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SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before: Hon. Justice Benjamin Mutanga Itoe, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Pierre Boutet

Registrar: Mr. Herman von Hebel, Registrar

Date: 30th of June 2008

PROSECUTOR Against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

Public Document

WRITTEN REASONS - DECISION ON THE ADMISSIBILITY OF CERTAIN PRIOR STATEMENTS OF THE ACCUSED GIVEN TO THE PROSECUTION

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TRIAL CHAMBER I ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, Hon. Justice Bankole Thompson, and Hon. Justice Pierre Boutet;

NOTING the Oral Ruling of the Chamber on the 8th of June 2007, in which it ordered that a *voir dire* should be conducted to determine the issue of the voluntariness of statements made by the First Accused, Issa Sesay, during interviews conducted with him by and in the Office of the Prosecutor ("Prosecution") between the 10th of March 2003 and the 15th of April 2003 and of his waiver of the right to counsel in relation to such statements for the purposes of use by the Office of the Prosecutor in order to cross-examine the First Accused, Issa Hassan Sesay, ("Accused") for the limited scope of impeaching his credibility;[1]

RECALLING that after an intensive Chamber deliberation the Oral Decision at that time was issued pending this substantive Decision and in order to avoid a delay in the proceedings;

NOTING that the Chamber indicated at that time that a reasoned written Decision on this matter would be forthcoming;

NOTING the written decision of the Chamber issued on the 2nd day of November 2007, in which the Chamber set out its reasons for its decision to grant the *voir dire*;

HAVING HEARD the evidence adduced and the submissions made by the Prosecution and the Defence for the First Accused, Issa Sesay, ("Defence") on the 12th , 13th , 14th, 15th, 19th, 20th and 21st of June 2007 during the conduct of the said *voir dire* to determine admissibility of the statements for purposes of examination-in-chief;

NOTING the Oral Decision issued by the Chamber on the 22nd of June 2007 in which the Chamber came to the conclusion that all statements made during interviews conducted were to be excluded because they were not obtained voluntarily by Prosecution Investigator and accordingly excluded them from evidence;

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[1] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Transcript, 8 June 2007, pp. 2-3.

NOTING the Separate Concurring Opinion of Justice Itoe in which he concurred in the Chamber's Oral Decision and added that, in addition to the reason given for such decision, he was of the view that the statements should be excluded because the Accused's Waiver of his right to Counsel allegedly obtained by the Prosecution Investigators pursuant to the provisions of Rule 42(B) and Rule 63(4) of the Rules of Procedure and Evidence was also not involuntarily obtained;

NOTING that the Chamber indicated at that time that a reasoned written Decision on this matter would be issued in due course;

NOTING the written version of the Oral Decision (Oral Ruling on the Admissibility of Alleged Confessional Statements obtained by Investigators of the Office of the Prosecutor from the First Accused, Issa Hassan Sesay), and the Separate Concurring and Partially Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe on the Oral Ruling on the Admissibility of Alleged Statements obtained by Investigators of the Office of the Prosecutor from the First Accused, Issa, Hassan Sesay) issued on the 5th of July 2007;

PURSUANT to Articles 17 and 20 of the Statute of the Special Court for Sierra Leone ("Statute"), and Rules 42, 43, 54, 63, 89(B), 92 and 95 of the Rules of Procedure and Evidence ("Rules");

THE TRIAL CHAMBER HEREBY ISSUES ITS REASONED WRITTEN DECISION:

I. BACKGROUND

1. The Accused stands charged in this Court on an Indictment dated the 7th of March 2003 which was subsequently amended on the 2nd August of 2006. He was detained by the SLP Authority and placed at the disposal of the Prosecutor for investigations and interrogations by Prosecution Investigators on the 10th of March 2003.[2]

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[2] *Prosecutor v. Sesay*, SCSL-03-05-PT, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003; *Prosecutor v. Sesay*, SCSL-03-05-PT, Warrant of Arrest and Order for Transfer and Detention, 7 March 2003

2. On various dates between the 10th of March 2003 and the 15th of April 2003, the Prosecution conducted a total of 11 interviews ("the interviews") with the Accused while he was in the custody of the Special Court.

3. On the 16th of April 2003, the Defence Office filed an Extremely Urgent and Confidential Request for an Order Regarding Issa Sesay and an interim order was issued on the 30th of April 2003 for the Prosecution to temporarily cease questioning the Accused.[3] In his Decision of the 30th of May 2003, Hon. Justice Thompson on the basis of the materials before him held that the Accused's waiver of his right to Counsel was voluntary and informed.[4]

4. On the 15th of June 2004, the Chamber issued its Decision on a Defence Motion seeking an order prohibiting the Prosecution from disclosing the statements ("the statements") to any Party.[5] The Chamber held in that decision that "the question of admissibility of the Material, if any, will [. . .] only arise and be determined at the trial stage and in any event, after its disclosure".[6] The Chamber ordered the disclosure of this material, first in redacted, and then in a non-redacted form, to Counsel for the other Accused.[7]

5. The Accused began his testimony on this *voir dire on* the 3rd of May 2007. His examination-in-chief was completed on the 30th of May 2007. He was then cross-examined by the Defence for the Second Accused, Morris Kallon, on the 30th of May 2007, and by the Defence for the Third Accused, Augustine Gbao, on the 30th of May and on the 1st of June, 2007.

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[3] *Prosecutor v. Sesay*, SCSL-03-05-PT, Interim Order to Temporarily Cease any Questioning of the Accused of the Special Court, 30 April 2003

[4] *Prosecutor v. Sesay*, SCSL-03-05-PT, Decision on Request of Defence Office for Order Regarding Contact with the Accused, 30 May 2003 ("Contact Decision"), p. 8

[5] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-PT, *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-PT, Confidential Decision on Motion to Prevent Prosecution from Serving Certain Materials to Other Accused Until Admissibility Determined, 15 June 2004 ("Confidential Decision"). The Chamber notes that these decisions were originally filed confidentially. The Chamber notes further that these matters were discussed publicly in court on the 5th, 6th and 7th of June 2007 with the agreement of both parties and that as a result it made an order in the decision which it issued on XX July 2007 that these decisions be refiled as public documents.

[6] Confidential Decision, para 38.

[7] *Ibid.* para 42.

6. On the 14th of May 2007, the Prosecution applied to file copies of the statements and the respective rights advisements with the Chamber.[8] On the 25th of May 2007, the Defence indicated that it objected to the admissibility of the statements.[9] On the 29th of May 2007, the Parties made submissions on the issue of the timing of the Ruling on the admissibility of these statements. On the issue of whether to hear arguments on admissibility at that point or at the stage when the Prosecution will seek to tender them, the Chamber ruled orally and unanimously that the application was premature and therefore, declined to hear it at that time.[10] The Chamber further ruled that Counsel could not properly at this stage, examine the Accused in chief about his arrest and the circumstances surrounding the taking of the disputed statements on the grounds that it was impermissible to do so.[11]

7. On the 5th of June 2007, the Prosecution made an oral application to use the statements to cross-examine the Accused for the purpose of impeaching his credibility. The Prosecution submitted that the statements had been obtained in compliance with Rules 42, 43 and 63 of the Rules of Procedure of Evidence ("Rules").[12] Consequently, it submitted that the presumption in Rule 92, that confessions are voluntary if Rules 63 and 43 have been complied with.[13] The Prosecution submitted further that it is clear from the transcripts, the rights advisements and the audio and videotapes of the relevant interviews, that the Accused had voluntarily waived his right to Counsel and that the statements he gave during the interviews were made with full knowledge of his rights. The Prosecution argued further that the transcripts and the video recording showed that the statements had been made voluntarily and that there was therefore no need to conduct a *voir dire*.[14]

8. The Defence submitted that all these statements of the Accused were inadmissible pursuant to Rules 89 and 95, and that were obtained in breach of Article 17(4)(g).[15] The Defence

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[8] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Confidential Prosecution Witness Statements, 14 May 2007.
[9] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Transcript, 25 May 2007, p. 104.
[10] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Transcript, 29 May 2007, pp. 53-54.
[11] *Ibid.*, p. 54.
[12] The Defence clarified that it was not bringing any challenge based on Rule 43 (*Ibid.*, p. 44).
[13] *Ibid.* p. 39.
[14] *Ibid.* p. 46.
[15] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Skeleton Argument of the Defence (Admissibility/Exclusionary Principles) ("Skeleton"), para 1; Transcript, 5 June 2007, p. 51.

also submitted that the involuntariness of the waiver and of the statements were manifest on the face of the transcript such that the Chamber should conclude that the Prosecution is unable to discharge its burden of proof of voluntariness of the statements and of the waiver, and should therefore exclude the statements automatically.[16]

9. The Defence further submitted in the alternative, that if the Chamber was not in agreement with its argument in this regard, there was ample evidence on the face of the transcripts to raise a doubt as to the voluntariness of the interviews, and furthermore, that the issue of voluntariness of the contested documents could not be fully determined without a *voir dire* so as to allow the Defence to test the evidence of the Prosecution investigators.[17]

10. The Chamber issued an oral decision on the 8th of June 2007 in which it held that a *voir dire* should be conducted in order to determine the voluntariness or otherwise of the statements and of the Accused's waiver of his rights in relation to those statements.[18] On the 5th of July 2007, the Chamber issued the written reasons for its oral decision. The *voir dire* was conducted from the 12th–19th and on the 20th of June 2007. The Prosecution called 4 witnesses and the Defence called the Accused Sesay and two other witnesses. In addition, 47 exhibits were admitted.

11. On the 22nd of June 2007 the Chamber in order as we have mentioned, to forestall a delay in the continuation of the proceedings, issued an Oral Decision in which it held that the statements were inadmissible and that written reasons for its decision in this regard would follow in due course.

II. SUBMISSIONS OF THE PARTIES

[16] Skeleton, para 4, Transcript, 5 June 2007, pp. 85-86, Transcript, 6 June 2007, pp. 60-62.
[17] Skeleton, para 8, Transcript, 5 June 2007, pp. 86-87.
[18] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Transcript, 8 June 2007, p. 2.

A. Prosecution Submissions

I. Voluntariness

i. General

12. Generally, the Prosecution submits that the statements were made voluntarily.[19]

13. It is the Prosecution's further submission that there has been no breach of Rules 43 and 63 and that the presumption in Rule 92 applied and therefore the confession is free and voluntary as these Rules have been complied with.[20]

ii. Inducements, Threats, Promises

14. On the issue of inducement, threats and promises, the Prosecution argues on the basis of the *Halilovic* case that there is a distinction between an inducement and an incentive and that the fact that an Accused may have taken an incentive into account does not mean that the Accused did not act voluntarily.[21] According to the Prosecution the Accused was told that his cooperation would be brought to the attention of the Trial Chamber and that the Witness and Victims Services could offer protection to his wife and children. The Prosecution argues that this was only an incentive offered to the Accused and not an inducement and that he consequently, acted voluntarily.[22]

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[19] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Prosecution Brief on its Application for Leave to Cross-Examine the First Accused on his Prior Statements for the Purpose of Impeaching his Credibility, 21 June 2007 ("Prosecution Brief"), paras 3-7 relying on *Prosecutor v. Ndayambaje, Kanyabashi, Nyiramasuhuko, Ntahobali, Nsabimana and Nteziryayo*, ICTR-98-42-T, Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997 (TC), 15 May 2006, para 43 ("Ntahobali TC") and *Prosecutor v. Ntahobali and Nyiramasuhuko*, ICTR-97-21-AR73, Decision on "Appeal of Accused Arsene Shalom Ntahobali againt the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali using Ntahobali's Statements to Prosecution Investigators in July 1997" (AC), 27 October 2006, paras 17-18 ("*Ntahobali* (AC)) to admit statements given by an accused despite his arguments that such statements had not been given voluntarily.

[20] Prosecution Brief, paras 8-9

[21] Prosecution Brief, paras 17- 18 relying on *Prosecutor v. Halilovic*, IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table (AC), 19 August 2005, ("*Halilovic*") paras 18

[22] Prosecution Brief, paras. 17- 18

15. In addition, the Prosecution argues, on the basis of domestic case law, that not all inducements raise a reasonable doubt as to the voluntariness of the Accused's statement.[23]

iii. Coercive circumstances

16. On the issue of coercive circumstances, the Prosecution contends that no police trickery was used to cause the Accused to co-operate with the Prosecution, and that from the outset, the Accused knew that the Prosecution was interested in having him to co-operate with them and that they were interested in using him as a witness, but that it depended on his truthfulness. According to the Prosecution, there is nothing wrong with this practice. It is a very common practice in most war crimes, organized crime, conspiracy and large financial crime investigations to approach an Accused to determine if he or she is willing to co-operate as a witness.[24] It is the Prosecution's further contention that in any event, police trickery is condoned by the Courts and that what should be avoided, as was decided in the Canadian Case of *Oickle*, is conduct that shocks the community.[25]

17 In conclusion, the Prosecution argues further that telling an Accused that his evidence is unreliable is a legitimate investigative approach.[26]

iv. Waiver of rights

18. On the issue of waiver of rights, the Prosecution argues that there is no need to go beyond reading his rights to an Accused in a language that he or she understands.[27]

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[23] Prosecution Brief, paras 19- 22 relying on *R. v. Oickle*, [2000] 2 SCR 3 (SCC), paras 2 and 57 ("*Oickle*"); *R. v. Rennie* [1982] 1 ALL ER 385 (CA); *Frazier v. Cupp. Warden*, 394 US 731.

[24] Prosecution Brief, para 13

[25] Prosecution Brief, para 14. relying on *Oickle*, para 66.

[26] Prosecution Brief, para 26 relying on *Oickle*, para 100.

[27] Prosecution Brief, para 10, relying on *Prosecutor v. Delalic, Mucic, Delic and Landzo*, IT-96-21Decision on Zdravko Mucic's Motion for the Exclusion of Evidence (TC), 2 September 1997, para 58 ("*Delalic*"); *Prosecutor v Delalic, Mucic, Delic and Landzo*, Judgement (AC), 20 February 2001, paras 551 and 552; *Prosecutor v Bizimungu*, Decision on Prosper Mugiraneza's Renewed Motion to Exclude His Custodial Statements from Evidence (TC), 4 December 2003, paras 17, 20 and 21

v. Service of the warrant of arrest and the Indictment

19. As regards the service of the warrant and Indictment, the Prosecution contends that the warrant of arrest is not relevant to the application to cross-examine the Accused and that no one from the Special Court was present in the room where the arrest took place. The Prosecution also argues that the wording of the arrest warrant is not mandatory, but rather that it permitted members of the Special Court to be present when the Accused was arrested.[28]

20. In addition, the Prosecution argues that the rules do not require the Indictment to be read to an accused before he is questioned, and that the words in the warrant to deliver the Indictment to an accused "as soon as practicable" are irrelevant to an analysis of whether his statements are admissible under Rule 89(C). The Prosecution further argues however that time delays must be understood in their context and that the Indictment was delivered to the Accused as soon as practicable and that was as soon as he arrived at Bonthe Island.[29]

B. Defence Submissions

I. Voluntariness

i. Inducements, threats, promises

21. On the issue of voluntariness, the Defence submits generally that the statements of the Accused and the waiver of his rights in relation to such statements were made involuntarily, and that they were obtained as a result of a deliberate plan on the part of the Prosecution's investigators to sap the Accused's will in breach of his right to remain silent and his right to have his lawyer present.[30] According to the Defence, this plan entailed deliberately failing to explain fully the meaning of Article 17 and Rules 42 and 63 in order to deceive the Accused into believing that despite his detention, he was a witness for the Prosecution and not an accused. In addition, it is the contention of the Defence that the Prosecution's Investigators did engage in conversations

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[28] Prosecution Brief, para 27.

[29] The First Accused, Issa Sesay was transferred to Bonthe Island on the 10th of March 2003. Prosecution Brief, para 28 relying on *Bizimungu*, para 27 where the ICTR Trial Chamber held that a delay of 8 days between the time of an arrest and a request for transfer was not unreasonable.

[30] *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T, Skeletal Argument: Exclusion of Mr Sesay's Statements to the OTP Obtained in Breach of Article 17 of the Statute, 20 June 2007, para 3 ("Skeleton 2").

off-tape regarding the Accused's cooperation with the Prosecution and the alleged crimes in the Indictment.[31]

ii. Coercive circumstances

22. On the issue of coercive circumstances, the Defence argues that the Prosecution's conduct from the initial arrest until the end of the interviewing process was oppressive, designed, *inter alia*, in its nature and duration to excite fears of the consequences of the process and hopes of immediate release from charge and detention that deeply affected the mind of the Accused to the extent that his free will was so overborne that he was left with no choice but to speak when he would otherwise have remained silent.[32]

II. Breach of the right to counsel under Article 17(4)(d) of the Statute and Article 42(A)(ii) of the Rules, and the waiver of this right

23. As to the alleged breach on the part of the Prosecution of the right to Counsel under Article 17(4)(d) of the Statute, the Defence argues that the Accused expressed a desire for Counsel on at least 3 occasions; first in a request form submitted on the 13th of March 2003, again during his initial appearance on the 15th of March 2003 in the presence of the Prosecution and then in a letter dated the 24th of March 2003, which was witnessed and signed by John Berry, a Prosecution Investigator. According to the Defence, all the interviews which were conducted after the 13th of March 2003 and the waiver of the Accused's rights were invalid and should be excluded.[33]

24. Further, the Defence argues that at the time of the interview, the Accused did not understand the words 'waive" or "counsel" and that Rule 42, which requires that rights should be explained to an accused in a language which he understands, was therefore breached.[34] According to the Defence, Gilbert Morissette's explanation of the right to counsel was wilfully or negligently misleading and failed to communicate the substance of the right. There was no subsequent effort

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[31] *Ibid* para 4.
[32] *Ibid* para 2.
[33] *Ibid*, para 6, relying on *Prosecutor v Sesay*, SCSL-2003-05-I, Initial Appearance of Issa Hassan Sesay held before Benjamin Mutanga Itoe on Saturday 15 March 2003, Transcript, pp. 54-56 ("Transcript of the Initial Appearance"); Exhibit A4 of the *voir dire*; *Prosecutor v Bagosora*, ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C), (TC), 14 October 2004, para 20 ("*Bagosora*").
[34] *Skeleton 2*, para 7.

to disabuse the Accused of his misunderstanding and all subsequent waivers were consequently invalid.[35]

25. The Defence affirms that the Accused demonstrated confusion as to his right to immediate legal assistance (as opposed to legal assistance once his case went to trial) during his initial appearance on the 15th of March 2003. In addition, he demonstrated a misunderstanding of the meaning of the waivers during his interview on the 14th of April 2003. Mr Berry and Mr Morissette, the two Investigators failed to adequately correct these misunderstandings as required by Rules 42 and 63. The subsequent waivers were therefore according to the Defence, invalid.[36]

26. The Defence contends that the Prosecution's investigators failed to sufficiently explain the roles and responsibilities of Duty Counsel. It argues that by failing to correct the Accused's misapprehensions regarding the Duty Counsel's duty of confidentiality, Mr Morissette failed to offer him the services of a lawyer,[37] thereby breaching the right of the Accused to be adequately informed of the nature and cause of the charges under Article 17(4)(a) of the Statute.

27. The Defence also argues that the Accused was not served with his Indictment until after his first interview when his co-operation with the Prosecution was first obtained.[38] It contends that due to the circumstances of his incarceration at Bonthe Island, the Accused had no practical opportunity to read his Indictment prior to his initial appearance on the 15th of March 2003,[39] as evidenced by the fact that during his initial appearance, it took over two hours to read the Accused's Indictment to him in Krio and to explain it to him.[40]

III. APPLICABLE LAW

[35] *Ibid*, para 8.
[36] *Ibid*, para 9, relying on the Transcript of the Initial Appearance, p. 6.
[37] *Ibid*, para 10.
[38] *Ibid*, para 11.
[39] *Ibid*, para 12.
[40] *Ibid*, para 13.

28. As regards the law applicable in issues of this nature, this Chamber recognises the existence of an elaborate regime of statutory provisions and rules which are embodied in the Statute and in the Rules of Procedure and Evidence of the Court respectively, Articles 17(4) (a), (d) and (g) of the Statute, Rules 42, 43, 63, 89, 92 and 95 of the Rules of Procedure and Evidence.

29 Articles 17(4) (a), (d) and (g) provide as follow:

> 4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
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> a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her,
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> d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
>
> g. Not to be compelled to testify against himself or herself or to confess guilt.

30. Rule 42 covers Rights of Suspects during Investigation. The Rule provides that:

> (A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:
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> > (i) The right to legal assistance of his own choosing, including the right to have legal assistance provided by the Defence Office where the interests of justice so require and where the suspect does not have sufficient means to pay for it;
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> > (ii) The right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning; and
> >
> > (iii) The right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.
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> (B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

31. Rule 43 which deals with Recording Questioning of Suspects is in these terms:

Whenever the Prosecutor questions a suspect, the questioning, including any waiver of the right to counsel shall be audio-recorded or video-recorded, in accordance with the following procedure:

(i) The suspect shall be informed in a language he speaks and understands that the questioning is being audio-recorded or video-recorded;

(ii) In the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded;

(iii) At the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything he has said, and to add anything he may wish, and the time of conclusion shall be recorded;

(iv) The content of the recording shall then be transcribed as soon as practicable after the conclusion of questioning and a copy of the transcript supplied to the suspect, together with a copy of the recording or, if multiple recording apparatus was used, one of the original recorded tapes; and

(v) After a copy has been made, if necessary, of the recorded tape for purposes of transcription, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect.

32. Rule 63 relates to the Questioning of the Accused. The Rules states that:

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

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

33. Rule 89 provides as follows:

(A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence.

34. Rule 92 relates to Confessions. It provides that:

> A confession by the suspect or the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 43 and Rule 63 were complied with, be presumed to have been free and voluntary.

35. Rule 95 on Exclusion of Evidence, states that:

> No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute.

36. In this regard, the Chamber recognises the established principle of law which lays on the Prosecution, the burden of proving "convincingly and beyond a reasonable doubt"[41] the voluntariness of an Accused's statement made in a custodial setting and of the waiver of his right to counsel during interrogation.

IV. DELIBERATION

A. *Introduction*

37. The Chamber has consistently held that, as a matter of law, the issue of admissibility of evidence is governed by Rule 89. This Rule confers on the Chamber, a discretionary power to admit any relevant evidence, as well as, on the other hand, to exclude evidence which is not relevant.[42] It is also within the Chamber's discretion to exclude evidence pursuant to Rule 95 where its admission would bring the administration of justice into disrepute under this Rule, and pursuant to its inherent jurisdiction; the Chamber may exclude evidence whose probative value is manifestly outweighed by its prejudicial effect.[43]

38. The Chamber wishes to emphasize here that the statutory right of an accused person guaranteed by Article 17(4)(g) of the Statute of the Court is unquestionably an internationally

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[41] *Delalic*, para. 42, *Bagosora*, para. 14.

[42] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, "Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible," 1 August 2006 ("Decision on Moulding of Evidence"), para 12; Prosecutor *v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Written Reasoned Ruling on Defence Evidentiary Objections Concerning Witness TF1-108, 15 June 2006 ("Ruling on TF1-108"), para 9; See *Prosecutor v. Norman, Fofana and Kondewa.*, Case No. SCSL-04-14-AR65, Fofana – Appeal Against Decision Refusing Bail, 11 March 2005 para 22ff.

[43] Decision on Moulding of Evidence, para 12; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, 23 May 2005, para 7. See also Ruling on TF1-108, para 9.

protected human right in law. It is our considered view therefore that evidence obtained in contravention of such a right should be excluded by the Chamber pursuant to the power conferred on it under the provisions of Rule 95 of the Rules.[44] The Chamber is also of the view that as a matter of law, statements by an accused person obtained in a custodial setting which are not voluntary must be excluded under Rule 95.[45]

39. The Chamber further recalls that the principles of law governing the admissibility of confessional statements are settled and entrenched in municipal legal systems where they are fully developed. In this regard, and on this subject, We recall the English legal authority of *Ibrahim v The King*.[46]

40. In that case, the Appellant, *Ibrahim*, had been convicted and sentenced to death, but his sentence was respited pending the hearing of appeal brought by special leave *in forma pauperis* on two grounds: (i) that the jurisdiction of the court was not established, and (ii) that there was a grave misreception of evidence.

41. It is the second ground of appeal that is relevant for the purposes of judicial guidance from English municipal law as to the applicable principles governing the issue raised by the instant application. The Chamber notes here that the alleged misreception of evidence in that case related to the alleged inadmissibility of a statement made by *Ibrahim* in the course of custodial interrogation. It was argued on behalf of *Ibrahim*, that his statement was inadmissible on two grounds, to wit, (a) as not being a voluntary statement and obtained by pressure of authority and fear of consequences, and (b) in any case as being the answer of a man in custody to a question put by a person having authority over him as his commanding officer and having custody of him through the subordinate who had made him prisoner.

42. In disposing of the appeal on the said ground, Lord Sumner, articulating the law in the Judgment of the Lords of the Judicial Committee of the Privy Council, had this to say:

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[44] *Decide*, para. 42, *Bagosora*, para. 14
[45] *Decide*, para 41.
[46] Privy Council Appeals No. 112 of 1913

> It has long been established as a positive rule of English Criminal Law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority Continuing, His Lordship pertinently observed: "The principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in *R v Thompson* a case which, it is important to observe, was considered by the trial judge before he admitted the evidence. There was, in the present case, Barett's affirmative evidence that the prisoner was not subjected to the pressure of either fear or hope in the sense mentioned. There was no evidence to the contrary. With *R v Thompson* before him, the learned Judge must be taken to have been satisfied with the prosecution evidence that the prisoner's statement was not so induced either by hope or fear, and, as is laid down in the same case, the decision of this question, albeit one of fact, rests with the trial Judge. Their Lordships are clearly of opinion that the admission of this evidence was no breach of the aforesaid rule.[47]

43. In light of the above, We are compelled to observe that the principle enunciated in *Ibrahim* by the Judicial Committee of the Privy Council was followed and applied by the Supreme Court of Canada in the case of *R v Spencer*.[48] In that case, S was arrested for multiple robberies and his girlfriend H, was arrested for one of them. Following his arrest, S expressed concern for H and asked that she be kept out of it. The police told S that H would be charged with possession of a handgun and other items connected with one of the robberies. S offered to confess in exchange for lenient treatment for H. The interviewing officer denied being able to make a deal with S. S also requested a visit with H. S confessed to some of the robberies and was allowed to visit H. He then confessed to other robberies. After a lengthy *voir dire*, the Trial Judge admitted S's statements into evidence and subsequently convicted him of 18 robberies. A majority of the Court of Appeal found that the trial judge had applied an incorrect test in admitting the statements as voluntary, and ordered a new trial with respect to 16 (sixteen) of the robberies. The Supreme Court in a 5-2 Majority Decision held that the appeal should be allowed and that the convictions should be

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[47] *R v. Thompson*, (1893), Q.B. 12
[48] (2007) 1 S.C.R. 500, 2007

restored. The majority Justices held that S's statements to the police were properly admitted. Applying with some elucidation the principle enunciated in *Ibrahim*, the Supreme Court noted:

> At common law, statements made by an accused to a person in authority are inadmissible unless they are voluntary. Several factors are relevant to determining whether a statement is voluntary, including whether the police made any promises to or threatened the accused. A promise renders a statement involuntary only if the *quid pro quo* provides a strong enough inducement to raise a reasonable doubt about whether the will of the suspect was overborne. Accordingly, while, a *quid pro quo* is an important factor in establishing the existence of a threat or promise, it is not by itself determinative. It is the strength of the inducement, having regard to the particular individual and his or her circumstances that is to be considered in the overall contextual analysis into the voluntariness of the accuser's statement.

The Court in that case thereupon emphasized that where a trial judge considers all the relevant circumstances and properly applies the law, deference is owed to his or her determination on the voluntariness of the statement in issue.

44. Putting the issue of the admissibility of the impugned statements in their preliminary procedural perspective in this instant case, the Chamber finds as follows:

(i) that following his arrest on the 7th of March 2003 pursuant to the present Indictment, the First Accused was, in a custodial setting, interviewed on various dates between the 10th of March 2003 and the 15th of April 2003 by the Prosecution on eleven (11) occasions;

(ii) that on the 16th of April 2003, the Defence Office filed an Extremely Urgent and Confidential Request for an Order Regarding Issa Sesay, to wit, the temporary cessation of Prosecution questioning the First Accused,

(iii) that on the 30th of April 2003, Justice Thompson issued an order for temporary cessation of the questioning of the First Accused by the Prosecution;

(iv) that on the 30th of May 2003, Justice Thompson gave a decision holding that, on the basis of the materials before him, the First Accused 's waiver of his rights to counsel during the custodial interrogation was voluntary and informed;

(v) that on the 15th of June 2004, the Chamber issued a Decision granting a Defence Motion seeking an Order prohibiting the Prosecution from disclosing the statements to any party;

(vi) that the Prosecution did not introduce or attempt to introduce any statements made by the First Accused as part of their case;

(vii) that in the course of its cross-examination of the First Accused following his testimony on his own behalf, the Prosecution sought to have admitted for the purpose of cross-examination only the aforesaid statements obtained from the First Accused during the interviews conducted between the 10th of March 2003 and the 15th of April 2003 by the Prosecution.

B. Findings

45. Guided by the applicable principles of law as expounded in the foregoing paragraphs of this Decision, and predicated upon a contextual analysis of the facts and circumstances surrounding the taking of the impugned statements of the First Accused in the custodial setting of the Court, the Chamber finds as follows:

(i) that On the morning of 11th March 2003, the First Accused Sesay was taken from his cell by guards armed with pistols and truncheons. He was handcuffed and taken to an office where a black cloth was tied over his face, then taken to a vehicle and subsequently aboard a helicopter. While he was on the helicopter, the blindfold was removed but it was replaced when the helicopter was about to land. He was then taken via another vehicle to a "container room" where the blindfold and the handcuffs were both removed. Morissette was there.[1] John Berry subsequently joined him.[2]

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[1] Transcript of 19 June 2007, Issa Sesay, p. 45.

[2] Transcript of 19 June 2007, Issa Sesay, pp. 45-46. The allegation that the First Accused was blind folded by the Police Investigators is in fact, clearly corroborated in the records, Transcript of 20 June 2007, Claire Carlton Hancile, p. 42.

(ii) that the First Accused was interrogated by John Berry and Gilbert Morissette who are Special Court Prosecution Investigators. That in executing their mission in this respect, they were acting as and were in fact, persons in authority in the Prosecutor's Investigation Department of the Special Court.

(iii) that during the course of the interviews, the investigators, as persons in authority in the Special Court, did indicate to the First Accused that he would be called as a witness for the Prosecution if he co-operated with them in their investigations of the alleged crimes charged in the Indictment;

(iv) that the said Investigators told the First Accused that they had the authority to speak the Judges for leniency for the First Accused if he co-operated with them and that the Judges would accept whatever they, the Investigators told the Judges;

(v) that the co-operation of the First Accused in the investigation would also enable the Investigators to ask the Court for a reduced sentence for the First Accused;

(vi) that the Investigators also indicated that the Prosecution would take care of the family of the First Accused during the duration of his interrogation;

(vii) that Gilbert Morissette did request Protective Measures from the Witness and Victim Section ("WVS") for Mrs. Sesay and their children;

(viii) that Gilbert Morissette explicitly stated that the First Accused's family would be placed in protective custody and there would also be financial benefits and possible relocation of the family to another country;

C. Further Analysis Based on the Findings

46. In addition, the Chamber takes the view that the foregoing *quid pro quo* assurances could also have been understood by the Accused to mean that he might be able to avoid prosecution by being a witness for the Prosecution. On this issue, the Accused testified that he had been told that

if he co-operated, he would be a witness and not an accused.[51] We are of the opinion that the testimony given by Mr Morissette and Mr Berry does provide corroboration that the manner in which the Accused was approached and questioned created some confusion in his mind as to whether he was going to be able to escape prosecution by being a witness or at the least, gave him that hope as a reward for co-operating.[52] We take cognisance of the fact that the Investigators also repeatedly referred to the Accused throughout the interviews as a suspect, rather than as an accused, although he had been charged and they were very much aware of it.[53] This lends support to the inference that the Accused may have been further confused about his role during the first interview because up to that point, he had not yet been served with the Indictment.[54]

47. The Chamber further recalls that Mr Morissette also testified that his role throughout the interviewing process had been to talk to the Accused during the breaks and to ensure that he continued to cooperate by continually restating and reaffirming what the Prosecution could do for him in exchange for his cooperation.[55] Mr Morrisette deemed it necessary to keep repeating the *quid pro quo* assurances to the Accused because there had been a fear that he was going to stop cooperating.[56]

48. Taking the analysis a step further, the Chamber notes that there is no evidence as to what was said to the Accused during the breaks, the manner in which it was said, or the manner in

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[51] Transcript of 19 June 2007, Issa Hassan Sesay, p. 50, lines 1-15.

[52] Transcript of 12 June 2007, Gilbert Morissette, p 115, lines 11-18 and 120-126, p. 24 - 29; Transcript of 14 June 2007 John Berry, p. 85, line 17-19 and 97-100, lines 8-15.

[53] See *i.e.*, Exhibit B, Transcript of Interview of Issa Hassan Sesay, 10 March 2003, p. 28341, in which the investigator tells the Accused "'you are hereby advised that you are a suspected of [sic] being a participant involved in International War Crimes and/or Crimes Against Humanity...' So being a suspect, which is the reason why there was an arrest warrant issued for you, and that's why you are considered as a suspect, okey?" *See also* Exhibit U, Transcript of Interview of Issa Hassan Sesay, 14 March 2003, p. 28839:

"A. Yeah, but according to you I'm a suspect of – you know.

Q. Yes, you're a suspect, and that's why you're being advised of your rights. . ."

According to Rule 47(H)(ii) of the Rules, a "suspect" becomes an "accused" once the Indictment has been approved.

[54] Transcript of 19 June 2007, Issa Hassan Sesay, p. 51

[55] Transcript of 12 June 2007, Gilbert Morissette, p. 36, lines 1-12. See also *ibid*, p. 71, lines 20-22: "My role with Mr Sesay was to bond with him and, you know, encourage him and build confidence between him and I. That was my role."

[56] Transcript of 13 June 2007, Gilbert Morissette, p. 28, lines 24- p. 29, line 4.

which the Accused understood what was said.[57] This is as a result of the fact that no records were documented of the conversations that took place between the Accused and Mr Morissette during the breaks, nor was any account given on the record of what had transpired or said between them. It is the Chamber's clear recollection that Mr Berry testified that he had not known that Mr Morissette had been making *quid pro quo* assurances to the Accused during these breaks.[58]

49. In this regard, this Chamber would like to refer to the position taken by the ICTY Appeals Chamber in *Halilovic* when it was faced with a similar situation where a break in the interview of the Appellant was called for and a particular matter was discussed between the Prosecution and the Appellant which had not been recorded or accounted for on record.[59] In fact, during the break, a matter had been discussed which potentially affected the non-voluntariness of the interview hence the Prosecution should have re-commenced the interview with a full explanation of what had occurred during the break. The ICTY Appeals Chamber in this setting held that although there was no express requirement in its rules to this effect, it finds that after the break the interviews continued without any clarification on the record of what those alleged agreements were and the Trial Chamber placed no emphasis upon this break in the interview. The Appeals Chamber finds that the Trial Chamber erred in failing to do so.[60]

50. The Appeals Chamber further held that by not doing so, the statements made after the fact cannot remedy the failure of the Prosecution to ensure that at the time of the interview that the Appellant was labouring under a misapprehension that his cooperation would clear him of the charges against him, therefore the Prosecution's failure to avail itself of the opportunity to make it

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[57] A cursory inspection of the complete record of the interview transcripts indicates that over 35 [37] breaks were taken in various instances during the interviews, and the length of these breaks ranged from less than a minute to 106 minutes

[58] Transcript of 14 June 2007, John Berry, p. 103, lines 8-29- p.104, lines 1-10.

[59] *Prosecutor v. Sefer Halilovic* "Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table", para. 25.

[60] *Prosecutor v. Sefer Halilovic* "Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table", para. 40

abundantly clear in the record of interview affected the voluntariness of the statements which the Appellant had given to the Prosecution.[61]

51. This Trial Chamber finds this reasoning, logical, appropriate and persuasive, and accordingly adopts it in the instant case by concluding that this irregularity raises a serious and reasonable doubt as to the voluntariness of the Accused's statements recorded by the Prosecution whose role in this process borders on a semblance of arm twisting and holding out promises and inducements to the Accused in the course of the interrogation and particularly during the unrecorded conversations in the course of the break in order to sustain the Accused's co-operation with the Prosecution.

52. In light of foregoing analysis, the Chamber finds that the statements made by the Accused resulted from "fear of prejudice and the hope of advantage" held out to him both expressly and implicitly by persons in authority. The Chamber likewise, opines that at the material time, the advantage of protection and financial assistance for his family and the prejudice of remaining an Accused and being prosecuted were and must have been significant to the Accused at that material time of the interviews. Hence, We conclude that the statements were not made voluntarily. The inference which we note irresistible is that the Prosecution has not discharged its burden of proving beyond a reasonable doubt that the statements were made voluntarily. We so hold. However, the Chamber does not find that the conduct of the Investigators involved trickery rising to a level that "shocks the conscience of the community."

53. The Chamber observes that the Prosecution has relied heavily on the decisions of the ICTR Trial and Appeals Chamber in the *Ntahobali* decision in its argument that the statements were made voluntarily.[62] The Chamber is of the view, however, that the complaints which

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[61] *Ibid*, para 42, The Chamber notes in this regard domestic law authority cited by the Defence in which evidence was rejected as a result of the failure of the police to make contemporaneous notes of their interviews with the accused in those cases. Although in these cases there was legislation which specifically required the keeping of contemporaneous notes, the Chamber finds that the findings by those courts as to the importance of the keeping of contemporaneous notes to be equally relevant to proceedings before this Court. The courts in those cases held were that taking contemporaneous notes was necessary in order to ensure as far as possible that the suspect's remarks were accurately recorded and to protect the police from suggestions that they induced the suspects to confess by improper approaches or promises. See *R v Keenan* (1990) 90 Cr. App. R. 1, [1989] All 3 ER 598; *R v Canale* (1990) 91 Cr. App. R. 1.

[62] Prosecution Brief, paras 3-7

Ntahobali had raised were not analogous to the complaints raised by the Accused Sesay and that the *Ntahobali* decisions are not persuasive enough to sustain the Prosecution's argument that the statements were made voluntarily.[63]

54. On the specific issue of the circumstances surrounding the conduct of the interrogation, the Chamber recalls that in *Delalic*, the ICTY Trial Chamber held that statements induced by oppressive conduct that sapped the concentration and free will of the Accused through various acts and made it impossible for the Accused to think clearly, would be unreliable and consequently inadmissible.[64] Furthermore, in *Oickle*, the Supreme Court of Canada held that the absence of oppression was important in its own right and also in the context of the overall voluntariness analysis.[65]

55. Again, in *Delalic*, the said Trial Chamber held that the presence of oppression had to be determined on the facts of the particular case and that factors which would be relevant are the characteristics of the person making the statement, the duration and manner of the questioning and refreshments or periods of rests between questioning.[66] The said Trial Chamber held further that what may be oppressive to a child, old man or invalid or someone inexperienced in the

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[63] In the *Ntahobali* decision the ICTR Trial Chamber allowed evidence to be admitted despite an argument raised by the accused that he had been arrested in Kenya together with his family members, that his family members had only been released in exchange for huge sums of money paid to the Kenyan authorities, that he had only agreed to talk to the ICTR representatives because he had been under the impression that his father would be released in exchange for his cooperation and that he had had to sleep in handcuffs. He had also argued that trickery had been used in getting him talk to the ICTR investigators because they had introduced themselves as "ICTR representatives" and had not alerted him to the fact that they were working for the Prosecution (*Ntahobali* (TC), para 43). The Appeals Chamber upheld these findings (*Ntahobali* (TC), para 72 and *Ntahobali* (AC), paras 17-18). The Prosecution has argued that this case is on all fours with the *Ntahobali* decisions and the Chamber should find on the basis of this case that the Accused's statements were voluntary. The Trial Chamber noted that it had considered these arguments that the accused had raised in his affidavit and allowed him the opportunity to address these matters in court, but that the events of which the accused had complained had taken place prior to his arrest (*Ntahobali* TC, para 73). The Trial Chamber did not give any further consideration to the argument regarding his father. It did hold that at least one of the investigators had introduced himself to the Accused as such. The Appeals Chamber did not consider the argument by the Accused regarding his father. It can be concluded from this that it did not also did not view the Accused's allegations in this regard to be particularly relevant. In addition, the Chamber held that the Accused had been made to sleep in handcuffs in Kenya but that it had been explained to the Accused in the initial interviews that this was the national procedure in Kenya over which the Tribunal had no control (*Ntahobali* AC, para 17, n 56).

[64] *Delalic*, para 66

[65] *Oickle*, para 87

[66] *Ibid*, paras 66-67

administration of justice may not be oppressive to a mature person who is familiar with the judicial process.[67]

56. As regards the characteristics of the Accused, the Chamber is of the view that the characteristics of the Accused did not render the manner in which he was questioned oppressive. We find no merit in the submission that the fact that the Accused had spent the previous ten years fighting in a war in the bush and did not have direct experience of a judicial system or of a system or a state authority based on the rule of law and the protection of human rights relevant to its analysis of the circumstances in which the questioning occurred. By parity of reasoning, in *Delalic*, where the Defence relied on the cultural background of the suspect for the contention that he was unable to understand the scope and meaning of his right to counsel when it was read to him, the Trial Chamber held that:

> The Trial Chamber finds the cultural argument difficult to accept as a basis for considering the application of the relevant human rights provisions. The suspect had the facility of interpreting the rights involved in a language in which he understands. Hence, whether he was familiar with some other systems will not concern the new rights interpreted to him. If we were to accept the cultural argument, it would be tantamount to every person interpreting the rights read to him subject to his personal or contemporary cultural environment. The provision should be objectively construed.[68]

57. We, opine as well that the cultural background of the Accused is not relevant in determining whether the manner of questioning and the way in which the rights advisements were given to the Accused constituted oppressive circumstances and that the provision is to be construed objectively. This Chamber accordingly rejects the cultural argument advanced by Counsel for the First Accused.

58. As to the manner of questioning, the Chamber is also satisfied that the manner in which the questioning was carried out did not render it oppressive, being convinced, from the video recording that the Accused was questioned in comfortable surroundings, was fed and given water,

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[67] *Ibid* para 67

[68] *Delalic*, para 59. This was upheld by the Appeals Chamber (*Delalic* (Appeals Chamber), para. 553)

was granted breaks throughout the interviews, and that the Investigators in the process, spoke professionally and politely to him. We hold that, except during the first interview for which no video recording is available, the Accused's demeanour also indicated that he was at ease during the interviews and the conduct of the investigators was not oppressive.

59. The Chamber is also of the view that while the Accused was suffering from several medical ailments during the relevant period, these were not sufficiently grave to render the manner of questioning oppressive and that the conditions under which the Accused was detained at Bonthe Island were adequate.

60. Accordingly, the Chamber is satisfied that the interviews did not take place under coercive or oppressive circumstances. It is our view, however that the statements were a product of improper inducements made by the investigators emanating from the implanted belief in the mind of the Accused that he was to be a witness and not an accused. Significantly, We are equally strongly of the view that, because the Accused was persuaded to give self-incriminating statements while under this misapprehension, this amounts to a breach of the Accused's right not to be compelled to testify against himself and his right to silence under Article 14(4)(g) of the Statute and Rule 42(A)(iii) of the Rules.

61. On the issue whether all the statements were obtained in violation of the right of the Accused to Counsel under Article 17(4)(d) of the Statute and whether the waiver in relation thereto was informed and voluntary, the Chamber recalls that Rule 63 provides that once an accused person has requested the assistance of Counsel, questioning should immediately cease and shall only resume when the Accused's Counsel is present. Rule 42 provides similarly with regard to a suspect. The records show that the Accused requested Counsel in the request form submitted on the 13th of March 2003[69], during his initial appearance on the 15th of March 2003[70] and in a letter on the 24th of March 2003[71], which was signed and witnessed by Mr Berry.

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[69] Exhibit A21, Request for Legal Assistance, 13 March 2003.
[70] Exhibit A16, Transcript of Initial Appearance of Issa Hassan Sesay held before Judge Benjamin Muntanga Itoe on Saturday, 15 March 2003, p. 55, lines 15-18.
[71] Exhibit A4, Letter from Issa Sesay dated 24 March 2003.

62. We again note that in the *Delalic* Case, it was argued that because of the Accused's different cultural background he was unable to understand the scope and meaning of the right to Counsel when his rights were read to him.[72] To this end, it was argued that the investigators were under an obligation to explain to him what was involved in the right and its waiver.[73] The Trial Chamber rejected this argument, and held that if it were to accept the cultural argument it would mean that every person had the right to interpret the rights read to him subject to his personal or contemporary cultural environment. The right was to be objectively construed.[74] It further held that there was only a duty to interpret or to read to the suspect the rights in a language which he understood.[75] The Appeals Chamber endorsed this reasoning.[76]

63. Furthermore, in *Bagosora* Case, the ICTR Trial Chamber held that in order for a waiver of the right to Counsel to be considered voluntary, an accused must be informed that the right includes the right to the prompt assistance of Counsel, prior to and during questioning.[77] The said Trial Chamber held further that the right and the practical mechanism for its exercise must be communicated in a manner that is reasonably understandable to the accused and not "simply by some incantation which a detainee may not understand."[78] The Chamber reasoned that, generally, a suspect may be taken to comprehend what a reasonable person would understand; but where there are indications that a witness is confused steps must be taken to ensure that the suspect does understand the nature of his or her rights.[79]

64. Applying these propositions, this Chamber is of the view that in the circumstances of this case, the investigators had no obligation to go beyond reading the Accused his rights in a language that he understood. As stated earlier, We share the view of the Trial Chamber in *Delalic* that the cultural background of an Accused is not a relevant factor in the application of the voluntariness

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[72] *Delalic*, para.58
[73] *Ibid* 58
[74] *Ibid* para. 59
[75] *Ibid* para. 58
[76] *Delalic* Appeals Chamber, paras.553
[77] *Bagosora*, "Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C), (TC), 14 October 2004," para. 17
[78] *Bagosora*, para. 17
[79] *Ibid* para. 17

test in applications of this nature.[80] In the context of the instant application, the Chamber is of the opinion that the First Accused showed sufficient sophistication and intelligence to be able to understand the rights as they were read to him.[81]

65. Based on the reasoning in paragraphs 61-64, the Chamber, is of the view that, having explained to the Accused his right to Counsel, his right to waive the same on each occasion the waiver was signed, the investigators fulfilled their obligations under Articles 42 and 63. The Chamber is therefore satisfied that the waiver of the Accused's right to Counsel was voluntary and informed, and there was no breach of the aforesaid right to Counsel with respect to the statements.

V. CONCLUSION

66. Predicated upon the several considerations herein, the analysis of both law and facts, and our significant findings the Chamber is of the opinion and so holds, that the statements taken from the First Accused during the interviews referred to earlier in a custodial setting were involuntary having been so obtained out of "fear of prejudice and the hope of advantage" especially that the First Accused would be a witness and not an accused person.

67 The Trial Chamber also, find, as a matter of law, that the waiver of his rights on the part of the First Accused to the presence of Counsel at the said interviews was informed and voluntary.

VI. DISPOSITION

68. **THE CHAMBER ORDERS**, pursuant to Rule 95, that all the confessional statements given by the Accused during his interviews with the Prosecution Investigators are not admissible and accordingly excluded from evidence even for the limited purpose of cross-examining the First Accused, as their admission would bring the administration of justice into disrepute, as they were

[80] *Supra*, para 43
[81] *Ibid.*

obtained in violation of Article 17(4)(a), (d) and (g) of the Statute and Rules 42 and 63 of the Rules.

Hon. Justice Benjamin Mutanga Itoe appends to the present Decision a Separate Concurring and Partially Dissenting Opinion, with respect to the voluntariness of the Waiver of the Accused's Right to Counsel.

Done at Freetown, Sierra Leone, this 30th day of June 2008

Hon. Justice Pierre Boutet

Hon. Justice Benjamin Mutanga Itoe
Presiding Judge
Trial Chamber I

Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

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TRIAL CHAMBER I

Before: Hon. Justice Benjamin Mutanga Itoe, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Pierre Boutet

Registrar: Mr. Herman von Hebel, Registrar

Date: 30th of June 2008

PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

Public Document

SEPARATE CONCURRING AND PARTIALLY DISSENTING OPINION OF HON. JUSTICE BENJAMIN MUTANGA ITOE ON THE DECISION ON THE ADMISSIBILITY OF CERTAIN PRIOR STATEMENTS OF THE ACCUSED GIVEN TO THE PROSECUTION

Office of the Prosecutor:
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Wayne Jordash
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Defence Counsel for Morris Kallon:
Charles Taku
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Scott Martin

SEPARATE CONCURRING AND PARTIALLY DISSENTING OPINION OF HON. JUSTICE BENJAMIN MUTANGA ITOE ON THE DECISION ON THE ADMISSIBILITY OF CERTAIN PRIOR STATEMENTS GIVEN BY SESAY TO THE PROSECUITON

1 This Separate Concurring and Partially Dissenting Opinion relates to the Majority Decision of the 5th of July. 2007, on the Sesay Motion on the Admissibility of Alleged Confessional Statements obtained by Investigators of the Office of the Prosecutor from the First Accused, Issa Hassan Sesay.

2. I will not relate here, the entire facts of the Motion because they are already detailed and laid out in the Majority Decision, to which I am concurring on the rejection for want of voluntariness of the alleged Sesay confessional statements.

3. I recall here however, that there were two main issues at stake in this Voir Dire. The Sesay Defence contested the admissibility of the alleged confessional statements on an objection formulated by Learned Lead Counsel for the Sesay Defence Team, Mr Wayne Jordash, which Learned Counsel for the Prosecution, Mr Peter Harrison, sought to use to cross examine Mr Sesay in order to discredit his testimony. The Sesay Defence Team also and in addition, contested the admissibility and the legal validity of the Sesay Waiver of his Right to Counsel which he signed, under the provisions of Rule 42(B) of the Rules of Procedure and Evidence.

4. The validity of these documents which were signed by the First Accused was contested by Learned Counsel, Mr Wayne Jordash. He contested the validity and admissibility of the alleged confessional statements on the grounds that they were not voluntarily made, and that of the Waivers as well on the grounds that they were also involuntarily obtained.

5 On the 5th of July, 2007, we issued Oral Decision on these two categories of documents, namely, the alleged confessions made by Sesay and the alleged waivers also signed by him.

6 As far as the alleged confessional statements are concerned, The Chamber, unanimous in its decision, held that taking all the facts and circumstances as gathered from the totality of the evidence into consideration, and the applicable law and jurisprudence in

situations of this nature, the alleged statements obtained from the Accused during the interviews by the Prosecution were not voluntary in that they were obtained by fear of prejudice and hope of advantage held out by persons in authority, the Prosecution having failed to discharge the burden of proving beyond a reasonable doubt, under the provisions of Rule 92 as read conjunctively with Rules 43 and 63 of the Rules of Procedure and Evidence, that they were obtained voluntarily. Accordingly, the alleged confessional statements were declared inadmissible by a unanimous decision of this Chamber.

7. In relation, however, to the Waiver by the First Accused of his Right to the presence of his Counsel during his interrogation the Chamber Majority Decision has this to say:

> Based on the reasoning in paragraphs 61-64:
>
> The Chamber, (The Honourable Presiding Justice Itoe dissenting on the issue of the waiver of the Accused's Right to Counsel) we are of the view that having explained to the Accused his right to Counsel, his right to waive the same on each occasion the waiver was signed, the Investigators fulfilled their obligations under Articles 42 and 63. The Chamber is therefore satisfied that the waiver of the Accused's right to Counsel was voluntary and informed, and that there was no breach of the aforesaid right to counsel with respect to the statements.[1]

8 It is on the judicial stand taken by the Chamber Majority (Hon. Justices Bankole Thompson and Pierre Boutet) on the Waiver which they consider voluntary and informed, that I differ With Due Respect, and The Deserved Reverence to My Eminent Colleagues, and accordingly dissent. I will therefore, in the following discourse, articulate my Dissent.

[1] *Prosecutor v. Sesay, Kallon and Gbao.* SCSL-04-15-T, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, 30th June, 2008 at para. 65.

THE BASIC FACTS

9. In a conversation he testified he had had earlier with Ex-President Kabbah, Sesay said that the former had told him that a Court was coming to the Country but that he, Kabbah and Sesay would not be tried by that Court. This, assertion of course, in my opinion, and specifically uncontradicted as it stands on the record, sounded very reassuring, coming from a person of that standing, namely, The Head of State himself.[2]

ISSA SESAY'S ARREST

10. The First Accused testified that after the peace process, the RUF was transformed into a political party, the RUFP. They mobilised funds and paid an advance sum of $60,000 US to a certain individual residing in England, to purchase his building which was to serve as the RUF Headquarters.

11. Since they no longer desired to pursue the purchase of that property, they requested the Britain-based owner, whose name he did not mention, to refund to them, the advance payment they had already made to him. Their request was not materialising. Sesay then reported the matter to the Ombudsman and sought his intervention to secure the refund.[3]

12. The Ombudsman later told Sesay that there was not much he could do to assist. He directed Sesay to the CID Boss, Mr Daboh. Sesay saw the CID Boss who promised him he was going to do something. After some time, the CID Boss sent for Sesay to come and pick up the money.

13. Naturally happy and in the excitement of the refund they were expecting all that while from their vendor, Sesay asked Kallon, the Second Accused, to accompany him to the CID Headquarters to collect their money. On their arrival at the CID Headquarters, they met very many people, apparently, policemen in civilian attire.

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[2] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Trial Transcript of 19 June 2007, Issa Sesay, pp. 31-32.
[3] *Ibid* p. 25

14. As they entered Mr Daboh's office, they were, to Sesay's greatest surprise, shock, and astonishment, arrested and cuffed for crimes, as they were told, that they had committed during the war. Sesay, confused, surprised and bewildered, burst into tears crying and saying: "Is this the peace I signed for?"[4]

15. Sesay testified on oath. He said he contributed to the Peace and Disarmament process and that his cooperation with the Heads of State of West African Region was what enhanced the disarmament of the RUF fighters and brought peace to this Country. He states that Sankoh never forgave him for the Peace and Disarmament initiatives that he took because wanted him to make his release from Prison, a condition for accepting to participate in the Peace and Disarmament.

16. Viewed from this perspective, one who should, in these circumstances, easily understand human frailties which are not uncommon and do not spare even the most revered and powerful figures of the planet, would indeed figure the situation when Sesay tells The Chamber of his outburst into tears in the dramatic situation and change of status, from a free citizen to a detainee, coupled with what he was going through and which for him, as unexpected as it was, was shocking and distressing.

17. He was immediately driven in a sealed vehicle, moved to another detention facility, and thereafter, transferred to the custody of the Prosecutor's Investigators of the Special Court where he was immediately subjected to questioning by Prosecution Investigators, Messers John Berry and Gilbert Morrissette, at a time when he had just unexpectedly and suddenly found himself in a custodial setting of confinement and subjugation.

18. Sesay testifies that while in that situation in a cell for about 5 minutes, he was taken to see John Berry and Joseph Saffa[5] and that John Berry told him that he was in "very serious trouble in which you have to spend the rest of your life in

[4] *Ibid.* p. 35
[5] *Ibid.* p 38.

prison."[6] He further testified that Saffa told him the Special Court could sentence people to death and that Sesay should "listen to Berry and accept what he's telling you."[7] All this was said to him on the same day and a few minutes after he was, dramatically, I would say, arrested. Thereafter he was transferred to the detention facility in Bonthe.

19. It is clear from the above again, specifically uncontradicted as it is, that Sesay thereforth was a battered and subjugated man who was in a custodial setting, lived with an overborne will and open to inducements and unlikely to resist the suggestions of the Interrogators that were apparently but not really friendly.

20. He was held and flown by helicopter to Freetown for interrogation at the Prosecutor's Office by the Prosecution Investigators who, in that process, obtained from him, those confessional statements which We have unanimously ruled as inadmissible for want of the important ingredient of voluntariness on the part of the alleged maker of the said statements to make them.

21. This Chamber, I would like to emphasise, could not hold otherwise because given the overall circumstances surrounding his arrest and detention, as well as the inducingly seductive gestures and comportment towards him by his Interviewers, Gilbert Morrissette and John Berry, admitting those alleged confessional statements would have amounted to a breach of the principle of presumption of innocence, as well as a violation of the rule against self incrimination by a suspect.

A WAIVER OF HIS RIGHT TO COUNSEL

21. It is indeed the lack of unanimity amongst us on Our orientation on this subject, as I mentioned earlier, that I am issuing this Partially Dissenting Opinion.

22. In this regard it is pertinent to mention, for purposes of this Opinion, that it is a fundamental principle of Human Rights and criminal law, that a suspect under custody is entitled to the services of a lawyer during interrogations so that he

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[6] *Ibid.*
[7] *Ibid.*

does not make a statement when he should not or that even if he has to, he must be afforded the right to be properly advised and guided by a professionally trained person, in this case, a lawyer, preferably, one in practice.

23. This is considered necessary because of the importance which the judicial process attaches to various rights and guarantees that suspects and Accused Persons enjoy from various legal instruments that regulate the administration of justice. These include, *inter alia*, the presumption of innocence, the right against self-incrimination, the right to be represented by Counsel of his choice, and the opportunity which must be given to him to defend himself.

24. I am of the opinion that if he has this right, not just to a Counsel but to a Counsel of his choice to assist or defend him, it is because of the tacit admission and recognition of the fact that those who are not of the legal profession do not have the right and proper understanding of their legal rights and that consequently, there is a need for them to be protected by assistance from professionally competent people to participate in ensuring that their statutory and other legal rights are respected by those probing them on criminal allegations levied against them.

25. The volunteering of a statement, be it confessional or not, is a very important preliminary step in the documentation of elements that enable the Investigator, and eventually the Prosecutor, to determine whether or not, a prima facie case has been made at that stage, against a suspect to the extent that it supports a decision to institute criminal proceedings against him. It should be conceded that where the statement taken is confessional in nature, the task of the Investigators and also of the Prosecutor is, *prima facie*, much easier than when the statement is a complete rejection or repudiation of the allegations made against him, or where he exercises his discretion to say nothing in accordance with his rights under Rule 42(A)(iii) of the Rules.

26. In the ordinary course of things, and this is only normal, the Investigator or the Prosecutor would be happy to have a confessional statement. It makes his task easier. In view of the fact that a confessional statement touches on the rights of the

Suspect against self-incrimination and not to confess guilt, the judicial process has to be, and is usually very vigilant and scrutinous, to ensure, as far as the statements are concerned, that all pre-recording procedures and formalities that should be fulfilled before a statement especially where it turns out to be confessional, were fulfilled. It must not only be demonstrated that it was voluntarily made by the Accused, but also that the legal and regulatory mechanisms and procedures that are laid down to ensure the transparency and credibility of the process, have been scrupulously adhered to.

SESAY'S TESTIMONY ON THE WAIVER

27. As far as the Waiver of his right to Counsel is concerned, Sesay testified that when he was given a Waiver, he was told "Speak with us. We'll read a document to you. Just answer 'yes.'"[8] He testified that at the time, he did not know what a Waiver was nor what Counsel was; he testified that he believed that when the interviewers spoke about a Counsel, they meant Consul.[9]

28. Sesay further testified that Mr White told him he should not mind the documents that were read to him and that they were just procedures.[10] The Prosecution Investigators in their testimony, affirm that they explained the Waiver to Sesay. Sesay denies this.

29. The question to be asked is whether from the totality of the evidence adduced, the Prosecution has proven, to an acceptable threshold, that the waiver so obtained from the suspect, now the First Accused, Sesay, was voluntarily given as required by law. It should be stated here that before concluding on the element of voluntariness, it must be demonstrated by the Prosecution that the signatory had a clear understanding of its implications.

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[8] Ibid. p. 41-42
[9] Ibid. p. 42
[10] Ibid. p. 50

REGUALTORY AND LEGAL PROCEDURES TO BE IMPLEMENTED

30. It is my considered opinion that these protections and guarantees are accorded to Accused Persons because there is some certainty in the minds of the authors of these legal instruments, that Accused Persons who do not have a legal background, may be disadvantaged in volunteering any statement after their arrests, particularly in dramatic circumstances such as this, if they are not assisted by a Counsel.

31. In fact, in my opinion, what the due process is ensuring and enforcing, even at the investigatory stage of the proceedings, is to prevent and preempt the Investigator or the Prosecutor violating, at this level, the same principle of *nemo judex in sua causa* which accords him, the Accuser, the quasi judicial privilege of being involved in the recording of a confession that supports, buttresses, and helps the case he is building up and making against the suspect.

32. In order to avoid the elements of suspicion and the shadow of doubt that beclouds the transparency of the process and the critical element of the voluntariness of a confession, and equally that which surrounds the investigator who obtains a confession from the Accused, the Statute and the Rules provide that he be assisted by a Counsel of his choice in the course of the recording of his statements and the Waiver of his right to Counsel. Even though it is conceded that he can, and that he may in fact have waived those rights, it must be demonstrated by the Investigator that this was done within the parameters of the context and the spirit of what the law expects to be done in such circumstances.

APPLICABLE LAW

Presumption of Innocence

33. The bedrock, ancient, and cardinal principle of criminal law which has survived all times and ages, and which remains as sacrosanct as ever, is that an accused is presumed innocent until his guilt is established beyond a reasonable doubt before a lawfully constituted Court, and furthermore, that the burden of establishing this guilt is at all times, borne by the Prosecution who Mr Berry and Mr Morrisette represent in this case.

34. These principles as we know, are entrenched in Human Rights Conventions and in Article 17(3) of the Statute of this Court which provides: "The Accused shall be presumed innocent until proved guilty according to the provisions of the present Statute." However, in its ordinary meaning and in its application, This right only becomes rebuttable where the Prosecution succeeds in adducing incontrovertible evidence which establishes his guilt beyond all reasonable doubt.

35. In doing so however, the Prosecution should not employ methods or tactics that either violate the law or are contrary to the guaranteed tights of the Accused and which should be respected at all times.

36. In fact, the presumption of innocence is inextricably linked with the right and principle against self-incrimination, that is, of being constrained, against the Accused's will, to make a confessional statement, or to sign waivers which deprive him of the statutory entitlements of a lawyer not only in the course of an investigation, but also in the proceedings if ever they are instituted after the investigation.

37. Rule 42(B) of the Rules of Procedure and Evidence stipulates as follows:

> 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.** (Emphasis added).

38. Rule 63(A) of the Rules provides as follows:

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

39. It should be noted, and it is indeed clear and unambiguous that these provisions are imperatively mandatory in their context on the subject of Waivers of suspects' right to Counsel.

40. They emphasize the imperativeness of the necessity for the waiver to be voluntarily signed by the suspect. Furthermore, they emphasize the fact that even if he had earlier signed a Waiver, where the suspect subsequently expresses his desire to have Counsel, questioning shall cease and shall only resume when the suspect has obtained or has been assigned Counsel.

41. This emphasis on voluntariness and the mandatory prohibition for investigators to stop questioning the suspect when he indicates that he wants to be assisted by Counsel, and that interrogation only resumes when he has obtained or has been assigned Counsel, highlights and emphasizes the pre-eminently important role that the due process attaches to the necessity for a Counsel to be present during his interrogation to assist the suspect.

42. I say this because we are in a war crimes setting where the allegations and offences made against the suspect are so grave and serious that Counsel, of necessity, should be around to assist the detained and isolated suspect.

43. In light of these provisions, it is clear that for the waiver to be deemed to have been voluntarily given, the Prosecution must show and prove that it fully and comprehensively explained not only the nature of the document but also the consequences that go with its signature by the suspect. It is not just enough to rattle through the textual reading of the waiver but to really make a comprehensive explanation of its contents and implications if signing of the waiver by the suspect has to be considered voluntary and informed.

44. In this regard and in the *Bagosora* case, the Trial Chamber of the ICTR held that in order for a waiver of the right to Counsel to be considered voluntary, an accused must be informed that the right includes the right to the prompt assistance of Counsel, prior to and during questioning.[11] The said Trial Chamber held further that the right and the practical mechanism for its exercise must be communicated in a manner that is reasonably understandable to the accused and not "**simply by some incantation which a detainee may not understand**."[12]

SUBMISSION BY THE PROSECUTION

45. It is the Prosecution's submission that there has been no breach of Rules 43 and 62 and that the presumption in Rule 92 that the Sesay confessions are free and voluntary insofar as these Rules were complied with, therefore applies. In effect, it is the Prosecution's submission that the confessions shall be presumed to have been free and voluntary.

46. This submission, I observe, is based on the erroneous assumption by the Prosecution that there has been no breach of the provisions of Rules 43 and 63 and furthermore, on the literal interpretation of the provisions of Rules 42, 43, 63 and 92 of the Rules which, in all circumstances relating to issues of this nature, should be read together and interpreted in the light of each other and in their respective contexts.

47. It is my view that a reliance on the literal interpretation of those Rules and the Prosecution's option to base it on their ordinary meaning, does violence to the necessary intendment of the said Rules and could thereby occasion a serious miscarriage of justice.

48. I take the view that these Rules should be interpreted and applied in a manner that conforms with and produces the results for which they are intended. The results are that Rule 92 of the Rules will apply only, and only if there has been

[11] *Bagosora*, "Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C), (TC), 14 October 2004," para. 17
[12] *Ibid.*

a strict compliance by the Prosecution Investigators, first of all, of the clear and unambiguous provisions of Rules 42, 43 and 63 of the Rules of Procedure and Evidence.

49. This viewpoint is buttressed by the ordinary wording and meaning of Rule 92 which only provides for a presumption of regularity of the legal validity of the said statements, *a fortiori*, their admissibility, but subjects their admissibility to the question as to whether they were made freely and voluntarily in compliance with the provisions of Rule 43 and Rule 63 of the Rules. I am of the opinion, in light of the above analysis, that such a presumption, from the wording of Rule 92, is not as the Prosecution seems to suggest, absolute.

50. Indeed, it is rebuttable in that it is open to challenges and an eventual negation by an Accused Person if he is able, as he has done in this case, to prove and to establish that the provisions of Rules 43 and 63, were not complied with by the Prosecution's Investigators in the process of recording the alleged confessional statements which The Chamber has unanimously ruled out.

51. It is indeed my view that for the Rules to produce the intended results, they should not be given an interpretation that will not give rise to an absurdity. In this regard, coupled with the Chamber's findings on the circumstances surrounding the interviews which the Accused had with the Prosecution's Investigators, it is clear that the said interviews were conducted under the control and direction of the Prosecutor in the preparation of the case he sought at that time, and is still seeking to establish against the First Accused.

CONCLUSION

52. In the light of the above, given the situation and the prevalent circumstances and interactions during the recording of the impugned statements which the Chamber has unanimously held were illegally obtained by the Prosecution Investigators from the First Accused, it is, to my mind, erroneous to conclude in another breadth, that the Accused's Waivers of his right to Counsel, were voluntary and informed.

53. I say this because the statements that we have held to be inadmissible on the grounds that they were involuntary and the Waiver of his right to Counsel whose voluntariness the Accused also challenged, are inextricably and inseparably connected contemporaneous documents in which one, the Waiver, was a capital, fundamental and preliminary legal requisite and prelude to the other, to wit, the statements which we have declared inadmissible because, as we have unanimously found, they were involuntarily made by the First Accused.

54. The waiver, given the particular circumstances of this case, is a strategic document on which the Prosecution seeks to rely to establish the regularity of the process of recording, and the voluntariness of the rejected statements. It is supposed to buttress the claim by the Prosecution that those statements were voluntarily made and subscribed to by the Accused, a fact which the defence, vigorously contested, not only as regards the circumstances surrounding the recording of the statements, but also as to those which relate to his signing and subscribing to the Waiver of his right to Counsel.

55. It is my considered opinion that the Waiver of the right to Counsel by the First Accused which the Majority Judgment of My Distinguished Colleagues has held was voluntarily made and subscribed to, was also, as The Chamber concluded in relation to his excluded statements, as involuntarily subscribed to as the said statements themselves which we have excluded from evidence on the grounds that their admission would, as provided for under the provisions of Rule 95 of the

Rules of Procedure and Evidence, bring the administration of justice into serious disrepute.

56. In the same vein, and given the circumstances and surrounding atmosphere and environment under which the Waiver of the right to Counsel was obtained from the First Accused by the Prosecution Investigators, it is my opinion and finding that such a vital document which was obtained immediately after his traumatising arrest and detention, and which was a compulsory legal prelude and precondition to the recording of the rejected statements, like the impugned statements, was neither informed nor was it voluntarily given or subscribed to.

57. In these circumstances, I am of the opinion that accepting the validity of the Waiver which I consider as having been involuntarily and improperly obtained as I have found, would be gravely and legally erroneous and would equally bring the administration of justice into serious disrepute in violation of the provisions of Rule 95 of the Rules of Procedure and Evidence, as We unanimously held in relation to the impugned alleged confessional statements.

58. I accordingly, and for these reasons, decide that the said First Accused's waiver of his right to Counsel was uninformed and involuntarily subscribed to and therefore inadmissible for use for whatever purpose. In my view, the Prosecution's failure to prove beyond reasonable doubt, the essential ingredient of voluntariness before getting him to sign the Waivers or that they strictly complied with the provisions of Rules 42, 43, 63 and 92 of the Rules of Procedure and Evidence, constrains me to find, and to hold, that the First Accused's Waiver of his right to Counsel is, like his confessional statements, inadmissible and therefore, excluded from the records in conformity with the spirit of the provisions of Rule 95 of the said Rules.

59. ACCORDINGLY, I declare invalid, the Waivers allegedly signed by the First Accused and hold that they cannot be used for any purposes for which they were intended to be used, in This Trial.

60. FURTHERMORE, I again confirm and concur with the contents and motivation of The Chamber's Unanimous Decision on the alleged confessional statements.

Done in Freetown this 30th Day of June, 2008

Hon. Justice Benjamin Mutanga Itoe, Presiding Judge