

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

WEDNESDAY, 6 JULY 2005  
10.22 A.M.  
TRIAL

TRIAL CHAMBER I

|                                      |  |
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| Before the Judges:                   | Pierre Boutet, Presiding<br>Bankole Thompson<br>Benjamin Mutanga Itoe  |
| For Chambers:                        | Ms Sharelle Aitchison<br>Ms Roza Salibekova  |
| For the Registry:                    | Mr Geoff walker  |
| For the Prosecution:                 | Mr Desmond de Silva, QC<br>Mr James C Johnson<br>Mr Mohamed Bangura<br>Mr Kevin Tavener<br>Mr Mohamed Stevens (intern) |
| For the Principal Defender:          | No appearances   |
| For the accused Sam Hinga<br>Norman: | Dr Bu-Buakei Jabbi<br>Mr Kingsley Belle (legal assistant)  |
| For the accused Moinina Fofana:      | Mr Arrow Bockarie<br>Mr Andrew Ianuzzi   |
| For the accused Allieu Kondewa:      | Mr Yada Williams<br>Mr Ansu Lansana<br>Mr Virgil Chong (intern)<br>Ms Joanne Canada (intern)                           |

1 [CDF06JUL05A-RK]  
2 wednesday, 6 July 2005  
3 [Open session]  
4 [The accused Fofana and Kondewa present]  
09:32:27 5 [The accused Norman not present]  
6 [Upon commencing at 10.22 a.m.]  
7 PRESIDING JUDGE: Good morning, counsel. We are late  
8 starting this morning largely due to the weather condition. We  
9 were waiting for Defence counsel to be on site and we were  
10:24:16 10 informed that counsel for the first accused had not arrived so  
11 that is why we are late in going to court this morning.  
12 Yes, Dr Jabbi.  
13 MR JABBI: Yes, My Lords, I would like to apologise  
14 profusely for coming so late this morning, holding up the Court  
10:24:37 15 by at least 45 minutes. I was indeed on my way in due time from  
16 home but suffered a tire puncture at Blama Road [phon] in very  
17 heavy rain. I could not manage it earlier. Taxis don't come  
18 that way by this time, especially when it is raining so much.  
19 So, My Lords, I'm sorry I have held up the Court this morning and  
10:25:05 20 I apologise to Your Lordships, the whole Court and my colleagues.  
21 PRESIDING JUDGE: Thank you, Dr Jabbi. So, we are now  
22 ready to proceed. What I would like to ask the Prosecution to do  
23 is not necessarily repeat all of their requests for the admission  
24 of these documents but to -- we have read and noted the  
10:25:35 25 submissions made. We still have concerns about some documents  
26 sought to be admitted. So we will start with what has been  
27 referred to as the first bundle.  
28 Mr Tavener, can you address the Court with reference to the  
29 first bundle just so we have the same -- that is the one that

1 contains reports of the UN Secretary-General and number 11, 13,  
2 14, 15, 16, 18. That is the bundle that I'm talking about.

3 MR TAVENER: I understand. If I could make one quick  
4 general remark and then I will move on to your question. The  
10:28:08 5 Prosecution's submission at this stage, consistent with our  
6 written submissions, is that all documents can be tendered and  
7 ultimately Your Honours decide in the light of all the evidence  
8 at the end of the trial how much weight you place upon those  
9 documents. It may be there are documents tendered at this stage  
10:28:25 10 that you reject, some you accept in part, others you accept in  
11 full. That will be a function of the exercise of your discretion  
12 at the appropriate time. The mere admission of the documents  
13 does not carry with it the imprimatur of the Court in that there  
14 is no obligation for the Court to place weight on those  
10:28:45 15 documents. That is a question that can be resolved by the Court  
16 at the appropriate time. So, the Prosecution's submission is  
17 that all the documents are tendered and the Court then assess the  
18 documents when all the evidence is available.

19 JUDGE THOMPSON: That submission is a submission of law is  
10:29:00 20 it?

21 MR TAVENER: That's correct. That is our general  
22 submission.

23 JUDGE THOMPSON: In law?

24 MR TAVENER: In law, thank you. That has been the thread  
10:29:10 25 of our submissions in our written documents.

26 PRESIDING JUDGE: when you say all documents tendered are  
27 admissible, and when you say that they are admissible at this  
28 stage, whether or not they are given any weight and accepted by  
29 the Court is your position at this time. Anyhow it is for the

1 Court to make a determination in due course.

2 MR TAVENER: Yes.

3 PRESIDING JUDGE: But when you say this, which section or  
4 rules are you relying upon to make that statement at this stage,  
10:29:43 5 if I can put it this way?

6 MR TAVENER: 89 bis and 79 -- sorry 89(C). The Court to  
7 take notice of relevant evidence and when we come to the  
8 documentary evidence, we rely upon 92 bis because it enables  
9 documents to be put before the Court that may assist the Court in  
10:30:12 10 understanding better the matters put before them. We say that  
11 cannot be done ultimately until the end of trial, because it is  
12 not until the end of trial that Your Honours can see all the  
13 evidence and whether or not those particular documents assist the  
14 Court or not, and whether or not they are susceptible for  
10:30:38 15 confirmation. Because this is the end of the Prosecution case,  
16 we feel this is the appropriate time to put those documents  
17 forward.

18 PRESIDING JUDGE: When you say "assist the Court", this is  
19 an interpretation or a statement that is novel and important in  
10:30:54 20 the definition of 92 bis, because I don't see that anywhere in  
21 this particular rule that this is a condition of admissibility or  
22 reliability, whatever it may be.

23 MR TAVENER: In order for the Court to come to an effective  
24 decision or a decision based upon the facts, it needs to be  
10:31:15 25 informed. 92 bis and alternative proof of facts which allows for  
26 judicial economy, amongst other factors -- under subsection (a)  
27 it says, "a Chamber may admit as evidence in whole or in part  
28 information in lieu of oral testimony." So, the Court --

29 PRESIDING JUDGE: Yeah, but information in lieu of.

1 MR TAVENER: Yes. It doesn't not mean -- it means instead  
2 of the Court sitting and hearing from a whole range of people in  
3 order to provide background to you, that system can be  
4 short-circuited, or a shortcut is provided under the Rules of  
10:31:54 5 Evidence to enable documents to be used. That would be the  
6 general purpose of 92 bis.

7 JUDGE THOMPSON: In other words, you are saying that we  
8 can, using 92 bis, admit substantive evidence in lieu of an oral  
9 testimony.

10:32:08 10 MR TAVENER: That's correct.

11 JUDGE THOMPSON: As a matter of law.

12 MR TAVENER: Exactly. As to how much weight you place on  
13 that evidence, that ultimately is a matter for you. I use the  
14 example, in a national jurisdiction courts have information about  
10:32:21 15 the society in which they live, for instance, and what has  
16 happened in that society. An international court is formed and  
17 more or less is a blank palette. The purpose of 92 bis enables  
18 the Court to inform itself about matters that it otherwise would  
19 know in a normal national jurisdiction. There is that type of  
10:32:41 20 information that needs to be put before the Court. Then there is  
21 more specific information that needs to be put before the Court,  
22 such as the nature of the conflict, who was involved and so on.  
23 There is various levels of information that can be put before the  
24 Court.

10:32:55 25 PRESIDING JUDGE: Where do you draw the line between? If I  
26 follow this reasoning as such, why do we need to call witnesses?  
27 All you have to do is tender all the statements and all the bunch  
28 of documents and it is taken care of under 92 bis. Why do we go  
29 through this process?

1 JUDGE ITOE: I would follow to say that we have placed a  
2 lot of premium on the principle of orality and we have been  
3 functioning on this, even where we have documents tendered or  
4 used in the course of our proceedings. Where would you place  
10:33:31 5 this document in relation to the premium we have placed on the  
6 orality for purposes of serving us in these proceedings?

7 MR TAVENER: Clearly, the most weight the Court would place  
8 is upon the witnesses who have appeared before them. The  
9 Prosecution does not dispute that principle of orality. That is  
10:33:52 10 where the substantive evidence or the evidence that has been  
11 tested in cross-examination is presented before you. Clearly the  
12 most weight comes from the testimony of the witnesses; the  
13 documents are there merely as background to assist you. You can  
14 accept them or reject them as you will.

10:34:08 15 JUDGE THOMPSON: But then the difficulty is that if you  
16 submit as a matter of law that the admitting documents under 92  
17 bis would more or less mean that we are, in fact, substituting  
18 for oral testimony evidence from the documents in a sense. If  
19 that is the thinking, and we put them on the same pedestal, the  
10:34:36 20 documentary evidence coming in by way of substitute for oral  
21 testimony, then there is one missing link here. Of course, even  
22 though you are inviting the Court to say it is your function to  
23 determine what weight you attach to it, but there is a very  
24 significant missing link. That is that such documentary evidence  
10:35:06 25 will not in fact afford the Defence the opportunity of  
26 cross-examining whoever were the makers or the sources of those  
27 documents. That is a very important factor and if you agree that  
28 is important then it would stand to reason that this Court must  
29 not apply the same degree of flexibility which it applies in

1 admitting oral testimony to documentary evidence. In other  
2 words, we should not let, so to speak, 92 bis and 89(C) in  
3 respect of other documents become a legal dustbin.

4 MR TAVENER: The Prosecution's submission is not that you  
10:35:57 5 are substituting documents for oral testimony; that is not our  
6 position. The best evidence comes from the words of the  
7 witnesses who have been assessed by the Court and been  
8 cross-examined by the Court. The documents serve to assist the  
9 Court in informing itself of the context in which the particular  
10:36:22 10 offences or the alleged offences took place. That is all they  
11 do.

12 PRESIDING JUDGE: I will stop you right there. You seem to  
13 be lumping together background information as such with what  
14 would appear, at least according to my reading of some of these  
10:36:37 15 documents to have documents that are more specific to some crimes  
16 or some accused, as such. So background information to me is  
17 quite different than -- background information to situate the  
18 conflict in a scenario, in a particular location, in a particular  
19 time and space. It's quite different than to say accused A was  
10:36:58 20 there or not there and accused A did this or that or didn't do  
21 this. That is the kind of difficulties we're in. I make a  
22 substantial difference between background information to the  
23 conflict with involvement, directly or indirectly, of any of the  
24 accused in this Court.

10:37:20 25 MR TAVENER: If I might suggest then if a conflict arose  
26 between what was written in a document, say, mention is made of a  
27 particular offence involving one of the accused persons, it is  
28 only a document, there is no support for it anywhere else. Then  
29 the Court may well take the view that is clearly not enough

1 evidence to substantiate an offence. It is there, it cannot by  
2 itself, uncorroborated, support an offence. So it's of very  
3 little value. However, if it's contained within a document and  
4 there is oral testimony, then there is corroboration between the  
10:37:56 5 oral testimony and the document. The document cannot stand alone  
6 in that particular circumstance when the offence is being spoken  
7 about. If however, it is simply - such as a UN report, for  
8 instance, Security Council reports - talking about the nature of  
9 the conflict, in which there is effectively no dispute between  
10:38:12 10 the parties - there clearly was a conflict here. But the Court  
11 has been informed about general summation about what happened -  
12 then that can be used by the Court for that purpose.

13 JUDGE THOMPSON: But the bundles that you brought before us  
14 are a mixed bag.

10:38:27 15 MR TAVENER: That's right. And you look at the general and  
16 that is not in dispute, effectively. You then get to the other  
17 end of spectrum, as Your Honour has just raised, where there may  
18 be some specific mention of an offence. Alone that cannot stand.  
19 Simply, you assess it for whatever value you find. You may find  
10:38:47 20 that it's insufficient. And certainly it wouldn't by itself  
21 found an offence, or support an offence.

22 PRESIDING JUDGE: But you are still suggesting that it  
23 should be admitted and then given no weight if it is not  
24 confirmed by any other --

10:39:00 25 MR TAVENER: By the end of trial. The evidence is not all  
26 before the Court as yet. The Defence may suggest -- the Defence  
27 clearly must produce evidence; it intends to call witnesses.  
28 These matters may or may not be corroborated. This is the time  
29 when the Prosecution must put the documents before the Court.



1 And until all the evidence is in Your Honours can't make, we  
2 would say, a full assessment of the documents.

3 JUDGE ITOE: Mr Tavener, what about the principle of  
4 relevancy? Because there is relevancy in 89(C), there is  
10:39:41 5 relevancy in 92 as well. The Court, if we determine that the  
6 document is relevant, you know, we could admit it. What is your  
7 position as far as this pile of documents is concerned?

8 MR TAVENER: We say all the documents are relevant and  
9 admissible. We say, however, as I indicated, it's clearly a  
10:39:55 10 spectrum across the board of what those documents contain.

11 JUDGE ITOE: You are saying all the documents are relevant.

12 MR TAVENER: Yes. That is our submission. Otherwise we --

13 JUDGE ITOE: That is a legal proposition.

14 MR TAVENER: We wouldn't be seeking to tender them  
10:40:08 15 otherwise. We submit that they are relevant. As you say, at the  
16 end of the trial you can look at how much weight -- we would not  
17 suggest - I'm repeating myself - I would not suggest, for  
18 instance, an offence contained only in a document would be  
19 sufficient for Your Honours' purposes, as an example. One would  
10:40:23 20 look for corroboration, and that corroboration would have to come  
21 from oral testimony. So that is why the Prosecution maintains at  
22 this stage the documents can be tendered.

23 JUDGE THOMPSON: So what do we consider this stage of  
24 admissibility?

10:40:43 25 MR TAVENER: Well, they're simply admitted --

26 JUDGE THOMPSON: In other words, you are asking us to do  
27 what may well be a pro forma type thing. Apply a doctrine of  
28 automaticity.

29 MR TAVENER: That the documents are tendered, they're

1 treated as exhibits --

2 JUDGE THOMPSON: And then we suspend our judgment and wait  
3 until the appropriate time and then consider the question of  
4 weight --

10:41:06 5 MR TAVENER: That's correct.

6 JUDGE THOMPSON: -- In other words. Actually, the judges  
7 are being asked to play the role of supercomputers.

8 MR TAVENER: Oh no. Not at all. The Prosecution have  
9 indicated which parts we rely upon. You may not be satisfied; at  
10:41:20 10 the end of the day you may say we don't like that document, it  
11 does not assist and take no value from that document at all. So  
12 that is why we have brought down the documents, so those  
13 documents we say --

14 JUDGE ITOE: It isn't relevant?

10:41:32 15 MR TAVENER: We say it's relevant. You may not.

16 JUDGE ITOE: That's right.

17 MR TAVENER: At this stage we say it is and that decision  
18 ultimately is done at the end and certainly as part of our  
19 closing submissions, we would identify what documents we rely on  
10:41:43 20 and whether or not those documents have corroboration. So we  
21 would assist the Court in their deliberations. Simply because it  
22 is admitted at this stage does not mean that's the end of the  
23 matter. More evidence will be led and more submissions need to  
24 be made.

10:42:03 25 JUDGE ITOE: We appreciate, Mr Tavener, that the probative  
26 value is something else.

27 MR TAVENER: That's correct.

28 JUDGE ITOE: We should distinguish the admissibility of  
29 these documents from the probative value that we should give to

1 them. They could be admitted and they could also be adjudged to  
2 lack any probative value at all.

3 MR TAVENER: Exactly.

4 JUDGE ITOE: But I mean, it's just that we have to be very  
10:42:26 5 careful what we are admitting and what we should not admit. And  
6 particularly that we do not get into this process of admitting  
7 documents to the detriment of the rights of the Defence, which in  
8 the doctrine of orality, at least has a chance of cross-examining  
9 the witness if the document came through a witness, and you know,  
10:42:51 10 at least giving us a clearer perspective of where the truth lies.  
11 That is the problem. This is the crux of the problem in this  
12 particular procedure which you're adopting.

13 MR TAVENER: Yes, I again accept that if a person, if a  
14 witness has not been cross-examined about a particular document  
10:43:07 15 you would apply less weight to it, but at this stage the  
16 Prosecution will not be calling any more witnesses; however, the  
17 Defence will. And it may well be in the course of Defence  
18 witnesses testifying, documents that'll be tendered will be put  
19 before them and they'll be used for that purpose or other  
10:43:25 20 purposes. At the end of the case, the Prosecution will identify  
21 what the -- go back through those exhibits and identify for the  
22 Court's assistance how or whether those documents have been  
23 corroborated and whether or not you can place weight on those  
24 particular documents. So at this stage, we simply say the  
10:43:42 25 documents can be admitted and that at this time the Court need  
26 not concern itself with exactly how those documents are to be  
27 used and what weight to place upon them.

28 JUDGE THOMPSON: In other words, applying an extreme  
29 doctrine of flexibility.

1 MR TAVENER: A reasonable doctrine of flexibility.

2 PRESIDING JUDGE: But you accept, however, before we do  
3 proceed to admit any document that there has got to be some  
4 relevancy. Otherwise 89(C) or 92 bis, as my brother Justice Itoe  
10:44:18 5 has just said, relevancy is a primary role before dealing with  
6 any evidence, whether it is this evidence or any other evidence.  
7 If it is not relevant then we need not be bothered about that.  
8 To me, at least, and again in a very -- I have not listened and  
9 studied all of these documents in details because it is quite an  
10:44:46 10 extensive piece of work you will admit, but there are some  
11 documents that are -- I will give you one in bundle three, for  
12 example, a communiqué from the joint commitment for disarmament  
13 and so on and so on. It's clearly outside the scope of the  
14 indictment.

10:45:18 15 JUDGE THOMPSON: As a matter of law, you yourself rely on  
16 that in your written submission, that the documents must be  
17 relevant. You do rely on that. In fact, what you're saying is  
18 that at this point in time proof of reliability is not a  
19 condition of admission.

10:45:40 20 MR TAVENER: We say the documents are relevant.

21 JUDGE THOMPSON: Yes, you say they are relevant in your  
22 written submission.

23 MR TAVENER: That's correct.

24 JUDGE THOMPSON: So that would tie up with what my learned  
10:45:50 25 brothers are saying, that relevance seem to be a kind of  
26 condition precedent, in a kind of gatekeeping role, judicial  
27 gatekeeping role. If the documents do not pass the test of  
28 relevance then we cannot open the gate.

29 MR TAVENER: That's correct. For a document to be

1 admissible it has to be relevant. At the same time, we say they  
2 are.

3 PRESIDING JUDGE: Before we go to this specific bundle,  
4 because we were dealing with bundle 1 --

10:46:29 5 MR TAVENER: Bundle 1 was a subject of the Trial Chamber  
6 decision on the 2nd of June 2004, the decision on the Prosecution  
7 motion for judicial notice and admission of evidence. And at  
8 page, I have it as 7126 of that decision, it says at paragraph  
9 33: "By parity of reasoning, the Chamber has carefully examined  
10:47:03 10 and reviewed each of the documents enumerated in annex B of the  
11 Prosecution motion. As regards enumerated documents, the  
12 Chamber, applying the relevant jurisprudence, makes the following  
13 findings: (1) As to their existence and authenticity, documents  
14 9 to 21 do qualify for judicial notice. Documents 31 and 32 do  
10:47:35 15 qualify for judicial notice." That's as to their existence and  
16 authenticity, those are the documents contained in bundle --

17 JUDGE ITOE: You're referring to the Trial Chamber  
18 decision.

19 MR TAVENER: That's correct. The Trial Chamber decision on  
10:47:45 20 the motion for judicial notice and admission of evidence. So as  
21 we understood that decision, those documents which are listed in  
22 bundle 1, 9 to 21 - and I'm looking at annex B, Prosecutor's  
23 motion for judicial notice and admission of evidence - 9 to 21  
24 are UN, the report of the UN Secretary-General on the situation  
10:48:06 25 in Sierra Leone. And then, 31 and 32 are other UN reports which  
26 are from UNICEF, just UNICEF.

27 PRESIDING JUDGE: One is a press release, the other is a  
28 monthly report.

29 MR TAVENER: That's correct. It was our understanding that

1 as they have found to be -- the Court has made a finding in  
2 respect of their existence and authenticity that to finish that  
3 process we simply tender the documents.

4 JUDGE THOMPSON: In other words, those were judicially  
10:48:34 5 noticed. And there was no contrary ruling by the Appeals Chamber  
6 on those.

7 MR TAVENER: That is correct. And as they're not formally  
8 before the Court that was the purpose of bundle 1, simply to put  
9 those exhibits now formally before the Court by way of tendering.

10:50:30 10 [Trial Chamber confers]

11 JUDGE THOMPSON: So in summary you're virtually saying that  
12 the eight documents in the first bundle have all been judicially  
13 noticed pursuant to a decision of 2nd June 2004 as to their  
14 existence and authenticity. And that all we need now to do is  
10:51:01 15 just a formal process of tendering them into evidence.

16 MR TAVENER: That's correct. That would be our submission.

17 PRESIDING JUDGE: For the purpose?

18 MR TAVENER: To put them before the Court.

19 PRESIDING JUDGE: As to their content. And so there is no  
10:51:16 20 confusion on that as well, as to the content based on your  
21 submission that we may accept it in whole or in part or not at  
22 all if we feel the absence of relevancy or whatever it is or  
23 absence of corroboration, confirmation, whatever it is. The mere  
24 fact that we accept them as to content does not go to any weight  
10:51:44 25 to be attached at this stage to any of these documents.

26 MR TAVENER: That's correct. That process will take place  
27 at a later time.

28 JUDGE ITOE: I would like to add from what the learned  
29 Presiding Judge has said, you know, that these documents were

1 noticed -- judicially noticed as to their existence and  
2 authenticity. Let's be very clear on this. It is that there is  
3 indeed a document by the UN by the United Nations on this and the  
4 document is authentic and not that the facts in the documents  
10:52:24 5 necessarily have the probative value. We have to -- the  
6 probative value we have to attach to this. I would like us to be  
7 on the same wavelength on this in determining these issues. What  
8 would be your observation on this?

9 MR TAVENER: The Prosecution would submit that an authentic  
10:52:44 10 UN document should be given weight, but ultimately that is a  
11 decision for Your Honours.

12 JUDGE ITOE: It's authentic because it went through the  
13 regular United Nations process before it was published and so on.

14 MR TAVENER: Yes.

10:53:00 15 JUDGE ITOE: It is authentic. It exists. The question  
16 mark is what do these documents contain.

17 MR TAVENER: That is a matter ultimately for Your Honours  
18 to decide.

19 JUDGE ITOE: That's right.

10:53:11 20 PRESIDING JUDGE: So, Mr Tavener, to keep things in a  
21 proper perspective I didn't ask you to argue about bundle 2 and  
22 bundle 3 now. We'll rather go to the Defence and ask them if  
23 they have any submission to make as to the overall scenario and  
24 more specifically to bundle 1 that you've just dealt with. That  
10:53:34 25 will be easier for all of us to follow it that way given the size  
26 of the documents you're tendering at this particular moment.

27 MR TAVENER: Thank you.

28 JUDGE ITOE: And it gives you time to rest a bit from the  
29 barrage.

1           PRESIDING JUDGE: If I can ask counsel for the first  
2 accused to comment on the overall -- if you have any overall  
3 comment about the admissibility of these documents and then focus  
4 on the first bundle as we called it.

10:54:02 5           MR JABBI: My Lord, we have a concerted approach to this  
6 application and Mr Yada Williams will speak on behalf of the  
7 Defence.

8           PRESIDING JUDGE: That applies to the second accused as  
9 well?

10:54:15 10          MR BOCKARIE: Yes, Your Honour.

11          PRESIDING JUDGE: Yes, Mr Williams.

12          MR WILLIAMS: My Lord, the objection is based on a number  
13 of grounds, My Lord, to all three bundles. My Lord, it is our  
14 submission that the Prosecution has failed to satisfy a necessary  
10:54:48 15 pre-condition for these documents to be admitted.

16          My Lord, we refer Your Lordships to Rule 66(A)(i) and we  
17 would submit, My Lord, these documents that the Prosecution is  
18 now seeking to tender should have been disclosed to the Defence  
19 30 days -- within 30 days of the initial appearance of the  
10:55:42 20 accused persons.

21          My Lord, 30 days of the initial appearance does not take us  
22 beyond September 2003. My Lord, the first hint of these  
23 documents by the Prosecution was in April 2004 when they filed a  
24 motion pursuant to Rule 94. It is our submission that it cannot.

10:56:55 25          JUDGE THOMPSON: What was the date again?

26          MR WILLIAMS: April 2004, My Lords.

27          PRESIDING JUDGE: When they filed their judicial  
28 notification.

29          MR WILLIAMS: Yes, My Lord. In order to be more specific,



1 My Lord, the documents contained in the first bundle were  
2 included in annex B of the Prosecution's motion for judicial  
3 notice filed on the 1st of April 2004.

4 JUDGE ITOE: What was the date of the motion, again,  
10:58:02 5 Mr Williams?

6 MR WILLIAMS: 1st April 2004.

7 JUDGE ITOE: This was a motion for judicial notice?

8 MR WILLIAMS: Motion for judicial notice, My Lord.

9 PRESIDING JUDGE: These were included as part of the  
10:58:20 10 documents the Prosecution was seeking approval of judicial  
11 notice?

12 MR WILLIAMS: Exactly, My Lord. My Lord, those contained  
13 in the second bundle were included in annex A of the same  
14 application.

10:59:00 15 PRESIDING JUDGE: Mr Williams, we don't want to restrict  
16 your arguments but we were trying to focus now on the first  
17 bundle and we'll go back to the second and third bundle. I was  
18 asking you if you had any general overall comments on the  
19 application. I take it that you are objecting to all of them for  
10:59:23 20 the reasons you have just advanced, but over and above that, do  
21 you have any specific comments as to the first bundle? And we'll  
22 come back to you on number 2 and number 3 but bearing in mind  
23 that your objection applies to the three of them under 66(A)(i).

24 MR WILLIAMS: Yes, My, Lord. I would also want to address  
10:59:49 25 Your Lordships on the provision of 92 bis itself, My Lords.

26 PRESIDING JUDGE: Very well.

27 MR WILLIAMS: It is our submission, My Lord, that relevance  
28 is a precondition, My Lord. They have to satisfy the Court that  
29 each and every document that they are seeking to tender is

1 relevant. And furthermore -- secondly, My Lord, that the  
2 reliability of these documents are susceptible to confirmation.

3 My Lord, it is our submission, My Lord, that the documents  
4 have to be corroborated or confirmed in due course and due course  
11:01:19 5 there, My Lord, refers to the course of the Prosecution's case.

6 My Lord, the Defence is -- I mean for the Prosecution to  
7 say it extends to the Defence case is highly speculative. They  
8 do not have any idea whether we will be calling any witnesses  
9 they do not have any idea whether we will be tendering any  
11:01:56 10 documents, My Lord, and we are not under obligation to tender any  
11 documents or call any witnesses in support of our case.

12 JUDGE ITOE: Are you suggesting, Mr Williams, that the  
13 Prosecution after closing its case does not still have a case to  
14 establish when the Defence opens its case?

11:02:23 15 MR WILLIAMS: I didn't get you, I'm sorry, My Lord.

16 JUDGE ITOE: Are you suggesting that when the Prosecution  
17 closes its case, it can no longer continue to prove its case even  
18 when the Defence is making its case?

19 MR WILLIAMS: My Lord, they can continue by way of  
11:02:42 20 cross-examination to establish elements in the indictment. I  
21 mean, in other words, they can continue to prove their case. But  
22 what I'm saying, My Lords, is that -- I mean, we are not under  
23 obligation to call any witnesses, so they should not rely --

24 JUDGE ITOE: Agreed. I mean, that is not concerted.

11:02:57 25 MR WILLIAMS: They should not rely upon us for  
26 corroboration or confirmation of what they're tendering.

27 JUDGE ITOE: What if you do call witnesses?

28 MR WILLIAMS: They are at liberty to make whatever use of  
29 witnesses, My Lord.

1 JUDGE ITOE: Thank you.

2 PRESIDING JUDGE: But if you're not calling any evidence --  
3 not submitting any evidence or documents as such, well -- and if  
4 their obligation is based in part on that, then they will fail  
11:03:25 5 because there is no confirmation at all so, yes, you may be  
6 right. It does not impact nor affect the ability of the Defence  
7 to call or not to call evidence or any limited evidence, whatever  
8 it may be, if you're not calling anything and whatever they have  
9 tendered is not supported, well, then it has essentially no  
11:03:43 10 value. So that's the -- it does not go against your argument in  
11 this sense, Mr Williams. They're not saying you must call  
12 evidence. If you're are calling evidence, well, they have to  
13 live with that too.

14 MR WILLIAMS: Yes, My Lord, the point I'm couching was that  
11:04:06 15 in due course --

16 JUDGE ITOE: Mr Williams, let me get you right. The point  
17 you want to make is that the confirmation should not come in the  
18 process, you know, of the Defence conducting their case because  
19 the Prosecution has closed its case.

11:04:19 20 MR WILLIAMS: Yes, My Lord.

21 JUDGE THOMPSON: Let me take you up on that. Where is the  
22 jurisprudence to support that? Because you're suggesting that  
23 the concept of susceptibility of confirmation has a restricted  
24 interpretation in the context of the rule. That is what you're  
11:04:38 25 suggesting, Rule 92 bis. And of course the Appeals Chambers did  
26 say that the notion of susceptibility of confirmation is more or  
27 less the same phraseology as capable of corroboration in due  
28 course, fine. And so the Appeals Chamber did not place a  
29 restriction that, in fact, in due course would mean only at the

1 end of the Prosecution's case. It would seem as if the -- if you  
2 read the decision correctly, and I'm reading page -- at page 12,  
3 paragraph 26, they seem to suggest that it is after the entire  
4 evidence has been, in fact, laid before the Court. So if you're  
11:05:29 5 seeking to place a restrictive interpretation on that concept,  
6 perhaps you need to guide us as to any existing authority,  
7 because within our system and remember that our 92 bis is  
8 different from 92 bis in ICTY and ICTR. So perhaps you need to  
9 guide us on that, because it seems as though the Prosecution is  
11:05:58 10 saying that this idea of being susceptible to confirmation or  
11 capable of corroboration can only come at the end of the entire  
12 evidence before the Court.

13 MR WILLIAMS: My Lord -- My Lord, if 92 bis is read in  
14 conjunction with 66(A)(i) and if the -- I mean the -- it cannot  
11:06:40 15 be -- the Prosecution cannot gainsay that they have an obligation  
16 to prove the guilt of the accused persons. My Lord, the  
17 justification or the rational --

18 JUDGE THOMPSON: No, I'm really just concerned with the  
19 interpretation of 92 bis (B) which rarely introduces this  
11:07:09 20 interesting notion of reliability being susceptible of  
21 confirmation. Obviously my reading of the Appeals Chamber's  
22 decision on this issue is that it is another way of saying  
23 capable of corroboration in due course. Are you with me on the  
24 law in that?

11:07:25 25 MR WILLIAMS: Yes, I agree, My Lord.

26 JUDGE THOMPSON: That is the law according to the Appeals  
27 Chamber now and they have not restricted "in due course" just to  
28 after the Prosecution closes their case. In due course would  
29 seem to mean at the end of the entire case or trial when all the

1 evidence has been adduced before the Court. In other words, that  
2 would be a sensible interpretation of 92 bis. Any other  
3 interpretation would seem to be absurd.

4 JUDGE ITOE: Unless of course, Mr Williams, you know, the  
11:08:10 5 Defence does not intend to call any evidence.

6 MR WILLIAMS: My Lord, we will cross that bridge --

7 PRESIDING JUDGE: But then it would be the end of the case  
8 anyhow.

9 JUDGE ITOE: Yes, that would be the end of the case.

11:08:21 10 JUDGE THOMPSON: And our position, as my brothers are  
11 saying, is that that rule has to be given its purposive  
12 interpretation. Not an interpretation that reduces it to an  
13 absurdity. I mean, clearly from the plain and ordinary language  
14 interpretation, it would seem as if susceptibility of  
11:08:45 15 confirmation is the same as capable of corroboration when the  
16 entire case -- or when all the evidence is in.

17 MR WILLIAMS: That is the latter bit that I do not seem to  
18 argue with Your Lordships on.

19 PRESIDING JUDGE: We've noted your comments.

11:09:05 20 MR WILLIAMS: As My Lord pleases.

21 PRESIDING JUDGE: So going from the general to the specific  
22 order of the legal argument you are advancing, do you have any  
23 specific comment vis-a-vis -- we're still talking about the first  
24 bundle.

11:09:20 25 MR WILLIAMS: My Lords, my learned friend had mentioned the  
26 Chamber decision, My Lord, on judicial notice.

27 PRESIDING JUDGE: That is true and they are saying that  
28 this first bundle is related to that decision where this Chamber  
29 took judicial notice of the existence and the authenticity of

1 these documents, but not their content. And now they're  
2 tendering this for purpose of the Court for the purpose of their  
3 content.

4 MR WILLIAMS: My Lord, they're seeking to tender these  
11:09:57 5 documents under 92 bis and not 94.

6 PRESIDING JUDGE: Yes, yes, that's right. Under 94 we took  
7 judicial notice of their existence and authenticity and we said  
8 "not their content." Now they're tendering this under 92 bis for  
9 their content.

10 MR WILLIAMS: My Lord, what we would say, My Lord, is that  
11 the ruling, Your Lordship's ruling on the notice of judicial --  
12 on the motion for judicial notice cannot be the basis for them to  
13 tender these documents, My Lords. There is nothing in that  
14 ruling which says the documents would have to be tendered. I  
11:10:45 15 mean, Your Lordships recognised their existence and authenticity,  
16 period. But if they want to come under 92 bis, My Lord, it is a  
17 completely different set of rules that apply and that ruling does  
18 not -- now they are going into the contents and for those  
19 contents to be brought before Your Lordship, they have to  
11:11:05 20 strictly comply with the provision of 92 bis.

21 PRESIDING JUDGE: That is what they're doing today. That's  
22 what they say they are doing.

23 MR WILLIAMS: And we're saying that they have not done what  
24 is required of them.

11:11:20 25 PRESIDING JUDGE: what is it they have not done?

26 MR WILLIAMS: 66(A)(i) says they should have disclosed  
27 these documents to us.

28 PRESIDING JUDGE: Okay, but aside from -- we understood  
29 your position on that, but I was asking if you had any specific

1 comments vis-a-vis this, other than 66 which applies to all the  
2 bundles; it is not only this one. In your position it is all the  
3 documents, so do you have any specific comments about any of  
4 these documents being tendered into the first bundle other than  
11:11:51 5 66?

6 MR WILLIAMS: Yes, My Lord, we would also say that these  
7 documents -- this bundle is not relevant and --

8 PRESIDING JUDGE: You mean all of them are not relevant?

9 MR WILLIAMS: Yes, My Lord.

11:12:05 10 PRESIDING JUDGE: Why are you saying this?

11 MR WILLIAMS: My Lord, we spelled out our comment or our  
12 objections to each these documents on the motion -- on the joint  
13 Defence objection filed on the 29th of June, annex A, My Lord.  
14 My Lord, I note that some of them go beyond the temporal  
11:12:33 15 jurisdiction of this Court.

16 JUDGE ITOE: You're referring to what portion of that joint  
17 Defence objection?

18 MR WILLIAMS: It's page 13184.

19 JUDGE ITOE: 13184?

11:12:51 20 MR WILLIAMS: Yes.

21 JUDGE ITOE: Mr williams, what you would remember that when  
22 we took the first arguments on this matter and when Mr Kamara was  
23 handling it, our general observation on UN resolutions was that  
24 they should highlight those areas, those portions of the  
11:13:30 25 resolutions which they think are relevant to this case, because  
26 from that day we indicated the position of the Chamber not to  
27 swallow hook, line and sinker the entire contents, you know, of  
28 these resolutions. That is why we did direct that there should  
29 be a form of highlighting of the relevant portions of these so we

1 know what they're relying on for purposes of these proceedings  
2 and for purposes of our determining the notion of relevance as  
3 far as these documents and resolutions are concerned.

4 PRESIDING JUDGE: Your comment is essentially that it is  
11:14:13 5 not relevant because the Court has already taken judicial notice  
6 of the existence of an armed conflict, so the mere fact that the  
7 Court may have taken judicial notice of that does not exclude  
8 relevancy because of that. We're talking here, your argument now  
9 has to do with relevancy. I'm looking at your annex A. On all  
11:14:30 10 of these documents you say general relevance is the same comments  
11 that applies to all of them. Existence of an armed conflict  
12 during the relevant period has already been judicially noticed.  
13 And presumably you say because of that it becomes irrelevant. I  
14 fail to follow that reasoning. That is what I understand to be  
11:14:54 15 your position to be vis-a-vis all of these documents as to the  
16 absence of relevancy.

17 MR WILLIAMS: My Lord, my understanding of the provision of  
18 Rule 94 is that when a Court has taken judicial notice of certain  
19 facts there is no need for evidence to be adduced --

11:15:14 20 PRESIDING JUDGE: Yes, but no need is quite different than  
21 not being relevant.

22 MR WILLIAMS: Excuse me, My Lord, if I could confer with my  
23 learned friends.

24 [Defence counsel confer]

11:15:35 25 MR WILLIAMS: My Lord, the --

26 JUDGE THOMPSON: I would have thought that 94 would be  
27 suggesting that if the Court takes judicial notice of certain  
28 documents, particularly as to their existence and authenticity,  
29 then what is not necessary is further proof of their existence



1 and authenticity, not whether they're relevant or not, but what  
2 is not necessary is further proof of their existence and  
3 authenticity. Because the concept of judicial notice is a kind  
4 of concept designed to ensure economy, judicial economy, so if  
11:16:23 5 the Court takes judicial notice of certain documents, albeit to  
6 the existence of authenticity, then there is no need to go  
7 through the elaborate process of proving them again. Isn't that  
8 the whole point of it?

9 MR WILLIAMS: Relevance is the wrong word, My Lord.

11:16:53 10 JUDGE THOMPSON: Quite right.

11 MR WILLIAMS: Superfluous, My Lord.

12 PRESIDING JUDGE: Any other comments --

13 JUDGE THOMPSON: Did you say they did not disclose these  
14 documents to you pursuant to Rule 66?

11:17:00 15 MR WILLIAMS: They did not, My Lord.

16 JUDGE THOMPSON: But did disclose them pursuant to Rule 73  
17 and bis (B)(iv), bis (B)(v) wherein these documents disclosed for  
18 the purposes of pre-trial conference. 73 bis (B)(iv) -- or  
19 (B)(v), I'm sorry. Didn't you get a list of these?

11:17:33 20 MR WILLIAMS: Yes, My Lord, yes, they did.

21 JUDGE THOMPSON: Yes, for the purposes of pre-trial.

22 MR WILLIAMS: Yes, which was in April, My Lord. We're  
23 saying that -- I mean, this does not specifically refer to 92  
24 bis. It refers to evidence --

11:17:48 25 JUDGE THOMPSON: But the documents were disclosed but not  
26 for the purpose of 92 bis.

27 MR WILLIAMS: Exactly, My Lord.

28 JUDGE THOMPSON: All right.

29 MR WILLIAMS: And, My Lord, they do not seek to --

1 JUDGE ITOE: Doesn't that distinction you are making,  
2 doesn't it sound or look artificial? You admit that they were  
3 disclosed to you, but you say they were not disclosed to you, you  
4 know, under 92. I mean, supposing --

11:18:14 5 PRESIDING JUDGE: Under 66.

6 JUDGE ITOE: Under 66.

7 JUDGE THOMPSON: They were disclosed under 93 -- 73.

8 JUDGE ITOE: Does it really matter, you know - it was  
9 disclosed to you somehow - even if it is being used for another  
11:18:28 10 purpose?

11 MR WILLIAMS: My Lord, 92 is peculiar, I mean, in its  
12 nature, My Lord.

13 JUDGE ITOE: Yes, it is.

14 MR WILLIAMS: I mean, tendered documents, they are as good  
11:18:39 15 adds oral evidence. I mean, for 73, My Lord, these are documents  
16 that you tender or that you disclose which -- I mean, possibly  
17 witnesses will be coming to go use as they testify. That is  
18 completely different and I would beg to differ from Your Lordship  
19 that the distinction is not superficial, My Lord. My Lord, 92 --  
11:19:02 20 66(A) puts the Prosecution under a specific obligation as far as  
21 92 bis applications are concerned.

22 JUDGE THOMPSON: For what purpose then was it disclosed  
23 under 73 bis (v). Remember 73 bis (v) also says that "where  
24 possible whether or not the Defence has any objection as to  
11:19:25 25 authenticity." So the purpose would seem to be the same. It is  
26 just that you have received notice of it under 73 bis (v), so as  
27 to enable you to object to authenticity. So if you received it  
28 under that, I mean, why do we have to say that it wasn't filed --  
29 or were not filed under 66 and therefore a breach. The results

1 are the same.

2 [RUF06JUL05B 11.15 a.m. - AD]

3 MR WILLIAMS: I am sorry. My position of the rule, My  
4 Lord, is that disclosure under 73 --

11:20:08 5 JUDGE THOMPSON: Yes.

6 MR WILLIAMS: -- is where it is anticipated that a witness  
7 would come and testify and use those documents during his  
8 testimony. So there will be an opportunity to cross-examine him  
9 on those documents, My Lord. I mean, a couple of documents were  
11:20:32 10 tendered, like minutes of war Council meetings. Those have been  
11 disclosed to us under this particular rule. We had the  
12 opportunity of seeing them, investigating them and we are in a  
13 position to cross-examine on them. But it does not apply to 92  
14 bis applications because there is no opportunity of  
11:20:55 15 cross-examining them. We can agree; there is no opportunity  
16 whatsoever to cross-examine on them.

17 PRESIDING JUDGE: So, that concludes your comments as to  
18 the first bundle. We will come back to you about the second and  
19 third bundles.

11:21:20 20 MR WILLIAMS: It does, My Lord.

21 PRESIDING JUDGE: Thank you.

22 MR TAVENER: Thank you, Your Honour. In respect of the  
23 second bundle, the Prosecution has made written submissions and I  
24 do not wish to read them out to the Court in any great detail.  
11:21:35 25 These documents were classified in that way because they relate  
26 to documents that formed a fraction of the documents that were  
27 submitted in the Prosecution's motion for judicial notice and  
28 admission of evidence in support of certain facts the Prosecution  
29 sought to be judicially noticed by the Court. Ultimately, not

1 all those facts were judicially noted. The documents in annex 2  
2 include documents such as newspaper articles based on eyewitness  
3 reports, interviews and the like. It also contained documents  
4 which had been issued by the CDF and various respected  
11:22:14 5 non-government organisations. The Appellate Court in the Fofana  
6 appeal noted that 92 bis permits facts that are not beyond  
7 dispute to be presented to the Court in a written or visual form  
8 that will require evaluation in due course. This is in the  
9 submission. A party which fails in an application to have a fact  
11:22:40 10 judicially noticed under 94(A) will nonetheless be able to  
11 introduce into evidence under Rule 92 bis many of the sources  
12 upon which it has relied. At the end of the trial the Court may  
13 well conclude that such facts have been proved beyond a  
14 reasonable doubt. The weight and reliability of such admitted  
11:22:59 15 via 92 bis will have to be assessed in the light of all the  
16 evidence of the case.

17 PRESIDING JUDGE: So that is the comments of  
18 Justice Robertson?

19 MR TAVENER: Yes, and also the Court itself.  
11:23:11 20 Justice Robertson also made his own separate decision, but the  
21 Court stated that as well. Included in our submission --

22 JUDGE THOMPSON: Which are you relying on, the Court's own  
23 analysis or the separate concurring position of  
24 Justice Robertson.

11:23:35 25 MR TAVENER: Justice Robertson elaborates to some extent.

26 JUDGE THOMPSON: Yes. So you are not relying on paragraph  
27 26 of the Court's own majority decision?

28 MR TAVENER: I rely on the majority decision as well. They  
29 are not in any dispute really. It is simply a matter of how they

1 express. That is exactly what the second bundle includes. It  
2 includes documents that would have supported, we say, facts to be  
3 judicially noticed. The Appellate Court said it is acceptable to  
4 then come back and look at those documents under 92 bis, and that  
11:24:07 5 is in fact what we are doing. The Court outlined various  
6 procedures -- how that is done or how to review those matters. I  
7 will not read the written submissions made by the Prosecution.  
8 But we say that at the end of the day that is exactly the  
9 procedure being adopted here.

11:24:34 10 I am looking through the submission to see whether there  
11 are any further matters that need to be particularly put forward  
12 generally in respect of the second bundle. But the second  
13 bundle, the Prosecution says is admissible on that basis; they  
14 are documents that help inform the Court further.

11:24:55 15 JUDGE THOMPSON: But you are relying very heavily on the  
16 Appeals Chamber decision, the unanimous decision and also the  
17 separate concurring opinion. How would you answer this  
18 observation: If one said that in the case of the unanimous  
19 decision and also the separate concurring that the  
11:25:22 20 interpretation, or the statement of the law, in respect Rule 92  
21 bis was one, of course, obiter dicta, if you like - but you do  
22 not need to give me a thorough answer to that - but, secondly,  
23 the Court in construing 92 bis virtually was anticipating  
24 information coming from, say, the TRC and other authoritative  
11:25:58 25 bodies, seem to have limited their statement of the law to that  
26 kind of information.

27 PRESIDING JUDGE: which is background information, as we  
28 are stating.

29 JUDGE THOMPSON: That is right. Not to documents that may

1 well be sought to be tendered for the purposes of being  
2 substantive evidence in respect of persons who may have made  
3 witness statements or any other documents of other nature. How  
4 would you respond to that kind of observation, that the statement  
11:26:31 5 of the law seems restricted to TRC or other authoritative bodies?  
6 You can abandon the first part of my query about obiter dicta.

7 MR TAVENER: Thank you, Your Honour.

8 JUDGE THOMPSON: Of course, we can dispute about that. I  
9 don't even want to press it. But the second point.

11:26:55 10 MR TAVENER: The Prosecution would say that, in reading the  
11 appellate decision, we don't see that it is confined to one or  
12 two types of documents. Those are documents which could have  
13 been used. The TRC document could perhaps have been used.

14 JUDGE THOMPSON: [Microphone not activated] paragraph 26 of  
11:27:36 15 the unanimous decision, SCSL Rule 92 bis is different to the  
16 equivalent rule in the ICTY and ICTR, and deliberately so. The  
17 judges of this Court at one of their first plenary meetings  
18 recognised a need to amend ICTR Rule 92 bis (B) in order to  
19 simplify this position for a Court operating in what was hoped  
11:28:09 20 would be a short time span in the country where the crimes had  
21 been committed and where a Truth and Reconciliation Commission  
22 and other authoritative bodies were generating testimony and  
23 other information about the recently concluded hostilities. The  
24 effect of the SCSL rule is to permit the reception of  
11:28:33 25 information, assertions of fact, but not opinion made in  
26 documents or electronic communications if such facts are relevant  
27 and their reliability is susceptible of confirmation. It would  
28 seem to me that it was in that context that the Court was making  
29 its authoritative pronouncement on the law as it relates to 92

1 bis. I would invite your own response.

2 MR TAVENER: The Prosecution submits that Your Honour has,  
3 in reading that particular quote, what the Appellate Court is in  
4 fact saying is -- they are reducing the restrictive nature of  
11:29:17 5 admission of documents into evidence. The fact that there was a  
6 TRC commission within Sierra Leone does not mean that was the  
7 only sort of document contemplated. The restrictions which exist  
8 in the ICTY provisions, for instance, are being removed because  
9 of the time frame anticipated in this Court of a relatively short  
11:29:36 10 period of time. The Appellate Court is saying information should  
11 be received in order to promote judicial economy, in Your  
12 Honour's words. That means simplifying the manner in which  
13 documents are presented to the Court, not only documents  
14 generated by the Truth and Reconciliation Commission but also the  
11:29:58 15 type of documents we are proposing. We in fact rely upon the  
16 quotation the Your Honour has just used. That is why we are  
17 seeking to put in a range of documents.

18 Indeed, when one reads the entire appellate decision, it is  
19 promoting a system different from that used by the other ad hoc  
11:30:19 20 tribunals in that it is promoting a system by which documents  
21 should go in and then be used, as opposed to the opposite. It is  
22 trying to promote a less restrictive system by which the Court  
23 can be better informed.

24 JUDGE THOMPSON: In other words, a greater degree of  
11:30:40 25 flexibility.

26 MR TAVENER: Exactly. That is how I read the entire  
27 decision.

28 JUDGE THOMPSON: I am not disputing that. I am just saying  
29 that when they come with the TRC and the other authoritative

1 bodies I thought perhaps they were constraining their statement  
2 of the law.

3 MR TAVENER: It simply identifies one potential source to  
4 better inform the Court. In this case we have relied on other  
11:31:03 5 documents. But the overall effect of the appellate decision is  
6 to promote admissibility one would think, or one would suggest,  
7 because then the Court assesses the material at the end of the  
8 trial.

9 Further, the Appellate Court stated - I have it as  
11:31:38 10 paragraph 46 - "source information to support facts D, K, L and M  
11 and U, however, may be submitted by the Prosecution's evidence  
12 under Rule 92 bis subject to the assessment of their relevance  
13 and reliability by the Trial Chamber." That brings us back to  
14 our earlier discussion. So the Appellate Court was promoting a  
11:31:58 15 particular system. We say the method we have asked to be adopted  
16 today is consistent with the Appellate Court's approach. Again,  
17 I will not seek to read out the Prosecution's submissions on  
18 these matters. But we say that unless there is individual  
19 documents Your Honour wants to speak about, the method proposed  
11:32:37 20 by the --

21 PRESIDING JUDGE: I would like to know how document 68 is  
22 relevant -- the CDF calendar 2001.

23 MR TAVENER: The calendar, we accept, is outside the time  
24 period. However, what it does do, we would say it allows the  
11:33:02 25 Court ultimately to extrapolate backwards as to positions persons  
26 held. Do Your Honours have the calendar in front of you? It is  
27 the last exhibit in bundle 2.

28 PRESIDING JUDGE: Yes.

29 JUDGE ITOE: Bundle 2?



1 MR TAVENER: That is correct. The calendar is 2001.  
2 However, there has been evidence, for example, of the position of  
3 His Excellency Alhaji Ahmad Tejan Kabbah, President and  
4 Commander-in-Chief. There has been evidence given of the  
11:33:43 5 position of His Excellency Joe Demby. There has clearly been  
6 evidence given of the position of the Honourable Samuel Hinga  
7 Norman, and so on. Moinina Fofana makes a mention in the  
8 calendar. The late Professor Alpha Lavalie, there has been  
9 evidence given about him and his role in the establishment of the  
11:34:06 10 kamajors. There is also a photograph of the Honourable Allieu  
11 Kondewa, about whom evidence has been given, and so on. There  
12 are various matters throughout the calendar, various people  
13 identified throughout the calendar as holding certain positions  
14 in the CDF. Although that is outside, we say that by  
11:34:26 15 extrapolation backwards, and by looking at oral evidence, that  
16 confirms various positions people held. It is just that they  
17 held them. We have heard oral evidence that those persons held  
18 certain positions within the time frame as outlined in the  
19 indictment, and we say subsequently the calendar supports the  
11:34:41 20 proposition that they still held those positions. It only goes  
21 to nominating who held what positions within the CDF at a  
22 particular time, bearing in mind there has been evidence given  
23 throughout the trial. I note, for instance, the position of His  
24 Excellency Alhaji Ahmad Tejan Kabbah as President and  
11:35:05 25 Commander-in-Chief of the CDF would be a proposition the Defence  
26 would not argue with. I would be surprised if that particular  
27 issue is in dispute. That may be a piece of evidence which is  
28 mutually accepted by both sides. That is why it is there. We  
29 accept it is beyond the time period, but it identifies people and

1 their positions, and subject to oral evidence.

2 JUDGE THOMPSON: Did I hear you rightly, did you say the  
3 Defence is comfortable with that?

4 MR TAVENER: I have not asked them specifically, but I  
11:35:48 5 would be surprised if they are not. If they object to the  
6 President being described as the Commander-in-Chief of the CDF, I  
7 am happy to listen to that objection. But I would be surprised.

8 PRESIDING JUDGE: Your comment is restricted to President  
9 Kabbah?

11:35:58 10 MR TAVENER: Yes.

11 PRESIDING JUDGE: Not the other parts of that?

12 MR TAVENER: That is right, but we seek to tender the whole  
13 calendar, not just one page.

14 PRESIDING JUDGE: Before you sit down, I have one  
11:36:14 15 additional question regarding this bundle, if I may. Your report  
16 66 seems to be included in two different bundles, because the  
17 same documents comes back in document 162 in the third bundle.

18 MR TAVENER: I regret that.

19 PRESIDING JUDGE: Which is which?

11:36:37 20 MR TAVENER: The Prosecution has asked that it stay in the  
21 second bundle. It is the same document; it is simply a  
22 repetition by mistake.

23 PRESIDING JUDGE: Although 162 appears to contain other  
24 reports. In other words, 66 seems to be included in 162, the  
11:37:03 25 third bundle. But the third bundle includes more than just 66.  
26 I just want to know what is what.

27 MR TAVENER: We withdraw 162 from the third bundle to avoid  
28 confusion. Thank you.

29 PRESIDING JUDGE: So that concludes your comments on bundle

1 number 2?

2 MR TAVENER: Yes, thank you.

3 PRESIDING JUDGE: Mr Williams? Again, we ask you not to  
4 repeat unless it is absolutely necessary for this purpose your  
11:37:41 5 arguments under 66, because we are directing our minds to bundle  
6 2 and any comment you may have.

7 MR WILLIAMS: My Lord, we would want to comment on the  
8 decision of the Appellate Chamber dated 16 May 2005. It is our  
9 submission that the nature of the documents that could be  
11:38:25 10 tendered under a 92 bis application were set out in the said  
11 judgment. It is also our submission that the testimonial nature  
12 of the evidence that could be tendered under 92 bis were clearly  
13 spelt out in that judgment.

14 PRESIDING JUDGE: What, most specifically, are you making  
11:39:30 15 reference to in that judgment?

16 MR WILLIAMS: Paragraph 26, lines 1 to 7. Their Lordships  
17 sitting in the Appellate Chamber clearly envisaged evidence that  
18 had been tested by way of cross-examination in some other fora.  
19 We do concede that a departure was made from the provisions in  
11:40:28 20 the ICTR and ICTY rules. But we wish to submit that even under  
21 ICTR Rule 92 bis no Trial Chamber has accepted any other evidence  
22 than witness statements.

23 PRESIDING JUDGE: You mean ICTY and ICTR?

24 MR WILLIAMS: Specifically to the ICTR. The other trial  
11:41:18 25 chambers in that Court have only accepted witness statements,  
26 trial transcripts and exhibits previously admitted under Rule 92  
27 bis, My Lord. That is all I wish to say on this point.

28 PRESIDING JUDGE: Thank you, Mr Williams. As to the third  
29 bundle, Mr Tavener?

1 MR TAVENER: Thank you, Your Honour. Again, the  
2 Prosecution places reliance on the decision of the Appeal Chamber  
3 in respect of the Fofana appeal decision. It was said there that  
4 in that particular decision -- part of that may have already been  
11:43:05 5 read -- "Rule 92 bis is different to the equivalent rule in ICTY  
6 and ICTR and deliberately so. The effect of the SCSL rule is to  
7 permit the reception of information, assertions of fact but not  
8 opinion made in documents or electronic communications, if such  
9 facts are relevant and their reliability is susceptible of  
11:43:27 10 confirmation." This phraseology was chosen to make clear that  
11 proof of reliability is not a condition of admission. All that  
12 is required is that information should be capable of  
13 corroboration in due course. It is for the Chamber to decide  
14 whether the information comes in a form or is of a kind that is  
11:43:42 15 susceptible of confirmation. Propaganda claims or political  
16 attacks in partisan newspapers might be excluded, for example,  
17 but information set out in UN or NGO or Truth Commission reports,  
18 or books by serious historians should be admitted. So might  
19 certain newspaper reports if they carry a reporter's byline and  
11:44:10 20 purport to be based on eyewitness reports or interviews or have  
21 other indicia of reliability. That is the submission of the  
22 Prosecution in a nutshell. We again rely upon the appellate  
23 decision. These documents provided to the Court can be tendered  
24 and reviewed by the Court, and they can be assessed in the light  
11:44:29 25 of all the evidence. That is the procedure the Prosecution is  
26 seeking to adopt, bearing in mind the deliberate differences  
27 between the ICTY rules, for example, and the rules under which  
28 this Court is operating. I do not wish to repeat the submissions  
29 that I have made. But the Prosecution is consistent in its

1 submission that the documents can be tendered at this stage and  
2 used for the assistance of the Court as the Court ultimately sees  
3 fit. Thank you.

4 PRESIDING JUDGE: I have a few questions on the relevancy  
11:45:13 5 of some documents. One is number 38. Why is this relevant?

6 JUDGE ITOE: Maybe, learned Presiding Judge, if learned  
7 counsel can start from 23, which immediately precedes 38.

8 PRESIDING JUDGE: I accept that.

9 JUDGE ITOE: The curriculum vitae of Hinga Norman.

11:45:55 10 MR TAVENER: The particular use of that document --

11 JUDGE ITOE: Was it Mr Hinga Norman who submitted the CV?

12 MR TAVENER: It is a very thorough CV, Your Honour. The  
13 importance of the CV, we would say, is that it indicates  
14 Mr Norman's involvement in the army, his training at the Mons  
11:46:17 15 Officer Cadet School.

16 JUDGE ITOE: Who prepared this CV?

17 MR TAVENER: The Prosecution has no evidence about that  
18 particular item, as to who prepared it.

19 PRESIDING JUDGE: What are the indicia of reliability of  
11:46:29 20 that particular document? Because this is a condition precedent  
21 too.

22 MR TAVENER: It is a matter ultimately that we would say  
23 can be put to the witness. Whether or not it goes in at this  
24 stage as an exhibit is upon the Court. It is certainly an  
11:46:47 25 exhibit that can be used at some stage should the accused man  
26 testify. There has been some evidence about what is contained  
27 within the curriculum vitae.

28 PRESIDING JUDGE: Yes, we have some evidence that he has  
29 been in the military at some given time. But between that and

1 the whole CV is --

2 MR TAVENER: Yes, I accept that. That may be a document to  
3 which Your Honours do not ultimately accept.

4 JUDGE ITOE: We know that he was Deputy Minister of  
11:47:26 5 Defence; there is evidence somewhere about that.

6 MR TAVENER: From his passport, Exhibit No. 38, we know his  
7 date of birth, which is consistent in this CV. We also know that  
8 he did have training in the United Kingdom, military training  
9 which is indicated in this CV.

11:47:44 10 JUDGE ITOE: I am sorry to have interrupted your response  
11 to the question from the learned Presiding Judge on 38 and its  
12 relevance.

13 MR TAVENER: 38 is simply -- it is obvious that it is  
14 Mr Norman's passport. It just provides an identification, his  
11:48:01 15 date of birth. That would be the full extent of what the  
16 passport provides. A matter for Your Honours' consideration.

17 PRESIDING JUDGE: Another issue of relevancy is document  
18 104. It would appear to be outside the scope of the indictment.

19 MR TAVENER: Although it is outside the scope of the  
11:48:37 20 indictment, child soldiers are clearly one of the counts on the  
21 indictment. Demobilisation is an event that inevitably had to  
22 occur after the war concluded. The fact that the CDF were  
23 demobilising children means as a matter of logic that at some  
24 stage they were child soldiers.

11:49:02 25 JUDGE THOMPSON: This is a kind of logical position that  
26 they would not have been demobilisation without recruitment.

27 MR TAVENER: In the first place; that is correct.

28 JUDGE THOMPSON: It is an indirect way of establishing it.

29 MR TAVENER: Yes, I am looking at one particular page. I

1 have it as page one of three. Disarmament 5.5, at the bottom of  
2 the page: "The two parties agree on the following: To release  
3 to UNAMSIL all child combatants and abductees, particularly young  
4 women and children, starting on 25 May 2001. As Your Honour has  
11:49:44 5 just said, by logic that means at an earlier stage there must  
6 have been child soldiers, abductees and so on within the CDF.  
7 Although technically outside the range of the indictment it has  
8 applicability because of what it states. The inference, and we  
9 the Prosecution would say the only inference, that could be drawn  
11:50:11 10 is that the CDF had child soldiers at an earlier time. That  
11 combines with the oral testimony of various witnesses.

12 JUDGE THOMPSON: Is this irresistible, is it?

13 MR TAVENER: We would say it is the only inference.  
14 Perhaps Your Honour may say an irresistible inference.  
11:50:29 15 Certainly, it is a very strong inference. But it is corroborated  
16 by testimony already before the Court, oral testimony.

17 PRESIDING JUDGE: Thank you.

18 Mr Williams?

19 MR WILLIAMS: My Lord, we would submit that even by my  
11:50:49 20 learned friend's own admission that some of the documents in  
21 bundle C are unsourced. Their whereabouts are unknown even by  
22 the Prosecution themselves.

23 PRESIDING JUDGE: which one most specifically are you  
24 making reference to, the CV?

11:51:16 25 MR WILLIAMS: Yes, the CV of Hinga Norman. We also mention  
26 a lot of others, My Lord, in our --

27 JUDGE ITOE: Before you end your presentations you may wish  
28 to let us know finally which documents you are not objecting to.  
29 which documents are you not objecting to in this process?

1 MR WILLIAMS: My Lord, I said earlier we are opposed to  
2 everything.

3 PRESIDING JUDGE: Because of Rule 66?

4 MR WILLIAMS: Yes, and in the paper filed by us we gave  
11:52:10 5 specific objections. The 66 one is a technical objection, but we  
6 are going to factually oppose some of these documents and give  
7 the reasons for doing so in the document we file.

8 JUDGE ITOE: So you are objecting to the admissibility of  
9 all documents to bundle 1, bundle 2 and bundle 3?

11:52:38 10 MR WILLIAMS: Yes, My Lord.

11 JUDGE ITOE: Thank you.

12 PRESIDING JUDGE: Mr Tavener, do you wish to conclude your  
13 presentation, and then we will turn to the Defence?

14 MR TAVENER: I do not believe I need to submit any further.  
11:53:06 15 Thank you.

16 JUDGE ITOE: But, Mr Tavener, before you sit down, I forgot  
17 to put a question to you. There is 129, on page four, a letter  
18 from the War Council representatives to Joe Tamidey. Why is it  
19 being tendered at this stage when it could have at an earlier  
11:53:43 20 stage on the principle of orality?

21 MR TAVENER: That is correct; there are a number of options  
22 available. One option would have been to have put this to the  
23 particular witness. I am not sure whether his identity has been  
24 disclosed. There are a number of mechanisms by which a document  
11:54:17 25 can be put before the Court. At this stage the Prosecution is  
26 seeking to use 92 bis. Again, the impact - and Your Honour has  
27 highlighted - may well be the weight you then accord the document  
28 because it was not put through a particular witness. However, it  
29 does not preclude its admissibility.



1           PRESIDING JUDGE: The same would apply to 128, the letter  
2 to battalion commanders given some of the witnesses called by the  
3 Prosecution that dealt with these kinds of issues. I do not want  
4 to get into details.

11:54:50 5           MR TAVENER: Exactly. It has been submitted that this  
6 particular witness was illiterate. That would have also caused  
7 some issues as well.

8           PRESIDING JUDGE: Yes, but some other witnesses you called  
9 were not illiterate.

11:55:01 10          MR TAVENER: That is right. The impact, we would say, on  
11 how the documents were handled goes to weight.

12          PRESIDING JUDGE: Mr Williams, do you wish to add anything  
13 on behalf of the Defence?

14          MR WILLIAMS: Yes, My Lord. We wish to submit that the  
11:55:23 15 timing of this application is wrong. We refer Your Lordship to a  
16 number of cases. One ICTY [sic] decision, My Lord.

17          PRESIDING JUDGE: Are these the authorities you have quoted  
18 at end of your --

19          MR WILLIAMS: Yes, where the Defence in that particular  
11:55:58 20 case attempted to tender a bundle of documents when they were  
21 closing their defence.

22          PRESIDING JUDGE: Which case?

23          MR WILLIAMS: The Prosecutor against --

24          PRESIDING JUDGE: Delalic?

11:56:14 25          MR WILLIAMS: No, it is Kajelijeli.

26          PRESIDING JUDGE: That is the authority 20 on you list of  
27 authorities?

28          MR WILLIAMS: Yes, My Lord.

29          PRESIDING JUDGE: At page 13204?

1 MR WILLIAMS: Yes, My Lord. We would also round up by  
2 saying a number of these documents fail to meet the criteria  
3 mentioned in the Fofana decision. We refer Your Lordship to the  
4 separate opinion of Justice Robertson at paragraph 13 on page 8.

11:57:21 5 JUDGE ITOE: What aspect of the Fofana decision are you  
6 referring to?

7 MR WILLIAMS: No, the separate opinion of Justice  
8 Robertson.

9 JUDGE ITOE: I see; okay.

11:57:34 10 PRESIDING JUDGE: This is paragraph 13 of that document?

11 MR WILLIAMS: Yes, My Lord. We would crave Your Lordships'  
12 indulgence to carefully consider the specific objections that we  
13 made to the various documents.

14 PRESIDING JUDGE: You mean in the annex to your submission?

11:58:09 15 MR WILLIAMS: Yes, My Lord. That is all I wish to say, My  
16 Lord.

17 PRESIDING JUDGE: Thank you. Mr Tavener, you wish to  
18 reply?

19 MR TAVENER: Not in reply, Your Honour. I suggest a  
11:58:26 20 proposal bearing in mind the timing. I have spoken briefly to  
21 Defence counsel. We are trying to stay in the timetable by which  
22 this matter can progress. It may be that Your Honour will allow  
23 the documents to be tendered, ultimately to either be rejected or  
24 accepted, depending whatever approach Your Honours care to take.  
11:58:45 25 However, we would still seek to close the Crown case on that  
26 conditional basis that documents are before you -- ultimately a  
27 decision can be made. That will allow both parties to proceed  
28 with the no-case submission timetable. The Prosecution is  
29 willing to reduce the time period available to us, if that is

1 suitable, in order to complete by the August date. The Defence  
2 would still have available from today their three weeks, and the  
3 Prosecution will then file our submissions --

4 PRESIDING JUDGE: In two weeks rather than three?

11:59:22 5 MR TAVENER: Exactly. So, that is why we are hoping, as a  
6 matter of being pragmatic, to tender the documents conditional on  
7 Your Honours reviewing them in whatever method you chose to adopt  
8 so at least we know that has been dealt with. We are not closing  
9 the case and still having the documents outstanding. So, that is  
11:59:44 10 dealt with, then the clock starts, the Defence files their  
11 submissions in three weeks and we then file our reply in two  
12 weeks.

13 [Trial Chamber confers]

14 JUDGE THOMPSON: Mr Tavener, could you just explain what  
12:00:47 15 would in this context "tender" mean?

16 MR TAVENER: The documents would go into evidence and be  
17 given exhibit numbers. Ultimately the Court would produce a  
18 ruling in which it indicates which documents it has now accepted  
19 and which documents it has not accepted. As I have indicated all  
12:01:10 20 along, the documents are ultimately to be used anyway at the  
21 close of all the evidence; that is when they are finally  
22 reviewed. The no-case submission will be based primarily on the  
23 evidence now before the Court which came from the witness. So  
24 the reason why we need to do that, and this is out of an  
12:01:29 25 abundance of caution, if the Prosecution closes its case with the  
26 documents not in evidence then we may not get another opportunity  
27 to tender them. So, all we are doing is acting in caution,  
28 asking that they be allowed to be tendered with the understanding  
29 that ultimately some may well be rejected. And Your Honours --

1 JUDGE THOMPSON: We mark them with whatever letters or  
2 numbers that we are familiar with in tendering exhibits.

3 MR TAVENER: Yes.

4 JUDGE THOMPSON: Then in case certain documents are  
12:02:03 5 rejected then we unmark them.

6 MR TAVENER: Or simply a motion to the effect that the  
7 Court has not accepted the final tendering of the documents.

8 JUDGE THOMPSON: Actually I wanted the clarification  
9 because I thought "tender" was also being used in the context of  
12:02:23 10 the Court taking the documents into its custody tentatively.

11 MR TAVENER: Yes, I would physically hand up the documents  
12 and the Court staff can mark them. There is no need to do it in  
13 Court. There is a schedule available from which they can then  
14 have numbers allocated. Ultimately the Court can advise both  
12:02:39 15 parties as to which documents are being considered, or which  
16 documents have not been rejected, or whatever form the Court  
17 chooses to take.

18 PRESIDING JUDGE: For the sake of clarity on our part as  
19 well -- and do not take my comments to mean that we are ruling in  
12:02:57 20 that way; we have not made any decision in this respect -- but  
21 let's assume for the purposes of this discussion that accept the  
22 argument of the Defence under 66 and we deny all of that -- I  
23 have said so before, that that does not mean necessarily to say  
24 we are going that route, we are just trying to determine what it  
12:03:20 25 is. If you say, "We close our case subject to", and that is the  
26 decision of the Court, you are prepared to live with that at this  
27 stage?

28 MR TAVENER: Well --

29 PRESIDING JUDGE: Again, I am not suggesting this is our

1 decision. But, if it is, we have to look at these matters; we  
2 have to consider all of that. Technically and potentially, it  
3 could be one of the decisions. I am not saying it is; I am just  
4 raising the issue because of your proposal that you are closing  
12:03:54 5 your case and tendering this. But if the decision is that any of  
6 documents you have tendered or not admitted because -- I want  
7 that to be quite clear, on the record, this is what you mean so  
8 there is no confusion.

9 MR TAVENER: Bearing in mind the nature of what Your Honour  
12:04:13 10 has asked me, perhaps if we have a small break and I seek  
11 instructions.

12 JUDGE ITOE: Mr Tavener, is it prudent for the Prosecution  
13 to close its case when certain documents it is seeking to rely on  
14 are still lying in abeyance in terms of admissibility?

12:04:30 15 JUDGE THOMPSON: Let me just add to what my learned brother  
16 has said. I certainly would not want to give the impression that  
17 this Court is putting any pressure on the Prosecution to take any  
18 step which they intend to take within a constricted time frame.  
19 I just wanted --

12:04:54 20 MR TAVENER: It is a suggestion.

21 PRESIDING JUDGE: We are aiming too. I want that to be  
22 clear. In other words, yes, if it is possible we would like to  
23 see the case closed for the Prosecution today, but if it is not,  
24 it is not. It is this simple. I just want that to be quite  
12:05:13 25 clear. If you say it is closed, well, it will be closed.

26 MR TAVENER: Certainly, I understand that.

27 JUDGE THOMPSON: This judge wants to say that he is not  
28 letting the time dog wag the judicial tail.

29 PRESIDING JUDGE: Yes, you are asking for some time. Would

1 15 minutes be enough?

2 MR TAVENER: That would be suitable; that is fine.

3 PRESIDING JUDGE: The Court will adjourn. We will come  
4 back to you, Mr Williams.

12:05:43 5 MR WILLIAMS: As My Lord pleases.

6 PRESIDING JUDGE: We are not excluding you from that. It  
7 is just that we want to see what the position of the Prosecution  
8 is on this matter. If what you were saying is to assist them in  
9 this respect, we are quite prepared to hear it. It could be of  
12:05:52 10 assistance to them.

11 MR WILLIAMS: It is not, My Lord.

12 PRESIDING JUDGE: The Court is adjourned until 12.15 p.m.

13 [Break taken at 12.05 p.m.]

14 [On resuming at 12.28 p.m.]

12:33:38 15 PRESIDING JUDGE: Mr Tavener?

16 MR TAVENER: Thank you for your time. In the light of Your  
17 Honour's comments, the Prosecution will now wait for the result  
18 of Your Honours' consideration of the matters submitted under  
19 92 bis. At that time, once that matter is concluded, then we  
12:33:54 20 will proceed.

21 JUDGE ITOE: Did you decide whether to close your case or  
22 not?

23 MR TAVENER: Not today. Then we'll go back to the  
24 timetable already proposed and we'll see how we go.

12:34:08 25 PRESIDING JUDGE: Mr Williams?

26 MR WILLIAMS: I was going to commend my learned friend for  
27 his innovative skills. I think he has reconsidered now, I'm  
28 sure. I don't have any comment.

29 PRESIDING JUDGE: We expect to be able to give a ruling by

1 wednesday next week on all of this. We may not be able to give a  
2 very detailed, reasoned ruling, but we should be able to tell  
3 you, which, if any, we will accept or not. We hope to be able to  
4 do that by next wednesday. We'll inform Court Management, we'll  
12:34:47 5 notify everybody what time we will be sitting. From there, you  
6 will be able to make a final decision as to where you want to go.

7 MR TAVENER: Thank you.

8 PRESIDING JUDGE: Thank you very much. The Court is  
9 adjourned.

12:35:20 10 [whereupon the hearing adjourned at 12.31 p.m.,  
11 sine die]

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