



Case No. SCSL-2004-14-T
THE PROSECUTOR OF
THE SPECIAL COURT
V.
SAM HINGA NORMAN
MOINI NA FOFANA
ALLIEU KONDEWA

WEDNESDAY, 11 JANUARY 2006
10.04 A.M.
PRE-DEFENCE CONFERENCE

TRIAL CHAMBER I

Before the Judges:	Bankole Thompson, Presiding
For Chambers:	Ms Roza Salibekova Mr Simon Meisenberg Mr Matteo Crippa
For the Prosecution:	Mr James C Johnson Ms Nina Jorgensen Mr Joseph Kamara Mr Marco Bundi Ms Bianca Suci u (Case manager) Ms Lynn Hintz (intern)
For the Principal Defender:	Mr Vincent Nmeielle Mr Lansana Dumbuya
For the accused Sam Hinga Norman:	Dr Bu-Buakei Jabbi
For the accused Moini na Fofana:	Mr Arrow Bockarie Mr Andrew Ianuzzi
For the accused Allieu Kondewa:	Mr Charles Margai Mr Yada Williams Mr Ansu Lansana

1 Wednesday, 11 January 2006

2 [Pre-defence conference]

3 [Open Session]

4 [The accused not present]

09:59:43 5 [Upon commencing at 10.04 a.m.]

6 PRESIDING JUDGE: Good morning, learned counsel. I call to
7 order this pre-defence conference for the CDF trial which is
8 being conducted in public session, there being no order for a
9 closed session. Who appears for the parties? For the
10 Prosecution?

11 MR KAMARA: Your Honour, Jim Johnson, Nina Jorgensen,
12 Joseph Kamara and Marco Bundi.

13 PRESIDING JUDGE: Thank you. Who appears for the first
14 accused?

10:06:00 15 MR JABBI: Bu-Buakei Jabbi, My Lord, for the first accused.

16 PRESIDING JUDGE: Thank you. Who appears for the second
17 accused?

18 MR BOCKARIE: For the second accused, My Lord, Arrow John
19 Bockarie and Andy Ianuzzi.

10:06:15 20 PRESIDING JUDGE: For the third accused?

21 MR MARGAI: May it please, Your Honour. CF Margai,
22 YH Williams and AB Lansana for the third.

23 PRESIDING JUDGE: Thank you. For the principal defender's
24 office?

10:06:34 25 MR NMEHIELLE: Yes, Your Honour, just to say that
26 Vincent Nmehielle, Principal Defender, with Mr Dumbuya, who is
27 duty counsel. Your Honour, I know the seriousness of the
28 occasion, but that would not prevent me from wishing the
29 Honourable Bench a happy new year.

1 PRESIDING JUDGE: Appreciated. This proceeding, as we are
2 all aware, is a pre-defence conference for the CDF trial. The
3 statutory authority for convening a pre-defence conference is
4 Rule 73 ter of the Rules of Procedure and Evidence of the Special
10:07:13 5 Court.

6 The relevant portion of the Rule is as follows, and I
7 quote:

8 "(A) The Trial Chamber or a Judge designated from among
9 its members may hold a conference prior to the commencement
10:07:35 10 by the Defence of its case.

11 (B) At that conference, the Trial Chamber or a
12 Judge designated from among its members may order that the
13 Defence, before the commencement of its case but after the
14 close of the case for the Prosecution, file the following:

- 10:07:59 15 (i) Admissions by the parties and a statement of
16 other matters which are not in dispute;
17 (ii) A statement of contested matters of fact and
18 law;
19 (iii) A list of witnesses the Defence intends to call
10:08:11 20 with:

- 21 (A) The name or pseudonym of each witness;
22 (B) A summary of the facts on which each
23 witness will testify;
24 (C) The points in the indictment as to which
10:08:30 25 each witness will testify; and
26 (D) The estimated length of time required for
27 each witness;

- 28 (iv) A list of exhibits the Defence intends to offer
29 in its case, stating where possible whether or

1 not the Prosecution has any objection as to
2 authenticity. The Trial Chamber or the said
3 Judge may order the Defence to provide the
4 Trial Chamber and the Prosecutor with copies of
10:09:04 5 the written statements of each witness whom the
6 Defence intends to call to testify."

7 Well, learned counsel, before we proceed with the substance
8 of this particular proceeding, let me inform the parties that our
9 work-load for this proceeding will cover essentially the
10:09:20 10 following items:

- 11 1. Review of defence filings;
- 12 2. Number of witnesses;
- 13 3. Length of the defence case;
- 14 4. Statement of agreed and contested facts and issues; and
- 10:09:59 15 5. Any other relevant or salient matters.

16 Before addressing the task in hand, let me begin this
17 proceeding with some pertinent preliminary observations. They
18 are as follows:

19 1. I approach this pre-defence conference with a
10:10:28 20 heightened sense of judicial sensitivity to the reality that we
21 are about to commence a very important phase of the CDF trial,
22 namely, the case for the Defence. I do believe that this degree
23 of heightened judicial sensitivity is shared by the two other
24 honourable and learned colleagues of this Trial Chamber.

10:11:05 25 Because of this heightened judicial awareness of the
26 importance of this phase of the trial, namely, the case for the
27 Defence, I reckon that there is a reciprocal sense of
28 professional commitment on the part of both the Prosecution and
29 the Defence to ensure that nothing inhibits the realisation of

1 our collective supreme obligation, namely, the fair and
2 expeditious trial of the accused persons.

3 A third remark. I would therefore exalt counsel on both
4 sides to direct their forensic methodologies and strategies
10:11:49 5 towards achieving the objective of a fair and expeditious trial
6 of the accused persons in a determined effort to ascertain the
7 truth insofar as the issues in contention between the adversarial
8 parties are concerned.

9 4. Specifically, therefore, it seems to me a pre-eminent
10:12:15 10 obligation on the parties to comply strictly, fully,
11 substantially, as appropriate, with the founding instruments
12 regulating the judicial processes of the Special Court,
13 especially the Rules of Procedure and Evidence.

14 5. In summary let us not just make a commitment to the
10:12:42 15 rhetoric of a fair and expeditious trial, but to the reality of
16 it.

17 With these preliminary remarks, let me now proceed to
18 outline the specific purpose of the instant proceeding.

19 As already noted, it is being convened and conducted
10:13:04 20 generally pursuant to Rule 73 ter of our Rules. Specifically, it
21 has been convened in pursuance of this Chamber's order concerning
22 the preparation and the presentation of the defence case, dated
23 21st October 2005, for the following purposes:

24 (A) To consider the compliance of the Defence with the
10:13:35 25 Chamber's aforesaid order on filings.

26 (B) To review the defence witness lists and to settle the
27 number of witnesses each defence team is entitled to call.

28 (C) To determine the time to be allotted to each defence
29 team to present its case.

1 (D) To ascertain the state of the parties' submissions on
2 agreed facts and matters which do not fall within the contested
3 terrain of issues.

4 And in accordance with the Chamber's order on cooperation
10:14:19 5 between the parties dated 3rd November 2004, to require
6 submission of status reports on agreed co-operation on this
7 aspect of the case to the Chamber on the last day of each trial
8 session.

9 (E) To explore and resolve any other matters considered
10:14:41 10 appropriate by the Chamber for the purpose of facilitating the
11 expeditious presentation of each defence case. We will now begin
12 with review of defence filings.

13 Let me begin by observing that the procedural history so
14 far on this issue of defence filings is as follows:

10:15:12 15 1. On 21st October 2005, the Trial Chamber ordered that
16 the defence teams for first, second and third accused file
17 certain materials concerning the preparation and presentation of
18 their case.

19 2. On 27th October 2005, a first status conference was
10:15:37 20 held to consider the preparation and presentation of the defence
21 case. At that conference, as evidenced by the transcripts for
22 that conference, the Chamber discussed the nature and purpose of
23 the materials which were the subject matter of the Chamber's
24 order of 21st October 2005 and invited responses from the
10:16:07 25 parties.

26 3. On 17th November 2005, the Trial Chamber received a
27 joint filing of defence materials. Following that, the Defence
28 requested the Chamber to reconsider the terms of its order dated
29 21st October 2005 and to make certain modifications thereto.

1 4. On 25th November 2005, another status conference was
2 held primarily to consider further the preparation and
3 presentation of the defence case, and specifically to ascertain
4 the nature and extent of Defence compliance with the Chamber's
10:17:02 5 order of 21st October 2005.

6 On 28th November 2005, the Chamber took the significant
7 step of issuing another order entitled "Order for the compliance
8 with the order concerning the preparation and presentation of the
9 defence case." The main purport of that order was two-fold:

10:17:35 10 1. To indicate in explicit terms the Chamber's considered
11 view that the Defence had failed to comply with its controlling
12 order of 21st October 2005.

13 2. The issuing of a consequential order ordering, inter
14 alia, that each Defence team individually, not collectively or
10:18:04 15 jointly, file, no later than 5th December 2005 at 4.00 p.m., the
16 following materials:

17 1. A list of witnesses that each Defence team intends to
18 call, incorporating certain specific details:

19 (A) The names, subject to any protective measures ordered
10:18:29 20 by the Chamber, or pseudonyms of the witnesses;

21 (B) A summary of the respective testimony of all defence
22 witnesses, such summary to be sufficiently descriptive and
23 comprehensible enough for the appreciation of the Bench;

24 (C) The points of the indictment in respect of which each
10:18:55 25 witness will testify, including the exact paragraph and the
26 specific counts;

27 (D) The estimated length of time for which each witness
28 will testify;

29 (E) An indication of whether the witness will testify in

1 person or pursuant to Rule 92 bis;

2 (F) The language in which each defence witness will be
3 testifying.

4 At this point it is pertinent for me to emphasise that if
10:19:37 5 the defence teams are minded to add any witness or witnesses to
6 the submitted list after 5th December 2005, leave of the Chamber
7 should be obtained upon good cause being demonstrated.

8 The order of 28th November 2005 also required the Defence
9 to file:

10:20:07 10 1. A list of their expert witnesses with their names
11 indicated or specified in their master list of witnesses and
12 embodying a brief description of the nature of their proposed
13 testimony and the preliminary indication of when their reports
14 will be ready and available to the Prosecution;

10:20:37 15 2. A list of Defence exhibits embodying a brief
16 description of their respective nature and contents stating,
17 where possible, whether or not the Prosecution has indicated that
18 it has any objection based on the question of authenticity.

19 Again, the Chamber wishes to emphasise that if the Defence
10:21:02 20 intends to add to this list, it can only do so with the leave of
21 the Chamber upon good cause being demonstrated.

22 The aforesaid order of 28th November 2005 also required the
23 Defence to file an evidentiary chart, that is to say a chart
24 which indicates in respect of each paragraph in the indictment
10:21:45 25 both the testimonial and documentary evidence that will be
26 adduced by the Defence in refutation of the Prosecution's
27 allegations.

28 The Defence was also required to file an indication or a
29 statement as to whether the accused will be testifying in his own

1 defence pursuant to Rule 85(C). The Rule states, and I quote:

2 "The accused may, if he so desires, appear as a witness in
3 his own defence. If he chooses to do so, he shall give his
4 evidence under oath or affirmation and, as the case may be,
10:22:29 5 thereafter call his witnesses."

6 I should emphasise for the records that it is the Chamber's
7 view that if the accused persons intend to testify in their own
8 defence, the order of testimony will be strictly as follows:

9 First accused to testify first, second accused to testify second,
10:23:01 10 and third accused to testify third. There will be no variation
11 of this sequential mode. Where an accused person refuses to
12 comply with this sequence, he will be deemed to either have
13 waived his right to testify or to forfeit it.

14 Still on review of defence filings, it should be noted that
10:23:30 15 on 5th December 2005 various materials were filed by each of the
16 defence teams pursuant to the Chamber's order for compliance
17 28 November 2005.

18 Subsequently, upon the Chamber's order dated
19 9th December 2005, further materials were filed on different
10:23:58 20 dates. For the purposes of this proceeding, the materials filed
21 by the Defence will now be reviewed so as to ascertain the nature
22 and extent of each defence team's compliance with the Chamber's
23 order concerning the preparation of the case. We will also in
24 the course of this proceeding address such specific issues as the
10:24:26 25 overall number of defence witnesses who will be testifying.

26 Let us begin with the state of materials filed by the
27 defence team for the first accused. Our records disclose that
28 the materials filed by that team so far are: 1. A witness list
29 and an indication that the first accused will be appearing as a

1 witness pursuant to Rule 85(C). The question now is: Does the
2 defence team for the first accused wish to comment on this filing
3 or does the position remain the same?

4 MR JABBI: My Lord, the position is as reported.

10:25:22 5 PRESIDING JUDGE: Thank you. Does the Prosecution have any
6 observation in response?

7 MR JOHNSON: No, Your Honour.

8 PRESIDING JUDGE: Thank you. From the perspective of the
9 Bench there is a troubling issue raised by the defence team for
10:25:44 10 the first accused and the records disclose this. It is that of
11 an alleged initial fear on the part of potential witnesses for
12 the first accused because of, and I quote, "alleged intimidation
13 by the Special Court Outreach Team."

14 Due to the adverse implication for the integrity of the
10:26:11 15 trial proceeding, such a state of affairs, if true - emphasis, if
16 true - might have, it seems necessary for some further inquiries
17 to be made. Does the Defence wish to address the Chamber further
18 on this point? In essence, is there any concrete specific
19 evidence to substantiate this allegation which the Bench takes
10:26:37 20 extremely seriously?

21 MR JABBI: My Lord, that indication is from some of the
22 witnesses. We have not had an opportunity ourselves to directly
23 observe it, but fortunately we are now receiving into the witness
24 section some of the witnesses and we intend to further probe this
10:27:20 25 matter, at least from those witnesses who are coming in, to see
26 whether in fact it still obtains.

27 PRESIDING JUDGE: Would it also be proper or advisable that
28 in your efforts to probe this matter further you enlist or
29 solicit the support of the Victims and Witnesses Unit whose duty

1 it is to ensure the preservation of the integrity of that
2 machinery in respect of all potential witnesses who come before
3 the Special Court?

4 MR JABBI: We will endeavour to do exactly that, My Lord.

10:27:59 5 PRESIDING JUDGE: Thank you. Does the Prosecution have any
6 comments in response?

7 MR JOHNSON: No, Your Honour. We agree that these are very
8 serious concerns and appreciate the actions being taken and that
9 the Victims and Witness Support Unit would be the proper place
10:28:17 10 and proper people to facilitate that. Thank you.

11 PRESIDING JUDGE: Thank you.

12 As to an expert witness list, there has been no filing on
13 behalf of the first accused. Shall I have some clarification
14 from the defence team? Dr Jabbi?

10:28:44 15 MR JABBI: My Lord, we have not seen it fit or necessary up
16 until now to file a list of expert witnesses as we do not
17 [i ndiscernible].

18 PRESIDING JUDGE: In the foreseeable future.

19 MR JABBI: Yes, My Lord.

10:29:00 20 PRESIDING JUDGE: Thank you. Prosecution, any short
21 response? None at all.

22 MR JOHNSON: Just the understanding that any witnesses to
23 be added as you stated before.

24 PRESIDING JUDGE: Yes, the law is there. Quite. Thanks.

10:29:11 25 As regards the evidentiary chart, the present position is that,
26 pursuant to leave granted by the Chamber on 9th December 2005,
27 the first accused defence team did file an evidentiary chart on
28 14th December 2005. Any comments from both sides? Is that
29 correct?

1 MR JABBI: My Lord, that is correct.

2 PRESIDING JUDGE: Right. Nothing from the Prosecution.

3 The first accused defence team also filed an exhibits list.
4 That is correct. Any comments? Have you looked at the exhibits
10:29:57 5 list.

6 MR JOHNSON: Yes, Your Honour. The only comment that we
7 would have to make is as far as our obligation to state whether
8 we have objections to authenticity, we are more than willing to
9 work with the defence teams over the near future as soon as we
10:30:18 10 see the exhibits. We just have a list.

11 PRESIDING JUDGE: Okay. All right. Is that acceptable?

12 MR JABBI: Yes, indeed, My Lord.

13 PRESIDING JUDGE: All right. Now, let us examine the state
14 of the filings on behalf of the second accused. Gentleman on
10:30:37 15 that side, the materials filed so far are: 1. A witness list
16 and an exhibit list. The list initially contained only the
17 pseudonyms rather than the names of the witnesses. On
18 16th December 2005, a proper witness list containing the names of
19 intended witnesses was filed. I reckon that there was in fact
10:31:14 20 late compliance, because the question I would ask is whether it
21 is a fair assumption that no protective measures will now be
22 sought for these witnesses. And, of course, whether the
23 Prosecution has any comments. Could you elaborate on that,
24 Mr Bockarie?

10:31:28 25 MR BOCKARIE: Yes, Your Honour. As you have rightly
26 predicted, we do not intend seeking any protective measures for
27 the witnesses.

28 PRESIDING JUDGE: Right. Thank you. The Prosecution, you
29 are not invoking any penalty for late compliance? Probably the

1 Bench should, in fact, just decide to be charitable here.

2 MR JOHNSON: Yes, Your Honour, it has been acknowledged
3 that we are not seeking anything.

10:31:59

4 PRESIDING JUDGE: Right, okay. The second accused defence
5 team filed an expert witness list containing the names of one
6 military expert and one anthropologist and also a preliminary
7 indication of when the reports will be ready and made available
8 to the Prosecution. Mr Bockarie, could you enlighten us further
9 on this if there is need for some further information? One
10 military expert and one anthropologist.

10:32:23

11 MR BOCKARIE: Yes, Your Honour has rightly indicated by the
12 Defence for the second accused, yes, preparation is well underway
13 to have a summary of the report available.

10:32:46

14 PRESIDING JUDGE: Right. And I expect that this is
15 certainly going to be done expeditiously.

16 MR BOCKARIE: Of course, Your Honour.

17 PRESIDING JUDGE: What is the Prosecution's response to
18 this?

19 MR JOHNSON: Just the sooner the better. That's it.

10:32:57

20 PRESIDING JUDGE: Right. Thanks.

21 Well, after some hesitation, according to the recollection
22 of the Bench, and some dilatoriness on the part of the defence
23 team for the second accused, the Chamber now notes that an
24 evidentiary chart was filed on behalf of the second accused on
10:33:26 25 16th December 2005. Again, it raises the issue of late
26 compliance. The second accused did not file an exhibit list. Is
27 there any comment on the evidentiary chart?

28 MR BOCKARIE: Your Honour, I will seek leave for Andy to
29 address on this issue.

1 PRESIDING JUDGE: All right. Leave is granted.

2 MR IANUZZI: Good morning, Your Honour. Thank you. To
3 address your first comment, we did file an exhibit list.

4 PRESIDING JUDGE: Yes, that is fine.

10:34:06 5 MR IANUZZI: And the late filing of the evidentiary chart
6 was due in part to our pending request for leave to appeal the
7 denial of our motion for reconsideration. When it appeared that
8 no decision was going to be forthcoming before the recess, we
9 deferred to the order and filed the chart.

10:34:24 10 PRESIDING JUDGE: And you are asking --

11 MR IANUZZI: Our request still stands. We have not
12 abandoned the request.

13 PRESIDING JUDGE: Any response from the Prosecution on that
14 observation?

10:34:36 15 MR JOHNSON: No.

16 PRESIDING JUDGE: No, I think we will acquiesce on that.

17 The Chamber notes, in regard to the second accused, that
18 there is indication from that defence team as to the second
19 accused's right under Rule 85(C) that he will not be exercising
10:35:00 20 that option. That position remains unchanged.

21 MR BOCKARIE: Yes, that is our stance, Your Honour.

22 PRESIDING JUDGE: Well, let us move on to the state of the
23 filings on behalf of the third accused. To begin with the
24 Chamber wishes to observe that the filings on behalf of the third
10:35:24 25 accused were purportedly made confidentially without any prior
26 order or leave of the Chamber to that effect. May I have some
27 enlightenment or clarification on that, counsel?

28 MR WILLIAMS: May it please Your Lordship, we are not
29 certain in the particular filings Your Lordship is referring to.

1 PRESIDING JUDGE: Well, our record shows that the filings
2 are there, but if you know -- I mean, the matter is peculiarly
3 within your knowledge. You can treat the Court with candour as
4 to whether we are mistaken, and I am prepared to admit that if we
10:36:07 5 are in error we will correct the error.

6 MR WILLIAMS: My Lord, I believe one of the filings we did
7 was done in anticipation of us filing a motion for protective
8 measures.

9 PRESIDING JUDGE: I see.

10:36:23 10 MR WILLIAMS: So we withheld the names of the witnesses and
11 what we submitted were pseudonyms. But, I mean, subsequently we
12 actually filed a motion for protective measures but abandoned it
13 later on.

14 PRESIDING JUDGE: The difficulty we have, unless we are
10:36:43 15 under some misapprehension here, is that from the existing state
16 of the records those filings are still sort of confidential in
17 nature, and unless I get some further clarification from the
18 Court Management section or our own section, I was minded to say
19 that we will issue an order that all materials on behalf of the
10:37:27 20 third accused be re-filed publicly and no later than tomorrow,
21 the 12th, and that for the purpose of this proceeding they shall
22 be deemed to have been so filed. I mean, there was no order for
23 confidential filing and so we want to clarify that. Any further
24 guidance, Mr Margai, learned counsel?

10:38:00 25 MR MARGAI: We shall act accordingly, My Lord.

26 PRESIDING JUDGE: Yes, I think we just set the record
27 straight.

28 MR MARGAI: Very well.

29 PRESIDING JUDGE: Is there anything that the Prosecution

1 wants to add? Yes, the defence team for the third accused did
2 file a witness list. Does the Defence have any additions or
3 anything they would like to point to? Prosecution, they filed a
4 witness list. Do you know of that?

10:38:28 5 MR JOHNSON: Yes, Your Honour, we have the witness list. I
6 am not sure. Ultimately it may have been filed publicly. I
7 remember that initially there was an order that it has been
8 filed.

9 PRESIDING JUDGE: Yes, well there is this confusion
10 somehow. I think learned counsel Williams did explain that this
11 was because the whole thing was intricately connected with the
12 protective measures thing, and it must have created this
13 difficulty. All we need to do is just get the record straight
14 and get it all re-filed.

10:38:54 15 As regards expert witnesses, there is no separate list of
16 any such witnesses from the Defence of the third accused, though
17 it appears that your controlling master list of witnesses does
18 include the name of a military expert incorporating a preliminary
19 indication of when his report will be ready and available for the
10:39:23 20 Prosecution. The said list also includes the name of a social
21 anthropologist, but with no indication as to when the report will
22 be available to the Prosecution. Can I be enlightened on that,
23 please? Who speaks? Mr Lansana.

24 MR LANSANA: Yes, Your Honour. With regards to the
10:39:44 25 military expert witness, that is the shared witness we are going
26 to have with the second accused. Since they are the team who
27 have started negotiations with that witness, we, following upon
28 what is done with the witness, returned then with any discussions
29 we had.

1 With regards to the social anthropologist, we are still in
2 the process of negotiating with him. He has indicated in
3 principle to have a report available to us, but that is subject
4 to our having clearance with the Registry as to what his terms of
10:40:30 5 reference will be and his terms of payment. But he has given us
6 a quotation as to what that will entail.

7 PRESIDING JUDGE: You do not think that this kind of
8 situation is likely to have any consequence of undue delay in the
9 proceedings at this stage?

10:40:51 10 MR LANSANA: Not at all. As a matter of fact, he has
11 written a number of literature on the Kamajors and he will be
12 tapping essentially from that, and what he will be doing
13 basically will be adding on new facts that have come to him after
14 that said publication. We do not envisage any delay at all.

10:41:14 15 PRESIDING JUDGE: And the Prosecution is not likely to be
16 hampered in terms of response. Mr Johnson, is there any
17 response?

18 MR JOHNSON: Your Honour, the Prosecution certainly, when
19 we presented our expert witnesses, had some of the same issues on
10:41:29 20 getting a report and getting a report timely and so we appreciate
21 what the Defence is going through. It is hard for me to -- I
22 certainly cannot state any objections now. We have to wait and
23 when we get it see if we have the time.

24 PRESIDING JUDGE: Good. Well, as long as we all make a
10:41:47 25 commitment that some of these matters are being aggressively
26 pursued and that we recognise that time is of the essence and
27 nothing is being done to impede the process. And, of course, in
28 good faith, we, the Bench, are of that mind that we are all here
29 to expedite the process within the limits of these practical and

1 logistical constraints.

2 As to the requirement of an evidentiary chart, the records
3 show that in response to an order of the Chamber dated
4 9th December 2005, an evidential chart was filed which, in the
10:42:40 5 Chamber's considered opinion, is an evidentiary chart, not so
6 properly called because it is lacking in comprehensiveness, and I
7 wonder whether counsel for the third accused will want to
8 enlighten us or respond to this observation. It is, in fact, the
9 considered opinion of the Chamber that it is deficient in
10:43:11 10 comprehensiveness. Can I have a response and some guidance? In
11 other words, the assumption here is that counsel can do better,
12 that may have been done hastily and perhaps within the next four
13 or five days it could be, to use some rather metaphorical
14 language, beefed up.

10:43:36 15 MR MARGAI: That is quite true, My Lord, but
16 comprehensiveness is a relative term, no doubt.

17 PRESIDING JUDGE: Of course. I used it advisedly.

18 MR MARGAI: I appreciate that. And, My Lord, we were of
19 the view that a chart of this nature should disclose materials
10:43:57 20 sufficient enough to give an indication as to how we intend to
21 move. We did not think that it was necessary, as it were, to go
22 beyond that, as indeed this Chamber had on one or two occasions
23 held that there were statements that were produced in this
24 Chamber by the Prosecution that need not be comprehensive, as
10:44:24 25 long as there was indication as to what the witness was going to
26 say. But if Your Lordship is mindful to indicate to us what
27 exactly should be contained in that chart, we are quite prepared
28 to comply.

29 PRESIDING JUDGE: Yes. And without inviting the

1 Prosecution to make any comment on that, I would certainly
2 suggest that one of your learned colleagues there would be able
3 to liaise with our legal office to indicate what perhaps may well
4 be some of the alleged deficiencies and to see how you can, in
10:45:09 5 fact, enhance the nature of the document. I recognise that the
6 term comprehensiveness is relative.

7 MR MARGAI: Yes, well, I might also add that we have in
8 mind that we would be furnishing the other side with statements
9 of intended witnesses.

10:45:25 10 PRESIDING JUDGE: Yes.

11 MR MARGAI: And should there be any deficiency, I am sure
12 that will be taken care of.

13 PRESIDING JUDGE: Right. Well, perhaps now I should invite
14 the intervention of the Prosecution. Thank you, learned counsel.

10:45:40 15 Learned counsel for the Prosecution.

16 MR JOHNSON: Well, Your Honour, certainly I was just kind
17 of waiting for the right time to bring this issue up and it
18 appears this may be the right time.

19 Of course, the Prosecution generally with the defence
10:45:52 20 filings, as the Prosecution has stated in its motion before the
21 Chamber seeking defence statements, are generally concerned with
22 the amount of materials contained in the summaries of the
23 expected witness testimony that has been provided to the
24 Prosecution and the ability for the Prosecution to prepare for
10:46:14 25 cross-examination based only on those summaries. Now, if the
26 Chamber is inclined to grant an order and provide us with defence
27 statements, then some of these or most of these concerns will
28 likely be alleviated because we will have a more comprehensive
29 understanding of what the witness will testify to. This, of

1 course, all goes down to the concerns that when the witness does
2 indeed testify, if we are left with summaries that do not
3 encompass what the witness is going to testify to, what the fear
4 of a possible remedy for the Prosecution to enable the
10:46:54 5 Prosecution to properly cross-examine those witnesses, and to
6 avoid any potential delay in the proceedings because of that, and
7 that is clearly what we want to do is to see the proceedings move
8 along as expeditiously as possible.

9 So possibly just to reinforce my concerns, the
10:47:14 10 Prosecution's concerns on the summaries that have been provided,
11 to state that we feel, certainly in most instances, those
12 summaries are inadequate and to ensure that we, as the Defence
13 had the similar concerns, see that we can be fully prepared to
14 cross-examine particular witnesses when they do testify.

10:47:41 15 And, of course, timing is also a concern as far as if
16 statements are indeed ordered down the line, that they be ordered
17 to be provided to the Prosecution with sufficient time so that we
18 can indeed have a chance to study those and to prepare for
19 cross-examination, again to avoid any risk of delaying the
10:48:01 20 proceedings once a witness does come and testify.

21 The Prosecution, of course, were required to provide - and
22 I will not go through our motion again - redacted statements long
23 before they testified and unredacted statements no less than 21
24 days before the witness testified.

10:48:18 25 So we do have concerns with the summaries as they have been
26 filed. We are concerned the effect that would have on our
27 ability to prepare for cross-examination. The possible remedy is
28 either a delay in the proceedings or to not allow the witness to
29 testify beyond what is contained in the summary or the statement

1 is of course another possible remedy.

2 And let me just bring this to one other of our major
3 concerns at this time. This might also be the case of witness
4 order and knowing that, particularly with respect to the first
10:48:55 5 accused because their witnesses will be coming first, although we
6 have the witness names, we do not yet have an order, at least an
7 initial order, that it is expected those witnesses will testify
8 to. We have been provided with 140 names without having some way
9 to prioritise that list on when those witnesses are expected to
10:49:16 10 testify or the order in which they will testify. It is very hard
11 for us to allocate our resources and prepare for those witnesses
12 and do the investigations that we need to do before those
13 witnesses will come to testify.

14 Before the long holiday recess we did have an understanding
10:49:38 15 from the first accused that they would work very hard to get us
16 an order of their initial witnesses and the order in which those
17 witnesses would testify. Based on that understanding we did not
18 proceed with something formal before the Chamber requesting them
19 to file an order. Now we are within six days of the trial
10:49:58 20 starting and we do not have an order yet and we have significant
21 concerns about that, and again we want to see the trial start and
22 proceed along. Thank you.

23 PRESIDING JUDGE: Well, clearly these are issues, in fact,
24 which I had anticipated will be coming up later on. But
10:50:16 25 reverting to the evidentiary chart, the solution I have proffered
26 may well be helpful on the question of whether the Chamber will
27 be exercising its discretion in ordering the Defence to file
28 statements of witnesses. This is a matter which of course we
29 have under consideration, but indeed is a possible line of action

1 that can help dispel some of the difficulties here.

2 MR MARGAI: Yes, My Lord. Considering that we oppose the
3 motion filed by the Prosecution as to the adequacy or inadequacy
4 of the evidentiary chart, and since we are awaiting a ruling from
10:51:13 5 the Chamber, might it not be perhaps advisable for us to defer a
6 decision on this until Your Lordships rule?

7 PRESIDING JUDGE: Yes. Thank you. Probably that is the
8 way to proceed. But, indeed, we do have the armoury of possible
9 remedies in case of some of the difficulties that the Prosecution
10:51:46 10 has raised, and of course difficulties which were experienced
11 when the Prosecution was presenting its own case. We have no
12 reason to depart from the doctrine of equality of arms and it's a
13 question of to what extent may we need to fine-tune the process
14 when we are, in fact, applying the philosophy of equality of arms
10:52:14 15 to the Defence, having regard to the fact that the Prosecution
16 bears the burden throughout to prove their case beyond a
17 reasonable doubt.

18 But the Bench is extremely sensitive to this and any
19 worthwhile and constructive suggestions from both sides to
10:52:36 20 enhance and accelerate the process would be most welcome. So I
21 will be consulting with my colleagues when we get back to see how
22 some of these concerns should be addressed.

23 MR MARGAI: I am sorry, My Lord, I don't see how the
24 Prosecution could be disadvantaged by awaiting the ruling of this
10:52:58 25 Chamber because --

26 PRESIDING JUDGE: Maybe impending.

27 MR MARGAI: Yes, depending on the sequence of leading
28 witnesses for the Defence, we are of the view that surely apart
29 from the accused persons who may be testifying on their own

1 behalf - so far I think it is only the first accused - we will
2 not be calling witnesses until after the first and second accused
3 persons have.

4 PRESIDING JUDGE: Yes. These are also matters that we will
10:53:34 5 be touching upon subsequently as this proceeding advances.

6 MR MARGAI: As My Lord pleases.

7 PRESIDING JUDGE: And I think when we come to that we might
8 put these issues in more specific context.

9 MR MARGAI: As My Lord pleases.

10:53:46 10 PRESIDING JUDGE: The records reveal also that an exhibit
11 list was not filed by the defence team for the third accused and
12 this is consistent with an earlier indication on 25th November
13 last year that you did not intend to file any such list. I
14 reckon the position remains the same.

10:54:09 15 MR MARGAI: It sure does, My Lord.

16 PRESIDING JUDGE: The records likewise show that no
17 indication was given on the part of the defence team for the
18 third accused that the third accused will, in fact, be exercising
19 his option pursuant to Rule 85(C). I again would want to assume
10:54:32 20 that position remains unchanged.

21 MR MARGAI: Yes, My Lord.

22 PRESIDING JUDGE: Yes. Well, let us move now to another
23 very important item in our workload for this morning: The number
24 of witnesses. Perhaps we should combine this with the equally
10:54:53 25 important item, the length of the defence case.

26 But let us now address the issue of the total number of
27 witnesses and wherever possible if we can factor the duration of
28 the defence case into that to provide some relevant analysis that
29 would be appreciated. But at this point in time the record

1 discloses: 1. That the first accused intends to call 77
2 witnesses. Is that correct, Mr Jabbi?

3 MR JABBI: Yes, My Lord.

10:55:43

4 PRESIDING JUDGE: Before we go on I just want to give you
5 the state of the records, because we want to take this in
6 aggregation since we had talked about at some point in time the
7 possibility of common witnesses. So we are expecting some kind
8 of common strategies, techniques and methodologies from your side
9 as to how we put this whole thing into proper trial focus.

10:56:09

10 The second accused intends to call 25 witnesses with a
11 reservation of the right to call possibly another 18. Would you
12 comment, Mr Bockarie, on this position? Have you abandoned this
13 reservation of possibly another 18?

14 MR BOCKARIE: Yes, Your Honour has rightly indicated 25.

10:56:30

15 We have got 25 witnesses, these are certain.

16 PRESIDING JUDGE: Certain?

17 MR BOCKARIE: Yes, Your Honour.

18 PRESIDING JUDGE: What about this 18 that is floating
19 around there?

20 MR BOCKARIE: Your Honour, it is just for any eventuality.

21 PRESIDING JUDGE: Are they going to be what, back-up
22 witnesses?

23 MR BOCKARIE: Exactly, Your Honour.

24 PRESIDING JUDGE: Why not call them by their correct name?

10:56:52

25 In other words, your 25 would be core witnesses and your 18 would
26 be back-up witnesses?

27 MR BOCKARIE: It is possible we may not call the back-up
28 witnesses.

29 PRESIDING JUDGE: Well, I mean, the concept of a back-up

1 witness as far as our jurisprudence here is concerned is a
2 witness that is designed to, as it were, make up for the
3 deficiency in the core list. That is what we have defined
4 back-up witnesses in terms of our jurisprudence, the Special
10:57:29 5 Court jurisprudence. And I think our jurisprudence finds support
6 from jurisprudence of other tribunals, that it is like your jury
7 pool, some of them waiting there, if somebody is not qualified
8 then somebody comes in. Do you accept that analogy?

9 MR BOCKARIE: Yes, Your Honour.

10:57:51 10 PRESIDING JUDGE: So if that is the case why not be candid
11 with the Court so that the Prosecution knows that those 18, which
12 you called possible witnesses, are really back-up witnesses?

13 Before you go further, am I on the same wavelength there?
14 Mr Johnson, before now the Bench was of the impression that this
10:58:17 15 possible 18 would be 18 more called. Now a clarification has
16 been given. Were you of the same impression that we were talking
17 about?

18 MR JOHNSON: Well, we were certainly uncertain as to
19 exactly what their status was.

10:58:30 20 PRESIDING JUDGE: And now there is a clarification.

21 MR JOHNSON: Your Honour, that is very helpful.

22 PRESIDING JUDGE: That is helpful.

23 MR BOCKARIE: Yes, Your Honours, so we will say a total of
24 43.

10:58:47 25 PRESIDING JUDGE: Well, 43 core witnesses.

26 MR BOCKARIE: Well, 43 witnesses; 25 core witnesses.

27 PRESIDING JUDGE: The situation gets complicated.

28 MR IANUZZI: Your Honour, if I may?

29 PRESIDING JUDGE: Do you want to consult?

1 MR IANUZZI: I would just like to add something.

2 PRESIDING JUDGE: With our leave, yes, you are allowed.

3 MR IANUZZI: Thank you very much. The back-up list was
4 also labelled an unconfirmed/back-up list because -- I do
10:59:08 5 apologise for the confusion, but there are at least two
6 categories of witnesses on that unconfirmed/back-up list; one
7 being witnesses who we have already begun the interview process
8 with, but who have yet to confirm 100 per cent they would like to
9 testify. Also back-up witnesses. And also witnesses, for
10:59:27 10 example, the President who we have sought the assistance of the
11 Court to issue a subpoena.

12 PRESIDING JUDGE: Yes. Well, this is the difficulty about
13 all these sub-categorisations. We have no difficulty with
14 sub-categorisations for the purpose of your strategy. It seems
10:59:34 15 to us that the Bench needs to have some clear appreciation that
16 if we are talking about core witnesses, which would be a master
17 list of witnesses, or calling them controlling witnesses, your
18 main witnesses, then if you have a possible 18 waiting in the
19 wings it is important for us to have this clarification. As to
11:00:09 20 whether they are core witnesses or whether they are just back-up
21 witnesses who, if a core witness is for some reason unable to
22 come and testify, he will just fill in the slot, that would be
23 the tidy legal categorisation for us, but without prejudice to
24 whatever sub-categorisations you might want to work out for your
11:00:31 25 own purposes.

26 MR IANUZZI: We did not want to leave names off the list
27 and then be subject to the rule that we had to seek leave and
28 show good cause [Overlapping speakers]

29 PRESIDING JUDGE: The rule does not in any way preclude

1 you. It says come for leave and if you show good cause why
2 should not the court be willing to?

3 MR IANUZZI: May I suggest that we re-submit the witness
4 list by the end of the week redesignating along the lines that
11:00:54 5 you have just --

6 PRESIDING JUDGE: Yes, that would be appropriate, so that
7 we do not have any -- we do not run into any more confusion.
8 Because really the 18 more, I suppose the next time you come in
9 and we do not know these 18, whether they are back-up or core, I
11:01:14 10 think the clarification would be useful.

11 MR IANUZZI: We will provide it.

12 PRESIDING JUDGE: The third accused intends to call 39
13 witnesses. Does that position remain the same as of today?

14 MR MARGAI: Yes, My Lord, it does.

11:01:28 15 PRESIDING JUDGE: So, if we exclude the 18 possibly back-up
16 whatever/whatever witnesses which the second accused will be
17 calling, our total now would be 141 witnesses for the Defence.
18 Is that mathematically correct - 141?

19 MR JOHNSON: Yes, Your Honour.

11:02:05 20 PRESIDING JUDGE: In other words, we are not talking about
21 those back-up witnesses yet. And clearly the observation of the
22 Bench here is that this is over double the number of witnesses
23 called by the Prosecution. I am inviting comments.

24 MR MARGAI: The only difference here is that there is one
11:02:31 25 Prosecution and three accused persons.

26 PRESIDING JUDGE: Yes. Does anyone want to add to that
27 debate? Does the Prosecution? I mean, we make this a
28 statistical kind of thing and how far statistics in matters of
29 this nature can be very helpful and instructive becomes a very

1 difficult issue, but I am prepared to be enlightened on this by
2 some of you who have probably researched or studied these areas.
3 Mr Johnson intends to.

11:03:16 4 MR JOHNSON: Well, Your Honour, it is a general observation
5 that there seems to be quite a few witnesses, but it is certainly
6 not for the Prosecution to limit or place limits on how many
7 witnesses the Defence need to present their case.

8 PRESIDING JUDGE: Yes.

11:03:31 9 MR JOHNSON: I don't think there is a lot more I can say,
10 Your Honour.

11 PRESIDING JUDGE: Yes, yes, quite. Well, the Bench, of
12 course, we will say -- and I recall that the defence position was
13 clearly predicated upon those two submissions during one of our
14 conferences, that the Defence are still in the process of
11:04:02 15 confirming or securing that submission of back-up witnesses and
16 that it intends to rely on such witnesses only if it becomes
17 necessary.

18 The only point I am making from the perspective of the
19 Bench is that if you look at the jurisprudence - and again I
11:04:26 20 would like to say that we would like to adhere to our position
21 that if the additional witnesses that probably the second accused
22 is intending to call really come out as back-up witnesses - then
23 we might -- we will have to characterise them as such so that
24 that would not augment the total number of witnesses for the
11:04:52 25 Prosecution that the Defence is going to call.

26 But whilst on that subject, it seems as if it is necessary
27 now to enquire from the three defence teams whether there has
28 been any coordination among them on the subject of common
29 witnesses. If so, can the Chamber have some idea as to the

1 nature and extent of such coordination and any agreed strategies
2 as to which team will call which common witnesses. Because there
3 was some undertaking during one of the status conferences that
4 that was an issue that was being actively pursued and was
11:05:44 5 considered highly desirable in terms of efficient trial
6 management and to avoid duplication of evidence and
7 multiplication of issues perhaps. I remember there was a
8 commitment on the part of all the leading counsel for the defence
9 team on this. Yes, Mr Margai.

11:06:07 10 MR MARGAI: It is true, My Lord, that we have started
11 talking and we continue to talk and we will continue to talk
12 until perhaps when we consider it necessary to stop as to the
13 common witnesses. But as to the strategy we wish to adopt, I
14 would, with respect, crave your indulgence that we keep that
11:06:27 15 close to our chest for now and without impinging upon the ethics
16 of the profession.

17 In the light of the common witnesses who number about nine,
18 it is possible that with the commonality of the witnesses and
19 also the Chamber's ruling on the motion to acquittal, it is
11:06:52 20 possible, My Lord, that the total number may reduce definitely.

21 PRESIDING JUDGE: Yes.

22 MR MARGAI: But I would indeed crave Your Lordship's
23 indulgence to bear with us for a while and let us start the
24 defence proper and we shall adjust as we proceed, bearing in mind
11:07:11 25 that we need to be mindful of the fairness of the trial and to
26 expedite it.

27 PRESIDING JUDGE: Right. Well, I will invite some response
28 from the Prosecution. This is very much a concern of the Bench
29 that we need to have some indication of the nature and extent of

1 the co-operation and the coordination. I am prepared to concede
2 ex arguendo that perhaps it may be wise not to press you on the
3 question of strategies. Of course, I am pretty sure that having
4 regard to the experience and seniority of counsel, all of you,
11:07:50 5 you will not adopt strategies that will excite the disfavour of
6 the Bench. I am not suggesting that. So I am prepared to make
7 that concession.

8 MR MARGAI: We hope to maintain the cordiality hitherto.

9 PRESIDING JUDGE: Thank you. But does the Prosecution have
11:08:10 10 any comment, because that's important if -- I would have thought
11 that for us, the Bench, if the coordinating efforts could also be
12 directed as to exploring the possibility of augmenting the list
13 of common witnesses, that would also be a step in the right
14 direction. What is your response, Mr Johnson?

11:08:41 15 MR JOHNSON: Well, Your Honour, perhaps this may also
16 relate back to just determining the total number of defence
17 witnesses and the appropriate number of defence witnesses. I
18 might also kind of bring back into our concerns the degree or the
19 extent of how thorough the summaries are, ultimately, if
11:09:03 20 statements are to be provided. Whereas I am not sure that a
21 purely statistical analysis of the number of defence witnesses is
22 necessarily something, the Prosecution had 75 and so the Defence
23 should have this many. But some of these factors can be looked
24 at more carefully as to the content of the witness's testimony to
11:09:21 25 ensure that, one, of course, the witnesses are relevant, and two,
26 avoid repetitiveness.

27 PRESIDING JUDGE: Well, let me stop you there. In fact,
28 that is precisely the next area that I was going to give by way
29 of guidance to the Defence. Clearly both sides are aware that

1 the Chamber has the authority under Rule 73 ter(D) to order a
2 reduction in the number of witnesses a party intends to call.
3 But the Chamber is also very sensitive that such an authority
4 should not be exercised lightly and therefore there has been a
11:10:04 5 considerable degree of judicial restraint in this matter. We did
6 exercise it in the case of the Prosecution and we have no
7 intention of not adopting the same degree of judicial restraint
8 with the Defence.

9 The question of an order from the Bench is something that
11:10:27 10 we consider should be an exceptional power and exercised only in
11 exceptional circumstances. I am sure it is the mind of the Bench
12 at this stage that we have not yet reached that level. So
13 clearly the point is there.

14 We find also on this particular issue - and it is a good
11:10:50 15 thing that counsel for the Prosecution mentioned this - there is
16 some instructive and persuasive case law on this subject that
17 statistical analysis here may not be helpful in guiding us as to
18 how best to proceed. Here I take the liberty of quoting, for its
19 persuasive authority, the observation of the Appeals Bench in the
11:11:14 20 case of Prosecutor against Oric, case number IT-03-68-AR73.2:
21 "Interlocutory Decision on Length of Defence Case", 20th
22 July 2005, paragraph 7 and I quote:

23 "The Appeals Chamber has long recognised that 'the
24 principle of equality of arms between the Prosecutor and
11:12:01 25 the accused in a criminal trial goes to the heart of the
26 fair trial guarantee.' At a minimum, 'equality of arms
27 obligates a judicial body to ensure that neither party is
28 put at a disadvantage when presenting its case,' certainly
29 in terms of procedural equity. This is not to say,

1 however, that an accused is necessarily entitled to
2 precisely the same amount of time or the same number of
3 witnesses as the Prosecution. The Prosecution has the
4 burden of telling an entire story, of putting together a
11:12:54 5 coherent narrative and proving every necessary element of
6 the crimes charged beyond a reasonable doubt. Defence
7 strategy, by contrast, often focuses on poking specifically
8 targeted holes in the Prosecution's case, an endeavour
9 which may require less time and fewer witnesses. This is
11:13:23 10 sufficient reason to explain why a principle of basic
11 proportionality, rather than a strict principle of
12 mathematical equality, generally governs the relationship
13 between the time and witnesses allocated to the two sides."

14 I think that is very helpful and we will not want to lose
11:13:49 15 focus of that. Of course, the Bench is eminently aware that
16 nothing should be done to disadvantage the Defence in the
17 presentation of their case.

18 I do not intend to invite any learned commentaries on this
19 particular decision. I just put it there for what it is worth.
11:14:17 20 I think all I can say is that at this point in time we do not yet
21 have enough before us as a Chamber to enable us to determine
22 conclusively and definitively whether the factors and the
23 circumstances and the conditions are present to invoke our
24 jurisdiction on the 73 ter(D). All we can say for the time being
11:14:45 25 is the number is a little on the inflated side. That is what we
26 can say. But I think it is important in terms of the issues that
27 we have been talking about in terms of comprehensiveness of
28 evidentiary charts and also the lack of specificity or
29 sufficiency in respect of summaries that at this point in time,

1 to avoid any orders emanating from the Bench, we encourage each
2 defence team to see what they can do to file summaries that would
3 in fact be a little more comprehensive in nature and give some
4 more details in terms of the testimony that their witnesses,
11:15:46 5 their core witnesses, will be putting forward.

6 Clearly, as the Prosecution was observing, we can ask the
7 Defence to be guided by the formula which Rule 67 provides also,
8 that inclined to reduce the number of witnesses that where you
9 have a multiplicity of witnesses coming to testify to the same
11:16:19 10 set of facts it may be quite pertinently enquired: "Why do we
11 have all of them coming to testify to the same set of facts?"
12 73 ter(D) provides that criterion too for reducing the number of
13 witnesses.

14 We would also request the Defence to be guided by the fact
11:16:50 15 that there is the alternative mechanism of Rule 92 bis, where if
16 you can bring evidence forward through the machinery of 92 bis
17 and reduce the number of viva voce evidence. So these are all
18 armoury, conceptual armoury, at the disposal of the Court to be
19 able to reduce the number of witnesses. So I would encourage
11:17:32 20 defence counsel to work on this as they coordinate their work in
21 terms of the presentation of their defence.

22 The other issue, of course, is the question of - and I
23 would rather we deal with that straight away - is the matter of
24 character witnesses. Whether at this point in time each team is
11:18:14 25 in a position to indicate the number of character witnesses from
26 the master list that will be testifying. The defence team for
27 the first accused, have you been able to make that determination?

28 MR JABBI: Not yet, My Lord. My Lord, on some of these
29 issues, if I may just make a general point --

1 PRESIDING JUDGE: Yes.

2 MR JABBI: -- not specifically on the character witnesses,
3 but on the statistical aspect.

4 PRESIDING JUDGE: Yes.

11:18:52 5 MR JABBI: It is good that we perhaps generally understand
6 that a strict statistical approach may not be adopted.

7 PRESIDING JUDGE: It would be helpful, or has its
8 limitations.

9 MR JABBI: Yes, indeed. I mean, I just want to give one
11:19:08 10 short example. It may well be the case that with some particular
11 Prosecution witness a whole range of issues may have been covered
12 which perhaps would not be observed or testified to by only one
13 or two witnesses and a prosecution witness's evidence may well
14 need even up to six defence witnesses.

11:19:43 15 PRESIDING JUDGE: To refute that.

16 MR JABBI: Yes, for refuting that. So whilst I do not want
17 to really exaggerate that point, but nevertheless it is good to
18 have it in mind and apply it in thinking of how many witnesses
19 the Defence need to call to refute the prosecution evidence. We
11:20:04 20 will, however, endeavour. It is not impossible in some cases
21 that the list that has been given may not be utilised.

22 PRESIDING JUDGE: Yes.

23 MR JABBI: But we want to have the freedom to reserve the
24 ultimate decision on these aspects and would certainly exercise
11:20:24 25 some responsibility in revealing it as we go along.

26 PRESIDING JUDGE: Well, I mean, the point, of course, is
27 part of the global debate in the context of the adjudicatory
28 process, whether we are talking about national criminal
29 adjudication or international criminal adjudication, whether in

1 terms of evidence whether the emphasis clearly is on quality or
2 quantity. It is the perennial thing. In other words, is it
3 really the quantum of evidence that really matters in proving
4 one's case or the quality of the evidence. Because, as you have
11:21:06 5 rightly said, it is so difficult to want to make any conclusive
6 pronouncements either way. But one would have thought that in
7 our own adjudicatory process we look more to the quality of the
8 evidence rather than the quantity, and if the reasoning or the
9 observation in the case of Oric is right, here the Defence does
11:21:44 10 not bear the burden of proving the innocence of the accused. It
11 doesn't bear that burden at all. The burden is just to poke
12 holes into the Prosecution's case and to raise reasonable doubts.

13 So, in other words, the concept of equality of arms does
14 not in any way diminish persuasive overall burden on the
11:22:13 15 Prosecution to prove their case to the hilt, and they stand or
16 fall by their charges and the evidence that they lead in support.
17 And that is what we are trying to do. We are just trying to say
18 that the fact that these types of trials might be very complex
19 and of greater magnitude sometimes than national trials, but the
11:22:37 20 fundamental principles remain the same. I mean, the accused
21 persons can rightly say, "We are not going into that witness
22 stand at all. Let them prove their case."

23 But, of course, I am not in any way discounting the cogency
24 of the statement that you have made. There may be some times
11:22:56 25 that you do have Prosecution witnesses coming with so many
26 different allegations. But again, remember, learned counsel,
27 that at the end of the day the indictment is the road map and if
28 witnesses have testified outside the scope of the indictment,
29 again it would be the business of the Defence to call the

1 attention of the Bench, that look all that stuff was clearly
2 outside the scope of the indictment. But, as I say, I don't want
3 to go into any methodological analysis on this. But your point
4 is taken.

11:23:39 5 Does the defence team of the second accused have any
6 statements relating to the character witnesses? Have you been
7 able to identify which are your witnesses?

8 MR BOCKARIE: Yes, Your Honour, we intend to call two.

9 PRESIDING JUDGE: Two character witness?

11:23:46 10 MR BOCKARIE: Yes.

11 PRESIDING JUDGE: Are they included in your master list?

12 MR BOCKARIE: Yes, Your Honour. And we may even avail
13 ourselves of the provisions of Rule 92 bis.

14 PRESIDING JUDGE: Yes, quite. That is very helpful, it is
11:24:03 15 a step in the right direction.

16 What about learned counsel for the third accused?
17 Character witnesses and any commitment to --

18 MR MARGAI: No, we will not be calling character witnesses.

19 PRESIDING JUDGE: Good. Thanks, that's helpful. Also, do
11:24:14 20 you wish to make any commitment, learned counsel, on the
21 possibility of utilisation of Rule 92 bis by way of reducing the
22 number of witnesses?

23 MR MARGAI: My Lord, we shall.

24 PRESIDING JUDGE: It is something that I am sure you, with
11:24:29 25 your degree of creativity, that you bring to this process.

26 MR MARGAI: We shall definitely have that in mind, but I am
27 sure that if and when we get to the point of determining the
28 number of witnesses, the Chamber will act judiciously. I mean,
29 we should not lose sight of the fact that the Prosecution are not

1 on trial, the Defence is on trial and that is a vital point to
2 remember.

3 PRESIDING JUDGE: Yes. Well, I can assure you that we are
4 not going to lose focus on that one.

11:25:08 5 Well, the issue of common witnesses we have already
6 addressed. Are there any observation at this point by the
7 Prosecution before we continue on this issue so far on what we
8 have covered before we go on to other specifics?

9 MR KAMARA: Yes, Your Honour, it is only on the issue of
11:25:25 10 common witnesses. There is a fact that I want to bring to the
11 notice of the Bench that is very crucial for the Prosecution. A
12 case in point is wherein a witness has been called by the first
13 accused that is common to the second and third, the Prosecution
14 ought to be prepared to cross-examine not only for the first
11:25:45 15 accused, but with reference to the second and the third accused
16 as well. And it goes without saying that the second and third
17 accused should also be prepared to cross-examine that witness
18 relating to their own case. And it rolls on further to the fact
19 that also wherein we identified common witnesses, the issue of
11:26:05 20 opening statements by the second and third accused, is it going
21 to be such that they are going to waive the opening statements
22 or, if not, will they be cross-examining common witnesses prior
23 to the opening statements? Those are the few issues I want to
24 raise to the Bench.

11:26:25 25 PRESIDING JUDGE: What is the Defence response to these
26 issues that counsel has raised?

27 MR MARGAI: My Lord, I would have thought that opening
28 statements would be dealt with once and for all, not on
29 individual witnesses. And with regard to common witnesses

1 somebody has to call that witness, either by way of a subpoena or
2 otherwise, and the individual calling that witness, albeit a
3 common witness, will have the burden of leading that witness in
4 evidence and the others will cross-examine that witness. That is
11:27:00 5 my understanding of the procedure.

6 Now, as to whether the witness will be cross-examined by
7 the second and third accused before the Prosecution, that remains
8 to be determined. Since this is a hybrid procedure, the
9 procedure that is practised locally is that where you have joint
11:27:24 10 trials after the first accused, for instance, leads the witness
11 for the first accused, then we on this side will cross-examine
12 and then the Prosecution will. But I believe that it is the
13 converse in other jurisdictions, so it is for this Chamber to
14 determine. As far as we are concerned it does not really matter,
11:27:45 15 the end justifies the means.

16 PRESIDING JUDGE: Learned counsel, response?

17 MR JOHNSON: Okay, thank you, Your Honour. The first point
18 I would like to make is that I think for a common witness, a
19 witness being called by all three, granted one of them will be
11:28:06 20 the first to call the witness, but the second and third or the
21 first and third or whatever of the next two, I believe would be
22 still conducting a direct examination of that common witness as
23 opposed to a cross-examination. It would be a direct examination
24 if it is only -- or a cross-examination if it is only a witness
11:28:26 25 for the first accused. But whoever is a common witness would be
26 a direct examination by all the accused and, in any event, the
27 Prosecution would be the last to examine the witness.

28 MR IANUZZI: I think we may need to make a distinction
29 between joint witnesses and common witnesses, because there may

1 be a witness that is common to all of our lists but may be
2 testifying to discrete items and not common items. Do you follow
3 my point?

4 PRESIDING JUDGE: Yes, quite.

11:28:55 5 MR IANUZZI: So I think we will have to deal with that as
6 it comes. If it is a common, everybody is -- if it is a joint
7 witness, then everybody is conducting a direct. But if it is a
8 common witness testifying about different issues, then we may
9 want to reserve our right to cross-examine that witness. I think
11:29:08 10 it is a different scenario.

11 PRESIDING JUDGE: Any further responses on that, because in
12 the final analysis the Bench will have to, as the Americans say,
13 weigh in on this?

14 MR KAMARA: Yes, Your Honour. And earlier, as Andrew was
11:29:23 15 saying, we will wait until that time comes. But the crucial fact
16 that I would like to respond to my learned friend Mr Margai about
17 the opening statements is again that it is inconceivable to see
18 you making an opening statement after you have examined in chief
19 or cross-examined a particular witness. That is why I brought it
11:29:39 20 out that if at all there is going to be a common witness that is,
21 let us assume, witness number three for the first accused is a
22 witness for the second, is a witness for the third, what is the
23 situation there? The second accused will lead that witness based
24 on whether it is of interest to him and the third accused will
11:29:59 25 also direct on that witness, and thereafter what is the position
26 is there ought to have been an opening statement and if not, is
27 it going to be waived?

28 But now as to our position, the Prosecution, it is
29 important to us that we know. That is why my learned friend

1 Mr Johnson mentioned the order of witnesses, that if X, Y, Z are
2 going to be common witnesses for the Defence, we have to be
3 prepared to cross-examine for the first accused, cross-examine in
4 relation to the second and the third.

11:30:30 5 PRESIDING JUDGE: I think perhaps learned counsel Margai
6 needs to restate his position on that. The question of the issue
7 that Mr Bangura [sic] is raising, that the whole question of an
8 opening statement seems connected with the witnesses, how common
9 witnesses testify, I wanted you to repeat your response.

11:31:00 10 MR KAMARA: It's Mr Kamara, Your Honour.

11 PRESIDING JUDGE: Kamara, I do apologise.

12 MR MARGAI: My Lord, my own understanding of the procedure
13 is that when opening statements are delivered they outline the
14 case, for instance, of the third accused, how we intend to
11:31:17 15 proceed, a resume of what each witness will be testifying to.
16 That is my understanding. And this is why I say that it is going
17 to be a rather strange phenomenon if counsel were to make an
18 opening statement in respect of each witness. I have never known
19 of such practice anywhere.

11:31:42 20 PRESIDING JUDGE: Well, I would like to -- just briefly, I
21 don't intend to detain counsel on both sides on the issue, but
22 the governing rule is Rule 84. What does it say, learned counsel
23 Kamara? Read it.

24 MR KAMARA: "At the opening of his case, each party may
11:32:14 25 make an opening statement confined to the evidence he intends to
26 present in support of his case. The Trial Chamber may limit the
27 length of those statements in the interests of justice."

28 PRESIDING JUDGE: So, what is your complaint or what is
29 your difficulty here?

1 MR KAMARA: The second and third accused, not having waived
2 their right to an opening statement, will have to do that come
3 the 17th.

4 PRESIDING JUDGE: When?

11:32:40 5 MR KAMARA: After the evidence of the first accused.

6 PRESIDING JUDGE: Read the rule again.

7 MR KAMARA: "At the opening of his case, each party may
8 make an opening statement confined to the evidence he intends to
9 present in support of his case."

11:32:53 10 PRESIDING JUDGE: Yes, so how do you operationalise that?

11 Now, we come to the Defence to present their case.

12 MR KAMARA: Yes.

13 PRESIDING JUDGE: Right, the first accused decides to make
14 an opening statement, the first accused will be presenting their

11:33:06 15 case.

16 MR KAMARA: Yes, he has waived his own right to that and we
17 have gone beyond that stage.

18 PRESIDING JUDGE: Yes, on record. Yes.

19 MR KAMARA: And he calls his first witness. And the first
20 accused gave his evidence and then the second witness is a

11:33:23 21 witness for the second and the third. My understanding of this

22 Rule particularly is that before the second and third accused

23 persons cross-examine or lead this witness, they have to open

24 their case.

11:33:35 25 PRESIDING JUDGE: Yes, well, the difficulty is this - and I

26 see it as a difficulty perhaps which is really not insurmountable

27 - it is possible that what we are talking about is that we will

28 have to make sure that no common witnesses are called until each

29 party has opened their case with other witnesses.

1 MR KAMARA: You are with me now, Your Honour. And this is
2 why I am putting them on their guard that there is every
3 likelihood that come the 17th they should be ready to open their
4 case.

11:34:17 5 MR MARGAI: If I may be heard, My Lord. Just as the
6 Prosecution did at the start of the proceedings here, the
7 Prosecutor opened the case for the Prosecution.

8 PRESIDING JUDGE: Yes.

9 MR MARGAI: I am also of the view that perhaps come the
11:34:33 10 17th all three defence counsel for the first, second and third
11 will open the case for each accused person before we even move on
12 to attest.

13 PRESIDING JUDGE: Yes, I thought that perhaps we were here
14 raising a cloud of dust and complaining that we cannot see. Can
11:34:58 15 you help? Yes, go ahead.

16 MR NMEHIELLE: Whilst I take the point that learned counsel
17 for the Prosecution may be making, I think that the difficulty
18 here is caused by the fact that we have joint trials and
19 therefore the specific rule in question does not clearly state
11:35:20 20 that it relates to joint trials and presupposes, in my view, a
21 single trial of an accused person in which case the person opens
22 his case. And therefore, I would think that the proposition of
23 learned counsel Margai is the right way to go, whereby there is
24 an opening of the defence case prior to even the calling of any
11:35:37 25 particular witness [overlapping speakers].

26 PRESIDING JUDGE: Well, Rule 82 says that in joint trials
27 each accused will be accorded a right as if he was being tried
28 separately.

29 MR NMEHIELLE: Exactly. And then --

1 PRESIDING JUDGE: So 82 covers too.

2 MR NMEHIELLE: Okay. I agree. That makes my point
3 clearer. That it presupposes the opening of the case, each
4 defence case, before the --

11:36:05 5 PRESIDING JUDGE: Well, as I say, I thought [overlapping
6 speakers]

7 MR MARGAI: I am sorry, there is some ambiguity here,
8 My Lord.

9 PRESIDING JUDGE: All right, let us be.

11:36:12 10 MR MARGAI: Because if one were to interpret it the other
11 way round, it could very well mean that in the case of the first
12 accused he would open his case, lead his witnesses, if that is
13 the way we are going, at the close of his case the second accused
14 opens his case, leads his witnesses and then the third accused.
11:36:32 15 That is another way of interpreting it. But, as I said, for the
16 purposes of cohesion and perhaps smooth sailing, subject to what
17 the Chamber might say, on the 17th we could all open our
18 respective cases on behalf of our respective clients and then we
19 move on from there for the sake of tidiness.

11:36:58 20 PRESIDING JUDGE: Yes. Well, as I said, this is something
21 that, as it's a familiar American way of putting it, this Bench
22 will weigh in on since the Rules themselves have provided us with
23 a lot of legal food for thought and we develop the jurisprudence
24 as we go along. These are worthwhile observations, but as I say,
11:37:25 25 they are not insurmountable. The Rules authorise us to formulate
26 rules that fairly determine, you know, or guide the adjudicatory
27 process. One thing I can assure you is that this Bench has
28 always made it quite clear we will not let technicalities stand
29 in the way of a fair determination of matters in issue.

1 MR JOHNSON: Your Honour, if I could, since we are just six
2 days from that day and in light of Mr Margai's comments, I think
3 that we understand then that the first order of business on the
4 17th, since first accused has already had their opening
11:38:11 5 statement, that the first order of business would be the opening
6 statements by the second accused followed by the third accused.

7 PRESIDING JUDGE: Yes, that is a fair presumption, subject
8 to any further directions and rulings by the Bench.

9 MR IANUZZI: Your Honour, we would --

11:38:27 10 MR MARGAI: Sorry, My Lord --

11 PRESIDING JUDGE: Subject to any directions or rulings by
12 the Bench on that.

13 MR MARGAI: My Lord, I agree with my learned friend Johnson
14 I think.

11:38:47 15 PRESIDING JUDGE: Yes, I understand that there was some
16 controversy as to whether the first accused has already
17 relinquished his right, but we are not going to enter into that
18 debate at this point.

19 What about the order of calling defence witnesses? We did
11:39:11 20 require the Prosecution, as I recall, to provide some written
21 indication prior to the testimony of their witnesses as to the
22 order in which they intend to call them and an indication of,
23 say, every seven or eight or ten or nine witnesses, certain
24 number of days prior to the date of the proposed testimony. And
11:39:41 25 it would seem that it is fair to require the Defence also to make
26 a commitment to providing some written indication as to the order
27 in which they intend to call their witnesses, giving us the
28 number, probably 10 or 15, you know. I mean, having regard to
29 the fact that the trial sessions lasts for six weeks, or more

1 than that, and some indication -- am I on the same radar screen
2 as the Defence or am I on a different radar screen?

3 MR MARGAI: No, we are on the same. I was just thinking
4 that perhaps what is bringing about this confusion with regard to
11:40:28 5 common witnesses is we need to determine whether common witnesses
6 are synonymous with joint witnesses or whether there is a
7 difference though subtle. Maybe if that were to be clarified by
8 the Bench with contributions from colleagues on both side of the
9 house, then maybe that might simplify quite a number of issues.

11:41:10 10 PRESIDING JUDGE: Well, I thought that at one stage during
11 the pre-trial phase of these cases we dealt with a situation
12 which I am not sure is entirely analogous to the one that we are
13 dealing with, wherein the case of the AFRC trial and the RUF
14 trial there was some concept of common witnesses where there may
11:41:46 15 be some witnesses who were coming to give the same kind of
16 evidence in respect of those two trials, and there was a motion
17 for taking down the testimony of common witnesses and using them
18 in both trials. And during that particular point in time there
19 was no suggestion that the term "common witness" was synonymous
11:42:14 20 with joint witnesses. I am trying to recollect those decisions,
21 witnesses that are common to the Defence would be common
22 witnesses and perhaps the Prosecution might -- wasn't that at
23 some stage we had a motion asking the Court to order the taking
24 down of testimonies of common witnesses and allow those
11:42:54 25 testimonies to be used in both trials? Do you have a
26 recollection of that? I think the concept was given another
27 name.

28 MR JOHNSON: Your Honour, I mean I know there have
29 certainly been witnesses that have testified in both trials.

1 PRESIDING JUDGE: And what do you call those? You call
2 them common witnesses, don't you?

3 MR JOHNSON: Yes, Your Honour, but I don't know that that
4 has an analogy with what we are referring to here. I think it is
11:43:22 5 a very different concept because you are talking about two
6 completely different trials.

7 PRESIDING JUDGE: Yes.

8 MR JOHNSON: And I guess that what we are trying to grapple
9 with here is the distinction between a witness that would be
11:43:35 10 called by two or more counsel and possibly a witness that might
11 be testifying to the same event, but not being called.

12 I guess the concern that we have is that those witnesses
13 that more than one accused want to call as their witness - and
14 this, of course, is a witness that I believe would be subject to
11:44:05 15 direct examination by each defence counsel - again they are
16 intending to call that witness in their client's behalf - the
17 concern now that where the water seems to be getting very muddy
18 here is, so to speak, counsel for the first accused calls the
19 witness and testifies to things for the first accused and may
11:44:25 20 testify adversely to the second or third accused. Counsel for
21 the second accused still wants that witness to testify on behalf
22 of his client, but now wants to cross-examine him with relation
23 to the adverse testimony he gave while being under direct
24 examination by the first accused. Now the water keeps on getting
11:44:47 25 muddier and muddier and muddier, and there are numerous
26 permutations of this. Well, I am not sure, thinking off the cuff
27 here, that I have got some good guidance for it. I think it
28 needs some thought.

29 PRESIDING JUDGE: Well, I would have thought if we are

1 applying the plain and ordinary meaning to the term "common"
2 here, we should look at what the dictionary says. What does
3 "common" imply?

11:45:22 4 MR MARGAI: My Lord, if I may be heard. I believe there is
5 a difference between a common witness and a joint witness.

6 PRESIDING JUDGE: I am not disagreeing at all.

7 MR MARGAI: In the case of a common witness the testimony
8 relates to issues, but the thrust is directed at individual
9 accused persons. What they did. For example, a murder has been
11:45:46 10 allegedly been committed at Kissi Town. The witness comes to
11 testify as to what he or she saw on that day relating to the
12 alleged murder, and goes on further to testify as to the
13 activities of each individual accused. Coming to a joint
14 witness, the joint witness's testimony talks about same issues
11:46:16 15 and all components are directed at one goal. That is the
16 difference I see.

17 And here, from the list of witnesses that have been
18 submitted, there is only the common witness, not a joint witness.
19 We have not presented any list here that indicates calling a
11:46:43 20 joint witness. All we have here are common witnesses, nine in
21 number.

22 PRESIDING JUDGE: And the presumption here, of course, is
23 that the term "common" bears its ordinary meaning, not any
24 technical or legal meaning. I mean, as far as I know I am not
11:47:15 25 sure whether we can find any legal meaning attributed to the word
26 "common" in this context from Blacks Law Dictionary. So when
27 Mr Johnson talks about the waters being muddied, I am not sure
28 whether, again in my own familiar metaphorical way, we are not
29 raising a cloud of dust and complaining that we cannot see.

1 MR JOHNSON: Yes, Your Honour, I think I would agree and
2 think that -- I mean, I cannot -- I have trouble imagining the
3 situation where one counsel has the right to both conduct a
4 direct examination and a cross-examination of the same witness at
11:48:01 5 the same time. That just seems -- I am just not familiar with
6 that as I think was being suggested.

7 PRESIDING JUDGE: Procedurally nightmare-ish.

8 MR JOHNSON: I just can't imagine and I think that is what
9 was being suggested. To me, if it is a common witness, a witness
11:48:15 10 on more than one list, then whose ever list they are on conducts
11 a direct examination. And if they are not on a list then they
12 may very well have the right to conduct a cross-examination and I
13 think that is the only logical way to proceed on this basis.

14 MR IANUZZI: But, as Mr Johnson indicated, there might well
11:48:37 15 be a witness -- pardon, with leave Your Honour?

16 PRESIDING JUDGE: Yes.

17 MR IANUZZI: Thank you. As Mr Johnson indicated, there
18 might be a witness who may be a common witness testify
19 beneficially for one accused, adversely for another accused, who
11:48:49 20 also wants to be directed by one of the accused who has been
21 adversely affected. And there will be an effect of whether or
22 not we can ask leading questions of that witness.

23 PRESIDING JUDGE: Well, the difficulty, of course, would be
24 that at that point in time the Court would be intuitively
11:49:08 25 prompted to apply the usual judicial guarantees and safeguards to
26 ensure fairness to one accused person or the other. But the
27 question is that there would have been a prior or antecedent
28 characterisation of that witness as a common witness by the
29 defence teams. It is your characterisation.

1 MR IANUZZI: Common to the lists.

2 PRESIDING JUDGE: Well, yes, it is your characterisation.

3 It is not a conceptual contrivance being imposed by the Bench.

11:49:46

4 MR IANUZZI: As long as we can see the Bench to say, for
5 instance, treating him as hostile ask leading questions.

6 PRESIDING JUDGE: Yes, quite right. But that would not in
7 any way disable the Bench from applying the necessary safeguards
8 to avoid unfairness to an accused person. Does any other --

9 Prosecution, any other --

11:50:05

10 So, I think perhaps there has been enough food for thought
11 and it is something I will pass on to the other judges that they
12 may need to turn over in their minds. I did not realise when we
13 were using the words "common witnesses" we were importing into
14 the judicial process some kind of complicated creature that we
15 may have to define with a greater degree of precision. But
16 perhaps we should shift ground.

11:50:30

17 MR MARGAI: One more thing, My Lord, before we shift
18 ground. Let me just add that one more distinction between a
19 common witness and a joint witness is that in the former, the
20 former may be cross-examined by, as in this case, second and
21 third accused if he is called by the first. In the case of a
22 joint -- sorry, a joint witness is not cross-examined.

11:50:46

23 PRESIDING JUDGE: Yes. Thank you.

24 So we were in fact also briefly - let's get to that -

11:51:10

25 trying to elicit from the Defence the commitment that, in much
26 the same way as the Prosecution did provide an advance list of
27 their witnesses that they intend call and 15 days -- well,
28 nominally 15 days prior to the date of their proposed testimony,
29 the sequence, we will expect that the Defence will have to do

1 that, some written indication. Again for tidy management of the
2 trial and at least for the Prosecution to be able to prepare in
3 advance their own case in response to whatever the witnesses will
4 be coming to testify to.

11:52:01 5 MR JOHNSON: Your Honour, I would only ask if we could
6 place some kind of deadline on this because, again, I mean, the
7 Prosecution, of course, knows that the first witness to testify
8 will be the first accused, but beyond that we are down to under a
9 week and we don't know who is coming after that.

11:52:24 10 PRESIDING JUDGE: Can we have an undertaking that this
11 could be done within --

12 MR JABBI: Within the next two days, My Lord.

13 PRESIDING JUDGE: Yes, two days. So in other words we
14 don't want an order directing you to --

11:52:32 15 MR JABBI: No, My Lord.

16 PRESIDING JUDGE: -- submit that list in two days' time.
17 Do we have that undertaking from the Defence?

18 MR JABBI: Certainly for the first accused.

19 PRESIDING JUDGE: For the first accused. Second accused?

20 MR BOCKARIE: Yes, Your Honour.

21 PRESIDING JUDGE: And third accused?

22 MR IANUZZI: Your Honour, could we just get some
23 clarification?

24 MR MARGAI: My Lord, considering that we will be leading
11:53:00 25 evidence much later --

26 PRESIDING JUDGE: I see. Perhaps, in your case --

27 MR MARGAI: Yes, thank you.

28 PRESIDING JUDGE: -- you may ask for a reservation.

29 MR JOHNSON: Your Honour, certainly our immediate concern

1 is --

2 PRESIDING JUDGE: Whoever begins.

3 MR JOHNSON: -- by the first accused; yes, Your Honour.

4 Ultimately we would seek a similar order.

11:53:17 5 PRESIDING JUDGE: Yes, and the Prosecution is not precluded
6 from coming from time to time for orders, consequential orders,
7 on these issues. Right, okay.

8 MR MARGAI: We cooperate with them as always.

9 MR IANUZZI: That applies to the second accused as well.

11:53:30 10 PRESIDING JUDGE: Yes, leave. Fine.

11 The next issue is the question of statement of agreed and
12 contested facts and issues. I think it was on 26th May 2004, and
13 subsequently on 4th November 2004, that the Trial Chamber issued
14 certain orders requiring both parties to submit status reports on
11:54:07 15 agreed points of fact and law. And needless, I remind counsel,
16 that this is required by Rule 73 ter. We also have that
17 authority under the Rule to order parties to file such statements
18 and before the commencement of the case for the Defence.

19 I invite comments on both sides on this issue, otherwise it
11:54:44 20 may be necessary for the Bench to have to issue some order
21 pursuant to Rule 73 ter. What progress, if any, has been made in
22 this regard? Who wants to speak first?

23 MR JOHNSON: Well, I can say little or no progress would
24 probably be the best way to characterise it, Your Honour. Of
11:55:14 25 course, we were relatively unsuccessful during the Prosecution
26 case to file any additional agreed facts. We will endeavour to
27 get with defence to see if we can, now that we have moved past
28 the Prosecution case and the defence case, to see if there is
29 some working room there. It will be easier now that we are going

1 into session because everyone is here in the same place. One of
2 the problems, of course, is that we are dealing with four
3 different parties with four different schedules scattered to the
4 winds much of the time. And now that for the next, of course,
11:55:49 5 two months we pretty much know where everybody will be, we will
6 make an effort to get together and see - I won't make any
7 promises - but to see if there are additional facts that we can
8 agree to and work towards, Your Honour.

9 PRESIDING JUDGE: Yes, and also statements of contested
11:56:08 10 matters of fact. Again the Chamber will restrain itself, but at
11 the same time not be oblivious of the fact that it has
12 jurisdiction to issue an order in respect of this requirement.

13 Before we move on to any other matters, are there any other
14 substantive issues in respect of the matters that we have already
11:56:40 15 covered that you would like to revisit? Prosecution, any
16 clarifications you might want to seek or any comments you might
17 want to bring to the attention of the Bench on issues already
18 covered that we may have left out?

19 MR JOHNSON: Well, Your Honour, just to ask the Bench to
11:57:05 20 please - and I don't want to suggest you are not working on it,
21 we know that you are working on it - but our motion for
22 statements to please deliver that quickly.

23 PRESIDING JUDGE: Yes, quite right.

24 MR JOHNSON: I only bring that up to point out because, as
11:57:17 25 I said, we know the first witness will be the first accused and
26 he will be coming up now, and quite frankly the summary we got of
27 the first accused of what he is going to testify to is the
28 vaguest as can be and it contains very, very little information
29 and makes it, of course, extremely hard to prepare for

1 cross-examination.

2 PRESIDING JUDGE: Yes, well, we will take it under
3 consideration and treat it with a great sense of urgency.
4 Anybody else on the Prosecution side want to supplement?

11:57:40 5 MR KAMARA: Yes, Your Honour, this is just a very simple
6 issue on the controversy about witnesses.

7 PRESIDING JUDGE: Yes.

8 MR KAMARA: I think the Court has been right all along. It
9 mentioned that witnesses in common to all defences and never
11:57:57 10 refer to common witnesses and there is a distinction there. Even
11 the agenda says witnesses common to all defence teams. Thank
12 you.

13 PRESIDING JUDGE: Well thanks very much for the
14 clarification. Anybody else on that side?

11:58:17 15 Now defence, again on this issue, are there any omissions
16 on issues already covered that you might want to revisit for the
17 purposes of clarification or reinforcement? Any other areas we
18 have already covered that you might want to revisit so we can --
19 remember, this is a pre-defence conference, we may not have the
11:58:37 20 opportunity to -- Dr Jabbi, anything that you think?

21 MR JABBI: My Lord, I do not have any particular subject,
22 we have already covered that.

23 PRESIDING JUDGE: Nothing on your aide-memoir there? What
24 about Mr Bockarie, anything on your aide-memoir?

11:58:54 25 MR BOCKARIE: No, Your Honour.

26 PRESIDING JUDGE: Learned counsel Mr Margai, anything on
27 your aide-memoir?

28 MR MARGAI: No, My Lord. I believe what I have in mind
29 here would be addressed under any other matter.

1 PRESIDING JUDGE: Okay, very well.

2 Well, let's move on to any other matters and let's address
3 quickly an issue which is also very important here, and that is a
4 question of special defences. It may be recalled that both

11:59:24 5 defence teams for the second and third accused did indicate that
6 they would not be raising or relying on any special defences.

7 The defence team for the first accused did reserve the right to
8 provide some indication on that issue. I raise this because I
9 want to allude to Rule 67, which clearly provides some guidance

12:00:09 10 on this question and which we all need to be sensitive to. That
11 is the Rule which says that:

12 "Subject to the provisions of Rules 53 and 69:

13 (A) As early as reasonably practicable and in any event
14 prior to the commencement of the trial...the defence shall
15 notify the Prosecution of its intent to enter..."

12:00:38

16 And section (B) says:

17 "Any special defence, including that of diminished or lack
18 of mental responsibility; in which case the notification
19 shall specify the names and addresses of witnesses and any
20 other evidence upon which the accused intends to rely to
21 establish the special defence."

12:01:00

22 May I have confirmation of the defence position in respect
23 of the second and third accused persons? Mr Bockarie.

24 MR BOCKARIE: The position remains the same, Your Honour.

12:01:21

25 PRESIDING JUDGE: And learned counsel?

26 MR MARGAI: Ditto, My Lord.

27 PRESIDING JUDGE: May I have some response from the defence
28 team of the first accused as to their own precise position at
29 this stage?

1 MR JABBI: We do not at this stage, Your Honour, have any
2 intention to give notice of special defences. However, we would
3 wish to draw attention to Rule 67(B), which reads --

4 PRESIDING JUDGE: Which reads, yes. 67?

12:01:51 5 MR JABBI: 67(B), My Lord.

6 PRESIDING JUDGE: Yes.

7 MR JABBI:

8 "Failure of the Defence to provide such notice under this
9 Rule shall not limit the right of the accused to rely on
10 the above defences."

12:02:15

11 As much as we do not as yet contemplate that possibility,
12 we want to call attention to that sub-rule.

13 PRESIDING JUDGE: Right, I will give the Prosecution a
14 right of reply.

12:02:27 15 MR JOHNSON: Well, certainly, Your Honour, if we discover
16 something we will comply with the Rules and I will provide
17 notification and --

18 PRESIDING JUDGE: Well, it says that the Rule is not
19 absolute.

12:02:51 20 MR JOHNSON: Yes.

21 PRESIDING JUDGE: And you agree on the law that the Rule is
22 not absolute?

23 MR JOHNSON: Yes, Your Honour, certainly.

24 PRESIDING JUDGE: But, of course, I don't think I learned
12:03:06 25 counsel for the first accused is suggesting that in a matter of
26 this nature good faith is not the overriding consideration rather
27 than anything to the contrary.

28 MR JABBI: My Lord, we shall always endeavour to exercise
29 good faith in response to application of the Rules. But even in

1 this case we will have to give notice anyway.

2 PRESIDING JUDGE: Right. Is there any indication from the
3 first accused who will be testifying in his defence as to any
4 particulars as to the modality of the proposed testimony? Is
12:03:55 5 there anything that you want to enlighten the Chamber and the
6 Prosecution on without disclosing any of your forensic
7 strategies?

8 MR JABBI: As a matter of fact, My Lord, we have been, up
9 to quite recently, in some difficulty in this regard, considering
12:04:33 10 the first accused's fairly belated concession of coming to give
11 evidence. There was some prevarication and on the basis of that
12 we decided to give notice that, in fact, he would give evidence.
13 But in our interactions with him we did not get a clear
14 indication personally from him until yesterday, late yesterday.

12:04:56 15 So we will try to comply with a requirement of the Rule, although
16 we are within a very restricted time frame now, especially if
17 after this conference we confirm with him that indeed he is
18 coming to give evidence. Because of the past prevarication,
19 notwithstanding the assurance we got yesterday, we want to
12:05:23 20 reserve the position until we have confirmed with him after this
21 conference and then we will go into other requirement concerning
22 his evidence.

23 PRESIDING JUDGE: And you will communicate that promptly to
24 the Prosecution, the Defence and the Bench.

12:05:40 25 MR JABBI: Yes, indeed, My Lord. We are really sorry for
26 that, but we have not wished it ourselves and we have been trying
27 to deal with a very delicate situation.

28 PRESIDING JUDGE: Any wisdom from your side on this?

29 MR JOHNSON: No, Your Honour. We will just react to the

1 best of our ability appropriately and from whatever information
2 we have got. And again just our concern about preparing -- we
3 want to see the trial go forward on the 17th, but we also want to
4 be prepared.

12:06:08 5 PRESIDING JUDGE: Yes, and of course these are some of the
6 unpredictable and the imponderables to which these trials are
7 constantly exposed. I have always mentioned the extent to which
8 the idiosyncratic dimensions of the actors within the system tend
9 to impact upon the whole judicial process, and, of course, when I
12:06:46 10 say idiosyncratic I am not in anyway restricting it to just
11 accused persons or witnesses. Probably one morning a judge might
12 just have an attack of what, some serious attack, gastroenteritis
13 and he can't come to court and the trial would not go on, sort of
14 thing. But we will have to do the best we can to limit the
12:07:18 15 adverse impact of some of these imponderables and unpredictable
16 within the context of our human abilities.

17 There is also the issue of interest to the first accused,
18 that of the Court being asked to issue subpoenas ad testificandum
19 and for defence witnesses. The Chamber is currently seized of
12:07:59 20 two motions by the second and the third accused for the issue of
21 a subpoena ad testificandum directed to President Ahmed Tejan
22 Kabbah to testify for the second and third accused persons. The
23 matter is under consideration by the Chamber.

24 MR MARGAI: Sorry, My Lord, not the third accused.

12:08:17 25 PRESIDING JUDGE: I do apologise.

26 MR MARGAI: Second and first accused.

27 PRESIDING JUDGE: Second and first accused. Let the
28 records reflect the correction. Thank you.

29 The matter is under consideration by the Trial Chamber.

1 The Prosecution has not yet exercised its right of response and
2 the Bench also wishes to observe that the motion was not copied
3 or served on the President. But this is a matter that we are
4 actively considering. Are there any brief procedural comments on
12:08:55 5 this issue by the Defence? And I say procedural comments because
6 I am not inviting comments on the substantive aspect of the
7 merits or otherwise of these motions. Just procedural. Who
8 wants to begin?

9 MR JOHNSON: No, Your Honour, we certainly will be
12:09:13 10 respondi ng.

11 PRESIDING JUDGE: Right. Good. Thanks.

12 MR IANUZZI: And we will serve the President with a copy of
13 the motion. We will serve the President with a copy of the
14 motion.

12:09:22 15 PRESIDING JUDGE: Yes, and first accused.

16 MR JABBI: My Lord, we just want to emphasise the need for
17 us to have a clear-cut statement on this issue as soon as
18 possible.

19 PRESIDING JUDGE: From whom, from the Bench?

12:09:38 20 MR JABBI: Both from the Bench in terms of the ruling and
21 ultimately --

22 PRESIDING JUDGE: Come on, I told you that you have been
23 limited to procedural issues. I can assure you that the Bench --
24 I began this proceeding by emphasising the heightened sense of
12:09:54 25 judicial sensitivity for this particular trial at this phase to
26 move as expeditiously and fairly as possible. I am not renegeing
27 from that and I can assure you that once the procedural
28 formalities are complied with this Bench will waste no time in
29 coming out with a decision on the matter. All I am asking now is

1 whether you are prepared to serve the President a copy of the
2 motion because it seems necessary.

3 MR JABBI: As my colleague for the second accused
4 indicated, that is to be done. But, My Lord, I only mention this
12:10:43 5 in order to indicate the special status and order in which the
6 first accused would wish to have this witness.

7 PRESIDING JUDGE: Yes, but the point one is making here is
8 really to advance your case. If you give us -- I mean, I am in
9 fact saying that all we need to do is have all the procedural
12:11:06 10 formalities complied with and here the judges come in a matter
11 of, I hope, one, two, three hours, deliberate on the issue and
12 decide what they have to do.

13 MR JABBI: We shall comply with the aspect of service.

14 PRESIDING JUDGE: Quite. And what about also the
12:11:24 15 possibility if the first accused has requests for subpoenas in
16 respect of other witnesses, why not let us have them as quickly
17 as you can.

18 MR JABBI: We will do that, of course.

19 PRESIDING JUDGE: Yes, it is just to advance your interest.

12:11:38 20 MR JABBI: Yes, indeed, My Lord.

21 PRESIDING JUDGE: And Prosecution, is there anything you
22 need to add to that?

23 MR JOHNSON: Your Honour, nothing additional.

24 PRESIDING JUDGE: Yes, quite.

12:12:03 25 We have outstanding the following motions and certainly
26 they are under consideration and there is a motion, joint motion,
27 for clarification of the decision and motions for judgment of
28 acquittal that was filed on 31st October 2005. A response was
29 received by the Prosecution on 4th November. We certainly will

1 come out with a decision very soon.

2 The Prosecution application for leave to appeal proprio
3 motu findings in decision on motions for judgment of acquittal
4 pursuant to Rule 98. Again, that too is certainly under

12:12:53 5 consideration and we will issue a decision very soon.

6 Urgent Fofana request for leave to appeal the
7 7th December 2005 decision of Trial Chamber I filed on
8 12th December 2005. Defence seeks leave to appeal the decision
9 on the urgent motion for reconsideration of the orders for

12:13:19 10 compliance with the order concerning the preparation and

11 presentation of the defence case. Again, that is being disposed
12 of.

13 Then there is also, as I already mentioned, the Fofana
14 motion for issuance of a subpoena ad testificandum to President
12:13:38 15 Ahmed Tejan Kabbah. Then there is a Norman motion also. Again,
16 I have just referred to those two.

17 Then there was another motion that was coming, Prosecution
18 request for order to defence pursuant to Rule 73 ter to disclose
19 written witness statements filed on December 7, 2005.

12:14:03 20 All these motions are receiving the urgent attention of the
21 Chamber and decisions will issue very soon.

22 MR MARGAI: My Lord, I am sorry to bring us back to C. We
23 had deliberated on the modalities of examination of witnesses,
24 but no conclusions were reached either on common or uncommon
12:14:27 25 witnesses. For instance, where the first accused leads a witness
26 in chief, after him who cross-examines before the other? Is it
27 the second and third persons or the Prosecution before us?

28 PRESIDING JUDGE: I would like to leave that. We will give
29 a position on that before we commence trial.

1 MR MARGAI: As My Lord pleases. Much obliged.

2 PRESIDING JUDGE: Are there any other matters that any side
3 wants to bring to the attention of the Chamber?

4 MR JOHNSON: I just don't think we noted on the record at
12:15:07 5 the beginning, Your Honour, that none of the accused are present
6 for the conference.

7 PRESIDING JUDGE: Yes, let the record so reflect that.

8 MR JOHNSON: That is all, Your Honour.

9 MR IANUZZI: With leave, Your Honour, one last point?
12:15:18 10 Could you please give us an indication of how much time we will
11 have to make an opening statement on Wednesday?

12 PRESIDING JUDGE: Of course, in this particular case we do
13 not want to even go back to the concept of mathematical
14 equalities.

12:15:41 15 MR IANUZZI: Just for planning purposes.

16 PRESIDING JUDGE: Well, I think an opening statement, I
17 mean, speaking for myself - and I don't see why we should not -
18 30 minutes would be a good time frame.

19 MR IANUZZI: Thirty minutes.

12:15:56 20 PRESIDING JUDGE: Thirty minutes would be a reasonable time
21 frame considering, as we say, all along the Defence does not have
22 the burden of proving the innocence of the accused persons. All
23 they have is the burden of - not even a burden - just to poke
24 holes in the Prosecution's case. Thirty minutes would be
12:16:18 25 reasonable and, of course, this is subject to what we think may
26 be judicious depending on how elaborate the opening statement is.

27 MR IANUZZI: As we understand it, the purpose of the
28 opening statement would be direct Your Honours' attention to the
29 evidence we are about to present. So as we are going to make an

1 opening statement and then go directly into Mr Norman's
2 witnesses, could we reserve 10 minutes?

12:16:54

3 PRESIDING JUDGE: Thirty minutes seems reasonable because
4 what you will be doing, in an encapsulated form -- you are not
5 making, as I say -- you seem to take the view that your opening
6 statement is not meant to be in any way some indication that the
7 burden of the Prosecution is diminished.

8 MR IANUZZI: Understood.

12:17:07

9 PRESIDING JUDGE: Thirty minutes, I think, is a reasonable
10 time frame.

12:17:30

11 MR IANUZZI: My second question is: Could we reserve 10
12 minutes or so of the 30 for when we are about to open our case,
13 as the purpose of the opening statement is to direct Your
14 Honours? We will be making an opening statement going right into
15 Mr Norman's witnesses. The effect will be lost unless we have a
16 chance to just make a brief comment when we finally open our
17 case.

12:17:41

18 PRESIDING JUDGE: It sounds reasonable, but I will give you
19 some more directions as we begin. But just work within the 30
20 minute framework.

21 MR IANUZZI: Thank you.

12:18:00

22 MR JOHNSON: If I could only comment on that, Your Honour.
23 I mean, we have been through that. Mr Norman has made his
24 opening statement and it's completed. I think we are before a
25 panel of professional judges and that the impact concerned that
26 the defence counsel may be having. I mean, I just submit that
27 they should give their opening statement and that is that.

28 PRESIDING JUDGE: Well, as I say, this is a matter which,
29 of course, is again subject to what the Chamber collectively will

1 decide on. I don't want to prejudge what my other colleagues
2 might think on this.

12:18:32 3 MR JOHNSON: If I might only add, Your Honour, from the
4 time perspective, if I recall, it has been some time now, but you
5 did not place a limit on us on time, but rather you put the
6 obligation back on us and said how much time do you think you
7 need, and I think we responded with 90 minutes and we kept it
8 under that. Perhaps it would be just see what they think they
9 need.

12:18:48 10 PRESIDING JUDGE: That means on the outside for them. Yes.
11 They might not even use up to 30 minutes. It's possible.
12 Anything else?

13 MR IANUZZI: Just one last technical point. Are we still
14 going to be having Wednesday afternoons free?

12:19:08 15 PRESIDING JUDGE: Yes, the Chamber has not decided to vary
16 this particular requirement.

17 MR IANUZZI: And that goes for the opening day as well?

18 PRESIDING JUDGE: Yes, quite. We are certainly not. It is
19 the only time that we are free to work in chambers by ourselves
12:19:17 20 collectively.

21 Anything else on the legal office?

22 MR KAMARA: Your Honour, I am sorry to take the Court back.

23 PRESIDING JUDGE: That's okay. That is fine. I said we
24 need to clear things up. It does not matter.

12:19:42 25 MR KAMARA: I was skimming through the witness list for the
26 first accused and I realised that witness numbered 60 is
27 identified as a journalist who would provide a factual analysis
28 of the conflict. I just want to give an indication to the
29 Defence of the first accused that we shall be seeking a report,

1 if at all, it seems as if this particular witness is on an
2 elevated level. He has not been labelled as an expert and if we
3 tend to agree with that we may describe him as a quasi-expert,
4 and therefore we may need to know the methodology, his
12:20:17 5 qualifications, the credentials that will give him the authority
6 to speak in relation to that.

7 PRESIDING JUDGE: Yes, I will let them respond. Please do.

8 MR JABBI: My Lord, we are not proposing him as an expert.
9 We believe that he can give evidence which would not qualify as
12:20:36 10 quasi-expert's evidence, unless, of course, the Court otherwise
11 determines.

12 PRESIDING JUDGE: How do you respond to that? Do you
13 think --

14 MR KAMARA: Well, since the summary is nothing to go by,
12:20:57 15 and from what we have, a factual analysis of the conflict -- I
16 mean, this is not a report in fact this is what I saw, but an
17 analysis of the conflict. It shows that there is some knowledge
18 in the possession of that witness and we in the Prosecution would
19 like to know the basis of that knowledge and what methodology was
12:21:15 20 put in place for that basis. If it is an ordinary journalist, I
21 am sure he is only described as a journalist by profession
22 probably, but he would not be here as a journalist. But to give
23 an assessment of analysis of the conflict that is very technical.

24 PRESIDING JUDGE: Yes. Would there be a difference here
12:21:37 25 between a commentator and an analyst? Would it be the same?

26 MR KAMARA: It would be different, Your Honour.

27 PRESIDING JUDGE: Different. It's not just a commentator.

28 MR KAMARA: He is not just a commentator giving his point.

29 PRESIDING JUDGE: Or just a narrator.

1 MR KAMARA: Not, Your Honour.

2 PRESIDING JUDGE: He is coming to analyse.

3 MR KAMARA: He is analysing the facts. And we know the
4 facts as presented by the Prosecution. If he is coming to
12:21:58 5 analyse the facts for us, we also need to know so that we can
6 present and confront in evidence about that as well. So, we seek
7 a report to know where we stand.

8 PRESIDING JUDGE: Your contention now is that there is a
9 veiled characterisation here which is more or less consistent
12:22:25 10 with him being an expert rather than just someone who is coming
11 to report as a journalist.

12 MR KAMARA: I had my suspicions, but I was not going to
13 come up with that. But Your Honour, it seems that is the case if
14 he is going to give us a factual analysis and he has been
12:22:41 15 labelled as a journalist.

16 PRESIDING JUDGE: Would you be precluded, if he testifies,
17 from challenging vigorously under cross-examination the
18 methodological basis of his analysis? Would you not be able,
19 through the medium of cross-examination, to say, "Look, you are a
12:23:04 20 bogus kind of -- you are not really this kind of thing that you
21 are trying to come and give us here. An analysis of the factual
22 thing, it does not lie within your competence"? Would that be
23 difficult for you?

24 MR KAMARA: It would be difficult and too late at that
12:23:18 25 point because --

26 PRESIDING JUDGE: But then remember he says that they are
27 not going to put him forward as an expert. But you will not be
28 precluded from saying here, "That you guy are pretending as an
29 expert, but of course the side that has called you is not putting

1 you forward as an expert."

2 MR KAMARA: That is why we are pre-empting them by telling
3 them that we are going to challenge any form of analysis that he
4 is going to do. And if you look what they said, he is going to
12:23:44 5 go by the factual analysis. We are only going to limit him as to
6 facts. But if he ventures into the arena of analysis, then
7 definitely we are not going to let that happen.

8 PRESIDING JUDGE: You are putting them on notice that they
9 are going to have a fight.

12:23:57 10 MR KAMARA: You have a report or do let him not analyse
11 anything.

12 PRESIDING JUDGE: Right. Well, as I say, I think the most
13 effective machinery for this would be cross-examination. By the
14 time you finish you may have been able to satisfy the Court that
12:24:12 15 we really have here an imposter or something.

16 MR KAMARA: We will wait for that, Your Honour. Thank you
17 very much.

18 PRESIDING JUDGE: All right. Anything else?

19 MR WILLIAMS: My Lord, on that issue I believe the
12:24:26 20 Prosecutor did call a witness during the presentation of their
21 case. That person testified in closed session. He had worked
22 for a reputable international organisation. He is a human rights
23 expert. The witness that refused to disclose one of his sources.
24 I mean, we actually thought that was an expert, but we let him go
12:24:48 25 as a factual witness.

26 PRESIDING JUDGE: I think you should be prepared to give
27 them a fight too on this issue.

28 MR WILLIAMS: As Your Lordship pleases.

29 PRESIDING JUDGE: I mean, that is how it should go because

1 really characterisations are so delicate issues. So many people
2 pose these days as analysts, commentators, whatever. There are
3 so many of them all over the place. The line now between a
4 professional and a non-professional is so thin so that we live
12:25:22 5 with this kind of development.

6 If there is nothing else for the good of the Special Court
7 in particular and specifically for the purpose of this
8 proceeding, I will then bring it to a conclusion. So that is the
9 end of the proceeding and we will see you in due course.

12:25:47 10 [Whereupon the pre-defence conference was
11 adjourned at 12.25 a.m.]

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