

1 [Wednesday, 20 June 2012]

2 [Open Session]

3 [Accused enter court]

4 [Upon commencing at 9.03 a.m.]

09:03:45 5 JUSTICE DOHERTY: Good morning.

6 Before I take appearances, I will just check if Kigali can
7 hear me. I can see Kigali. I can see that the Independent
8 Prosecutor and two accused are in position.

9 Can you hear me? I am not hearing a reply.

09:04:16 10 Mr Interpreter, do you know - did my request go to Kigali?

11 THE INTERPRETER: Your Honour, I am not sure about that
12 because the telephone was not dialed. But the technician is here
13 now to dial the telephone so that we can get to Kigali.

14 JUSTICE DOHERTY: Thank you. Then I'll wait a few moments
09:04:34 15 and I'll repeat what I said afterwards.

16 THE INTERPRETER: Yes, Your Honour.

17 JUSTICE DOHERTY: Mr Herbst, I can hear you.

18 MR HERBST: You can, Your Honour? My mic is off

19 [interpretation overlap]

09:05:10 20 JUSTICE DOHERTY: Well, I definitely heard something.

21 THE COURT OFFICER: [In Kigali] Your Honour.

22 JUSTICE DOHERTY: Yes, Madam Court Manager. I'm listening.

23 THE COURT OFFICER: Your Honour, yesterday [Interpretation
24 overlap]

09:05:44 25 JUSTICE DOHERTY: I'm sorry, you're breaking up.

26 THE COURT OFFICER: We would like CITS to put the cables to
27 the [indiscernible]. We do not want to [indiscernible]. So can
28 we give five minutes to CITS to facilitate that.

29 JUSTICE DOHERTY: Another five minutes, did you say?

1 THE COURT OFFICER: [In Kigali] Yes, Your Honour.

2 JUSTICE DOHERTY: Very well, we will pause for five
3 minutes. Incidentally, I am also getting the interpretation.

4 MR HERBST: Can Your Honour still hear me?

09:08:41 5 JUSTICE DOHERTY: I can hear clearly. Let me check with
6 counsel.

7 Counsel, can you hear the English interpretation?

8 MR METZGER: I could hear something in the background, but
9 as we weren't called to attention, it may be that my attention
09:09:07 10 wasn't focused fully on it.

11 JUSTICE DOHERTY: Very well. I heard a very clear voice,
12 and I will now ask the same gentleman to ask again if his voice
13 is heard clearly.

14 Please speak again.

09:09:22 15 THE INTERPRETER: Mr Metzger, can you hear me? Chief Taku,
16 can you hear me? Lawyer Serry Kamal, can you hear me?

17 MR METZGER: I am unable to hear, but it may be they are
18 using a different channel from the floor channel.

19 JUSTICE DOHERTY: I'll have your channels checked by the
09:09:44 20 Court officer, because the machines have a habit of doing
21 something on their own.

22 MR METZGER: Thank you, Your Honour.

23 THE INTERPRETER: Chief Taku, can you hear me?

24 CHIEF TAKU: Yes, I can hear you. Thank you.

09:10:06 25 THE INTERPRETER: Lawyer Nicol-Wilson, can you hear me?

26 MR METZGER: Yes, I can.

27 THE INTERPRETER: Lawyer Serry Kamal, can you hear me?

28 MR KAMAL: Yes.

29 JUSTICE DOHERTY: The voice is very clear, and I can

1 certainly hear you clearly. If everything is ready and in
2 position, I will now take appearances for counsel, and then I
3 will ask Mr Herbst to proceed with his case.

09:10:48 4 MR NICOL-WILSON: Your Honour, Mel ron Ni col -Wi lson for
5 Mr Hassan Papa Bangura.

6 CHIEF TAKU: May it please Your Honour, Chi ef Char les Taku
7 for Mr Samuel Kargbo.

8 MR METZGER: May it please Your Honour, Kevi n Metzger for
9 Mr Santigie Borbor Kanu.

09:11:06 10 MR KAMAL: May it please Your Honour, Abdul Serry Kamal for
11 Ibrahim Bazy Kamara.

12 JUSTICE DOHERTY: Thank you, gentlemen.

13 Mr Herbst, are you in position and can I have appearances,
14 please?

09:11:25 15 MR HERBST: Your Honour, Robert Herbst for the Prosecution.
16 I would like to inform the Court that I was able to hear clearly
17 the English translation; however, I am now hearing simultaneous
18 Krio translation as I speak.

09:11:52 19 JUSTICE DOHERTY: That's not very good. That appears to be
20 a problem at the Kigali end, because none of us are experiencing
21 that. I will ask the Court attendant to check what the situation
22 is.

23 Mr Court Attendant [microphone not activated].

09:12:19 24 MR HERBST: Could it possibly be the channel that's going
25 into my earphone? Is anybody else also hearing the simultaneous
26 translation? Everybody hears.

27 Your Honour? Your Honour, I'm informed that everyone here
28 is --

29 JUSTICE DOHERTY: Continue.

1 MR HERBST: -- is still hearing the simultaneous
2 translation.

3 JUSTICE DOHERTY: Well, it's impossible to hear and think
4 in those conditions.

09:13:59 5 Mr Herbst, I understand it's being worked on.

6 MR HERBST: I'm sorry, Your Honour. I couldn't hear the
7 last part of what you said. I apologise.

8 JUSTICE DOHERTY: Sorry, I didn't have my earphones on.

9 THE INTERPRETER: Can you hear this in Krio and English in
09:14:31 10 Kigali, or has the problem been rectified on your side?

11 THE COURT OFFICER: [In Kigali] We can hear you on the
12 floor. Lawrence, I can hear you on the floor now. But every
13 time the interpretation goes on, we hear it, and I thought we had
14 sorted this out yesterday. We do not want --

09:14:56 15 THE INTERPRETER: Can you hear the interpretation for what
16 I am saying right now?

17 THE COURT OFFICER: [In Kigali] What you said now, no.

18 MR HERBST: [Overlapping speakers] Why don't I try to speak
19 and see whether there is still a simultaneous translation going
09:15:26 20 on. And yes, I can report that there still is the simultaneous
21 translation that we all hear here in Kigali.

22 THE INTERPRETER: Can you hear this being interpreted right
23 now?

24 MR HERBST: [Overlapping speakers]. We hear your voice,
09:16:12 25 the English interpreter now.

26 THE INTERPRETER: So you can hear the English version, but
27 you are not getting the Krio interpretation?

28 MR HERBST: We can hear the male voice, which I assume is
29 the English interpretation, but we are also hearing the female

1 voice, which I had assumed was the Krio interpreter.

2 THE INTERPRETER: Can they switch channels, maybe go to the
3 English channel solely.

4 MR HERBST: We heard that and I will ask the people here if
09:16:55 5 that is possible to be done. I, unfortunately, do not know how
6 to do that.

7 THE COURT OFFICER: [In Kigali] Mr Lawrence?

8 THE INTERPRETER: Yes, chief, I can hear you.

9 THE COURT OFFICER: [In Kigali] It's not nothing to do with
09:17:19 10 our channel.

11 THE COURT OFFICER: But when we changed and went to
12 English, it stopped.

13 THE INTERPRETER: I would just like to make a comment.
14 Everything that was just said, was it heard in Krio also in
09:17:35 15 Kigali?

16 MR HERBST: What was just said by, I guess, one of the
17 Defence lawyers was heard in English. We did not hear a Krio
18 interpretation of that.

19 THE INTERPRETER: Then I will try one more time to make
09:18:00 20 sure we are all on the same page. What I am saying right now, is
21 it being interpreted in Krio simultaneously?

22 MR HERBST: No, it is not. And perhaps I can just keep
23 talking for a while and see whether the Krio translation of what
24 I am saying has stopped. And I do not hear a Krio translation at
09:18:28 25 this point. Let me check with my colleagues.

26 THE INTERPRETER: Everything you just said was translated,
27 but if you cannot hear it, that means the problem has been
28 resolved.

29 MR HERBST: Excellent. So I think, then, as I understand

1 it, if we do not wear our earphones, then we will not get the
2 translation.

3 The Court Officer has asked me to request that the Krio
4 interpreters - that they speak a little more loudly so that the
09:19:17 5 accused here anyway hear better because they, apparently, have
6 advised the Court that they are having some difficulty hearing
7 the translation.

8 THE INTERPRETER: That has been acknowledged in the booth,
9 and it's being worked on right now. They have increased the
09:19:41 10 volume, and it will be better now.

11 MR HERBST: Thank you very much.

12 Your Honour, shall I give my appearances?

13 JUSTICE DOHERTY: Please, Mr Herbst. I actually heard your
14 appearance, and we need now to go into really start the trial
09:20:02 15 proper inasmuch as your opening statement and the evidence.

16 There were two preliminary matters that I recall. I'll
17 mention them both. First was my invitation to review the AFRC
18 trial judgement for purposes of Rule 94(B). I don't know if
19 you've been able to do anything on that, but I've done something
09:20:28 20 on it. So please advise if you have reviewed it.

21 MR HERBST: Your Honour, I was unable to do that last night
22 for --

23 JUSTICE DOHERTY: You don't have to give me any reasons. I
24 will not pursue that matter because that is now in your - for the
09:20:51 25 moment it's with you, and I will likewise not invite any comment
26 from counsel for the Defence on it.

27 The second preliminary matter that I recall was
28 Mr Metzger's application for leave to appeal, the interlocutory
29 decision. I want to set a time and a time limit to hear that

1 application. I have in mind to give both counsel 20 minutes
2 each, and I have in mind to do it - I'd like to give counsel at
3 least 24 hours' notice of those submissions.

09:21:34 4 Mr Metzger, it's your application. How much time do you
5 need to prepare it? It will be an oral application and there
6 will be a time limit.

7 MR METZGER: Your Honour has very kindly indicated the time
8 limit, and I am at your disposal as to when you would wish me to
9 argue the point. I preferably would not like to embark upon it
09:21:57 10 now, but at any point in time that it is suitable for Your Honour
11 thereafter - it's the two limbs Your Honour indicated you wanted
12 me to address you on - I shall be ready to do so.

13 JUSTICE DOHERTY: I think at least 24-hours' notice is
14 applicable. I will be giving a judgement tomorrow afternoon in a
09:22:29 15 nonrelated matter. Maybe we could do it before that, provided it
16 is a good time for witnesses. In other words, if there is a
17 witness mid-heard, we will continue with the witness. If he's
18 not mid-heard, I will slot it in tomorrow afternoon. That would
19 give you about a day and a bit to think about.

09:22:54 20 MR METZGER: As Your Honour pleases.

21 JUSTICE DOHERTY: Yes.

22 Mr Herbst, would that suit you for purposes of reply?
23 Again, I don't wish to spring this too quickly on counsel.

24 MR HERBST: I will do my best, Your Honour, to prepare for
09:23:15 25 that by tomorrow afternoon.

26 JUSTICE DOHERTY: Very well.

27 We will have it tomorrow afternoon if it can fit in with
28 evidence.

29 The 94 document I will continue to look at because it's

1 before me, and that will save some time of counsel looking at it.

2 Those were my preliminary matters. If there is no other
3 matter, I would invite Mr Herbst to give us his opening
4 statement.

09:23:52 5 Mr Metzger.

6 MR METZGER: Your Honour, just before --

7 MR HERBST: Your Honour, I had one more preliminary matter.

8 JUSTICE DOHERTY: Very well. Please raise it. Mr Metzger
9 appears to have one as well. Please raise yours.

09:24:07 10 MR HERBST: Your Honour, I had a little difficulty hearing

11 Chief Taku's - I don't know if it was an application of the

12 Court, but he said something about Mr Kargbo's being present or

13 absent in the courtroom for either the opening statement and/or

14 334's testimony, and I have - I haven't had a chance to discuss

09:24:34 15 this with Chief Taku, but I did have some concerns about

16 Mr Kargbo's absence from the courtroom in light of the fact that

17 the Court will ultimately be sentencing Mr Kargbo in part on what

18 transpires in the courtroom and what is said about what

19 transpired by all of the witnesses, and Mr Kargbo is expected to

09:25:09 20 be the second witness - second or third, depending on whether or

21 not Mr Saffa testifies before or after Mr Kargbo.

22 But I just want to raise that as an issue. If he had in

23 fact made an application for Mr Kargbo to be absent, I couldn't

24 tell and I haven't yet been able to review the transcript of

09:25:44 25 yesterday.

26 So I just want to raise that point.

27 JUSTICE DOHERTY: So to be clear, you wish to have Kargbo

28 present when 334 gives - or any other witness gives evidence; am

29 I correct?

1 MR HERBST: I think he should be present, unless there is
2 something different about our procedures here in this court. I
3 would - just in terms of his right to see and hear what is said,
4 that might affect his - his sentencing. That's my only concern.
09:26:27 5 And if he, you know, wishes to be absent, that's fine with me as
6 well. But I just wanted to raise that, because I wasn't sure
7 that that had been considered by either Mr Kargbo or his counsel.

8 JUSTICE DOHERTY: Chief Taku, your response, please.

9 CHIEF TAKU: My Lord, Kargbo is a witness for the
09:26:56 10 Prosecution, and I have absolutely no objection to the
11 observations made by Mr Herbst, in particular with regard to his
12 presence of the giving of evidence that might affect his
13 sentence. So I have no objection to him being present. He is a
14 co-accused in the case and he remains a co-accused, even though
09:27:27 15 he is also a witness.

16 MR METZGER: May I address on that point when Your Honour
17 comes to think about it? It was one of the preliminary matters I
18 was going to raise. I have two.

19 JUSTICE DOHERTY: I see. Let's deal with it now,
09:27:58 20 Mr Metzger.

21 MR METZGER: I think --

22 JUSTICE DOHERTY: And first of all, tell me what your locus
23 standi is to address on it.

24 MR METZGER: As a witness in the case, any evidence
09:28:11 25 Mr Kargbo gives has a direct bearing on Mr Kanu. Mr Kargbo will
26 give evidence that the Prosecution says incriminates Mr Kargbo to
27 the extent that he should not be pleading not guilty. He will be
28 sitting in Court hearing what is being said and have the
29 opportunity to, as it were, buttress any evidence he is about to

1 give. If he were not in Court, then nobody could level that
2 accusation at him.

3 But it is more fundamental than that, in my respectful
4 submission. Rule 90(B) of the Rules of Procedure and Evidence
09:28:42 5 effectively says that a witness who is to give evidence in Court
6 out not to be in Court when other witnesses are giving evidence
7 unless he has already testified. The fact that he is a defendant
8 is by arrangement between my learned friends Mr Herbst and
9 Chief Charles Taku, who also discussed and came to a conclusion
09:29:08 10 about the best way to deal with it when it came to sentencing.

11 Your Honour will note that we did not object to that course
12 of action. But in doing so, it would ill befit the lack of,
13 shall we say, opposition to that, because it seemed to me that at
14 that point in time the two parties are ad item. Mr Kargbo is
09:29:37 15 cooperating with the Prosecution in this case, and effectively
16 they are singing from the same hymn sheet.

17 Now, if they were to fall out in due course, then it can
18 only be as a result of one or the other party's doing. But he
19 has put forward as a witness of truth who has told the Prosecutor
09:30:01 20 what he knows and been full and frank as very early as - I think
21 it was April of last year. In those circumstances, it would seem
22 to me for the Prosecution to say that he needs to hear what is
23 said about him because he's going to be sentenced on those facts,
24 perhaps is putting the matter too highly. I am very careful here
09:30:26 25 not to use emotive language.

26 Perhaps it's putting the matter too highly when you
27 consider, as I say, that the Prosecution are saying he's a
28 witness of truth and he corroborates the evidence of the man who
29 will be giving evidence on whom the Prosecution will mostly be

1 relying, Mr 334.

2 JUSTICE DOHERTY: Thank you.

3 MR HERBST: Can we have a brief right of reply on an issue
4 of law related to the Rules --

09:31:05 5 JUSTICE DOHERTY: Law only.

6 MR HERBST: Rule 90(D), as I read it, is not as unequivocal
7 as counsel has just expressed. It says that a witness, other
8 than an expert who has not yet testified, may not be present
9 without leave of the Trial Chamber when the testimony of another
09:31:26 10 witness is given; however, a witness who has heard the testimony
11 of another witness shall, not for that reason alone, be
12 disqualified from testifying.

13 It seems to me that in this particular situation, where
14 there is a good reason for the witness, who was also an accused,
09:31:47 15 to be present so that he is aware of what is said about him by
16 the witnesses who are going to give testimony on which the Court
17 will later rely to sentence him, is a good reason and leave of
18 court could and should be granted.

19 JUSTICE DOHERTY: Thank you. I'll now rule on this.

09:37:45 20 This is a ruling on an application by the Prosecutor to
21 have the defendant Samuel Kargbo present in court during the
22 hearing of Prosecution evidence and the application by counsel
23 for Kanu to have him absent during Prosecution evidence.

24 Both have made realistic and convincing arguments to
09:38:29 25 support their respective positions. Article 17 of the Statute of
26 the Special Court for Sierra Leone confers certain rights on all
27 accused. Those rights include, at 17(4)(D) the right, "To be
28 tried in his or her presence and to defend himself in person or
29 through legal assistance", and at 17(4)(E), "To examine or have

1 examined the witnesses against him..."

2 Before me there are two accused to which these rights
3 equally apply; that is, Kanu and Kargbo. Conflicting
4 applications have been made in respect of Kargbo's presence
09:39:42 5 whilst the evidence is adduced. Rule 90(D) prescribing the
6 absence of a witness who has not yet testified being absent
7 whilst another witness is giving evidence is not a mandatory
8 provision.

9 I have already yesterday drawn a contrast to the varying
09:40:14 10 practices in national jurisdictions, two which I have personal
11 experience of, differ. In Northern Ireland, all witnesses are
12 present whilst other witnesses give evidence. But in England,
13 witnesses for the Prosecution are normally not present whilst
14 other evidence is being given.

09:40:43 15 It is clear that the presence of a witness whilst another
16 witness is giving evidence does not preclude the first witness
17 giving evidence, as I have heard argued in yet a third
18 jurisdiction.

19 The overriding concept that goes with that is that
09:41:13 20 cross-examination is available, and such issues, for example, a
21 conflict - or, to adopt Mr Metzger's words, buttressing - can be
22 put in cross-examination. In weighing up these two rights, I
23 will take a cautious approach.

24 I will direct that Mr Kargbo be absent during the evidence
09:41:39 25 of Witness 334. On reading the Prosecution brief, the same
26 factual concerns do not apply to any other Prosecution witness,
27 and accordingly Mr Kargbo will be present through the rest of the
28 Prosecution case.

29 In the light of that, is there any other preliminary

1 matter? First of all, Mr Herbst, yourself?

2 MR HERBST: No, Your Honour, there is not.

3 JUSTICE DOHERTY: Counsel for the --

4 MR KAMAL: Your Honour, the only preliminary point is I
09:42:27 5 would like to put my learned friend on notice that not
6 withstanding your Lordship's ruling, we will be objecting to
7 certain parts of the evidence of certain professional witnesses
8 where we think that there is a professional privilege involved.
9 And that being the case, since the question of admissibility will
09:42:50 10 be an issue, we would rather he did not refer to them in his
11 opening address, since as opening counsel he is a minister of
12 justice and he should present the facts fairly without
13 controversy.

14 JUSTICE DOHERTY: Mr Herbst, that is actually putting you
09:43:13 15 on notice as opposed to directing you what to do. So you're on
16 notice now, and I'm not making a ruling on that because it was a
17 matter of telling you. I will therefore invite you to proceed on
18 with your opening statement and calling of your witnesses.

19 Please proceed.

09:43:34 20 MR METZGER: Your Honour did ask for other preliminary
21 matters, and I was waiting for that one to finish.

22 JUSTICE DOHERTY: I see. Another one?

23 Please continue, Mr Metzger.

24 MR METZGER: This is more on the practical point, and I
09:43:45 25 just want to raise it. It will be very brief. Hopefully it
26 wouldn't have to be dealt with and Mr Herbst can continue.

27 It's just that as I understand it, it appears that
28 arrangements have been made based on the Scheduling Order for
29 certainly those Defence counsel with clients in Rwanda to travel

1 on Friday, and I just --

2 JUSTICE DOHERTY: Not on Sunday?

3 MR METZGER: Your Honour, no. Because I think it was hoped
4 that we would have time to speak with our lay clients. I am

09:44:21 5 concerned by first-hand experience that the weekend is not a good
6 time to try and avail oneself of the administration to see one's
7 clients. But that is the position. I just wanted to raise it
8 for the attention of the Court, because we are not going to go
9 into full swing. We've got today, we've got tomorrow, and if
09:44:43 10 we're travelling on Friday, it would be, I suspect, nigh on
11 impossible - well, certainly very difficult indeed to get much
12 time in before having to leave.

13 JUSTICE DOHERTY: We'll deal with this in Chambers sometime
14 in the course of the week, and I will arrange a telephone
09:45:04 15 conference from Chambers with Mr Herbst. So leave that with me
16 and we'll discuss.

17 MR METZGER: Thank you, Your Honour.

18 JUSTICE DOHERTY: Anything else? No.

19 Mr Herbst, please proceed.

09:45:24 20 MR HERBST: Thank you very much, Your Honour.

21 Let me just say that this is the first time in many years
22 that I have addressed the Court or a jury sitting down in an
23 opening or closing statement, and again I want to apologise for
24 the necessity of having to do so. I will now begin.

09:45:49 25 May it please this Honourable Court, Her Honour,
26 Justice Doherty, my learned friends of the Defence: My name is
27 Robert Herbst. It is a high honour and distinct privilege to
28 open the Prosecution's case in this proceeding and to summarise
29 what we believe the evidence will show.

1 In late 2010, the accused convicts in Rwanda hatched an
2 unlawful scheme to induce one or more of the insider witnesses
3 who testified against them at the AFRC trial to recant their
4 testimony in order to support a review of their convictions and
09:46:32 5 sentences under the Rules.

6 Of these insider witnesses, 334 was the most important, and
7 therefore the first contacted. This is not just clear from the
8 judgement itself, but as you will hear as much from Andrew
9 Daniels with whom the defendant, Kamara, along with the convict
09:46:58 10 Brima, discussed having witnesses change their testimony.

11 Mr Daniels was Mr Kamara's former lawyer at the AFRC trial
12 after 334 testified. The role of lawyers in this case, the
13 evidence will show, is prominent, as they were sought out and
14 used in aid and furtherance of the unlawful plan. In addition to
09:47:25 15 Mr Daniels, the lawyers consulted included the Principal
16 Defender --

17 MR METZGER: Your Honour, there is an objection at this
18 point.

19 JUSTICE DOHERTY: Just a moment - pause, Mr Herbst. Yes.

09:47:40 20 MR METZGER: As I understand it, Your Honour indicated
21 yesterday very clearly that this was a matter that was in
22 abeyance because Your Honour had directed - or, rather, Your
23 Honour was awaiting an amicus brief on the point. In all the
24 circumstances, it seems to me that the opening does not take into
09:47:59 25 account that Your Honour has yet to rule on that matter.

26 JUSTICE DOHERTY: This is only an opening statement.
27 Various people will be referred to. It is not evidence, and so
28 it's not the status of evidence, so I'm not going --

29 MR METZGER: Your Honour, the difficulty is that it is my

1 humble submission that any communication or purported
2 communication up until Your Honour rules otherwise between a
3 lawyers, including the Principal Defender, and any one of the
4 persons who have been under the care of the Special Court for
09:48:34 5 Sierra Leone Defence Office for some considerable time now is
6 privileged.

7 If that is the case, then that material is clearly
8 confidential. To refer to it in itself under the provisions as
9 they stand could technically be seen as a breach in itself of
09:48:57 10 that confidentiality. This is a point that we have sought to
11 make very clear right from the outset, and I am sure my learned
12 friend can open his case without it.

13 JUSTICE DOHERTY: Let me hear his reply.

14 Mr Herbst, the matter is on record as it happens because
09:49:14 15 it's been said. Have you any statement or reply to make?

16 MR HERBST: I do, Your Honour. In addition to the fact
17 that opening statements are not evidence, and in addition to the
18 fact that I believe it's incumbent on the Prosecution to lay out
19 the relevant evidence that it in good faith has and intends to
09:49:37 20 introduce and believes is admissible in evidence in this Court so
21 that the trier of fact can understand the case as a whole, the
22 fact is that the communications have already been disclosed.
23 There is no further breach in my referring to them in my opening
24 statement, because the lawyers involved have disclosed the
09:50:07 25 communications. The only question is an evidentiary one:
26 Whether in fact they will be admitted.

27 I have made my submission to the effect that
28 the communications that I intend to refer to - and not all of
29 the matters in which I mention a lawyer are going to be

1 communications - but even the communications are admissible, in
2 my view, and therefore I think it's appropriate for the
3 Prosecutor, in an opening statement, to make reference to them so
4 that the trier of fact can understand the case as a whole and the
09:50:46 5 Judge on the issue of law will, of course, make a ruling, and the
6 Judge is the trier of fact. Having been a Judge for so long, of
7 course, is well capable of disregarding in her deliberations any
8 mention that's made in an opening statement that is otherwise not
9 introduced into evidence.

09:51:18 10 JUSTICE DOHERTY: You are going to rise, but I don't know
11 why, Mr Metzger.

12 MR METZGER: Yes. I was simply going to rise on a matter
13 of law.

14 If this matter is to be ventilated, what my learned friend
09:51:35 15 seems to fail to understand - I say "seems to," because he has
16 paid no regard to it in his address to you - is that if a matter
17 is confidential under the Rules of the Special Court for
18 Sierra Leone, then the opening statement, which is an open and
19 public statement, goes out to the world. It is not simply to the
09:51:56 20 trier of fact.

21 The trier of fact in this case, Your Honour, is fully
22 cognisant of what it is the Prosecution is saying. But the
23 opening statement is a public statement, and therefore the
24 question of admissibility becomes more important. Because if
09:52:12 25 Your Honour were to rule that, in fact, the material - or some of
26 the material that my learned friend is relying on was, in fact,
27 privileged, then what do we do about the fact that it has been
28 publicly stated in open court without regard having been paid to
29 that aspect of confidentiality?

1 MR HERBST: Your Honour, I have a suggestion that might
2 meet the last point.

3 JUSTICE DOHERTY: Yes.

4 MR HERBST: If Your Honour wishes - permits - gives me
09:52:54 5 leave to mention it, even though [Overlapping speakers] --

6 JUSTICE DOHERTY: I'll hear your suggestion, but I could
7 make a quick ruling. But let's hear the suggestion.

8 MR HERBST: One possibility is to hear the portions of the
9 opening statement that relate to the communications in closed
09:53:19 10 session pending Your Honour's ruling. I'm only suggesting that
11 as an alternative if Your Honour were to credit the arguments of
12 my learned friend, Mr Metzger, but I'm not withdrawing my
13 position that I earlier stated. But it just occurred to me, as I
14 was listening to him, that that is one possibility, but the
09:53:51 15 lesser of the two alternatives, in my view.

16 JUSTICE DOHERTY: This is an opening statement. It recites
17 much of what is in the pre-trial brief of the Prosecution. Under
18 Rule 84 of the Rules of Procedure and Evidence, an opening
19 statement is confined to the evidence which a party intends to
09:57:06 20 call. It is not evidence.

21 The matters that have been stated just now are already in
22 the public arena by virtue of the pre-trial brief. I see no
23 prejudice to any party if they are stated again, as it is only
24 the evidence that is called and possibly cross-examined which
09:57:35 25 will be considered by this Court as evidence in making a
26 judgement.

27 Please proceed, Mr Herbst.

28 MR HERBST: Thank you, Your Honour.

29 In addition to Mr Daniels, the lawyers consulted included

1 the Principal Defender and Ibrahim Mansaray in Freetown. The
2 accused sought the assistance of the Principal Defender to
3 appoint counsel to represent them for the purposes of seeking
4 such a review. Mr Daniels was standing by waiting to hear from
09:58:17 5 the Principal Defender, but never did hear, so he was never
6 appointed. But 334 and Mr Kargbo were told that a lawyer from
7 Ghana was coming to speak to 334 about recanting his testimony.

8 From the prison call records, it appears that a second
9 lawyer from Ghana, a Mr Kojo Graham, may have been consulted as
09:58:45 10 well in the relevant time period, which appears to be in November
11 and December 2010. When I say the relevant time period, the
12 relevant time period of the events about which the Court will
13 hear evidence in this case.

14 In response to the accused's entreaties, the Principal
09:59:09 15 Defender went to visit them in Rwanda in early November 2010.
16 During that visit she discussed with Mr Kamara, Mr Kanu, and
17 Mr Brima, the subject of a review, pardon, and commutation of
18 sentence under Rules 120, 123, and 124, and remission under the
19 laws of Rwanda. She told them straight out that they may not
09:59:39 20 interfere with protected witnesses. She was talking to them
21 about fresh witnesses, fresh evidence; but the accused had a more
22 corrupt scheme in mind.

23 She told them that they could proceed to write the
24 President of the Special Court if they develop fresh evidence,
09:59:58 25 and if they have witnesses willing to come forward, they should
26 work with a local pro bono lawyer, send the witnesses to him, and
27 have the lawyer collect the evidence and work with them.

28 The three convicts in Rwanda identified Mr Mansaray as one
29 of their prior local lawyers and asked the Principal Defender if

1 Mr Mansaray could be appointed pro bono to help them. Upon her
2 return to Freetown, the Principal Defender enlisted Mr Mansaray
3 and asked him whether he would agree to assist and counsel the
4 accused pro bono, and he did agree.

10:00:36 5 The Principal Defender specifically informed Mr Mansaray
6 that they are protected witnesses and to be mindful of his
7 obligation to the Court. Because the accused were in prison in
8 Rwanda, they needed assistance from those close to them on the
9 outside to execute their plan to get out from under their very
10:00:58 10 lengthy sentences.

11 They reached out for Mr Bangura, the accused, and his close
12 friend, Mr Kargbo, who agreed to assist the accused by first
13 reaching out to 334, the most important of the insider witnesses
14 against them and whom was a very close friend and associate
10:01:34 15 during the prior years.

16 It is difficult to pinpoint when they first reached out to
17 them, but the prison call records reflect communications with
18 Mr Daniels on 11 November, Mr Bangura on 12 and 13 November, but
19 the first approach to 334 occurred several weeks later. On or
10:02:02 20 about November 26 and/or November 27, 334 received a call from
21 and then met with Mr Kargbo, also known as Mr Ragga, who told 334
22 that he had received a call from the Rwanda convicts and had been
23 requested to approach 334 about recanting his testimony to help
24 them get their sentences reduced.

10:02:34 25 Now this initial approach itself was unlawful because it
26 was put to 334, not that anyone thought his prior AFRC trial
27 testimony was false or defective in any way on the merits, but
28 merely that he should recant to help the accused out to get their
29 sentences reduced. This was itself an interference with the

1 witness and an interference with the integrity of the Court's
2 process and, indeed, the Court's administration of justice.

3 But the crime, the offence, the contempt of the Court was
4 then compounded as 334 said he was not interested in recanting
10:03:21 5 his testimony. That should have been the end of the matter. But
6 Mr Kargbo, Mr Bangura, Mr Kamara, and Mr Kanu persisted in
7 attempting to persuade him to do so over a period lasting through
8 mid-December 2010 right up until the Office of the Prosecutor of
9 this Court, which I will refer to as the shorthand of OTP,
10:03:53 10 earlier and promptly alerted by 334 to the unlawful contacts,
11 filed a motion for an investigation of contempt which, when
12 reported by the Principal Defender to the accused in Rwanda, put
13 an end to the unlawful scheme. An involuntary end, not a
14 voluntary one. There is no abandonment here.

10:04:32 15 As I said notably, there was no discussion of the veracity
16 of 334's testimony at the AFRC trial. Instead the accused
17 offered financial compensation. They offered a bribe to attempt
18 to persuade 334 to recant. The offer of financial compensation
19 is perhaps the most blatant of the interferences which are
10:04:56 20 chargeable under Rule 77, the most clearly revealing of the
21 requisite specific intent to interfere with the Court's
22 administration of justice and to interfere with the integrity of
23 its processes. And so this is how it played out.

24 The evidence will show 334 told Mr Kargbo that very first
10:05:25 25 day they met on this that he was not interested. Mr Kargbo
26 called Mr Bangura on his cell phone, who told 334 to do what the
27 convicts in Rwanda were asking 334 to do. And after that phone
28 call, Mr Kargbo brought up the money.

29 In continuing to attempt to persuade him to honour the

1 request to recant, he told 334 that the convicts were prepared to
2 pay 334 to recant. The money was to be arranged by the Rwanda
3 convicts. 334 again insisted to Mr Kargbo, Mr Ragga, who was a
4 cousin and a very close friend from many years back, that he was
10:06:14 5 not willing to recant his testimony notwithstanding the offer of
6 money.

7 A few days later, Kargbo again called and met with 334. We
8 know now from an e-mail that we will offer in evidence, and from
9 the prison phone records that we will offer in evidence, that
10:06:37 10 must have been on 30 November, 2010. Mr Kargbo again urged 334
11 to comply with the request to recant, and again 334 said he was
12 not interested. Mr Kargbo again persisted in persuasion, again
13 pointing out that the proponents of the scheme were ready to give
14 him money to do so, and he added that he, himself, was also
10:07:15 15 expecting to obtain financial compensation from the deal.

16 And on this occasion, Mr Kargbo received on his cell phone
17 a phone call from the accused Kamara in Rwanda. 334 heard
18 Mr Kargbo tell Mr Kamara that he was with 334 at which point
19 Mr Kargbo indicated that Mr Kamara wanted to speak directly to
10:07:39 20 334 which 334 declined to do. After that call Mr Kargbo told 334
21 that Mr Kamara was going to have the accused, Mr Kanu, call back
22 which he did. Mr Kargbo advised 334 that Mr Kanu wanted to speak
23 to him, asked him insistently to do so, and 334 did and got on
24 the phone with Mr Kanu, who told 334 that he and the Rwanda
10:08:19 25 convicts were all brothers and that they were counting on 334 to
26 assist them.

27 Mr Kanu also asked 334 if Mr Kargbo had spoken to him about
28 the request that they were making and the fact that they were
29 putting modalities in place to compensate 334 if he rendered the

1 requested assistance. Your Honour will hear from a number of
2 witnesses that phrase again and again: "Putting modalities in
3 place to compensate," actually, "putting modalities in place,"
4 period; meaning "to compensate," "to bribe," to pay 334.

10:09:08 5 334 told Mr Kanu in reply that Mr Kargbo had explained
6 everything and that he was thinking about it, and then he handed
7 the phone back to Mr Kargbo. 334 recognised Mr Kanu's voice on
8 the phone, and again these men had known each other for many,
9 many years and had been very, very close. And there will be no
10:09:36 10 doubt that the person on the other end of the line was Mr Kanu.

11 After that phone conversation, Mr Kargbo again persisted in
12 trying to persuade 334 to comply with the request and emphasized
13 the financial benefit to both of them. And after the events of
14 the day just described, 334 texted and then called a lawyer,
10:10:22 15 Ms Shyamala Alagendra, a former OTP Prosecutor who at that time
16 was no longer with the Court but who at one point had handled
17 334.

18 This was the relatively early report by 334 of the unlawful
19 contact to him. Ms Alagendra immediately e-mailed Brenda Hollis,
10:10:57 20 the Prosecutor, and one other member of her staff and reported
21 that 334 had reported Mr Kargbo's contact and had spoken that day
22 to 5-5 - 5-5 is Mr Kanu's nickname - and that Mr Kanu had told
23 334:

24 "We are brothers and we will soon be released and we expect
10:11:23 25 you to help us with the release."

26 The quote appears in the e-mail from Ms Alagendra to
27 Ms Hollis. Ms Alagendra also reported that 334 had reported the
28 promise by the AFRC accused to pay him money, as well as to take
29 care of his security and to relocate him and his family. And

1 Ms Alagenda also e-mailed that the accused, Mr Bangura, also
2 known as Bomb Blast, was aware of this. The e-mail is dated 30
3 November, 2010, in the late afternoon/early evening.

4 And the second reason we now know that this occurred on 30
10:12:26 5 November is that we have found in the phone record of the Rwanda
6 prison records of three calls from the prison phone to
7 Mr Kargbo's cell phone on 30 November, at 1.09 p.m., 1.37 p.m.
8 and 1.49 p.m. Because of the duration of the first two calls,
9 the third call could have been a quick call back after the loss
10:12:58 10 of connection on the second call. But it certainly reflects at
11 least two calls, with some relation the reference to what you
12 will hear from Mr Kargbo and 334 about the two calls that I have
13 just described where Mr Kamara asked to speak to 334 and he
14 doesn't want to speak and so he says he'll call back with Mr Kanu
10:13:35 15 on the line.

16 In other words, the prison phone record appears to fit
17 hand-in-glove with 334's testimony, with first that call to
18 Mr Kamara and then the call back with Mr Kanu, and at a time that
19 roughly, not precisely, fits the testimony, even though 334 nor
10:14:00 20 Mr Kargbo were aware of the record of those calls and therefore
21 could not have tailored their testimony to fit the record of
22 those calls. And they were not aware of them because the
23 Independent counsel and OTP were not aware of them - OTP first
24 and then the Independent counsel were not aware of them until
10:14:30 25 recently.

26 The next day on December 1, 2010, Mr Kargbo called and met
27 334 a third time. I don't know whether I mentioned this, but the
28 e-mail from Ms Alagenda, as well as the testimony you'll hear
29 from 334, indicates that she recommended that he report to OTP

1 what had occurred and, as you will hear, he did so. 334 did so.

2 And so now you will hear from this point on what happens as
3 the scheme plays out and, on the other hand, the reports that 334
4 makes to OTP staff members. And the very next day, it happens on
10:15:48 5 1 December, Mr Kargbo calls 334 and meets with him again and
6 tells him that he had again been in communication with the Rwanda
7 convicts and had been told that a lawyer was coming from Ghana
8 and would be speaking to 334 about the same issue of his
9 recanting his testimony. Because the phone record from Rwanda
10:16:13 10 reflects numerous calls from Mr Graham in November of 2010, it is
11 not possible to say for sure which lawyer from Ghana the
12 defendants were referring to.

13 But Mr Daniels will testify that he did travel to Freetown
14 in December 2010. Mr Kargbo also asked 334 for the whereabouts
10:16:41 15 of 033, a second witness, but by his real name of course. By
16 asking 334 for 033's whereabouts, Mr Kargbo said that he was also
17 one of the people the Rwanda convicts wanted to talk to about his
18 testimony. 334 advised that he did not know where 033 was
19 presently staying.

10:17:19 20 Mr Kargbo is expected to testify that it was the accused
21 Mr Kamara who asked him, Mr Kargbo, to ask 334 for the
22 information about 033 and who disclosed to Mr Kargbo that 033 had
23 testified against the Rwanda convicts at the AFRC trial, which
24 Mr Kargbo had not known prior thereto, and that the Rwanda
10:17:58 25 convicts also wanted to persuade, Mr Kamara said to Mr Kargbo, to
26 persuade 033 to recant his testimony. And this, of course, is
27 the factual basis for the additional charge against Mr Kamara of
28 knowingly and willfully interfering with the Court's
29 administration of justice by disclosing confidential information

1 relating to the AFRC proceedings in knowing violation of an order
2 of the Trial Chamber; in short, by revealing the identity of a
3 protected witness to Mr Kargbo.

10:18:48 4 Now, on the same day, 1 December, 334 was interviewed by
5 OTP staff for the first time, investigators Saffa and Lamin, and
6 reported in significant detail what had occurred up to that
7 point. There is a memo authored by one of the OTP investigators
8 which describes what Mr 334 had relayed in their meeting on 1
9 December. Two days later, on 3 December, Mr Kargbo came to 334's
10:19:25 10 house and said he had received another call from the Rwanda
11 convicts, who told him to tell 334 that they were quite prepared
12 to fulfill their promise earlier made to 334, but asking that he
13 be patient for a while, as they were putting things together or
14 putting things in place.

10:19:48 15 Again on the same day the evidence will show that on the
16 phone with an OTP investigator, 334 reported the additional
17 contact from Mr Kargbo occurring earlier that day.

18 The next contact was on 14 December, when Mr Kargbo met
19 with 334 and told him that Mr Kamara had contacted him both the
10:20:23 20 day before, that's 13 December, and earlier in the day on 14
21 December. He further told 334 that the reason why 334 had not
22 been contacted since the last time was that they were "putting
23 modalities in place," and he told him again on 14 December that
24 on 16 December he would be contacted as agreed previously on
10:20:57 25 providing what had been promised 334.

26 Again, there are memos that document what was said and at
27 the time. 334 reported this to Mr Saffa. Saffa called to inform
28 334 that a contempt motion would be filed the next day, 15
29 December. But as a result of the information provided by 334 as

1 to what was expected to happen on 16 December, the contempt
2 motion was delayed for a day to see what would happen on 16
3 December.

4 And what happened on 16 December? 334 meets Mr Bangura and
10:21:59 5 Mr Kargbo and drove them in his car to the office of Mr Mansaray.
6 On the way, Mr Bangura and Mr Kargbo, advised 334 that they were
7 going to meet Mr Mansaray, a lawyer who was coordinating the
8 activities of the AFRC convicts in Rwanda, to contact witnesses
9 to recant their testimony.

10:22:27 10 While in the car, Mr Bangura received a call that it was
11 the lawyer Mr Mansaray that was calling to know their present
12 location, and also while on route Mr Bangura asked 334 how much
13 money he wanted to be paid for the deal. 334 did not give an
14 amount in reply. He suggested this was a big deal. You decide
10:22:58 15 what you want to give me, something along those lines. He put
16 the onus back on the defendants.

17 334 dropped Mr Bangura and Mr Kargbo off at Mr Mansaray's
18 office, but did not go in with them. Mr Kargbo's testimony will
19 shed light on what happened at this meeting with Mr Bangura and
10:23:27 20 Mr Mansaray.

21 He is expected to testify that when they went to discuss
22 the plan to compensate 334 to change his testimony before the
23 Special Court, in the lawyer's office they told Mr Mansaray that
24 Mr Kamara had said that he would be in a position to offer 334
10:23:50 25 financial benefit so that 334 can change his evidence before the
26 Special Court.

27 Then Mr Kamara wanted Mr Kargbo and Mr Bangura to assist
28 the AFRC Rwanda convicts. Mr Mansaray introduced himself as one
29 of Mr Kamara's Defence lawyers and asked Mr Kargbo and Mr Bangura

1 if they would be in a position to convince 334 to recant his
2 evidence. Mr Kargbo replied that 334 is his younger brother,
3 "brother," and that Mr Kargbo could persuade him. According to
4 Mr Kargbo, Mr Mansaray stated it would be very difficult for 334
10:24:43 5 to go back to the Court and recant his evidence. But when
6 Mr Kargbo told Mr Mansaray that Mr Kamara had said that they,
7 meaning the Rwanda convicts, would put modalities in place to
8 have enough money to recant his evidence. Mr Mansaray then
9 replied that if that was the case, they should go ahead and
10:25:07 10 convince 334 to do it.

11 According again to Mr Kargbo, Mr Mansaray told both he and
12 Mr Bangura that this type of money needed money to facilitate,
13 and Mr Mansaray wanted the convicts to pay him as well. 334
14 drove Mr Kargbo and Mr Bangura to the meeting, as I said. He
10:25:34 15 didn't attend. But later that afternoon after the meeting,
16 Mr Bangura and Mr Kargbo met 334 again and related that while
17 they were at Mr Mansaray's office, Mr Kamara and Mr Kanu called
18 and made the same promise, that modalities were being put in
19 place to make sure that what was being promised to 334 earlier
10:26:04 20 would happen soon.

21 Mr Bangura also told 334 in his contact when they were
22 together after the Mansaray meeting - Mr Bangura told 334 he
23 should not be afraid of rendering the assistance to the convicts;
24 that if there were anyone that 334 should be afraid of, it should
10:26:34 25 be Mr Bangura and Mr Kargbo; that as long as they have given 334
26 the go ahead, he should do so without any fear.

27 Then again, in these remarks I am paraphrasing. I am not
28 quoting directly. It is the substance of what was said that Your
29 Honour will hear from the witnesses, the thrust of it.

1 Now, that is as far as the scheme went, because the
2 contempt filing was made immediately thereafter on 17 December,
3 and the filing was reported by the Principal Defender to the
4 Rwanda convicts a few days later. So the jig was up, as they
10:27:23 5 say. The scheme ended it came to the attention of the Court, and
6 this investigation and prosecution followed, and here we are
7 today in this Court to hold the accused to account for their
8 wrongful acts, for their contempt of the court, and for - in
9 Mr Kamara's case, it was a violation of a Court order - and for
10:27:53 10 the attempt of all of the accused to obstruct and pervert the
11 Court's administration of justice.

12 As the Court well knows, Mr Kargbo early on agreed to
13 cooperate with this investigation shortly after it began. He has
14 acknowledged his guilt and has agreed to cooperate, and he will
10:28:17 15 testify as a Prosecution witness. He will affirm the essentials
16 of 334's testimony, and he adds some pertinent facts; that
17 Mr Brima and Mr Kanu were sometimes present when Mr Kamara spoke
18 to Mr Kargbo about the plan on the Rwanda prison cell phones -
19 speaker phone, I guess - and that although 334 appeared reluctant
10:28:49 20 to recant from the beginning, he, Mr Bangura, Mr Kamara and
21 Mr Kanu, all nonetheless attempted to persuade 334 to recant and
22 promised him financial and other benefits if he did so.

23 Your Honour, that is a summary, a bird's-eye view of the
24 evidence, not necessarily referring to all of it. But that's the
10:29:16 25 thrust and the crossword puzzle picture on the box, as Your
26 Honour hears the individual pieces of evidence as it comes in.
27 The evidence, the Prosecution submits - well, overwhelming
28 evidence of guilt of the accused. Thank you.

29 JUSTICE DOHERTY: Thank you, Mr Herbst.

1 Please call your first witness.

2 MR HERBST: Your Honour, the Prosecution calls Witness 334.

3 JUSTICE DOHERTY: Before 334 enters the courtroom, I wish
4 to clarify that he is continuing to give evidence under the
10:30:06 5 protective measures granted to him in the AFRC trial. I ask that
6 because it will be necessary to possibly pull the curtains and
7 have a screen put in position; is that the situation?

8 MR HERBST: Your Honour, I am advised that it is - I'm
9 sorry --

10:30:33 10 JUSTICE DOHERTY: No, please reply. I need to put
11 modalities in place.

12 MR HERBST: [Overlapping speakers] Can Your Honour hear me?

13 JUSTICE DOHERTY: I can hear you very clearly. Someone
14 else was speaking, so we've sorted that out.

10:30:52 15 MR HERBST: Okay. My understanding is that 334 will
16 testify without the protective measures, but we will refer to him
17 again by his pseudonym, 334.

18 JUSTICE DOHERTY: That's a bit confusing. Either he's 334
19 or he has a name. I am not quite sure why we're having both.

10:31:25 20 MR HERBST: Well, I meant to communicate, Your Honour, that
21 he is willing to testify without the protective measures, but
22 that since we've been referring to him throughout as 334, I was
23 going to continue to refer to him by the pseudonym. But he's
24 willing to be referred to by his real name, is my understanding,
10:31:48 25 if it comes to that.

26 JUSTICE DOHERTY: Just pause a moment. I wish to check
27 something in the rules. I am going to be cautious here. As I've
28 already indicated, but not actually ruled, Rule 75(J) states
29 that:

1 "An application in a Chamber to rescind, vary, or augment
2 protective measures by a second Chamber, if it does vary,
3 rescind, or augment them, those changes shall apply only with
4 regard to the second proceedings."

10:32:47 5 So in the case of 334, he rescinded his protective measures
6 in the case of the Prosecutor and Taylor. However, the
7 protective measures were granted in a different trial and, as
8 I've been reminded both by the Rules and by the Appeal Chamber,
9 they are still in place. The recession was only for Taylor.

10:33:23 10 So what I am going to do is this: I am going to have the
11 curtains pulled, I am going to go into private session, and I am
12 going to ask the witness himself what his situation is because
13 the protective measures vest in him, and I have a duty to ensure
14 that they are, that he is protected. Then from his own mouth I
10:33:43 15 will hear what he says, and at the end of that I will rely on
16 what he tells me to make a ruling.

17 So that is what I am going to do.

18 MR METZGER: Would you also hear us on the matter, Your
19 Honour. Obviously in closed session.

10:34:00 20 JUSTICE DOHERTY: Yes, I will if necessary. But you will
21 there is transcripts in other courts about your submissions,
22 Mr Metzger.

23 MR METZGER: It would be a practical point that I can make
24 as easily in open or in closed session. A practical point.

10:34:14 25 JUSTICE DOHERTY: For protection, we'll just do it in
26 closed session.

27 MR METZGER: [Overlapping speakers]

28 JUSTICE DOHERTY: So for the purposes of the public who are
29 sitting and listening to this court case, there is a witness who

1 has had protective measures, and that included not being seen.
2 We want to be clear what exactly he wants to do in this session
3 and therefore I am going to ask him, and I am going to have it in
4 closed session in order to protect his identity until a ruling is
10:34:49 5 made. So the curtains will be closed. You will not hear for a
6 little while, and then the curtains will be opened again.

7 So please close the curtains.

8 THE COURT OFFICER: Your Honour, I am informed that 334 is
9 sick and he has been taken to hospital. So he is not here at the
10:35:10 10 moment.

11 JUSTICE DOHERTY: Well that saves that problem, doesn't it.

12 Mr Herbst, did you hear the Court Attendant?

13 MR HERBST: I did. And I have to confess my great surprise
14 because I was not informed about this at all. This is the first
10:35:28 15 I am hearing of it.

16 JUSTICE DOHERTY: Well, the one obvious thing I can remark
17 is that nobody can take instructions from the gentleman since
18 he's in hospital and that you are the one who would need to take
19 the instructions.

10:35:47 20 Mr Court Attendant, can you give us anymore information;
21 for example, how sick he is, how long he's been there, how long
22 he's likely - have you any information at all? Or maybe it would
23 be more appropriate to come from WVS who may well have escorted
24 him. Is there anyone from WVS who can give us some information.

10:36:12 25 THE COURT OFFICER: Yes Your Honour.

26 MR AKINBOBOLA: Yes, Your Honour.

27 JUSTICE DOHERTY: Please tell us what the situation is and
28 please do not reveal Witness TF1-334's name in the course of what
29 you say.

1 MR AKINBOBOLA: Yes, Your Honour.

2 He reported sick this morning.

3 JUSTICE DOHERTY: Yes.

4 MR AKINBOBOLA: And informed me that he is unable to come
10:36:47 5 to Court, and I instructed the support officer to take him to
6 hospital. I've not received any information from the support
7 officer as up to now. I believe they are still in the hospital.

8 JUSTICE DOHERTY: Well, we've all been taken a bit surprise
9 by this.

10:37:28 10 Chief Taku.

11 CHIEF TAKU: If I may help, Your Honour. We've had
12 situations like this, and when they do arise, when he gets better
13 before he comes to the court next time, it will be good to submit
14 medical reports for the course of the records. The Prosecution
10:37:52 15 have done many times in the past.

16 JUSTICE DOHERTY: I am quite sure that will be brought to
17 us.

18 Given this turn of events, I think the only sensible and
19 practical thing to do, Mr Herbst - hello, Mr Herbst? Are you
10:38:08 20 still there? I don't see you. I see a vacant chair. Oh, you
21 are there. Sorry. Just the camera was in the wrong position.

22 MR HERBST: I am here. I'm just, as I said, surprised not
23 just at the turn of events but of the fact that I am hearing of
24 it for the first time now.

10:38:35 25 JUSTICE DOHERTY: I agree with you.

26 MR HERBST: [Overlapping speakers]

27 JUSTICE DOHERTY: It's not very good form that - sorry?

28 MR HERBST: [Overlapping speakers]

29 JUSTICE DOHERTY: It is not very good form that you have

1 not been informed of your witness's absence.

2 Mr Herbst, I think I spoke over you.

3 MR HERBST: I was going to suggest, Your Honour, I don't
4 know how much time we've already consumed because I don't have -
10:39:05 5 I don't have a clock handy and I don't have my phone to look at
6 the time. But what time is it? And we - was Your Honour going
7 to go until 1.00? I've forgotten the schedule now in terms --
8 [Overlapping speakers].

9 JUSTICE DOHERTY: Well, the schedule would have been a
10:39:25 10 break at 11.00, in 15 minutes' time, for 45 minutes. That's to
11 allow the people in Kigali - the longer break is to allow people
12 in Kigali to have their meal.

13 I am going to adjourn now. I am going adjourn 45 minutes
14 to allow you to consider your position to allow - because there
10:39:45 15 are other witnesses, but it's up to you which. Also to allow
16 you, and I will ask Mr Court Attendant to assist, to get any
17 up-to-date information on the situation of 334.

18 So I'm going to adjourn now to 11.30 my time, which is
19 three quarters of an hour from now. I think that's 1.30 your
10:40:09 20 time, and then you can tell me if you intend to call someone else
21 or what the situation is. These are your witnesses, Mr Herbst,
22 and I am not in a position, and nor is Defence counsel, to
23 dictate to you on what to do.

24 So we will adjourn until 11.30.

10:40:37 25 Please adjourn Court until 11.30.

26 [Recess taken at 10.45 a.m.]

27 [Upon resuming at 11.34 a.m.]

28 [Accused present]

29 JUSTICE DOHERTY: I will first ask if I can be heard in

1 Kigali. Can you hear me in Kigali?

2 MR HERBST: Yes, Your Honour, we can.

3 JUSTICE DOHERTY: Thank you. I will next ask Mr Akinbobola
4 to tell us what the situation is in relation to TF1-334 as I see
11:34:39 5 him in the Court precincts. Please advise.

6 MR HERBST: Your Honour, if I could just ask the Court to
7 let me make the report, because I've spent the last 45 minutes
8 talking both to WVS, to the witness, and to the witness's doctor,
9 so I'm the one who has I think the most current information.

11:35:06 10 JUSTICE DOHERTY: Mr Herbst, that would be most helpful. I
11 would be grateful if you did so. Thank you, please proceed.

12 MR HERBST: Thank you, Your Honour.

13 Your Honour, I've learned today for the first time that 334
14 began to be ill yesterday. He received some medication from WVS
11:35:41 15 for pain, but I guess neither the witness nor WVS thought that
16 hospital or medical treatment would be appropriate because of the
17 symptomatology that was exhibited at that time.

18 However, during the night the witness's condition
19 deteriorated overnight and when WVS arrived to bring him to Court
11:36:51 20 this morning, he complained - and understandably so as I
21 understand it - that he couldn't come to Court and he needed
22 medical attention. So WVS took him to hospital, where he - just
23 in the last 20 minutes or so he has finally been seen by a
24 physician. I spoke to the physician who was in the middle of
11:37:25 25 examining him and determining what kind of treatment to pursue.

26 He described that the witness has a very high fever. Apparently
27 it is of sufficient concern that he's taken emergency treatment
28 to reduce the fever, including - and he's giving him
29 anti-malarial treatment, and he's not sure yet what his diagnosis

1 ultimately is going to be and what the treatment is going to be.

2 So that is the latest up-to-date information on 334.

3 Now I have considered - or I am in the process of

4 considering what to do. It's possible that had I - I don't

11:38:25 5 think - even if I had been notified yesterday of his situation, I

6 probably would not have anticipated that he would have become

7 that ill overnight, so right now - but I asked the doctor if he

8 had an opinion as to whether the witness could testify and he

9 said absolutely not. By that I mean, yes, he has an opinion, and

11:38:50 10 the opinion is that he absolutely cannot testify. Of course,

11 we're not sure, as we sit here today, what - when he will be able

12 to testify.

13 That will have to await the diagnosis and the treatment

14 regimen to see. So I don't think we have any alternative but to

11:39:27 15 figure out what the alternatives are going forward. I will say

16 to the Court and Defence counsel that I have not had a chance to

17 talk in substantive terms with Mr Kargbo about his testimony

18 since I've been here. As the Court knows, part of that is my

19 fault because of - I've had a more limited capacity to exercise

11:40:08 20 my role than I thought I would have. That's all I think I need

21 to say about that, but I do apologise for that.

22 So we all - we all face situations where we have to put

23 witnesses on out of turn. The problem in this case, of course,

24 is that 334 is the witness who is essentially, you know, the main

11:40:42 25 witness who I would have liked to put on first but it does not

26 look like I'm going to be putting on first. So I have considered

27 and am considering proceeding next with Mr Kargbo.

28 The problem I have - and you know, I have put witnesses on

29 call before. The problem I have is I feel I have some obligation

1 to Mr Kargbo to prepare him as a witness. Because - well, for
2 obvious reasons. I don't think it need be said. He is a
3 cooperating witness and obviously his - how he does is one factor
4 that the Court may take into account in sentencing him.

11:41:41 5 So I don't think it's fair to Mr Kargbo to proceed with him
6 today. But I do think we should proceed with Mr Kargbo tomorrow,
7 and then with Investigator Saffa if necessary, if as I suspect is
8 going to be the case, 334 is not in any condition to testify
9 tomorrow.

11:42:11 10 I had hoped to gauge by the direct and cross-examination of
11 334 how long the testimony of Mr Kargbo might take, but I suspect
12 we'll be doing just the opposite. We'll be learning from
13 Mr Kargbo's testimony more about how long the proceedings are
14 going to take. And I - of course, we had anticipated that we
11:42:38 15 would be through Mr 334, Mr Kargbo, and Mr Saffa before we left -
16 before you folks left Freetown and came over here. I think
17 Mr Kargbo's testimony - direct testimony will be somewhat shorter
18 than 334's. I don't know about the cross, but I am hopeful that
19 if we start bright and early tomorrow morning with Mr Kargbo,
11:43:08 20 because I would endeavour to perform my obligations with him
21 today and we start with him in the morning, that we would
22 hopefully finish him, tomorrow being Thursday.

23 Mr Saffa's a relatively short witness. And I hope there's
24 a Thursday - actually, before I heard that Defence counsel were
11:43:41 25 planning - it was not my understanding that Defence counsel were
26 going to be - were going to be travelling on Friday here. I
27 thought that we would be holding Court there Thursday and Friday.

28 JUSTICE DOHERTY: That was my understanding too, so it was
29 quite a surprise to me as well, Mr Herbst.

1 MR HERBST: I think - I certainly think that by Thursday
2 and Friday we ought to finish with Mr Kargbo and Mr Saffa. Then
3 the question becomes - no. If Mr - if 334 is able to testify on
4 Saturday - either Friday or Saturday, I would want to put him on
11:44:33 5 and perhaps delay the flight arrangements to Rwanda so that we
6 could complete those. If not, you know, we'll know certainly by
7 tomorrow more about the condition of 334.

8 JUSTICE DOHERTY: I can appreciate two things.

9 MR HERBST: I think we might [overlapping speakers]

11:45:01 10 JUSTICE DOHERTY: Continue.

11 MR HERBST: I'm sorry, Your Honour, go ahead.

12 JUSTICE DOHERTY: No, I'm just - obviously the scheduling
13 was done relying entirely on the briefs, and the briefs gave
14 indications of time, and it appeared that the Prosecution case
11:45:24 15 would be well and truly finished by Friday afternoon. At that
16 point none of us anticipated the many things that arose in
17 between, and none of us can control illness, both your own, which
18 I don't criticise at all, or 334's, which I equally don't
19 criticise.

11:45:49 20 The reason for going to Rwanda of course was to hear
21 Defence evidence, and Defence evidence comes in after the
22 Prosecution evidence ends and that's the logical sequence. Now
23 I'm beginning to - I've already invited Defence counsel to meet
24 in Chambers on the travel thing, and I'll do that at some point
11:46:11 25 today.

26 I accept the wisdom of your interposing Kargbo. I can see,
27 of course, the logic of your - the way you're intending to
28 present your evidence, and I'm sure Defence counsel would equally
29 have shared that logical sequence. But I'm happy - and I will

1 not object - to you interposing Kargbo.

2 The one thing I note that you say you can't do him until
3 tomorrow morning, and I want to really make as much use of the
4 time as we can. I therefore ask if the facilities are available
11:46:55 5 for you to speak to him - and his counsel is not here, and
6 normally his counsel would be present when you spoke to him.
7 Would it be possible to have it at least, say, an hour or an hour
8 and a half of his testimony this afternoon?

9 MR HERBST: Your Honour, I - after I finished, it took me
11:47:23 10 quite a while to get a report for 334. I had tried to
11 communicate via the Court administration to see if they could
12 locate Chief Taku so I could discuss how to proceed with him. I
13 have not been able to talk to Chief Taku, and of course
14 Chief Taku is Mr Kargbo's lawyer, so I'm reluctant to suggest how
11:47:52 15 to proceed without talking to him first. I certainly would be
16 willing to - as soon as I've had lunch, which I was not able to
17 do because I was --

18 JUSTICE DOHERTY: I can see you were extremely busy.

19 MR HERBST: -- trying to obtain medical information, but I
11:48:11 20 would be happy to begin telephone preparation with him as soon as
21 we can get everybody together, the Chief, the witness, and
22 myself. I just don't know, not having --

23 JUSTICE DOHERTY: I'm going to ask Defence counsel if they
24 know where --

11:48:55 25 MR HERBST: [Overlapping speakers] I will ask Defence
26 counsel if anyone knows where Chief Taku [Overlapping speakers].

27 JUSTICE DOHERTY: [Overlapping speakers]. All right.

28 Mr Herbst, you speak.

29 MR HERBST: I apologise, Your Honour. I was debating to

1 myself whether to say to the Court that I would try to put him on
2 this afternoon if possible and have people wait around and then
3 admit to the possibility that we might need more time, but I'm
4 also - what time would we start if we would have an hour today,
11:49:32 5 Your Honour?

6 JUSTICE DOHERTY: Well, first of all I'm going to ask does
7 anyone know --

8 MR HERBST: [Overlapping speakers]

9 JUSTICE DOHERTY: Mr Herbst, could you turn off your
11:49:53 10 microphone, please.

11 First of all, does anyone know where counsel for Kargbo,
12 Chief Taku, is? Because he's not here. And my understanding
13 from the information he gave is that he was travelling on the
14 21st. So he's not here. We'll have to find him. That's the
11:50:10 15 first thing.

16 The second thing is whilst we're, as you say, hanging
17 around, that's what we're paid to do. So I can certainly put my
18 time to use, and I'm sure counsel can put their time to use. An
19 hour and a half from now would be - even two hours from now would
11:50:38 20 be 2.00 our time; 4.00 your time. I could - what I will do is
21 this: I will ask the Court Attendant to try and locate Chief
22 Taku. I will ask the Court Attendant to arrange Chief Taku to
23 phone and speak to you, and I will ask that you notify us here in
24 Freetown, if you can, within the next two hours if you are able
11:51:13 25 to put Kargbo on. If in the next two hours you are able to put
26 Kargbo on, we will put him on and we will deal with it then.

27 So I'm not going to formally close the Court now. I'm not
28 even going to formally stand it over until 2 o'clock. I am going
29 to wait until we're notified, and then notification will also be

1 given to counsel.

2 Just a minute. Everybody is getting on their feet at once.
3 I'll start with Mr Nicol-Wilson.

4 MR NICOL-WILSON: Your Honour, I want to put the Court on
11:51:50 5 notice that I shall be applying for bail for Mr Bangura.

6 JUSTICE DOHERTY: I understand that. I haven't actually
7 closed the Court, so that will be dealt with.

8 Mr Metzger.

9 MR METZGER: Simply this, Your Honour: Bearing in mind, of
11:52:04 10 course, that we have to bear at the forefront of these
11 proceedings the Article 17, the fair trial rights for the
12 Defence, and understanding that when the Prosecution in the
13 course of constructing this building before the Court appears to
14 have found that the mortar it wishes to use for its foundation is
11:52:32 15 not in a position to be poured, wishes to use some of the
16 material to start the construction but is now, it seems to me,
17 applying for some time so to do,

18 Whilst one is always anxious to bend over backwards to
19 accommodate unforeseen circumstances, it is perhaps prudent for
11:52:59 20 us to just be reminded of the circumstances of Mr Kargbo giving
21 evidence. He has been cooperating, we've been told, with the
22 Prosecution since something like April 2011. He's given a
23 statement. He's spoken to the independent Prosecutor.

24 I was just wondering if, rather than the Prosecutor sort of
11:53:22 25 being in a position where he's having to think in a couple of
26 hours whether, all things being equal in the situation we find
27 ourselves in, he would be in a position to start calling evidence
28 from Mr Kargbo today, whether it would not be perhaps better and
29 fairer to all parties for the Prosecution to recognise that

1 Mr Kargbo is almost entirely fully prepared, and the amount of
2 time that he requires with him should not be a great deal of
3 time.

4 JUSTICE DOHERTY: I've given him a lunch break.

11:54:06 5 MR METZGER: I wouldn't want to interfere with any man's
6 food.

7 JUSTICE DOHERTY: And we've got to find Chief Taku. So
8 really, the amount of time he's given is not as much as it
9 appears. So I'm going to stick with the 2 o'clock.

11:54:21 10 MR METZGER: Did your Honour say 2?

11 JUSTICE DOHERTY: Yes, 2 o'clock our time; in other words,
12 there's a period of two hours. I am conscious of the rights of
13 all of the accused, including Kargbo, who has a right of
14 representation, and I want to make sure that that representation
11:54:40 15 is available to him.

16 MR METZGER: Your Honour will be pleased to see what has
17 just transpired.

18 [Chief Taku enters courtroom]

19 JUSTICE DOHERTY: [Microphone not activated] Chief Taku,
11:55:08 20 you're late, and you should know by now what I think of people
21 being late.

22 CHIEF TAKU: I'm sorry. So sorry, my Lord. I think I had
23 a problem. I kept the time - I was looking at my watch. I
24 didn't - I forgot that we are three hours behind, so I'm so sorry
11:55:37 25 and I apologise.

26 JUSTICE DOHERTY: I will, as briefly and succinctly as
27 possible, inform you of what's happened.

28 334 is unable to appear today for medical reasons, and
29 there is a question as to how long it will take him to be

1 treated. Counsel for the Prosecution is therefore considering
2 interposing - or calling the next witness, who is Mr Kargbo.

3 However, he has not spoken to Mr Kargbo - in the words that
4 are used in this Court, and ones I never really understood -
11:56:18 5 prepping is the terminology that is used, but no counsel has used
6 that word, so I will not use it again. But in any event, he
7 needs to speak to - I have considered that you should be there.
8 I'm therefore adjourning for two hours to allow you, your client,
9 and Mr Herbst to ready themselves to call Mr Kargbo.

11:56:51 10 In fact, counsel for the Prosecution asked for tomorrow.
11 I'm trying to get the thing moving. I am going to be informed -
12 I'm not reconvening the Court at 2. I'm going to be informed if
13 it is ready to go. If it is, we will reconvene. In any event -
14 in any event - we will have to reconvene, because at the end of
11:57:15 15 each day the bail remand situation in respect of each accused has
16 to be considered. So at some point this afternoon we will sit
17 again.

18 I hope that's a correct summation.

19 CHIEF TAKU: May it please the Court --

11:57:36 20 MR HERBST: Your Honour --

21 JUSTICE DOHERTY: Yes, Mr Herbst.

22 MR HERBST: -- I just wanted to ask if I could - the only
23 thing I wanted to add was because the facilities - the
24 communication facilities between Defence counsel and myself -
11:57:49 25 because I'm over here - are not yet well established, if Chief
26 Taku, after we finish whatever he wants to say and your Honour
27 adjourns for the two hours, if he could please give me a call
28 through the Court administration service.

29 JUSTICE DOHERTY: I will have that arranged by Mr Court

1 Attendant.

2 CHIEF TAKU: May it please the Court, I have no objection
3 to Mr Kargbo or Mr Herbst putting the witness on the stand at any
4 time that the Court pleases.

11:58:26 5 JUSTICE DOHERTY: It's to ensure you're present when your
6 client is spoken to. That I want to ensure is respected.

7 CHIEF TAKU: Yes, my Lord. I just want to say that my
8 standing permission starts from tomorrow - tomorrow is Thursday,
9 I think.

11:58:43 10 JUSTICE DOHERTY: Yes.

11 CHIEF TAKU: Oh, my goodness. I've lost track of the days
12 and the date. Tomorrow, and I will not be here tomorrow. I will
13 be here this afternoon and see how far I go, my Lord.

14 JUSTICE DOHERTY: That's why I consider it imperative that
11:59:02 15 we work on it this afternoon, because I haven't forgotten that
16 point.

17 CHIEF TAKU: Unfortunately, I have no co-counsel. If I had
18 known - I don't know what to do in my absence, but I have no
19 co-counsel and I would need really to advise on that. I don't
11:59:21 20 know what to do. I'm really - have no answer to that myself. I
21 don't know what to do.

22 JUSTICE DOHERTY: That's one thing I can't give a ruling
23 on, unfortunately. We will adjourn provisionally - provisionally
24 only - until around 2. When the Court is notified, immediately
11:59:44 25 Defence counsel will also be notified when we're ready to
26 reconvene. If we're not able to reconvene, I will then set a
27 definite time to hear both of you concerning Mr Kargbo and
28 Mr Bangura.

29 CHIEF TAKU: Yes, my Lord. Also I can be here at 9 o'clock

1 or about 10 o'clock. Then I need time to go and get the boat to
2 the airport. Thank you, my Lord.

3 JUSTICE DOHERTY: Thank you. Please adjourn the Court to a
4 time to be fixed.

12:00:20 5 MR KAMAL: Before we adjourn, can I make a point. I can
6 come and see you in chambers in connection with the other matter?

7 JUSTICE DOHERTY: Yes, I certainly would like you to do
8 that. But first of all, I would like Mr Herbst to complete
9 whatever he has to do with Mr Taku, because he would also, very
10 properly, have to hear what's being said.

11 MR KAMAL: What will be the timing? Will it be after the
12 sessions today?

13 JUSTICE DOHERTY: After the session today.

14 MR KAMAL: Thank you.

12:00:51 15 JUSTICE DOHERTY: Adjourn to a time to be fixed.

16 [Whereupon the Court adjourned at 12.01 p.m. to
17 a time to be fixed]

18 [Upon resuming at 2.33 p.m.]

19 JUSTICE DOHERTY: I'll start by asking if I can be heard in
14:34:20 20 Kigali.

21 THE COURT OFFICER: [Kigali] Yes, Your Honour. We can
22 hear you.

23 JUSTICE DOHERTY: Mr Herbst, can you update me on the
24 situation, please.

14:34:34 25 MR HERBST: Your Honour, you mean with respect to
26 Mr Kargbo?

27 JUSTICE DOHERTY: Exactly.

28 MR HERBST: We were able to spend about 30 or 40 minutes
29 together, but we were not able to arrange a Krio interpreter and

1 that can be done immediately after Court. So we are requesting
2 that we go ahead at 9.00 in the morning with Mr Kargbo as opposed
3 to now.

14:35:47 4 JUSTICE DOHERTY: There appears to be little we can do
5 about that, so I'm going to grant that adjournment. Obviously
6 I'm very concerned at the time lost, but these things are not
7 within my control.

8 I have used some of my time to look at the document that
9 was being sought to be entered by Independent Counsel that I was
14:36:23 10 asked to take judicial notice of, and a large document was placed
11 before counsel for the Defence and before the Court. I'm now
12 going to make a ruling on that document.

13 This is an application by counsel for the Prosecution, the
14 Independent Counsel, to take judicial notice of adjudicated facts
14:36:54 15 in another proceeding, the other proceeding being the AFRC trial.

16 A number of the facts have been opposed by counsel for
17 Kanu, Mr Metzger, and I understand by other counsel who have
18 adopted his submissions. I have undertaken to look at the
19 document because the discretion of admission is a discretion
14:37:32 20 vested in the Court.

21 Having looked at the document, I am about to admit certain
22 adjudicated facts. It is my understanding that the document is
23 sought to be admitted for reasons of credibility of the witness
24 TF1-334. If I am incorrect in that interpretation of the
14:38:02 25 submission, I would add that I have also looked at relevancy as
26 an important issue and consider that the following are the only
27 relevant paragraphs.

28 I am therefore admitting the following paragraphs as
29 enumerated in the document before me: Paragraph 272; paragraph

1 281; paragraph 359; the first sentence of paragraph 561; the
2 first two sentences of paragraph 562-563; and paragraph 1719.

3 I do so aware, as I have stated on two occasions in these
4 proceedings, that every trial turns on its own facts and issues
14:39:48 5 of credibility will be considered on the facts before me.

6 The documents will be admitted, and I don't think there is
7 any other document. But as these are adjudicated facts, I do not
8 have to give them a number. They have been admitted by the
9 Court.

14:40:09 10 I have also had some informal - and very informal -
11 indication that the subpoena has been served on
12 Mr Andrew Daniels, and efforts are being made to bring him to the
13 Court. If he comes, he will be interposed.

14 Unless there's some other matters that therefore brings me
14:40:38 15 to Mr Nicol-Wilson's application in relation to Bangura.

16 MR NICOL-WILSON: Your Honour, I want to renew my
17 application for bail on behalf of Hassan Papa Bangura.

18 Your Honour, I will submit that the granting of bail in
19 contempt proceedings before the Special Court is not unusual.

14:41:26 20 JUSTICE DOHERTY: How about once the Court opens?
21 Normally, generally, in any trial once it opens, what's the
22 position of a person on bail?

23 MR NICOL-WILSON: Your Honour, we've had about three past
24 contempt hearings before the Special Court. One relates to the
14:41:50 25 "wives" of the AFRC and they were all admitted to be bail, even
26 after the trial had started.

27 Your Honour, there is no compensation for those
28 incarcerated if an accused person is found not culpable at the
29 end of the day, and that is why the preferred option is normally

1 for bail to be granted. But I want to confine my submission to
2 the ruling you gave yesterday on the issue of flight risk in
3 order not to re-open the arguments I submitted yesterday.

4 Your Honour, I will ask a question and then I will attempt to
14:42:33 5 answer it myself, and the question is how risky is the flight
6 risk.

7 Your Honour, in a determination of who is a flight risk,
8 the Court must consider each case individually. There is no
9 exact method for calculating an accused's risk of flight.

14:43:05 10 Instead, the practice normally is for the Courts to weigh the
11 accused's reliability against factors that points to the
12 likelihood for the accused to flee.

13 Your Honour, these factors will include the nature and
14 circumstances of the offence; the length of the possible
14:43:38 15 sentence; the strength of the evidence; family and community
16 ties; record of appearances at trial; defendant's character; and
17 the opportunity itself to flee.

18 Your Honour, it is always the case that a person with
19 stronger ties to the community, such as a home, a family, a
14:44:21 20 business, is viewed as less likely to flee than someone with
21 weaker ties. I will submit that Mr Bangura has very, very strong
22 ties to Sierra Leone community.

23 JUSTICE DOHERTY: That's an awfully big community. I
24 believe it's even in England and America. Which one in
14:44:51 25 particular were you thinking of?

26 MR NICOL-WILSON: Your Honour, he has very strong ties to
27 the community in Freetown, which is the seat of the Court, and
28 where he is presently residing.

29 JUSTICE DOHERTY: Where is his home area - his area of

1 origin, I mean?

2 MR NICOL-WILSON: He's from Freetown, Your Honour. His
3 home is in Freetown, and his house is approximately a mile from
4 the seat of the Court. His house is just at the back of the
14:45:27 5 Court. Your Honour, as I speak to you his wife is sitting in the
6 public gallery. He also has children, Your Honour. And most
7 importantly, Your Honour, he's the sole breadwinner of his family
8 and he runs a business of which he is the sole proprietor.
9 Your Honour, that business cannot function at the moment because
14:46:02 10 of his present incarceration. Therefore, his family, including
11 his wife in the public gallery and his children, will suffer
12 irreparable harm if Mr Bangura continues to be incarcerated.

13 Your Honour, I've always insisted in previous applications,
14 and even today, that the past conduct of Mr Bangura shows that he
14:46:55 15 can be relied upon to attend subsequent proceedings. He was
16 present, Your Honour, during the initial hearing. Even though he
17 was served with an indictment, an Order in Lieu of Indictment
18 before that initial hearing, he did not run away, Your Honour.
19 Even on Saturday he came to Court and was here at 8.00 a.m. in
14:47:25 20 the morning, and he did not run away. Notwithstanding the fact
21 that he knows fully well the implications of these proceedings
22 after having explained the whole issue to him, but he did not run
23 away, Your Honour.

24 Your Honour, he does not have the means to run away because
14:47:50 25 he has surrendered his passport to this Court, and Your Honour he
26 does not even have the desire to run away. As I stated
27 yesterday, Your Honour, his past he has moved far away from and
28 he is now a completely different man. He's an ardent Christian,
29 Your Honour, and he attends church service at least three times a

1 week. At the moment he cannot attend to his religious needs.

2 Your Honour, Mr Bangura is an example of what a
3 Sierra Leonean can be in the absence of war. He is very
4 peaceful. And in his own very little way, he's trying to
14:48:51 5 contribute to the improvement of our society.

6 Your Honour, I will further submit that if you determine
7 that the accused is still a flight risk, then the release must be
8 with conditions that the mere determination; that an accused is a
9 flight risk, does not in itself warrant the incarceration of that
14:49:24 10 accused, but the release can be subject to conditions for the
11 accused considered a flight risk to limit the risk involved in
12 his appearance, and such conditions, Your Honour, will include
13 surrendering of his passport. It will include the obligations
14 for sureties, to stand for his appearance. In our own
14:50:12 15 jurisdiction, Your Honour, outside the Special Court's
16 jurisdiction, it will include the submitting of title deeds, and
17 any other factor considered relevant in limiting the likelihood
18 of the accused to move out of the jurisdiction of the Court.

19 Your Honour, the presumption of innocence must never be
14:50:44 20 substituted for the presumption of guilt. As I stated yesterday,
21 Your Honour, there is a likelihood that these proceedings will go
22 far beyond the expected duration. Therefore, it will be in the
23 interest of justice, Your Honour, and as a minister of justice in
24 this Court, for bail to be granted to the accused pending the
14:51:18 25 ending and determination of this matter. That will be all in
26 this application.

27 JUSTICE DOHERTY: Thank you, Mr Nicol-Wilson. Yes,
28 Chief Taku.

29 CHIEF TAKU: May it please the Court, Your Honour very

1 graciously granted me leave in time of need and in time of pain,
2 and I'm extremely grateful to the Court for that act of sympathy.
3 I'll be leaving tomorrow, leaving Mr Kargbo entirely within the
4 wisdom of the Court, because even when we were here, it is always
14:52:09 5 the wisdom of the Court that prevails.

6 A little while after this I'll be sitting in while the
7 Prosecutor prepares Mr Kargbo to testify tomorrow to have an
8 opportunity to tell what he knows of the truth, the whole truth,
9 and nothing but the truth. I must say at this point in time -
14:52:33 10 there will be time for that, but let me with your kind permission
11 say this: For the time I've been here and the time I've known
12 Mr Kargbo, all the time I've been in Sierra Leone, I've been
13 involved in proceedings in the RUF trial and I follow other
14 trials. This process has been the most pedagogic and the most
14:52:57 15 redemptive of all the proceedings that have taken place because
16 the ordinary men and women of Sierra Leone, many of them who are
17 here, now know what it means by respect for the rule of law and
18 respect for due process, and they also know through this process
19 that at least the Court orders should be respected, and I
14:53:36 20 sincerely thank the Court for running this process so far with
21 regard to Mr Kargbo in the most transparent and the most
22 pedagogic manner, and I can say that never before from all my
23 years of practice I've never seen the number of ordinary men and
24 women, old men, young men, boys and girls, organising prayer
14:53:59 25 sessions hoping for the miracle moment in the land of Mr Kargbo
26 and that of many others involved in this process. I think I've
27 learned from that. I think in defending him or sitting in for
28 him I think I've become a better Christian.

29 Your Honour, I crave your indulgence to say that - to say

1 this: That Mr Kargbo - his bail should be extended and that at
2 the end of the day, Your Honour, whatever decision is taken,
3 Mr Kargbo is still a lovely citizen of Sierra Leone, one of those
4 people that this community - this country will need again, that
14:54:50 5 ordinary men and women, wives, mothers, and others will need.

6 We pray the Court that when that ultimate moment will come,
7 we'll make our representations, but for now we want - we pray
8 that bail be extended, first to permit me to sit in while he's
9 being prepared to testify, and also that in my absence the Court
14:55:21 10 should exercise the wisdom that the Court has exercised all along
11 with regard to him.

12 I leave it entirely in your hands, and all I can say that I
13 thank you once more for granting me permission to go and give my
14 aunt a decent goodbye because with her death, part of me is gone
14:55:48 15 again for eternity. Thanks once more.

16 JUSTICE DOHERTY: Thank you, Chief Taku.

17 Mr Herbst, your reply on both applications, please.

18 MR HERBST: [Microphone not activated] to my position from
19 yesterday, I don't think anything has changed. I still feel the
14:56:20 20 same way on both applications for the reasons previously stated.

21 JUSTICE DOHERTY: This is a decision on two applications.
22 Mr Nicol-Wilson has made a very eloquent and very thorough
23 submission on behalf of his client. Having listened to it, I
24 have no doubt that Mr Bangura's wife and family are feeling the
15:02:27 25 effects of his incarceration, and by all accounts she is a
26 totally innocent person in this affair and I have sympathy for
27 her position.

28 When considering and reconsidering bail, I, in common with
29 other courts, look for changes in the status quo since the bail

1 was revoked. But on all of the submissions before me, I did not
2 hear any changes in circumstances or changes in the situation as
3 was put before me on Saturday, 16 June. For that reason, I am
4 not persuaded to change the decision in relation to Mr Bangura,
15:03:31 5 and his remand will be extended.

6 The same reasoning applies to Mr Kargbo. Again I have had
7 no change in the factual situation put before me. If anything,
8 he is about to become a witness, and if I understand the
9 procedure correctly, he will be within the care of WVS, and
15:04:04 10 therefore of the Court. For that reason, I also leave the status
11 quo as it is.

12 Having disposed of that, I'm now going to move on, because
13 I notice that Mr Akinbobola is here in the Court and I ask him to
14 give us an update on the situation with relation to witness
15:04:34 15 TF1-334, both for counsel in Kigali and for the Court's
16 information.

17 MR AKINBOBOLA: Yes, Your Honour. 334 is still undergoing
18 treatment, My Lord. I cannot ascertain whether he will be in a
19 position to testify tomorrow. I'm still waiting for the
15:05:11 20 certificate of examination from the medical doctor. That's all,
21 My Lord.

22 JUSTICE DOHERTY: Thank you.

23 Mr Herbst, this is your witness and you've heard what
24 Mr Akinbobola said, so it would appear that TF1-334 is absent now
15:05:39 25 and may continue to be absent. It's not at all clear to us. I
26 will ask for an update maybe tomorrow at sometime in the course
27 of the day.

28 MR HERBST: Your Honour, I have been in touch with 334
29 within the last half hour, who reported to me that he was still

1 in the hospital and that he was feeling very poorly. I am going
2 to endeavour to maintain contact with him so that I'm in a
3 position to advise the Court and counsel. Based on what he told
4 me, I'm going to assume that he's not going to be available
15:06:26 5 tomorrow and we'll go ahead with Mr Kargbo. If that changes and
6 he is available, we'll put him on. But right now my expectation
7 is that he will not, and that Mr Kargbo will be the first
8 witness.

9 JUSTICE DOHERTY: Thank you, Mr Herbst.

15:06:47 10 The only other matter that I think is outstanding is the
11 leave to appeal. I have already indicated to both counsel
12 involved that I think in fairness I should give them a day. I
13 don't see any good reason why I should cut that down unless
14 somebody says, Yes, I'm ready to argue it. I suspect Mr Herbst
15:07:13 15 is not, given the circumstances in which he finds himself.

16 Mr Metzger, can I take it you also need the same time I've
17 allowed you?

18 MR METZGER: Far be it from me to change the course of
19 events, Your Honour. I'm grateful for the time that is on offer.

15:07:28 20 JUSTICE DOHERTY: Then we'll stand it down and I will try
21 and set a suitable time with all the other things that are
22 happening.

23 Is there anything else that I have overlooked or not dealt
24 with?

15:07:43 25 MR METZGER: May I just make --

26 MR HERBST: Your Honour, can I --

27 JUSTICE DOHERTY: [Microphone not activated].

28 Yes, Mr Herbst.

29 MR HERBST: I believe Your Honour mentioned earlier there

1 was an unrelated case judgment that Your Honour was prepared to
2 deliver tomorrow. I don't know if I heard that correctly, but
3 was that the matter on which Your Honour had asked me to stand in
4 for other Independent Counsel?

15:08:14 5 JUSTICE DOHERTY: Yes, I'm glad you reminded me of that
6 particular request, because I'm informed by my Associate that the
7 e-mail to counsel informing him of the time has bounced back, so
8 he may not be aware of it. I set it for 4.00 tomorrow and it's
9 still my intention to do it then.

15:08:45 10 MR HERBST: Thank you, Your Honour. That's 4.00 --

11 JUSTICE DOHERTY: My time. Sorry, if that doesn't suit,
12 you'd better tell me now.

13 MR HERBST: Your Honour, I'll do everything to make myself
14 available. I guess that's 6.00 here, but that's fine. I
15 appreciate Your Honour permitting me an extra day to find out at
16 least under what Rule the interlocutory appeal is being sought,
17 because I have not had a chance to address that. But I will do
18 my best to inquire into that and get educated by tomorrow.

15:09:04 19 JUSTICE DOHERTY: I think it's Rule 72. Just a moment,
15:09:29 20 please. I correct myself. It's Rule 73(B), and Mr Metzger is
21 making an oral submission.

22 If there's nothing else, I will adjourn until 9 o'clock
23 tomorrow.

24 Mr Metzger.

15:10:22 25 MR METZGER: Yes, I was in the process of making one or two
26 small submissions to the Court. I note - and your Honour has the
27 thanks of the bar for doing the hard work of going through the
28 judicial notice application material. But I just wanted to point
29 out, in case the Court thought it might be appropriate to excise

1 a few words, particularly in paragraphs 281 and 359 --

2 JUSTICE DOHERTY: Just pause one moment, Mr Metzger, until
3 I find that document.

4 MR METZGER: Your Honour, yes.

15:11:22 5 JUSTICE DOHERTY: I have it before me. Which paragraphs?

6 MR METZGER: Thank you, your Honour. Paragraphs 281 and
7 359, and the words which if I were to submit to your Honour I
8 would consider to be - and I use the word offensive advisedly in
9 the context of current submission and the fact that the witness
10 was not shaken on cross-examination. That appears in the
11 penultimate line of the reference to paragraph 281 and in the
12 first line running into the second of 359.

13 It may be that your Honour comes to the conclusion that one
14 cannot read the paragraphs without having those words in, but it
15:12:19 15 would be the submission on behalf of Mr Kanu that it cannot be a
16 relevant issue in this trial whether or not that witness was
17 shaken, stirred, or otherwise administered on cross-examination
18 in a case before another Trial Chamber.

19 JUSTICE DOHERTY: Did you say the second paragraph was 359?
15:12:47 20 I found it.

21 MR METZGER: Yes, from the first to the second line after
22 the words "cross-examination" --

23 JUSTICE DOHERTY: Yes, I found it. So your application is
24 to excise these words?

15:13:06 25 MR METZGER: Indeed, your Honour. It is a submission I
26 make simply because, knowing the length of the material and how
27 much work your Honour must have done to go through it, it may be
28 something that may have been on your Honour's mind, but you
29 didn't, as it were, then excise it. It is for those reasons that

1 I put those matters before your Honour.

2 The second matter that I wanted to raise related to the
3 issue of scheduling and that which I had referred your Honour to
4 earlier, because it has again been confirmed that steps had been
15:13:49 5 taken in anticipation of the process of this case to obtain
6 visas, where necessary, and travel arrangements for Defence
7 counsel, where necessary, to travel to Kigali on Friday. It is
8 imperative, it seems to me, that that matter is resolved as soon
9 as possible, because as I understand paying for travel these
15:14:19 10 days, it has to be done quickly and the longer you take, the more
11 likely it is that you will encounter difficulties in either
12 changing or recouping what money there is. I know it's not mine,
13 but it seems that perhaps it would help all parties if we can
14 resolve that aspect of the matter.

15:14:42 15 JUSTICE DOHERTY: When we rise, I'll ask the relevant -
16 when I say relevant, those counsel that are travelling to see me
17 in chambers, please.

18 MR METZGER: I'm very much obliged. I have no bail
19 application.

15:15:01 20 JUSTICE DOHERTY: I'm beginning to feel I need one myself.
21 Mr Herbst, there's a question about the facts. The Court
22 has had an application to remove certain words in those two
23 paragraphs. Have you any reply?

24 MR HERBST: Well, my brief reply is to the extent that
15:15:27 25 these paragraphs are relevant to credibility, it seems to me
26 those words are also relevant. I don't have much else to say
27 about that.

28 I did, though, want to ask whether I had heard the Court
29 correctly, because I had not had a chance to actually look at the

1 paragraphs in question. But my recollection is that the Court
2 said that it understood that the document - the paragraphs were
3 being submitted for the purpose of credibility.

4 There was another purpose, perhaps a more important
15:16:12 5 purpose, which was to demonstrate the importance of witness 344
6 in the AFRC trial. I don't know that that came through, and I
7 apologise for not quite understanding whether or not in
8 your Honour's ruling your Honour was cognisant of that second
9 purpose.

15:16:45 10 JUSTICE DOHERTY: It is true that in my ruling I stressed
11 the credibility issue. I agree that I did stress that. But I
12 also said there was questions of relevance, and the relevance is
13 the statements in the paragraphs. The paragraphs that I have not
14 admitted all deal with findings of fact. The paragraphs I have
15:17:10 15 not admitted all dealing with findings of fact dependant upon
16 several witnesses, some of them both Defence and Prosecution,
17 some of them are Prosecution, and for that reason I was of the
18 view that it doesn't single out 334. He doesn't - he's one of
19 several. I have taken note of several facts where he is
15:17:47 20 mentioned.

21 So I did not emphasise it because I emphasised twice
22 already that this case will turn on its own facts. I did not
23 recite his importance, and I don't think the paragraphs that I've
24 left out make him stand out. He is one of several.

15:18:21 25 On the application by Mr Metzger to cut part of the record
26 out, the rule is that notice of adjudicated facts are documentary
27 evidence, and adjudicated facts are documentary evidence is not
28 something that we play around with. It's in or it's out, and
29 therefore it's in in its entirety as I have ruled, and I'm not

1 prepared to change the paragraphs I've admitted, which go to the
2 credibility issue, and I'm not going to repeat the caveat that
3 I've repeated ad nauseam in this Court. So for those reasons I'm
4 not going though change the admissions.

15:19:23 5 Please adjourn Court.

6 MR HERBST: I just wanted to ask --

7 JUSTICE DOHERTY: Please ask.

8 THE COURT OFFICER: [Kigali] I think Mr Herbst is saying
9 something.

15:19:35 10 JUSTICE DOHERTY: I know. I'm asking --

11 MR HERBST: Your Honour, I just had a --

12 JUSTICE DOHERTY: Yes, Mr Herbst, keep going.

13 MR HERBST: I just wanted to ask at 6 o'clock tomorrow with
14 respect to the other case are we going to do, is that here by
15:19:55 15 video or - on the other hand, should I be here at 6 o'clock to
16 participate by video in the same way we're doing this, or - that
17 was my question.

18 JUSTICE DOHERTY: That would be my preference. Mr Herbst,
19 that would be my preference. I am aware that you had some health
15:20:21 20 problems, and if in the course of the day you tell me those are
21 still in existence, I might amend the time. But if it is
22 possible for you to be here, I would appreciate it, particularly
23 as we've had trouble getting Mr Gardner.

24 MR HERBST: Your Honour, I will be here. Not a problem.

15:20:41 25 JUSTICE DOHERTY: I'll try and talk fast. We'll adjourn
26 until 9 o'clock tomorrow.

27 [Whereupon the Court adjourned at 3.21 p.m.
28 until 9.00 a.m. the following day]

29