



Case No. SCSL 2011-02-T
THE INDEPENDENT COUNSEL

-V-

HASSAN PAPA BANGURA, SAMUEL KARGBO, SANTIGIE BORBOR KANU AND
BRIMA BAZZY KAMARA

Before the Judge:	Justice Teresa Doherty
For Chambers:	Elizabeth Budnitz
For the Registry:	Elaine-Bola Clarkson Thomas Alpha
For WVS:	Tamba D. Sammie
For the Prosecution:	Robert L. Herbst
For the accused Hassan Papa Bangura:	Melron Nicol-Wilson
For the accused Samuel Kargbo:	Charles Taku
For the accused Santigie Borbor Kanu:	Kevin Metzger
For the accused Brima Bazy Kamara:	Abdul Serry-Kamal Wara Serry-Kamal
For the Principal Defender:	Claire Carlton-Hanciles

1 [Saturday, 23 June 2012]

2 [Open session]

3 [Accused present]

4 [Witness entered court]

08:51:00 5 [Upon resuming at 9.00 a.m.]

6 JUSTICE DOHERTY: I'll just check if Kigali is with us.

7 Mr Herbst, can you hear me?

8 MR HERBST: Yes, I can, your Honour. Can you hear me?

9 JUSTICE DOHERTY: Loud and clear. I'll take appearances,
09:00:23 10 please. Mr Herbst, we'll start with your side of the bar.

11 MR HERBST: Good morning, Your Honour. Robert Herbst for
12 the Prosecution.

13 JUSTICE DOHERTY: Yes.

14 MR NICOL-WILSON: Good morning, Your Honour, Melron
09:00:42 15 Nicol-Wilson for Hassan Papa Bangura.

16 JUSTICE DOHERTY: Thank you.

17 MR METZGER: Morning, Your Honour. Kevin Metzger for
18 Santi gi e Bobo Kanu.

19 JUSTICE DOHERTY: Thank you.

09:00:53 20 MR KAMAL: Morning Your Honour AF Serry Kamal for Bri ma
21 Bazzy.

22 JUSTICE DOHERTY: Thank you. My associate has informed me
23 Mr Metzger wishes to raise some preliminary issue.

24 MR METZGER: That's correct, Your Honour. As a result of a
09:01:21 25 telephone conversation with my lay client yesterday, I had cause
26 to send an e-mail directly to Mr Herbst, the Prosecutor in this
27 case, copying in the Defence office and other Defence counsel.

28 The subject matter of that e-mail was the purported
29 communication by the Prosecutor with a witness who has been

1 identified in the Defence pre-trial brief.

2 Your Honour will recall that some time during the last
3 week, there was a discussion about contacting witnesses that were
4 on the Prosecution list. As a result of that, an e-mail was sent
09:02:13 5 by Mr Herbst overnight which I have perused in the very briefest
6 form. We haven't managed to have it printed out. But the
7 essence of that is, as I understand it, Mr Herbst accepts that he
8 has not only spoken to Mr Hillary Sengabo, the witness named in
9 the Defence pre-trial brief, but has asked him to examine records
09:02:46 10 that are in his possession and asked for those records to be
11 available, now wishes to call him as a Prosecution witness.

12 Mr Herbst challenges the contention from Defence that there
13 is no bar on the Prosecution speaking to any potential witness,
14 despite, I think, the discussions we have had on this matter in
09:03:17 15 this Court. The Prosecutor, with the greatest of respect to him,
16 did not have the courtesy to inform the Defence that this was his
17 intended plan, either before leaving for Kigali or once he was
18 there.

19 JUSTICE DOHERTY: Just to clarify, this contact that you
09:03:42 20 say took place between the Prosecutor and this witness Sam Kargbo
21 was prior to the opening of the Court or immediately just after
22 the opening?

23 MR METZGER: It was since Mr Herbst has been in Kigali.
24 Now, I'm terribly sorry, but I shall claim, as my learned friend
09:04:11 25 has, that I don't have as much experience in this particular
26 tribunal as others, and I can't put before Your Honour any Rules,
27 directives or precedent as far as this is concerned. But it does
28 seem to me that this kind of behaviour discourages the very open
29 disclosure that Mr Herbst has been talking about. We have

1 complained on behalf of Santi gie Bobo Kanu, that the
2 Prosecuti on's goal posts have been shifted as the Defence meets
3 the case. The clear evidence one anticipates that 334 will give,
4 is that the offensive telephone call occurred on 29 November
09:05:17 5 2010. It has been the Prosecution's case, to cover the position
6 as far as 30 November is concerned, to supply an e-mail by
7 Ms Al agenda in order to be able to include 30 November. If the
8 Prosecuti on had material that suggested that these calls were
9 made on 30 November, it certainly did not seek to adduce that as
09:05:43 10 part of its case, waiting patiently until the Defence put its
11 case forward.

12 Having put our case forward, and having, as it were,
13 nominated telephone calls on the MTN list, the Prosecuti on then
14 goes to a witness identified by the Defence without telling the
09:06:09 15 Defence, without notifying the Court, and has the temerity to say
16 that he is not aware of any Rules or anything which prevents him
17 from doing so, and obviously not aware of what we would call
18 common professional courtesy.

19 In my respectful submission, this is something that ought
09:06:38 20 not to have been done. I need to consider the ramifications of
21 it, but in all the circumstances, it has placed the Defence for
22 Kanu in a very difficult situation. It has affected Mr Kanu's
23 fair trial rights because without wanting to give evidence, my
24 learned friend must be aware that I was in Rwanda from the 12th
09:07:08 25 of May, I believe, this year; that I asked for access to these
26 documents; that I was also looking at the possibility of dealing
27 with a potential - if partial - alibi because of Mr Kanu's
28 absence from Mpanga Prison at a certain time; and that I had
29 incredible difficulties in obtaining that information. In fact,

1 I'm grateful to the office of Principal Defender and the
2 Registrar for, as it were, underlining the importance of material
3 being available to the Defence.

09:07:58 4 And now, the Prosecutor goes and is apparently shown
5 documentation relating to 30 November. No, I won't give evidence
6 about it. I was in Rwanda. All I can say is I'm very concerned
7 about this. I want to put it on the record, and in all the
8 circumstances, the Prosecution, in my respectful submission,
9 should be restrained from speaking to a declared Defence witness
09:08:31 10 and certainly from seeking to call that witness at this point in
11 time.

12 JUSTICE DOHERTY: Mr Metzger, could you remind me of the
13 dates alleged in the indictment? I haven't the indictment in
14 front of me. I will get a copy as you speak.

09:08:47 15 MR METZGER: Your Honour, yes, I can do that. Off the top
16 of my head, I thought it was from 26 November until 16 December.
17 It is within the broad-brush approach that the Prosecution
18 initially adopted in this case, the timeframe, because I believe
19 we are now talking about 30 November. The complaint that is
09:09:16 20 being made here really is more about the Prosecution carrying out
21 investigations in Kigali, which he is able to do because he is in
22 Kigali, unfortunately due to health reasons, at a time when we
23 are continuing the case. It is unfair to the Defence from any
24 perspective whatsoever.

09:09:42 25 JUSTICE DOHERTY: Yes, I do appreciate the point you are
26 making. You have not asked immediately for a remedy. I note
27 you're putting it on record. So technically I do not require to
28 ask for a response. But however, in the circumstances I'm going
29 to ask for a response.

1 MR METZGER: The remedy I've asked for, as it were, on an
2 interlocutory basis until I have considered the matter further,
3 is restraining the Prosecution from continuing to speak to a
4 Defence witness without a representative of the Defence present.

09:10:19 5 JUSTICE DOHERTY: Thank you. That's very clear now.

6 MR METZGER: Thank you, Your Honour.

7 JUSTICE DOHERTY: Mr Herbst, your response, please.

8 MR HERBST: I couldn't quite hear Your Honour, I'm sorry.

9 JUSTICE DOHERTY: I'm seeking your response.

09:10:50 10 MR HERBST: Yes, Your Honour, and I would like the Court to
11 know that I had sought to raise the same preliminary issue with
12 the Court. I had sent an e-mail and I had hoped that it had been
13 delivered through the Court Officer to your chambers, as a result
14 of the same e-mail communications that Mr Metzger referred to.

09:11:18 15 JUSTICE DOHERTY: I can put on record for the benefit of
16 everyone that I didn't receive any communication. And if I had,
17 that would have been put on public record, because I am
18 particularly wary of having communications with one-party unknown
19 to any other party. So I'm afraid I don't know the e-mail you're
09:11:44 20 referring to.

21 MR HERBST: Okay. In any event, it is a similar issue, and
22 I want to speak in detail about it.

23 First of all, Your Honour knows from the discussion we had
24 with respect to Mr Mansaray that it was not my understanding that
09:12:16 25 there was any [inaudible] on any party contacting any prospective
26 witness whether on the other party's witness list or not if the
27 witness was not a protected witness. After I received this
28 e-mail last evening from Mr Metzger, I made inquiry from the
29 lawyers at the Special Court in Freetown with far more experience

1 than I have and asked whether there was any Rule or practice of
2 the Court that restricted access in the fashion that Mr Metzger
3 has suggested, and I was advised that there are none. They
4 didn't think there was any requirement to seek permission to seek
09:13:17 5 information from any witness who is not protected.

6 Now I realise that this Court, as well as all the
7 international tribunals, are an amalgam of different legal
8 cultures, and I have earlier confessed my - despite my efforts to
9 educate myself, my lesser familiarity with the Rules and
09:13:53 10 practices than others. And if I have misstepped, then I will do
11 whatever is necessary to remedy it, including not [indiscernible]
12 evidence, not contact - or further contact such prospective
13 witnesses with information, or anything else that's required.
14 But it is my understanding that I have not misstepped, but of
09:14:34 15 course I will leave that to the Court.

16 I would like to explain who Mr Hillary Sengabo is. It's
17 the defence witness in question. Mr Sengabo is the deputy warden
18 or the deputy director of the Mpanga Prison. He is also the
19 Special Court's liaison. During my investigation last year when
09:15:07 20 I came to Rwanda, Mr Sengabo was one of the officials who
21 assisted me. So he was well-known to me. When the issue about
22 the phone calls and the phone records came up, and Your Honour
23 will recall that I turned over the telephone records of the phone
24 at the prison, despite the fact that I did not at the time see
09:15:45 25 much relevance in them. I turned them over again in the spirit
26 of full disclosure in the event that Defence would have some use
27 for them.

28 It was never my thought that Mr Metzger, nor anyone else,
29 would be restricted from going into the prison or talking to any

1 official who could provide relevant information for the trial.
2 Because in fact the trial in this Court - and the trials in any
3 Court - is a search for truth. It is not a game of chess. The
4 parties need to be free to gather and prove up evidence or
09:16:43 5 information that is helpful to each side.

6 Now, when I perceived that Mr Metzger - that there were
7 issues with respect to the phone manual log, the question of the
8 phone, how it was used by the prisoners, and of course the
9 November 30 call, about which Your Honour heard evidence
09:17:26 10 yesterday, then I determined, even before I came to Sierra Leone
11 to start inquiring into it. And I sought information from others
12 who indicated Mr Sengabo was the person in the best position to
13 provide information about it.

14 MR METZGER: I'm sorry I just want to interpose.

09:17:53 15 MR HERBST: I just want to address for a moment the
16 notion --

17 JUSTICE DOHERTY: Mr Herbst, there's an interruption. Just
18 one moment, please.

19 MR METZGER: I'm terribly sorry to interrupt my learned
09:18:04 20 friend while he is, as it were, in full flow. It just occurred
21 to me that he is referring to evidence in this case. There's a
22 witness who is waiting to be cross-examined and perhaps that
23 witness should not be in the courtroom if there's a discussion or
24 an analysis of the evidence that turns on evidence that the
09:18:23 25 witness is being asked questions about.

26 JUSTICE DOHERTY: I haven't heard anything that gives me
27
28
29

1 concern yet so I'll just let it continue.

2 MR METZGER: May I clarify. My learned friend has just
3 said something about the telephone calls Your Honour has heard
4 evidence about. In fact, no date has been given by this witness
09:18:46 5 to date.

6 MR HERBST: The witness, Your Honour, I don't believe has
7 information about dates at all and neither in direct nor in cross
8 has he given such.

9 JUSTICE DOHERTY: I did notice that, but we'll err on the
09:19:16 10 side of caution. Please assist the witness to leave the Court
11 briefly but please have him very close to the Court.

12 [Witness leaves courtroom]

13 JUSTICE DOHERTY: Please continue, Mr Herbst.

14 MR HERBST: Yes, thank you, Your Honour. I was about to
09:20:04 15 address the allegation by Mr Metzger that the Prosecution in this
16 case, having received information from Mr Metzger about the lack
17 of corroboration on the 29th, is changing course in midstream and
18 now contending that the date of the meeting at which Mr Kamara
19 and Mr Kanu got on the phone first with Mr Kargbo and then with
09:20:40 20 334 occurred on the 30th rather than the 29th.

21 The short answer to that is that many, many months ago when
22 the Alagenda e-mail came to light back in the summer of 2011,
23 last summer, I believe - if my recollection serves me correctly -
24 I turned that e-mail over to the Defence. That e-mail clearly
09:21:17 25 demonstrates that the conversation in question occurred on the
26 30th November. This is not a new allegation by the Prosecution.

27 JUSTICE DOHERTY: Mr Herbst --

28 MR HERBST: Now, in response to questions --

29 JUSTICE DOHERTY: -- I'm going to ask Mr Metzger a

1 question. Could you pause, please.

2 Mr Metzger, I'm looking at - I'm trying to find your
3 various documents. I'm looking at disclosure documents, and I've
4 looked at the document of the 29th of May 2012 and the 22nd of
09:22:04 5 May 2012, and I don't see any witnesses names - very quickly
6 looking at those, very quickly, I don't see - exhibits, you will
7 produce a manual log, and you don't name who is going to produce
8 it or who is going to produce the records of the hospital.

9 I'm just looking for this gentleman's name in your
09:22:41 10 pre-trial documentation. I confess that I'm sitting on without
11 notice of the content of this matter, so I haven't got all the
12 documents prepared as I normally would before I come into Court.
13 So can you show me where this man is named?

14 MR METZGER: Just bear with me one moment, Your Honour. I
09:23:06 15 certainly named him to Mr Herbst.

16 JUSTICE DOHERTY: His name has come up in preliminary
17 discussions.

18 MR METZGER: His name came up, as I understand it, in
19 e-mail communications with Mr Herbst before this trial started, I
09:23:23 20 think Friday the week before - before I travelled to the UK. Not
21 on the Friday I travelled but the week before that.

22 MR HERBST: Your Honour, perhaps I could be of assistance.

23 JUSTICE DOHERTY: Thank you.

24 MR HERBST: First let me say that I am glad to see
09:23:49 25 Mr Metzger in Court, because his indication was that he might be
26 feeling badly and I'm glad that he's not.

27 MR METZGER: He shouldn't make assumptions. I am here
28 because I need to be here.

29 JUSTICE DOHERTY: Just a minute, Mr Metzger. You told me

1 you mightn' t be here today.

2 MR HERBST: I do have a - [overlapping speakers].

3 MR METZGER: Sorry. With the greatest respect, I didn' t
4 say I am not - I' m feeling well. I' m here because I have to be
09:24:12 5 here, and that' s the assumption people should not maybe
6 [i ndi scerni bl e].

7 JUSTICE DOHERTY: Please don' t be nasty to courteous
8 remarks.

9 Mr Herbst, please continue.

09:24:25 10 MR HERBST: Yes, Your Honour. In Mr Metzger' s 29 May
11 pre-trial brief on page 9, he did indicate that he might -
12 Mr Sam Kargbo is mentioned at page 9 in paragraph 27 and 28, and
13 he does say that at the time of this filing it is envisaged that
14 the Defence will call Mr Kanu and Mr Sam Kargbo. It' s envisaged.
09:25:14 15 He doesn' t actually say that he definitely will call him but he' s
16 suggesting that he may call him, and I understand that and I
17 don' t dispute it.

18 My suggestion to the Court is that I could - number one, I
19 could find no Rule restricting access by the other side to a
09:25:43 20 witness who has been identified as someone who might be called in
21 the Defence; and further, that there should be no restriction,
22 and especially no restriction, nor any need of notice, of a
23 witness of this kind, who is essentially an officer of the Court
24 and who is the person who essentially has custody of the relevant
09:26:22 25 records, one of which Mr Metzger provided to me upon my request
26 after the colloquy we had and the discussion we had in Court on
27 Saturday last in part. He provided pages from the 26th to the
28 29th November and didn' t provide the page of 30 November.

29 And so I did ask Mr Sam Kargbo, because I thought there was

1 nothing wrong with it. There was nothing inappropriate about
2 doing it. And again I say to the Court if I was wrong, if as a
3 result of the upbringing in my own legal culture I did not
4 appreciate that a different practice or Rule applied in this
09:27:20 5 Court, I will do whatever is necessary to make amends. But
6 having consulted counsel last evening, and hearing that much more
7 experienced counsel had no knowledge or belief that there was
8 such a rule of practice, I was of course going to ventilate this
9 matter myself this morning in Court to make sure that we're all
09:27:51 10 on the same page.

11 But what I did was I asked Mr Sam Kargbo for the full log,
12 that was provided to me, and lo and behold what do I find and
13 what did I turn over to the Defence today? In turning over a
14 copy of that as well as the updated call list that is not
09:28:18 15 mentioned in Mr Metzger's Defence brief but which apparently was
16 also provided to him. It appears that at the very time of these
17 calls on November 30 about which Your Honour has heard testimony,
18 in the manual log there is reference to a call - several calls by
19 both Mr Kamara and Mr Kanu. At 13.11 p.m., almost precisely the
09:29:10 20 times at which the calls to Mr Kargbo from that prison phone
21 began, and what does the log say as to whom - as to whom the
22 calls were made to? It does not say "Mr Kargbo". It says
23 "brother". And on the updated call lists - and I've disclosed
24 all this in e-mail to which - I've related all this, again in the
09:29:44 25 interests of full disclosure, to all Defence counsel in this
26 e-mail last night.

27 On the updated call list are three brothers combined of the
28 two accused, none of which contain those three numbers, and one
29 of the numbers is a number on the log quite - somewhat

1 remi nisc ent of Mr Kargbo' s phone number but with several di gits
2 changed. Hi ghly, hi ghly pertinent i nformation, which had I not
3 been able to inquire about in response to what clearly the thrust
4 of both Mr Metzger and Mr Serry Kamal' s presentati ons to the
09:30:42 5 Court had suggested and the cross-exami nati ons in part had
6 suggested, that there would be no corroborati on of these calls in
7 the phone records and in the manual log.

8 Now are Mr Sengabo is not, I would submit, a witness with
9 any stake in this trial. He is in effect an officer of the Court
09:31:28 10 and a custodi an of records and someone who i nvestigated the
11 telephone si tuati on when the allegati ons of contempt in this case
12 came to light. And in fact, my understanding is a new system was
13 put in place thereafter and he made certain findi ngs about phone
14 accessori es in the rooms of Mr Brima and one other of the
09:32:07 15 accused, so he has i nformation to provi de that is hi ghly relevant
16 and pertinent to the case. And it seems to me with a witness of
17 this kind, it ought not be necessary, as I' d understood the
18 practice, to get the permissi on of counsel to i nterview a witness
19 such as Mr Sengabo, just as Mr Metzger did not seek my permissi on
09:32:46 20 to i nterview him when he came to Ki gali hi msel f, and I would not
21 have expected him to seek such permissi on because in my vi ew it' s
22 part of his j ob to seek out i nformation from any prospecti ve
23 witness that could help his case and even to be i nformed of
24 i nformation that is unfavourable to him that might hurt his case
09:33:06 25 so he might try to meet it. And because a trial is a search for
26 truth, in my respectful submissi on, the same Rules shoul d apply
27 to the Prosecuti on.

28 JUSTICE DOHERTY: Thank you.

29 MR HERBST: Now, I am making an applicati on - I am making

1 an application to add both the documents that I provided to
2 counsel and Mr Sengabo to the Prosecution's witness list because
3 of the relevant information that he can provide. All of that
4 information was provided to Mr Metzger and there's absolutely no
09:33:57 5 prejudice to the Defence in doing so, whether or not Mr Metzger
6 was going to call Mr Sengabo or not. I don't believe Mr Metzger
7 was going to call Mr Sengabo.

8 And I don't think that there ought to be a race to see who
9 puts a witness on the witness list first to determine who
09:34:17 10 controls that witness and controls access to that witness, and I
11 differentiate where there is a protected witness. There I fully,
12 fully understand the reason for seeking leave to consult such a
13 witness first. But as I say, if I am misadvised, if I've been
14 misadvised, then I will do whatever the Court thinks fit to
09:35:04 15 ensure that this trial is fair to both sides.

16 MR METZGER: May I respond. There were certain matters I
17 didn't deal with that Mr Herbst has raised.

18 JUSTICE DOHERTY: Well, on law, and keep it very short,
19 because this is taking too long.

09:35:24 20 MR METZGER: I'm going to keep it short.

21 But on fact Your Honour will see at the relevant paragraphs
22 in the pre-trial Defence brief, which, by the way, was filed de
23 bene esse because it doesn't have to be filed under the Rules
24 until after the close of the Prosecution case. In the spirit of,
09:35:47 25 as it were, reciprocal disclosure even if it was later on.

26 Paragraphs 27 of the pre-trial brief actually states that
27 the Defence had obtained a statement from Mr Sengabo which will
28 confirm that Mr Kanu was taken for treatment over a period of
29 days to KFH. He will also deal with procedures relating to

1 telephone facilities and their use, produce a list of authorised
2 numbers for the relevant detained persons and excerpts of the
3 relevant section of the manual log which records the use of the
4 telephone facilities. These will be filed as annexes to his
09:36:29 5 statement, if required, in due course.

6 Inquiries are ongoing in Kigali with KFH, King Faisal
7 Hospital, who are suffering from data loss difficulties after
8 changing their computers system in early 2011 and the Kigali
9 central prison for assistance with the dates of this visit or any
09:36:51 10 other visits during the material time. Paragraph 28: As at the
11 time of filing, it is envisaged that the Defence will call
12 Mr Kanu and Mr Sengabo. Now, my learned friend seems to have
13 read that as "we may call him." And then it goes on --

14 JUSTICE DOHERTY: That's what it says.

09:37:12 15 MR METZGER: -- if further - well, what about paragraph 27?
16 "Which will confirm". We've taken a statement from him. If
17 required, one always says "if required," because not to do so
18 means that one doesn't believe that a Rule 98 application will
19 succeed. It's for the Prosecution to prove its case. And so the
09:37:35 20 fact that one says "if required we will call" means he is on the
21 Defence witness list. Now, that may be neither here nor there.

22 On the 18th of May, immediately on my return from Kigali, I
23 sent an e-mail to my learned friend indicating that I was
24 awaiting material. I had spoken to certain people. That's
09:37:57 25 before the filing of this. So he was on notice then that the
26 Defence were looking at doing that. And he knows because of our
27 e-mail exchange, as I said, the week before this matter started
28 and discussions we have personally had outside of this courtroom,
29 and indeed in this courtroom, about Mr Sengabo.

1 With the greatest of respect, to say he didn't know the
2 Defence were looking to call Mr Sengabo has got to be a total
3 misconception, a lack of understanding between counsel. I don't
4 know if there's a language difficulty there or something. But
09:38:38 5 otherwise, it would be - would have been very clear.

6 JUSTICE DOHERTY: Mr Metzger, refer me to a Rule under our
7 Rules of Procedure and Evidence which preclude any witness --

8 MR METZGER: I can't at this point in time. This has just
9 arisen, Your Honour, with respect, and I stated that right at the
09:38:58 10 beginning. Research will be carried out. If we find that
11 material, I will put it before Your Honour. I'm talking about
12 the principle of fairness here. The Defence - the defendants'
13 Article 17 rights.

14 The Prosecution - may I just remind this Court, we may be
09:39:18 15 missing sight of something here. In the free and fair disclosure
16 that the Prosecution relies on, at page 38 of the Rule 66
17 pre-trial disclosures, Mr Herbst states in relation to records -
18 I'm sorry, that's - I've marked that for something else. I
19 probably need to go somewhere else.

09:39:51 20 In general terms, certainly it's the penultimate paragraph
21 on the records. The only records, documents, or tangible items I
22 currently have are telephone records for the cell phone use by
23 the prisoners in Rwanda. So this was in the possession or had
24 been seen by the Prosecution by the time of the filing of the
09:40:16 25 Rule 66 disclosures pursuant to Your Honour's direction on the
26 15th of July 2011. These records are available for inspection by
27 you at the Special Court.

28 I was advised by Rwanda prison officials that there were no
29 procedures in place at the time to prevent the recipient of a

1 prisoner's call from facilitating a conversation between a
2 prisoner and a third party. I may call a witness to testify at
3 trial if we cannot get a stipulation of fact from Defence counsel
4 to that effect.

09:40:50 5 Now Mr Herbst knows, because I've spoken to him, insofar as
6 fact that somebody on the other end of a telephone can pass it to
7 another person, that's a matter of commonsense. It's not
8 something that we for Kanu could gainsay. At no stage - and I
9 look at the next filings, which is the filing --

09:41:15 10 JUSTICE DOHERTY: Mr Metzger, you're reciting what you've
11 told me.

12 MR METZGER: No, Your Honour.

13 JUSTICE DOHERTY: And let me stress that this Court is not
14 a party to e-mails and exchanges between counsel. I reiterate
09:41:30 15 that if something comes before this Bench from one-party, it will
16 be made public to another. I am not a party to these records and
17 the exchanges between me. I have only the facts as I know them
18 and I am now trying to apply the law to those facts. You have
19 made an application to - you've applied to - I'm trying to get
09:42:18 20 the wording of your exact application in front of me. You're
21 asking me to restrain the Prosecution from taking certain actions
22 with Defence witnesses, and you're putting on record that the
23 Prosecution be restrained from seeking contact with Defence
24 witnesses. That's what you're saying to me. That's your
09:42:43 25 application.

26 MR METZGER: Your Honour, yes. And I'm now just referring
27 you to areas in the Prosecution's filings, not his e-mails, which
28 are therefore before the Court.

29 JUSTICE DOHERTY: And I have a counter-application from

1 Prosecution to call this gentleman and have him put on the
2 Prosecution list. Now I want to sit down and work on that
3 decision, and I'm clear from both of you, because I've had a
4 chance to - as you speak - to very quickly look at these filings,
09:43:16 5 and I do note that you mentioned Sengabo and I do note you used
6 the word "envisage." I'm going to decide now, because I'm going
7 to tell you both at the end of the day this Court has a right to
8 call a witness and will call a witness if I consider a witness's
9 evidence is important.

09:43:39 10 The only reason I don't particularly want to call them,
11 because Rule 84 is that they come at the end of the day and I
12 want - that evidence should be in early so that both Prosecution
13 and particularly Defence witnesses have a chance to
14 cross-examine. But if I'm stuck that is what I'm going to do,
09:44:04 15 but let me think about it properly.

16 MR METZGER: Should either of those matters arise, I
17 would - I should foreshadow an application to further interview
18 Mr Sengabo.

19 JUSTICE DOHERTY: This is my ruling on the interlocutory
10:06:33 20 applications.

21 There has been a lengthy exchange by Defence and
22 Prosecution counsel, and I consider that it boils down to: (1) A
23 complaint of impropriety and/or breach of procedure by the
24 Independent Counsel in contacting an official at Mpanga Prison
10:07:01 25 who the Defence, I quote, "envisaged" calling as a witness and an
26 application that Prosecutor be restrained from further contact;
27 (2) Whether the Prosecution can call the same witness and a
28 counter application to apply to add documents to the Prosecution
29 list and to call the official in question.

1 Neither counsel refers or is aware of a precise rule on the
2 issue of contact between - sorry, contact with witnesses of an
3 opposing party. Both refer to the restrictions on contact with
4 protected witnesses. This witness is not protected.

10:08:02 5 Like counsel, I am not aware of a Rule in our Rules of
6 Procedure and Evidence of a specific provision precluding contact
7 between witnesses of an opposing party. Likewise, I am not aware
8 of jurisprudential precedent in the other international tribunals
9 on this point. The Prosecution has a continuing duty to disclose
10:08:36 10 under Rule 66(A)(ii) of all the additional evidence that he
11 becomes aware of.

12 Since there is no precise Rule on this point, I observe
13 that the parties, and I myself, have tended and first to look at
14 our own practice and jurisprudence in our own Courts. I should
10:09:11 15 maybe say "home courts." Those are not part of the international
16 tribunal's Rules, which draw from both the common law and the
17 civil law and can vary with national law or practice. I recall
18 hearing justice Justice Kirk McDonald of the ICTY describe in
19 detail the conflicts between her and Justice Cassesse arguing
10:09:45 20 over the common and the civil law procedure. In the
21 circumstances of this case, I am - without the benefit of better
22 research - I am not prepared to make a final and formal ruling on
23 this wide procedural issue without more research; hence, I will
24 rule only on the precise facts before me as follows:

10:10:13 25 (1) That given the lack of Rules and lack of precedent, I
26 can find no reason why the Prosecutor should not have contacted a
27 witness who is a custodian of records, and I stress rather than
28 one of fact in pursuance of: (A) His disclosure obligation; and
29 (B) His obligations to bring all facts before this Court.

1 (2) It is apparent from arguments that the records are
2 important in the fact-finding and, as I have indicated briefly, I
3 consider that evidence should be before me to the extent I am
4 prepared to use the Court's powers under Rule 85(A)(iv), but I do
10:11:10 5 not consider 85(A)(iv) is quite a satisfactory place to call that
6 witness because the evidence called by the Court comes in after
7 the Prosecution and the Defence and that is not satisfactory,
8 given the issues before me.

9 It is clear that both counsel want to call this witness.
10:11:41 10 If by Monday morning it is not resolved who will call him, then I
11 will reconsider my own powers under Rule 54 of the Rules and
12 determine when he is to be called and also if Rule 54 enables me
13 to override the sequence provided in Rule 55 to call him as an
14 independent Court witness.

10:12:16 15 We will now proceed with the evidence. Please bring in
16 Mr Kargbo.

17 MR HERBST: Your Honour, while Mr Kargbo is coming in, may
18 I just ask the Court prior to adjourning Court for the day, I
19 would just like some clarification - further clarification that I
10:13:05 20 will ask if the Court gives me leave at that time. I don't want
21 to further delay the witness, but I just want to ask for some
22 further clarification as to what I plan to do to secure certain
23 evidence in the case for the benefit of the Court and all
24 counsel.

10:13:23 25 [Witness enters Court]

26 JUSTICE DOHERTY: Mr Kargbo is in the Court and I know
27 Mr Metzger was uneasy about his presence when certain things,
28 dates, et cetera, were mentioned, so what I'm going to do is see
29 if - I have to confess Mr Metzger is not looking the best.

1 Mr Metzger, would you be able to remain or do you want me to
2 bring this up on Monday?

3 MR METZGER: I will wait. I hope that we can keep it
4 within a reasonable time period.

10:14:01 5 JUSTICE DOHERTY: Thank you. I'll deal with it as soon as
6 we finish with Mr Metzger or if there's - whatever other evidence
7 we have today.

8 Mr Metzger - excuse me, Mr Kargbo. Mr Kargbo, can you hear
9 me? Now, I'm going to ask someone to switch on your microphone,
10:14:26 10 and you put your hand up. Did you want to say something?

11 THE INTERPRETER: Apparently, Your Honour, he cannot hear
12 you.

13 JUSTICE DOHERTY: [Microphone not activated]

14 THE COURT OFFICER: We seem to have a problem with this
10:14:55 15 channel. I can't seem to hear the Krio.

16 JUSTICE DOHERTY: Mr Kargbo, can you hear me now?

17 JUSTICE DOHERTY: [Microphone not activated]

18 THE INTERPRETER: His microphone is off.

19 JUSTICE DOHERTY: I will ask someone to switch on your
10:15:50 20 microphone, and I'm going to remind you, Mr Kargbo, again, as
21 I've done before, that you are under oath. The oath continues to
22 be binding on you, and you must answer questions truthfully. Did
23 you hear me?

24 THE WITNESS: Yes, My Lord.

10:16:08 25 JUSTICE DOHERTY: Very good. Mr Serry-Kamal, please
26 proceed.

27 MR HERBST: Your Honour, before we start, can I report that
28 there is enormous static on the line, and I had thought that the
29 witness's testimony in Krio would be cut off so I would not be

1 able to hear it, but that has not happened. So I'm anticipating
2 that we're going to have similar problems. I'm just alerting the
3 Court to that.

4 JUSTICE DOHERTY: I'll have our technicians deal with it
10:16:55 5 immediately. Mr Court Attendant, please contact the technicians.
6 I'm going to ask Mr Serry-Kamal to ask his first question and get
7 the first answer. If you don't hear it clearly, tell me and I'll
8 pause.

9 Mr Serry-Kamal, please proceed.

10:17:22 10 MR SERRY-KAMAL: Thank you, Your Honour.

11 WITNESS: SAMUEL KARGBO [Resumed]

12 Cross-examination by Mr Serry-Kamal: [Continued]

13 MR SERRY-KAMAL:

14 Q. Good morning, Mr Witness. I think yesterday we were
10:17:29 15 talking about Sweissy area. Now, I remember I said to you that
16 Sweissy is a place where, in addition to doing business like
17 changing money, foreign currency, people hang around also, young
18 men - particularly young men hang around.

19 JUSTICE DOHERTY: Mr Serry-Kamal, what's the relevance of
10:18:19 20 this line of questioning?

21 MR SERRY-KAMAL: Your Honour, the witness told us that he
22 was unemployed when he left prison, and later on he said he was
23 dealing in diamonds - I mean in gold. I didn't ask him where he
24 was selling this gold, but I asked him whether he frequented
10:18:46 25 Sweissy. You will see that there is some evidence that they met
26 somebody at Sweissy and they moved on to a particular lawyer.

27 JUSTICE DOHERTY: Well, his employment questions and his
28 business been covered by cross-examination by counsel for Kanu,
29 and under the procedures in this Court the same issue cannot be

1 asked twice. So I will of course allow you to proceed with your
2 cross-examination concerning the meeting and the contact with the
3 lawyer because that - although it has been dealt with, not as it
4 relates to your witness - to your client.

10:19:39 5 MR SERRY-KAMAL: Exactly, Your Honour, since I have a duty
6 to put my case to the witness.

7 JUSTICE DOHERTY: Indeed. So please move on to that very
8 pertinent topic.

9 MR SERRY-KAMAL: I will do so in due course, Your Honour.

10:19:56 10 JUSTICE DOHERTY: You'll do it now. I'm not interested in
11 the history and the geography of Freetown. Let's get to the
12 issue.

13 MR SERRY-KAMAL: We're not doing anything about the
14 geography of Freetown. We just wanted to prove certain facts
10:20:10 15 that he was a frequent visitor to Sweissy.

16 JUSTICE DOHERTY: Put that to him, please.

17 MR KAMAL:

18 Q. Mr Kargbo, you were - you answered yesterday that you
19 visited Sweissy frequently?

10:20:25 20 A. Yes.

21 Q. Most times when you visited Sweissy you were in the company
22 of 334?

23 A. No, no, no.

24 Q. Are you telling this Court that you have never been in the
10:20:53 25 company of 334 when you visited Sweissy?

26 JUSTICE DOHERTY: No, there's a difference between "never"
27 and "frequent." You said "frequent." He said "no." Never is a
28 different issue.

29 MR SERRY-KAMAL: As Your Honour pleases. I don't want to

1 be involved - today is Saturday. I want to leave.

2 JUSTICE DOHERTY: Don't we all. And I'm sure all of our
3 support staff who have gone to so much trouble to come in are
4 equally anxious to get away.

10:21:28 5 MR SERRY-KAMAL: In Freetown, Saturday is very special.

6 Q. Mr Kargbo, did you at any time visit Sweissy in the company
7 of 334?

8 A. No, sir.

9 Q. Never? Do I now understand that you have never visited
10:21:58 10 Sweissy in the company of 334?

11 A. Yes, sir. Sometimes.

12 Q. Let us have it clear. You either have or you haven't. Let
13 me ask the question again. I said have you ever been to Sweissy
14 during this period after you left prison in the company of 334?

10:22:32 15 A. Yes, sir.

16 Q. How many times would you say?

17 A. I can't recall all. Sometimes when I go there I'll find
18 him there. Sometimes I won't find him there.

19 Q. 334 is your personal friend?

10:23:01 20 A. Yes, sir.

21 Q. Let me qualify it. He's a close personal friend. Close
22 personal friend?

23 A. Yes, sir.

24 Q. Now, you used to discuss about these trips to this Court in
10:23:28 25 the Bazy case - Brima Bazy case, Chamber number II, his
26 evidence here, and also his evidence in the Taylor trial?

27 THE INTERPRETER: Your Honour, that answer is not very
28 clear to the interpreter.

29 JUSTICE DOHERTY: Mr Kargbo, the interpreter didn't hear

1 you clearly. Please answer the question again.

2 Mr Serry-Kamal, if I could please remind you about
3 switching on the microphone.

4 MR SERRY-KAMAL: Sorry.

10:23:59 5 JUSTICE DOHERTY: Mr Kargbo, answer the question again,
6 please.

7 MR SERRY-KAMAL:

8 Q. Let me ask you again. Did he ever discuss with you his
9 evidence in the Trial Chamber II against Bazzy and the others?

10:24:20 10 A. No, sir.

11 Q. Did he ever discuss his evidence in the Taylor trial in The
12 Hague?

13 A. No, sir.

14 Q. Did he tell you that he was a protected witness?

10:24:51 15 A. No, sir.

16 Q. He never told you that he was a protected witness?

17 A. I never had such a discussion with him.

18 Q. Thank you very much. I'm going to ask you about something
19 else now. Do you know Junior Lion?

10:25:23 20 A. Yes, sir.

21 Q. Now, Junior Lion was Bazzy's bodyguard?

22 A. Yes, sir.

23 Q. You know he was a witness in the case against Bazzy and
24 others?

10:25:48 25 A. No, sir. No, sir.

26 Q. Now, you were all in the army. Who was closer to - I am
27 putting it to you that Junior Lion was closer to Bazzy than
28 anybody else.

29 A. Yes, sir.

1 Q. And Junior Lion was a witness?

2 A. Well, by then I was in prison. I was not aware of that.

3 Q. Junior Lion is another person who frequents Sweissy?

4 A. I'm not aware of that. I have never met him there, no,
10:26:58 5 sir.

6 MR HERBST: I'm sorry, Your Honour. That question and
7 answer I could not hear.

8 JUSTICE DOHERTY: The question was --

9 MR HERBST: The static is enormous.

10:27:09 10 JUSTICE DOHERTY: Can you hear me without static?

11 MR HERBST: I hear Your Honour through the static.

12 JUSTICE DOHERTY: Well, first of all I'm going to ask

13 Mr Court Attendant to see if our technicians can help with the

14 static, although it could be your end as much as our end. And

10:27:31 15 secondly, the witness was asked the following question: Junior

16 Lion is a visitor in Sweissy - the district called Sweissy, and

17 the answer was, "I am not aware. I have not met him there." Did

18 you hear that?

19 MR HERBST: I have now heard it and I thank Your Honour.

10:28:06 20 MR SERRY-KAMAL: [Microphone not activated].

21 Q. Let us come to May during your interview with the

22 investigator then.

23 JUSTICE DOHERTY: Was that 2011, Mr Serry-Kamal?

24 MR SERRY-KAMAL: Yes, Your Honour. May 2011. 6 May.

10:28:28 25 JUSTICE DOHERTY: Thank you.

26 MR SERRY-KAMAL:

27 Q. You will recall that on 5 May you came to the office of the

28 Prosecution?

29 A. Yes, sir.

1 Q. At that time you did not make a statement because you said
2 you were not comfortable?

3 A. Yes, sir.

4 Q. Later you gave your telephone number to the investigator?

10:29:12 5 A. Yes, sir.

6 Q. But before you did so, you said you wanted protection?

7 A. Yes, sir.

8 Q. Now, did you tell the investigator what type of protection
9 you needed?

10:29:43 10 A. He did not ask me.

11 Q. What protection did you have in mind when you asked for
12 protection?

13 A. Because by then I was not secured [overlapping speakers].

14 JUSTICE DOHERTY: You're speaking over each other.

10:29:59 15 MR SERRY-KAMAL: I'm sorry, Your Honour.

16 JUSTICE DOHERTY: It's not possible for the interpreter or
17 anybody to hear.

18 MR SERRY-KAMAL: Can I ask the question again?

19 JUSTICE DOHERTY: Yes.

10:30:08 20 MR KAMAL:

21 Q. What protection did you have in mind when you asked for
22 protection?

23 A. Because when I went inside, I was not secure by then.

24 Q. What do you mean when you say you were not secure? You
10:30:25 25 went there of your own free will. What kind of security did you
26 want?

27 A. I did not go there by myself. We went there together.

28 It's the question that the Prosecution asked that you answered on
29 my behalf that I felt unprotected. That is why I said I needed

1 protection.

2 Q. When you came back the next day, you had discussed
3 protection. Protection from you. You discussed protection from
4 you with the investigator?

10:31:00 5 A. He asked me. Because he asked me: Why do you say you
6 needed protection? Then I explained to him that when I came with
7 Serry-Kamal, when you asked the question that if lawyer
8 Serry-Kamal is my lawyer, I did not answer immediately. The
9 lawyer Serry-Kamal answered, Yes, I am defending Samuel Kargbo.
10:32:39 10 Then I said, No, I have not committed any offence for lawyer
11 Serry-Kamal to answer that. I am his lawyer. And when he called
12 me to his office, I can remember it was at
13 Lightfoot Boston Street. He told me that whatever question I'm
14 asked at the Special Court, I should deny it. I should not
10:34:06 15 answer it. He said if I knew anything about Bazy Kamara.

16 THE INTERPRETER: Your Honour, can the witness repeat his
17 entire answer? I did not get it.

18 JUSTICE DOHERTY: Mr Witness, the interpreter did not hear
19 you clearly. He wants you to repeat your answer from where you
10:34:35 20 said "if I knew anything of Bazy Kamara".

21 THE WITNESS: Yes, my Lord. He said I should deny if
22 somebody asks me, I should deny talking to Bazy Kamara at the
23 Rwanda prison if somebody asks me.

24 JUSTICE DOHERTY: Proceed, Mr Serry-Kamal, and could I
10:35:29 25 again ask you to switch off your machine each time you finish
26 your question.

27 MR SERRY-KAMAL:

28 Q. Now, remember you made a witness statement?

29 A. I remember.

1 Q. On 6 May 2011. I think it's an exhibit?

2 JUSTICE DOHERTY: It's not an exhibit, but it has been put
3 before the witness before, so I'll ask Mr Court Attendant to
4 bring it to you.

10:36:08 5 MR SERRY-KAMAL: Mr Court Attendant, could you please.

6 Q. I want you to look at that statement and tell me --

7 MR HERBST: Your Honour --

8 JUSTICE DOHERTY: Just a moment, Mr Serry-Kamal. Yes,
9 Mr Herbst.

10:36:22 10 MR HERBST: Your Honour, the witness statement was
11 confidential annex 1 to the Confidential Plea Agreement that is
12 in evidence as Prosecutor 1.

13 JUSTICE DOHERTY: I was not aware of that, Mr Herbst. So
14 in effect, it is part of Prosecution exhibit P1.

10:37:03 15 MR HERBST: Yes, Your Honour.

16 JUSTICE DOHERTY: I note you said it was confidential. In
17 the light of that, I will entertain an application to have it
18 retained as confidential, but by all means it must be put in
19 front of the witness.

10:37:19 20 Please put the statement in front of Mr Kargbo.

21 MR SERRY-KAMAL: Thank you, your Honour.

22 Q. Mr Kargbo, can you turn --

23 MR HERBST: Your Honour, at this time --

24 JUSTICE DOHERTY: Yes.

10:37:31 25 MR HERBST: Your Honour, at this time while the witness
26 statement was originally filed, as was the Plea Agreement, as
27 confidential, I would submit that it no longer has a confidential
28 character, as it was part of exhibit P1 which is in evidence and
29 was introduced in open Court.

1 JUSTICE DOHERTY: Very well then. I will not change its
2 status. It's in as a public document. But I will ensure that
3 the statement is annexed to the Plea Agreement as one whole
4 document.

10:38:19 5 Mr Serry-Kamal, please proceed with your questions.

6 MR SERRY-KAMAL: [Microphone not activated]

7 MR HERBST: I'm sorry, very sorry, Your Honour, but I could
8 not hear the question.

9 JUSTICE DOHERTY: The witness has been asked to look at all
10:38:42 10 three pages of the statement. I must say, it's not too clear
11 here either. But keep going, please, Mr Serry-Kamal.

12 MR SERRY-KAMAL:

13 Q. The three - all the pages. Look at all the pages, and also
14 the Agreement. Do you have the Agreement?

10:39:05 15 MR SERRY-KAMAL: Does he have the Agreement?

16 Q. And also the Agreement where you have recorded all you have
17 been telling the Court a little while ago.

18 A. I looked at it, sir.

19 Q. Sorry? Have you seen it there?

10:39:37 20 A. I've looked at it.

21 Q. And all you've been telling the Court in the last few
22 sentences; is it recorded there?

23 A. It's not there.

24 Q. Did you tell the investigator that?

10:39:55 25 JUSTICE DOHERTY: I'm sorry, Mr Serry-Kamal, you've lost
26 me.

27 MR SERRY-KAMAL: I'm sorry.

28 JUSTICE DOHERTY: I didn't hear one of the questions very
29 clearly. You asked him to look at all three parts of the

1 statement.

2 MR SERRY-KAMAL: Witness statement and also the Agreement.

3 JUSTICE DOHERTY: That maybe is what he's saying is not
4 there. Mr Court Attendant, make sure the witness has a copy of
10:40:18 5 both parts. Has he got both parts?

6 THE COURT OFFICER: The Agreement and the statement, he has
7 them.

8 JUSTICE DOHERTY: And the witness said something, it's not
9 there, but I'm not sure what you asked him. Could you say it to
10:40:34 10 me again.

11 MR SERRY-KAMAL: What I asked him was what he was saying
12 about going to my office and all the rest of it --

13 JUSTICE DOHERTY: Now I'm clear.

14 MR SERRY-KAMAL: Did he have it recorded by the
10:40:46 15 investigator on the 6th or subsequently in any document?

16 THE WITNESS: No.

17 MR SERRY-KAMAL:

18 Q. This is one of your creations again?

19 JUSTICE DOHERTY: What does that mean?

10:41:07 20 THE WITNESS: No, because --

21 JUSTICE DOHERTY: Just a minute, Mr Kargbo. What does that
22 question mean?

23 MR SERRY-KAMAL: The question is has he created that story.

24 JUSTICE DOHERTY: Put it like that.

10:41:18 25 MR SERRY-KAMAL:

26 Q. Is it one of your creations?

27 A. No.

28 Q. Now, I am putting it to you that what you wanted the
29 Prosecution to do was to protect you so that you can come back

1 and say all kinds of things against Mr Bazy and others; no?

2 A. No.

3 JUSTICE DOHERTY: Continue, Mr Serry-Kamal.

4 MR SERRY-KAMAL:

10:42:29 5 Q. Mr Kargbo, I am putting it to you that at no time did Bazy
6 call you, either by phone or any other means or telex or
7 whatever. At no time. No time whatsoever?

8 THE COURT OFFICER: Your Honour, may I interrupt. I still
9 get communication that the static is really bad in Kigali and
10:43:01 10 they are thinking that maybe if we advise the witness to do the
11 same, turn on and off, he might have to practise a lot more than
12 counsel, but that might help a little bit.

13 JUSTICE DOHERTY: You may even have to go and stand beside
14 him.

10:43:18 15 THE COURT OFFICER: Okay.

16 JUSTICE DOHERTY: Mr Kargbo, we are having trouble, as you
17 know. People in Kigali must hear all that is said. We're going
18 to try switching off and on your microphone when you finish
19 speaking. If you feel able and happy to do it yourself,
10:43:35 20 otherwise Mr Court Attendant will assist you.

21 The question was, "At no time did Bazy phone you or by any
22 other means like telex." I do not have an answer to that
23 question. Please answer the question.

24 THE WITNESS: My Lord, I can't tell lies in this Court.
10:44:05 25 Bazy called me and there are proofs. They will testify that
26 Bazy called me.

27 JUSTICE DOHERTY: [Microphone not activated]

28 MR SERRY-KAMAL:

29 Q. You've already answered that you gave your telephone number

1 on the 5th to the investigator. Now, did he call you on that
2 number, the investigator?

3 JUSTICE DOHERTY: This is 5 May? 5 May?

4 MR SERRY-KAMAL: Yes, Your Honour, on the 5th. 5 May last
10:44:58 5 year.

6 MR HERBST: [Indiscernible]

7 JUSTICE DOHERTY: Mr Herbst? I can't hear you, Mr Herbst,
8 please speak again.

9 MR HERBST: [Indiscernible]

10 JUSTICE DOHERTY: Can't hear.
10:45:09 10

11 MR HERBST: [Indiscernible] dates wrong.

12 THE INTERPRETER: Your Honour, now the interpreters can
13 hardly hear Mr Herbst.

14 JUSTICE DOHERTY: I heard Mr Herbst say he thinks --

15 MR HERBST: [Indiscernible] hear me now.
10:45:24 15

16 JUSTICE DOHERTY: I can hear you faintly, please repeat.

17 MR HERBST: Your Honour, I believe that Mr Serry-Kamal
18 inadvertently has the wrong dates. For the two consecutive days
19 that Mr Kargbo was in my office during the investigation, that
10:45:52 20 was in April while I was there. The witness statement was
21 prepared and signed at a later date. And it was signed on 6 May.
22 And I hope that clarifies for the record.

23 JUSTICE DOHERTY: I will inform Mr Serry-Kamal of your
24 comment and obviously it's for Mr Serry-Kamal to either accept or
10:46:26 25 continue with his line of cross-examination.

26 Mr Serry-Kamal, Mr Herbst thinks you may have inadvertently
27 mistaken the dates, as it was in April that you were in his
28 office. The statement itself is 6 May.

29 MR SERRY-KAMAL [microphone not activated]

1 JUSTICE DOHERTY: Do you want to --

2 MR SERRY-KAMAL: [Microphone not activated]

3 MR HERBST: I'm sorry, Your Honour --

4 MR SERRY-KAMAL: 19th of April. Mr Herbst, you're right:

10:47:13 5 19 April.

6 Q. The other mention was later - the next day; not so?

7 A. I don't know, sir.

8 Q. The next day you met the - on the 19th you received the
9 telephone call from the investigator?

10:47:48 10 A. Yes, sir.

11 Q. And you asked him - he asked you to come and see him?

12 A. Yes, sir.

13 Q. When did you come to see him?

14 A. I came to see him the following day.

10:48:16 15 Q. And again you discussed the question of protection for you?

16 A. Yes, sir.

17 Q. And he agreed to recommend protection to you through the
18 Courts?

19 A. Yes, sir.

10:48:52 20 Q. Then, of course, you made a statement?

21 A. Yes, sir, he said I shouldn't be afraid.

22 Q. Now, I want to look at - I want you to look at your witness
23 statement. I am suggesting to you that your witness statement
24 here is different from what - the statement you made to the
10:49:29 25 investigator on the 19th?

26 A. I know that what I told the investigator is what I saw in
27 my statement.

28 JUSTICE DOHERTY: [Microphone not activated]

29 MR SERRY-KAMAL: [Microphone not activated]...

1 Q. Since making that statement, you have now been given
2 protective measures - not so? - limited protected measures now?

3 MR HERBST: I'm sorry, Your Honour. I couldn't understand
4 the question.

10:50:19 5 JUSTICE DOHERTY: Put the question again, Mr Serry-Kamal.

6 MR SERRY-KAMAL:

7 Q. Since he has made that statement, he has been given limited
8 protective measures?

9 A. Yes.

10:50:36 10 MR HERBST: He's been given limited something.

11 JUSTICE DOHERTY: Protective measures.

12 MR HERBST: [Indiscernible]

13 JUSTICE DOHERTY: And the witness responded "yes".

14 Yes, continue.

10:50:56 15 MR SERRY-KAMAL:

16 Q. Now, you have also - I'm suggesting to you that up to a few
17 days ago, you were always in the company of 334? Up to a few
18 days ago.

19 A. No, sir.

10:51:25 20 JUSTICE DOHERTY: [Microphone not activated]

21 MR SERRY-KAMAL:

22 Q. Now, remember yesterday you told us that you were at
23 Kissy Road when you called 334, who was then at Congo Water?

24 A. Yes, sir.

10:51:40 25 Q. [Overlapping speakers]... to meet him at Congo Water?

26 A. Yes, sir.

27 Q. And you said he was going to Newton?

28 A. Yes, sir.

29 Q. What time of the day was this?

1 A. Well, I can't remember the day, actually. I can't remember
2 the date, but I can remember the month. It was in late
3 December - sorry, late in November. Late in November.

4 Q. Late in December or late in November; which one?

10:52:19 5 A. Late November.

6 MR HERBST: The Court Officer here in Kigali [inaudible],
7 but she is requesting permission to interrupt to advise the
8 Court.

9 JUSTICE DOHERTY: Yes, please do so. What does she want to
10:52:54 10 tell us?

11 MR HERBST: Your Honour, I will relay the message.

12 Mr Kanu has indicated to the Court Officer here that he can
13 hear nothing. Let me modify that or elaborate on it. He
14 indicates that the - everything is scrambled, what is heard. In
10:53:40 15 other words, he hears sound but it is scrambled.

16 JUSTICE DOHERTY: Well, clearly he's entitled to hear the
17 evidence.

18 Have a seat, Mr Serry-Kamal, and we'll see what we can do
19 about this.

10:53:57 20 Mr Court Attendant, can you contact our people in the
21 technical booth and see if they know the cause of that problem.

22 MR METZGER: May I be excused, Your Honour.

23 JUSTICE DOHERTY: Certainly, Mr Metzger. Certainly.

24 THE COURT OFFICER: Your Honour, the technical people are
10:54:48 25 working on it.

26 JUSTICE DOHERTY: Mr Court Attendant, could you give us an
27 idea how long it might take? Because maybe it would be
28 appropriate to have a short break.

29 THE COURT OFFICER: I'll ask them, Your Honour.

1 MR SESAY: May I speak, Your Honour, from the technical
2 booth.

3 JUSTICE DOHERTY: Certainly. It will be helpful.

4 MR SESAY: I think we'll have to do some coordination from
10:55:35 5 the Kigali side, so maybe a little break would assist us.

6 JUSTICE DOHERTY: We'll take [Overlapping speakers]. How
7 long would you need?

8 MR SESAY: Ten to fifteen minutes, My Lord.

9 JUSTICE DOHERTY: We'll take a 15-minute break. I'm
10:55:48 10 looking at the time and I know it's close to lunchtime in Kigali,
11 but we'll resume in 15 minutes and hopefully the technicians will
12 be able to sort things out.

13 Mr Serry-Kamal, can you give me sort of an indication of
14 how much longer you - many more questions you have? For forward
10:56:10 15 planning. Not holding you to it, of course.

16 MR SERRY-KAMAL: [Microphone not activated]. I have to get
17 used to it. I think we'll finish within 30 minutes.

18 JUSTICE DOHERTY: That's very helpful. So we'll break for
19 15 minutes, resume, and let's see how the problem is.

10:56:46 20 Please adjourn for 15 minutes.

21 [Break taken at 10.56 a.m.]

22 [Upon resuming at at 11.15 a.m.]

23 JUSTICE DOHERTY: Good morning, Kigali. Can you hear me?
24 And if you can hear me, can you tell me what the state of play
11:16:32 25 is.

26 MR HERBST: Excuse me, I'm sorry. We can hear you,
27 Your Honour. The static is still present, and I'm advised that
28 the staff is still trying to work on it. However, it seems right
29 now to be a little less. I don't know if that's because I'm

1 speaking or what the reason is.

2 JUSTICE DOHERTY: What I will do is ask Mr Serry-Kamal to
3 continue, have Mr Kargbo answer, and at the end of that I will
4 check again how you, and in particular - in particular -
11:17:27 5 Mr Kamara and Mr Kanu, can hear.

6 So Mr Serry-Kamal, please put your next question.

7 MR SERRY-KAMAL:

8 Q. Mr Witness, how many minutes - how many meetings did you
9 have with the investigator between the 20th of April 2011 and the
11:18:01 10 6th of May 2011?

11 A. If I can remember, once, when he took my statement. That
12 was the only time.

13 Q. And that was when?

14 A. At the Special Court.

11:18:33 15 Q. On what date?

16 A. I can't remember the particular date, because it's a long
17 time now since 2010 - sorry, 2011.

18 JUSTICE DOHERTY: Mr Serry-Kamal -

19 Kigali, did you hear?

11:18:57 20 MR HERBST: Yes, Your Honour. I did hear that - those
21 questions and answers.

22 JUSTICE DOHERTY: And if the Court --

23 MR HERBST: I think it would assist if Mr Serry-Kamal could
24 sit or somehow be closer to the microphone.

11:19:20 25 JUSTICE DOHERTY: Mr Serry-Kamal is having problems going
26 from his normal long-established practice of standing. We've
27 tried to get the microphone closer to him using my Archibald.

28 MR SERRY-KAMAL: Your Honour, I cannot address the Bench
29 sitting down. I've never done that, ever.

1 JUSTICE DOHERTY: Then I would ask that you come closer to
2 the microphone when you speak, Mr Serry-Kamal. It definitely
3 does help.

4 MR SERRY-KAMAL: Thank you, Your Honour.

11:19:58 5 JUSTICE DOHERTY: Please proceed.

6 MR SERRY-KAMAL:

7 Q. Now, you say you only had one interview with him. Now, how
8 long was that interview?

9 A. It was over some hours anyway.

11:20:26 10 Q. Was any person putting questions to you?

11 A. Yes.

12 Q. Who was putting the questions?

13 A. Mr Bob Herbst. Then there was an interpreter.

14 Q. Mr Kargbo, you also have the advantage of hearing both the
11:20:53 15 English and the Krio interpretation; not so?

16 A. No.

17 Q. You are not illiterate?

18 A. No, sir. No, sir.

19 Q. You are literate?

11:21:13 20 A. No, I didn't go to school.

21 JUSTICE DOHERTY: Mr Kargbo, can you read?

22 THE WITNESS: Yes, ma'am.

23 JUSTICE DOHERTY: Can you write?

24 THE WITNESS: No, ma'am.

11:21:43 25 MR SERRY-KAMAL:

26 Q. Can you speak English?

27 A. No, sir.

28 Q. Now, since you started talking to the investigator, have
29 you spoken to anybody else in connection with this matter?

1 A. I don't remember. I did not talk to anybody concerning
2 this matter .

3 Q. When you were making these statements to the investigator,
4 nobody molested you. Nobody interfered with you, nobody molested
11:23:00 5 you?

6 A. What? Nobody attacked me.

7 Q. You came here of your own free will?

8 A. Yes.

9 Q. And you returned home every day of your own free will?

11:23:20 10 A. Yes.

11 Q. Now, Mr - I am putting it to you that the written
12 statement, although you say cannot read, that you have there that
13 you've been looking at --

14 JUSTICE DOHERTY: Mr Serry-Kamal, he said he can read but
11:23:45 15 he cannot write.

16 MR SERRY-KAMAL:

17 Q. The written statement there was not prepared by you; not
18 so? It was prepared by Mr Bob?

19 A. Yes.

11:24:04 20 Q. Did you sign it?

21 A. Yes.

22 Q. Now, when you were making the statement and you were being
23 asked questions?

24 A. Yes.

11:24:32 25 Q. Now, who was recording the answers? Who was recording the
26 answers?

27 A. Mr Bob.

28 Q. Was anybody showing you what direction you should be
29 following them?

1 JUSTICE DOHERTY: I don't really understand that question,
2 Mr Serry-Kamal.

3 MR SERRY-KAMAL: Let me put it this way:

4 Q. Was anybody leading you as to which questions he was going
11:25:04 5 to ask you or not?

6 A. Say that again?

7 Q. Was anybody leading you on the questions he was asking?

8 A. I do not understand what you mean by "lead". "Lead".

9 Q. Did the person tell you we are going to talk now about
11:25:31 10 Bazzy, and then he starts asking you questions about Bazzy?

11 A. Yes.

12 Q. Who was it?

13 A. Mr Bob.

14 Q. Did he ask you any further questions during the interview
11:26:03 15 about, let's say, Bazzy?

16 A. Yes.

17 Q. And he would record the answers from you?

18 A. Yes.

19 MR HERBST: Your Honour, the video link has been restored.

11:26:30 20 JUSTICE DOHERTY: Good.

21 MR HERBST: But I did not hear the previous questions and
22 answers.

23 JUSTICE DOHERTY: I will go back a bit.

24 MR HERBST: The last question and answer that I heard was:
11:26:51 25 I recorded his answers; and then there was a question about
26 leading, whether I asked him about Bazzy Kamara and he gave
27 answers about Bazzy Kamara, but I didn't hear the answer.

28 JUSTICE DOHERTY: The question was: Did any person - for
29 example I'm going to ask you now about Bazzy, and then questions

1 about Bazzy, and the witness said, yes. The next question was:
2 Who? Mr Bob. Did you ask then further questions, for example,
3 about Bazzy? Yes. Were the answers recorded? Yes. Did you
4 hear that, Mr Herbst?

11:27:38 5 MR HERBST: I did, Your Honour, and I thank you.

6 JUSTICE DOHERTY: Please proceed, Mr Serry-Kamal.

7 MR SERRY-KAMAL:

8 Q. Now, Mr Witness, I referred you to this statement. Did you
9 read it, the witness statement?

11:28:01 10 A. Yes, sir.

11 Q. Now, who prepared it for you? Did you prepare it yourself,
12 or was it prepared for you?

13 A. Well, Mr Bob would ask me a question and he would write.

14 Q. This was on 6 May?

11:28:33 15 A. Yes, sir.

16 Q. Was there any other person present when this statement was
17 made?

18 A. Yes.

19 Q. Did you read it yourself, or was it read to you?

11:29:04 20 A. They read it out to me and they passed it over to me, and I
21 read it myself.

22 Q. And you signed it; not so?

23 A. Yes, sir.

24 Q. Now, Mr Kargbo, I am intrigued by the witness statement. I
11:29:38 25 put it to you that this statement was tailor-made to the order
26 for indictment.

27 MR HERBST: I apologise, Your Honour, I did not understand
28 the question and I'm sure I heard it fully.

29 JUSTICE DOHERTY: It's not entirely clear to me either.

1 I'm not sure what else the statement would be taken for, if it
2 wasn't in relation to an indictment. But maybe you could clarify
3 it, because I notice the witness is looking quiet. What do you
4 mean by that, Mr Serry-Kamal?

11:30:23 5 MR SERRY-KAMAL: It was prepared with a view to the -
6 something that was already in existence. He was working from the
7 answer to the sum. That is what I mean. I was working from the
8 answer to the sum.

9 JUSTICE DOHERTY: Put it to the witness, but put it a
11:30:55 10 little more clearly.

11 MR SERRY-KAMAL:

12 Q. The statement on 6 May was prepared - was like an answer to
13 a problem that already existed.

14 A. It does not happened. What they asked me to explain is
11:31:18 15 what I explained, and that is what they wrote.

16 Q. Who is this they what they asked you? Who asked you?
17 [Indiscernible]

18 A. What Mr Bob asked about and I explained what happened.

19 Q. Now, your friend 334, you'll agree with me, was not a
11:31:48 20 friend of Mr Bazzy?

21 A. I don't know about that. I don't know about his
22 relationships.

23 MR HERBST: I apologise, Your Honour, I did not understand
24 the answer there. I heard the question, but not the answer.

11:32:12 25 JUSTICE DOHERTY: The answer was, "I do not know about
26 that. I do not know about his relationships".

27 Continue, Mr Serry-Kamal.

28 MR SERRY-KAMAL:

29 Q. And I put it also to you that the relationship between

1 Mr Bazzy and yourself was not cordial. You were not friends.

2 You were bitter enemies?

3 A. No. No.

4 Q. But you know 334 very well?

11:33:00 5 A. I know him.

6 Q. You know that he has a desire to be relocated abroad?

7 A. I don't know about that.

8 Q. You know that after the trial, he bought himself a car - a
9 Peugeot car, the first trial?

11:33:37 10 MR HERBST: Your Honour, I would object to that question.

11 JUSTICE DOHERTY: On what grounds?

12 MR HERBST: I don't see how it is possibly relevant.

13 JUSTICE DOHERTY: Which is the first trial, by the way,
14 Mr Serry-Kamal?

11:33:58 15 MR SERRY-KAMAL: Trial Chamber II, Brima and others against
16 - that was the case against Brima and others in which he
17 testified.

18 JUSTICE DOHERTY: What is the relevance of the question?
19 There's an objection on relevance.

11:34:14 20 MR SERRY-KAMAL: My answer to that is that will be - it is
21 our case that this - the whole story is being concocted by the
22 two of them for their own personal benefit and that in the
23 previous trial he received - we will put it to him that he
24 received financial considerations to testify against Bazzy and
11:34:38 25 others.

26 JUSTICE DOHERTY: I see. Very well. Put the question. I
27 allow the question.

28 MR SERRY-KAMAL:

29 Q. Now after that trial he bought the car?

1 A. I saw him with a car, but I did not know where he got the
2 money from. I won't tell lies to this Court.

3 Q. You used to ride that car too. You used to ride that car,
4 you too?

11:35:06 5 A. I'm not a driver. I don't drive.

6 Q. Ride. Ride in the car.

7 A. Except he meets me on the way and gives me a ride, but I
8 never said I owned the car or that I'll be moving around with it
9 for the rest of the day, no.

11:35:28 10 Q. I'm not saying you owned it. I'm saying you used to be a
11 passenger in that vehicle frequently?

12 A. Except he gives me ride.

13 Q. All right. After the Taylor trial he bought another
14 vehicle, a Volvo?

11:35:53 15 A. No. No, I never saw him with a Volvo.

16 Q. All right. You didn't see him with a Volvo but you did see
17 him with a new car after the Taylor trial?

18 A. I never saw him with any other car - a new car.

19 Q. You did not see him with another car apart from the first
11:36:24 20 one?

21 A. No, sir.

22 Q. Just one last general question: Now, Mr Witness, do you
23 have any special skills - apart from lying - do you have any
24 special skills?

11:36:54 25 JUSTICE DOHERTY: I will have that aside taken out of the
26 record. It's improper.

27 MR SERRY-KAMAL: About the special skills?

28 JUSTICE DOHERTY: No, I said the aside.

29 MR SERRY-KAMAL: I'm sorry.

1 JUSTICE DOHERTY: Possibly I wasn't meant to hear it.

2 MR SERRY-KAMAL: You were not meant to hear it.

3 JUSTICE DOHERTY: Definitely not. Continue with your
4 question.

11:37:15 5 MR SERRY-KAMAL:

6 Q. The question is --

7 MR SERRY-KAMAL: May I be guided by your last --

8 JUSTICE DOHERTY: The question, Mr Serry-Kamal, was: Have
9 you any special skills?

11:37:28 10 MR SERRY-KAMAL: Yes.

11 Q. Are you a carpenter, mason, or anything? Did you learn
12 anything in the army? Answer that.

13 A. I did not, but I have a skill - a skilled job which is an
14 artist. I am an artist.

11:37:48 15 Q. What kind of artist?

16 A. Number 1, I can shade. I print T-shirts. If you need a
17 banner, a billboard, I can do it. I know how to do it.

18 Q. Do you do that for Flaming Church, Flaming?

19 A. Yes. Yes.

11:38:21 20 Q. You left [indiscernible] him in charge?

21 A. Yes, sir.

22 Q. Since you left prison?

23 A. Yes, sir. And I'm playing an active role in the Flaming
24 Church, and I'm a God fearing person. I did not come to this

11:38:45 25 Court to tell lies about anybody. What happened is what I'm
26 explaining.

27 Q. No, I just asked you if you attend Flaming Church, that's
28 all. What work do you do for them?

29 A. Well, I render assistance. Wherever there are lapses, I'll

1 volunteer to do it for them.

2 Q. That is since 2009?

3 MR HERBST: I'm sorry, Your Honour. I didn't catch the
4 question.

11:39:21 5 JUSTICE DOHERTY: It inquired the --

6 MR HERBST: [Overlapping speakers]... the answer but I did
7 not understand the question.

8 JUSTICE DOHERTY: The witness was asked whether he attends
9 the Flaming Church since prison. He answered yes and then added
11:39:37 10 that he was active - was God fearing, didn't come to tell lies.
11 And asked what he did for them, he said where there is lapses, he
12 volunteers.

13 MR HERBST: Your Honour, had I hear the question I would
14 have objected to it, but I'm not going to ask that the answer be
11:39:57 15 stricken.

16 JUSTICE DOHERTY: Very well. Is it this line of
17 questioning you're objecting to, or just that one question?

18 MR HERBST: Well I actually don't think the witness's
19 church-going activities are relevant and an appropriate question,
11:40:24 20 but I defer to the Court as to whether that's true or not.

21 JUSTICE DOHERTY: Relevance, Mr Serry-Kamal?

22 MR SERRY-KAMAL: Your Honour, the witness said he's an
23 artist, he does banners and so on, and I said do you do that for
24 Flaming Church.

11:40:41 25 JUSTICE DOHERTY: Yes, but what about his church-going
26 activities? What is the relevance of that?

27 MR SERRY-KAMAL: It could be purely as a professional
28 employed to do it or as a member of the church, and he's told us
29 he's a member of the church and he attends that church. I stand

1 corrected.

2 JUSTICE DOHERTY: No, I'm not talking about that. That's
3 all on record. Nobody is going to go into it. I'm just asking
4 what is the relevance of this line of questioning.

11:41:05 5 MR SERRY-KAMAL: The relevance is that he's told us that -
6 at the beginning he said he was unemployed. Later he said he was
7 a diamond - in the gold business. Now he says he's also an
8 artist. Do I have to explain all the time to Mr Bob?

9 JUSTICE DOHERTY: No, you have to explain to me. I asked
11:41:26 10 you what is the relevance. I have a right to control relevance.

11 MR SERRY-KAMAL: I --

12 JUSTICE DOHERTY: I consider that this is an issue of
13 credibility. I allow the question. Continue.

14 MR SERRY-KAMAL: As Lordship please.

11:41:40 15 Q. Now, Mr Witness, you have told us so many things in the
16 last couple of days. Now, since this matter started, you've
17 admitted receiving some remuneration from the witness services of
18 this Court?

19 A. Yes, sir.

11:42:12 20 MR HERBST: I'm sorry, Your Honour. I did not catch the
21 question.

22 JUSTICE DOHERTY: You have told us so many things in the
23 last few days. You have admitted receiving remuneration from the
24 witness of this - WVS, I presume, of this Court. Answer: Yes.

11:42:28 25 MR SERRY-KAMAL:

26 Q. Now you have tried to tell us that you have protective
27 measures. Do you still go around town freely?

28 A. No. Let me go into that particular area, if you are
29 talking about protective measures. Let me clarify it to the

1 Justice and the Court. If I asked for protective measures, you
2 should know that as long as I'm testifying about what happened
3 against Bazy, they have people in this town who are loyal to
4 them. And for my own safety and security, and I know the type of
11:43:19 5 organisation they have, when you are testifying against them,
6 people would want to take it differently. They would want to
7 take it that you do not belong to them or you are not a part of
8 them. So for my own safety I asked for protective measures.

9 Q. All right. Well, answer my question now: Do you go around
11:43:46 10 freely in town here?

11 JUSTICE DOHERTY: Mr Serry-Kamal, he said "no." I heard
12 him say "no."

13 MR SERRY-KAMAL: He's not answered yet.

14 JUSTICE DOHERTY: The answer was no.

11:44:08 15 Continue.

16 MR SERRY-KAMAL:

17 Q. Do you go to church? Do you still go to church?

18 MR HERBST: Objection, Your Honour. Again I think his
19 religion and his religious practices and church affiliations, in
11:44:33 20 my view, are generally an inappropriate --

21 JUSTICE DOHERTY: I don't think that's the point of this
22 question, Mr Herbst.

23 MR HERBST: [Overlapping speakers]

24 JUSTICE DOHERTY: The question arises from him going freely
11:44:44 25 around the town. This is one example of going freely around the
26 town. On that basis I'm allowing it.

27 MR HERBST: [Overlapping speakers]

28 JUSTICE DOHERTY: Please put the question again.

29 MR SERRY-KAMAL:

1 Q. Do you still go to church?

2 A. Yes, I used to go to church sometimes.

3 Q. No, that is not the question. Do you go to church now?

4 Did you go to church last Sunday?

11:45:15 5 A. No, sir.

6 Q. [Overlapping speakers] Wednesday?

7 A. No, sir.

8 Q. The question is since we start these proceedings, have you
9 been to church?

11:45:27 10 A. No, sir.

11 Q. That will be all.

12 JUSTICE DOHERTY: Thank you very much, Mr Serry-Kamal.

13 Mr Herbst, that's the end of Mr Serry-Kamal's

14 cross-examination. Have you any re-examination for the witness?

11:45:57 15 MR HERBST: I have some brief redirect, Your Honour.

16 JUSTICE DOHERTY: Please proceed.

17 Re-examination by Mr Herbst:

18 MR HERBST:

19 Q. Mr Kargbo, the plea agreement --

11:46:05 20 A. Yes, sir.

21 Q. -- do you have that with you?

22 A. Yes, sir.

23 Q. Do you know whether that plea agreement was drafted by me
24 or by your lawyer, Mr Chief Taku?

11:46:34 25 A. From you and my lawyer Chief Taku.

26 MR METZGER: Your Honour, may I just interpose briefly.

27 JUSTICE DOHERTY: Pause, Mr Herbst.

28 Yes.

29 MR METZGER: If Mr Herbst's intent is to prove from this

1 witness who drafted documents where Defence teams know the
2 knowledge, I'm quite happy for it to be put in alternative form
3 before the Court by way of some form of admission of fact. The
4 witness has given evidence about this point, and it may just be
11:47:25 5 that he doesn't fully know who did what.

6 JUSTICE DOHERTY: Mr Herbst, you heard Mr Metzger. He is
7 permitting you to put in any information on the drafting.

8 MR HERBST: [Overlapping speakers] Yes, Your Honour. The
9 point of my question was to establish that it is quite likely
11:47:50 10 Mr Kargbo did not know who drafted the agreement.

11 JUSTICE DOHERTY: I see. I think that's been conceded.

12 MR METZGER: I think that was the evidence he gave and I
13 didn't pursue it.

14 JUSTICE DOHERTY: Indeed. Please continue, Mr Herbst.

11:48:09 15 MR HERBST: Thank you, Your Honour.

16 Q. Now, you've been asked about protection and your request
17 for same. Isn't it true that you began to cooperate --

18 MR METZGER: Leading question, Your Honour.

19 MR HERBST:

11:48:32 20 Q. -- and provide information before [overlapping speakers].

21 JUSTICE DOHERTY: Mr Herbst --

22 MR HERBST: [Overlapping speakers]

23 JUSTICE DOHERTY: Mr Herbst, there's been an objection that
24 you're leading and it is leading. Please reword - rephrase. Did
11:48:51 25 you hear me?

26 MR HERBST: Yes, I did, Your Honour.

27 Q. At the time that you first began to speak to me on the 20th
28 of April, did you know whether or not protection would actually
29 be provided to you?

1 JUSTICE DOHERTY: Mr Interpreter? I heard the answer, but
2 I didn't hear you.

3 THE INTERPRETER: His microphone was not on. I did not
4 hear the answer.

11:49:51 5 JUSTICE DOHERTY: Very well, I'll ask him to repeat.

6 Mr Kargbo, please repeat your answer.

7 THE WITNESS: I said no, Ma'am.

8 JUSTICE DOHERTY: Thank you. Proceed. Mr Herbst, please
9 proceed.

11:50:16 10 MR HERBST: I'm actually considering whether to ask one
11 more question, Your Honour. If you'll bear with me?

12 JUSTICE DOHERTY: Yes.

13 MR HERBST: I have no further questions of the witness,
14 Your Honour.

11:50:33 15 JUSTICE DOHERTY: Thank you. I have no questions of the
16 witness.

17 Mr Kargbo, that is the end of your evidence. Thank you for
18 giving your evidence. You will now be returning to that other
19 part of the Court. So I will ask WVS to assist you to move from
11:50:51 20 the witness box to the dock.

21 THE WITNESS: Thank you, my Lord.

22 JUSTICE DOHERTY: Given the time and the fact that, as
23 Mr Serry-Kamal reminds me, it's Saturday and a lot of people have
24 come in to work extra, I'm not going to ask you to call another
11:51:10 25 witness, Mr Herbst. But I will now indicate --

26 MR HERBST: Thank you, Your Honour. I would like --

27 JUSTICE DOHERTY: Yes, proceed.

28 MR HERBST: Your Honour, I wanted to raise two brief
29 matters: The second a suggestion for the Court to consider and

1 counsel to consider, and the first, some clarification. If I may
2 proceed briefly to those matters.

3 JUSTICE DOHERTY: Yes, please do so.

4 MR HERBST: Your Honour has indicated that you will be
11:52:00 5 considering over the weekend the preliminary matters that were
6 raised today, and I am asking for some guidance or instruction
7 from the Court, because I do not want to do anything in this
8 proceeding that this Honourable Court would feel in the slightest
9 way inappropriate or untoward. I will not in this proceeding
11:52:35 10 strike any sort of foul blow, and I don't want to even come close
11 to the line. It's my job to present the evidence and to achieve
12 a just solution, whatever it turns out to be.

13 To be completely transparent, it was my intention this
14 afternoon to proceed to the prison, both to refresh my
11:53:07 15 recollection from when I was there before; to try to gather and
16 bring back for the Court the original manual log so that the
17 Court, when it arrives - and indeed, so that all counsel would
18 have the benefit of the original document. At the same time, I
19 was going to talk to people, including Mr Sengabo, who is the
11:53:48 20 person who would arrange my transportation to the prison, to
21 further inquire about some of the procedural matters with respect
22 to the telephone.

23 I will not do it if the Court feels that I ought not to do
24 it. I just won't do it. So I guess I'm asking whether the Court
11:54:26 25 would like me voluntarily to restrict my further contact with
26 either Mr Sengabo or anybody at the prison pending your Honour's
27 further consideration of the issue, I guess, to be determined on
28 Monday. In other words, whether I'm - have I made myself
29 sufficiently clear in terms of the guidance I'm seeking?

1 JUSTICE DOHERTY: I am very clear on it. My intention in
2 saying that I was going to stand it over to Monday was to allow
3 Defence counsel and Prosecution counsel a chance to decide which,
4 if either of them was going to call Mr Sengabo. If neither of
11:55:15 5 them could agree it, then it appears from my rereading during the
6 short break of Rules 85 and 54, that the Court could actually
7 both call him, because he's not a question of fact. He's to do
8 with records. He's not an eyewitness. And in those
9 circumstances, then of course it would be open to both counsel to
11:55:48 10 cross-examine, because the Court would be the - it would be the
11 Court's witness. But that's an unusual procedure, so if you
12 cannot both between you agree who is going to call him, then I
13 will have to do that. The visit to the prison, that, of course,
14 I have no control over, and you're also entitled to look for the
11:56:14 15 original manual log, because it's part of the continuing
16 discovery. I would add in passing that the best evidence rule
17 does not apply in this tribunal, but you're entitled to get it,
18 and I have no objection to you getting it, or asking him for it.

19 It might be preferable, in the light of the dispute, if his
11:56:49 20 deputy or other officer who has knowledge of the procedure for
21 phone calls, et cetera, gave you that information rather than him
22 directly. So I am waiting, basically, if you, counsel, cannot
23 decide who is going to call this gentleman, then on Monday I will
24 say whether the Court will call him.

11:57:12 25 So I hope that answers as your question. But basically,
26 yes, go to the prison. You can ask Sengabo for the original
27 manual because it's part of your duty. On procedure for use of
28 telephones, et cetera, I think it's preferable you ask you
29 someone else. Does that answer your question.

1 MR HERBST: Okay --

2 JUSTICE DOHERTY: Does that adequately answer your
3 questions, Mr Herbst? I think the line to Kigali is frozen.
4 Mr Herbst.

11:57:55 5 MR HERBST: [Microphone not activated] in addition to being
6 a custodian - yes, Your Honour, can you hear me.

7 JUSTICE DOHERTY: I can hear you now but it was frozen for
8 a bit.

9 MR HERBST: Can you hear me, Your Honour?

11:58:04 10 JUSTICE DOHERTY: I can hear you clearly.

11 MR HERBST: I see.

12 JUSTICE DOHERTY: Did you --

13 MR HERBST: I wanted to - I think I heard Your Honour say
14 that you can now hear me clearly?

11:58:17 15 JUSTICE DOHERTY: I can.

16 MR HERBST: What I was saying was I wanted to make sure
17 that there was no misapprehension in terms of what I had advised
18 the Court, and the Court understands. It's my understanding that
19 Mr Sengabo - I think this perception is shared by Mr Metzger

11:58:40 20 based on the submission that he was intending to ask Mr Sengabo
21 about procedures in connection with the telephone at the prison.
22 It's my understanding that in addition to being a custodian of
23 records, Mr Sengabo is the witness best able to testify about not
24 only the procedures about the cell phone, things like whether it

11:59:13 25 has a speaker phone, but also how the phone was used. In other
26 words, what in fact the practical realities were at the time
27 until they discovered the problem when the allegations in this
28 case surfaced and then changed the procedures. I think he's also
29 the witness best able to testify about certain searches that were

1 made as part of their investigation after these allegations came
2 to light to try to understand what the various violations of the
3 Rules were and so forth, and I think I mentioned to the Court
4 that at least two of the accused - not these accused, but two
12:00:02 5 others - were found with various elements of telephone
6 paraphernalia - cell phone paraphernalia, suggesting there might
7 have been other phones involved. So I don't want the Court to
8 think he is just a custodian of the documents, although that's a
9 critical part of what his testimony would be to authenticate
12:00:27 10 these documents. So I'm asking whether I should voluntarily
11 consider myself under restriction in talking to him.

12 JUSTICE DOHERTY: This is why --

13 MR HERBST: About it.

14 JUSTICE DOHERTY: This is why I'm suggesting that he can
12:00:41 15 give the evidence. Of that I have absolutely no quibble. Once
16 he's sworn, it's open slather as to what he's asked. But I am
17 suggesting that on those procedural points - when I say
18 procedure, how things work in the prison system, I am suggesting
19 you speak to his deputy to avoid any suggestion, if he's called
12:01:05 20 by the Defence, that you have in some way colluded with him, put
21 ideas in his head, or put any issues. So that's why I'm saying I
22 would prefer you saw a competent senior official who is as well
23 versed as he is in these procedures. Mr Metzger is nodding in a
24 way that indicates to me I'm on a hiding to nothing. Mr Metzger.

12:01:38 25 MR METZGER: I can well understand what my learned friend
26 Mr Herbst is saying. In fairness, Mr Sengabo is very well versed
27 in these things. What I am concerned about at this stage is that
28 the Prosecution says this falls under the duty of continuing
29 disclosure.

1 JUSTICE DOHERTY: No, the Court said that.

2 MR METZGER: Oh, sorry. It was the Court. I was about to
3 Iambast Prosecution and I can't do that to the Court. What I
4 shall say, Your Honour, is that this is a document if one wants -
12:02:13 5 this is material that has existed since the 29th - now we're
6 talking about since 30 November 2010. This is a document that
7 the Prosecution had access to when the Prosecution started its
8 investigations. What I am concerned about is, for example, my
9 learned friend has just mentioned that some evidence relating to
12:02:45 10 other inmates, but not these, and phones found in their
11 possession, that this case is turning into something where the
12 Prosecution will be using satellite evidence to suggest that
13 there were other phone calls, even though that is not its case.
14 It seems to me that the Prosecution --

12:03:03 15 JUSTICE DOHERTY: We don't know that, Mr Metzger, really.
16 I'm really just trying to achieve a transparency that will allow
17 this witness to be called by one of you, whether it's yourself
18 for the Defence, or him for the Prosecution, or at the end of the
19 day, for me, and maintain a transparent and avoid any allegations
12:03:25 20 of collusion. What the evidence is that comes in, I'll deal with
21 it as it comes in. If it's extraneous or irrelevant I'll say so.

22 MR METZGER: We haven't been served with what the
23 Prosecution has obtained as yet, and that should be the first
24 step before any decision can be made. The e-mail communication
12:03:46 25 which I mention because I know Your Honour has been included in,
26 does indicate that there is already material on work product in
27 the possession of the Prosecution. I really can't make a
28 decision until I know what that is.

29 JUSTICE DOHERTY: I'm just dealing with Mr Herbst's

1 professional problems. Incidentally, Mr Kargbo can be taken out
2 of the witness box.

3 MR METZGER: Insofar as what Mr Herbst has said or asked
4 Your Honour, I certainly cannot be of any assistance to him
12:04:24 5 whatsoever. My application before Your Honour is that he should
6 be restrained from further speaking to the witness.

7 [Witness leaves]

8 MR METZGER: Your Honour, the matter is entirely in your
9 hands as to whether to, as it were, deal with the matter by
12:04:40 10 saying that the application made by the Defence is rejected or
11 leaving that in abeyance, as you have said, but nevertheless
12 giving Mr Herbst permission. There are so many ways of dealing
13 with it, but I can't assist him with that request. It would fly
14 in the face of the submission that I made to Your Honour this
12:05:01 15 morning.

16 JUSTICE DOHERTY: I'm going to repeat what I said.

17 MR HERBST: Your Honour.

18 JUSTICE DOHERTY: Yes, Mr Herbst.

19 MR HERBST: Your Honour, I'm going to make it easy for the
12:05:14 20 Court. Until the Court provide further guidance, I'm not going
21 to go to the prison and I'm not - what I will do is - I've
22 already provided the documents that have been sent to me, we
23 scanned them in and I asked the Court Officer to ask the
24 Court Officer in Freetown to provide copies of those documents to
12:05:42 25 all Defence counsel, so they have been provided.

26 Apparently they are in the courtroom and have not yet been
27 distributed, so I'll ask the Court Officer, if he has those
28 documents, to distribute them to counsel so all counsel have the
29 documents that I and Mr Metzger have that I - Mr Metzger had a

1 portion thereof and also had the updated list which is one of the
2 two documents that I'm asking to be distributed. I will probably
3 just ask Mr Sengabo just to bring with him at some point before
4 the people arrive the original log if that's possible. But I'm
12:06:44 5 going to wait until the Court provides further guidance.

6 What I will do is what I promised to do in the e-mail last
7 night. I will over the weekend provide a summary of the
8 information that I have learned up to now from Mr Sengabo and I
9 will provide that. I will make full disclosure of that
12:07:08 10 information to all counsel by e-mail over the weekend.

11 JUSTICE DOHERTY: Mr Herbst, it's not exactly a ruling, but
12 if my indication wasn't clear, I'll apologise. But I'm saying
13 you can go to the prison as far as I'm concerned. You can
14 collect the original manual log as far as I'm concerned. And I
12:07:32 15 would ask you not to speak to Sengabo but to acquaint yourself
16 with the procedures, matters of phones calls, et cetera,
17 et cetera, through another person. I accept that he's the best
18 person. We'll just have to deal with that with someone else to
19 help you and when he comes to give evidence, then no doubt he
12:07:56 20 will give evidence.

21 MR HERBST: I thank the Court for that clarification. And
22 if such an individual can be identified and is available today,
23 then I will avail myself of that. I will inquire as to whether
24 that's possible, and I thank the Court.

12:08:23 25 Do you want me to move to my second suggestion?

26 JUSTICE DOHERTY: Indeed I do.

27 MR HERBST: Your Honour, I say this with enormous respect
28 for the efforts of the Court staff to fix the transmission
29 problems that have beset us. I'm also cognisant of the great

1 efforts that have been made first to permit me to come to Kigali
2 to try the case from here, and the fact that we have accused in
3 both places, and so the need for video link, even if I were in
4 Freetown.

12:09:15 5 I'm wondering, in light of the difficulties that apparently
6 are quite difficult to resolve, and including the weather,
7 whether it would be at all feasible after Mr Daniels testifies
8 just to bring everybody over here and try the case here. And
9 before it's - even considering the idea, I did ask Mr Sengabo,
12:09:51 10 who is the Court liaison officer whether there would be a problem
11 getting visas for people, even including 334, Mr Bangura and so
12 forth, and he thought that there might be a way to facilitate and
13 expedite that. I know there might be cost considerations
14 involved, but the savings in time might equal the costs.

12:10:23 15 I don't know if it's feasible, but I just throw that out
16 there for the consideration of the Court and Defence counsel. If
17 it's not feasible, I quite well understand. I just think if we
18 were all in one place - and I know the Court does - everybody
19 plans to come out I guess at the end of next week, it would just
12:10:54 20 save a lot of time and effort if we were all here.

21 JUSTICE DOHERTY: I will ask the Registrar, but I foresee a
22 lot of problems, I can tell you, particularly on the transfer of
23 the co-accused. So my initial reaction is: I'm going to leave
24 the status quo as it is, particularly as Mr Daniels is coming
12:11:21 25 over the weekend and will be giving his evidence here and for
26 personal reasons he has to get back quickly to Ghana, so
27 certainly that will be here. I'll explore it but I will not make
28 any decision without consulting other counsel. It's a bit late
29 for me to do it now, but first thing Monday.

1 MR METZGER: Just one --

2 MR HERBST: Thank you, Your Honour. I have nothing further
3 here.

4 MR METZGER: Just one point of information, Your Honour.

12:11:59 5 Some point in time during the evidence of Mr Kargbo, Mr Herbst
6 suggested that the witness statement of Mr Kargbo was in fact
7 annexed to the confidential plea agreement and therefore it was
8 part the same document.

9 Respectfully, there is nothing in the confidential plea
12:12:19 10 agreement which annexes it. It is annexed by administrative
11 exercise. And if it is to be an exhibit, it ought to be a
12 separate exhibit of the Prosecution, it being the case that the
13 confidential fee - not fee, excuse my expression, plea agreement
14 is an unsigned document that is, as it were, in lieu of the
12:12:45 15 original which is floating around in the ether somewhere but we
16 hope to find before the end of the Prosecution case or even this
17 trial, and then it would replace it.

18 But the statement of the witness is a completely separate
19 document, which I believe - I'm not sure the original was signed.
12:13:09 20 It may well have been. And it may not have the same difficulties
21 as the conditional - you know what I mean.

22 JUSTICE DOHERTY: Yes.

23 MR METZGER: It's just that -- [overlapping speakers].

24 JUSTICE DOHERTY: I notice there is a reference to
12:13:27 25 confidential annex 1, but I'll just clarify that point.

26 Mr Herbst, you've heard Mr Metzger mention that the
27 statement was not annexed, but I'm satisfied on what you have
28 said, and I think he is too, that it's intended to be part of the
29 exhibit, and if it is intended to be part of the exhibit, I will

1 admit it as Exhibit P2.

2 Mr Herbst, did you hear me?

3 MR HERBST: Your Honour, I heard everything except what
4 came after Exhibit P. I thought - I thought you had not finished,
12:14:26 5 that's why I had not responded.

6 JUSTICE DOHERTY: I said if it is indeed part of the
7 confidential agreement, and it was to be tendered as part of it,
8 and it's not in dispute, I will admit it either as Exhibit P2 or
9 Exhibit P1A.

10 MR HERBST: I see, Your Honour. I have - it doesn't matter
11 to me which, but I will draw your and counsel's attention to page
12 4 of the confidential plea agreement, which is in paragraph -
13 section 5, paragraph 11, which makes it clear that the witness
14 statement is annexed to the document as confidential annex 1 in
12:15:16 15 order to set out the factual basis by which Mr Kargbo pled - was
16 pleading guilty to the crimes charged in counts 1 and 2 and his
17 participation in them. So it's clearly referenced in the
18 document and therefore it is a part of the document, but I have
19 no objection to how it's marked. I think that's an
12:15:42 20 administrative matter, and it doesn't matter to me.

21 MR METZGER: I think the Defence are content if it were to
22 be given a separate exhibit number. We understand the relevance
23 of it, and I think we've cross-examined sufficiently on it for it
24 to enter the record. So there's no objection on that. But there
12:16:02 25 are two separate considerations: His agreement with the
26 Independent Prosecutor; and his statement to the
27 Independent Prosecutor. It may not matter to all parties, but I
28 certainly will be treating them as separate acts by Mr Kargbo.

29 JUSTICE DOHERTY: I will admit the document as

1 Prosecuti on Exhi bi t P2.

2 [Exhi bi t P2]

3 JUSTICE DOHERTY: Any other matters? If there are no other
4 matters, I'm going to adjourn the Court.

12:16:44 5 MR HERBST: No, Your Honour. It's - I was going to say no
6 matters here except to wish everybody a good weekend.

7 JUSTICE DOHERTY: Well, before I do that I'm going to
8 review a decision I made a couple of days ago. That was a
9 decision in relation to where Mr Kargbo would sit during the
12:16:58 10 evidence of 334. That was on the premise that Witness 334 would
11 be called first and with the implication that evidence could be
12 tailored. However, Kargbo has given his evidence. That
13 consideration no longer applies, and therefore his right to hear
14 the evidence in the trial against him will be exercised and he
12:17:22 15 can remain in the Court while all other witnesses are giving
16 evidence. So that decision is reviewed.

17 Mr Kargbo, you heard me?

18 If there's nothing else I'm going to adjourn Court, and the
19 status quo in relation to both accused here in Court will be
12:17:47 20 mai ntai ned.

21 Did you have an issue, Mr Metzger, that was to be dealt
22 wi th at the end of the day? No?

23 MR METZGER: Don't encourage me, Your Honour.

24 JUSTICE DOHERTY: Thank you, Mr Metzger.

12:18:06 25 First can I thank very sincerely all those staff who have
26 come in on a second Saturday running to run this Court. We are
27 very grateful for your help, and I know it's not something I ask
28 li ghtly. But I will now adjourn Court to Monday at 9 o'clock.

29 Please adjourn Court.

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[Whereupon the Court adjourned at
12.18 p.m., to be reconvened on Monday,
the 25th day of June, 2012, at 9.00 a.m.]