



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

-V-

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

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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 [Monday, 25 June 2012]

2 [Open Session]

3 [Accused enter court]

4 [Upon commencing at 9.00 a.m.]

09:01:06 5 JUSTICE DOHERTY: Before I open, my machine is having a  
6 nervous breakdown. My microphone, I mean.

7 First of all, I'd check if anybody can hear me. Kigali,  
8 can you hear me?

9 [Technical difficulties]

09:05:26 10 JUSTICE DOHERTY: As you can all see, we're all  
11 experiencing a problem. Kigali may not realise that, but the  
12 technicians are going to come into the Court and see what they  
13 can do.

14 THE COURT OFFICER: Can Kigali hear us?

09:06:37 15 Mr Herbst, can you hear us from Kigali?

16 MR HERBST: Yes, I now can hear you. That's the first  
17 thing I've heard.

18 THE COURT OFFICER: Okay. We have a very serious problem.  
19 All the systems on the Judge's table are experiencing an error  
09:06:57 20 message, so the technicians are coming in to fix that. So we  
21 would observe a few minutes for that to happen. So please bear  
22 with us.

23 MR HERBST: We will bear with you here. We recognise that  
24 there is a problem that must be remedied.

09:07:19 25 THE COURT OFFICER: Thank you.

26 [Technical difficulties]

27 JUSTICE DOHERTY: Good morning. Kigali, can you hear me?

28 MR HERBST: Good morning, Your Honour. We can hear you  
29 through the static.

1 JUSTICE DOHERTY: We have a slight delay because there was  
2 something wrong with our machines. I hope our technicians have  
3 heard your comment about the static and I would request them to  
4 work on it.

09:09:14 5 I will now take appearances and then hear if there are any  
6 matters to be raised before the next witness is called.

7 Appearances for the Independent Counsel.

8 MR HERBST: Robert Herbst, Independent Counsel for the  
9 Prosecution.

09:09:37 10 JUSTICE DOHERTY: Thank you.

11 Mr Melron Nicol - Mr Nicol-Wilson, I apologise.

12 MR NICOL-WILSON: Your Honour, Melron Nicol-Wilson for  
13 Hassan Papa Bangura.

14 JUSTICE DOHERTY: Yes.

09:09:54 15 I note Mr Metzger is arriving.

16 Principal Defender, yes?

17 MS CARLTON-HANCILES: Well, apologies. There was an  
18 accident this morning along Wilkinson Road, but Mr Metzger as  
19 well as Mr Serry-Kamal were affected and they had to use an  
09:10:17 20 alternate route. Now Mr Metzger is here. I am hoping  
21 Mr Serry-Kamal will walk in any time. Thank you.

22 JUSTICE DOHERTY: I hope they weren't involved in it.

23 MS CARLTON-HANCILES: Certainly not, Your Honour.

24 JUSTICE DOHERTY: If there are any preliminary matters,  
09:10:40 25 otherwise I will take Mr Metzger's appearance.

26 MR HERBST: Your Honour, there is one short --

27 JUSTICE DOHERTY: Yes. Just wait until Mr Metzger gets his  
28 earphones on.

29 MR METZGER: Kevin Metzger for Santi gie Borbor Kanu.

1 JUSTICE DOHERTY: Thank you, Mr Metzger. Please have a  
2 seat and get your earphones on because Mr Herbst has a  
3 preliminary issue.

4 Please proceed.

09:11:07 5 MR HERBST: Your Honour, it's just an information request,  
6 but Mr Daniels has asked to be provided a document which I had  
7 sent to Freetown this morning to be given to him. I am now  
8 advised that he has been given that document. Thank you.

9 And because he has travelled from Ghana to testify, we are  
09:11:50 10 going to take him next.

11 JUSTICE DOHERTY: Very well. We'll call --

12 MR HERBST: Before 334, who I --

13 JUSTICE DOHERTY: Just before you call Mr Daniels, I would  
14 just remind everyone that on Saturday we agreed to revert to the  
09:12:11 15 original timing of the Court, that means a two hour session from  
16 9.00 to 11.00, a three quarter of an hours break, and then a  
17 reopening for a one and a half hour session, and then another  
18 three quarters of an hour break. So we'll how that goes. If  
19 there are any problems, obviously it may well have to be amended  
09:12:39 20 in the light of problems.

21 Also, Mr Herbst, you've raised the possibility of everyone  
22 going to Kigali. I had given it some thought over the weekend  
23 and I do not consider it a practical option. The original  
24 scheduling or division was adopted without objection by either  
09:13:00 25 party and unsatisfactory as it is in the circumstances, bearing  
26 in mind the rights of both sets of accused, those in Freetown and  
27 those in Kigali, we will have to continue with that division.

28 Please call Mr Daniels now.

29 MR HERBST: We call Mr Daniels.

1 MR SERRY-KAMAL: Your Honour, I'm sorry I'm late.

2 JUSTICE DOHERTY: You have the Principal Defender --

3 MR SERRY-KAMAL: We had a problem on Wilkinson Road.

4 JUSTICE DOHERTY: The Principal Defender represented you  
09:14:18 5 and explained that to us. Thank you.

6 MR SERRY-KAMAL: Thank you.

7 [The witness enters court]

8 WITNESS: ANDREW DANIELS

9 THE COURT OFFICER: Sworn, Your Honour.

09:15:31 10 JUSTICE DOHERTY: Thank you, Mr Court Attendant. Just  
11 before I hear his evidence, can I remind counsel that while the  
12 oath is being administered there must be proper decorum in this  
13 court. There should be no moving around [Overlapping speakers]

14 MR HERBST: Your Honour, we have lost the audio link.

09:15:47 15 JUSTICE DOHERTY: Well, Mr Daniels has been sworn and I've  
16 been reprimanding counsel on an issue that doesn't affect Kigali.  
17 Can you hear me now?

18 MR HERBST: Your Honour, we have lost the audio link. I  
19 don't know if - can Your Honour hear us?

09:16:10 20 JUSTICE DOHERTY: I can hear you very clearly --

21 MR HERBST: We wouldn't be able to hear you respond, but if  
22 Your Honour can hear us perhaps a sign. We've lost the audio  
23 link and now it appears the video-link is frozen.

24 JUSTICE DOHERTY: Mr Serry-Kamal, can you turn off your  
09:16:40 25 microphone.

26 Mr Daniels, we'll just have to wait for the video-link to  
27 be reinstated.

28 THE WITNESS: Very well.

29 JUSTICE DOHERTY: But maybe I can, off the record, welcome

1 you back to the Court.

2 THE WITNESS: Thank you.

3 MR HERBST: Your Honour, we now have the video-link but we  
4 do not have the audio link. I don't know if Your Honour can hear  
09:17:43 5 us because, of course, we cannot hear you.

6 Your Honour, we now have sound. There is static. Can you  
7 hear us?

8 JUSTICE DOHERTY: I can hear you very clearly, Mr Herbst.  
9 I will ask counsel and the witness if they can also hear you.

09:18:27 10 THE WITNESS: Yes.

11 JUSTICE DOHERTY: Yes. They have confirmed that they also  
12 hear you.

13 So please proceed.

14 Again, with the static, our technicians are working on it.  
09:18:38 15 So please proceed.

16 MR HERBST: Your Honour, we here did not hear the witness  
17 take the oath and we did not hear what Your Honour said  
18 thereafter.

19 JUSTICE DOHERTY: The witness took the oath and swore in  
09:18:55 20 English on the Bible. I will be asking him what language he  
21 wishes to use for purposes of record. The Judge afterwards  
22 reminded counsel that they shouldn't - or parties in the Court  
23 that they should not be moving around and they must maintain a  
24 proper decorum during the administration of the oath. It was  
09:19:17 25 nothing to do with Kigali; it was a matter internally.

26 Mr Daniels, what language will you opt to give your  
27 evidence in?

28 THE WITNESS: In English, Your Honour.

29 JUSTICE DOHERTY: The witness will give evidence in

1 English, and I'm presuming our interpreters are in place for the  
2 accused and others.

3 Mr Interpreter, you're in place?

4 THE INTERPRETER: Yes, Your Honour.

09:19:46 5 JUSTICE DOHERTY: Thank you, we will proceed.

6 Mr Herbst, please proceed.

7 MR HERBST: Thank you, Your Honour.

8 Examination-in-Chief by Mr Herbst:

9 Q. Good morning, Mr Daniels.

09:19:59 10 A. Good morning counsel.

11 Q. In late 2010, where were you based; in what country?

12 A. In Accra. In Ghana, Accra.

13 Q. All right. And when did you join the Bazy Kamara Defence  
14 team at the AFRC trial?

09:20:23 15 A. I think June 2005.

16 Q. Did you continue to stay on the team until the trial ended?

17 A. That is correct, yes.

18 Q. Will you tell the Court with what frequency thereafter you  
19 maintained communication with Mr Kamara?

09:21:01 20 A. After the trial he would call me - he would call me in  
21 Accra occasionally, perhaps every couple of months, sometimes  
22 three months.

23 Q. All right. And in late - directing your attention to late  
24 in 2010 --

09:21:29 25 A. Um-hm.

26 Q. -- did you receive a communication from Mr Kamara?

27 A. A telephone conversation. He called me, yes.

28 Q. And would you tell the Court what he told you or asked you?

29 A. He told me that they were contemplating filing a petition,

1 either before the President of the Court or to the Court, for a  
2 review of their sentence or conviction.

3 Q. And was anybody else on the line or was anybody else a  
4 party to the conversation --

09:22:28 5 A. I spoke to --

6 Q. -- in addition to you and Mr Kamara?

7 A. I also spoke to Tamba Brima.

8 MR HERBST: I'm sorry, Your Honour. I couldn't hear the  
9 name.

09:22:48 10 JUSTICE DOHERTY: The witness answered:

11 "I also spoke to Tamba Brima."

12 MR HERBST: Thank you.

13 Q. Now, would you tell us what, if anything, they told you  
14 about the purported basis for the petition for review?

09:23:12 15 MR METZGER: I object to the question, Your Honour, on the  
16 basis that my learned friend has not sought to explain the terms  
17 under which Mr Daniels was speaking to these people to deal with  
18 the question of privilege, which, as I understand Your Honour's  
19 ruling, remains extant; i.e., the principle that Your Honour  
09:23:38 20 ruled on, subject to the matters which we raised before Your  
21 Honour appealing that particular point or seeking permission to  
22 appeal, was that in principle Rule 97 is not absolute, but you  
23 will still have to consider the question of whether or not  
24 privilege existed.

09:24:15 25 JUSTICE DOHERTY: Mr Herbst, your questions were relating -  
26 showed that Mr Daniels acted for Bazzy Kamara in the AFRC up  
27 until the end of the trial; that there was communications  
28 thereafter; therefore, two questions come to my mind in the light  
29 of the objection: Question one, was there still a client-lawyer



1 relationship between the witness and Bazy Kamara; and question  
2 two, was there a client-lawyer relationship between the witness  
3 and Tamba Brima. And if I establish those two matters, I will be  
4 able to rule on the objection. But, of course, we'll ask you  
09:25:17 5 your response first after I hear that evidence.

6 MR METZGER: Thank you.

7 MR HERBST: [Microphone not activated].

8 JUSTICE DOHERTY: Mr Herbst, were you able to hear what I  
9 said? Oh, I can see Mr Herbst's lips moving, but I don't hear  
09:25:48 10 anything.

11 Did you hear what I said, Mr Herbst?

12 MR HERBST: I'm sorry, Your Honour. Yes, I did, and I had  
13 the wrong buttons pushed.

14 JUSTICE DOHERTY: I see. Please continue.

09:26:06 15 MR HERBST:

16 Q. Mr Daniels --

17 A. Yes, I can hear you.

18 Q. -- from the time of the end of the AFRC trial, had you had  
19 any attorney - were you representing first Mr Tamba Brima as a  
09:26:32 20 lawyer?

21 A. I was not.

22 Q. Secondly, from the time of the end of the AFRC trial, were  
23 you representing Mr Bazy Kamara as a lawyer?

24 A. After the trial I represented him on the appeal, and that  
09:27:07 25 was the end of my representation.

26 Q. And when did the appeal end? When did your representation  
27 on the appeal end, just in terms of the year?

28 A. If I recall, it would be 2008.

29 JUSTICE DOHERTY: Mr Herbst, if you would please pause

1 there so I can --

2 MR HERBST: [Overlapping speakers].

3 JUSTICE DOHERTY: -- deal with this objection now.

4 Mr Metzger, you've heard the facts. And do you renew your  
09:27:41 5 objection, or have you anything further to say in light of these  
6 facts?

7 MR METZGER: Yes, Your Honour.

8 The physical manifestation of representation of a client  
9 does not stop and cease or otherwise vanish from the face of the  
09:28:05 10 earth on the end of representation. What Mr Herbst is seeking to  
11 ask relates to, as I understand it, an inquiry by a former client  
12 and someone who was not his client about making an application  
13 for a review.

14 As I understand it, such an application is seeking the  
09:28:29 15 advice of a lawyer. The question that then comes into being is  
16 whether, at the time a client or a potential client seeks the  
17 assistance of a lawyer, whether the lawyer-client privilege then  
18 applies.

19 And I have addressed Your Honour on this and don't propose  
09:28:53 20 to do so again unless I am invited so to do. But the, shall I  
21 say, thrust of the argument, is simply this: Once someone makes  
22 an inquiry of a lawyer about litigation, privilege attaches to  
23 that conversation. Now, if that lawyer decides he doesn't wish  
24 to represent the client, or circumstances mean that he doesn't  
09:29:25 25 represent that client, it still means that conversation, because  
26 it is a conversation between a lawyer and someone who has a legal  
27 problem, is privileged, as I understand the privilege; and  
28 therefore, my objection stands.

29 On the strength of the questioning that has thus far been

1 put, Mr Daniels has for some - a period of some three years, and  
2 as I understand it, continuously - I beg your pardon, three years  
3 and six months, represented Mr Kamara continuously. Does he  
4 cease to represent Mr Kamara when Mr Kamara asks him about the  
09:30:14 5 potential of reviewing his case?

6 JUSTICE DOHERTY: Just a minute, Mr Metzger.

7 MR METZGER: Yes.

8 JUSTICE DOHERTY: Just a moment. You are not representing  
9 Mr Kamara, so why are you making this submission?

09:30:25 10 MR METZGER: I am making this submission because I  
11 represent Mr Kanu and the--

12 JUSTICE DOHERTY: He's not been mentioned.

13 MR METZGER: I appreciate that. But the point about it is  
14 once the evidence is before Your Honour, it is the Prosecution's  
09:30:38 15 case that they were all in it before together, even if Mr Kanu  
16 didn't speak to him. I cannot take the risk, especially with the  
17 wide-ranging approach that the Prosecution has used in this case,  
18 that I should sit silently by whilst Mr Andrews gives evidence  
19 for the Prosecution to, as it were, connect the dots.

09:31:07 20 Now, it may be that counsel for Mr Kamara will make  
21 objection; or he may not. What we do understand - which is why  
22 I'm making this submission - is that on previous occasions when  
23 we have discussed the question of privilege - and we argued this  
24 matter on, I think it was Saturday a week ago - counsel for  
09:31:27 25 Kamara stated openly in this Court on the record that the client  
26 was not waiving privilege - that Mr Kamara was not waiving  
27 privilege. In those circumstances, the matter on record; it is  
28 before the Court; and I may object on behalf of Mr Kamara because  
29 of the dot connection that I expect the Prosecution will, in all

1 fairness, properly seek to try and make.

2 It is in those circumstances that I make this objection.

3 JUSTICE DOHERTY: Very well. I've recorded your objection,  
4 and I will now hear a response by counsel for the Prosecutor.

09:32:04 5 MR METZGER: Thank you, Your Honour.

6 MR SERRY-KAMAL: May it please, Your Honour, before counsel  
7 responds --

8 JUSTICE DOHERTY: Yes, Mr Serry-Kamal.

9 MR SERRY-KAMAL: -- I would like to state that the last  
09:32:14 10 time this issue was raised I declared that I was associating  
11 myself with my learned friend, and since he stated his objection  
12 I didn't think it was necessary to come in. But I want to state  
13 myself and to say that the privilege belongs - even under  
14 Rule 97 - belongs to the client, and we have indicated there that  
09:32:34 15 we will not be waiving our privilege.

16 When you seek advice, the client is entitled to be advised  
17 in confidence, and that privilege, even until the death of the  
18 client, that is what is recorded in the - in all the criminal  
19 procedure books and evidence books.

09:32:59 20 I refer Your Honour to the 2008 edition of Blackstone's  
21 Practice, where it is stated [microphone not activated].

22 JUSTICE DOHERTY: Mr Serry-Kamal, please speak into the  
23 microphone, because the recorders can't hear it. And I would say  
24 at this point, my Blackstone is propping up your microphone and I  
09:33:33 25 will need you to pass it back to me.

26 MR SERRY-KAMAL: I will give you my own copy which is the  
27 one I am referring to. It says that:

28 "Legal professional privilege survives the death of a  
29 client and vests in his or her personal representative, or, once

1 administration is complete, on the person entitled to the  
2 deceased's estate. Such persons, therefore, are entitled to  
3 either claim or to waive the privilege."

09:34:13 4 We have indicated there. My client, who is still alive,  
5 has indicated. I have on his behalf indicated that we are not  
6 waiving privilege. Communication between my learned friend and  
7 his former client is privileged, and we are not waiving that  
8 privilege.

9 JUSTICE DOHERTY: Thank you, Mr Serry-Kamal.

09:34:31 10 Mr Herbst, your response please.

11 MR HERBST: As Your Honour knows, we have several prongs  
12 that we are relying on. One is the crime fraud exception,  
13 assuming the privilege exists and there was a legal  
14 relationship - professional relationship at that point and that  
09:35:15 15 the information provided by Mr Kamara and Mr Brima to Mr Daniels  
16 was for the purpose of seeking legal advice in that particular  
17 conversation.

18 My understanding is that, in fact, the gentlemen in Rwanda,  
19 the accused, and Mr Brima, told Mr Daniels that they were filing  
09:36:03 20 a petition before the Court to assign Mr Daniels --

21 MR SERRY-KAMAL: Your Honour --

22 JUSTICE DOHERTY: That's not the evidence in front of me,  
23 Mr Herbst. The evidence in front of me is that he contemplated  
24 filing a petition to the President or the Trial Chamber for  
09:36:25 25 review of sentence or conviction. That's as far as it went.

26 So the further part that you've added --

27 MR HERBST: [Overlapping speakers]

28 JUSTICE DOHERTY: -- is not in evidence before me.

29 MR HERBST: Then I guess I could elicit that, Your Honour,

1 if Your Honour permits me to ask a few more questions.

2 JUSTICE DOHERTY: Just let me give a ruling on this point  
3 and then I will move on.

4 This is a --

09:41:43 5 MR METZGER: I'm sorry, Your Honour, I rise simply to  
6 remind Your Honour that I had referred you to certain sections in  
7 Archibald, the current edition of which is in the third  
8 supplement of 2012 and I can assist the Court if required on  
9 those sections, 12-12 and 12-68a - simply that, because I  
09:42:02 10 understand it properly.

11 JUSTICE DOHERTY: Read them very thoroughly, Mr Metzger.  
12 Very thoroughly. Thank you for that reminder. My Archibald is  
13 also propping up Mr Serry-Kamal's machine.

14 MR METZGER: I believe that is somewhat earlier than 2012.

09:42:20 15 JUSTICE DOHERTY: It is. But we have had the benefit of  
16 Lexisnexis to look it up.

17 This is a ruling on an objection by counsel for Kanu and  
18 Kamara on the grounds of privilege between the witness and their  
19 respective clients, Mr Metzger's by extrapolation.

09:43:14 20 The evidence before me shows: (1) the representation  
21 between Mr Daniels and Mr Kamara ended in June 2008; (2) there  
22 were occasional calls. There is no evidence before me whether  
23 those were calls of a legal or personal nature; (3) there was a  
24 call from Kamara and Tamba Brima saying they were contemplating  
09:43:45 25 filing a petition. Filing of a petition is provided in our Rules  
26 and is not an illegal enterprise.

27 On the facts before me I do not consider (1) that there was  
28 any client lawyer relationship had been established at the time  
29 the phone was can you see now made; and (2) I say further, whilst

1 I agree with Mr Serry-Kamal that Blackstone says that privilege  
2 exists until death, it also says, and I quote from  
3 paragraph (F)9.36:

09:44:28 4 "Communications in furtherance of crime or fraud are a  
5 well-recognised exception to the principle of legal professional  
6 privilege. It was held that if a client applies to a legal  
7 advisor for advice intended to facilitate or to guide the client  
8 in a commission of a crime or fraud, the legal advisor, being  
9 ignorant of the purpose for which his advice is sought, the  
09:44:54 10 communication between the two is not privileged."

11 And therefore if the evidence as adduced further as  
12 examination-in-chief continues, there is evidence or even  
13 tentative evidence that could be in breach of the lawyer client  
14 privilege, I will listen to that evidence. If as the evidence  
09:45:24 15 progresses, I determine (A) there was a client relationship  
16 developed; and (B) it was above board and in accordance with the  
17 Rules, I will allow the privilege to be maintained and I will not  
18 admit it and not listen to it.

19 Mr Herbst, did you hear my ruling?

09:45:48 20 MR HERBST: I did, Your Honour, I believe and I understand  
21 it.

22 JUSTICE DOHERTY: Sorry, did you say you didn't understand  
23 it? I didn't hear. I apologise.

24 MR HERBST: No. I believe I do understand the ruling, Your  
09:46:04 25 Honour.

26 JUSTICE DOHERTY: Please continue.

27 MR HERBST:

28 Q. Mr Daniels, before the objection by Defence counsel, I was  
29 asking you to relate what Mr Kamara and what Mr Brima told you in

1 that conversati on.

2 A. They told me that they had information that some witnesses  
3 who had previously given testimony in the trial were prepared to  
4 change their testimony.

09:47:18 5 Q. Now did they or did they not, to the best of your  
6 recollection, mention the name or names of any particular witness  
7 who they said were prepared to change their testimony?

8 A. I am not set in the - who they mentioned, though I got the  
9 impression that it was - they were talking about the insider  
09:47:56 10 witnesses as opposed to the civilian witnesses.

11 Q. And who did you believe was the most important of the  
12 insider witnesses, if anyone?

13 A. Who was the most important? The most important --

14 Q. Yes.

09:48:31 15 A. -- would have been 334.

16 Q. I ask you again: To the best of your recollection, was the  
17 name 334 mentioned by either Mr Kamara or Mr Brima?

18 MR SERRY-KAMAL: Objection, My Lord.

19 JUSTICE DOHERTY: Sorry? I can't hear you.

09:48:50 20 MR SERRY-KAMAL: I am objecting to that piece of  
21 questioning. It is a leading question.

22 JUSTICE DOHERTY: It's a leading question, Mr Herbst.

23 Rerword the question, please.

24 MR HERBST:

09:49:13 25 Q. To the best of your recollection, was or was not the name  
26 334 --

27 JUSTICE DOHERTY: Still the same --

28 MR METZGER: Still the same objection. Asked and answered  
29 as well.



1 JUSTICE DOHERTY: First of all, I did not hear the answer,  
2 and it's just a rephrase of the previous question that has not  
3 been allowed.

4 And basically, if you're asking the witness who was named,  
09:49:41 5 I think you could rephrase it in that - in a way that is not  
6 leading. Proceed, Mr Herbst.

7 MR HERBST: [Microphone not activated]

8 JUSTICE DOHERTY: Mr Herbst, I cannot hear you. Your  
9 microphone is not on. Can you start again and switch on your  
09:50:28 10 microphone?

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

12 JUSTICE DOHERTY: Please put your question. I didn't hear  
13 it.

14 MR HERBST:

09:50:44 15 Q. Can you tell the Court whether, to the best of your  
16 recollection, the name 334 --

17 MR METZGER: Objection. Same objection, Your Honour.

18 JUSTICE DOHERTY: Mr Herbst, please. Three times I've said  
19 that's a leading question.

09:51:05 20 MR HERBST:

21 Q. Were any names, to the best of your recollection, mentioned  
22 during the conversation of any insider witnesses at all?

23 A. No.

24 MR HERBST: Now, Your Honour, I would like to ask a leading  
09:51:33 25 question. With permission I'd like to lead the witness, in light  
26 of the fact that the witness has testified, to some extent, a bit  
27 differently than what he had previously advised or confirmed. So  
28 I'd like to put these - the relevant e-mail in front of him to  
29 ask a leading question.

1 JUSTICE DOHERTY: Are you applying to have your witness  
2 declared hostile?

3 MR HERBST: Well, Your Honour, again in our legal culture  
4 we wouldn't have to make a request that he's hostile, and we  
09:52:34 5 would actually be able to refresh his recollection with his prior  
6 statement without doing so. But I understand from Your Honour's  
7 prior ruling that that may not be in accordance with the  
8 procedures in the UK or in this Court. So I am not at all  
9 suggesting Mr Daniels is hostile.

09:53:09 10 JUSTICE DOHERTY: Before we proceed further, this e-mail  
11 you're referring to, is he either a recipient or a sender of that  
12 e-mail?

13 MR HERBST: He was a recipient of that e-mail, and then he  
14 sent back, after reviewing the substance of the e-mail, an e-mail  
09:53:29 15 saying that the summary was [inaudible].

16 JUSTICE DOHERTY: Well, if he was the recipient and a  
17 sender, he is entitled to see the document and identify it.

18 MR SERRY-KAMAL: May it please Your Honour, is my learned  
19 friend treating the witness as a hostile witness, or as a witness  
09:53:56 20 who fails to come to proof? Because if he's treating him as a  
21 hostile witness, then he needs to have your leave. And if he  
22 doesn't come to proof, I don't think it's fair to hand him over  
23 an e-mail.

24 MR HERBST: Your Honour, I did not hear Mr Serry-Kamal's  
09:54:22 25 statement.

26 JUSTICE DOHERTY: Mr Serry-Kamal is objecting. He's  
27 saying - or at least I think he's objecting - and he's saying  
28 that if you are not seeking to declare - sorry. He's putting  
29 forward two possible positions: You're either seeking to have

1 him made hostile, or you're treating him as a witness who hasn't  
2 come up to proof. And in either event, he objects to putting  
3 these documents before the witness.

4 MR METZGER: I support that objection.

09:55:03 5 JUSTICE DOHERTY: And it is supported by counsel for Kanu.

6 MR HERBST: Are you receiving a response, Your Honour?

7 JUSTICE DOHERTY: Pardon, Mr Herbst? I didn't hear you,  
8 Mr Herbst.

9 MR HERBST: I said would you like me to respond to that?

09:55:27 10 JUSTICE DOHERTY: Very much so, because I am going to have  
11 to rule on this.

12 MR HERBST: Your Honour, first of all, it's my belief that  
13 a witness should be permitted to refresh his recollection with  
14 any document if asked; secondly, without declaring a witness  
09:55:55 15 hostile, I believe I should be able to put to the witness a prior  
16 statement that's to some extent, and materially, inconsistent  
17 with the answer he just gave, particularly when it is, in effect,  
18 a statement by e-mail that he had affirmed.

19 Normally we lay that foundation by either showing the  
09:56:34 20 witness the statement and directing his attention to the line  
21 which appears materially inconsistent or partially inconsistent,  
22 or we are allowed to ask a leading question such as, When we  
23 spoke on the phone on 10 May, 2011, did you not tell me so and  
24 so, so and so, so and so?

09:57:14 25 MR METZGER: That would be objected to.

26 MR HERBST: So again I understand that I may be - my  
27 version in my own legal culture may be different. But I think it  
28 ought to be appropriate - recognised as appropriate when  
29 circumstances like this occurs where - where the witness, who

1 is - who, you know, was - who was formerly counsel for an  
2 accused, and who has indicated that he is in frequent  
3 communication with the accused and has continued it, has  
4 suggested that the name was not mentioned, when, in a prior  
09:58:20 5 statement, he said that it is likely that--

6 JUSTICE DOHERTY: Don't tell me what he said.

7 MR HERBST: I'm sorry, Your Honour.

8 JUSTICE DOHERTY: But I understand the import of your  
9 submission. Is there any other points you wish to put?

09:58:43 10 Mr Herbst, is there any other point you wish to put?

11 MR HERBST: [Overlapping speakers].

12 MR METZGER: If it assists Your Honour, I would be happy to  
13 respond on the law so far as I know it and in a separate  
14 jurisdiction, common law and section 1 of --

09:59:16 15 JUSTICE DOHERTY: No. My interest is in the rules and the  
16 jurisprudence of the international tribunals on this point.

17 MR METZGER: Yes. I don't believe that my learned friend  
18 has actually relied on any of the rules. He's relying on his  
19 experience in the United States and hasn't mentioned that when  
09:59:36 20 you want to put - as I understand the jurisdiction of the United  
21 States, you don't simply put a document to a witness. You must  
22 first of all establish one of two things: Either that the  
23 witnesses refuses to testify something that he should have done  
24 in the first place; or that he has forgotten. And that is the  
09:59:56 25 basic groundwork, in my respectful submission, that applies in  
26 his jurisdiction, as it applies in the United Kingdom.

27 JUSTICE DOHERTY: Thank you.

28 MR SERRY-KAMAL: And, Your Honour, even in this  
29 jurisdiction you are not allowed to cross-examine your own

1 witness, and he will be - my learned friend will be  
2 cross-examining his witness if we allow him to put those  
3 questions to the witness.

4 JUSTICE DOHERTY: Which Rule or which order of a Trial  
10:00:28 5 Chamber says that, Mr Serry-Kamal? It would be very helpful to  
6 know.

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

8 JUSTICE DOHERTY: Sorry, Mr Serry-Kamal?

9 MR SERRY-KAMAL: I will tell you in a few minutes.

10:02:21 10 MR HERBST: [Indiscernible] the Court.

11 JUSTICE DOHERTY: Mr Serry-Kamal, have you found that  
12 precedent for me?

13 MR SERRY-KAMAL: Your Honour, I have not found one directly  
14 on the point, but I believe Rule 89(B) should have - should be of  
10:02:45 15 some assistance to the Court. 89(B).

16 MR HERBST: Your Honour, I'm having grave difficulty  
17 hearing and understanding Mr Serry-Kamal.

18 JUSTICE DOHERTY: He referred the Court to Rule 89(B) after  
19 the Court invited him to make further - he had said he would  
10:03:16 20 supply the Court with a Rule or precedent, and he referred the  
21 Court to Rule 89(B).

22 MR HERBST: Thank you, Your Honour. I now understand what  
23 he said, and I have a more specific Rule that I believe applies.

24 JUSTICE DOHERTY: Oh dear, I'd just about made a ruling.  
10:03:37 25 Tell me what it is.

26 MR HERBST: *92 ter*. I am not sure what "*ter*" means, but  
27 it's *92 ter* which says that - I know it says that "... with the  
28 agreement of the parties a Trial Chamber may admit in whole or in  
29 part the evidence of a witness in the form of a written statement

1 or transcript of evidence given by a witness in proceedings  
2 before the Tribunal under the following conditions: The witness  
3 is present in Court; the witness is available for  
4 cross-examination or any questioning by the Judges; and the  
10:04:32 5 witness attest that the written statement or transcript  
6 accurately reflects that witness's declaration and what the  
7 witness would say if examined."

8 JUSTICE DOHERTY: I don't think you're going to get any  
9 agreement from the parties --

10:04:49 10 MR HERBST: [Overlapping speakers]

11 JUSTICE DOHERTY: -- Mr Herbst. Hopeful, but I don't think  
12 it's realistic.

13 MR HERBST: [Overlapping speakers] What I was going to  
14 suggest, Your Honour, was that while the Rule does not directly  
10:05:03 15 apply, it does suggest that when a witness is present in Court,  
16 when he's available for cross-examination, and when he has  
17 already attested that a written statement is accurate, by  
18 implication what had been permitted to be shown to the witness in  
19 circumstances like this where the witness has testified either  
10:05:51 20 inadvertently --

21 JUSTICE DOHERTY: Mr Herbst, you are putting something that  
22 has been objected to, so I cannot permit this particular line of  
23 submission. I am going to make a ruling on this matter.

24 The objection is to a procedure that the Prosecutor is  
10:06:48 25 considering adopting, and it is objected to on the basis that his  
26 procedure is tantamount to having his witness declared hostile.  
27 The Prosecutor responds pointing out the provisions and the  
28 procedures in other jurisdictions.

29 Under the Rules of this Court, Rule 98(A), the Chamber is

1 not bound by national rules of evidence, and what I have before  
2 me are the Rules of Evidence of Sierra Leone of - well, they are  
3 not named as such but I recognise it, the United Kingdom and  
4 United States. This Chamber is not bound by any of them.

10:07:55 5 No exact precedent has been put before me from either of  
6 the Trial Chambers or the Appeals Chamber of this Court on the  
7 questions of whether a witness can be declared hostile or, if he  
8 can be, the procedure to be followed. Rule 89(B) places a  
9 mandatory obligation on the Chamber to apply rules of evidence  
10:08:21 10 which best favour a fair determination of the matter before it  
11 and are consonant with the spirit of the Statute and the general  
12 principles of law. And it also obliges me to control the mode  
13 and order of interrogating of witnesses so as to be effective for  
14 the ascertainment of the truth and avoid wasting time.

10:08:54 15 It is apparent on the submissions and what has been said  
16 under oath by the witness that there was an exchange of documents  
17 pertinent to the issue before me. Provided sufficient foundation  
18 for the transmission of those documents is laid in this Court  
19 now, I will allow them to be put before the witness. Foundation  
10:09:28 20 must be laid first.

21 Mr Herbst, continue please.

22 MR HERBST:

23 Q. Mr Daniels --

24 A. Yes, sir.

10:09:47 25 Q. -- do you have --

26 A. Yeah, I can hear you.

27 Q. Do you have with you the exchange of e-mails?

28 A. Yes, I have.

29 MR METZGER: Can we have sight of same?

1 MR HERBST:

2 Q. [Overlapping speakers]

3 JUSTICE DOHERTY: Indeed. Just pause, Mr Herbst. They  
4 must be shown to counsel for the Defence first.

10:10:06 5 Mr Court Attendant, please see if there are copies  
6 available for counsel for the Defence, and if there are please  
7 put them before each counsel.

8 MR HERBST: Your Honour, it might help Defence counsel if I  
9 were to advise that these are the e-mails that I sent to all  
10:11:07 10 counsel by e-mail on Friday, June 8th, 2012, at [inaudible] 42  
11 a.m.

12 MR METZGER: Respectfully, the attachment was not with the  
13 document. We were advised these e-mails existed and that's why I  
14 asked for sight of them now.

10:11:35 15 JUSTICE DOHERTY: I see.

16 MR METZGER: I am sure it was an error.

17 JUSTICE DOHERTY: Mr Metzger, I would have directed that  
18 they be put before you in any event.

19 MR METZGER: May we just have some time to peruse them  
10:11:47 20 before.

21 JUSTICE DOHERTY: Indeed. And for purposes of record, you  
22 will note that the Court is not perusing them.

23 MR METZGER: Thank you.

24 MR HERBST: Your Honour, we've lost the video-link just  
10:13:16 25 right now.

26 JUSTICE DOHERTY: I can see you and hear you. Can you hear  
27 me?

28 MR HERBST: Now I can, Your Honour.

29 JUSTICE DOHERTY: You can.



1 Mr Herbst, did you say you can hear me?

2 MR HERBST: Your Honour, I can hear you and just now the  
3 video-link has been restored.

4 JUSTICE DOHERTY: Very good.

10:13:45 5 MR HERBST: So I can see you as well.

6 JUSTICE DOHERTY: Are counsel for the Defence ready to  
7 proceed?

8 MR METZGER: I have now seen the document. I am grateful  
9 to my learned friend, and strengthen and renew my objection on  
10:14:31 10 the basis that my perusal of Mr Daniels's answer to my learned  
11 friend suggests that what the Prosecution is seeking to do is  
12 give evidence via a different means.

13 The basis upon which he is seeking to ask this witness  
14 question about names which are mentioned is not supported in this  
10:14:51 15 thread of this e-mail, with the greatest of respect.

16 JUSTICE DOHERTY: Well, that, I think will be a matter for  
17 submission, Mr Metzger, or possibly for cross-examination,  
18 because you are speaking to me in a vacuum.

19 MR METZGER: I will reserve my powder, sorry for having  
10:15:09 20 spilt some of it, and I shall, as it were, rise again at the  
21 relevant time, which I warn the Court is likely to be very  
22 shortly and into the next few questions of Mr Herbst.

23 JUSTICE DOHERTY: Mr Herbst, please proceed.

24 MR HERBST: Thank you, Your Honour.

10:15:39 25 Q. Mr Daniels.

26 A. Indeed. I can hear you.

27 Q. After we spoke on the telephone, I sent you an e-mail  
28 summarising what I thought you had said to me; is that right?

29 A. That is correct.

1 Q. And that e-mail is one of the e-mails before you.

2 A. That is correct.

3 Q. Namely, the one on July 13, 2011, right?

4 A. I think the 13th. Yes, correct.

10:16:22 5 Q. And on July 15 you sent back an e-mail saying the  
6 summary --

7 A. Yes, I did.

8 Q. -- was accurate except for certain matters --

9 A. That is so.

10:16:35 10 Q. -- that were recited in that e-mail.

11 A. That is correct.

12 Q. Now would you direct your attention to the summary.

13 A. Yes.

10:17:12 14 Q. At the end of the 12th line, there is a sentence that  
15 begins with the word "when" --

16 A. Yes.

17 Q. "When I asked"; do you see that sentence?

18 A. I can see.

10:17:28 19 Q. Would you read that sentence to yourself [Overlapping  
20 speakers]

21 A. Very well. "When I asked again --"

22 MR METZGER: He was asked to read it to himself.

23 MR HERBST: [Overlapping speakers]

10:17:41 24 THE WITNESS: I beg your pardon. I've done so several  
25 times.

26 MR HERBST:

27 Q. Okay. Now you earlier testified that you were not certain  
28 that the name of a particular witness was mentioned.

29 A. That is correct.

1 Q. Let me ask you this question: Was it more probable than  
2 not --

3 MR METZGER: Your Honour, I object to that question.

4 MR HERBST: [Overlapping speakers]

10:18:06 5 JUSTICE DOHERTY: Just a minute Mr Herbst. Switch off,  
6 please.

7 Yes, Mr Metzger.

8 MR METZGER: Respectfully, I object to that question. My  
9 learned friend is a lawyer, the witness is a lawyer, we are all  
10:18:20 10 lawyers in this Court looking at this evidence. This is leading.  
11 He knows where he is going. He has taken him to this witness's  
12 answer. He knows what the witness's answer is. He refuses to  
13 accept that. And he is seeking to try and get an answer from  
14 this witness that doesn't exist. Is it more probable or not?

10:18:40 15 The fact of the "or not" in my respectful submission doesn't  
16 reprieve the question from being a prelude to a leading question.

17 JUSTICE DOHERTY: Mr Herbst, we cannot speculate. This is  
18 not a question; it's speculation. Either something is in  
19 writing, or it is not. The witness can read what is written  
10:19:07 20 there. And if he does read it, or if you ask him to read it,  
21 then you can question him and seek clarification if that is  
22 appropriate.

23 MR HERBST: All right. Then I will ask the witness to read  
24 that sentence out loud.

10:19:24 25 MR METZGER: Your Honour, I object.

26 JUSTICE DOHERTY: I have just directed it. Why do you  
27 object?

28 MR METZGER: Sorry, I misunderstood your ruling. I was  
29 going to suggest to my learned friend, far be it for me to teach

1 my grandfather to suck eggs. I'm sorry, I don't mean it in any  
2 pejorative way, but the proper question is: Having read that  
3 e-mail, is there any way in which you wish to change your  
4 evidence or the evidence that you've given in Court? It's  
10:19:56 5 simple, it's effective, it gives the witnesses autonomy to answer  
6 the question. But I'm sorry --

7 JUSTICE DOHERTY: Just a minute, Mr Metzger. He may well  
8 do that next, but I haven't heard what was written, and I need to  
9 hear before I can rule on whether the question that you have  
10:20:12 10 formulated follows on.

11 MR METZGER: I understand.

12 JUSTICE DOHERTY: It's for my benefit.

13 MR METZGER: I understand, Your Honour, that it is for your  
14 benefit. The situation I am trying to avoid is a situation - and  
10:20:23 15 the Rules tell us we should bear very well in mind - a series of  
16 questions asked by my learned friend Mr Herbst may put me in a  
17 situation where I am asking Your Honour to call Mr Herbst as a  
18 witness in this case, and I'm trying to avoid that situation.

19 JUSTICE DOHERTY: I am grateful for your indication,  
10:20:45 20 Mr Metzger. I am working on a premise that this record speaks  
21 for itself. I will hear it. I want to hear what was written --

22 MR HERBST: [Overlapping speakers].

23 JUSTICE DOHERTY: -- because otherwise the questions don't  
24 mean anything to me.

10:21:05 25 THE WITNESS: Your Honour, with your leave --

26 MR HERBST: [Overlapping speakers].

27 THE WITNESS: -- I will read it.

28 JUSTICE DOHERTY: I would be grateful, Mr Daniels, if you  
29 would read it, so I know what we are talking about.

1 THE WITNESS: When I asked again whether Bazy Kamara and  
2 Brima had mentioned his name, Mr Daniels stated that it was  
3 likely that they had. It was likely that they probably had, yes.

4 MR HERBST: [Overlapping speakers] understand that  
10:21:36 5 sentence. We have to read the previous sentence.

6 JUSTICE DOHERTY: Mr Herbst has indicated that for the full  
7 clarification of the Court, you should read the preceding  
8 sentence. Since it's not before me, again I rely on --

9 THE WITNESS: Okay.

10:21:49 10 "At first Mr Daniels advised that they did not mention the  
11 names of any such witnesses who were prepared to change their  
12 testimony but that he was thinking that they were referring to  
13 the former soldiers, the insiders, rather than the civilian  
14 witnesses, the most important of which was the first TF1-334."

10:22:18 15 JUSTICE DOHERTY: I would say for purposes of --

16 MR HERBST: [Overlapping speakers].

17 JUSTICE DOHERTY: Just a moment. Please proceed with your  
18 examination-in-chief, Mr Herbst, because I shouldn't be  
19 commenting at this stage on any form of the evidence. It is  
10:22:44 20 inappropriate for me to do so.

21 MR HERBST:

22 Q. Mr Daniels, are those two sentences read together an  
23 accurate summary of what you told me in our oral conversation  
24 during my investigation?

10:23:02 25 A. Yes, they are.

26 Q. And is it or is it not likely that Mr Kamara and Mr Brima  
27 mentioned the name 334 --

28 A. You see --

29 MR SERRY-KAMAL: Objection.

1 MR HERBST: [Overlapping speakers].

2 JUSTICE DOHERTY: Just a moment. What's the objection?

3 MR SERRY-KAMAL: Well, the question has been answered  
4 before by reading these two sentences, and we are going back to  
10:23:39 5 where we were before he was asked to read two sentences.

6 JUSTICE DOHERTY: I am allowing --

7 MR SERRY-KAMAL: They have already been answered.

8 JUSTICE DOHERTY: I am allowing the question because it is  
9 a clarification of a written document.

10:23:50 10 Please put the question. Mr Herbst, please put the  
11 question.

12 MR HERBST: Yes, Your Honour.

13 JUSTICE DOHERTY: Mr Herbst, the interpreters cannot hear  
14 you at this end. Please pause and I'll ask Mr Court Attendant to  
10:24:20 15 check with the AV if there is some loss of connection.

16 MR HERBST: Your Honour, I don't think there was a loss of  
17 connection. I just hadn't put the question yet.

18 THE INTERPRETER: Your Honour, we can hear him now.

19 JUSTICE DOHERTY: Very good, Mr Herbst. The interpreters  
10:24:39 20 can hear you quite clearly. Please put your question again. I  
21 didn't record it.

22 MR HERBST: Yes, Your Honour. I am trying to recall  
23 what --

24 JUSTICE DOHERTY: It started off with "Is it likely", And  
10:24:53 25 then there was an objection.

26 MR HERBST:

27 Q. Is it or is it not likely, Mr Daniels, that during the  
28 conversation Mr Kamara and Mr Brima mentioned the name 334 as one  
29 of the witnesses who was prepared to change his testimony?

1 A. I am not 100 per cent certain that it was mentioned, and  
2 that is why - how I've explained it in my e-mail. You can see  
3 from my e-mail that I state categorically "no", and I thought it  
4 was possible that he was mentioned, but I am not 100 per cent  
10:25:35 5 certain. That is the only clarification I can give. But I am  
6 certain that --

7 Q. [Overlapping speakers]

8 A. -- they were referring to insider soldiers, not civilians.

9 JUSTICE DOHERTY: Mr Herbst, please continue, because I am  
10:25:56 10 not listening - excuse me, I am not hearing you. If you're  
11 speaking, I don't hear. Are you speaking? Because I see your  
12 light is on.

13 MR HERBST: Yes, Your Honour. I did put the light on, but  
14 I hadn't said anything yet. I'll just ask one last question on  
10:26:14 15 this.

16 Q. In the answer you just gave you used the word "possibly".  
17 My question was: Is it more probable than not that they did  
18 mention the name three times?

19 JUSTICE DOHERTY: Mr Herbst, the witness has answered, and  
10:26:37 20 I think this is forcing the issue more. The witness cannot say  
21 more than he said, to my mind.

22 MR HERBST: Thank you, Your Honour. I just have a few more  
23 questions for the witness and then I'll [Overlapping speakers] --

24 JUSTICE DOHERTY: The witness is yourself, Mr Herbst. I am  
10:26:58 25 not curtailing you except when it comes to rules of procedure.

26 MR HERBST: I understand, Your Honour, and I appreciate  
27 that very much.

28 Q. Mr Daniels, in the year 2010, how many trips did you make  
29 to Freetown from Ghana?

1 A. Probably about two or three. At least two.

2 Q. And would you tell the Court the approximate months in  
3 which you did travel to Freetown?

4 A. I believe it was May and December.

10:27:35 5 Q. Of 2010?

6 A. That is so.

7 Q. When you went to Freetown, did you visit anyone related to  
8 the accused Mr Kamara?

9 A. I visited Kamara's mother.

10:27:57 10 Q. And when you went to Freetown two or three times a year,  
11 did you typically visit Mr Kamara's mother?

12 A. No, I only saw her once and I haven't seen her since.

13 Q. Thank you very much.

14 A. You're welcome.

10:28:35 15 JUSTICE DOHERTY: Mr Herbst, is that the end of your  
16 examination-in-chief? I beg your pardon, I didn't hear.

17 MR HERBST: Yes, it is, and I thank you.

18 JUSTICE DOHERTY: Now, Mr Nicol-Wilson, you're first  
19 counsel. Have you questions of the accused - of the witness?

10:29:01 20 MR NICOL-WILSON: No question, Your Honour.

21 JUSTICE DOHERTY: Thank you.

22 Mr Metzger, I think you're next. Or it might be - sorry,  
23 it's Mr Serry-Kamal, but I have no - very well, he's allowing you  
24 to go first. Please proceed.

10:29:16 25 MR METZGER: I shall go in whatever order pleases Your  
26 Honour the most.

27 JUSTICE DOHERTY: I am happy for you to go first.

28 MR METZGER: Thank you.

29 Cross-examination by Mr Metzger:



1 Q. Good morning, Mr Daniels.

2 A. Good morning.

3 Q. Simply this: I think I am right in saying that in all of  
4 the evidence that you've given, you haven't mentioned the name  
10:29:42 5 Kanu?

6 A. I have not.

7 Q. And that's because he did not speak to you in any of these  
8 conversati ons.

9 A. He did not.

10:29:48 10 Q. Thank you. Secondly, please, this: As counsel who has  
11 appeared before the Special Court for Sierra Leone, you are fully  
12 aware of the client and lawyer privilege under Article 17 Of the  
13 Counsel's Code of Conduct, aren't you?

14 A. I should be, but I'd like to refresh my memory.

10:30:19 15 Q. I mean, if there is - if we need to, we can put it before  
16 you. I had just meant to ask you, really, about 17(C)(iii). Can  
17 I put it in this way: Do you understand it to be the case that  
18 in general terms, communication between a lawyer and his client,  
19 even - within Special Court matters, are privileged?

10:30:49 20 A. Yes.

21 Q. And that the privilege vests in the client?

22 A. Yes.

23 Q. Thank you.

24 JUSTICE DOHERTY: Just to be fair to the witness, I am  
10:31:01 25 going to pass down my copy of the Code of Professional Conduct.

26 MR METZGER: I am grateful, Your Honour. Unfortunately,  
27 I've only got it on computer myself.

28 Q. Can I ask you, Mr Daniels, please, just to refresh your  
29 memory by going to Article 17?

1 THE COURT OFFICER: Your Honour, the technicians think that  
2 the feedback we are getting is because of the interaction of  
3 Mr Daniels's mic, and [indiscernible], so can we kindly ask him  
4 to keep his mic down or a little bit up.

10:32:08 5 MR METZGER: [Overlapping speakers].

6 JUSTICE DOHERTY: And Mr Metzger, you too.

7 MR METZGER: Thank you.

8 Q. Now, bearing that in mind, would you agree that whatever  
9 communication there was between yourself and the people in

10:32:39 10 Rwanda, you did not form the opinion that it was in furtherance  
11 of a criminal enterprise?

12 A. No, I did not have that belief.

13 Q. Yes. Indeed, had you believed that to be the case,  
14 17(C)(iii) would have required you to, as it were, make that  
10:33:04 15 information available.

16 A. Correct.

17 Q. And you have followed the code in this case? You have  
18 followed the code in relation to privilege in this case, have you  
19 not?

10:33:21 20 JUSTICE DOHERTY: There is an awful lot in the code. There  
21 is something like 36 sections, so maybe --

22 MR METZGER: I am talking about Article 17.

23 JUSTICE DOHERTY: I see.

24 MR METZGER: I'm sorry, I thought I had made myself clear.

10:33:34 25 I am limiting myself. I don't normally limit myself, but on this  
26 occasion I am limiting myself to Article 17, in particular  
27 17(C)(iii).

28 Q. 17(C)(iii), Mr Daniels, as I said, places you in a position  
29 where as Defence counsel if you believe - reasonably believe that

1 the material, the subject matter of your conversation, involved  
2 the commission of a criminal offence, you would then be obliged  
3 to report it?

4 A. That is correct.

10:34:08 5 Q. Yes. And I'm saying you followed that code because you did  
6 not report a criminal offence?

7 A. I was not aware of any criminal offence at the time.

8 Q. Yes. Would you say "not aware" is higher than reasonable  
9 belief?

10:34:24 10 A. What I am saying is that for me it was an innocent  
11 representation being made to me to possibly act for him in the  
12 future.

13 Q. All right.

14 A. I mean, there was nothing criminal about the conversation

10:34:36 15 --

16 Q. And --

17 A. -- so far as I was concerned.

18 Q. And indeed you were waiting to hear from the

19 Principal Defender Ms Carlton-Hanciles about whether or not you

10:34:47 20 would be assigned should there be an application for review?

21 A. That is correct. I was waiting to be contacted.

22 Q. As you understand it, if a witness voluntarily decides to  
23 change his testimony or recant and communicates that to a person,  
24 would that amount to a criminal offence?

10:35:05 25 A. I don't think so. No, not to my knowledge.

26 Q. Thank you very much. That's all I have.

27 JUSTICE DOHERTY: Yes, Mr Serry-Kamal, questions for the  
28 witness.

29 MR SERRY-KAMAL: Thank you very much, Your Honour.

1 Cross-examination by Mr Serry-Kamal:

2 Q. Good morning, Mr Daniels.

3 A. Good morning, sir.

4 Q. Now you may recall on Tuesday the 12th of July, last year.

10:35:34 5 A. Yes.

6 Q. You sent prosecuting counsel an e-mail telling him you are  
7 outside of [inaudible] for a couple of days and that you'd a  
8 subpoena to come and testify against your client?

9 JUSTICE DOHERTY: Mr Herbst.

10:35:58 10 MR HERBST: I'm sorry, Your Honour --

11 JUSTICE DOHERTY: Mr Serry-Kamal --

12 MR HERBST: -- [Overlapping speakers] Mr Serry-Kamal was  
13 asking.

14 JUSTICE DOHERTY: We were also hearing a lot of squeaking,  
10:36:09 15 or at least I was, so I didn't hear it clearly. But he was  
16 referring to some communication on the 12th of July last year  
17 between you and him.

18 Now I am going to ask him to put his question again. And  
19 Mr Daniels, can I ask your assistance. Maybe switching off your  
10:36:28 20 machine might help that noise.

21 Mr Serry-Kamal, will you put your question again, please?

22 MR SERRY-KAMAL:

23 Q. The question is in July last year did you send an e-mail to  
24 prosecuting counsel now, that you were out of Accra and that if  
10:36:45 25 you were needed to testify against your client, a subpoena had to  
26 be issued to you?

27 A. Yes, I did.

28 MR HERBST: Your Honour, could I have Mr Serry-Kamal's  
29 question read back?

1 JUSTICE DOHERTY: "Is it correct on the 12th of July last  
2 year you sent prosecuting counsel an e-mail that you were out of  
3 Accra and that if you were needed to testify against your client,  
4 you would have to have a subpoena - a subpoena would have to be  
10:37:20 5 issued"?

6 And the witness replied in the affirmative, "yes."

7 MR SERRY-KAMAL:

8 Q. And in that same e-mail, you also said that the extent of  
9 your knowledge on this matter is only to the effect that you were  
10:37:44 10 informed of possible new evidence coming up and that you'd be  
11 contacted by the Court?

12 A. That is correct.

13 Q. And you said you had no specific knowledge of any - you had  
14 no knowledge of any specific allegations against Bazzy or others  
10:38:07 15 to commit contempt against the Court?

16 A. That is correct.

17 Q. And you were expecting to hear from the Court?

18 A. I was told by Bazzy that the Court would contact me. The  
19 Court did not contact me and I did not contact the Court.

10:38:43 20 JUSTICE DOHERTY: Continue.

21 MR SERRY-KAMAL:

22 Q. Now, you said you visited Freetown.

23 A. Yes.

24 Q. Two or three times in two --

10:38:54 25 A. That's correct.

26 MR HERBST: I'm sorry, Your Honour. I heard something  
27 about Freetown in Mr Serry-Kamal's question, but I didn't  
28 understand the question.

29 JUSTICE DOHERTY: Mr Serry-Kamal asked the witness if he

1 had visited Freetown on two or three occasions and the witnesses  
2 replied "yes."

3 MR SERRY-KAMAL:

4 Q. In the year 2010.

10:39:21 5 A. Yes, that's correct.

6 JUSTICE DOHERTY: Mr Serry-Kamal, I missed something.

7 MR SERRY-KAMAL: In the year 2010.

8 JUSTICE DOHERTY: In the year 2010. Thank you. That has  
9 also been affirmatively answered.

10:39:33 10 Continue.

11 MR SERRY-KAMAL:

12 Q. You said you visited the mother of Bazzy on one occasion  
13 only.

14 A. That is correct.

10:39:41 15 Q. Was the question of money ever discussed?

16 A. No.

17 Q. Either here or in Accra?

18 A. I am not with you. Money about what?

19 Q. To finance any projects.

10:40:06 20 A. Certainly not.

21 Q. That will be all for the witness.

22 JUSTICE DOHERTY: Thank you, Mr Serry-Kamal.

23 MR SERRY-KAMAL: Sorry, My Lord. Just one question before  
24 we say goodbye.

10:40:29 25 Q. Now, were you asked to bring any money at all?

26 JUSTICE DOHERTY: To who or where?

27 MR SERRY-KAMAL: To Bazzy's mother or to send it to  
28 anywhere in Freetown.

29 THE WITNESS: Bazzy himself was not aware that I was going

1 to visit his mother, so the answer is no.

2 MR SERRY-KAMAL:

3 Q. No. Thank you very much, Mr Daniels. Have a pleasant trip  
4 back.

10:40:54 5 A. Thank you very much.

6 JUSTICE DOHERTY: Mr Herbst, have you re-examination of the  
7 witness?

8 I think Kigali has got frozen again. Mr Herbst, can you  
9 hear me?

10:41:14 10 MR HERBST: I can hear Your Honour but I cannot see.

11 JUSTICE DOHERTY: I was at Mr Serry-Kamal has completed his  
12 cross-examination which completes the cross-examination of this  
13 witness, and I am asking have you re-examination?

14 MR HERBST: I do, Your Honour, but when I lost the link  
10:41:35 15 here Mr Serry-Kamal had indicated to the Court that he had one  
16 additional question.

17 JUSTICE DOHERTY: The question was --

18 MR HERBST: [Overlapping speakers] the question.

19 JUSTICE DOHERTY: The question was: Were you asked to  
10:41:51 20 bring money to anyone in Freetown? And the answer was, Bazy was  
21 not aware I was going to see his mother. So the answer is no.

22 MR HERBST: I thank the Court. I have some brief  
23 re-examination.

24 JUSTICE DOHERTY: Please proceed.

10:42:16 25 Re-examination by Mr Herbst:

26 Q. Mr Daniels, if you will look at the July 12 e-mail that  
27 Mr Serry-Kamal asked you about on cross-examination.

28 A. I am looking at it.

29 Q. It's only two paragraphs long.

1 A. Yes.

2 Q. Mr Serry-Kamal asked you whether you had referred to  
3 Mr Kamara as a client, as your client. In fact, you referred to  
4 him in the e-mail as your former client.

10:43:11 5 A. That is correct.

6 Q. And in fact, one of the reasons that you did not invoke the  
7 privilege when I was asking you questions and you had given me  
8 answers -- [Overlapping speakers]

9 JUSTICE DOHERTY: Mr Herbst, Mr Metzger is on his feet.

10:43:33 10 MR METZGER: Objection. It appears that my learned friend  
11 is about to give evidence, "one of the reasons that you didn't"  
12 normally follows by "was because ..." So I think my objection he  
13 is about to give evidence. Could he possibly rephrase the  
14 question so that we can get the witness's evidence.

10:43:52 15 JUSTICE DOHERTY: Mr Herbst, I don't know what the question  
16 exactly is going to be because you haven't asked it, but whatever  
17 it is, please don't lead the witness.

18 MR HERBST: Give me one minute, Your Honour, to decide  
19 whether or not to ask the question at all, if you will.

10:44:16 20 JUSTICE DOHERTY: By all means.

21 MR HERBST: I have nothing further, Your Honour.

22 JUSTICE DOHERTY: Thank you. I have no questions of the  
23 witness.

24 Mr Daniels, thank you very much for coming to Court and I  
10:44:36 25 know it wasn't a very convenient time for you or your family to  
26 be travelling, so I particularly wish to thank you and also to  
27 wish you well in the future.

28 THE WITNESS: Thank you very much, Your Honour.

29 JUSTICE DOHERTY: You're welcome. Thank you.



1 Please assist Mr Daniels to leave the Court.

2 [The witness withdrew]

3 JUSTICE DOHERTY: Mr Herbst, can you hear me?

4 MR HERBST: Yes I can, Your Honour.

10:46:09 5 JUSTICE DOHERTY: Your next witness, please.

6 MR HERBST: Your Honour, We call 334, who I hope is in the  
7 Court and in the courthouse.

8 JUSTICE DOHERTY: Very good.

9 MR HERBST: [Overlapping speakers]

10:46:33 10 JUSTICE DOHERTY: Now, just a moment. Before the witness  
11 is brought in, the witness still has protective measures in  
12 place; therefore, the curtains will have to be drawn and the  
13 screen will have to be put up.

14 How long will it take to put the screen in place, please?

10:46:56 15 Before the witness is brought in, that should be done.

16 MR METZGER: Might I just remind Your Honour that on the  
17 last occasion we were considering this witness, Your Honour had  
18 indicated in view of the rescinding of the protective measures in  
19 the Charles Taylor trial that you were going to ask the witness  
10:47:20 20 what way he favoured giving his evidence. I just wanted to  
21 remind Your Honour of that.

22 JUSTICE DOHERTY: I am grateful, Mr Metzger, because I do  
23 recall I said something about Rule 75, I think it was (J). But  
24 let us not worry about it. I will ask him because of the many  
10:47:38 25 submissions. It would be possibly more appropriate to first ask  
26 Mr Herbst if he has taken instructions on this point.

27 MR METZGER: Thank you, Your Honour.

28 JUSTICE DOHERTY: Mr Herbst, you may recall, I think it was  
29 on Monday, or last week, there were questions about the

1 protective measures of 334 and one of the points was whether he  
2 still wanted those protective measures.

3 Have you been able to take instructions from the witness or  
4 can the Court ask him?

10:48:09 5 MR HERBST: Your Honour, I would prefer very much that the  
6 Court ask him directly and whatever he wants to do I will abide  
7 by.

8 JUSTICE DOHERTY: When the witness is brought in I am going  
9 to go into private session because these are issues of  
10:48:39 10 protection, and I think it's appropriate to ensure his protection  
11 and security that we do it in private session.

12 For the purposes of those members of the public who are  
13 listening and watching the Court, the next witness who will be  
14 called was a protected witness who was granted protective  
10:48:59 15 measures in another trial. The Court will ask some preliminary  
16 questions of the witness, and it will do so in private session in  
17 order to protect his security.

18 [The witness enters court]

19 JUSTICE DOHERTY: Good morning, Mr Witness. Before you  
10:51:03 20 were sworn, I want to first say I hope you are well; and  
21 secondly, I want to ask you some clarification about your  
22 protective measures. Can you hear me?

23 No, just a minute. Let me sort this one out first before  
24 you swear the witness.

10:51:33 25 Mr Witness, can you hear me?

26 THE WITNESS: Yes, My Lord.

27 JUSTICE DOHERTY: Mr Witness, you have protective measures  
28 in place. They were granted to you by Trial Chamber I. In  
29 another trial, you did not - you rescinded or revoked those

1 protective measures.

2 I would like us to be clear if you wish to proceed with  
3 protective measures in this court hearing, or do you not want to  
4 proceed with protective measures in this court hearing?

10:52:24 5 THE WITNESS: Well, I would like to go into open because I  
6 would like the truth to be known. Even the last time when they  
7 said they accorded me protection, all throughout the country  
8 people knew that I had testified. So if you look, they will have  
9 a place that has been told in town that has my name. If you  
10:52:53 10 watch that place you would see my name. You would see me there.  
11 Even this trial, as I am coming I know that people are aware that  
12 I was coming here to testify. So I think there is no protection.  
13 So I just have to go in the open so that people would know the  
14 truth of what I am saying.

10:53:21 15 JUSTICE DOHERTY: So to be clear and to make sure that I  
16 have heard you correctly, you are prepared to proceed without  
17 that screen behind you and with people hearing your name and  
18 where you live? That's three things. I'll start one by one:  
19 Without the screen?

10:53:41 20 THE WITNESS: Yes, My Lord. Because even in that AFRC  
21 trial when they put me behind the screen, people were well aware  
22 that I testified. It was well known. So if they even use it, I  
23 think it's the same thing. So I'd rather be in the open so that  
24 people would know that I am testifying.

10:54:09 25 JUSTICE DOHERTY: Very good, and I am clear on that point.  
26 And also that you are willing to have the Court and the public  
27 hear your name?

28 THE WITNESS: Yes, My Lord.

29 JUSTICE DOHERTY: And where you live?

1 THE WITNESS: Yes, My Lord.

2 JUSTICE DOHERTY: That is fine. We will therefore go back  
3 into, if we're not - I've just realised we may not have been in  
4 private session. But since there was no mention of the witness's  
10:54:42 5 name or personal details, I have no concern that there is any  
6 need for redaction.

7 We will have the curtains opened and the screen removed.

8 MR HERBST: [Overlapping speakers].

9 JUSTICE DOHERTY: I note actually we are very close to the  
10:54:57 10 two-hour break time.

11 So Mr Witness, although you've only come in for a few  
12 minutes, we've made some progress. We will take a  
13 three-quarters-of-an-hour break now. This will allow the screen  
14 to be removed and the Court be in open session. Did you  
10:55:15 15 understand me?

16 THE WITNESS: Yes, My Lord.

17 JUSTICE DOHERTY: Very well.

18 The witness is not sworn, but I would ask that WVS help him  
19 to leave the witness box.

10:55:29 20 Counsel in Kigali and counsel for --

21 MR HERBST: Before we adjourn --

22 JUSTICE DOHERTY: Sorry, Mr Herbst, you were going to say  
23 something?

24 MR HERBST: I had one matter just to - a preliminary matter  
10:55:46 25 to raise with the Court. In my zeal to turn over everything I  
26 had relating to 334, I turned over an interoffice memorandum  
27 dated December 7, 2010, from the Prosecution, from a Mr Lamin to  
28 Mr Johnson.

29 The memo, now that I have perused it again, contains some

1 security information relating to Mr 334's relatives abroad. Had  
2 I realised what was in there and looked more closely at it, I  
3 would not have turned the document over without very, very heavy  
4 redaction.

10:56:54 5 I am going to request - I am not going to be referring to  
6 the document or any of its contents on direct examination, but I  
7 am requesting of the Court and counsel that if there is to be any  
8 cross-examination on the matters contained in the memo, that that  
9 be done in closed session, regardless of the witness's  
10:57:33 10 preferences about how he testifies. I don't believe the names of  
11 his relatives and where they live should be a matter of public  
12 record.

13 JUSTICE DOHERTY: Obviously this is a matter that could or  
14 could not arise. I don't know. When it arises, I will deal with  
10:57:50 15 it. But we are now on notice that it could arise and Defence  
16 counsel are on notice. So if they are putting contents of that  
17 document to a witness, then I would ask that I be informed and  
18 that you renew your application at that point.

19 MR METZGER: Your Honour, may I ask for clarification as  
10:58:15 20 to --

21 MR HERBST: Thank you, Your Honour.

22 MR METZGER: -- whether the protective status is being  
23 rescinded or not? Because if it is, I am not sure that anybody  
24 will use that information, but then the Prosecution may not,  
10:58:26 25 respectfully, fetter the way in which Defence counsel wish to  
26 cross-examine. Your Honour may; but not the Prosecution.

27 JUSTICE DOHERTY: I am satisfied that the witness TF1-334  
28 has knowingly and carefully considered his protective measures  
29 and of his own volition and application has asked that they be

1 rescinded. As a result of that clear and unequivocal statement  
2 on his part, his evidence will be given in public and in open  
3 session.

4 In the event of security issues that existed at the time  
10:59:14 5 that he was protected, or security issues relating to his family  
6 that may have existed at the time he was protected, I will deal  
7 with those security issues when and as they arise.

8 The Court cannot make a ruling in a vacuum. The only  
9 observation I would make - and I am trying not to make a ruling  
10:59:41 10 in a vacuum - is the decision has taken effect just of now. So  
11 it existed prior.

12 MR NICOL-WILSON: Your Honour, just one preliminary matter  
13 before we take the break. There was mention of the witness  
14 having seen a doctor during the time he was supposed to have  
11:00:01 15 testified. I would want a copy of that medical certificate made  
16 available to the Defense.

17 JUSTICE DOHERTY: Why? There is medical and patient  
18 privilege as well, you know. So you better tell me why you want  
19 it.

11:00:15 20 MR NICOL-WILSON: Your Honour, there is a likelihood I  
21 would have to cross-examine the witness on issues pertaining to  
22 his nonattendance of these Court proceedings at the scheduled  
23 dates, so I want to have a look at that medical.

24 JUSTICE DOHERTY: You know, it's a privileged document. I  
11:00:36 25 will think about this and if at the time again - because there is  
26 provisions in these Rules relating to some of these matters you  
27 are raising. I will have a look at them. He also has privilege.  
28 I'll deal with it when it comes up.

29 MR NICOL-WILSON: As Your Honour pleases.

1 JUSTICE DOHERTY: But at least you've put me on good notice  
2 to get a little research done, Mr Nicol-Wilson.

3 MR NICOL-WILSON: As Your Honour pleases.

4 JUSTICE DOHERTY: Mr Witness, you've heard all that was  
11:01:07 5 said and I am sure that you understand all that was said, and we  
6 will deal with those two things, if necessary, if they come in  
7 Court. Did you understand?

8 THE WITNESS: Yes, My Lord.

9 JUSTICE DOHERTY: Very well. We normally take a break at  
11:01:22 10 this time because of the time difference with Kigali. That break  
11 is 45 minutes. We will resume Court at 11.50. Please adjourn  
12 Court.

13 [Break taken at 11.02 a.m.]

14 [Upon resuming at 11.40 a.m.]

11:56:03 15 JUSTICE DOHERTY: Kigali, can you hear us?

16 [Microphone not activated]

17 THE COURT OFFICER: Can Kigali hear us, please?

18 JUSTICE DOHERTY: Mr Herbst, if you're speaking, you're  
19 very faint. I think I hear your voice in the background.

11:56:46 20 [Microphone not activated] before the witness is sworn because  
21 you must hear the oath.

22 Mr Court Attendant, please check with our people to see if  
23 it can be louder. Can the interpreters hear? Because they will  
24 be interpreting for the witness.

11:57:20 25 THE INTERPRETER: No.

26 MR HERBST: Testing one, two, three, four.

27 JUSTICE DOHERTY: We can hear you clearly now.

28 THE INTERPRETER: We can hear him clearly in the booth as  
29 well.

1 JUSTICE DOHERTY: Thank you, Mr Interpreter. Mr Court  
2 attendance, please swear the witness.

3 WITNESS: ALIMAMY BOBSON SESAY

4 JUSTICE DOHERTY: Thank you.

11:58:22 5 Mr Witness, are you going to give your evidence in Krio? I  
6 heard you speak.

7 THE WITNESS: In Krio, ma'am.

8 JUSTICE DOHERTY: Thank you. Please proceed, Mr Herbst.

9 MR HERBST: Thank you, your Honour.

11:58:39 10 Examination-in-chief by Mr Herbst:

11 Q. Good morning and good afternoon, Mr Bobson Sesay.

12 A. Good afternoon, My Lord.

13 Q. Do you see Sammy Kargbo, also known as Sammy Ragga, in the  
14 courtroom today?

11:59:11 15 A. Yes, My Lord.

16 Q. Will you point him out for the record?

17 A. That's him sitting down there.

18 THE COURT OFFICER: Sorry to interrupt, but the transcriber  
19 cannot hear anything so we have to pause.

11:59:31 20 JUSTICE DOHERTY: For purposes of record, I would note that  
21 the witness stood up and indicated the defendant sitting in the  
22 dock - the defendant Samuel Kargbo.

23 THE COURT OFFICER: She cannot hear Mr Herbst.

24 MR HERBST: [Indiscernible] technical problem.

12:00:20 25 JUSTICE DOHERTY: The transcriber cannot hear clearly  
26 enough so could you pause, Mr Herbst, while I ask the AV booth if  
27 they can raise the volume coming in from Kigali.

28 MR HERBST: Yes, Your Honour. I was going to do the  
29 testing one, two, three, to see if the problem had been resolved.



1 THE COURT OFFICER: Can we try one more time please?

2 Mr Herbst, say something so we know if she can hear you better.

3 MR HERBST: Yes, of course I would be happy to do so. How  
4 do you hear me now?

12:01:24 5 THE COURT OFFICER: She's indicating that she doesn't hear  
6 you very well.

7 MR HERBST: Your Honour, I'm speaking quite as loudly as I  
8 think I can without --

9 JUSTICE DOHERTY: I accept that, Mr Herbst.

12:01:43 10 MR HERBST: [Indiscernible] into the microphone.

11 JUSTICE DOHERTY: I can see that. It's the intervening few  
12 thousand miles that are causing us the problem.

13 MR HERBST: I have moved the microphone a little closer to  
14 me. Does this help? I've been asked to try again. Testing one,  
12:03:14 15 two, three, four.

16 JUSTICE DOHERTY: That's clear to me, let's see if the  
17 transcriber can hear it. Good. We're back on line. The witness  
18 has pointed to the defendant Samuel Ragga Kargbo.

19 Mr Herbst, please continue with your examination-in-chief.

12:03:41 20 MR HERBST: Thank you, Your Honour.

21 Q. Mr Sesay, would you tell the Court how you know  
22 Samuel Kargbo and what your relationship was with him in late  
23 November 2010?

24 A. Samuel Kargbo I can say is a family friend to me. In those  
12:04:25 25 days his father and my own father came from the same village in  
26 Kamabai. He met us at Pademba Road when they had a problem. All  
27 of us spent time in the prisons. Even when he was released, we  
28 remained very good family friends. We had served in the army  
29 together.

1 Q. And when you say "all of us in the prisons", to what other  
2 persons were you referring?

3 A. Well, in the prison even with Bomb Blast when we were  
4 arrested on 2 June 2000.

12:05:44 5 MR HERBST: Your Honour, the video link is frozen so I'm  
6 not sure - okay, I think it's back now.

7 JUSTICE DOHERTY: Proceed.

8 MR HERBST:

9 Q. And when you say Bomb Blast, to whom are you referring?

12:06:06 10 A. Hassan Papa Bangura.

11 Q. Do you see him in the courtroom today?

12 A. Yes, My Lord, he is in the courtroom.

13 Q. Would you please point him out?

14 A. There he is sitting down towards the two officers.

12:06:38 15 JUSTICE DOHERTY: Mr Witness, what colour of shirt is he  
16 wearing?

17 THE WITNESS: Something I can see him wearing off white.  
18 He is sitting in between two officers.

19 JUSTICE DOHERTY: Thank you. Please proceed, Mr Herbst.

12:07:01 20 The witness has identified the accused Hassan Papa Bangura.

21 MR HERBST:

22 Q. Would you tell the Court how long you've known Mr Bangura,  
23 to whom you refer as Bomb Blast?

24 A. Well, I've known Mr Bangura for quite a long time in the  
12:07:20 25 army. During the AFRC he was my boss. I was with him directly.  
26 I was the MTO to him, military transport officer. Even when we  
27 went to the jungle, I was still his subordinate as his personal  
28 security. Up to the time we formed the West Side, I was his ADC,  
29 up to the time that we were arrested. We are very close.

1 Q. And what is an "ADC"?

2 A. It is aide-de-camp.

3 Q. In late November 2010, did you receive a phone call from  
4 Mr Kargbo?

12:08:29 5 MR NICOL-WILSON: Objection, Your Honour.

6 JUSTICE DOHERTY: Why?

7 MR NICOL-WILSON: As much as I do not represent Mr Kargbo,  
8 I think the Independent Counsel has started a process of leading  
9 the witness which is totally unacceptable.

12:08:49 10 JUSTICE DOHERTY: It's not exactly leading because there's  
11 a yes/no answer to it. But it does give a name. It's a very  
12 borderline case. The question is out now. But I would warn you,  
13 Mr Herbst, against leading in future.

14 Mr Metzger, you're on your feet.

12:09:16 15 MR METZGER: Your Honour, yes. I wanted to support the  
16 objection. It has my support on the basis that we've jumped from  
17 "I know him" to did you receive a telephone call at X number time  
18 from so and so. There's no background, there's no preparation to  
19 show us what level of contact they had, et cetera. And for that  
12:09:38 20 reason, I ally myself to the objection.

21 JUSTICE DOHERTY: Mr Herbst, the evidence as it stands in  
22 actual fact, counsel has a point. The evidence as it stands has  
23 them all in Pademba Road Prison so a little bit more foundation  
24 to have him making phone calls in 2010 I think would be  
12:10:15 25 appropriate. So inasmuch as that is important, I would ask you  
26 to lay that foundation.

27 MR HERBST: I'm sorry, can Your Honour hear me?

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

29 MR HERBST: I thought I did hear the witness testify that

1 after he got out of Pademba Road Prison he maintained his  
2 friendship and relationship with Mr Kargbo so I thought there had  
3 been a sufficient foundation laid.

12:11:08 4 JUSTICE DOHERTY: He said when - he remained a good - well,  
5 I'm not sure when he was released from prison. I know when  
6 Mr Kargbo was released but there's more than one of them on this  
7 telephone conversation, so some foundation leading up to November  
8 2010 would clarify the issue.

9 MR HERBST: All right.

12:11:32 10 Q. Mr Sesay, would you tell the Court when you got out of  
11 Pademba Road Prison?

12 A. Maybe around November - no, August 2004.

13 Q. And after you got out of prison in 2004, when did you next  
14 see Mr Kargbo approximately?

12:12:13 15 A. Mr Kargbo was still in prison afterwards. I used to visit  
16 them when they used to come to the Court. I used to visit him.

17 Q. When did - approximately when did you see him outside of  
18 the prison walls at Pademba Road?

19 A. Well, it was in 2009 that they were pardoned. They were  
12:12:49 20 released from prison.

21 Q. And from 2009 until late November 2010, would you tell us,  
22 please, with what frequency you maintained contact with Mr Kargbo  
23 and what your relationship was during that period of time?

24 A. Well, at that time we used to see each other. The  
12:13:26 25 relationship was cordial. We used to coordinate things. The  
26 relationship was still good.

27 Q. [Indiscernible] direct your attention to late November  
28 2010, did you have occasion to receive a telephone call relating  
29 to this matter?

1 A. Well, in November I was in my house and I was busy doing  
2 something when I got a call on my phone. I looked at this call.  
3 I picked it up and it was Sammy who was calling them. Then he  
4 said "Yapo" - because most times he calls me Yapo - and he said,  
12:14:26 5 Where are you? I said, I'm at my house. Then he said, Please, I  
6 have a very important discussion that I want us to have. He  
7 said, But it is not something we can do on the phone. He said,  
8 How best can I see you? And I told him, I said, Well, I am busy  
9 now, but I don't know if you can find time for us to see each  
12:14:54 10 other the following day. We had that discussion until he called  
11 me the following day.

12 Q. After he called you the following day, did you have  
13 occasion to meet with him?

14 A. Well, when he called me the other day, I was preparing  
12:15:23 15 myself to go to my mother's village, that is Newton.

16 THE INTERPRETER: Your Honour, can the witness repeat the  
17 registration number of the car slowly.

18 JUSTICE DOHERTY: Mr Witness, Mr Interpreter did not hear  
19 the number of the car clearly. Please repeat it.

12:15:42 20 THE WITNESS: I was with my --

21 MR SERRY-KAMAL: Pleading that he goes slowly so we can  
22 take at least some of his evidence down.

23 JUSTICE DOHERTY: And Mr Witness, could you speak a little  
24 more slowly. Pause at the end of each sentence, because it's  
12:16:04 25 being interpreted. It's being transcribed and counsel also need  
26 to make a note of what you're saying. Please repeat the number  
27 of the car first and then continue with your evidence.

28 THE WITNESS: The car that I was using, which was a taxi,  
29 is ADW 814.

1 JUSTICE DOHERTY: Proceed, please. Please proceed,  
2 Mr Herbst.

3 MR HERBST: Yes, Your Honour.

4 Q. Who, if anyone, joined you in your car for your trip to  
12:17:05 5 Newton?

6 A. Well, I got a call from Sammy telling me that he was on his  
7 way, and he joined me in my car and we left together towards  
8 Newton.

9 Q. Can you tell the Court what, if anything, Mr Samuel Kargbo  
12:17:35 10 said to you in the car on the way to Newton?

11 A. Well, on our way going, Mr Samuel Kargbo said, Yapo, I told  
12 you yesterday that I have something to discuss with you, but you  
13 are a man with hot temper. Maybe if someone tells you something,  
14 you'll want to behave some way. That's why I didn't tell you on  
12:18:09 15 the phone yesterday. At that time I was driving. He said, But  
16 now that we're going, it's those men. I asked him which men?

17 Then he said those men in Rwanda prison. He said they called him  
18 and they talked to him to please talk to me, because they've  
19 heard that the two of us have a very good relationship. I said,  
12:18:43 20 My man, I don't want to hear anything about those men. Don't  
21 tell me anything about them. But as we were driving along, Sammy  
22 persisted and he said, My man, this thing that I'm telling you,  
23 it is not something you would regret. He said Yapo, I am telling  
24 you those men want you to help them.

12:19:08 25 Then I said in what way? He said the men have gotten  
26 advice from their lawyers who's told them that the only way that  
27 they could be released from Rwanda prison is for them to get some  
28 key witnesses, especially you. Then I said how? They said those  
29 men really want you to help them as a brother. They really want

1 you to help them.

2 I said, Well, in what way? Then he said those men really  
3 want you to change your story. Then I asked Sammy what meant. I  
4 really wanted to become angry. He said, No, please don't be  
12:19:55 5 angry. He said, Those men want you to change your testimony that  
6 you had given that caused them to be jailed. Then I said, Sammy,  
7 that is not possible.

8 MR SERRY-KAMAL: Again I appeal to the Court for him to  
9 slow down so that we can take it down. He's stringing up a  
12:20:13 10 series of sentences.

11 JUSTICE DOHERTY: Mr Witness, can you speak more slowly?  
12 Because the transcriber needs to keep up with you, please.

13 THE WITNESS: Yes, My Lord, but it slows down my memory  
14 because as I am thinking, that's how I'm talking.

12:20:31 15 JUSTICE DOHERTY: I understand. Just do your best.

16 Mr Serry-kamal, please switch off your machine.

17 Continue, Mr Witness. You said you wanted to become angry.

18 THE WITNESS: Then he said Yapo, don't be angry about this  
19 issue. This thing, there is something good coming out of it. I  
12:21:06 20 said what good? He said those men wanted to - they are ready to  
21 pour money in this issue. There is financial support in this as  
22 long as you cooperate. We continued going.

23 As we were going, Sammy's phone rang. When his phone rang  
24 he said, Aha, Bobby, that's Blast calling. Then he gave me the  
12:21:39 25 phone and said your man wants to talk to you. Then I took the  
26 phone. Then Blast said, My man. Then I said, Yes, sir. Then he  
27 said, Your man has told you exactly. Then I said, Yes, Sammy has  
28 explained to me. Then he said, What's going on? Then I said,  
29 Well, I am still considering --

1 MR NICOL-WILSON: Your Honour, can the witness please slow  
2 down.

3 JUSTICE DOHERTY: I've asked him twice. There's an  
4 official transcript. If they cannot keep up with - if the  
12:22:15 5 official transcript cannot keep up with him, I'll have to slow  
6 him. But he's explained.

7 MR NICOL-WILSON: Because there is a likelihood I will have  
8 to cross-examine before the transcript becomes available so I  
9 have to take down notes.

12:22:31 10 JUSTICE DOHERTY: You've heard, Mr Witness.

11 THE WITNESS: Yes, ma'am. This is a tactics to slow down  
12 my memory. I've having continuous attack from the councils.

13 MR METZGER: [Microphone not activated] tactics please. I  
14 beg Your Honour's pardon.

12:22:49 15 JUSTICE DOHERTY: I am speaking, please don't interrupt me.

16 MR METZGER: I was objecting to what the witness said, not  
17 what Your Honour said.

18 JUSTICE DOHERTY: Mr Witness, I'm going to try and hold my  
19 hand up every now and again to - you just speak a little slower.

12:23:13 20 MR SERRY-KAMAL: Your Honour, I know that you do not speak  
21 Krio but we have something said in Krio which is very  
22 uncomplimentary of us. He said we were using tactics to confuse  
23 him and we are not.

24 JUSTICE DOHERTY: He said --

12:23:29 25 MR SERRY-KAMAL: We are using tactics to confuse him and we  
26 are not.

27 JUSTICE DOHERTY: The interpretation I heard was "tactics  
28 to slow him down." That's the way it was interpreted.

29 Mr Witness, I'm going to hold my hand up every so often. I



1 want you to pause and just speak more slowly. When I put my hand  
2 up, it means you've speeded up. You understand me?

3 THE WITNESS: Yes, My Lord.

4 JUSTICE DOHERTY: Keep going. You just said Bomb Blast  
12:24:07 5 said, My man. You said, Yes, sir. I didn't hear the next bit.  
6 You started repeating what Bomb Blast said, but I haven't heard  
7 it. Answer that question.

8 THE WITNESS: When Sammy said Bobby, he said that's your  
9 man calling. That's Blast calling. Then he gave me the phone.  
12:24:35 10 He says he wants to talk to you. Then I said, Yes, sir. He  
11 said, Well, has your man told you? I said, Yes, sir. He was  
12 just explaining to me. He said, But please, I want you to  
13 cooperate with those men. I want you to help them. I said I've  
14 heard everything that you've said, but I will think about it.  
12:25:07 15 I'll know what to do. So I handed over the phone back to Sammy.

16 JUSTICE DOHERTY: [Microphone not activated]

17 THE WITNESS: So after which --

18 MR HERBST: Now --

19 THE WITNESS: -- I continued my journey and Sammy was still  
12:25:40 20 with me. So as we were going, Sammy was still convincing me. He  
21 was saying Bobby - because normally most times he calls me Yapo.  
22 He said, My man, I don't want you to fail those men. I want you  
23 to cooperate. Because - because this - this particular mission,  
24 I myself --

12:26:14 25 JUSTICE DOHERTY: Go on. Continue.

26 THE WITNESS: -- would have financial benefits out of this.  
27 You will benefit and I will benefit.

28 JUSTICE DOHERTY: Continue, Mr Witness.

29 THE WITNESS: He said please, those men, help them. Then I

1 said, Well, okay. Now that you've said it, I'll think it over  
2 and I'll see what to do. Then afterwards, we dispersed. Sammy  
3 went his way and I went my way.

4 MR HERBST: May I put another question to the witness now?

12:27:00 5 JUSTICE DOHERTY: Yes, please.

6 MR HERBST:

7 Q. Mr Witness, in the course of your answer to the previous  
8 questions, you referred to the men in Rwanda when you were  
9 describing both what Mr Ragga said to you - what Mr Kargbo said  
10 to you and what Mr Bangura said to you. Was either Mr Kargbo or  
11 Mr Bangura or both more specific about which men in Rwanda they  
12 were referring to?

12:27:32

13 A. Well, Sammy told me that Bazzy and Five Five wanted to talk  
14 to me. He said they wanted to talk to me. He said they had  
15 called him because the two of us were close.

12:28:20

16 THE INTERPRETER: Excuse me, Your Honour.

17 JUSTICE DOHERTY: Just a moment. I can hear another  
18 interpreter addressing me. Is there a problem?

19 THE INTERPRETER: She was merely interpreting what  
20 Mr Herbst was saying as the witness was speaking.

12:28:29

21 JUSTICE DOHERTY: Thank you. I understand.

22 MR HERBST: I didn't hear that answer and I would like to  
23 have it repeated.

24 JUSTICE DOHERTY: I didn't get it all down but I've got the  
25 following. Sammy told me Bazzy and Five Five wanted to talk to  
26 me. He said, and then I didn't hear the rest. Mr Witness, could  
27 you pick up your answer where you said he said. Mr Witness, I'll  
28 read to you what you just said and then - because we didn't hear  
29 everything. You said, "Sammy told me Bazzy and Five Five wanted

12:28:48

1 to talk to me." Continue your answer from there, please.

2 THE WITNESS: Yes. Sammy said Bazy and Five Five wanted  
3 to talk to me. He said that was why they called him, because  
4 they were made to understand that the two of us have a close  
12:29:39 5 relationship and he was the only person who was able to talk to  
6 me.

7 JUSTICE DOHERTY: Mr Herbst, your next question, please.

8 MR HERBST: Thank you.

9 Q. And when you were speaking to Mr Bangura on the phone, was  
12:30:03 10 he more specific in referring to the men in Rwanda that he was  
11 referring to?

12 A. Yes, he told me. He said, Your man. He said your man has  
13 told you, eh? He said please cooperate with your men in Rwanda.  
14 He told me. He did not hide it from me. He said my man, it's  
12:30:25 15 your men. They want you to help them. He said since we're on  
16 the phone, Sammy would discuss everything with you.

17 Q. Thank you. Now --

18 JUSTICE DOHERTY: Mr Witness, I understood the witness to  
19 be more - Mr Herbst, could you switch off your machine for a  
12:30:54 20 moment.

21 Mr Witness, I understand the question was did you know -  
22 did Hassan Papa Bangura actually name anyone?

23 MR NICOL-WILSON: Your Honour, I think the witness has  
24 answered twice that the only conversation is from Bomb Blast he  
12:31:19 25 said I want you to cooperate with those men, and the Prosecutor  
26 asked again was he more specific? And then he repeated again  
27 that he said I want you to cooperate with those men. So I think  
28 it's very clear, Your Honour.

29 JUSTICE DOHERTY: Are you telling me I can't ask a

1 question?

2 MR NICOL-WILSON: Your Honour, I am responding to the  
3 second question which was put to the witness by the Independent  
4 Counsel, and I think the issue is very clear. Twice he has  
12:31:48 5 answered.

6 MR METZGER: Your Honour, may I ally myself to that  
7 submission on the strength of the statement we have, there's no  
8 detail of the names given to him and therefore there ought to be  
9 no expectation from the Prosecution unless he has material that  
12:32:08 10 he has not provided us with that indicates that that was the  
11 position. It's on that basis I ally myself to the submission.

12 JUSTICE DOHERTY: I have a right to ask questions too.  
13 It's in the Rules. But in the light of what you've said, I will  
14 reserve my question.

12:32:24 15 MR METZGER: Thank you.

16 JUSTICE DOHERTY: But let it be clear that I am entitled to  
17 ascertain the truth. I have always adopted what I consider to be  
18 a procedure, even with the leeway that the Rules give me of not  
19 asking questions that incriminate. But I am reserving that.

12:32:48 20 MR METZGER: I'm very much obliged to Your Honour. I just  
21 wanted to put it on the record that obviously we operate on the  
22 basis of disclosure to us and sometimes these things do take us  
23 by surprise if there's something more expected than what we've  
24 been served.

12:33:04 25 JUSTICE DOHERTY: Very well. I'll leave it at that and  
26 I've also laid down my - what would you say? Mark.

27 MR METZGER: Let's use gavel, Your Honour.

28 JUSTICE DOHERTY: Never used them in 25 years.

29 Mr Herbst, please continue.

1 MR HERBST: Your Honour, I know you didn't hear me and you  
2 probably were not able to see me signaling on the monitor. We  
3 had lost the video and audio link, so we did not hear any of the  
4 colloquy between Court and counsel until Your Honour said in  
12:33:52 5 substance that you had not used a gavel in 25 years.

6 JUSTICE DOHERTY: Basically I asked a question of the  
7 witness. Two counsel for the Defence objected to me asking a  
8 question. I put on record that the Court has a right to ask  
9 questions. It's in the Rules. Then there was a statement  
12:34:23 10 concerning disclosure, and I said in light of the fact of that  
11 disclosure I would not pursue my question, but I would not lose  
12 sight of the entitlement I have to seek clarification if I so  
13 consider it appropriate. However, it's been a matter of personal  
14 policy that I do not ask a witness a question that could  
12:34:49 15 incriminate either him or an accused person.

16 MR HERBST: [Overlapping speakers]

17 JUSTICE DOHERTY: The reference to gavels came from  
18 counsel.

19 Sorry, Mr Herbst, I spoke over you. Could you please  
12:35:09 20 repeat.

21 MR HERBST: Yes, I'm sorry, Your Honour. We heard the  
22 audio, but we want you to know that the video is frozen while you  
23 were speaking. But now it has been restored. So if I may, I'll  
24 ask my next question.

12:35:26 25 JUSTICE DOHERTY: Please do so.

26 MR HERBST:

27 Q. Mr Witness, to whom do you understand Bomb Blast to be  
28 referring when he spoke to you and asked you to cooperate with  
29 his men in Rwanda?

1 A. Well, because there are three convicts there whom I know  
2 when I was in the AFRC. He told me about Bazzy and Five Five  
3 specifically. He said those men really want to talk to you. He  
4 said, Please, we want you to cooperate.

12:36:14 5 Q. Now, in the next few days did you have additional contact  
6 with either of the two men Mr Kargbo and/or Mr Bangura?

7 A. Well, after this time, Sammy called me again. He said  
8 Bobby, where are you? And I said I was on my way going to PWD in  
9 Kissy. He told me that he was by Sarolla, so I was driving along  
12:37:00 10 and I picked him up. I and Sammy drove together and went to PWD  
11 because I had - I was going to meet my sister at PWD Junction.

12 So as we were driving to PWD Junction, Sammy started the  
13 same topic. He said Bobby, really those men are desperate. They  
14 really want to talk to you because if I can't get in touch with  
12:37:41 15 you one-on-one for them to know that I was really with you, then  
16 this thing won't really go down well. This programme that I am  
17 after won't go down well. He said, So my man, I want you to  
18 cooperate. I am still telling you that those men are really  
19 ready to pour money on this thing. I really want you to  
12:38:09 20 cooperate. So when we got to PWD Junction, I disembarked from  
21 the vehicle and Sammy received a call.

22 And he said, Ah ha, Yapo, it's Bazzy calling me. Then I  
23 saw them. They were talking. There was a small distance between  
24 us. I did not really hear what they were saying, but I saw him  
12:38:40 25 talking. Then Sammy said, My man, come and talk to your man.  
26 Bazzy wants to talk to you. Then I said no. I said I'm not  
27 talking to him. I'm not going to talk to him. But he still  
28 persisted. I said I'm not going to talk to Bazzy.

29 So later he came to me and he said, My man - that is Sammy,

1 he said, My man, I'm begging. Because I have told those men that  
2 we were together, and they said in 15 minutes' time they will  
3 call again. Bazy said he was going to call Five Five so that  
4 the two of them would talk to you. And I said, Hey Sammy, you  
12:39:26 5 are pressurising me. I said, Sammy, I don't want to talk to  
6 those men. Leave me alone. Okay.

7 As we stood there discussing, and within that time he got  
8 another call. He said, Oh, it's Five Five calling. So Sammy  
9 continued to convince me. He will come up and say, Yapo, talk to  
12:39:51 10 these men so that they will know I was with you. Then I took the  
11 phone. As I took the phone, whom did I hear talking? It was  
12 Five Five. He said, Oh, Bobby. I said, Yes, sir. How are you,  
13 sir? And he said you are our brother. He said, Please, because  
14 we've gotten advice from some of our lawyers that the only way is  
12:40:18 15 if we can talk to some of you people who can at least cause us to  
16 be released or reduce our prison term. He said, So please, I  
17 don't want you to feel any way. We sent Sammy for us to be able  
18 to talk to you. He said but all the same, we are still trying to  
19 work out our modalities. We're trying to work out how best we  
12:40:51 20 can put things in place. He said, So please, we want you to  
21 cooperate with us. Please help us. Then I said, Well, I've  
22 heard. I'll see what I can do concerning that. So I gave the  
23 phone back to Sammy after that, and he and Sammy continued their  
24 discussion. But I did not hear what they continued discussing.

12:41:26 25 I came back in my vehicle and Sammy was still persisting.  
26 He continued talking to me. He said, My man, this particular  
27 mission, there is money in it. I really want you to do what  
28 those men have told you to do. My man, that's a simple thing.  
29 You've given a testimony, so if you change it, those men were

1 ready to do it. But I - and then I said Sammy, I said, You are a  
2 man who served in prison, but I'll still know what to do. And he  
3 said, My man, I am relying on you. And then I said okay. So  
4 that day we dispersed. He went his way and I went my way.

12:42:26 5 Q. Let me ask you this question: In your discussion with Five  
6 Five, that is Mr Kanu, you said that he told you they were  
7 putting modalities in place. Did he say --

8 MR METZGER: The evidence is "we're working on modalities,"  
9 Your Honour.

12:42:54 10 MR HERBST:

11 Q. -- [overlapping speakers] to do what of putting modalities  
12 into place? To do what?

13 JUSTICE DOHERTY: The actual words used by the witness was  
14 "working on modalities," Mr Herbst.

12:43:08 15 MR HERBST: Let me modify the question then, Your Honour.

16 Q. When Mr Kanu told you that they were working on putting  
17 modalities - working on modalities or working on modalities to  
18 put in place, did he say --

19 MR METZGER: Your Honour, there is no such thing as "to put  
12:43:29 20 in place."

21 MR HERBST: [Overlapping speakers]

22 MR METZGER: The evidence, with the greatest respect, if my  
23 I learned friend wants to put the evidence to the witness, he  
24 actually said: While we are speaking to you, he said, we were  
12:43:41 25 working out modalities, and then went on to say we are trying to  
26 put things in place. And then this witness said, I'll see what I  
27 can do about that and passed the phone back. He may be  
28 conflating the two because of previous information.

29 JUSTICE DOHERTY: I have on record Sammy, we want to talk



1 to you to work out modalities. Please help. So what I have  
2 recorded is "work out modalities." That's my record.

3 MR HERBST: [Indiscernible]

4 JUSTICE DOHERTY: Please do.

12:44:25 5 MR HERBST:

6 Q. Mr Witness, when Mr Kanu told you that they were working on  
7 modalities, did he tell you for what purpose or to do what?

8 A. Well, basically Sammy had told me that your man - your men  
9 were putting money together. So when he told me that, well,

12:44:47 10 Sammy has explain - since Sammy has explained to you, we too are  
11 trying. We are putting things in place financially so that we  
12 can see how best it could reach you so that you can help us on  
13 this issue.

14 Q. Thank you. Now let me ask you: Do you have any

12:45:12 15 recollection about what time of day you had this conversation  
16 first with - I'm sorry, that you had this conversation with  
17 Mr Kanu?

18 A. Well, it was in the morning around 11.00 to 12.00 because  
19 time was - it was not in the afternoon hours, but it was around

12:45:38 20 11.00 to 12.00 when we had that discussion when I drove from my  
21 house going to PWD Junction.

22 JUSTICE DOHERTY: Mr Herbst, please continue.

23 MR HERBST:

24 Q. You mentioned Mr Kanu - you described to the Court a few  
12:46:06 25 minutes ago your conversation with Mr Kanu. How do you know - or  
26 how did you know that, in fact, it was Mr Kanu on the line on  
27 phone with whom you were speaking?

28 A. Well, that man, we've lived for so long. He stutters as he  
29 speaks, so as soon as he started talking, I recognised his voice

1 and I said, Oh, that's Five Five speaking. And Sammy really  
2 showed the international number to me, but I don't have a copy of  
3 it, but it really indicated it's an international call because he  
4 said, Here, look at the number, so that I won't be in any doubt  
12:46:46 5 so that I'll know what he is doing, but he didn't allow me to  
6 write it down. He had the international number in his phone that  
7 they were calling him on.

8 Q. Would you tell the Court how you had known Mr Kanu? You  
9 told the Court how you knew Mr Kargbo and Mr Bangura. How did  
12:47:14 10 you know - [overlapping speakers] what was your relationship with  
11 him, your history with him?

12 A. Well, I had known Mr Kanu for the past years during the  
13 NPRC when he was with Strasser and later they overthrow the SLPP  
14 government in 1997. He was one of the AFRC men who overthrow the  
12:47:36 15 AFRC government - I mean the SLPP government, and he was one of  
16 the senior commanders with whom we came during the January 6  
17 invasion of Freetown.

18 Q. You mentioned telephones and an international number. What  
19 was Mr Kargbo's telephone number on which he would call you or  
12:48:12 20 the phone on which he handed [overlapping speakers]?

21 A. Well, normally --

22 THE INTERPRETER: Your Honour, we're having some problems.  
23 Whilst the --

24 JUSTICE DOHERTY: Mr Witness, pause.

12:48:27 25 THE INTERPRETER: Whilst Mr Herbst is still asking his  
26 question and the interpreter is still interpreting Mr Herbst's  
27 question, the witness starts answering so that we do not get the  
28 tail end of Mr Herbst's question. So if the witness could be  
29 advised to wait until the interpreter finishes? Something has to

1 be done so that we do not confuse each other.

2 JUSTICE DOHERTY: Yes. I had noticed that, Mr Interpreter.

3 Mr Witness, it is very important for you to wait until the  
4 end of the question that you are being asked. It's important for  
12:48:57 5 several reasons: So we know what question you're being asked;  
6 and also because the interpreters then have to try and interpret  
7 both of you and that's just not possible. So you were explaining  
8 something to do with Mr Kargbo's number. Do you need me to ask  
9 Mr Herbst to put the question again? Or are you clear on the  
12:49:25 10 question.

11 THE WITNESS: I got the question clearly, my Lord.

12 JUSTICE DOHERTY: Good. Please now answer the question.

13 THE WITNESS: Well, the number that Mr Kargbo normally  
14 calls me on, I know it off head: 033255597. That is Mr Kargbo's  
12:50:05 15 number, his Comium number that he's using.

16 MR HERBST:

17 Q. What was Mr Bangura's - Mr Bomb Blast's cell phone number  
18 that he was using to communicate with you when he would?

19 A. Bomb Blast had three numbers that he would call with. I  
12:50:31 20 have all of them. But the most common one that he used most  
21 times like lately it is Zain or he's called me on I have his  
22 Comium off head.

23 Q. Do you remember the number?

24 MR NICOL-WILSON: Your Honour.

12:51:00 25 JUSTICE DOHERTY: Pause, Mr Herbst, please.

26 Mr Nicol-Wilson wishes to make a point.

27 MR NICOL-WILSON: Your Honour, I wish to object to the last  
28 two questions put by the Independent Counsel to the witness. And  
29 my objection is thus: Firstly, Your Honour, the witness has so

1 far not indicated that he had any direct conversation with Bomb  
2 Blast from Bomb Blast's mobile phone to his open mobile phone.  
3 He has not indicated so far.

4 And therefore, there is no sufficient background for that  
12:51:47 5 question to be put to the witness as to what number Bomb Blast  
6 normally used in communications to him. And that is the basis of  
7 my objection, Your Honour.

8 JUSTICE DOHERTY: I think it's a straightforward question:  
9 What number was Bangura using? And I don't see anything wrong in  
12:52:28 10 that question so I'm going to allow the question.

11 MR NICOL-WILSON: As Your Honour pleases.

12 JUSTICE DOHERTY: Please put the question again, Mr Herbst.

13 MR HERBST: Yes, Your Honour.

14 Q. Mr Witness, [overlapping speakers]

12:52:50 15 A. Yes, my Lord.

16 Q. What was the most common number on which he would call you  
17 or you would call him when you communicated with him by phone?

18 A. Well, it was the Comium.

19 Q. What was the number?

12:53:18 20 A. 033810173.

21 Q. Now, how often in 2010 would you communicate with  
22 Mr Bangura?

23 MR NICOL-WILSON: Your Honour, objection.

24 MR HERBST:

12:53:55 25 Q. How frequently?

26 JUSTICE DOHERTY: Just pause, Mr Herbst. Yes,

27 Mr Nicol-Wilson.

28 MR NICOL-WILSON: Your Honour, this line of  
29 examination-in-chief has not been disclosed to the Defence. The

1 Independent Counsel disclosed a statement made by this witness to  
2 the Defence which has nothing to do with direct communications  
3 between Mr Bangura and the witness, and there is nothing in that  
4 statement in which the witness had mentioned the telephone number  
12:54:44 5 of Mr Bangura or had mentioned any form of direct conversation  
6 between himself and Mr Bangura. This cannot be trial by ambush,  
7 Your Honour, and I find it procedurally unfair for Mr Bangura to  
8 be confronted with information for which he never had notice.  
9 I'm therefore submitting that if the Independent Counsel wants to  
12:55:37 10 continue with this line of cross-examination, that he discloses  
11 the information he had before from the witness and we take an  
12 adjournment so that I can properly consult with my client.  
13 Otherwise, firstly, I will not be able to proceed with  
14 cross-examination after this examination-in-chief; and secondly,  
12:55:57 15 I will ask that such information be excluded from the records of  
16 these proceedings because it amounts to trial by ambush. That  
17 will be my submission.

18 JUSTICE DOHERTY: Could you just remind me what the  
19 question was about Mr Bangura's contact and number.

12:56:24 20 MR NICOL-WILSON: He said how often has Mr Bangura been  
21 communicating with the witness I think in 2010.

22 JUSTICE DOHERTY: Yes, I understand that. I'm looking at  
23 prior foundation.

24 MR NICOL-WILSON: Yes, and the prior foundation was what  
12:56:42 25 number does Mr Bangura use to communicate with him - most common  
26 number and he said three and then he said but there is one common  
27 number which he said 810173. But my objection centres around  
28 lack of proper disclosures, Your Honour. This information was  
29 not disclosed that he will be leading the witness on issues of

1 direct communication with Mr Bangura. So far the information  
2 that was disclosed is there had been no direct communication  
3 between Mr Bangura and the witness through each other's mobile  
4 phone. So I was not expecting to hear the Independent Counsel  
12:57:26 5 put such questions to the witness.

6 JUSTICE DOHERTY: Mr Herbst.

7 MR HERBST: Your Honour, first let me confess that the  
8 conditions under which I'm operating here are not ideal for a  
9 trial lawyer. There are times when it's hard to hear the  
12:57:58 10 witness, and there are even times when I do not fully understand  
11 the interpreter who is interpreting in English. So if I missed  
12 something, I hope everyone will understand.

13 Now it is my understanding that I asked the witness to  
14 explain something of his knowledge of and relationship with  
12:58:30 15 Mr Bangura. I thought he had said enough, although I perhaps  
16 didn't hear all of it, to make clear that the relationship was a  
17 close one and emanated from the time in the army and the war when  
18 Mr Bangura was Mr Sesay's immediate superior and to whom Mr Sesay  
19 was his aide-de-camp. And I thought he had indicated that that  
12:59:22 20 relationship continued when they were in Pademba Road and so  
21 forth and so on. I thought I had established that the  
22 relationship between the two men were close.

23 THE INTERPRETER: Your Honour, the witness is saying  
24 something that is not clear to me.

12:59:46 25 JUSTICE DOHERTY: Mr Herbst, I'm afraid you'll have to -  
26 just a moment, Mr Herbst. The witness wants to say something.  
27 Yes, Mr Herbst.

28 THE WITNESS: I want to use the rest room.

29 JUSTICE DOHERTY: Please assist the witness to leave the

1 Court.

2 [Witness leaves Court]

3 JUSTICE DOHERTY: Mr Herbst, the witness has had to leave  
4 the Court for personal reasons. This is an objection which we're re  
13:00:15 5 dealing with, so his presence is not essential. Please continue.

6 MR HERBST: Yes, Your Honour. It cannot possibly have been  
7 a secret to any of the Defence lawyers in this case that 334,  
8 this witness, had a close relationship with Mr Bangura and that  
9 there would have been direct communications between them as a  
13:01:00 10 result of that relationship. Indeed, I thought I heard on prior  
11 days, Counsel for Mr Bangura talk about observations and  
12 communications that Mr Bangura had made of 334. So I did not  
13 think that I had to fully -- [microphone not activated]

14 JUSTICE DOHERTY: Mr Herbst, the line has frozen. Are you  
13:01:49 15 all right? Mr Herbst, the line froze just now. It's frozen in  
16 Kigali too.

17 MR HERBST: Yes [overlapping speakers]

18 JUSTICE DOHERTY: I can hear you now.

19 MR HERBST: I can hear you, Your Honour. Now I can see  
13:02:12 20 you. So I think I was saying that I did not --

21 [Witness returns to Court]

22 MR HERBST: -- feel a specific disclosure that he was  
23 having direct communications with Mr Bangura was something I had  
24 to specifically say. It seemed to be implicit in everything  
13:02:54 25 else. Moreover, in the witness statement in the last paragraph  
26 on the first page, the conversation - or a form of the  
27 conversation that the witness just related was contained in that  
28 statement. Again implicit in the communication was a long  
29 historic and close relationship among the two men, and indeed

1 among them all, including the men in Rwanda stemming from the  
2 days back in the army. Mr Kargbo testified as much, and that's  
3 all in the record.

4 MR NICOL-WILSON: Your Honour --

13:04:02 5 MR HERBST: So again I say --

6 MS CARLTON-HANCILES: I will ask that the witness be led  
7 out of the courtroom while we deal with this objection.

8 MR HERBST: [Overlapping speakers]

9 JUSTICE DOHERTY: No, I'm not making that order.

13:04:12 10 MR NICOL-WILSON: As Your Honour pleases.

11 MR HERBST: I apologise, Your Honour. Apparently there was  
12 an interruption. I will stop speaking.

13 JUSTICE DOHERTY: There was an objection to the witness  
14 being present in Court during this, but this submission has gone  
15 on so long, that it really serves nothing to have him taken out  
16 at this late stage in the proceedings. He's heard  
17 Mr Nicol-Wilson's objection. He's heard most of your reply.

18 It's not going to serve anything. If it had been made earlier I  
19 might have had a didn't attitude. But you're referring me to a  
13:04:32 20 statement, and I'm looking at your pre-trial brief. Is it a  
21 statement within that pre-trial brief? Where is this statement  
22 that you're referring me to?

23 MR NICOL-WILSON: Your Honour, this is a statement dated 9  
24 December 2010 by the witness which was disclosed to the Defence  
13:05:25 25 by the independent counsel.

26 JUSTICE DOHERTY: I see. Was it among the documents filed  
27 in the Court?

28 MR NICOL-WILSON: Yes, Your Honour.

29 MR HERBST: Your Honour, I didn't hear the answer, but I



1 hope the answer was yes.

2 JUSTICE DOHERTY: Yes, it was. It's a document that was  
3 disclosed, and I asked then if it was filed in Court because I  
4 want to look at it myself in the light of the submissions from  
13:05:54 5 both counsel. That's yourself and Mr Nicol-Wilson. If you can  
6 indicate to me when it was filed, that might be the easiest way  
7 of finding it.

8 MR METZGER: I believe it was filed on 15 July 2011, Your  
9 Honour.

13:06:17 10 JUSTICE DOHERTY: I'm very grateful, Mr Metzger. I'll try  
11 and quickly find it.

12 MR HERBST: Your Honour, it's attached to the confidential  
13 disclosures under Rule 66. The Rule 66 disclosures.

14 MR METZGER: Confidential annex 1.

13:06:40 15 MR HERBST: [Overlapping speakers] number 1. Your Honour,  
16 I believe the Court Officer has a copy of that witness statement  
17 which he could hand up to the Court.

18 JUSTICE DOHERTY: [Microphone not activated]

19 MR HERBST: In addition, Your Honour, there's further  
13:08:17 20 evidence of direct contact between Mr Bangura and the witness.  
21 It is contained in the declaration of Joseph Saffa dated 17  
22 December 2010, which is also part of confidential annex 1 of  
23 those same disclosures.

24 JUSTICE DOHERTY: Among the many documents I have before me  
13:10:23 25 I appear to be missing one document: Document filed number 10,  
26 and that could be the one, because it is around that date. So  
27 I'm going to either have to have it read out to me, or if someone  
28 has a clean copy they would be prepared to lend me, I would be  
29 very grateful, as my associate has had to unfortunately leave.

1 MR HERBST: Your Honour, I can read it out to you.

2 JUSTICE DOHERTY: Reading it into the record might actually  
3 be the most practical thing to do and then it's in the  
4 transcript.

13:11:06 5 MR METZGER: Your Honour, with the greatest respect I think  
6 Mr Saffa is due to give evidence himself as a witness.

7 JUSTICE DOHERTY: I was talking about the present witness's  
8 statement. That's what I had in mind.

9 MR METZGER: So be it. I'm very much obliged.

13:11:19 10 JUSTICE DOHERTY: It is Mr Sesay's witness statement we're  
11 talking about isn't it, that you're about to read out, because  
12 that's what I want to hear.

13 MR HERBST: Yes, it is, Your Honour.

14 JUSTICE DOHERTY: Yes, please.

13:11:35 15 MR HERBST: I'm going to read the third paragraph on the  
16 first page: "While we were still in the car Ragga made a call on  
17 his phone and when the person on the other side took the call,  
18 Ragga gave the phone to me and told me that it was Hassan Papa  
19 Bangura AKA Bomb Blast on the phone and that he wanted me he to  
13:12:15 20 talk to him. Bomb Blast told me to cooperate with the convicts  
21 in Rwanda and do what they were asking me to do. It was a short  
22 conversati on between us. I only told him that I was thinking  
23 about it."

24 JUSTICE DOHERTY: Mr Herbst [overl appi ng speakers]

13:12:43 25 MR HERBST: For the AFRC --

26 JUSTICE DOHERTY: Mr Herbst, what you're reading out to me  
27 has been put into evidence but that's not the objecti on. The  
28 evidence is to do with communi cations prior - prior  
29 communi cations. How, in other words, the witness would know, and

1 your question was how often in 2010 he would communicate. The  
2 objection came a bit late in the day because there was some  
3 lead-up - some prior questions about Mr Herbst Bangura's number,  
4 et cetera. But what I have not established before me in my mind  
13:13:39 5 was that there was continuous communication either on a regular  
6 or very erratic basis between the release of the witness and  
7 Bangura, prior to the telephone call in the car there Mr Kargbo.  
8 So some foundation is going to have to be laid for that or  
9 there's going to have to be some time given to counsel for  
13:14:13 10 Bangura to take instructions on it. I will hear if there's a  
11 foundation and then I will decide if it's sufficient and I may  
12 well allow counsel for Bangura to have some time to take  
13 instructions.

14 MR NICOL-WILSON: Your Honour --

13:14:31 15 MR HERBST: Your Honour, I think I can [overlapping  
16 speakers]

17 JUSTICE DOHERTY: Just a moment, Mr Herbst. Mr Herbst -  
18 first of all, I can't hear you and secondly, Mr Nicol-Wilson is  
19 on his feet.

13:14:42 20 MR NICOL-WILSON: Your Honour, I also want to draw your  
21 attention to Rule of 66 which makes it obligatory on the part of  
22 the Prosecutor to have disclosed statements within 30 days of the  
23 initial appearance and to continuously disclose to the Defence  
24 copies of the statements of all additional Prosecution witnesses  
13:15:02 25 whom the Prosecutor intends to call to testify not later than 60  
26 days. But I think the appropriate Rule is 66 (A)(i). So if the  
27 Independent Counsel wants to introduce new material, I think it's  
28 not appropriate at this stage.

29 JUSTICE DOHERTY: First of all, are you challenging what

1 I've said?

2 MR NICOL-WILSON: No, Your Honour, I'm merely referring the  
3 Independent Counsel to the provisions of Rule 66.

4 JUSTICE DOHERTY: And you think I didn't think about that.

13:15:50 5 MR NICOL-WILSON: No, no disrespect, Your Honour.

6 JUSTICE DOHERTY: Listen. I'm trying to be clear what is  
7 happening here. We have evidence that the witness knew the first  
8 accused. We have evidence - and it appears not to have been  
9 challenged - that he had phone numbers. It appears to me a

13:16:12 10 logical sequence that if they had known each other and the  
11 witness had three phone numbers, that that evidence - that  
12 information must have been adduced from somewhere. And therefore  
13 I'm going to allow some questions to establish how he knew it,  
14 and at the end, I'm going to take a break longer than the 45

13:16:43 15 minutes to allow you to take instructions. That's what I'm going  
16 to do. Mr Herbst, please establish some foundation to show that  
17 the witness had reason to have the three numbers he has told us  
18 about and the one number that he knew was the most - I quote, the  
19 most common number.

13:17:15 20 MR HERBST: Your Honour, I will do that. I do though, if  
21 Your Honour would permit me one sentence? On the issue of  
22 disclosure to just direct my learned friends on the Defence to  
23 that portion of the confidential disclosures, Rule 66  
24 disclosures, which contains the oral statements that Mr Bangura  
13:17:42 25 made to me clearly. Contained in those statements is evidence  
26 from Mr Bangura's own mouth of direct communications with 334.

27 JUSTICE DOHERTY: I accept that that could have happened  
28 from Mr Bangura. But the evidence I'm listening to is evidence  
29 of Mr Sesay. And that is where that should come from now.

1 MR HERBST: Yes, I'm going to ask that question now, Your  
2 Honour.

3 Q. Mr Sesay, would you tell the Court how you knew that the  
4 number you just testified to and ascribed to Mr Bangura was in  
13:18:31 5 fact his number?

6 A. Yes. Even before this matter came up, we had been  
7 communicating with each other. He has my number and I have his  
8 number, you see? So I don't have anything to say - to lie about  
9 the number. There was communication flow even before these  
13:19:00 10 charges were made. There was a flow of communication. If he has  
11 something, an activity, he will call me; if I had an activity, I  
12 will call him. So there was that mutual understanding.

13 Q. That brings me to the question I had asked before, which  
14 was how frequently did Mr Bangura call you and you call  
13:19:31 15 Mr Bangura from [overlapping speakers] --

16 A. Well, before this time--

17 Q. -- [overlapping speakers] prison up until late November  
18 2010?

19 MR HERBST: And I asked that question, your Honour, in part  
13:19:49 20 for foundational purposes as well as on the merits.

21 JUSTICE DOHERTY: Thank you, Mr Herbst.

22 Mr witness, you heard the question. Please answer the  
23 question.

24 THE WITNESS: Like I said, before these charges were made  
13:20:09 25 there was communication flow. Whatever he had he will call me,  
26 or whatever programme that he had he will call me, and I will  
27 also call him. We used to call each other. He had concern for  
28 my family, and I had concern for his family. He knows my entire  
29 family and I know his entire family, but there was communication

1 between the two of us.

2 JUSTICE DOHERTY: Mr witness, counsel asked you how  
3 frequently; in other words, how many times, how often.

4 MR HERBST:

13:20:43 5 Q. How often?

6 A. Within a week we will call each other. If he does not see  
7 me, he will call me. He will call me most times. If he doesn't  
8 see me, he will call me. He will say, Yapo, how are you doing?  
9 How is the family? He shows concern. He would ask because we

13:21:05 10 had that mutual understanding. He had concern for me, and I had  
11 concern for him.

12 JUSTICE DOHERTY: Continue, Mr Herbst.

13 MR HERBST: Thank you, your Honour. I don't know whether  
14 the witness has already testified to this.

13:21:44 15 Q. How did you leave things with Mr Kargbo - at the end of  
16 your contact with Mr Kargbo that day?

17 JUSTICE DOHERTY: Which day, Mr Herbst? There was two days  
18 mentioned in evidence.

19 MR HERBST: This is the second occasion, your Honour, the  
13:22:08 20 conversati on wi th Fi ve Fi ve, Mr Kanu.

21 JUSTICE DOHERTY: Mr witness, are you clear on the question  
22 put?

23 THE WITNESS: I would like him to repeat the question.

24 JUSTICE DOHERTY: Mr Herbst, please repeat.

13:22:39 25 MR HERBST:

26 Q. What was the last things said between you and Mr Kargbo  
27 before you left each other's company that day?

28 A. Well, Mr Kargbo said that he will contact me for any  
29 further development, he said, but he will contact me. He will

1 call me. Just in case there is any development from those men,  
2 he will call me.

3 MR HERBST: May I just have one minute, your Honour?

4 JUSTICE DOHERTY: Certainly.

13:23:56 5 MR HERBST:

6 Q. Now, after the events of that - withdrawn. After you and  
7 Mr Kargbo left each other's presence, did you text or call anyone  
8 else?

9 A. Well, my Lord, after this had happened, I was so confused  
13:24:30 10 and tormented because Mr Kargbo was pressurising me, Mr Blast had  
11 called me, so I said well, let me seek advice. So I texted  
12 Shayamala, who was a lawyer in the past trial, the AFRC and the  
13 Charles Taylor trial. I called her afterwards and explained  
14 exactly what Sammy - the discussion that had happened between  
13:25:05 15 myself, Sammy, Bomb Blast and Five Five. I said well, Shayamala,

16 this is what has happened that is tormenting and troubling me. I  
17 said, So I want you to advise me, because I don't have - I don't  
18 have the judicial sense on how to do this thing. Then Shayamala  
19 said, Bobby, now what I'm going to do is to e-mail the OTP so  
13:25:44 20 that they will contact you so that you can explain yourself  
21 exactly about what was going on. But as a professional lawyer,  
22 it is something bad. If you do that thing, you'll find yourself  
23 in prison. She said, But I'll make sure I e-mail the OTP so that  
24 they can get in contact with you.

13:26:19 25 MR HERBST: Your Honour, we've lost the video link, but we  
26 did have the audio link and I did hear the witness's testimony.

27 I would like now the e-mail, which I understand the Court  
28 Officer has, to be placed in front of the witness.

29 MR METZGER: I object, your Honour. The basis upon which

1 this witness can look at an e-mail written by a third party and  
2 comment on it whatsoever has not yet arisen and couldn't possibly  
3 arise. He cannot comment on what a third party has written  
4 to a fourth party, if I may put it that way.

13:27:18 5 MR NICOL-WILSON: Your Honour, I associate with the  
6 objection and strongly object.

7 JUSTICE DOHERTY: Mr Herbst, I do not know if this witness  
8 has ever seen this e-mail, helped write it, or in any other way  
9 would be able to identify it. So I uphold that objection.

13:27:48 10 MR HERBST: Well, your Honour, I would like to ask the  
11 witness whether he has seen the e-mail. The only way I can  
12 possibly do that would be if the e-mail were put before the  
13 witness.

14 JUSTICE DOHERTY: In actual fact --

13:28:09 15 MR HERBST: And also [overlapping speakers].

16 JUSTICE DOHERTY: Mr Herbst, I could add another leg to  
17 this: I don't even know if the witness knows if any e-mail was  
18 sent, from the evidence before me. So there is a fair way to go  
19 before he can be called upon to identify or speak to an e-mail.

13:28:37 20 MR HERBST: Well, your Honour, if you'll recall my  
21 additional statement of anticipated trial issues, I had  
22 anticipated that this issue would come up. And in paragraph 9 of  
23 that document, I had argued for the admissibility of the document  
24 without the necessity of calling Ms Alagenda.

13:29:14 25 JUSTICE DOHERTY: Is that your argument? I've got the 16th  
26 of May, or is it the later one? Is it the one of 15th May? I've  
27 got one called "additional submissions".

28 MR HERBST: This is 11 June 2012, your Honour.

29 JUSTICE DOHERTY: Just let me find it, please.



1 MR HERBST: It's called "public".

2 JUSTICE DOHERTY: Yes, I have it in front of me. I should  
3 say that I'm also watching the time here in Freetown, because I  
4 know that the food outlets close at a certain time and people - I  
13:30:17 5 have to think about that.

6 So what I will do is you referred me to paragraph 9 of that  
7 e-mail. I think it would be appropriate to adjourn at this  
8 point. I can read that document over the break, and I can then  
9 continue to hear what you have to say when we return.

13:30:44 10 I have also said that I will give Mr Nicol-Wilson some time  
11 to take instructions from his client on issues that have arisen  
12 to enable him to cross-examine. So instead of the 45 minutes  
13 we'll take 5 minutes and resume at 2.30.

14 Mr witness, you are aware that you are now under oath. You  
13:31:10 15 should not discuss your - you should not discuss or talk about  
16 your evidence to anyone else. We're going to resume at 2.30, and  
17 then we will continue to hear what you have to say.

18 You understand, Mr witness?

19 THE WITNESS: Yes, my Lord.

13:31:29 20 JUSTICE DOHERTY: Please adjourn Court until 2.30.

21 [Luncheon adjournment taken at 1.32 p.m.]

22 [Upon resuming at 2.32 p.m.]

23 JUSTICE DOHERTY: Does anybody - Mr Nicol-Wilson, do you  
24 know what's happened to your learned colleagues for the Defence  
14:32:53 25 who seem to be absent? We did wait a few minutes once I was told  
26 they weren't here.

27 MR NICOL-WILSON: Your Honour, Mr Kamal is on his way in  
28 and I think Mr Metzger wants to be excused for a few minutes. He  
29 has an urgent personal matter to attend to.

1 JUSTICE DOHERTY: Has he asked you to keep a watching  
2 brief.

3 MR NICOL-WILSON: Yes, Your Honour.

4 JUSTICE DOHERTY: Very well. We will proceed on.

14:33:16 5 Please, Mr Witness, I remind you that you are under oath  
6 and you must answer questions truthfully. We will proceed on  
7 with your evidence.

8 Mr Herbst, your next question of the witness, please.

9 MR HERBST: Your Honour, I think when we left, Your Honour  
14:33:38 10 had indicated you would consider over the break the Alagendra  
11 e-mail and the admissibility grounds submitted in our 11 June  
12 2012 submission. [Overlapping speakers]

13 JUSTICE DOHERTY: I did reread it over the break and I note  
14 that it is an application under Rule 92*bis* and that you have  
14:34:07 15 given, you say, the requisite notice to counsel for the Defence  
16 of your intention to make this application.

17 Now you ask questions of the witness and are you now moving  
18 it under Rule 92*bis* or are you seeking to put it through the  
19 witness?

14:34:36 20 MR HERBST: Well, I would first move its admission through  
21 92*bis*. And if that was not successful, then I would try and lay  
22 a foundation through the witness.

23 JUSTICE DOHERTY: I understand. Well, if you proceed - I  
24 have read the paragraph that you referred me to, hence my  
14:34:59 25 observation about Rule 92*bis*. If there is anything further you  
26 wish to say in relation to that, I will listen to it now.

27 MR HERBST: I guess the only other thing I would say, Your  
28 Honour, is that the document is relevant for several purposes,  
29 and I have in mind now paragraph (B) of Rule 92*bis*. First of

1 all, this document will establish the date on which the events  
2 that the witness just testified to with the call with Five Five  
3 occurred. Because the e-mail is dated 11-30, or I should say 30  
4 November 2010, 6.15 in the evening and it recites that the --

14:36:24 5 JUSTICE DOHERTY: Don't tell me what it recites, because I  
6 have to make a ruling on it, Mr Herbst, but you do say it's  
7 relevant in your submission.

8 MR HERBST: [Overlapping speakers] Yes. And it's relevant  
9 not only to fix the date but also to prove up the fact that the  
14:36:42 10 witness made a proper report of the events and that the report  
11 contains a number of things that the witness has already  
12 testified to, let me put it that way, without reciting the e-mail  
13 in question. So I believe, Your Honour, that the Rule is fully  
14 complied with.

14:37:32 15 JUSTICE DOHERTY: Thank you.

16 Mr Nicol-Wilson, were you going to make a response on this  
17 matter?

18 MR NICOL-WILSON: No, Your Honour. I had earlier on  
19 objected to this witness, and this document has been tendered  
14:37:49 20 through this witness and I stand by my objection.

21 JUSTICE DOHERTY: No, no. This is an application under  
22 Rule 92*bis* to admit it. This goes back to the paragraph that  
23 Independent Counsel referred to before lunch-time, which is a  
24 document of the 11th of June which I said I would read over the  
14:38:08 25 break and which I have read over the break.

26 MR NICOL-WILSON: Your Honour, Rule 92*bis* (B) gives the  
27 Trial Chamber a discretion to so admit if, in its opinion, the  
28 document is considered reliable and sustainable of confirmation.  
29 So I have nothing further to say on this.

1 JUSTICE DOHERTY: Thank you.

2 Mr Serry-Kamal, have you any response to make in this  
3 application?

4 MR SERRY-KAMAL: [Microphone not activated]

14:38:43 5 JUSTICE DOHERTY: Sorry, Mr Serry-Kamal. I'm afraid I  
6 didn't hear you.

7 MR SERRY-KAMAL: I have nothing to add to what my learned  
8 has already said.

9 JUSTICE DOHERTY: Very well. Thank you.

14:38:52 10 MR SERRY-KAMAL: He objected, and I think I shared his  
11 objection.

12 JUSTICE DOHERTY: Mr Metzger, have you any response to this  
13 application made - starting before the lunch break and which I  
14 undertook to read the submissions in paragraph 9 of the document  
14:39:31 15 of the 11th of June 2012?

16 MR METZGER: I would do, Your Honour, but unfortunately at  
17 this present point in time I've just received news that my mother  
18 has been involved in an accident.

19 JUSTICE DOHERTY: Oh, I'm very sorry to hear that.

14:39:46 20 MR METZGER: And I am a little bit shaken.

21 JUSTICE DOHERTY: Yes. You would be very perturbed. I  
22 have no doubt about that. So just sit down, compose yourself,  
23 and then tell me what you want to do.

24 MR METZGER: Thank you.

14:40:04 25 MR HERBST: Your Honour, I don't know if you can hear me  
26 now but --

27 JUSTICE DOHERTY: I can hear you, Mr Herbst. Pardon?

28 MR HERBST: I'm sorry, Your Honour. I wanted to advise the  
29 Court that we had lost the video and audio link.

1 JUSTICE DOHERTY: Can you hear me speaking in.

2 MR HERBST: [Overlapping speakers]

3 JUSTICE DOHERTY: If you cannot hear me speaking, please  
4 wave.

14:40:25 5 MR HERBST: No, I can hear you speaking now. But I did not  
6 hear anything that was said, I think, from the time Mr Metzger  
7 came into the courtroom.

8 JUSTICE DOHERTY: Mr Metzger has informed us that he's had  
9 some news of an accident involving his mother. He's obviously  
14:40:43 10 perturbed and I'm just letting him get to his feet and tell me  
11 what he needs to do when he's got a chance to speak.

12 MR HERBST: We're all very sorry --

13 THE INTERPRETER: And Your Honour, the interpreters can  
14 only faintly hear Mr Herbst.

14:41:05 15 JUSTICE DOHERTY: Mr Herbst, the interpreters can only  
16 faintly hear you. Whilst they work on that, I'll wait until  
17 Mr Metzger is ready to speak.

18 Mr Metzger, whilst I don't want to upset you more by asking  
19 a lot of questions, is it here in Freetown or is it overseas?

14:41:33 20 MR METZGER: It's here in Freetown, not a million miles  
21 away from here.

22 JUSTICE DOHERTY: Well, now, there is obviously a few  
23 choices available to us; one is to release you and let you go and  
24 see about this and stand over this particular argument,  
14:41:53 25 submission; and the other is to invite you to let me know what  
26 would be best to cope with the situation.

27 MR METZGER: Maybe I can deal with this point briefly. At  
28 the moment it's just the lack of information. I have managed to  
29 speak to her. She's very shaken. And it just happened as we

1 were walking into Court. There is still a lot of information to  
2 obtain.

3           Insofar as this point is concerned, I did object to the  
4 matter being put to the witness. I continue to do so on behalf  
14:42:33 5 of Mr Kanu on the basis that the Prosecution has sought, I think,  
6 to adduce this under Rule 92*bis*, which as I understand it he gave  
7 us notice of and immediately notice was given back to the  
8 Prosecution that we objected to that.

9           Insofar as the document itself is concerned, we can't,  
14:43:04 10 obviously, argue that there is an e-mail and what is on the  
11 e-mail is on the e-mail. But with the greatest of respect to the  
12 Prosecution, what it is now sought to do is to ask a witness,  
13 namely the witness currently giving evidence, to comment on the  
14 content of what somebody else wrote about a conversation that he  
14:43:34 15 had had with that person. Clearly what is contained in that  
16 e-mail is different from the evidence that he has given us. I  
17 don't wish to elaborate. We can all read for ourselves. It is  
18 different in a very material particular.

19           Now it was my understanding that the Prosecution's purpose  
14:43:58 20 in producing this e-mail was in order to, as it were, assist when  
21 it came to the question of dates. And Your Honour will know that  
22 there is an issue about that. So as I understand it, what  
23 Mr Herbst submits in that document is that primarily the e-mail  
24 will be offered in evidence, not put to a witness, to prove that  
14:44:29 25 334 made a prompt report of the approach.

26           Whether the report was prompt or otherwise is a matter for  
27 evidence from 334, and presumably any other evidence that we  
28 have, and therefore showing him this document does not assist in  
29 that material particular. It then goes on to say, "or through

1 the testimony of any member of the OTP, prosecutive or  
2 investigative staff who could testify to its authenticity as a  
3 business record received and maintained in the ordinary course of  
4 business." And then he goes on to say:

14:45:11 5 "It can be admitted pursuant to *92bis* as a written record  
6 relevant for the purpose or purposes for which it is admitted  
7 whose reliability is susceptible of confirmation and which for  
8 the limited purpose for which it is offered does not go directly  
9 to proof of the acts and conduct of the accused but rather to the  
14:45:30 10 act of TF1-334 in promptly reporting the corrupt", as he puts it,  
11 "approach to OTP" pursuant to *92bis* and the notice was given.

12 My learned friend knows that notice was given to him. If I  
13 may just refer so that we put the date on record. I believe on  
14 the 8th of June this year. *92bis* is a provision which is  
14:46:19 15 additional to the provisions of *92ter*, alternative proof of  
16 facts, which states that:

17 "The Court may admit as evidence in whole or in part  
18 information, including witness statements and transcripts", and  
19 in this case we don't have witness statements or transcripts,  
14:46:40 20 it's information, "that do not go to the proof of the acts and  
21 conduct of the accused."

22 I pause for the moment because from one perspective,  
23 arguably, it goes to what the Prosecution will say is the proof  
24 of the acts because the Prosecution seek to use that evidence as  
14:47:03 25 confirmation of the day in question.

26 JUSTICE DOHERTY: Is any accused named by name in the  
27 document?

28 MR METZGER: Yes. Certainly Five Five is named. In fact,  
29 there are two other accused named in the document, the two

1 sitting in Court here today.

2 92*bis* (B) then goes on to say:

3 "The information submitted may be received in evidence if  
4 in the view of the Trial Chamber it is relevant to the purpose  
14:47:58 5 for which it is submitted and if its reliability is susceptible  
6 of confirmation."

7 The purpose for which it is submitted it seems to me goes  
8 above and beyond the alleged promptness of the report by  
9 TF1-334 - I beg your pardon, Mr Sesay, who is giving evidence in  
14:48:19 10 Court. And he can give evidence of that.

11 The other thing, perhaps that we should bear in mind, is  
12 the term "computers", certainly in my experience are dumb  
13 creations of mankind. I say that because they rely on the  
14 material that is input into them. What the Prosecutor will know,  
14:48:41 15 I am sure he is fully aware of this, is that the document placed  
16 before us purports to have the date and the time. There is no  
17 evidence before this Court as to how that date and that time, or  
18 those dates and times, appeared on that document.

19 In realistic terms, the document cannot speak to the date  
14:49:01 20 on which it was sent without there being, not necessarily expert  
21 evidence, but evidence from a computer administrator who ran the  
22 system at that time telling us whether or not the timing was  
23 accurate and the date was accurate. We also need to know the  
24 location of Ms Alagendra at the time that e-mail was sent,  
14:49:24 25 because if the timing was correct what time zone was she in?  
26 Because it may become a crucial matter if the Prosecution wants  
27 to prove promptness.

28 As far as Rule 92*ter* is concerned, the tertiary aspect of  
29 Rule 92, it seems to me that it doesn't and cannot arise because



1 clearly this document does not have the agreement of the parties  
2 to enable the provisions contained therewith to avail itself to  
3 the Prosecution at this material time.

14:50:03 4 Unless there is any specific matter that Your Honour wishes  
5 my assistance on, those are the points that I would raise before  
6 the Court.

7 JUSTICE DOHERTY: Thank you. My concern is to do with acts  
8 and conduct of the accused. It's not uncommon in such situations  
9 when these sort of documents are put before a Court in writing by  
14:50:28 10 way of motion that the document in question is annexed to the  
11 application so that the Court is able to assess whether it does  
12 go to the acts and conduct of the accused.

13 I bear in mind that this Rule applies to both inculpatory  
14 and exculpatory evidence. So I think this document may have been  
14:50:59 15 part of the brief, in which case I am now going to look at it  
16 briefly to satisfy myself as to the acts and conduct aspect of  
17 it.

18 MR HERBST: Your Honour, you will find it appended to the  
19 Prosecutor's pre-trial brief as confidential annex Exhibit 1.

14:51:20 20 JUSTICE DOHERTY: Thank you, Mr Herbst, that's most  
21 helpful.

22 MR METZGER: Page 97, Your Honour.

23 JUSTICE DOHERTY: Thank you.

24 MR HERBST: Your Honour I'd like to be heard briefly on the  
14:53:05 25 issue of the acts and conduct of the accused if that's --  
26 [Overlapping speakers]

27 JUSTICE DOHERTY: Mr Herbst, I didn't hear you. I didn't  
28 have my earphones on. Could you please repeat what you said?

29 MR HERBST: Yes, Your Honour. I'm sorry.

1 I would like to address briefly the point about acts and  
2 conduct of the accused.

3 JUSTICE DOHERTY: Yes, please do so.

4 MR HERBST: For just a moment. If Your Honour would  
14:53:32 5 permit.

6 JUSTICE DOHERTY: Yes, since I've raised it.

7 MR HERBST: Your Honour, the e-mail clearly contains part  
8 of the substance of Mr Sesay's report to Ms Alagendra that  
9 evening, but the purpose of the - and as counsel pointed out,  
14:54:03 10 there are some things that are consistent with what was later put  
11 and contained in his witness statement, and some things are not  
12 contained in them, I think.

13 But the purpose of the offer doesn't go to those because,  
14 in fact, the witness is here to testify to what was said to him  
14:54:32 15 and what he said to Ms Alagendra. And he could be cross-examined  
16 on it, and I would be very surprised if the e-mail were not used  
17 in cross-examination or referred to in cross-examination, or the  
18 substance of the e-mail, in the course of the cross-examination.

19 But what - the primary purpose, as Mr Metzger, I think,  
14:55:11 20 properly perceived, is to prove up the report that was made, the  
21 fact that the report was made, and when the report was made. And  
22 for that purpose, that doesn't strictly go to the proof of the  
23 acts and conduct of the accused, even though the e-mail contains  
24 information going to the acts and conduct of the accused. So  
14:55:53 25 there is an evidentiary distinction to be made there that I think  
26 is important as one construes the Rule.

27 With respect to that purpose, Mr Metzger suggested that in  
28 order to submit with respect to the date of the e-mail, I would  
29 have to put on a computer expert. I utterly reject that notion.

1 E-mails are now so common and have been a part of the evidentiary  
2 fabric of trials for so many years, that we all know that there  
3 is a presumption of regularity to dates and times on e-mails.  
4 And if every time an e-mail were to be submitted or entered into  
14:57:03 5 evidence one were to have a computer expert testify, the business  
6 of the courts around the world would break down.

7 So it seems to me that for admissibility it's sufficient to  
8 note the date and time and to note that it corresponds to the  
9 testimony that the witness has already given; that in fact he  
14:57:43 10 called Ms Alagenda on the evening after the meeting he just  
11 described was a telephone to Five Five - or with Five Five.

12 Ms Alagenda said she would immediately e-mail OTP and report,  
13 and in fact in the report there is one line of the e-mail which  
14 makes clear that the date of the e-mail - that the e-mail is  
14:58:25 15 written on the evening that Mr Sesay reported the communication  
16 and the call of Five Five on the day that that conversation with  
17 Five Five occurred.

18 So the document essentially so forth authenticates the date  
19 when it is put next to the testimony of the witness, so I think  
14:59:01 20 more than a sufficient foundation has been laid to admit the  
21 document for the purpose for which it is offered, even before  
22 asking the witness whether in fact he has seen it before. And so  
23 the time - we are getting a little ahead of the story, but he's  
24 going to testify that the next day he went in and met with the  
14:59:39 25 investigative staff.

26 So that's my - that's all I wanted to say, Your Honour.  
27 Thank you.

28 JUSTICE DOHERTY: Thank you.

29 MR METZGER: Your Honour, I wonder if I may respond. My

1 I learned friend was asked to respond on the issue of acts and  
2 conduct of the accused. I didn't hear a response. I heard a  
3 further submission to Your Honour, and there are two matters in  
4 that further response that the Defence seek a reply to.

15:00:06 5 JUSTICE DOHERTY: There has to be an end. We've had three,  
6 four submissions, and I want to make a ruling on this,  
7 Mr Metzger.

8 MR METZGER: Right, Your Honour. I am just saying that if  
9 there has to be an end, then it should end at the time when Your  
15:00:25 10 Honour says. And if you ask my learned friend - if he said he  
11 was going to respond on acts and conduct, then he should have  
12 dealt with that. Respectfully, I found that that was singularly  
13 missing in his submission to Your Honour, but was not - did not  
14 feel it necessary to rise during the course of it and object to  
15:00:40 15 his response. But for the record.

16 JUSTICE DOHERTY: Very well.

17 MR HERBST: I feel I did respond on that point.

18 [The witness withdrew]

19 [The witness enters court]

15:10:41 20 JUSTICE DOHERTY: This is an application to admit an e-mail  
21 from Shayamala Alagendra who the witness says was a trial  
22 attorney when he gave evidence in a former trial.

23 The e-mail is from Ms Alagendra to the Prosecutor. It  
24 records content of a conversation from the witness to Alagendra.

15:11:06 25 Independent Counsel seeks to admit the document to: (1)  
26 establish the date that the report was made; and (2) show a  
27 prompt report of events being made. All Defence counsel object  
28 to the admission of the document under Rule 92*bis*.

29 Mr Metzger says that the content of the e-mail is different

1 in a material particular. I am satisfied that this is the type  
2 of document that can be subject of an application under Rule  
3 92*bis* and admissible. The question that follows from it is  
4 whether this document is information that goes, not to proof of  
15:12:05 5 the events, but to the acts and conduct of the accused.

6 Mr Metzger in submission says three accused are named in  
7 it. Mr Herbst states, and I quote, "It clearly contains part of  
8 the Sesay" that is the witness's "report", but goes on to submit  
9 that this can be overcome by cross-examination and it is not the  
15:12:37 10 intent to prove but to show dates.

11 Our jurisprudence shows that both inculpatory and  
12 exculpatory acts and conduct of an accused disbar the admission  
13 of documents such as this one. The Trial Chambers have been  
14 vigilant to exclude any scrap of facts or statements that are  
15:13:02 15 either inculpatory or exculpatory if they deal with acts and  
16 conduct.

17 Having seen this document, I consider that it goes to acts  
18 and conduct of two accused, and given the reference to the AFRC  
19 accused persons, it is likely to go to the acts and conduct of  
15:13:24 20 all four. In the circumstances, I am not prepared to admit this  
21 document as I consider that it offends the proviso to Rule  
22 92*bis* (A).

23 We will now continue with the evidence of the witness.

24 MR METZGER: I'm very much obliged, Your Honour. May I  
15:13:54 25 just ask, before we continue, I crave the Court's indulgence. If  
26 perhaps we could stop sitting a little early than normal,  
27 although I am not sure normal is 3.30 anymore, because of the -  
28 because of my particular circumstances.

29 I am loathe to leave this witness, as I dare say there will

1 be material impinging on my client's case, and like  
2 Mr Nicol-Wilson I can't be satisfied that I will have access to  
3 the transcripts in plenty of time. If the Court is so minded, I  
4 would be most grateful.

15:14:32 5 JUSTICE DOHERTY: We could - I mean, they are difficult  
6 circumstances, I accept that. I had in mind to try and go until  
7 4.00, and I have prepared a decision in the leave to appeal which  
8 I wanted to read out, but it could be stood over until tomorrow  
9 morning. If we were to rise at 3.45, would that suit?

15:15:00 10 MR METZGER: I am obliged, Your Honour. I would ideally  
11 have liked to take a little bit of time out, but I don't want to  
12 necessarily --

13 JUSTICE DOHERTY: Obviously you can be excused. I  
14 understand why you want to remain.

15:15:12 15 MR METZGER: Thank you, Your Honour.

16 JUSTICE DOHERTY: In that case we will arise at 3.45.

17 MR METZGER: Yes, Your Honour.

18 JUSTICE DOHERTY: Alternately, you can leave, Mr Metzger,  
19 in the circumstances, and instruct your co-counsel on a watching  
15:15:28 20 brief.

21 MR METZGER: Thank you, Your Honour, I will take up Your  
22 Honour's kind offer. I just want to make a call or two and see  
23 what's happening. I intend to be back.

24 JUSTICE DOHERTY: That is most understandable. So you make  
15:15:44 25 a call, the evidence will continue, and if it's necessary for me  
26 to try and read the record I will do so.

27 MR METZGER: Thank you, Your Honour.

28 JUSTICE DOHERTY: Mr Herbst, we will continue with the  
29 evidence, please.

1 MR HERBST: Yes, Your Honour. I now would like to try to  
2 establish the admissibility of the document through the witness  
3 and see whether I can lay a proper foundation.

4 Your Honour will recall that I have not had the usual  
15:16:23 5 opportunity to prepare the witness because of various things that  
6 have occurred in the manner that I normally would. So I am not  
7 sure what the answer would be but I'd like to put the questions  
8 to the witness.

9 JUSTICE DOHERTY: By all means, provided you don't lead him  
15:16:44 10 or do something else of that nature, you are most entitled to lay  
11 any foundation that you consider appropriate.

12 MR HERBST: I would like to have the e-mail placed before  
13 the witness.

14 JUSTICE DOHERTY: That's not quite the way to play the  
15:17:05 15 game, Mr Herbst. You're going to have to find out if he knows  
16 anything about it or if he's ever seen it, et cetera, before I am  
17 prepared to let it go that far.

18 MR HERBST: Okay.

19 Q. Mr Sesay --

15:17:25 20 A. Yes, My Lord.

21 Q. -- [Overlapping speakers] I learn - when did you first learn  
22 that Ms Alagendra had actually sent an e-mail --

23 JUSTICE DOHERTY: No, Mr Herbst. We don't even know yet  
24 what happened after he spoke to Ms Alagendra. He's told us he  
15:17:49 25 spoke to her. There is no doubt about that. But what happened  
26 between after he put the phone down, we don't know. I must hear  
27 that first.

28 MR HERBST: All right. Okay.

29 Q. Mr Sesay, what happened --

1 A. Yes, My Lord.

2 Q. -- [Overlapping speakers] conversation with Ms Alagendra?

3 A. Well, I explained exactly the discussions and the phone  
4 calls that Five Five had with me and the discussion that I had  
15:18:39 5 with Sammy, Bomb Blast, as I have said before. I explained  
6 everything to her and I told her that she would need to advise  
7 me, which should be legal advice. So she told me that she was  
8 going to send this e-mail. She was going to e-mail what I have  
9 told her to the OTP, and the OTP would contact me. She would  
15:19:16 10 facilitate OTP contacting me to see how best they can handle the  
11 information that I have relayed to her. And indeed the OTP  
12 called me. At one point the OTP called me - wait, that was  
13 before I got this conversation with Shayamala. They called me  
14 and asked me how I was doing and they briefed me about the  
15:19:39 15 Charles Taylor trial.

16 At that time I even told them that I had an issue to  
17 discuss with them. That - they called me through phone. But  
18 that issue is something I cannot discuss over the phone and that  
19 I will try to see how best I can reach them to tell them exactly  
15:20:03 20 what I wanted to tell them.

21 So after that e-mail - sorry, after that text and the call  
22 that I made to Shayamala, when she told me that she would e-mail  
23 the OTP. Indeed OTP called me and invited me to the office.  
24 They called me and I came to the office and I explained the  
15:20:31 25 transaction that was between myself, Sammy Ragga, Bomb Blast, and  
26 Santiage Borbor Kanu. So it was through that I knew that the  
27 e-mail that Shayamala had promised to e-mail them had happened.  
28 That is what led me to come to the OTP to make a statement.

29 Q. When did you go to OTP? When in relation to your



1 conversation with Ms Alagendra?

2 A. Well, it was after the text and discussion that I had with  
3 Shayamala. It was after that. I cannot remember the date they  
4 called me. After that they told me they wanted to see me at the  
15:21:38 5 office, the OTP office. And they said, Well, when we called you  
6 previously, you had told us that you had something to discuss  
7 with us, and we have also received an e-mail. I discussed  
8 exactly what had happened between myself - between Sammy Ragga  
9 and myself, Bomb Blast, and Five Five.

15:22:10 10 Q. Okay. When you came in, did they show you a copy of the  
11 e-mail?

12 A. Well, at that time they just told me that they've e-mailed  
13 them, Shayamala had e-mailed them, the office had e-mail them.  
14 They did not show me any copy of the e-mail. They did not show  
15:22:40 15 me any copy. But they just told me that they had received an  
16 e-mail from Shayamala through the Prosecutor.

17 Q. Okay. The communication that you had, the calls that you  
18 had with OTP, was that the same evening as the telephone  
19 conversation you had with Ms Alagendra?

15:23:17 20 A. Well, let him repeat the question so that I can understand  
21 it.

22 JUSTICE DOHERTY: Mr Herbst, please repeat the question so  
23 it's understood. Oh, no, just pause.

24 MR NICOL-WILSON: Your Honour, I think it's a statement.  
15:23:32 25 Not even a question.

26 JUSTICE DOHERTY: Well I've got down:

27 Was it the same evening as the telephone conversation with  
28 Ms Alagendra?

29 So I consider that a question.

1 Mr Herbst, please repeat the question.

2 MR HERBST:

3 Q. The call that you from OTP telling you that they had  
4 received a copy of Ms Alagendra's e-mail, did that happen that  
15:24:11 5 same evening; the next morning; when?

6 A. Well, as far as I can recall, when I did the text, I  
7 believe I can't state the time and date, but they called me the  
8 following day.

9 Q. Okay. And did you go in to see them on the same day that  
15:24:42 10 they called you on that following day, or was it some other time?

11 A. Well, the day that they called me, I came to the Court.  
12 That's the following day. That is the day that I spoke to  
13 Shayamala. The following day they called me and I came to the  
14 Court, the OTP office.

15 JUSTICE DOHERTY: Mr Witness, I am not clear if you mean  
16 that you went to the OTP office the day they called you or some  
17 other time? Please tell me which day.

18 THE WITNESS: The day that the OTP called me. It was on  
19 that day that I came to see them.

15:25:21 20 JUSTICE DOHERTY: Thank you.

21 Just a moment, Mr Herbst, please.

22 Mr Metzger, do you need to leave or --

23 MR METZGER: No, I've ascertained that my mother is all  
24 right, and there are formalities that are taking place at the  
15:25:40 25 moment. I think it is important that I be here in as complete a  
26 condition as I can be to hear the evidence that the witness  
27 gives. I shall --

28 JUSTICE DOHERTY: Very well, Mr Metzger. We will stick to  
29 the time we said. But it's good that it's not as bad as it could

1 have been.

2 MR METZGER: Indeed, Your Honour.

3 JUSTICE DOHERTY: Mr Herbst, sorry. I intervened there.

4 Please continue.

15:26:09 5 MR HERBST: Your Honour, I wanted to add clarification to  
6 what Your Honour's clarification was; that I did hear the witness  
7 testify that when he came in to see OTP, it was the day following  
8 the call with Ms Alagendra.

9 JUSTICE DOHERTY: The sequence of events was he recalled  
15:26:32 10 that they called the following day. They called him the  
11 following day - that was one answer ago - and he went in the same  
12 day that they called him. So that's the sequence of his  
13 evidence.

14 MR HERBST: Yes, Your Honour.

15:27:18 15 JUSTICE DOHERTY: Please continue, Mr Herbst.

16 MR HERBST:

17 Q. When you went in to see OTP, do you remember who you met  
18 with on the day following [Overlapping speakers] --

19 A. Yes, My Lord.

15:27:43 20 Q. -- your call from Ms Alagendra?

21 JUSTICE DOHERTY: The witness replied in the affirmative,  
22 Mr Herbst. Please continue. He said he did remember who he met.

23 MR HERBST: He did. So I am asking him with whom did he  
24 meet?

15:28:16 25 THE WITNESS: Well, the late Mustafa, Mr Saffa, Mr Magnus,  
26 these are the investigators, and Mr Lamin. I met four of them on  
27 that day.

28 MR HERBST:

29 Q. And did you - well, what - withdraw. What did you tell

1 them?

2 A. Well, when I got to the OTP office, they asked me. They  
3 said they have received this e-mail, so we want to get a  
4 statement from you in relation to this e-mail that we received.

15:29:09 5 And the call that was made to me, when I told them that I had  
6 something to discuss with them, when I told them that it was not  
7 something to be discussed on the phone, they also said they would  
8 want to hear that. From there, they obtained a statement from  
9 me, and I explained exactly the contacts that I had with Sammy  
15:29:32 10 Ragga, Bomb Blast, and Five Five, and they took down that  
11 statement.

12 MR HERBST: Your Honour, I -- [Overlapping speakers].

13 JUSTICE DOHERTY: Mr Witness, could you just repeat the  
14 names that you mentioned. You started with Sammy Ragga,  
15:29:56 15 Bomb Blast, and what were the other names, please?

16 THE WITNESS: I said the contacts that I had with Sammy  
17 Ragga, Bomb Blast, and Five Five.

18 JUSTICE DOHERTY: Proceed.

19 MR HERBST: Your Honour, I would like to have placed before  
15:30:22 20 the witness a two-page document that has the heading "Meeting  
21 With TF1-334." I'd like that document shown to the witness.

22 JUSTICE DOHERTY: [Microphone not activated].

23 THE INTERPRETER: Your Honour's microphone is off.

24 JUSTICE DOHERTY: I'm checking. Does Mr Court Attendant  
15:30:50 25 have the document? Yes. Please show it to counsel for the  
26 Defence before you show it to the witness.

27 MR METZGER: I have the document, and I object on the basis  
28 that this document does not belong to this witness and it is  
29 properly adduced by someone, I believe from the OTP, that I

1 understood the Prosecution would be calling. It falls into the  
2 same sort of category as the last document.

3 MR HERBST: If I may reply briefly, Your Honour?

4 JUSTICE DOHERTY: Yes.

15:31:20 5 MR HERBST: The witness said that he came in the following  
6 day and that they took a statement from him. I think it's fair  
7 to show the witness that a document - although it's true that  
8 another witness, Mr Saffa, can testify to it - I think it's fair  
9 to ask this witness whether this is the information that he said  
15:31:52 10 he told and reported to them and, when he said they took a  
11 statement, whether this is what he means. Because the document  
12 does have a date on it that seems to correspond to what the  
13 witness has said.

14 MR METZGER: Your Honour, there is an unsigned statement in  
15:32:22 15 the bundle of papers and in the documents disclosed by the  
16 Prosecution which also has a date on it and purports to be the  
17 statement of this witness - or has dates on it. Respectfully,  
18 this witness cannot give evidence about the state of somebody  
19 else's mind when they were creating the document and making a  
15:32:42 20 note of their conversation.

21 MR HERBST: No. But the witness, Your Honour, can review  
22 the document and can testify as to whether this is the material  
23 that he reported to the gentlemen - the four gentlemen that he  
24 mentioned, whom he has already testified took a statement of  
15:33:14 25 sorts from him. Counsel knows from the disclosure that nothing  
26 was signed until the 9th of December. This documents - and he is  
27 able to testify to [indiscernible] what he said to them. So I  
28 think it's fair game and perfectly appropriate to put it before  
29 the witness and ask him whether, in fact, that's what he meant

1 when he said that they took a statement from him.

2 JUSTICE DOHERTY: The witness has said he went to OTP, they  
3 said they received the e-mail, they wanted to take a statement,  
4 he explained the context, and in the circumstances I allow the  
15:34:05 5 document to be put before the witness.

6 Please show it to counsel for the Defence first.

7 Mr Herbst, the document has been placed before the witness  
8 and he's now looking at it.

9 MR SERRY-KAMAL: Your Honour, the document I have is  
15:34:56 10 incomplete. It has no signature, no date. Just two pieces of  
11 paper.

12 JUSTICE DOHERTY: Well, we'll have to deal with that.

13 MR HERBST: Let me make sure the document is the right  
14 document, in light of Mr Serry-Kamal's statement.

15:35:21 15 JUSTICE DOHERTY: Well, I am --

16 MR HERBST: [Overlapping speakers] -- to say on Wednesday,  
17 1st December, 2010. So there is a date on the document. Is that  
18 the right document?

19 JUSTICE DOHERTY: It starts - the first paragraph - the  
15:35:40 20 heading is "Meeting with TF1-334", and the first paragraph reads  
21 as follows:

22 "On Wednesday, 1st of December, 2010, Thomas and I met with  
23 TF1-334 in respect of information he had earlier indicated that  
24 he wanted to share with members of OTP."

15:36:04 25 That's the first paragraph. Is this the document you're  
26 referring to? The last paragraph starts:

27 "334 said that Sammy Ragga ..."

28 And it goes on from there at the last paragraph. Is that  
29 the document in question?

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

2 JUSTICE DOHERTY: Just a minute, Mr Serry-Kamal, I am  
3 trying to get an answer from counsel for the Prosecution. Is  
4 that the document?

15:36:23 5 MR HERBST: It is, if Your Honour was reading the last  
6 paragraph [inaudible].

7 THE INTERPRETER: Your Honour, Mr Herbst is gone. We can't  
8 hear him any longer.

9 JUSTICE DOHERTY: Let me deal with that, Mr Interpreter.

15:36:35 10 Mr Herbst, the interpreter can't hear you and that, of  
11 course, is vital. Pause for a moment everyone and let me ask  
12 Mr Court Attendant to contact our technicians.

13 MR HERBST: Can the interpreter hear me now, Your Honour?

14 JUSTICE DOHERTY: Mr Interpreter?

15:37:02 15 THE INTERPRETER: We can only hear him faintly, and there  
16 is some echo in the microphone, in the headsets.

17 JUSTICE DOHERTY: I, too, can only hear you faintly,  
18 Mr Herbst, but it's more important that the interpreters hear you  
19 very clearly.

15:37:21 20 MR HERBST: Is this any better?

21 JUSTICE DOHERTY: No. We're looking into it.

22 THE COURT OFFICER: Your Honour, the technicians here say  
23 that the problem should be from that end because they, too, are  
24 finding difficulties hearing him.

15:37:51 25 MR HERBST: They are having trouble hearing me. They are  
26 having difficulty hearing me, apparently.

27 Your Honour, if you can hear me, I think the technical  
28 staff here is at their wit's end.

29 JUSTICE DOHERTY: Obviously I want to keep - we all want to

1 keep this trial going. I am sure the witness wants to get this  
2 over and done with. But if we can't hear, and we are a few  
3 minutes to the time I agreed to adjourn, I think the sensible  
4 thing would be to stand this over until tomorrow and allow  
15:38:42 5 everyone to get the technicians to deal with this problem.

6 I am going to --

7 MR HERBST: [Overlapping speakers].

8 JUSTICE DOHERTY: -- release the witness for the day with  
9 the usual warning, and then I'm going to ask you both - I am  
15:39:03 10 going allow Mr Metzger to leave also.

11 Mr Witness, we're having technical trouble, and it's also  
12 very close to the end of the day. Kigali are two hours ahead of  
13 us, and it's almost 6 o'clock their time. So I'm going to  
14 adjourn this part of the hearing for today.

15 I remind you that you are now under oath, and you are not  
16 to discuss your evidence with any other person, and you are to  
17 free to leave the courtroom, and if WVS could assist you, please,  
18 to leave.

19 [The witness withdrew]

20 JUSTICE DOHERTY: Mr Metzger, if you want to leave. I have  
21 prepared a reasoned decision in this leave to appeal. Obviously,  
22 I would prefer to read it out properly in your presence. But if  
23 you want someone to take it for you, I can read it now and make  
24 use of my time.

25 MR METZGER: I'm content, Your Honour, for the ruling to be  
26 read in my absence. I'm sure there will be a paper copy for me,  
27 and either the Court or my learned friends could, as it were,  
28 hold the brief in the meantime.

29 JUSTICE DOHERTY: Thank you, Mr Metzger. And obviously I



1 hope things go well at home.

2 Mr Herbst, can you hear me clearly? Because you don't have  
3 to reply to this.

4 MR HERBST: Your Honour, I do hear you clearly and I would  
15:40:30 5 like on behalf of all of us here in Kigali to wish Mr Metzger's  
6 mother nothing but the best and a speedy recovery from her  
7 accident.

8 MR METZGER: Thank you, Mr Herbst. That's most kind.

9 JUSTICE DOHERTY: [Microphone not activated]

15:41:04 10 [The witness withdrew]

11 JUSTICE DOHERTY: This is a ruling on an interlocutory  
12 application for leave to appeal a decision made by me.

13 Defence counsel for Kanu, Kamara, and Bangura, join in an  
14 application for leave to appeal an interlocutory decision in  
15:41:29 15 which the Court held that lawyer client privilege vested by  
16 Rule 97 of the Rules of Procedure and Evidence is not absolute.  
17 If the purpose of the communication is obtaining advice on the  
18 commission of a future crime and, following on from that  
19 decision, the decision to issue a subpoena requiring  
15:41:57 20 Andrew Daniels to appear and give evidence.

21 Rule 73(B) of the Rules provide that the decisions rendered  
22 on such interlocutory motions are without interlocutory appeal;  
23 however, in exceptional circumstances and to avoid irreparable  
24 prejudice to a party, the Trial Chamber may give leave to appeal.  
15:42:21 25 Such leave should be sought within three days of the decision and  
26 should not operate as a stay of proceedings unless the  
27 Trial Chamber so orders.

28 This provision has been considered in various applications  
29 for leave to appeal and by the Appeals Chamber, and they have

1 ruled that: (1) As a general rule, interlocutory decisions are  
2 not subject to appeal; (2) That Rule 73(B) involves a high  
3 threshold that must be met before the Trial Chamber can exercise  
4 its discretion to grant leave to appeal; (3) A party seeking  
15:43:02 5 leave against an interlocutory decision must show exceptional  
6 circumstances and irreparable prejudice; (4) The two-pronged test  
7 is conjunctive and not disjunctive; and (5) even where the  
8 conjunctive test is satisfied, leave to appeal remains in the  
9 discretion of the Trial Chamber.

15:43:27 10 In particular, the Appeals Chamber has said that as a  
11 general principle interlocutory appeals are a rare exception and  
12 that in this Court the procedural assumption is that trials will  
13 continue to their conclusion without delay or diversion caused by  
14 interlocutory appeals on procedural matters, and that any errors  
15:43:49 15 which affect the final judgement will be corrected in due course  
16 by the Appeals Chamber on appeal.

17 Likewise, the Appeals Chamber has held that an  
18 interlocutory appeal does not lie as a right and that the  
19 overriding consideration in respect of an application of this  
15:44:09 20 nature is that the applicant's case must reach a level nothing  
21 short of exceptional circumstances and irreparable prejudice  
22 having regard to the restrictive nature of 73(B), and the  
23 rationale that criminal trials must not be heavily encumbered and  
24 unduly delayed by interlocutory appeals; hence, exceptional  
15:44:34 25 circumstances where it may arise where the cause of justice may  
26 be interfered with or where issues of fundamental legal  
27 importance are raised.

28 The applicants seek to raise what I understand to be an  
29 issue of fundamental legal importance. They submit that Rule 97

1 is absolute and that the provisions of Article 17 of the code of  
2 conduct is subjective only if a lawyer or counsel reasonably  
3 believes that the subject matter of his conversation with a  
4 client about a criminal offence. In order to prevent such a  
15:45:22 5 criminal offence, the lawyer may reveal information.

6 Counsel submits that this point of law has not been decided  
7 by any of the international tribunals and therefore it will  
8 benefit the accused in this case and the jurisprudence of the  
9 tribunals to have the matter considered at the highest level.

15:45:48 10 They submit that this lack of precedents and jurisprudence  
11 amounts to exceptional circumstances. What the Appeals Chamber  
12 has called an issue of fundamental legal importance.

13 They further submit that once evidence is called of  
14 communications between lawyer and counsel in the instant case,  
15:46:15 15 there will be irreparable prejudice because the evidence will  
16 have been heard and admitted. Counsel for the Prosecution  
17 stresses the high threshold provided in Rule 73(B) before leave  
18 can be granted and stresses the conjunctive terms of the Rule.

19 Whilst I accept that there is no prior jurisprudence in the  
15:46:44 20 international tribunals on the interpretation of Rule 97, there  
21 is certain law in various national jurisdictions to which this  
22 Court can look for guidance, and I do not consider that the  
23 question is so exceptional that it must be determined by the  
24 Appeals Chamber on an interlocutory basis.

15:47:11 25 In regard to irreparable prejudice, I further consider that  
26 there are powers vested in the Appeals Chamber. Both those  
27 stated in Rule 118 of the Rules, which include power to order a  
28 retrial and, as has been pointed out by the Appeals Chamber  
29 itself, by their own powers which could include excluding

1 evidence that has been put to the Trial Chamber. In these  
2 circumstances, I consider that neither of the two provisions of  
3 the conjunctive grounds that must be met have been made out and  
4 accordingly I refuse leave to appeal.

15:48:03 5 Now the next question is the --

6 MR HERBST: Your Honour [Overlapping speakers] --

7 JUSTICE DOHERTY: Mr Herbst, I didn't hear you. Could you  
8 please say?

9 MR HERBST: Yes, Your Honour. I thought you were finished.  
15:48:17 10 I did not mean to interrupt the Court and I apologise.

11 JUSTICE DOHERTY: It's quite all right. I'd finished the  
12 ruling.

13 MR HERBST: I wanted to ask whether Your Honour had any  
14 further word with respect to the arrival of the amicus brief  
15:48:40 15 because after 334 the only two other witnesses that I would -  
16 that I would call would be Joseph Saffa to the extent that we  
17 have not gotten into evidence matters such as the Alagenda  
18 e-mail --

19 JUSTICE DOHERTY: I have made inquiries --

15:49:10 20 MR HERBST: [Overlapping speakers]

21 JUSTICE DOHERTY: -- today, and I am informed that the  
22 amicus brief is close to completion, and I was told in - I think  
23 they said one or two days. So it's not far away. And --

24 MR HERBST: That's fine, Your Honour. The only other thing  
15:49:35 25 I was going to say was that the only witness besides Mr Saffa  
26 would be the Principal Defender, depending on how Your Honour  
27 rules.

28 JUSTICE DOHERTY: I understand.

29 Now I come to the end of today's hearing.

1 And Mr Nicol-Wilson, any new circumstances that I can  
2 consider for your client? If not, I will extend the present  
3 status quo.

4 MR NICOL-WILSON: Your Honour, I was going to renew my  
15:50:16 5 application for bail after 334 completed his  
6 examination-in-chief.

7 JUSTICE DOHERTY: I think that's a very appropriate action  
8 on your part, Mr Nicol-Wilson.

9 MR NICOL-WILSON: I will wait.

10 JUSTICE DOHERTY: Indeed, quite appropriate.

11 Mr Herbst, that disposes of one accused. Now the defendant  
12 Kargbo?

13 MR HERBST: No change, Your Honour.

14 JUSTICE DOHERTY: In that case, in relation to the  
15:50:47 15 defendant and the accused Bangura, the status quo will be  
16 maintained. Mr Bangura will be remanded and Mr Kargbo's bail  
17 will be extended with the warning, Mr Kargbo, that I've already  
18 given you and which you are aware of. You are not to speak to  
19 any other witnesses, et cetera. Do you understand?

15:51:12 20 THE ACCUSED KARGBO: Yes, My Lord. Thank you.

21 JUSTICE DOHERTY: Now I think that completes us for today,  
22 and I will therefore adjourn Court until 9.00 tomorrow morning.

23 Please adjourn Court until 9.00 tomorrow morning.

24 [Whereupon the hearing adjourned at 3.53  
15:51:22 25 p.m., to be resumed on Tuesday, 26 June,  
26 2012, at 9.00 a.m.]

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