn't been held. There's been evidence called on behalf of investigators and either an accused has been --

JUDGE BOUTET: I'm talking about statement. That's why I say, I make this difference --

MR JORDASH: Yes. Well, I think the simple answer is: Not to this extent. I think evidence has been called on both sides, from Prosecution, Defence. Sometimes just the Prosecution give evidence, sometimes the defendants give evidence about it. But this is the first time there has been such a wholesale challenge

on the basis of 42, 63 and 92 and the first time I think that I have seen in the international jurisprudence where there has been a two-week or selected period of time where it has been considered in such a wholistic way.

JUDGE BOUTET: Thank you.

PRESIDING JUDGE: Well, the Prosecution have a right of reply, a short right of reply, if you have anything new to add to your earlier submissions.

MR HARRISON: There is nothing specifically new. With respect to the factual assertions that have been made --

PRESIDING JUDGE: Yes.
MR HARRISON: We simply rely upon the brief.
PRESIDING JUDGE: Right, yes.
MR HARRISON: That I told you about earlier and we don't agree --
PRESIDING JUDGE: You did call our attention to that.
MR HARRISON: The only thing I can assist you on, with respect to the Court's question about whether there was further international jurisprudence --
PRESIDING JUDGE: Yes.
MR HARRISON: -- and I will stand corrected but I believe the Halilovic --
PRESIDING JUDGE: Yes.
MR HARRISON: -- Appeals Chamber decision is the only Appeals Chamber decision on the topic.
PRESIDING JUDGE: Yes.
MR HARRISON: And I believe the Ntahobali case is the only Appeals Chamber decision from the ICTR. In the event that we should locate another case this afternoon, we will of course forward it to you.
PRESIDING JUDGE: Very well.
MR HARRISON: But there has been some research done. I

think they are the Appeal Chamber's decisions.

PRESIDING JUDGE: I merely was saying -- you are right. I merely was saying that this is a field where the national courts seem to have taken the lead in enunciating a coherent body of law and that we are virtually beginning to tread or do some ground-breaking kind of exercise but, of course, we -- there is nothing wrong in relying on the reservoir of the wisdom of the

national tribunals. Thank you.

JUDGE ITOE: Of course, it is permitted by our Rules that we can rely on rules from national systems, although we are not bound by them. I think we would only go by that and be able to make a determination on this.

PRESIDING JUDGE: Well, we will stand down for a while.

[Break taken at 10.40 a.m.]

[RUF21JUN07B - MD]

[Upon resuming at 11.07 a.m.]

PRESIDING JUDGE: Counsel, after a brief consultation in Chambers, we have decided, having regard to the nature and the voluminous character and also the complexity of the legal submissions here this morning on both sides, and with a special regard to the case law authorities that have been cited by both parties, we will adjourn this trial until tomorrow, 22 June, at 10.00 a.m., when we hope to deliver a ruling on the issue. And after we have delivered that ruling, we'll expect we'll revert to the main trial and expect the Prosecution to commence their cross-examination. So the trial is adjourned until tomorrow at

10.00 a.m..

MR CAMMEGH: Before Your Honours rise -- excuse me.

PRESIDING JUDGE: Yes.

MR CAMMEGH: Before Your Honours rise, there is, I think you are aware, Your Honours, there is a delicate matter which is incumbent upon me to raise. I am within Your Honours' hands.

PRESIDING JUDGE: Well, we'll give you leave to do that. I'll hold the adjournment decree in abeyance until you --

MR CAMMEGH: Thank you. Your Honour, this is a difficult and delicate issue which would, in fact, be all the more

difficult and delicate were it not for the gracious approach being taken by my learned friend, Mr O'Shea, to whom I'm grateful.

I think it came to Your Honours' attention yesterday that a letter was written by our client, Augustine Gbao, concerning his continued representation in this case. It's not my intention and it's earnestly not my wish to enter into the details or merits of that letter. It is to be hoped that that could be avoided at all costs.

Nevertheless, I am aware of a situation which has continued concerning the relationship between Mr Gbao and Mr O'Shea, which has led me, and I think it's right it's perhaps led everybody concerned, to the irreversible conclusion that there is an irrevocable breakdown in confidence flowing from Mr Gbao to his lead counsel.

My duty is to this Court to be candid. My duty is also to my client, to act, as I see it or as I see them, in his best interest, at all times, no matter how difficult that may be. I

also have a duty to my conscience, to express what I feel to be right.

Having taken everything into account, I have to repeat my conclusion: That we have reached a point which is irreversible.

PRESIDING JUDGE: Before you go further, do you want to leave it at that point?

MR CAMMEGH: Can I just --

PRESIDING JUDGE: Let me just say something.

MR CAMMEGH: Sorry.

PRESIDING JUDGE: The reason being that the Chamber is seized of this particular matter --

MR CAMMEGH: Yes.
PRESIDING JUDGE: -- in writing.
MR CAMMEGH: Yes.
PRESIDING JUDGE: And we are also in the process of requiring that certain procedural safeguards be maintained.
MR CAMMEGH: I'm aware of that.
PRESIDING JUDGE: So I would caution that whatever you say does not in any way anticipate whatever might flow out from the Chamber's own deliberation or conclusion.
MR CAMMEGH: Yes.
PRESIDING JUDGE: But I'm not -- I do not intend to stop you. It's just to put you on guard --
MR CAMMEGH: I will.
PRESIDING JUDGE: -- that you may not say certain things that may well be preemptive of what we --
MR CAMMEGH: I am not going to presuppose --
PRESIDING JUDGE: Yes. Thank you.
MR CAMMEGH: -- anything.
PRESIDING JUDGE: Right.
MR CAMMEGH: All I wish to do is put on record my respectful application and when I say respectful, I'm not just extending that respect to the Court, who I know, or I trust, will

trust my judgment in this matter. I'm also extending my deepest respect to Mr O'Shea.

Having taken everything into account, I have to say that I wish to adhere to my client's wishes. I know that he has discussed matters with Mr O'Shea, it's not in my gift to reveal what those discussions were, but we have arrived at a situation which, as I say, is irredeemable, in my view.

I don't want to presuppose anything but I can assure the Court of this: I have a commitment to see this trial through to the end. If necessary, I am committed to continue every day, from September. If it becomes appropriate, it would be my intention to engage another counsel, who I would intend to have with me at all times. Again, I'm not presupposing anything, but this is the position. And I'm grateful to everybody concerned for their dignified approach to this in minimising the embarrassment in which I find myself.

PRESIDING JUDGE: Thank you. The legal office of the Chambers will serve the Prosecution a copy of this letter, at least they are an interested party.

JUDGE ITOE: And I think I'm particularly interested in knowing, you know, if Mr O'Shea, in addition to this case, has a new or an additional commitment in another international tribunal. I want to be clarified on this. Fortunately, he is here.

MR O'SHEA: Your Honours --

JUDGE BOUTET: Mr O'Shea, I don't want to preclude you to respond to what has been raised by Justice Itoe, but I know you

have been informed that we want to have some information from you, some response. I am just mentioning that. Whether or not you want to respond now or wait for a more total picture, but it's your call.

JUDGE ITOE: I would not insist on a response now, but I would say that, in making the response to this, that this issue be addressed so we can leave it at that.

PRESIDING JUDGE: Yes. Just to reinforce that I'm advised that the letter was served on you personally this morning, with

an accompanying memorandum from this Chamber, the Bench, requesting that you respond within three working days to the letter and respond in writing, so you are not obliged to say anything now at this point, you know. We would like a written response and I take it that you would see no difficulty in providing that response, unless, perhaps, the time frame is too restricted and you probably want an enlargement of time, but it's important to mention that expedition here is of the essence.

MR O'SHEA: Your Honour, I will respond to Your Honour's letter in writing and provide appropriate information. I would like to respond to Justice Boutet's question in public, if I may.

JUDGE BOUTET: It was not my question, it was Justice Itoe.

PRESIDING JUDGE: Justice Itoe's question.

MR O'SHEA: Yes.

JUDGE ITOE: But I'm not insisting because I just said if it could come within the framework of the general response.

PRESIDING JUDGE: Yes.

JUDGE ITOE: I didn't want to go into these matters in the open.

MR O'SHEA: Yes. Well, I --

PRESIDING JUDGE: But we certainly give you the discretion.

It's a judgment call --

JUDGE ITOE: But if you wish to, it's a judgment call.

PRESIDING JUDGE: -- whether you want to do it. But you clearly have all the time to --

MR O'SHEA: Well, I don't want the impression to be given that I see any difficulty in my own professional situation and that's why I would like to respond to that question in public.

PRESIDING JUDGE: Very well. You're at liberty to do that.

MR O'SHEA: I'm grateful, Your Honours. It is the case that I have been appointed as lead counsel to the case of Bikindi before the International Criminal Tribunal for Rwanda.

This is a case of short duration and, in my view, does not interfere with my commitments here, but, just for the record and so it is clear, I do have another case other than the case before this Tribunal, and it is not the first time, either.

PRESIDING JUDGE: Thank you.

JUDGE ITOE: Thank you. I'm satisfied, Mr O'Shea --

MR O'SHEA: Thank you.

JUDGE ITOE: -- of this information.

PRESIDING JUDGE: Anything else? Does any counsel want to raise anything before we bring the proceeding to a close?

MR CAMMEGH: As Your Honours are aware, I was due to fly home for a family matter tomorrow. Unfortunately, I'm unable to do so and I now leave on Monday.

I would be very grateful if this matter could be concluded by the end of this week because, without wanting to sound too self-indulgent, this matter has been an enormous strain on me for

the last period of time and it is very disruptive to my work. It would be fair on all concerned that a swift conclusion is reached.

PRESIDING JUDGE: We can take two positions, two short positions: One, that we realise expedition is of the essence; and two, that we'll do the best we can.

MR CAMMEGH: Thank you.

MRS KAH-JALLOW: Your Honour, if I may provide an input.

PRESIDING JUDGE: You have our leave to speak, yes. I recognise you.

MRS KAH-JALLOW: The Office of the Principal Defender does not have a policy of barring counsel from representing other accused persons, providing, of course, it does not interfere or does not infringe on the rights of a client --

PRESIDING JUDGE: Yes.

MRS KAH-JALLOW: -- who is appointed for the Special Court.

PRESIDING JUDGE: Do you want to put that it in writing, if you think it's necessary for us?

MRS KAH-JALLOW: Yes, we'll forward all correspondence in respect of this matter.

PRESIDING JUDGE: Since we have not yet started deliberating on this issue, if you have that input that you think might help us in the process of deliberating, you might want to put it in writing?

MRS KAH-JALLOW: We certainly will.

JUDGE ITOE: I hope that Mrs Jallow's position is already on record, what she said. I hope it's already on record, in addition, of course, to you providing this information to us in writing -- is it possible for us to have it today?

MS KAH-JALLOH: Yes, Your Honour, I will provide it today.

PRESIDING JUDGE: If you think it will shed some light on the issue.

MRS KAH-JALLOW: Absolutely.

PRESIDING JUDGE: That's helpful.

MRS KAH-JALLOW: Thank you.

MR CAMMEGH: Your Honour, I'm sorry to [overlapping speakers] --

PRESIDING JUDGE: No, that's okay, Mr Cammegh.

MR CAMMEGH: I think we're all patently and abundantly

aware of what Mrs Jallow has just said. The issue here, however, is more fundamental than that.

JUDGE ITOE: Mr Cammegh, I think we understand the issue.

MR CAMMEGH: [Overlapping speakers]. Thank you.

JUDGE ITOE: I think we understand the issues. We've understood, you know. You've spoken very frankly and openly. I think we don't need to drive this issue any further.

PRESIDING JUDGE: And, again, let's trust our judgment. The trial is adjourned to tomorrow, June 22nd, 2007 at 10.00 a.m.. Thank you.

[Whereupon the hearing adjourned at 11.23 a.m., to be reconvened on Friday, the 22nd day of June 2007, at 10 a.m.]

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SCSL - TRIAL CHAMBER I