

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO. SCSL-2004-15-T  
TRIAL CHAMBER I

THE PROSECUTOR  
OF THE SPECIAL COURT  
v.  
ISSA SESAY  
MORRIS KALLON  
AUGUSTINE GBAO

TUESDAY, 18 JANUARY 2004  
9.54 A.M.  
TRIAL

Before the Judges:

Benjamin Mutanga Itoe, Presiding  
Bankole Thompson  
Pierre Boutet

For Chambers:

Ms Candice Welsch  
Mr Matteo Crippa

For the Registry:

Ms Maureen Edmonds  
Mr Geoff Walker

For the Prosecution:

Mr Peter Harrison  
Mr Alain Werner  
Ms Sharan Parmar  
Mr Mark Wallbridge (Case Manager)

For the Principal Defender:

Mr Ibrahim Mansaray

For the accused Issa Sesay:

Mr Wayne Jordash  
Ms Sareta Ashraph

For the accused Morris Kallon:

Mr Shekou Touray  
Mr Melron Nicol-Wilson

For the accused Augustine Gbao:

Mr Andreas O'Shea  
Mr John Cammegh

1 [HS180105A]

2 Tuesday, 18 January 2005

3 [Open session]

4 [The accused Sesay and Kallon not present]

09:34:56 5 [The accused Gbao entered court]

6 [On commencing at 9.54 a.m.]

7 PRESIDING JUDGE: Good morning, learned counsel. We are

8 resuming our session, and we would be asking the

9 Prosecution to call the next witness.

09:55:58 10 MR HARRISON: The next witness, which will be the 20th witness

11 in the trial, is TF1-141. The Prosecution has discussed

12 certain matters with all Defence counsel, and we have a

13 suggestion on how we might proceed this morning. We

14 suspect it may be a more efficient means of proceeding,

09:56:31 15 and I'd like to indicate to the Court what we have

16 discussed.

17 There are, in fact, three applications to be made

18 with respect to this particular witness.

19 PRESIDING JUDGE: By who?

09:56:46 20 MR HARRISON: The first application would be by the

21 Prosecution, which is an application that the next

22 witness testify by closed-circuit television and that

23 there be a support person in the room of the witness when

24 they testify by closed-circuit television.

09:57:26 25 The second and third applications would be made by

26 Mr Jordash and Mr O'Shea, and they are in respect to

27 objections to certain evidence which was disclosed in the

28 most recent statement of 10 January 2005.

29 PRESIDING JUDGE: In the most recent statement for this



1 witness?

2 MR HARRISON: Correct.

3 PRESIDING JUDGE: Dated?

4 MR HARRISON: 10 January 2005.

09:58:49 5 MR JORDASH: Just to clarify, and this is probably my lack of  
6 -- I beg your pardon to jump up.

7 PRESIDING JUDGE: That's okay.

8 MR JORDASH: It's an objection to evidence which has been  
9 disclosed in three statements. One on the 9th of October  
09:59:02 10 2004, one on the 19th to the 20th of October 2004, and  
11 one in a statement dated the 10th of January 2005.

12 PRESIDING JUDGE: So there are three statements, not one.

13 MR JORDASH: It's three statements.

14 PRESIDING JUDGE: Facts contained -- you're objecting to  
09:59:21 15 certain facts contained in three statements.

16 MR JORDASH: Indeed. It's the statements which have been  
17 served after the date which Your Honours prescribed as  
18 the date for which the Prosecution should adhere to as to  
19 serving evidence pursuant to Rule 66, which was, I think,  
09:59:38 20 the 16th of April 2004. So it's all the evidence since  
21 then.

22 PRESIDING JUDGE: Yes. Now, for the neatness of the record,  
23 why don't we allow Mr Harrison to conclude.

24 MR JORDASH: Indeed.

09:59:51 25 PRESIDING JUDGE: And then you can supplement his application  
26 with whatever further observations you have to make.

27 MR JORDASH: Certainly.

28 PRESIDING JUDGE: All right.

29 MR HARRISON: Yes. And I have no difficulty with Mr Jordash



1 pointing out that information, or any other information  
2 where I may be misleading.

3 That was the introduction that I wish to give to the  
4 Court as to how we might proceed this morning if in the  
10:00:18 5 Court's view that is an efficient manner. What we also  
6 contemplated was that all applications would be resolved  
7 before the witness would be brought into the room so that  
8 they would take place without him knowing the words  
9 uttered. The Prosecution is at the Court's pleasure, but  
10:00:37 10 we are prepared to deal with the first application. We  
11 estimate submissions of perhaps 10 to 15 minutes. But I  
12 should indicate that it's -- what's most significant  
13 probably for the Court is the information that has been  
14 provided in the statutory declaration by Ms An Michels,  
10:00:58 15 the psychologist from the witness and victim management.

16 [Trial Chamber confers]

17 JUDGE THOMPSON: Mr Jordash.

18 MR JORDASH: I agree with everything my learned friend has  
19 just said. To a large extent, it's in Your Honours hands  
10:01:54 20 as to the order of events or order of arguments. But it  
21 makes sense perhaps to deal with the argument as to the  
22 special measures since it involves the psychologist,  
23 Ms Michels, who is here in Court. So perhaps it might  
24 make sense to deal with that argument first, and then  
10:02:20 25 move on to the arguments as to exclusion of evidence.

26 PRESIDING JUDGE: What about -- we would like to have on  
27 record, you know, besides the statement dated the 10th of  
28 January 2005, you say you would also be objecting to two  
29 other statements. May we have the dates please.



1 MR JORDASH: 9th of October 2004, and the 19th-20th of October  
2 2004.

3 PRESIDING JUDGE: 19th and 20th of October?

4 MR JORDASH: Yes.

10:03:16 5 PRESIDING JUDGE: 19th?

6 MR JORDASH: 19th and 20th. It's -- basically, it's the  
7 proofing exercise carried out on the 19th and the 20th of  
8 October, and it's information contained as a result of  
9 those proofing exercises.

10:03:40 10 JUDGE BOUTET: So those statements, to follow your -- are  
11 statements that the Prosecution would have obtained  
12 subsequent to a series of other statements in this case.

13 MR JORDASH: Yes. The statements obtained on the 19th and  
14 20th of October and the 10th of January are perhaps not  
10:04:04 15 properly described as statements because they arise  
16 through a proofing exercise. But they --

17 JUDGE BOUTET: It's clarification of a previous statement, in  
18 other words, like we've seen with other witnesses.

19 MR JORDASH: That's the process by which the evidence arises.  
10:04:18 20 I would seek to argue that it's not evidence which arises  
21 through clarification, but that's the process.

22 JUDGE THOMPSON: In other words, there's an earlier statement  
23 in time, which is the original statement or controlling  
24 statement.

10:04:32 25 MR JORDASH: Yes.

26 JUDGE THOMPSON: And these may well be described as  
27 supplemental, the ones that you're likely to object to  
28 may well be characterised "supplemental" statements.

29 MR JORDASH: In the Prosecution's view and in our view,





1           they're additional statements.

2   JUDGE THOMPSON: Well, whatever. But there is a controlling

3           statement which they relate to.

4   MR JORDASH: They purport to relate to. We would say not.

10:04:58 5   JUDGE THOMPSON: That's the kind of language. I just wanted

6           to make sure --

7   MR JORDASH: Your Honour, yes.

8   JUDGE THOMPSON: -- that we're not talking about independent

9           statements in terms of your 19 October, 19 and 20, and

10:05:11 10   10/1/05. They are statements which are additional to the

11           controlling statement.

12   MR JORDASH: Your Honour, yes.

13   JUDGE THOMPSON: All right.

14           Mr O'Shea.

10:05:32 15   MR O'SHEA: Your Honours, with regard to the order of the

16           three applications, we have no difficulty with the

17           Prosecution proposal that the Prosecution application go

18           first. We also have no difficulty with the application

19           of Mr Sesay coming second. With regard to our

10:05:59 20   application, our application is distinct from that of

21           Mr Jordash. It is similar to this extent, that we are

22           objecting to particular evidence in the statement which

23           has been referred to as being dated the 10th of January

24           2005.

10:06:31 25           The evidence that we are objecting to is distinct

26           from the evidence which Mr Jordash is objecting to.

27   PRESIDING JUDGE: But it's contained in the same statement.

28   MR O'SHEA: But it's contained in the same statement, yes.

29           The legal basis of the submissions, while overlapping,



1 are also distinct. However, that having been said, it  
2 may be a time-saving exercise to deal with the arguments  
3 in relation to Mr Sesay and the arguments in relation to  
4 Gbao collectively, but I'm in Your Honours' hands in  
10:07:22 5 relation to that. They are distinct points, but they do  
6 overlap on questions of law. And so it may -- it may be  
7 convenient to hear the arguments from Mr Jordash, then  
8 hear the arguments of myself, and then Your Honours can  
9 deal with the two issues distinctly in one decision or  
10:07:44 10 two.

11 JUDGE BOUTET: Can I ask if the application that the  
12 Prosecution's intending to make about the witness  
13 testifying in closed circuit and the assistance of the  
14 witness, if this application is opposed in any way,  
10:08:19 15 shape, or form by the Defence of either accused?

16 JUDGE THOMPSON: Perhaps I should join you in seeking  
17 clarification on that because it seems as if there are  
18 two applications in one. So whether the Prosecution can  
19 guide us as to whether there's an agreement. If there  
10:08:41 20 isn't, then why not, in other words, separate them.

21 MR HARRISON: No, there's no agreement. That's why there's an  
22 application. And there's no agreement on either the  
23 closed circuit or on the support person being present.  
24 Our suggestion is that there be one application seeking  
10:08:58 25 two forms of relief, and the Court can deal with them in  
26 one decision, granting one, both, or none.

27 JUDGE THOMPSON: All right, thanks.

28 Mr Touray.

29 MR NICOL-WILSON: Your Honour, we are not objecting to the



1 Prosecution's application, but there is a likelihood that  
2 we will raise certain issues after the application which  
3 will take the form of an objection to that application.

4 But we want to wait first and listen to the application.

10:09:33 5 JUDGE THOMPSON: So in other words, you want to reserve your  
6 position on that --

7 MR NICOL-WILSON: Yes, until after --

8 JUDGE THOMPSON: You've heard the application.

9 MR NICOL-WILSON: But we just want to inform the Court that  
10:09:45 10 there's a likelihood that we will raise an objection to  
11 the application, but we want to listen to the application  
12 first.

13 JUDGE THOMPSON: Well, that's fine.

14 MR JORDASH: Could I make clear the extent of our opposition  
10:10:03 15 to the application. The Prosecution want this young man  
16 to give evidence by --

17 JUDGE THOMPSON: Well, are we -- we're not yet hearing the  
18 application. We were, in fact, advised by the  
19 Prosecution that they want to apprise the Chamber of some  
10:10:21 20 kind of agreement between the Prosecution and the Defence  
21 as to the modus operandi this morning in terms of an  
22 efficient discharge of judicial business, particularly  
23 before this witness testifies. That's the stage at which  
24 we are now, whether there is. But we're not yet at the  
10:10:44 25 stage of hearing the application substantively because  
26 when I accept I got Mr Harrison wrong, he said that the  
27 whole purpose of the exercise he has gone through is to  
28 inform the Court as to the efficient manner in which we  
29 should proceed before this witness testifies. Am I clear



1 on that?

2 MR JORDASH: Your Honour, yes. And in that case, I shall sit  
3 down.

4 JUDGE THOMPSON: Yes.

10:11:25 5 Do you want to throw some light on this?

6 MR HARRISON: There's nothing I can shed, unless we can  
7 proceed in the manner I suggested.

8 JUDGE THOMPSON: Quite right. That's something which we will  
9 have to determine first.

10:11:37 10 PRESIDING JUDGE: I have listened to both the Prosecution and  
11 the Defence teams. And I'm a bit wary about the  
12 complexity that these oral applications are likely to  
13 take, likely to assume for purposes of our determination.  
14 I was wondering, you know, if we could enter in order to  
10:12:18 15 give the applications very serious and thorough

16 consideration proceed by some motions in writing which we  
17 could subject to some expedited hearing. Because there  
18 is -- we are caught up in a complexity somewhere, you  
19 know. There are three applications. The Defence

10:12:55 20 is -- Mr Jordash is objecting to not only to the  
21 statement of the 10th, but also to the other statements  
22 of the 19th and the 20th of October, I mean the 10th of  
23 January. Also, the statements of the 19th and 20th of  
24 October, and Mr O'Shea has his own concerns which are  
10:13:29 25 legitimate. You know his objection is close to those of  
26 Mr Jordash, it is being raised for different reasons and  
27 purposes.

28 And the Defence team of the second accused Mr Kallon  
29 indicates that they are comfortable going with the





1 application, but that at that certain stage after  
2 listening to the application by the Prosecution, they  
3 might raise certain objections. I mean, this throws some  
4 complexity that are beyond the ordinary that one would  
10:14:06 5 expect to take in an oral application. I was wondering  
6 what the reaction of counsel would be on this because we  
7 consider the issues fundamental and important at this  
8 stage.

9 Yes, Mr Harrison.

10:14:24 10 MR HARRISON: The Prosecution is content to proceed in the  
11 manner that has been suggested. I have no difficulty  
12 with the position taken by Mr Touray and Mr Nicol-Wilson.  
13 That's a fair position which they're always entitled to  
14 proceed.

10:14:39 15 The application made by the Prosecution is a very  
16 straightforward one. There is simply one rule that would  
17 be referred to -- sorry, two rules to be referred to, and  
18 essentially I think turns on the evidence and how much  
19 weight the Court determines to give to the statutory  
10:14:57 20 declaration of the psychologist. There's authorities  
21 which the Prosecution say answer completely the motions  
22 of Mr Jordash and Mr O'Shea. There's one authority which  
23 we say answers their objections completely, and we're  
24 prepared to -- we have submitted the authority to -- one  
10:15:20 25 of the court legal officers already, and we say that  
26 again that's a relatively straightforward matter that can  
27 be dealt with.

28 There's one other bit of information if my friend  
29 could just indulge me for a minute. This witness is a



1 person that the Prosecution has requested be withdrawn  
2 from their educational programme on two occasions. There  
3 has been considerable hardship to this person, and the  
4 Prosecution does very much wish to try to have this  
10:15:58 5 witness dealt with in as speedy a manner as possible.

6 Thank you.

7 MR JORDASH: Your Honour, could I agree with what my learned  
8 friend has said. In relation to the issue of the  
9 protective measures, my submission would be that the  
10:16:18 10 argument will turn upon the evidence, and I would seek  
11 the live evidence of Ms Michels. So that extent, a  
12 written motion may not actually provide any resolution.  
13 As Your Honours may consider that the application does  
14 turn on what she has to say about this young man.

10:16:39 15 In relation to my argument, I've handed to  
16 Your Honours' learned legal officers a table of the  
17 evidence which has been given by this young man both  
18 before April of 2004 and in the evidence which I will  
19 seek to exclude. To the extent that the application is  
10:17:04 20 complicated, it revolves only around Your Honours' two  
21 judgements. One, which my learned friend has just  
22 referred, which they rely upon from the CDF trial, and  
23 the judgement which I rely upon which is from this trial.  
24 So both of which are Your Honours' own judgements, and my  
10:17:23 25 application essentially revolves around Your Honours  
26 looking at the table which has been prepared by our team  
27 and assessing whether that evidence is new, as in an  
28 additional statement or whether it arises as supplemental  
29 to the old statement. So I would respectfully submit



1 that it's much less complicated than perhaps it first  
2 appears from, perhaps, the long-winded way in which we've  
3 all expressed ourselves so far.

4 MR O'SHEA: I fully understand Your Honours' concern. There  
10:18:02 5 are, however, difficulties with the course that Your  
6 Honour is considering. With regard to the protective  
7 measures, of course it relates to how we proceed with the  
8 evidence of this witness, and that is, I think, the  
9 essential difficulty.

10:18:20 10 With regard to our argument, our application, as to  
11 complexity, it refers to one line in the supplemental  
12 statement of the 10th of January. However, one line, we  
13 say, of great significance.

14 With regard to the law, aspects of the law are  
10:18:59 15 covered by Mr Jordash's application, and therefore what  
16 Mr Jordash says about Your Honours' own rulings and the  
17 interpretations of them applies. So neither from our  
18 side nor from the side of the Bench should there need to  
19 be too much discussion about the content of Your Honours'  
10:19:20 20 own rulings.

21 The distinct aspect of the law is, while a difficult  
22 one for Your Honours to decide possibly, because it is  
23 not thus far covered by authority so far as I can see, in  
24 terms of its explanation, I think it's simple, and I  
10:19:45 25 wouldn't imagine that the new aspect of the legal  
26 argument that I intend to put to Your Honours should take  
27 more than 10 to 15 minutes, from my side. That's with  
28 regard to the complexity.

29 There's a more significant problem, however, with



1 the concept of a written motion, which is that is may be  
2 that if Your Honours are with my argument partially but  
3 not entirely, which I see as a possibility, it may be  
4 that Your Honours decide to postpone the testimony of  
10:20:28 5 this witness. So the only way we could really deal with  
6 the matter in the way of a written motion would be if the  
7 Prosecution were to indicate to this Bench that they  
8 would be happy to postpone this witness in any event. If  
9 that happened, then we could deal with it by written  
10:20:55 10 motions. If that does not happen, then one of the  
11 remedies is to postpone the testimony, and that's where  
12 the difficulty lies. Does Your Honour follow?

13 JUDGE BOUTET: I don't. I don't see any difference between  
14 what you're saying, whether the Prosecution agrees or  
10:21:11 15 not, what does that change? If we feel that we need some  
16 time to reflect upon that, then we'll certainly ask the  
17 Prosecution to postpone the evidence of this witness. So  
18 as far as we're concerned, obviously if we're asking you  
19 to produce something in writing, it means that we don't  
10:21:29 20 expect that to be handed to the Court this morning.

21 We'll have to give the time to everybody. And it goes  
22 without saying that there will necessarily be a  
23 postponement of the evidence of this witness. It goes  
24 without saying that if we go that route, that's what will  
10:21:46 25 happen.

26 MR O'SHEA: Indeed. But on the other hand, if we make the  
27 application quickly and Your Honours are against us, then  
28 the evidence can proceed.

29 MR JORDASH: Could I just -- could I also... Could I also add





1 this, and perhaps I should have made this clearer: If  
2 after hearing Ms Michels's evidence, I take the view that  
3 the evidence for my part passes what I see as the  
4 relevant standard in terms of what this young man's  
10:22:45 5 psychological state is then I would be happy to concede  
6 the application and not require, as such, a decision.  
7 Whether that assists Your Honours in deciding whether to  
8 hear this argument now, I don't know. But certainly, my  
9 opposition is only because I don't know what Ms Michels  
10:23:07 10 will say about this young man except what is so far  
11 detailed in a short statement.

12 JUDGE BOUTET: On that issue, if I may, Mr Jordash, so we are  
13 better equipped to think and take a decision about that,  
14 will this be the focus of your cross-examination -- or  
10:23:23 15 your examination, whatever it may be? Are you contesting  
16 or disputing the expertise level of that particular  
17 witness? I'm not talking -- I'm talking of Ms An  
18 whatever her second name is. And are you disputing  
19 conclusions or recommendation? I know you're going to  
10:23:43 20 challenge -- not challenge, but trying to get some  
21 clarification as to how much and what it is that he's  
22 suffering and whether it has or has not. But this is the  
23 focus of your examination of that witness, not the other  
24 issues that I'm raising.

10:23:58 25 MR JORDASH: Indeed.

26 JUDGE BOUTET: And you're not intending to call a counter  
27 expert. We're not going in that direction.

28 JUDGE THOMPSON: But let me add to that if that is the focus  
29 of your position, of course, it would seem that the Court



1 would have to apply its mind to the criteria. I mean,  
2 we're not just going to -- if you cross-examine, you  
3 question credentials, you question methodology, you  
4 question reasoning, then you question conclusion of the  
10:24:34 5 expert, the Court will have to now be able to advise  
6 itself on the criteria for assessing the scientific  
7 validity of expert testimony. So that in itself puts a  
8 little complexity on the issue because we're not just  
9 going to say, "oh, well, Mr Jordash has questioned this,  
10:24:59 10 and therefore that's the end of the matter." We would be  
11 called upon somehow to say what criteria, if any, should  
12 be applied in assessing the scientific validity of the  
13 psychological evaluation.

14 MR JORDASH: If I can summarise my position, in Your Honours'  
10:25:24 15 ruling of the -- it was the renewed motion for special  
16 measures, and Your Honours' ruling there -- dated the 5th  
17 of July 2004 ruled that child witnesses could give  
18 evidence via the live link in order to prevent certain  
19 psychological effects. Now, if Ms Michels's evidence is  
10:25:57 20 clear in that regard that this would prevent those  
21 psychological effects, Your Honours may take the view  
22 that this young man, therefore, falls, despite the  
23 dispute about age, into the category of witnesses who  
24 should give evidence via live link. In other words, if  
10:26:17 25 the Prosecution established through calling their  
26 evidence that the same retraumatisation risks apply to  
27 this witness as apply to child witnesses, then  
28 Your Honours have already ruled on that and it would  
29 simply be a matter of adjudicating that it is -- that the



1 evidence adduced is consistent with your previous order.

2 That's a long way of saying a very simple thing, but I

3 hope Your Honours understand me.

4 JUDGE THOMPSON: Because my difficulty is we would not be

10:26:57 5 escaping of having to do some preliminary assessment of

6 the scientific validity of expert testimony. Otherwise,

7 why would we need it then?

8 MR JORDASH: Indeed.

9 JUDGE THOMPSON: We have to be guided by it. And in doing

10:27:10 10 that, we need to advert our minds to what sort of general

11 criteria to use in assessing the scientific validity of

12 -- and particularly when you say if you question the

13 methodology, the reasoning --

14 MR JORDASH: I don't. I don't question Ms Michels's

10:27:32 15 expertise.

16 JUDGE THOMPSON: You can still concede her expertise in the

17 field but at the same time question the reasoning and the

18 conclusion. I mean, that is possible. You can say,

19 well, she is highly qualified. She got her degrees from

10:27:47 20 so and so and so. She is qualified in the clinical

21 aspects of psychology, but you can still say, it's

22 possible, how did you arrive at this conclusion of PSD?

23 Your methodology?

24 [Trial Chamber confers]

10:28:10 25 JUDGE THOMPSON: I mean, there could be a distinction here.

26 You can still not challenge her credentials, her

27 expertise, which is a preliminary determination as far as

28 I understand the law, but still challenge the methodology

29 and the conclusion.



1 MR JORDASH: I --

2 JUDGE THOMPSON: That's how I understand it.

3 MR JORDASH: I might. I'm simply saying that if --

4 PRESIDING JUDGE: [Microphone not activated]

10:28:37 5 MR JORDASH: Your Honour, your microphone.

6 PRESIDING JUDGE: Sorry. Thank you.

7           You said that you're not necessarily challenging the

8           expertise of this witness.

9 MR JORDASH: Definitely not.

10:28:55 10 PRESIDING JUDGE: That is what I understand you to have said.

11 MR JORDASH: And I haven't decided what else I might

12           challenge.

13 JUDGE THOMPSON: That's the point I'm making. I'm trying to

14           understand whether when you say you're not challenging

10:29:07 15           the expertise, that means that you may be accepting the

16           conclusion of the psychological evaluation or even the

17           reasoning or both. I don't understand it that way.

18 MR JORDASH: Until I hear the evidence, I don't know what --

19 JUDGE THOMPSON: You can -- precisely. That's what I have

10:29:26 20           been trying to clear up.

21 MR JORDASH: I agree with that. But I do suspect that having

22           concluded that her expertise is not to be challenged, my

23           challenge to any evidence will be minimal. It's

24           clarification I seek more than anything else.

10:29:48 25                           [Trial Chamber confers]

26 PRESIDING JUDGE: Yes, Mr Cammegh.

27 MR CAMMEGH: Your Honour, can I make it clear that my position

28           on this is exactly the same. First of all, we do not in

29           any way challenge the expertise or the credentials of the





1 expert witness whose evaluation we are hopefully about to  
2 hear. The task is simple, and it is simply this: To  
3 explore the ambit upon which she has come to her  
4 conclusions. And I very much doubt whether there will be  
10:30:35 5 anything that remains in issue after that. But it's our  
6 duty to explore the grounds upon which those conclusions  
7 are based.

8 I would venture to suggest that once that has been  
9 established, and I will not be in a position to challenge  
10:30:52 10 it or take it any further. But I think that's the  
11 process that I have to engage in. Just to be sure that  
12 the Court is content that the findings on what is, after  
13 all, quite an important issue, are satisfactory to the  
14 Tribunal and satisfactory to the Defence.

10:31:13 15 PRESIDING JUDGE: Thank you.

16 All right, thank you for the arguments which  
17 have -- yes.

18 MR NICOL-WILSON: Your Honour, the Defence for Morris Kallon,  
19 as we earlier stated, we have certain concerns with the  
10:31:35 20 application by the Prosecution which we know by  
21 implication will include a reference to the declaration  
22 by the psychologist. We think that the way to proceed  
23 would be by motion because we now see that the issues are  
24 many, and appears to be very complex. For instance, we  
10:31:52 25 shall be looking into the recommendations made by the  
26 psychologist, and we definitely need an independent  
27 advice in order to be able to deal with the  
28 recommendations effectively. So we definitely are in  
29 support of the suggestion made by the Presiding Judge



1 that we think that the right way to proceed would be by  
2 motion which would then be dealt with expeditiously.

3 PRESIDING JUDGE: Well, thank you.

4 Mr Cammegh, you're up again. Yes, Mr Cammegh.

10:32:25 5 MR CAMMEGH: Just to make it clear that with all respect to my  
6 learned friend, that is not the position that I take, and  
7 I anticipate it's not the position of Mr Jordash either.  
8 This is an exploration that can only take place orally in  
9 our submission, and the quicker the better.

10:32:39 10 PRESIDING JUDGE: All right.

11 MR JORDASH: Sorry, and since my learned friend is not making  
12 any application, I would suggest what they would need to  
13 do to be able to join this argument is to hear first of  
14 all from a Ms Michels. That can't be done by written  
10:32:57 15 motion.

16 PRESIDING JUDGE: What do you say?

17 MR JORDASH: Well --

18 PRESIDING JUDGE: That can be heard by written motion.

19 MR JORDASH: Well, as I understand it, my opposition to this  
10:33:12 20 application cannot be based unless I hear from  
21 Ms Michels. As I understand their position, their  
22 application, if there is to be one, cannot take place  
23 unless there is oral evidence from Ms Michels. So the  
24 written motion route wouldn't, I would submit, resolve  
10:33:29 25 this issue. We have a statement from Ms Michels. We've  
26 all I think are in agreement that nothing can be decided  
27 simply on the basis of that written statement. So we're  
28 all in effect waiting to hear from Ms Michels.

29 JUDGE BOUTET: So would that be a possibility, that we hear



1 Ms Michels, to see what she has to say, and that may take  
2 care of both views. And then see if there is an  
3 application following that, because I can see what you're  
4 saying is the application by counsel for the second  
10:34:08 5 accused can only follow the evidence -- you need to hear  
6 the evidence that has to be put forward by that  
7 particular expert witness before you make any stated  
8 position on that. That's basically what you're saying.

9 MR JORDASH: Yes.

10:34:27 10 JUDGE BOUTET: So would that be a possibility? I'm just  
11 raising that, that we hear that evidence sort of now,  
12 although it would not be in line with what has been  
13 suggested by the Prosecution as to how they want to  
14 proceed because they would like to proceed first with  
10:34:44 15 their application, and then we hear your objection. But  
16 just given the way it is moving now, would that be a  
17 solution to hear that first, and then we'll see if  
18 following this counsel for Mr Kallon still have their  
19 motion or not.

10:35:02 20 MR JORDASH: Your Honour, I would say yes. And also, as I  
21 understand the Prosecution's application, it is  
22 predicated upon the oral evidence of Ms Michels as well.

23 JUDGE BOUTET: Okay. Yes.

24 MR NICOL-WILSON: Your Honour, basically we are saying that  
10:35:17 25 there is a declaration already by Ms An Michels, and we  
26 are sure that she is going to confine herself in her oral  
27 declaration what is stated in this written declaration.  
28 So we think the right way to proceed is there will have  
29 to be an application from the Prosecution first, and that



1 is what we think should come in by way of motion so we  
2 could respond and that could be dealt with expeditiously.  
3 Because we already know what Ms An Michels will be saying  
4 to this Court because we have a declaration.

10:35:48 5 JUDGE BOUTET: The position that Mr Jordash has taken and that  
6 of your colleague from the third accused is that maybe  
7 this is what the Prosecution is content to establish  
8 through the evidence of this witness, but they would like  
9 to know more. And the approach, as I hear it from  
10:36:08 10 Mr Jordash, to say that we want to explore that, to know  
11 and question some of the issues that are raised in that  
12 declaration as such, and see from there if we're  
13 satisfied with it or not. So obviously even though the  
14 Prosecution may use that statement and stick with that  
10:36:23 15 statement, your colleagues from the Defence side are  
16 saying "we're not content with this. We want to know a  
17 little bit more. And it's only once we know more that  
18 we're going to be in a position to determine where we  
19 go." So yes, maybe that's the position of the  
10:36:38 20 Prosecution but it is certainly my understanding not the  
21 position of your colleagues from the Defence.

22 MR NICOL-WILSON: We're in your hands, Your Honour.

23 PRESIDING JUDGE: The Court will rise for a few minutes. We  
24 shall come in when we are ready. The Court will rise,  
10:36:59 25 please.

26 [Break taken at 10.37 a.m.]

27 [On resuming at 10.50 a.m.]

28 PRESIDING JUDGE: We would be resuming the session, and we'll  
29 take the arguments which have been raised this morning





1 orally, beginning with the Prosecution. And if at any  
2 stage, any necessity arises for arguments to be put in  
3 writing, we would take that stand which is solicited by  
4 the Defence team of the second accused, Mr Kallon. We  
10:52:35 5 would call on Mr Harrison to proceed and present very  
6 succinctly, very, very succinctly indeed, and as usual,  
7 of course, I'm not saying that Mr Harrison is always  
8 long, the arguments he's putting across in support of his  
9 application.

10:53:03 10 Mr Harrison, you may proceed, please.

11 MR HARRISON: The frank concession the Prosecution makes now  
12 is that it cannot establish the age of Witness TF1-141.  
13 The best that it can do is advise the Court that in 2000,  
14 in approximately December of that year, an estimate was  
10:53:43 15 made of the witness's age --

16 PRESIDING JUDGE: That's in December 2000.

17 MR HARRISON: An estimate was made by a nurse, who upon  
18 reviewing the dental formation and skeletal formation,  
19 estimated the age of the witness to be 14 years of age,  
10:54:21 20 at that time, in the year 2000.

21 JUDGE BOUTET: That's December 2000, which would mean that by  
22 December 2004, that witness would be 18 and over, based  
23 on that estimate.

24 MR HARRISON: Based on that estimate. That is the frank  
10:54:41 25 concession we make. The witness protection order of the  
26 Court --

27 PRESIDING JUDGE: That he was 14.

28 MR HARRISON: In the year 2000.

29 PRESIDING JUDGE: 2000, yes.



1 MR HARRISON: That was the estimate. The witness protection  
2 order of the Court, as all members of the Court are  
3 aware, does have a provision for category B witnesses  
4 which refers to children. There's no definition of  
10:55:18 5 children in the order, but I'm wishing to assist the  
6 Court by letting the Court know that the convention on  
7 rights of the child provides in Article 1 that at any  
8 rate for the purpose of that convention "child" is  
9 defined as every human being below the age of 18. So the  
10:55:45 10 Prosecution advises the Court that we cannot rely solely  
11 upon the witness protection order to assert that this is  
12 a category B witness.

13 What we do rely upon are the Rules. And the two  
14 Rules that we ask the Court to consider are Rule  
10:56:36 15 75(B)(i)(c). The heading for that Rule is "measures for  
16 protection of victims and witnesses", and the particular  
17 section I'm relying upon reads as follows. Under (B), "a  
18 Judge or a Chamber may hold an in camera proceeding to  
19 determine whether to order, (i), measures to prevent  
10:56:55 20 disclosure to the public or the media of the identity or  
21 whereabouts of a victim or a witness or persons related  
22 to or associated with him by such means as," and then (c)  
23 reads "giving of testimony through image or voice  
24 altering devices or closed-circuit television, videolink,  
10:57:14 25 or other similar technologies."

26 And then Rule 85(D) states: "Evidence may be given  
27 directly in court or via such communication media,  
28 including video, closed-circuit television, as the Trial  
29 Chamber may order."



1           The Prosecution puts that information before the  
2           Court and says that's a legal context for any decision.

3           The factual context is as follows: A statutory  
4           declaration which has been distributed to Defence counsel  
10:58:06 5           and to the legal officer - and I would ask if the copies  
6           have not been given to the members of Court, if they  
7           could be given - it's a two-page statutory declaration  
8           consisting of six paragraphs. The declarant is Ms An  
9           Michels, psychologist of the victims and witnesses unit.  
10:58:48 10           She has brought this information to the Prosecution, and  
11           the Prosecution, in its conduct of the matter, has chosen  
12           to bring this to Court's attention.

13           We rely upon the assertions made in the statutory  
14           declaration. The Prosecution does not choose to expand  
10:59:18 15           upon the information in the statutory declaration;  
16           however, it's our suggestion that Ms Michels be given the  
17           opportunity to address Court in the event that there's  
18           some further information that she may wish to convey to  
19           the Court that may be of assistance.

10:59:41 20           I should allow my friends to state their position,  
21           but it may be appropriate to have the statutory  
22           declaration marked as an exhibit in the proceedings.

23                           [Trial Chamber confers]

24           JUDGE THOMPSON: Learned counsel for the Prosecution, can we  
11:01:11 25           now proceed to have the declarant come to the witness  
26           box -- stand.

27           MR HARRISON: That's my suggestion.

28           JUDGE THOMPSON: Yes, and it would be preferable, the Bench of  
29           the opinion that it would be preferable for her to tender



1 the document after she has given the evidence. It's her  
2 declaration. So we can call the witness.

3 [The witness entered court]

4 WITNESS: AN MICHELS - sworn

11:02:33 5 JUDGE THOMPSON: Proceed, learned counsel.

6 MR HARRISON: If I can indicate to the Court, the Prosecution  
7 does not see Ms Michels as being its witnesses. She is a  
8 member of the Registry. We have brought this information  
9 to the Court's attention. I'm open to the Court's

11:02:49 10 suggestion. I can put questions to this witness to take  
11 her through it. It may be just as appropriate for the  
12 Court to do it.

13 JUDGE THOMPSON: Let me tell you my response quickly that if  
14 this witness is here to support your application, it  
11:02:58 15 would seem to me logical to conclude that she is a  
16 witness for the Prosecution, and I would not want to  
17 treat her as a Court witness.

18 EXAMINED BY MR HARRISON:

19 Q. Ms Michels, do you have a statutory declaration before  
11:03:17 20 you?

21 A. Yes, I do.

22 Q. Is that a statutory declaration dated the 16th of  
23 December 2004?

24 A. That's correct.

11:03:22 25 Q. Is that your statutory --

26 PRESIDING JUDGE: Please, can you go slowly, please. We want  
27 to note down what she is saying.

28 JUDGE THOMPSON: Excuse me, has she been sworn?

29 PRESIDING JUDGE: Yes, she has.





1 JUDGE THOMPSON: Let her proceed, then.

2 PRESIDING JUDGE: We know that the Court records are being  
3 kept by the stenographers, but we keep our own notes so  
4 as to guide us at times. That's why we normally ask that  
11:03:55 5 examination be conducted at an acceptable speed so as to  
6 enable us to get some salient points on our personal  
7 records.  
8 Yes, she has a statutory declaration before her.  
9 Yes.

11:04:13 10 MR HARRISON:  
11 Q. It's dated the 16th of December 2004?  
12 A. Yes, it is.  
13 Q. Are all of the contents in that declaration true?  
14 A. Yes, they are.

11:04:34 15 Q. Is there any other information that you would like Court  
16 to know?  
17 A. Basically, this declaration contains the content -- the  
18 summary of my findings so I could provide the Court with  
19 some other details. But I think that the main  
11:04:54 20 information is in this declaration.

21 MR HARRISON: At this point, could I ask that the statutory  
22 declaration become an exhibit.  
23 PRESIDING JUDGE: Yes.

24 MR HARRISON: That being the case, there's no further  
11:05:31 25 questions.

26 PRESIDING JUDGE: Can the declaration be shown to -- has it  
27 been -- let it be shown to the Defence.  
28 MR JORDASH: We already have it.  
29 PRESIDING JUDGE: You already have it, right, okay.



1 JUDGE THOMPSON: Yes. To be Exhibit 16 is it? 15? 15, yes.  
2 14 we have, it should be 15.  
3 The document is received in evidence and marked  
4 Exhibit 15.  
11:06:22 5 [Exhibit No. 15 was admitted]  
6 MR HARRISON: That concludes the questions that the  
7 Prosecution wish to put to the witness.  
8 JUDGE THOMPSON: Thank you.  
9 Mr Jordash for the first accused.  
11:07:23 10 MR JORDASH: Thank you.  
11 JUDGE THOMPSON: Your witness.  
12 MR JORDASH: Your Honour, thank you.  
13 CROSS-EXAMINED BY MR JORDASH:  
14 Q. What are the principal symptoms of -- you conclude that  
11:07:23 15 this witness has post-traumatic stress disorder?  
16 A. That is correct, yeah.  
17 Q. And the symptoms you list are palpitations and body  
18 pains, but what else does this young man suffer?  
19 A. Well, in my declaration --  
11:07:23 20 PRESIDING JUDGE: Just a minute.  
21 THE WITNESS: I'm sorry.  
22 PRESIDING JUDGE: I conclude that the witness is suffering  
23 from post-traumatic --  
24 THE WITNESS: Post-traumatic stress.  
11:07:32 25 JUDGE BOUTET: Is there any difference between post-traumatic  
26 stress and post-traumatic stress disorder?  
27 THE WITNESS: We could call it post-traumatic stress disorder.  
28 Post-traumatic stress is a little bit broader concept  
29 than post-traumatic stress disorder. We can call it



1 post-traumatic stress disorder, yeah.

2 PRESIDING JUDGE: The question which you were going to ask.

3 MR JORDASH: If I can just pick up on what Ms Michels has just  
4 said.

11:08:27 5 Q. I don't understand the distinction. Is post-traumatic  
6 stress disorder a generic term, and post-traumatic stress  
7 falls within that group?

8 A. Well, basically post-traumatic stress disorder or  
9 post-traumatic stress, in this context we can use it's a  
11:08:45 10 general term, post-traumatic stress. And there are  
11 basically three main groups of symptoms that needs to be  
12 there to talk about this type of stress. The first group  
13 is that there have to be important -- basically, the  
14 person might develop post-traumatic stress after having  
11:09:04 15 been confronted or exposed to what we call traumatic  
16 events --

17 PRESIDING JUDGE: Please, you go slowly.

18 THE WITNESS: I'm sorry.

19 PRESIDING JUDGE: Because you're going a bit too fast. You  
11:09:17 20 say that there are three types of symptoms that would  
21 normally be revealed by a situation of post-traumatic  
22 stress disorder.

23 THE WITNESS: Yes, that is correct.

24 PRESIDING JUDGE: Or post-traumatic stress.

11:09:29 25 THE WITNESS: Post-traumatic stress.

26 PRESIDING JUDGE: Which you say are generic terms.

27 THE WITNESS: Yes.

28 PRESIDING JUDGE: Which are the symptoms?

29 THE WITNESS: The three -- what I wanted to say first is that



1 basically the main condition is that the person has been  
2 exposed to a traumatic event or to a series of traumatic  
3 events. A traumatic event is an event where a person has  
4 been -- I'm sorry.

11:09:59 5 A traumatic event is an event where a person has  
6 been confronted with a life-threatening situation. And  
7 in the context of a war, like we are here, it is often a  
8 series of life-threatening situations. And so after  
9 having been confronted with these situations, in order to  
11:10:47 10 be able to speak of post-traumatic stress disorder, there  
11 are three groups of symptoms which are important. The  
12 first group is the person suffers from intrusive and  
13 recurrent recollections of the event.

14 PRESIDING JUDGE: Please wait. Intrusive and?

11:11:22 15 THE WITNESS: Recurrent recollections of the event.

16 JUDGE BOUTET: Which means?

17 THE WITNESS: Which means this can be flashbacks, images,  
18 thoughts about the event that are overwhelming for the  
19 person.

11:12:03 20 JUDGE BOUTET: Yes.

21 PRESIDING JUDGE: The second symptom?

22 THE WITNESS: No, this is the first symptom.

23 PRESIDING JUDGE: Go to the second.

24 THE WITNESS: The second is that a person has a tendency to  
11:12:17 25 avoid everything that is related to these events.

26 PRESIDING JUDGE: Everything that is related to --

27 THE WITNESS: Related to these traumatic events. Everything  
28 that reminds him of these events. Or when -- if being  
29 confronted with a reminder or being asked to talk about





1           these events, the person might report feelings of  
2           physical symptoms, an emotional expressance of stress and  
3           fear.

4   PRESIDING JUDGE: Yes.

11:14:02 5   THE WITNESS: And thirdly, also often we observe an increased  
6           general --

7   PRESIDING JUDGE: That would be the third symptom.

8   THE WITNESS: Exactly, the third group of symptoms. That is  
9           an increased irritability, presence of physical symptoms,  
11:14:28 10          of stress, also having sleeping problems, nervousness,  
11          and so on, combined with often feeling of anxiety, anger,  
12          and feeling of hopelessness. Also, in this group of  
13          symptoms, there might be what we call a lack of emotional  
14          responsiveness.

11:15:08 15   PRESIDING JUDGE: In which group?

16   THE WITNESS: In the third group. That there is a lack of  
17          what we call emotional responsiveness, that the person  
18          has the feeling to be -- a feeling of being numb, being  
19          far away from his own emotions.

11:15:23 20   PRESIDING JUDGE: A lack of?

21   THE WITNESS: Emotional responsiveness.

22   PRESIDING JUDGE: What does that mean?

23   THE WITNESS: This means that the person has the feeling to be  
24          -- not to feel things in the way he should feel them, to  
11:15:44 25          be far removed from his own experiences. Or sometimes,  
26          people describe it as being -- feeling numb or feeling  
27          dazed.

28                A last condition to talk about post-traumatic stress  
29          disorder is that these symptoms should be present during



1 a long time; more than three months.

2 PRESIDING JUDGE: You have covered the grounds for the three  
3 symptoms.

4 THE WITNESS: Mm-hmm.

11:16:34 5 PRESIDING JUDGE: That go with the phenomena of posttraumatic  
6 stress. You are now on what grounds? The fourth one,  
7 you said the fourth.

8 THE WITNESS: Yes, the fourth condition.

9 PRESIDING JUDGE: Would you say the fourth is also a symptom?

11:16:55 10 THE WITNESS: No, it's not a symptom. The condition to be  
11 able to speak about this type of disorder is that the  
12 symptoms should be present during a long time after the  
13 event, "a long time" meaning more than three months.

14 JUDGE BOUTET: On that -- pardon me -- that last observation,  
11:17:23 15 when you say have to be present for a long time, more  
16 than three months after the event, you mean to say that  
17 they have to show up after three months, or they have to  
18 be of a duration of three months and more?

19 THE WITNESS: They have to be -- they might show up  
11:17:42 20 after -- later after the event, in a delayed way, but  
21 they have to be -- the duration has to be more than three  
22 months.

23 JUDGE BOUTET: And that duration would be of the three groups  
24 of symptoms that you have described.

11:18:04 25 THE WITNESS: Yes, yes.

26 PRESIDING JUDGE: Yes, Mr Jordash.

27 MR JORDASH: Thank you.

28 PRESIDING JUDGE: Unless you had something else.

29 THE WITNESS: No.



1 MR JORDASH:  
2 Q. Isn't it right, though, that many of the witnesses giving  
3 evidence in this Court including those who come from the  
4 rebel groups have been confronted by such traumatic  
11:19:21 5 events?  
6 A. That is correct.  
7 Q. Isn't it also true that --  
8 PRESIDING JUDGE: Please, just a minute, Mr Jordash. It is  
9 true that most persons including those --  
11:19:34 10 MR JORDASH: Including those from the rebel groups.  
11 PRESIDING JUDGE: Confronted by these symptoms?  
12 MR JORDASH: No. Confronted by --  
13 PRESIDING JUDGE: By the post-traumatic stress.  
14 MR JORDASH: By traumatic events.  
11:20:07 15 PRESIDING JUDGE: By traumatic events.  
16 MR JORDASH:  
17 Q. Similarly, don't many of the witnesses also suffer from  
18 recurrent recollections of those events which at times  
19 are overwhelming to them?  
11:20:31 20 JUDGE THOMPSON: Don't many of.  
21 MR JORDASH: Similarly, don't many of the witnesses suffer  
22 from intrusive recurrent recollections which are for them  
23 at times overwhelming.  
24 THE WITNESS: That is true. And I also think that many  
11:20:48 25 of -- many of people who went through these events suffer  
26 from post-traumatic stress or post-traumatic stress  
27 disorder. I think in this case, and this I stated in my  
28 declaration, it is not only the fact that there is  
29 -- there are these symptoms of post-traumatic stress



1 disorder which I stated the main symptoms in my  
2 declaration, which are for the witness the most  
3 disturbing, so to say. The difference here is I think  
4 that it is the fact that these symptoms are so clearly  
11:21:28 5 present, the fact that the witness suffers from it  
6 clearly. But also the fact that there is the issue that  
7 the witness -- the level of his mental development. We  
8 don't know exactly how old he is, but he's just over 18  
9 maybe, which is an argument. And also the fact that this  
11:21:55 10 witness was a child ex-combatant, which is also a factor  
11 that makes him more vulnerable for a lot of reasons.

12 What I want to say is when he was confronted with  
13 these traumatic events he was much younger, which makes  
14 the witness even now more vulnerable. So it is a  
11:22:16 15 combination of these different aspects.

16 MR JORDASH:

17 Q. But whatever the causes of this post-traumatic stress  
18 disorder or post-traumatic stress, can you say that this  
19 young man suffers from it significantly more than other  
11:22:48 20 witnesses who have given evidence in this Court -- in the  
21 Court rather than through videolink?

22 A. I think the symptoms are very clear with this witness,  
23 yes.

24 PRESIDING JUDGE: I don't think your question is answered.

11:23:06 25 MR JORDASH:

26 Q. Have other witnesses suffered from as clear symptoms?

27 A. There were other witnesses who suffered from it as clear.

28 I think so.

29 PRESIDING JUDGE: You mean they're clearer on this witness





1 than they have been on other witnesses who may have  
2 suffered the same -- the same post-traumatic stress?  
3 THE WITNESS: It is difficult for me to compare all the  
4 witnesses and how I've seen other witnesses with clear  
11:23:39 5 symptoms of post-traumatic stress. It's difficult to say  
6 if they were more or less. I think this witness falls in  
7 the category of a witness who is severely traumatised.  
8 Again, for me, the difference with maybe other witnesses  
9 who testified in open court is the fact that he is -- the  
11:24:01 10 stage of mental development is not the same. I would not  
11 -- I mean, we don't know exactly his age, but I would not  
12 consider him as an adult looking at his stage of mental  
13 development. And the fact that he was also a child  
14 ex-combatant which makes him even more vulnerable. So I  
11:24:23 15 think we have to take into consideration these three  
16 aspects, and therefore it is true that there is an  
17 agreement on child witnesses under 18, this one is most  
18 likely a little bit over 18. But therefore, I think he  
19 should be considered as a child ex-combatant.

11:25:20 20 PRESIDING JUDGE: Are you suggesting -- are you suggesting  
21 that the impact of post-traumatic stress varies with the  
22 age of the victim of the stress?  
23 THE WITNESS: I cannot put it so straightforward. But it is  
24 clear that because of the age of the witness, the whole  
11:25:47 25 situation of testifying is also more overwhelming. And  
26 again, I stress very much the fact that he was an child  
27 ex-combatant, which makes him very vulnerable. So we  
28 could say, if we take the overall context, it is  
29 definitely more impactful. Or put in a different way, I



1 think the risk for retraumatisation or for a negative  
2 impact on the witness from testifying is bigger, I think.

3 MR JORDASH:

4 Q. You recommend that a psychologist or a senior support  
11:26:33 5 officer be present in the video room together with the  
6 child. What role would you see these play?

7 A. Well, it would be basically the same role that a support  
8 person plays in the courtroom when a witness is  
9 testifying in a courtroom. It means just being present.  
11:26:53 10 I think it is important for this witness that when he's  
11 sitting, if he testifies through closed-circuit  
12 television, when he sits in the video room, that there is  
13 someone present, just being present, someone who he's  
14 familiar with. I mean, it is clear, as I also stated,  
11:27:11 15 that this person would take care, would be clearly  
16 briefed that there is no improper communication that  
17 takes place with the witness during testimony. I think  
18 the fact that just someone is present with this witness  
19 might increase the comfort level and might help the  
11:27:31 20 witness to control his feelings of fear and what he also  
21 calls depersonalisation, the feeling to be removed from  
22 his own experiences or to feel unreal.

23 PRESIDING JUDGE: I didn't quite get what you said about  
24 depersonalisation. You said to control the level of fear  
11:27:58 25 and what?

26 THE WITNESS: Yes. One of the symptoms the witness is  
27 complaining of is what we could call depersonalisation,  
28 is that at some moments, the witness not only has  
29 flashbacks, but also has the feeling that he feels far



1 removed from his own experiences. Basically, you could  
2 say that he feels unreal or strange. And when he is then  
3 present with someone who is familiar with, I think it  
4 will be easier for him to control these feelings and to  
11:28:31 5 stay -- to stay calm and to go through his testimony in a  
6 good way.

7 MR JORDASH:

8 Q. Would they communicate at all with the witness verbally  
9 through the course of their evidence?

11:29:29 10 A. No.

11 PRESIDING JUDGE: Supposing he gets emotionally disturbed,  
12 would there be no verbal communication?

13 THE WITNESS: Well, in that case, I think we would proceed in  
14 the same way as we proceed in the courtroom, that if it  
11:29:50 15 becomes clear that the witness has a difficult moment,  
16 Your Honours can decide to adjourn for a few minutes, and  
17 the support person can talk or can talk briefly with the  
18 witness. This would be the same then what is happening  
19 when witnesses are testifying in open court.

11:30:20 20 PRESIDING JUDGE: But normally, there would be no  
21 communication between the psychologist and the witness.

22 THE WITNESS: No, there would be no communication.

23 JUDGE BOUTET: So communication if it were to happen would  
24 happen as a result of the witness having difficulties and  
11:30:36 25 asking the Court to withdraw for a few moments.

26 THE WITNESS: Exactly.

27 JUDGE BOUTET: Other than that, it's just a physical presence.

28 THE WITNESS: Just a physical presence, yes.

29 MR JORDASH:



- 1 Q. If the witness were to say something about either the  
2 evidence or the questions being asked of him or the  
3 challenges to his evidence, would -- do you know how the  
4 person would deal with that?
- 11:31:43 5 A. You mean the person sitting in the --
- 6 Q. Yes.
- 7 A. Well, these again are the same rules as applying in the  
8 court, in the open court, meaning that the psychosocial  
9 assistant or myself, we are properly briefed on what we  
11:31:59 10 can say and not say. I mean, it is not -- the only  
11 intervention that takes place is to reduce the stress  
12 level and increase the comfort level of the witness and  
13 not to interrupt with the testimony.
- 14 Q. The conversations which have taken place between the  
11:32:46 15 members of your staff and yourself and witnesses have not  
16 been public insofar as the Defence don't know what has  
17 been said. Are you and your staff briefed, in effect, to  
18 say we cannot discuss with you your evidence?
- 19 A. Yes, of course. Yes.
- 11:33:06 20 Q. Just one final issue: Paragraph 3 of your declaration:  
21 "Despite this, Witness TF1-141's reality testing stays  
22 intact at all times."
- 23 A. Mm-hmm.
- 24 MR JORDASH: I beg your pardon.
- 11:33:54 25 Q. What does that mean?
- 26 A. In this context, reality testing, this means that the  
27 witness as far as I could observe in my contacts with him  
28 has a correct perception of the reality. This means that  
29 I did not --





1 PRESIDING JUDGE: I'm sorry, what paragraph is that?

2 MR JORDASH: Paragraph 3.

3 THE WITNESS: Paragraph 3, the last sentence.

4 JUDGE THOMPSON: It needs elaboration.

11:34:24 5 THE WITNESS: What I mean is I did not observe any disruption  
6 of his perception of reality which would mean that I did  
7 not observe any presence of hallucinations or delusions.  
8 I mean, in spite of the symptoms, the witness is able to  
9 perceive the reality in a correct way as far as I could  
11:34:44 10 assess.

11 MR JORDASH:

12 Q. So if I understand that correctly, any frailties in his  
13 evidence such as inconsistencies would not be  
14 attributable to an illness, but would be attributable to  
11:35:28 15 other factors which would ordinarily impact upon a  
16 witness's testimony, such as whether it's true?

17 A. Well, yes. As far as I can judge or as far as I spoke  
18 with the witness, I see no reason from his symptoms why  
19 he should not perceive the reality in a correct way. So  
11:35:50 20 that's...

21 Q. Okay, thank you.

22 MR JORDASH: I've got no further questions.

23 PRESIDING JUDGE: Is it then your opinion, Madam, that this  
24 witness can testify normally under guidance, under the  
11:36:34 25 normal guidance as you've given, as you've related it?

26 THE WITNESS: Yes. But I would advise or I think seeing his  
27 vulnerability, I would advise that it's through  
28 closed-circuit television because he's vulnerable. But I  
29 don't see any reason why the normal process of giving



1 testimony should be changed, apart from that, and apart  
2 from having someone in the video room with him.

3 JUDGE BOUTET: So just to pursue that issue, it's your opinion  
4 that regardless of the exact age, whether he is or is not  
11:37:20 5 a child, but given his vulnerability as you have  
6 described it, you are of the opinion that his evidence,  
7 if given, should be in a closed-circuit, not in the  
8 normal process per se, with the assistance and so on. In  
9 other words, you're not recommending that he be sitting  
11:37:43 10 at your place, even though he would be hidden from the  
11 public.

12 THE WITNESS: Exactly, yes. This mainly because to reduce the  
13 potential negative impact of his testimony, seeing his  
14 vulnerability. That is what I would advise, what I  
11:38:00 15 advised in my statement as well.

16 JUDGE BOUTET: And I have one more question: This opinion  
17 that you are giving today to the Court is based upon your  
18 own personal observation of that witness?

19 THE WITNESS: Yes.

11:38:36 20 JUDGE BOUTET: And on more than one occasion or?

21 THE WITNESS: As I stated, as I wrote in my declaration, I had  
22 regular contacts with the witness. And during these  
23 contacts, I made these observations. So it is -- my  
24 assessment has been based on these contacts with the  
11:38:57 25 witness.

26 JUDGE BOUTET: Thank you.

27 PRESIDING JUDGE: Sure, why not.

28 JUDGE THOMPSON: Mr O'Shea, do you want to cross-examine the  
29 accused? Sorry, Mr Touray.



1 MR TOURAY: Thank you, Your Honour. We'll ask a few  
2 questions.

3 JUDGE THOMPSON: Go ahead.

4 CROSS-EXAMINED BY MR TOURAY:

11:39:21 5 Q. Madam, from your declaration, you have had some regular  
6 contacts with this witness. Correct?

7 A. That is correct, yeah.

8 Q. When was the first time you met this witness?

9 A. I met the first time this witness in March last year.

11:39:32 10 Q. This year?

11 A. No, last year.

12 Q. Last year. And how many times have you met him since  
13 then?

14 A. I met him again in October, and I had about four longer  
11:40:16 15 interviews with him. And then in between, a number of  
16 short contacts which I cannot say exactly how many  
17 because it was on a regular basis.

18 PRESIDING JUDGE: You had four long interviews with him. And  
19 subsequently?

11:40:37 20 THE WITNESS: And in between and afterwards, I had shorter  
21 contacts with him.

22 MR TOURAY:

23 Q. Are you aware that this witness had made -- previous to  
24 your meeting him in March 2004 made statements to the  
11:41:08 25 OTP?

26 A. Well, I am -- yes, that is possible, yes.

27 Q. Do you know whether at that time he had any support from  
28 some expert to give him comfort and assurance in making  
29 those statements?



1 A. As far as I'm informed, he had not. He had no other  
2 support, no.

3 Q. No other support. Are you also aware that subsequent to  
4 your meeting him in March, he had made some other  
11:42:43 5 statements to the OTP?

6 A. That is possible.

7 Q. It's possible.

8 A. Yeah, it's possible.

9 PRESIDING JUDGE: Not it is possible. Are you aware? Not  
11:42:53 10 "it's possible."

11 MR TOURAY: Subsequent.

12 PRESIDING JUDGE: Are you aware that subsequent to your  
13 meetings - Mr Touray --

14 MR TOURAY:

11:43:05 15 Q. Meetings in March, that is after March, he made  
16 statements to the OTP?

17 A. I think he did. I mean, I am informed about this witness  
18 after he had been identified as a witness by the OTP.

19 Q. So it was only after. And during the time he made all  
11:43:25 20 his statements, he had no support at all from any expert?

21 A. Apart from the contact he had with the people of the  
22 witness and victims section, as far as I'm informed, he  
23 had not, no.

24 PRESIDING JUDGE: Mr Touray, when you're referring to  
11:43:45 25 contacts, you mean contacts with support staff,  
26 psychologists?

27 MR TOURAY: Yes, psychologists, support staff.

28 Q. Now, you talk of post-traumatic stress. Is there -- does  
29 that exhibit any psychic injury leading to some mental





1 aberration?

2 A. Well, it is seen -- it can be seen as a mental disorder.

3 Q. As a mental disorder?

4 A. Yes.

11:45:01 5 JUDGE BOUTET: But I thought the question included whether or  
6 not it would lead to mental aberration.

7 THE WITNESS: That is possible. In this case, I have no real  
8 indication of long-term effects. I see the symptoms  
9 which are present now, and I can see that these are, in a  
11:45:23 10 certain way, handicapping the witness because it is  
11 disturbing him in his normal behaviour, or more in his  
12 social -- in his normal life. But I have no -- at this  
13 moment, I have no indication that it would be -- it can  
14 be on the long term. I mean, I don't know if the problem  
11:45:42 15 would get worse or not.

16 MR TOURAY:

17 Q. But there are symptoms of it now?

18 A. Yes.

19 JUDGE BOUTET: Symptoms of it. What do you mean, of  
11:45:57 20 aberration or of the disease?

21 MR TOURAY: Mental disorder.

22 JUDGE BOUTET: Mental disorder, okay.

23 MR TOURAY: Yes.

24 Q. Now, this witness is about to be proffered to the Court.  
11:46:26 25 Are you aware whether he has undergone any relaxation  
26 exercises --

27 A. Well, as I put in my declaration -- I'm sorry.

28 Q. Yeah.

29 A. As I put in my declaration, one of the things we did with



1 this witness was help him, practice with him relaxation  
2 exercises, again, to increase his comfort level and to  
3 reduce his fear. This is one of the things we do with  
4 witnesses.

5 [HS180105B 11.50 a.m.]

6 Q. And you have gone through that today.

7 A. I didn't do that today, no.

8 Q. Now, you state in your declaration that despite the  
9 recommendations you have made these would only minimise  
10 the potential and negative impacts of giving testimony.  
11 That is paragraph 5 of your declaration.

12 A. Yes.

13 Q. So, no matter what happens, there will still be some  
14 negative impact on this witness giving testimony?

15 A. I cannot say that. I don't know what impact will be of  
16 his testimony. I can only say that from my assessment of  
17 the witness and the vulnerability of witness testifying  
18 in open court might increase or might have a potentially  
19 negative impact. There is always a risk for what we call  
20 retraumatisation because of his testimony, but I cannot  
21 say that this will be the case. That I cannot do.

22 Q. I think my question is -- I put it -- perhaps you did not  
23 understand its properly. I read your paragraph 5 again,  
24 "The above measures in combination with relaxation  
25 exercises practised before testimony will increase the  
26 comfort level of the witness during testimony and help  
27 the child control his feelings of fear and  
28 depersonalisation minimising the potentially negative  
29 impact of giving testimony on witness TF1-141." My



1 question is there will still be some negative impacts

2 left?

3 A. There might be some negative impacts left, yes.

4 Q. Yes.

5 PRESIDING JUDGE:

6 Q. Are you confirming that?

7 A. Well, for me as a psychologist it is difficult to predict  
8 what impact will be of a testimony on a witness. I can  
9 only, from my expertise and experience and with the  
10 contacts I have with witnesses, try to estimate what can  
11 be the impact and in this case I think that seeing the  
12 factors that I stated, there might, if he testifies in  
13 open court, there might be a higher negative impact that  
14 is --

15 Q. No, you see, I am sure what counsel wants to know is --  
16 there are two possibilities: It might, depending on how  
17 we assess it, he might give evidence where you are  
18 sitting, just as he might also give evidence through  
19 closed circuit television. Counsel wants to know whether  
20 there will be a negative -- some element of a negative  
21 impact whichever way. A negative impact, you know, on  
22 the testimony that he is going to give, either where you  
23 are sitting or hidden somewhere behind there?

24 A. I think if we --

25 PRESIDING JUDGE: Mr Touray, am I right?

26 MR TOURAY: What I am saying here, Your Honour, the paragraph  
27 5 [inaudible] from the recommendation she makes --

28 PRESIDING JUDGE: This is it, yes, I have seen your paragraph

29 5.



1 MR TOURAY: What she says is, "It still to me..." "It appears  
2 to me that still there will be some negative impact  
3 left."  
4 PRESIDING JUDGE: Yes, this is what I am trying to expound,  
5 you know, to her.  
6 MR TOURAY: Indeed, sir.  
7 PRESIDING JUDGE: You see, because she, the witness, she is  
8 now a witness, I mean, she was saying that there could be  
9 a negative impact if he testifies openly in open court.  
10 That is what appears to be saying. But what you are  
11 saying is that -- what you are saying appears to be, you  
12 know, that whether here or there --  
13 MR TOURAY: Yes, wherever she [inaudible]  
14 PRESIDING JUDGE: -- there would be a negative impact. That  
15 is what you are say?  
16 MR TOURAY: That's what I am saying.  
17 MR HARRISON: But I think the answer has been twice said that  
18 there might be.  
19 JUDGE BOUTET: Yes, the paragraph 5 does not say there will be  
20 an impact it says --  
21 MR TOURAY: Minimising.  
22 JUDGE BOUTET: It says the potentially negative impact.  
23 Potentially there might be, that's what it says. There  
24 is no absolute certainty of that, this is what the  
25 witness is saying.  
26 MR TOURAY: Yes, we accept that.  
27 JUDGE BOUTET: But whether it's in -- I understand the  
28 evidence to be that if the witness testified not in a  
29 closed circuit TV scenario as such it could be worse, but





1 from that there is potentially, there will potentially,  
2 be an impact on the witness regardless.  
3 MR TOURAY: Regardless.  
4 JUDGE BOUTET: Potentially.  
5 MR TOURAY: It's not foolproof really.  
6 PRESIDING JUDGE: Potential not real.  
7 MR TOURAY: Yes, I agree.  
8 Q. Now are you really worried about this witness testifying?  
9 MR HARRISON: Well, with respect. Whether this witness is  
10 worried is irrelevant. I think it is --  
11 MR TOURAY: No further questions, Your Honour.  
12 JUDGE THOMPSON: Yes, Mr Cammegh, proceed.  
13 MR CAMMEGH: I suppose it is inevitable, is it not, Ms Michels  
14 that when you are called upon to make a diagnosis or give  
15 an expert opinion on the question of PTSD you are  
16 inevitably going to be drawing upon the subjective  
17 complaints of a patient. That is to say that you lend an  
18 ear to what they have to say about what they are  
19 experiencing, periodically, consistently or over any  
20 given period of time. And it seems that from your list  
21 of symptoms, the intrusive and recurrent recollections  
22 firstly; secondly, tendency to avoid everything related  
23 to the event.  
24 PRESIDING JUDGE: Mr Cammegh, are you on submission?  
25 MR CAMMEGH: I am asking a question, Your Honour.  
26 PRESIDING JUDGE: You are yet to land.  
27 MR CAMMEGH: Well, I'm going to land a good deal --  
28 PRESIDING JUDGE: With a gesture. Get along, get along,  
29 Mr Cammegh.



1 MR CAMMEGH: Well, I think Your Honour will find I am going to  
2 be very quick and to the point.

3 PRESIDING JUDGE: Yes, please.

4 MR CAMMEGH:

5 Q. If I can continue, I will move on to the third symptom  
6 which refers to increased irritability et cetera, et  
7 cetera. That seems to be the one that may allow some  
8 observation by you. Are you content that, over the  
9 period of time that you had this person under your care  
10 or supervision, you saw evidence of those symptoms  
11 pertaining to point 3 yourself?

12 A. Yes, when you talk about symptoms of increased  
13 irritability, nervousness and so on, yes.

14 Q. Right. You state that as far as the reality tests are  
15 concerned that the witness appeared to be most  
16 satisfactory.

17 A. Yes.

18 Q. That is to say that it would appear, would it, that he is  
19 able to distinction between truth and fiction?

20 A. Yes.

21 Q. Given that during the course of his testimony he is going  
22 to be called upon to recount events that he experienced,  
23 traumatic event, what benefit do you think he will derive  
24 by giving those traumatic accounts in front of a  
25 television camera rather than sat in this room with the  
26 curtains closed. What is the benefit of this particular  
27 protective measure that you suggest.

28 A. The benefit, I think, is mainly that you creat a more  
29 quiet, a more quiet environment which is less



1           overwhelming than a courtroom with less people around and  
2           where the witness can more easily focus on what is  
3           happening. He is only seeing one person at a time and so  
4           on. And you prevent a direct confrontation.

5 MR CAMMEGH: Your Honours, that is all I have to ask and for  
6           my part, I must say, I do concede the Prosecution's  
7           position.

8 JUDGE THOMPSON:

9 Q. Let me ask one question, Ms Michels. To what extent, if  
10          at all, would your categorical finding that the reality  
11          testing of this witness remains intact, requires some  
12          modification or even some limitation in the light of your  
13          opinion that presently the witness exhibits symptoms of  
14          mental disorder or aberration. And if not, why? And if  
15          why not?

16 A. Well, I have put in my declaration that again, as far as  
17          I can -- in my contacts with the witness I never observed  
18          a disruption of his reality testing. I have put that in  
19          because he has -- I mean, he has symptoms of post  
20          traumatic stress, but his reality testing is not -- is  
21          intact. So that it is in the context of the symptoms he  
22          has that I found it necessary to state that explicitly.

23 Q. So in other words, as an expert you can -- you are  
24          affirming that with regard to this particular witness  
25          that even though he now exhibits symptoms of mental  
26          disorder or mental aberration, yet his reality testing  
27          remains intact?

28 A. Yes, exactly. Yes.

29 JUDGE BOUTET:



1 Q. I would like to know a bit more about this mental  
2 aberration. I thought mental -- PTSD now, as we  
3 understand, is described and qualified as one of those  
4 mental disorders recognised by science; am I right?

5 A. Yes, and to be honest I would not talk about -- I mean,  
6 although it is, as you have stated, it is a mental  
7 disorder, I would not see this witness or I would not --  
8 let's put it this way, that post traumatic stress  
9 disorder is --

10 JUDGE THOMPSON:

11 Q. Perhaps we should assist you a little. Would it  
12 necessarily follow from your finding that the possibility  
13 of -- because of the mental disorder symptoms and mental  
14 aberration symptoms, in the foreseeable future would the  
15 reality testing remain intact? Or is it possible that  
16 the reality testing can shatter, so to speak in the  
17 process because of the mental disorder? Disorder.  
18 Because it would seem as if your finding perhaps is  
19 limited in time, but you cannot predict beyond the  
20 observations that you have made. That's what I wanted to  
21 know whether there would be some limitation on that  
22 categorical finding of reality testing in the light of  
23 your finding of mental disorder and aberration?

24 A. Yes, I see what you mean. I think -- what I want to say  
25 the word mental aberration is maybe not really the best  
26 word in this case, since what I want to say is that post  
27 traumatic stress disorder is a disorder that is rather  
28 common with people who went through these events. It is  
29 categorised as a mental disorder indeed. But it is also





1 more -- I would not say -- I would not see it really as  
2 an aberration. People often say it is a more normal  
3 reaction to very abnormal circumstances. Concerning his  
4 reality testing, again it is true I can only make my  
5 assessment from the contacts I have with him now, but I  
6 have no indication that this would change in the future.

7 Q. Yes, that's what I wanted to get at, Whether there is A  
8 possibility of change --

9 A. Yes.

10 Q. -- In the reality testing.

11 JUDGE BOUTET: Just to avoid any confusion. You have not  
12 observed, from what I hear, any mental aberration on the  
13 part of this witness.

14 THE WITNESS: Yes, exactly.

15 MR JORDASH: Two questions occur to me following Your Honours'  
16 questioning. May I have the Chambers leave to ask those  
17 questions? It's about reality testing. Only two. If it  
18 may help, I certainly can take the same position as my  
19 learned friend, Mr Cammegh, that I do not oppose the  
20 Prosecution's application in its totality if that helps  
21 to expedite.

22 PRESIDING JUDGE: Yes, Mr Jordash, you may ask your questions.  
23 You have the leave of the Court.

24 MR JORDASH: I am grateful, thank you.

25 Q. This witness suffers from, looking at the first set of  
26 symptoms, flashbacks and recurrent recollections of  
27 events.

28 A. Yes, yes.

29 Q. There is no way, is there, of you being able to assess



1 those flashbacks and recurrent recollections in terms of  
2 whether they are true or whether they are fictionalised;  
3 is that correct?

4 A. No, that is also not -- I mean, I don't see it as my role  
5 to check these things. I mean, the flashbacks I observed  
6 because he explained this to me.

7 Q. How then are you able to say that this is a person who,  
8 just looking at your expression, whose reality testing  
9 stays intact if you can't assess whether the flashbacks  
10 are accurate?

11 A. More so -- first of all, in general when -- in general  
12 with these people -- with people suffering from PTSD, the  
13 flashbacks are what happened to them. My assessment  
14 about reality testing is something I made my conclusion  
15 after conversations with him about normal real life. But  
16 I have no indications to believe that the flashbacks he  
17 describes are not true, because I don't observe only --  
18 any other indication that he cannot distinguish between  
19 reality and fiction.

20 Q. So, reality testing relates to conversations about  
21 ordinary events and not as relates to the more traumatic  
22 events which he relates during his testimony.

23 A. Well, obviously they relate to both. Yes.

24 Q. But in terms of being able to assess his reality testing  
25 as to normal events, you have spoken to him about those?

26 A. Yes.

27 Q. But you have not spoken to him and are not able to assess  
28 whether his recurrent recollections of the abnormal  
29 events he describes are accurate; is that correct?



- 1 A. Well, I am not in a position to -- I mean, I can listen  
2 to a witness, but I am not in a position to -- it's not  
3 my role to judge whether what he is telling me is true or  
4 not. I can only say in general his reality testing is  
5 okay.
- 6 Q. Okay thank you.
- 7 MR JORDASH: Thank you, Your Honours.
- 8 JUDGE THOMPSON: Thank you, Ms Michels. Is there anything you  
9 want to ask.
- 10 MR HARRISON: No there is not.
- 11 JUDGE THOMPSON: Okay, thanks. Well thank you, Ms Michels, we  
12 are very grateful to you for your testimony. You are  
13 released. Yes, counsel.
- 14 MR HARRISON: There is nothing else the Prosecution intend to  
15 tender in pursuit of this application.
- 16 JUDGE THOMPSON: Right. Learned counsel for the first  
17 accused, could we have your clear and unequivocal  
18 position in respect of the Prosecution's application now  
19 that you have heard the evidence?
- 20 MR JORDASH: Well, Your Honours ruled in the renewed -- in the  
21 Prosecution's application for renewed protective measures  
22 that the risk of retraumatisation was a factor which  
23 related to why you deemed it necessary for child  
24 witnesses to give evidence via video link.
- 25 JUDGE THOMPSON: Yes, quite right. One of our orders.
- 26 MR JORDASH: On the basis of what Ms Michels has said, there  
27 is a real risk of retraumatisation irrespective of this  
28 witness's age and on that basis I don't --
- 29 JUDGE THOMPSON: You do not oppose the application.



1 MR JORDASH: Neither for a video link or a person to be  
2 present with the young boy.

3 JUDGE THOMPSON: Right, thank you. Mr Cammegh or  
4 Professor O'Shea?

5 MR CAMMEGH: Well, as I stated just now, I concede --

6 JUDGE THOMPSON: Yes, go ahead.

7 MR CAMMEGH: I concede the Prosecution's application for the  
8 same reasons.

9 JUDGE THOMPSON: Right, thank you. And learned counsel for  
10 the second accused.

11 MR NICOL-WILSON: Your Honour, we have no objections, even  
12 though we have certain reservations pertaining to the  
13 ability of the witness to testify. We have no objection  
14 so far for the witness to testify by closed circuit  
15 camera and to have the presence of a psychologist.

16 JUDGE THOMPSON: Thank you.

17 [Judges confer]

18 JUDGE THOMPSON: We will now move onto the Defence  
19 application. We will hear that.

20 MR JORDASH: Do Your Honours have a bundle prepared including  
21 a table which indicates the evidence to be adduced by the  
22 Prosecution in relation to this witness and when that  
23 evidence was served? It should be attached to Your  
24 Honours' ruling at 23rd June 2004 and also relating to  
25 the compliance report filed by the Prosecution dated 11th  
26 May 2004.

27 JUDGE THOMPSON: Continue, Mr Jordash.

28 MR JORDASH: Thank you, Your Honour. The application is for  
29 the exclusion of evidence which has been served, as I





1 mentioned earlier, on 9th October 2004, the 19th and the  
2 20th October 2004, and 10th January 2005. It is the view  
3 of the Defence that these additional pieces of evidence  
4 amount to additional statements which, pursuant to Rule  
5 66, ought to have been disclosed by 26th April 2004,  
6 which was the date Your Honours set for service of the  
7 Prosecution evidence. Any evidence to be served after  
8 that date would be subject to a showing of good cause by  
9 the Prosecution pursuant to Rule 66. I particularly rely  
10 upon Your Honours' ruling of the 23rd July 2004 in this  
11 case. The essence of that ruling was that any new  
12 statement alleging entirely new facts would fall into the  
13 category of additional witness statements. Your Honours,  
14 of course, will appreciate that in relation to that  
15 application Your Honours decided that the evidence sought  
16 to be excluded was in fact supplemental. And this  
17 application, I would submit, is different to the evidence  
18 sought to be excluded in that instance and can be  
19 categorised as new. Entirely new.

20 Looking at that judgment, particularly at paragraph  
21 9, Your Honours set out what the Defence needs to show to  
22 prove a breach of Rule 66. And the Chamber observed  
23 that, "It is evident that the premise underlying the  
24 disclosure obligations is that the parties should act  
25 bona fides at all times. There is authority from the  
26 evolving jurisprudence of the international criminal  
27 tribunals that any allegation by the Defence as to a  
28 violation of the disclosure rules by the Prosecution  
29 should be substantiated with prima facie proof of such a



1 violation."

2 Your Honours go on in paragraph 11 to then quote  
3 with approval the case of Bagosora at the ICTR case  
4 number ICTR 98-41-T decision on the admissibility of  
5 evidence witness DP, 18th November 2003. And set out the  
6 procedure by which the matter is to be decided. Firstly,  
7 "By a comparative assessment of the new or allegedly new  
8 evidence and then specifically such a comparison involves  
9 analysis of the original statement of the witness,  
10 including any reference of the event in question in the  
11 indictment and the pre-trial brief of the Prosecution,  
12 consideration of notice to the Defence that the  
13 particular witness will testify in the event and the  
14 extent to which the evidential material alters the  
15 incriminating quality of the evidence of which the  
16 Defence already had notice."

17 My submission is -- our submission is that upon  
18 analysis of that kind the evidence is clearly new and  
19 clearly additional and the Prosecution -- and the  
20 Prosecution ought to have shown good cause and what we  
21 respectfully submit is that the evidence should be  
22 excluded.

23 The prima facie proof required is set out in the  
24 table we have prepared. Now, the evidence which was  
25 served before 26th April 2004, before the cut-off point,  
26 if I can use the vernacular, is contained in the first  
27 four columns of the table. And that evidence, as we can  
28 see from the section of the compliance report, the  
29 Prosecution alleged -- or the Prosecution asserted that



1 the evidence of this witness would relate to counts 1, 2,  
2 3, 4, 5, 6, 8, 9, it says 19, but I think that's a typing  
3 mistake, it should be 10, 11, 12 and 13. I think in  
4 order to properly understand how the evidence, the new  
5 evidence, has altered this witness's evidence one has to  
6 break down those assertions into a consideration of what  
7 direct evidence this witness would have given prior to  
8 the statement of 9th October and thereafter against  
9 Mr Sesay. In short it is this, there would have been  
10 direct evidence - and I am looking at the first column of  
11 the table, 31st January 2003 statement, the first  
12 statement of this witness, there would have been direct  
13 evidence of the killing of a man called Fonti Kanu, which  
14 was attributed to Sam Bockarie with Mr Sesay being  
15 present and so arguably participating in some way such as  
16 by encouragement. That would have been evidence which  
17 related to counts 3 to 5, direct evidence against  
18 Mr Sesay. The evidence also would have related to the  
19 assaulting of Johnny Paul Koroma's wife. Again the same  
20 observations I make in relation to Mr Sesay said to have  
21 been present, which would have been direct evidence  
22 supportive of counts 10 to 11; physical violence. It is  
23 interesting to note that -- I beg your pardon, let me  
24 start again.

25 If we move then to 23rd February, again we have a  
26 repeat of the allegation which is somewhat changed, but  
27 it is an allegation now of Mr Sesay killing Fonti Kanu.  
28 So that would have been direct evidence again unchanged  
29 from 31st January 2003, direct evidence of killing



1 relating to counts 3 to 5. And we also have there an  
2 allegation of Issa Sesay giving an order for Operation  
3 Spare no Soul which again would have been direct evidence  
4 of physical violence supportive of counts 10 to 11.

5 24th February no evidence -- no direct evidence  
6 against Mr Sesay. 24th February 2003, repeat of the  
7 Fonti Kanu allegation and importantly, looking at the  
8 fourth column PG 38/9718, "Issa Sesay often visited the  
9 Defence HQ, but witness did not know what he went there  
10 to do." And that was the Defence HQ in the Buedu. It is  
11 important to underscore that particular aspect of this  
12 witness's evidence up until 24th February 2003, as he  
13 appears to be saying, "Well, I have given this direct  
14 evidence killing of Fonti Kanu, the issuing of the  
15 Operation Spare No Soul order and the beating of Johnny  
16 Paul's Koroma's wife, but I cannot say anything  
17 indirectly about Mr Sesay." And that was the state of  
18 the evidence up until 24th February 2003. Supportive in  
19 reality of counts 3 to 5, 10 to 11.

20 The new allegations, served from 9th October 2004,  
21 effectively amounts to eight new allegation against  
22 Mr Sesay. 9th October, first new allegation is an attack  
23 by Sesay in Makeni. It's alleged that he used small boys  
24 in that attack. New direct evidence which the  
25 Prosecution rely upon to support count 12, conscription  
26 of child soldiers.

27 Number two, new allegation, is an attack on Koidu,  
28 looking an the fourth column and Mile 91, again it is  
29 alleged he moved with small boys. A new allegation,





1 direct evidence against Sesay, again in support of count  
2 12.

3 Number three, new allegation, on 19th and 20th  
4 October 2004 it is alleged that Sesay was at the Bunumbu  
5 training ground where this young man alleges he went when  
6 first captured by -- well, when he had been captured by  
7 the rebels, he says, on the third occasion he had been  
8 captured. It is the first time he mentioned that Sesay  
9 was present during the -- at the training ground. It's  
10 the first time he mentioned that Sesay was giving orders  
11 at the training ground. We have, therefore, a new  
12 allegation of, in effect, forced labour and the use of  
13 child soldiers, supportive of count 12 and supportive of  
14 count 13.

15 The fourth new allegation contained in this evidence  
16 arises from the statement of 10th January 2005 alleging  
17 that Sesay was in Koidu Town when he was first captured.  
18 He had his own group of small boys. Another new  
19 allegation supportive of Count 12. Wholly new, The  
20 Defence would say. There is no allegation contained in  
21 the first statements that Mr Sesay had any small boys  
22 units. Now we have a number of allegations so far that  
23 he had.

24 Number five new allegation is that contained on 10th  
25 January again. He was a based in Koidu Town, his boys  
26 would take women and would stay with them in their  
27 houses. So we have new allegation in support of count 6  
28 to 9, sexual violence. The Prosecution will use that  
29 evidence to invite the Chamber to infer that the women



1 were being held against their consent in a house  
2 undoubtedly for the purposes of sexual violence. That's  
3 a new allegation. A new allegation contained within that  
4 description of abductions supporting Count 13.

5 Number seven new allegation arises from over the  
6 page on the table, Issa Sesay came before witness's group  
7 attacking Daru. Sesay first went to Quiva where he shot  
8 a small boy who was his security because he did not show  
9 respect. A new allegation of direct participation in  
10 killing supportive of counts 3 to 5.

11 And finally number 8 new allegation ordering, it is  
12 said by this witness, on 10th January 2005 the burning of  
13 Koidu Town which supports the Prosecution's counts 3 to  
14 5, the killing counts, 10 to 11 the physical violence  
15 counts and count 14 the destruction of property counts.  
16 So, to summarise, we have moved from a position on the  
17 24th February 2003 to this witness testifying directly --  
18 sorry, testifying as to direct evidence against Sesay  
19 supportive of counts 3 to 5 and 10 to 11, involving only  
20 two allegations of direct offences: Fonti Kanu -- sorry,  
21 three. Fonti Kanu, the beating of JPK's wife, the  
22 operation Spare No Soul, with only minimal, if that,  
23 evidence of indirect participation in anything else as  
24 indicated by the witness's assertion that he did not know  
25 why Sesay came to the headquarters, to a position now  
26 where there is direct evidence sought to be led by the  
27 Prosecution in relation to counts 3 to 14, and obviously  
28 I have left counts 1 to 2 out of this argument because in  
29 both cases there was evidence to be adduced which would



1 support counts 1 and 2 which are the all encompassing  
2 counts. So, just concentrating on the individual counts  
3 from 3 to 14, the Prosecution now seek to adduce evidence  
4 in support of those counts. And what we have, I would  
5 submit, is a number of new allegations containing new  
6 locations, containing new crimes, containing new specific  
7 details which the defence are being expected to have to  
8 deal with at this late stage. New allegations of  
9 killing, new allegations of the use of small boys, new  
10 allegations of the burning of property, new allegations  
11 of abductions, new allegations of sexual violence.

12 Now, referring to Your Honours' judgment of 23rd  
13 July 2004, looking at paragraph 14 of Your Honours'  
14 decision, Your Honour decided that decision against the  
15 Defence looking at subsection paragraph 3 of 14, "That  
16 indeed the second statement cannot objectively be legally  
17 categorised as an entirely new statement having regard to  
18 its contents in relation to the original statement of the  
19 witness in that second statement is congruent in material  
20 respects with the matters -- with matters disposed --"  
21 Sorry, I beg your pardon, "with matters deposed to in the  
22 entire original statement dated 2nd February 2003." And  
23 my submission is straight forward, that the evidence  
24 contained in the later witness statements could not  
25 properly be categorised as congruent in material  
26 respects. Such a finding, I would respectfully submit,  
27 would effectively give the Prosecution carte blanche to  
28 effectively serve witness statements, which cover a large  
29 area of Sierra Leone, with little indication of evidence



1 of direct participation in events. Thereafter, to do  
2 what they have done here, serve a great deal of evidence  
3 of direct participation and effectively say, "Well it is  
4 congruent because it relates to the overall picture of  
5 what the witness would have said." They would be in  
6 effect using the generalised evidence of this witness and  
7 effectively inviting the Chamber to say that would be  
8 sufficient to be able to allege any new allegation  
9 because it relates to the generalised allegations  
10 contained in the earlier statements. And the real force,  
11 I would submit, in our application is this, that on any  
12 analysis, whether number of allegations, number of  
13 locations, support for counts, gravity of the  
14 allegations, on any analysis of those factors, the bulk  
15 of the evidence that this witness will give against  
16 Mr Sesay has been served after the date set by this  
17 Chamber. And, more importantly, I would submit, most of  
18 the new allegations or certainly -- yes, five of the new  
19 allegations are contained not in October 2004, but on  
20 10th January 2005, barely a week ago, the Prosecution  
21 served the bulk of their evidence of direct participation  
22 against Sesay.

23 My submission is this, that any interpretation of  
24 Rule 66, which allows the Prosecution to serve the bulk  
25 of their case in relation to any witness, only, in the  
26 case of the October disclosure, barely three months ago,  
27 but in the case of 10th January disclosure barely a week  
28 ago, must be in effect a breach of Article 17 of the  
29 Statute which, as Your Honours will fully appreciate,





1           obliges or provides, I should say, the Defence with  
2           adequate time and facilities for the preparation of their  
3           defence and the right to know the nature and case against  
4           them. And any interpretation of Rule 66 which allows the  
5           Prosecution to serve the bulk of their case two months -  
6           and in this case one week before the evidence is called -  
7           must be a breach of Article 17. I would submit that the  
8           right remedy is not to adjourn this evidence, but to  
9           exclude it, because contained also in Article 17 is the  
10          right to a trial within a reasonable time. And if Your  
11          Honours were to rule against me in relation to this then  
12          the Prosecution will, in effect, have carte blanche to do  
13          this again and again and again. And if the Chambers'  
14          response would be to adjourn the witness, this trial  
15          effectively would not end for several years, but more  
16          importantly, it would say to the Prosecution, "You were  
17          entitled to withhold your case from the Defence. You can  
18          disclose a small part of it and then a week before the  
19          evidence is to be called you can disclose the bulk of  
20          it."

21                   Those are my submissions.

22       JUDGE THOMPSON: Mr Jordash, I remember that at paragraph 10  
23                   of our decision of the 23rd we did, in fact, emphasise  
24                   that it was the Trial Chamber's role to enforce  
25                   disclosure obligations in the interests of justice and  
26                   the interests of a fair trial where the evidence has been  
27                   disclosed -- not been disclosed, quoting, or is disclosed  
28                   so late as to prejudice the fairness of the trial because  
29                   we were relying on another authority. That seems to be



1 one of the principles that we enunciated in our 23rd July  
2 decision. Perhaps you need to satisfy me to what extent  
3 the -- let's call it for the sake of argument, the late  
4 disclosure of these statements have unfairly prejudiced  
5 this trial. In other words, what are the particulars of  
6 prejudice that we need to take into consideration, if you  
7 can give me two or three of those?

8 MR JORDASH: The first and obvious one would be the fact that  
9 we have had no opportunity and could not reasonably be  
10 expected to investigate the events listed in 10th January  
11 2005 disclosure. It would be practically impossible to  
12 have our investigators investigate those events in the  
13 short space. The same would apply to the disclosure of  
14 October. What has to be borne in mind --

15 PRESIDING JUDGE: Just for the purposes of asking, even if the  
16 witness, to quote your words, to quote you, is adjourned,  
17 even if even assuming --

18 MR JORDASH: That comes to my second point which is this, the  
19 Defence have a schedule, we have a preparatory plan, we  
20 have a certain set number of resources in which to  
21 conduct our defence. It is based upon the Prosecution  
22 case as disclosed to us thus far. Now, if we suddenly  
23 are hit with new allegations a week before or two months  
24 before, then there is extra work to be done for the  
25 Defence. That prejudices the Defence because we don't  
26 then have the same opportunity to work on the case which  
27 has already been disclosed, we have to divert our  
28 resources to work on other aspects. It is an issue of  
29 case management, preparation, to be able to investigate



1           these new allegations, to be able to prepare -- just  
2           simply prepare cross-examination of these new  
3           investigations takes many, many legal hours. Many, many  
4           legal hours which have to come from somewhere. They have  
5           to come, not just simply from the budget, but they have  
6           to come from the time schedules of the Defence teams  
7           which have been in place now for some time. It's  
8           difficult enough with the constant flow of supplemental  
9           witness statements which require consideration by the  
10          Defence, and we have already adjusted our defence  
11          preparation in order to deal with those supplemental in  
12          accordance and in no way do I seek to go behind Your  
13          Honours' order, but those supplemental statements which  
14          Your Honours ruled were permissible have to be dealt  
15          with. Now what we are having is a wholly new scenario of  
16          being almost overwhelmed with new allegations which means  
17          that in effect we don't know what the case is against us  
18          because the case is growing day by day.

19        JUDGE THOMPSON: In this case are you saying that we now have  
20          more or less a kind of systemic situation whereby we are  
21          being overloaded with supplemental statements? It is now  
22          more or less a recognised prosecutorial technique; is  
23          that what you are saying?

24        MR JORDASH: It is. It is.

25        JUDGE THOMPSON: Because we have considered a couple of these,  
26          but have we gone the length to which we are justified in  
27          concluding that this is now a recognised prosecutorial  
28          strategy?

29        MR JORDASH: It is, but I don't object to -- I don't seek to



1 go behind Your Honours' ruling as to supplemental  
2 statement. If I had sought to do that I would have done  
3 it obviously through another route.

4 JUDGE THOMPSON: Yes.

5 MR JORDASH: And also, I don't seek to make point about those  
6 supplemental statements. If we look at the next witness,  
7 TF1-071 there is a great deal of supplemental evidence,  
8 most of it again relating to Mr Sesay not discussed in  
9 the first statements, but I don't take a point on that  
10 because it does -- it is supplemental, as I see it.

11 JUDGE THOMPSON: Yes, but of course your point is that there  
12 is a cut-off point. In other words, where the  
13 supplemental statements contain new allegations not  
14 germane to the existing counts in the indictment --

15 MR JORDASH: Yes.

16 JUDGE THOMPSON: -- and which cannot be, again using our  
17 criteria objectively, legally characterised as, you know,  
18 connected with the existing charges or allegations in the  
19 indictment.

20 MR JORDASH: Yes.

21 THOMPSON: The question is really, are these statements new in  
22 the sense that they do not relate to the material already  
23 that we have before the Court?

24 MR JORDASH: But also more than that, I think, there must come  
25 a point when supplemental statements are of such --  
26 describe such events are so wide in their parameters in  
27 the cumulative effect of them that you can objectively  
28 look at the evidence and say, "Actually most of this  
29 evidence against an accused was served only in the last





1 few months." And I suppose my application is two-fold in  
2 the sense that I would submit that they are new  
3 allegations, but if Your Honours are not with me on that,  
4 I would submit that it cannot be right that the  
5 disclosure rules provide for or allow the Prosecution to  
6 serve the majority of their case against an accused after  
7 26th April 2004. Supplemental or new, there comes a  
8 point when - and I think that is the most obvious stark  
9 point --

10 JUDGE THOMPSON: But the difficulty here is that Rule 66  
11 creates the obligation for the Prosecution to  
12 continuously disclose.

13 MR JORDASH: Continuously disclose, but not continuously rely  
14 upon --

15 JUDGE THOMPSON: Statement of all additional witnesses.

16 MR JORDASH: They can disclose it, but not, I would submit,  
17 rely upon it. Of course, they have a duty to disclose  
18 it, but my application is not that they should be  
19 prevented from disclosing it, they should be prevented from  
20 relying on it as part of their case.

21 JUDGE THOMPSON: Yes.

22 JUDGE BOUTET: What if they have -- you have a witness that  
23 comes in for the first time while in the witness box  
24 speaks about all of these matters they have not been  
25 disclosed to you, but the witness all of a sudden has  
26 this kind of a recollection because of -- for whatever  
27 reason? We have ruled upon that, as you know.

28 MR JORDASH: I do and it's a matter of degree, I would submit,  
29 if the witness came out with, as in Your Honours' ruling



1 in the CDF trial, if they came out with -- I think it was  
2 an allegation of serious burns caused by the placing of  
3 plastic on a witness's back.

4 JUDGE BOUTET: Yes, that was one of the scenarios, yes.

5 MR JORDASH: As a matter of fact and degree, one can see how  
6 that evidence arises from a description -- an original  
7 description of the event, it is added detail which  
8 supplements, it's normal, it is natural. But this is  
9 not, it is not that Mr -- the witness describes Sesay  
10 attacking Koidu and then suddenly remembered that he had  
11 also had his men abduct women. That almost - I am not  
12 conceding anything - but I can see how that might arise  
13 if the witness is probed and the detail arises from his  
14 evidence. This is new evidence. No mention of Mr Sesay  
15 in Koidu, no mention of him having a small boys unit,  
16 this not evidence that arises through the retelling of a  
17 story, the adding of detail, this is just new.

18 JUDGE BOUTET: But your position is that this new evidence, as  
19 such, if the Prosecution, the way they have been  
20 exercising their discretion, or certainly the procedure  
21 has been following, they seem to be interviewing all  
22 their witnesses prior to their coming to give evidence in  
23 Court a few days or a few weeks before. And from what we  
24 observed that is where a lot of this supplemental is  
25 coming from. And you are saying they have the obligation  
26 to disclose because that is part of the rules.

27 MR JORDASH: Yes.

28 JUDGE BOUTET: However, they should not be allowed to use it.  
29 Essentially that is what you are saying, there is an



1 obligation of disclosure, but the obligation of  
2 disclosure does not include the right for the Prosecution  
3 to use that evidence because of its lateness.

4 MR JORDASH: And I would go further and say it is incumbent  
5 upon the Prosecution to recognise when they go through  
6 that process, yes, they have to disclose it, but there  
7 should be, as ministers of justice, an obligation on them  
8 to make an assessment themselves as to whether it is fair  
9 to add those new allegation to the case against the  
10 Defence. It is not simply something which is in Your  
11 Honours' hands, it is in the Prosecution's hands to say,  
12 "Five new allegations, a week before the witness gives  
13 evidence, we are not going to rely upon this. We will  
14 give it to the Defence so that they know what is coming,  
15 but we will not adduce this through the witness."

16 JUDGE THOMPSON: But let me look at it from this short angle.  
17 You say we have a discretion to exclude this evidence and  
18 we say so. Remember also there is a kind of umbrella  
19 provision in our Rules that we can exclude evidence where  
20 the prejudicial effect outweighs the probative value.  
21 Or, evidence that brings the administration of justice  
22 into disrepute. If you invite us to exclude this  
23 evidence isn't one way of looking at it to say that you  
24 are inviting us to exclude evidence which perhaps must  
25 rise to the threshold of evidence whose prejudicial  
26 effect outweighs its probative value? Suppose I propose  
27 that as the bar of the threshold which we should use as  
28 our guide? Would that be too high that you must in fact  
29 prove this particular piece of evidence may well be



1 evidence whose prejudicial effect outweighs its probative  
2 value? Would we be right to proceed in that kind of way?

3 MR JORDASH: No, because it would simply increase the  
4 Prosecution's determination to make the evidence as  
5 probative as possible, notwithstanding the fact that it  
6 was served very late.

7 JUDGE THOMPSON: Yes.

8 MR JORDASH: That's why I think a perhaps draconian remedy is  
9 the only one which is called for. This, of course, is  
10 not simply prejudiced to the Defence. What about 141?  
11 We know he is a child witness, we know he has been  
12 disturbed from his schooling for two -- on two occasions.  
13 We know he suffers from a psychological illness and the  
14 Prosecution do not nevertheless seem restrained in  
15 serving evidence really late and allowing the  
16 Prosecution -- allowing the Defence the opportunity to  
17 apply to adjourn the evidence, because that would be the  
18 very least thing I would request. And it, I would submit  
19 on this particular case, would be the very least thing  
20 Your Honours should - and I say this with the deepest of  
21 respect - should do. And the impact upon that witness  
22 due to the Prosecution's late service and late reliance  
23 on the evidence is bad for us, it is bad for the  
24 administration of justice, it is bad for that young man.  
25 There is no justification for it, I would submit. It may  
26 be probative evidence, but that probative evidence was  
27 served too late and there has to be a cut-off point, I  
28 would respectfully submit.

29 PRESIDING JUDGE: Yes, may you round up, please?





1 MR JORDASH: I have finished.

2 PRESIDING JUDGE: You are finished. Right. Can we take  
3 Mr Touray, please.

4 MR. NICOL-WILSON: Your Honour, we have no application to  
5 make.

6 PRESIDING JUDGE: You have no application to make.

7 MR NICOL-WILSON: [Inaudible] Mr O'Shea --

8 PRESIDING JUDGE: Pardon?

9 MR NICOL-WILSON: Mr O'Shea would like to make an application.

10 PRESIDING JUDGE: Yes, I know, I was just proceeding. In fact  
11 I was going to ask, yes, it was indicated by the  
12 Prosecution, that after Mr Jordash Mr O'Shea was going to  
13 follow on. But we wanted to take a chronological  
14 approach by coming to you first.

15 MR. NICOL-WILSON: As your Honour pleases.

16 PRESIDING JUDGE: Yes. Mr O'Shea, do you have anything to add  
17 to this?

18 MR O'SHEA: Your Honour with regard to Mr Jordash's  
19 application, I will add nothing to his already forceful  
20 and persuasive argument. With regard to the application  
21 we wish to make, I am, of course, in your Honours' hands,  
22 but I would submit that it would not be fair to  
23 Mr Harrison to invite him to respond to both of our  
24 applications simultaneously simply because the legal  
25 points are different.

26 MR HARRISON: Mr Harrison would like to do that.

27 PRESIDING JUDGE: Supposing he can -- supposing he can.

28 MR O'SHEA: Well, if it's Mr Harrison's preference, then I  
29 will proceed.



1 MR HARRISON: It is.

2 PRESIDING JUDGE: Yes, we want a reply, because we don't want  
3 to push these issues. So you rest your own submissions,  
4 your arguments on Mr Jordash's?

5 MR O'SHEA: No, not at all. As I have indicated to Your  
6 Honour, I have quite a different application.

7 PRESIDING JUDGE: Right. Okay. Can you make the application?

8 JUDGE THOMPSON: In part anchoring on his submissions, general  
9 submissions, because we need to know that so that you --

10 PRESIDING JUDGE: That's what he said.

11 JUDGE THOMPSON: Are you anchoring on part of his submissions?

12 MR O'SHEA: No, non, what I said was, Your Honour, in so far  
13 as Mr Jordash's application is concerned I have nothing  
14 to add.

15 PRESIDING JUDGE: Yes.

16 JUDGE THOMPSON: All right.

17 MR O'SHEA: In so far as what he has said about the law, I  
18 associate with it in so far as it has an impact.

19 JUDGE THOMPSON: Yes, upon your own.

20 MR O'SHEA: Yes.

21 JUDGE THOMPSON: Yes. I mean, we want to get this quite clear  
22 because I am familiar with your kind of style in this  
23 approach, you know, in your written submissions to you  
24 anchor on part of what some other colleague has put  
25 forward and then you come with yours. We will need to  
26 get that quite clear.

27 MR O'SHEA: I think the part we can usefully anchor on is with  
28 respect to the question of --

29 PRESIDING JUDGE: Mr O'Shea, what is your application? What



1 is your application?

2 MR O'SHEA: Your Honours, the supplemental statement of 10th  
3 January 2005 makes the following statement, "The  
4 civilians that were brought from Kono to Kailan were  
5 handed to the G5. I believe his name was Augustine Gbao.  
6 I came to know his name during muster parade as he was  
7 introduced for everyone." None of these statements,  
8 going back to February 2003, make any reference to  
9 Augustine Gbao. This addition is highly significant  
10 because in our approach as defence counsel, when we read  
11 the statements as they stood before this supplemental  
12 statement last week, our impression was that this witness  
13 does not touch us and that had a significant impact on  
14 our strategy towards this witness. What this additional  
15 statement does is it puts Augustine Gbao in a position  
16 where he becomes a direct participant in the mistreatment  
17 of the civilians in Kailan according to this witness.  
18 That is the difficulty, that is the nature of the  
19 problem.

20 I rely first on the right to a fair trial. I rely  
21 on Article 17(4)(a). While recognising that 17(4)(a) is  
22 limited in that it deals with the essentials of the  
23 accusations against the accused, I submit that the  
24 essentials of the accusations of the accused include in  
25 the first place the charges and basic allegations, as set  
26 out in the indictment, and in the second place the  
27 essential nature of the evidence which will be used to  
28 prove those charges.

29 I also rely upon Article 17(4)(b) on the right to



1 adequate time and facilities. I further rely upon Rule  
2 66(1)(a), which I submit must be interpreted not only  
3 according to its plain meaning, but also in its context  
4 and object and purpose in accordance with Article 31 of  
5 the Vienna convention. So I say that there has been a  
6 violation of 66(1)(a) because additional witness --  
7 statements of additional witnesses must be interpreted in  
8 this case to include this statement because we are  
9 effectively faced with a new witness having regard to the  
10 object of the provision and its context.

11 I further rely upon Article 67(D) which provides for  
12 the continuing obligation of disclosure and I do so on  
13 the basis that that provision is premised on the  
14 assumption that reasonable efforts will be made to adduce  
15 the essentials of a witness's testimony at an early  
16 stage. Now in interpreting those two rules in the  
17 context of the statutory provisions, with regard to  
18 context I rely on all those provisions which deal with  
19 separate and joint trials. In particular, Article  
20 17(4)(1), the right of each accused to be treated equally  
21 before the Special Court, and Article 6, the individual  
22 criminal responsibility of the accused, Rule 82(A), in  
23 joint trials each accused shall be accorded the same  
24 rights as if he were being tried separately, and  
25 paragraph 22 of this Trial Chamber's decision on joinder,  
26 where this Chamber assured the accused that it would  
27 proceed with each accused as if they were being tried  
28 separately. In my respectful submission, when  
29 interpreting the meaning of statements of additional





1 witnesses it is my submission that that would include a  
2 statement or new evidence which effectively has the  
3 result the same as if one was dealing with a new witness,  
4 that what one has to look at in looking at this context  
5 is what would the be the position of Augustine Gbao in a  
6 separate trial in these circumstances? Now, our  
7 submission on that is that if Augustine Gbao were in a  
8 separate trial without the knowledge of the supplementary  
9 statement it is very unlikely that the Prosecution would  
10 call Witness 141, because witness 141 does not adduce  
11 direct evidence of a common plan or design. The most  
12 that direct us -- Witness 141 could do is contribute to  
13 the issue of widespread and systematic and in terms of  
14 the witnesses that the Prosecution has for that purpose  
15 it is not the most useful of those witnesses. Even if,  
16 in a separate trial, the Prosecution for whatever reason  
17 decided to call this witness not knowing about the  
18 contents of the supplementary statement, even in those  
19 circumstances it would be my submission that this Court  
20 would exclude the statement in the supplementary  
21 statement because if the Prosecution were conducting an  
22 investigation for a separate trial, only for Augustine  
23 Gbao, it would be incredulous that the Prosecution would  
24 take several statements from the witness knowing that  
25 that statement was for the purposes of this trial and not  
26 adduce that particular fact.

27 I remind the Court that we operate without  
28 instructions. I know I don't need to do so, but it is  
29 significant, because in these circumstances, in my



1 submission, there is an onus on us, the Defence, on your  
2 Honours, and on the Prosecution to exercise extreme  
3 caution knowing that the accused is not providing  
4 instructions to the Defence counsel.

5 The prosecution has had an opportunity of some two  
6 years to adduce this alleged fact. In the context of a  
7 separate trial it would be unbelievable for them to come  
8 six days before the witness gives testimony and mention  
9 the accused for the first time. That, would in my  
10 submission, at least in the eyes of the public, reek of  
11 unfairness.

12 If one has regard to the particular content of the  
13 statement, "The civilians that were brought to Kono from  
14 Kailan were handed to the G5, I believe his name was  
15 Augustine Gbao," there are two possible, very simple and  
16 very obvious questions which could have been put by the  
17 Prosecution investigators or by the Prosecution counsel  
18 during the course of these two years. Number one, when  
19 the civilians arrived in Kailan, who was present?

20 PRESIDING JUDGE: Is it on record that the Prosecution knew  
21 about this for the past two years or so?

22 MR O'SHEA: It is on record that the Prosecution know about  
23 the issues in relation to Kailan contained in the  
24 previous statements. What I am saying is that dealing  
25 with an uninstructed defence, dealing with a vulnerable  
26 child witness, and given the significance of the matter,  
27 it is in the context of separate trial - and this is the  
28 context which I am inviting Your Honours to put  
29 yourselves in - incredible that the Prosecution would not



1 put the question, "Do you know a man called Augustine  
2 Gbao?" Or alternatively, "All these events that you have  
3 spoken about in Kailan, when these civilians were brought  
4 to Kailan who was there? Give us the names of the  
5 rebels?" Had those simple questions been put, it is  
6 reasonable to think that this evidence would have been  
7 within the knowledge of the Prosecution at a much earlier  
8 stage. It has not been suggested by the Prosecution that  
9 any efforts have been made before six days ago or eight  
10 days ago to approach the witness to get significant  
11 supplemental information.

12 JUDGE THOMPSON: Is there a suggestion there of lack of due  
13 diligence?

14 MR O'SHEA: In response to your question, Your Honour, let me  
15 be clear. I am not alleging mala fides.

16 JUDGE THOMPSON: No, I am not suggesting. I did not use the  
17 word mala fides.

18 MR O'SHEA: No, I know you didn't, Your Honour.

19 JUDGE THOMPSON: Lack of due diligence.

20 MR O'SHEA: Your Honour, yes.

21 JUDGE THOMPSON: I am not equating mala fides with lack of due  
22 diligence at all.

23 MR O'SHEA: Your Honour, yes. I simply wanted to make that  
24 qualification. I am indeed, because of the nature of the  
25 statement in the supplemental statement, I am suggesting  
26 that all due diligence on the part of the Prosecution  
27 would have led to these aspects coming out at an earlier  
28 stage. And I am suggesting that the test to be applied  
29 in asking oneself what would a diligent Prosecutor have



1 done, must be looked at in the context of a child witness  
2 and an accused not providing instructions, which the  
3 Prosecution have known about for a long time, which is  
4 akin, not the same as, but akin to an unrepresented  
5 accused for the purposes of the kind of caution that all  
6 the parties must exercise.

7 PRESIDING JUDGE: May you be rounding up, Mr O'Shea.

8 MR O'SHEA: Subject to any further inventions from Your  
9 Honours, that is it. Yes.

10 PRESIDING JUDGE: Thank you.

11 [Judges confer]

12 PRESIDING JUDGE: Yes, Mr Harrison, I think we will take you  
13 before we go on break. I don't know for how long you are  
14 likely to be on your feet.

15 MR HARRISON: It is likely to be quite a lengthy response.  
16 There is a -- I should indicate to the Court that there  
17 is a point that I would like to take instructions on  
18 which ultimately may abbreviate this entire proceeding.  
19 If I am asked to proceed now it is going to be a lengthy  
20 submission, but there is a point that I am asking for  
21 some time to take instructions and then report back to  
22 the Court and to my colleague and my learned friends on  
23 the other side.

24 [Trial Chamber confers]

25 PRESIDING JUDGE: Well, we are with you, Mr Harrison, and we  
26 give you an opportunity to look into this issue before  
27 you make a reply.

28 MR HARRISON: Thank you.

29 PRESIDING JUDGE:





1 This said, the Court will adjourn to 2.30 p.m. for  
2 Mr Harrison to reply to the submissions by the Defence in  
3 support of the application. The court will rise, please.

4 [Luncheon recess taken at 1.10 p.m.]

14:30:14 5 [HS180105C]

6 [Upon resuming at 2.55 p.m.]

7 PRESIDING JUDGE: Good afternoon, learned counsel, we are  
8 resuming the session, please.

9 JUDGE THOMPSON: Mr O'Shea, you may continue with your  
14:52:28 10 response.

11 MR O'SHEA: Your Honours, I need intervene at this stage  
12 because a development has taken place during the course  
13 of the break. We had a discussion with my learned  
14 friend, Mr Harrison, and it would appear that there was a  
14:52:49 15 witness statement dated the 9th of October 2004, which  
16 neither myself nor Mr Cammegh had in our bundles, but  
17 upon inquiry the Prosecution were able to ascertain that  
18 we had, or our team had in fact been served with it.  
19 That is a matter which I don't dispute.

14:53:15 20 All I can say is that I apologise to the Court for  
21 the inconvenience created by that administrative error  
22 which has taken place within our team. Clearly the  
23 statement was served upon us but neither myself nor  
24 Mr Cammegh had it in our papers and therefore did not  
14:53:35 25 have knowledge of it when we were making the submissions  
26 that we were making. The statement that I am referring  
27 to is a statement of the 9th of October 2004.

28 JUDGE BOUTET: Which is the same statement that Mr Jordash was  
29 referring to this morning or a different one?



1 MR O'SHEA: I think it was the same statement. There were a  
2 number of statements that were mentioned.

3 JUDGE BOUTET: But he did mention one statement of 9 October.

4 MR O'SHEA: I think that's right, Your Honour. It didn't  
14:54:09 5 occur to me at the time that Mr Jordash was making his  
6 submissions, there being a series of statements which  
7 were mentioned. Suffice to say this is a statement which  
8 was missing from our papers during this trial session.  
9 If Mr Jordash can just help me here, I think this is one  
14:54:33 10 of the statements he referred to. Yes, it is,  
11 Your Honour.

12 PRESIDING JUDGE: That would be a statement dated what?

13 MR O'SHEA: It is dated 9th of October 2004, a statement of  
14 TF1-141. It is described as a supplemental statement and  
14:54:58 15 it consists of five pages. On page 5 the final paragraph  
16 reads as follows: "Augustine Gbao was with us in Juru,  
17 Niama. He ordered the flogging of a boy, a serious one  
18 which resulted in his bleeding all over. He was accused  
19 of having diamonds. Augustine Gbao had his own SBUs.  
14:55:56 20 His responsibility was to bring civilians who had been  
21 captured." So obviously, in the light of our knowledge  
22 of that statement now, we have to make certain factual  
23 corrections to the way in which we put our submissions to  
24 Your Honours.

14:56:19 25 JUDGE THOMPSON: In other words, you're no longer virtually  
26 saying that this is the first time your client has ever  
27 been allegedly implicated, because that was the crux of  
28 your submission.

29 MR O'SHEA: Exactly, Your Honours. I think the factual



1 scenario needs to be adjusted to the following: That the  
2 statement of the 9th of October 2004 was the first time  
3 that Augustine Gbao is mentioned and then he is mentioned  
4 again in a further statement of the 1st of January 2005.

14:57:01 5 JUDGE BOUTET: Tenth.

6 MR O'SHEA: Tenth of January, thank you, Your Honour. Tenth  
7 of January 2005. Obviously we have had to consider what  
8 impact that has upon our submissions.

9 JUDGE THOMPSON: In other words, there is clearly a change in  
14:57:18 10 the factual position from your perspective.

11 MR O'SHEA: There is clearly a change in the factual position.

12 JUDGE THOMPSON: Shall we say a revolutionary change.

13 MR O'SHEA: Well, yes. In the context of my submissions,  
14 because I have to say, having harped on about due  
14:57:35 15 diligence so much, I have to accord what is due to the  
16 Prosecution, which is first of all an apology and --

17 JUDGE THOMPSON: And indeed, when I said a revolutionary  
18 change, I meant perhaps that this might impact very  
19 significantly the legal dimension of your submissions.

14:57:55 20 MR O'SHEA: Well, it does have an impact. It does have an  
21 impact and I do not deny that, and I think effectively  
22 the goalpost shifted through our own fault.

23 JUDGE THOMPSON: I commend your candor.

24 MR O'SHEA: Thank you. And I apologise to the Court as well.  
14:58:16 25 We have thought about this in exactly what way this does  
26 impact upon our submission and we are now dealing with a  
27 situation of two what we say would be additional  
28 statements, one of some eight days ago and the other of  
29 some two and a half months ago. That, of course, must be



1 placed in the context of the statements going back to  
2 February 2003.

3 We retain the substance of our submission, but  
4 instead of me framing it the way I did, which was to rely  
14:59:04 5 upon 66(A)(i), and to essentially go down the route of  
6 saying this is a completely new witness, we will rely on  
7 66(A)(ii) and say that the Prosecution has not shown good  
8 cause for what we say are additional statements. And  
9 here, Your Honour Judge Thompson, this is where I adopt  
14:59:37 10 the submissions of Mr Jordash because the significant  
11 aspect of the 9th of October statement, as opposed to the  
12 latter one which we were discussing earlier, is that the  
13 9th of October statement makes quite a serious  
14 allegation. In fact, one that is even described as  
14:59:59 15 serious by the witness himself.

16 So it is in that context that we say this is the  
17 first time -- on the 9th of October this is the first  
18 time Augustine Gbao is mentioned. The allegation is of a  
19 very serious nature, and that therefore this should be  
15:00:21 20 classified as an additional statement for which good  
21 cause must be shown, and the same with regard to the 10th  
22 of January 2005.

23 All the submissions that I made earlier still apply  
24 to the extent that I was talking about the fact that we  
15:00:41 25 are without instructions, this is a child witness, when  
26 Your Honours are judging the question of due diligence  
27 and so on and so forth. And, most importantly, that the  
28 part of my submission that I continue to rely on firmly  
29 is to invite Your Honours to consider this scenario in





1 the context of a separate trial.

2 I hope I have been of assistance and, again, I  
3 apologise for this innocent sin, if I can describe it in  
4 that way.

15:01:19 5 JUDGE THOMPSON: Thank you. I think it is time for the  
6 Prosecution to reply.

7 MR HARRISON: Thank you. If I could just indicate at the  
8 outset that Mr O'Shea had indicated to me, I think it was  
9 last week, the general nature of his application and had  
15:01:47 10 I perhaps been more diligent myself I would have noted at  
11 that time the confusion that had probably existed in his  
12 file. So perhaps I am in part responsible for that  
13 confusion.

14 I am going to be very brief. There is one authority  
15:02:06 15 that I am going to rely upon, but I first want to  
16 introduce a matter to the Court as being a question of  
17 trying to determine how best to reconcile the principle  
18 of disclosure, which is part, of course, of trial  
19 fairness, and the principle of orality, which this Court  
15:02:28 20 has endorsed from the outset of the evidence being heard.  
21 One wouldn't think that these two principles would ever  
22 come into conflict, but they may in certain instances,  
23 but I think they can be reconciled.

24 What disclosure is all about is making sure that an  
15:02:46 25 accused person knows exactly what is going to be said  
26 about him before so that he can prepare for it. It's as  
27 simple as that. The principle of orality --

28 JUDGE THOMPSON: Let's get that again. What disclosure is all  
29 about?



1 MR HARRISON: It is as simple as providing all of the  
2 information to the accused that can be provided so that  
3 they can mount their defence.

4 JUDGE THOMPSON: Right.

15:03:35 5 MR HARRISON: The principle of orality simply says that the  
6 best evidence the Court is ever going to get is that  
7 which it hears before it, where it can judge the  
8 demeanour, the actions, the body language, the tone, the  
9 words of the witness. And part of the principle of  
15:04:04 10 orality is a recognition that witnesses frequently say  
11 things that are different, nuanced, subtly changed,  
12 completely at odds with what existed in prior statements.  
13 And of course, if it is completely at odds that is fodder  
14 for cross-examination that every Defence counsel licks  
15:04:40 15 his chops at. The obligation that's on the Prosecution  
16 is to continuously disclose all of the information that  
17 it obtains as soon as it can upon its delivery to the  
18 Prosecution.

19 JUDGE THOMPSON: Just a minute. You say that where the  
15:05:18 20 testimony is completely at odds with a statement that had  
21 been disclosed, this can trigger off cross-examination  
22 later on?

23 MR HARRISON: Well, generally speaking, as I recall from my  
24 years as a Defence counsel, my eyes used to sparkle when  
15:05:36 25 that came up.

26 JUDGE THOMPSON: Okay, continue.

27 MR HARRISON: But I think part of the reconciling of these two  
28 principles has already been done by the Court, and it was  
29 done in its decision of 16th of July 2004 in the CDF



1 case. Now, I did hand up copies of those decisions to  
2 the Court's legal officer and I was going to quote  
3 paragraph 25 to you, because we say this answers in its  
4 entirety the applications of both the first accused and  
15:06:12 5 the third accused.

6 JUDGE THOMPSON: What is the date of our decision again?

7 MR HARRISON: It is the 16th of July 2004.

8 JUDGE THOMPSON: Paragraph?

9 MR HARRISON: 25. If I could read the paragraph to the Court.

15:06:35 10 JUDGE THOMPSON: Please do.

11 MR HARRISON: It states: "The contention that witness TF2-198  
12 testified at trial about matters not included in his  
13 witness statement does not find support from the evolving  
14 jurisprudence as invalidating his oral testimony. The  
15:06:54 15 Defence argument is that the witness testified about  
16 burning plastic being placed on his back and to suffering  
17 serious burns, evidence which was not part of his witness  
18 statement disclosed prior to trial.

19 The fact that burns to the witness's shoulders were  
15:07:11 20 not in the brief interview notes does not amount to a  
21 breach by the Prosecution of its Rule 66 disclosure  
22 obligations. The Trial Chamber considers that it may not  
23 be possible to include every matter that a witness will  
24 testify about at trial in a witness statement. The  
15:07:30 25 Special Court adheres to the principle of orality whereby  
26 witnesses shall in principle be heard directly by the  
27 Court.

28 While there is a duty for the Prosecution to  
29 diligently disclose witness statement that identify



1 matters witnesses will testify about at trial, thereby  
2 providing the Defence with essential information for the  
3 presentation of its case, it is foreseeable that witnesses  
4 by the very nature of oral testimony will expand on  
15:07:59 5 matters mentioned in their witness statements and respond  
6 more comprehensively to questions asked at trial. The  
7 Trial Chamber notes that where a witness has testified to  
8 matters not expressly contained in his or her witness  
9 statement, the cross-examining party may wish to  
15:08:15 10 highlight this discrepancy and further examine on this  
11 point."

12 That is a traditional remedy available to Defence  
13 counsel in instances of late disclosure. The notion that  
14 there is wrongdoing in any way on the part of the  
15:08:36 15 Prosecution is categorically denied and I'll say nothing  
16 more about it.

17 what I do say, as an alternative to the Court, is  
18 this: The Prosecution has to bear in mind the  
19 practicalities of this trial and the realities of its  
15:08:58 20 witnesses. We've got a young witness that the  
21 Prosecution is very concerned give evidence in an  
22 efficient and timely manner. We're very concerned about  
23 adjournments of this witness or any other witness.

24 If the Court has any reservations about trial  
15:09:18 25 fairness, the fairness of disclosure with respect to the  
26 10th of January 2005 statement, the alternative remedy  
27 which the Court could make is the following: To give a  
28 direction to the Prosecution not to lead any evidence  
29 with respect to the 10 January 2005 statement. Such a





1 direction would be accepted by the Prosecution. That  
2 would provide this Chamber with the opportunity of  
3 proceeding with this witness now in the timely and  
4 efficient manner which we anticipate the Court wishes the  
15:10:06 5 Prosecution to follow.

6 I said I would be brief and I think that is all I am  
7 going to say to the Court.

8 JUDGE THOMPSON: So, in other words, there are the two options  
9 from your perspective: The Court adheres to its decision  
15:10:34 10 of 16th of July and faithfully applies its principles  
11 enunciated in that decision, or - again you preface this  
12 as a matter of practicality - the Court recognises the  
13 limitations on the part of the Prosecution in terms of  
14 problems of delay and then give appropriate directions.

15:10:55 15 MR HARRISON: As the Prosecution recognises some of the  
16 concerns expressed by Defence counsel -- I don't wish to  
17 in any way suggest that Defence counsel have made  
18 spurious representations, because I don't think that is,  
19 in fact, true.

15:11:10 20 JUDGE THOMPSON: Right, well, I understand your position  
21 perfectly.

22 JUDGE BOUTET: Before you sit down, your recommendation or  
23 suggestion, should the Court decide to -- about the late  
24 disclosure and your suggestion that you be directed not  
15:11:34 25 to lead evidence about the statement or whatever is  
26 contained in the -- presumably you're talking of the 10th  
27 of January 2005?

28 MR HARRISON: Yes. If I wasn't clear on that let me restate  
29 it. I am only referring to the 10th of January



1 statement.

2 JUDGE BOUTET: Let me finish my comments and I will allow you  
3 to speak about it. I haven't checked my notes but my  
4 recollection of Mr Jordash's presentation was directed to  
15:12:01 5 obviously 10th of January 2005, but also to all the  
6 statements that you have disclosed post-24 February 2003,  
7 so your suggestion applies only to the one of 10 January,  
8 not of 9 October, nor of 19-20 October 2004. Do I  
9 understand your position to be that?

15:12:28 10 MR HARRISON: You do. We join issue head on with Mr Jordash  
11 with respect to the earlier statements. It is only with  
12 respect to the most recent one that we are prepared to  
13 make the representation that we have.

14 JUDGE BOUTET: Thank you.

15:12:42 15 PRESIDING JUDGE: Mr Harrison, there is a lingering worry  
16 about these disclosures, the late disclosure of  
17 statements which effectively prejudice the rights of the  
18 Defence under Article 17 to prepare for the defence of  
19 their clients. There is a fear expressed by the Defence.  
15:13:19 20 That is that a leeway appears to be given -- if we do  
21 allow this, it would amount to a leeway given to the  
22 Defence to come up at any stage of this trial and keep  
23 disclosing on the principle of orality and on the  
24 principle of our decision, which you cited and which you  
15:13:42 25 stated, on the 16th of July 2004. You read that decision  
26 and you saw that there was a lot of caution -- we  
27 ourselves were worried about the extent to which we can  
28 give an unlimited leeway for the Prosecution to disclose  
29 new evidence.



1 I mean, we are talking about new evidence, evidence  
2 which is not necessarily supplemental to that which had  
3 already been disclosed to them. That is a lingering  
4 worry. What reply would you have to this? Because it is  
15:14:19 5 a matter which touches on the rights of the Defence and  
6 if we have to proceed on the basis of fairness, we have  
7 to draw a balance somewhere as to how late we should keep  
8 accepting these disclosures which introduce new elements  
9 to what the Defence has already been put on notice and  
15:14:51 10 which takes them by surprise.

11 Even if I were Defence counsel, certainly if I have  
12 my calendar, I've been given statements and so on and so  
13 forth, if fresh statements keep coming in, certainly I  
14 consider that the rights of the Defence have been  
15:15:08 15 prejudiced in one way or the other. How do we get around  
16 this, Mr Harrison?

17 MR HARRISON: Yes, and I think this revisits the two  
18 principles that I tried to indicate to the Court were the  
19 ones that may be in tension here. My suggestion to the  
15:15:28 20 Court is as follows: The principle of orality is of such  
21 significance and importance as a means of not only  
22 conducting procedure but of controlling substantive  
23 matters before the Court that it may be the case that  
24 this Court will have to at some point revisit that  
15:16:02 25 principle. I am not sure it will be wise to do so, but  
26 it may be some point in the future when it is necessary.

27 But at the present time there really is no  
28 difficulty, because there has been notice given of  
29 exactly what is going to be said, there is no surprise



1 taking place from the witness's mouth when they are on  
2 the witness stand. What would be most offensive is a  
3 circumstance or the scenario where some area of interest  
4 to the Court in general is not canvassed by the  
15:16:48 5 Prosecution, is then canvassed for the first time in  
6 court and a whole ream of information comes out for the  
7 very first time in open court. That would be quite  
8 unfair to the accused.

9 We are not talking about that situation and so I am  
15:17:06 10 saying to the Court that at this particular time you need  
11 not revisit the principle of orality and that we can  
12 proceed in one of the two manners that I have suggested  
13 to the Court.

14 JUDGE THOMPSON: Learned counsel, remember when Mr Jordash was  
15:17:58 15 making submissions he suggested that the best course of  
16 action in this situation -- I mean, on his submission  
17 based on what they consider a legitimate complaint, was  
18 to exclude the evidence completely. You have come up  
19 with a compromise, of course, in part relating to the  
15:18:26 20 statement of the 10th of January, and concede perhaps  
21 halfway that we may well direct you not to lead evidence  
22 on that. But then the palliative normally, which is the  
23 alternative to exclusion or suppression of the evidence,  
24 is an adjournment to enable the Defence to investigate  
15:18:56 25 the possibility of rebuttal of what may well be highly  
26 incriminating evidence. You foreclose that and of course  
27 foreclose that by your submission that we're dealing here  
28 with a child witness who may well be in a position in  
29 which he needs to attend to certain educational things.





1           At some point in time, when these various interests  
2           conflict, we will need to take a position, and I am a  
3           little worried that you foreclosed even the palliative,  
4           because if this Court feels strongly, as you have heard  
15:19:41 5           Presiding Judge's own perception of it, we may well say  
6           perhaps the exclusion remedy may well also be appropriate  
7           here. So I do not know whether, in the light of what I  
8           have said, you may want to review this strait-jacket that  
9           you are putting us in. Don't suppress the evidence in  
15:20:09 10          respect of the other two statements, only direct us not  
11          to lead that one, but then don't adjourn to give them a  
12          chance to effectively prepare their case. Help me out of  
13          that dilemma.

14       MR HARRISON: Yes, it is a suggestion that's really intended  
15:20:26 15          to be of assistance to the Court. The practical  
16          realities which we are burdened with is that we have  
17          dealt with one witness in a week out of 19 that we had  
18          intended for this session. We know that the Court is  
19          concerned and we acknowledge that with good reason you've  
15:20:43 20          admonished Prosecution in the past for perhaps not being  
21          as efficient as Prosecution could have been. But this is  
22          a way that we are suggesting -- an efficient way of  
23          resolving, and if I can put on the record, really on a  
24          one-off basis. We are making this suggestion simply  
15:21:02 25          because of the unique characteristics of this particular  
26          witness that you have heard about through the  
27          psychologist; you know about the difficulties. The  
28          Prosecution does not want to exacerbate those  
29          difficulties.



1           Mr Jordash put the submission before you that in --  
2           as he has quite correctly and perhaps with some wisdom  
3           suggested to the Court, that a Prosecutor acting as a  
4           minister of justice may well in fact take the view that  
15:21:31 5           it would be appropriate to withdraw certain of the  
6           evidence so that that witness could testify. So I am  
7           really just trying to follow on Mr Jordash's suggestion  
8           and provide you with the sort of circle or the -- just  
9           continuing on and closing the circle of how we might do  
15:21:48 10          that.

11        JUDGE THOMPSON: I appreciate that, because the Court too has  
12           a great burden of trying to work through a tight judicial  
13           rope to make sure that we act in the overall interests of  
14           justice.

15:22:05 15        PRESIDING JUDGE: Yes, Mr Jordash?

16        MR JORDASH: Your Honour, I will be brief. In my respectful  
17           submission, this is an application which doesn't depend  
18           upon a reconciliation of the two principles enunciated in  
19           the past by this Court. What this submission relies upon  
15:22:26 20           is the principle of disclosure, that's what it is based  
21           upon. We are not talking about a principle of orality.  
22           When we get to that point, when the witness is giving  
23           evidence and he comes out with evidence which has not  
24           been disclosed in written statements, then we are in the  
15:22:43 25           realm of the principle of orality.

26           Until that time, I would submit we are in the realm  
27           of have the Prosecution disclosed prior to oral  
28           testimony, the material pursuant to Rule 66? In my  
29           submission, no, and in my submission there can be no



1 useful distinction -- I beg your pardon, not useful,  
2 because Mr Harrison's proposal is useful because it does  
3 seek a solution to the present conflict. But in my  
4 respectful submission, there can be no distinction made  
15:23:22 5 between the late disclosure in October and the late  
6 disclosure on the 10th of January.

7 Rule 66 and the date set by Your Honours was there  
8 for a purpose, and the purpose was to give the Defence,  
9 in the Chamber's view, proper notice of the case it would  
15:23:45 10 face, proper time to prepare to rebut those allegations  
11 and set an onus on the Prosecution to serve that evidence  
12 before that date, or show good cause why they haven't.

13 In my submission we can deal with the principle of  
14 orality when we get there. Until that time the question  
15:24:14 15 is have the Prosecution abided by the very clear rules  
16 set out in Rule 66? If the witness departs from what we  
17 have been given in that Rule 66 disclosure, then an  
18 assessment can be made at that stage as to whether that  
19 oral evidence falls within this Chamber's order in the  
15:24:38 20 CDF trial, but I don't submit that we are at that point  
21 yet. Those are my submissions.

22 MR O'SHEA: Your Honours, I agree with Mr Harrison that  
23 Your Honours need not revisit the principle of orality.  
24 We do not contest the principle of orality as set out in  
15:25:09 25 Your Honours decision. We say that this is a different  
26 case. This is a case of additional statements. In the  
27 case of Mr Gbao, with regard to the statements of the 9th  
28 of October and the 10th of January, we are essentially  
29 dealing with a situation where the whole story against



1 Gbao suddenly unravels. It wasn't there in the original  
2 statements. That is what makes this case very different  
3 from the Norman case.

4 There are two aspects with regard to due diligence  
15:25:56 5 on the part of the Prosecution which need to be  
6 highlighted. The first is that this was, in our  
7 submission, a case where if the accused is mentioned for  
8 the first time there is clearly something very additional  
9 about it and the Prosecution ought to have applied for  
15:26:22 10 good cause. The second aspect of due diligence is the  
11 aspect that even if we are dealing with two and a half  
12 months as opposed to eight days, we are still looking at  
13 a context of almost two years in which the Prosecution  
14 had the opportunity to say do you know Augustine Gbao?

15:26:47 15 With regard to prejudice to Mr Gbao, and here is  
16 where I come to Your Honours's discussion on the  
17 appropriate remedy, we are in a particular position --

18 JUDGE THOMPSON: Yes, learned counsel?

19 MR HARRISON: The Prosecution takes a view that the Defence  
15:27:12 20 are certainly allowed to make a reply but a reply does  
21 not lead to brand new submissions on things that weren't  
22 raised in the response.

23 JUDGE THOMPSON: Yes, I understand.

24 MR O'SHEA: Your Honours, with respect, this was raised by  
15:27:28 25 Your Honours, not by my learned friends. It was raised  
26 by Your Honour Judge Thompson, because Your Honour Judge  
27 Thompson raised the question of is adjournment an  
28 appropriate remedy, and that is what I am turning my mind  
29 to now.





1           We are in a peculiar position and I say that because  
2           of that peculiar position, adjournment does not cure the  
3           problem. This is why: The first time or the time at  
4           which Mr Gbao withdrew our instructions from us was in  
15:28:01 5           July of 2004, when we began this trial. Before July 2004  
6           we were speaking to Mr Gbao and we did have instructions.  
7           I have to say that there's instructions and there's  
8           instructions, but, nonetheless, we did have instructions.  
9           Had we been in a position to know this information  
15:28:28 10           contained in the two later statements prior to July 2004,  
11           we would have been in the position to speak to Mr Gbao  
12           and put it to him and ask his views on it and perhaps get  
13           some direction on investigations. Both of these  
14           statements came after July 2004, and even if we are given  
15:28:51 15           an adjournment we will be probably in the same position  
16           in two months from now as we are today, because we are  
17           not in a position to speak to Mr Gbao.

18       PRESIDING JUDGE: Whose fault that you are not able to speak  
19           to -- is it the Court's fault?

15:29:08 20       MR O'SHEA: Your Honour, in my respectful submission it does  
21           not matter whose fault it is because -- yes, it is  
22           Mr Gbao's fault, Mr Gbao has made a choice. But the fact  
23           that Mr Gbao has made that choice does not remove his  
24           right to a fair trial and that is what we are dealing  
15:29:27 25           with here. And when we are dealing with the question of  
26           what is the appropriate remedy, one has to be not less  
27           cautious because the accused has made his own rod, but  
28           more cautious because he does not know what he is doing.

29       JUDGE THOMPSON: So you say that in fact the mischief here is



1 incurable, so to speak, by an adjournment. Are you  
2 suggesting that the prejudice from your perspective is  
3 irreparable or could only be remedied by exclusion? Is  
4 that what you're saying?

15:30:08 5 MR O'SHEA: Effectively, yes, Your Honour. I mean, it is  
6 always possible that we could try and conduct some  
7 independent investigations during the course of an  
8 adjournment, but it is not quite the same as being able  
9 to talk to the client, and, therefore, in that sense, it  
15:30:23 10 is irredeemable. Had the Prosecution acquired this  
11 information and disclosed it at a much earlier stage, we  
12 might be in a very different position today, and that's  
13 significant in our submission.

14 JUDGE THOMPSON: Thanks.

15:30:55 15 [Trial Chamber confers]

16 PRESIDING JUDGE: Learned counsel, the Court will rise for a  
17 few minutes. We will come in when we are ready. The  
18 Court will rise, please.

19 [Break taken at 3.35 p.m.]

16:09:09 20 [Upon resuming at 4.20 p.m.]

21 PRESIDING JUDGE: Well, we are resuming the session. We  
22 thought we would go into a conclave and come out with a  
23 solution on this issue, but it is not quite at hand as  
24 yet. So we would still face it on advisement and be able  
16:12:49 25 to come out with a ruling, either oral or written, in the  
26 not too distant a future. In fact, as urgently as we  
27 can, so that we will be able to take the evidence of this  
28 witness.

29 All we want to do is to find out from the



1 Prosecution if we could take the stand-by witness. If  
2 you require some time to prepare the scenery for him --  
3 and we also want to find out if the Defence would be  
4 prepared to take on the next witness, because we are very  
16:13:36 5 disturbed that out of the 19 witnesses who are listed for  
6 this session we are only on the first witness after one  
7 week of sittings. It is quite disturbing and I think we  
8 should move along. Once we clear the way for this other  
9 witness, we should be able to proceed and be done with  
16:13:57 10 him as well. But since we have all the time we would  
11 like to see -- Mr Harrison, are you --

12 MR HARRISON: There is a witness available. It's TF1-071.  
13 That will be in my estimate a lengthy witness, but I  
14 leave it to my colleagues to advise you if they are able  
16:14:19 15 to deal with that witness at this time.

16 MR JORDASH: For the first accused, we're ready.

17 MR NICOL-WILSON: For the second accused, we are ready as  
18 well, Your Honour.

19 MR O'SHEA: We are happy to hear the evidence of the next  
16:14:35 20 witness.

21 PRESIDING JUDGE: Pardon me?

22 MR O'SHEA: Yes, we're ready.

23 PRESIDING JUDGE: You're ready. Good, okay.

24 MR HARRISON: If I could indicate at the outset that there is  
16:14:54 25 a brief application to again be made for this witness.  
26 Through inadvertence this witness was not recorded as  
27 being a category C witness. He has been in subsequent  
28 documents submitted to the Court, but in the original  
29 witness protection information the Court was given, C was



1 not put beside his name. I am not sure if any of the  
2 Defence counsel are concerned about this witness being  
3 treated as a category C witness or not.  
4 MR JORDASH: He clearly falls within category C; yes, I think  
16:15:41 5 he does.  
6 JUDGE THOMPSON: Category C is insider witness?  
7 MR JORDASH: Yes, no objections.  
8 JUDGE THOMPSON: He will testify in English, is it?  
9 MR HARRISON: That's correct.  
16:15:51 10 JUDGE BOUTET: Second accused?  
11 MR NICOL-WILSON: No objection, Your Honour.  
12 JUDGE BOUTET: Third accused?  
13 MR NICOL-WILSON: No objection.  
14 MR HARRISON: That being the case, this is a category C  
16:16:00 15 witness testifying in English, and I think that was where  
16 we had the problems with the voice distortion, so should  
17 we -- I leave it to the Court to give instructions on  
18 what you wish the Prosecution to do; to have the witness  
19 brought in now or to check the voice distortion first.  
16:16:19 20 PRESIDING JUDGE: I think the voice distortion should be  
21 checked first and we have to make sure of that before we  
22 proceed. So we may have to rise again for a few minutes.  
23 When the technical arrangements are through you'll usher  
24 us in, please. Once more, the Court will rise and we'll  
16:16:42 25 resume when you're ready.  
26 [Break taken at 4.20 p.m.]  
27 [The witness entered court]  
28 [Upon resuming at 4.50 p.m.]  
29 PRESIDING JUDGE: Learned counsel, we are resuming the





1 session. The technical arrangements appear to be in  
2 place. Yes, Mr Harrison?

3 MR HARRISON: The next witness is TF1-071. I had earlier  
4 said, with respect to the last individual we intended to  
16:48:25 5 call as a witness, that they would be number 20, but as  
6 they were not called and sworn this will be the 20th  
7 witness in the trial.

8 PRESIDING JUDGE: I think you are right, yes. We never called  
9 nor swore -- yes, was neither called nor sworn, you're  
16:49:00 10 right.

11 MR HARRISON: To be sworn this witness is a Christian and  
12 would ask to be sworn on the Bible.

13 PRESIDING JUDGE: So this will be the 20th Prosecution  
14 witness?

16:49:24 15 MR HARRISON: Yes, that's correct.

16 PRESIDING JUDGE: TF1-071.

17 WITNESS: TF1-071 sworn

18 PRESIDING JUDGE: The witness will testify in English?

19 MR HARRISON: That's correct. I apologise for the  
16:50:01 20 inconvenience, but the Prosecution feels it is necessary  
21 to ask for a brief closed session in order to deal with  
22 certain information and we will also be, later on in the  
23 testimony, asking for another closed session which will  
24 be for a more substantial period of time. We have  
16:50:22 25 contemplated this and we've tried to --

26 PRESIDING JUDGE: You cannot merge them?

27 MR HARRISON: I'm afraid it would be a situation --

28 PRESIDING JUDGE: It would be untidy.

29 MR HARRISON: I beg your pardon?



1 PRESIDING JUDGE: It would be untidy, would it?

2 MR HARRISON: I fear it would be very confusing if we were to

3 try to do it in one closed session, because of the length

4 of time and the amount I anticipate being requested

16:50:45 5 ofthis witness. So at the outset I am asking for a brief

6 closed session, which I have already discussed with my

7 friend, and I have taken the guidance from Mr Justice

8 Thompson that I should actually be making this

9 application in closed session, so perhaps I ought not to

16:51:01 10 say anything further.

11 JUDGE THOMPSON: Well, we certainly will proceed to hear the

12 application in closed session. Before we ask for the

13 necessary adjournment to be made for that purpose, I will

14 request that members of the public gallery retire until

16:51:25 15 tomorrow morning.

16 PRESIDING JUDGE: We are sorry about this, but it is part of

17 the process, it is part of the procedure in international

18 tribunals. There is very little we can do about this.

19 These are parts of the rights of accused persons and the

16:51:42 20 witnesses as well.

21 JUDGE THOMPSON: So may we then have the necessary adjustments

22 made to the technology to move us from public session to

23 closed session? We received a signal indicating that we

24 are in closed session. With that assurance, learned

16:53:58 25 counsel, you'll proceed.

26 [At this point in the proceedings, a portion of the

27 transcript, pages 99 to 101, was extracted and sealed

28 under separate cover, as the session was heard in

29 camera.]



1 [Open session]

2 MR WALKER: Court's open session now, Your Honour.

3 JUDGE THOMPSON: This is the oral ruling of the Chamber on the  
4 Prosecution's application.

17:01:24 5 For the records we need to note that the application  
6 was not opposed by the Defence. The Chamber is disposed  
7 to grant the application on the grounds of protecting the  
8 security of this witness and members of his family. A  
9 reasoned written ruling will be given in due course.

17:01:58 10 We will now move to closed session and we ask the  
11 experts to make the necessary adjustments for that  
12 purpose.

13 [At this point in the proceedings, a portion of the  
14 transcript, pages 103 to 110, was extracted and sealed  
17:02:08 15 under separate cover, as the session was heard in  
16 camera.]

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1 [Open session]

2 JUDGE THOMPSON: We're now in open session, Mr Harrison,  
3 please continue.

4 MR HARRISON:

17:28:15 5 Q. Witness, where were you in the first months of 1997?

6 A. In 1997 I was in Liberia in the lower Lofa county,  
7 Bopolu.

8 Q. Why were you there?

9 A. We were over raided by the Kamajors and the government  
17:28:50 10 troops in Pujehun District so we ran over into Liberia.

11 Q. Did you remain in Liberia?

12 A. I remained in Liberia for few time.

13 Q. Did you ever leave Liberia?

14 A. Yes, I live in Liberia.

17:29:33 15 Q. I'm sorry, leave?

16 A. I left Liberia later.

17 Q. When was that?

18 A. It was in 1997, somewhere around October, I left Liberia.

19 Q. And where did you go?

17:30:00 20 A. I left Bopolu and travelled by the lower Lofa County and  
21 came through by the border of Liberia, and through the  
22 Kailahun District and from Kailahun I travel to Kenema,  
23 there I met Sam Bockarie.

24 Q. Why did you return to Sierra Leone?

17:30:57 25 A. We heard by Corporal Sankoh to join the AFRC and through  
26 that information, the RUF based in Bopolu asked me to go  
27 to Sierra Leone and meet with Sam Bockarie and any other  
28 RUF commanders to confirm this information from them.

29 JUDGE BOUTET: Mr Witness, you said you heard on the radio





1 that Sankoh had joined the AFRC?

2 THE WITNESS: Yes, I heard it over the radio. That was the  
3 main cause given me and my colleagues ordered me to go to  
4 Kenema and find out if it was a true statement.

17:32:03 5 MR HARRISON:

6 Q. When you talk about radio, are you referring to a public  
7 broadcast?

8 A. Yes, it was over public broadcast, the BBC, I heard that.

9 Q. When was that?

17:32:28 10 A. I heard it on May 28. It was a time I heard the voice of  
11 Sankoh.

12 PRESIDING JUDGE: May 28th of what year?

13 THE WITNESS: May 28.

14 PRESIDING JUDGE: Of what year?

17:32:56 15 THE WITNESS: Yes, October. No, no, May 28

16 PRESIDING JUDGE: What year?

17 THE WITNESS: 1997.

18 MR HARRISON:

19 Q. Tell the Court in as much detail as you can what that  
17:33:28 20 radio broadcast was about?

21 A. Yes, as I have just said he heard it over the BBC radio  
22 and the voice of Sankoh asking the RUF to train the AFRC.  
23 Indeed as I heard from him saying the AFRC was not our  
24 enemy as soldiers, that we have to train them. Our  
17:33:58 25 enemies were only the politicians in Sierra Leone, they  
26 were our only enemies, so we should train the AFRC. And  
27 in fact he ordered Sam Bockarie, Denis Mingo, alias  
28 Superman as part of the troops at that time to lead the  
29 troop.



1 MR HARRISON: I have discussed this with my friends and I'm  
2 right in saying they accept this suggestion. I have that  
3 radio broadcast here which could be played. I also have  
4 in front of me the transcript which I prepared of that  
17:35:04 5 radio broadcast and my suggestion is, and I think my  
6 friends agree, that we're content to simply use the typed  
7 transcript. The witness could review it and that would  
8 later become -- or at least the Prosecution would ask  
9 that the written transcript become an exhibit in the  
17:35:25 10 proceeding.

11 [Trial Chamber confers]

12 JUDGE THOMPSON: Learned counsel for the defence, what is your  
13 response to the request of the prosecution?

14 MR JORDASH: It seems a sensible one.

17:36:55 15 JUDGE THOMPSON: All right. Mr Cammegh, what is your reaction  
16 to the Prosecution's request.

17 MR CAMMEGH: I agree.

18 JUDGE THOMPSON: Mr Touray?

19 MR TOURAY: Your Honour, our only worry is that on the  
17:37:12 20 transcript this is an SLBS radio, it's not BBC. The  
21 evidence says its BBC radio. What we have here is SLBS  
22 radio. I don't know the nexus really, at this point.

23 JUDGE THOMPSON: In other words, there is no nexus between the  
24 transcript and the evidence so far.

17:37:32 25 MR TOURAY: And the evidence. Yes. That's the point.

26 JUDGE THOMPSON: Shall we hear the Prosecution on that.

27 MR HARRISON: I think it is a technical matter and the reality  
28 is that it was broadcast over various communications.

29 This witness happened to hear it on the BBC; the



1 transcription is from the SLBS. But if you prefer to  
2 have the witness actually hear it and then say yes,  
3 that's the one I heard and go through it on the  
4 transcript we're quite content with that procedure.

17:38:05 5 JUDGE THOMPSON: What's Mr Touray say?

6 MR TOURAY: We are in your hands, Your Honour. We don't want  
7 to prolong the proceedings.

8 JUDGE THOMPSON: We are in the minds that we could hear the  
9 radio version and of course, allow the Prosecution to  
17:38:19 10 tender this at some subsequent stage, but the Bench would  
11 be interested in hearing the radio version.

12 MR HARRISON: I believe the audio-visual technicians have it  
13 ready and set to play. I would ask if they could  
14 indicate if they can play it now and I would ask the  
17:38:41 15 witness to listen to the broadcast and ask if  
16 he recognises it.

17 JUDGE THOMPSON: Let's begin then, audio experts.

18 MR WALKER: Preparations are being made now to play the tape,  
19 Your Honour.

17:40:06 20 [Technical difficulty]

21 MR HARRISON: I understand there might be a few  
22 technical difficulties, this being the first time the  
23 audio-visual staff have been asked to carry out the such  
24 an activity. My suggestion would be that the Court allow  
17:46:26 25 me to simply jump over this. Perhaps this evening the  
26 audio-visual staff will be able to either let me know  
27 what I have done wrong or advise us if, in fact, this is  
28 something that cannot be done. I can continue on,  
29 jumping this over, but with it in the back of my mind,



1 returning to it tomorrow morning. And there is a certain  
2 amount of information that I think would take about a  
3 half hour, and I think that would be a convenient time,  
4 if that is acceptable to the Court to terminate the  
17:46:56 5 proceedings today.

6 JUDGE THOMPSON: It sounds reasonable. Let you move on to  
7 another episode. We can return to this. Proceed, then.

8 MR HARRISON:

9 Q. Witness, let me ask you this question: After you heard  
17:47:16 10 this radio message, which we unfortunately didn't hear  
11 today, what happened then?

12 A. As I was just trying to say over, the RUF that were based  
13 in the Bopolu in Liberia asked myself and some other  
14 colleagues to come over to Kenema and confirm this.

17:47:43 15 PRESIDING JUDGE: The area based why spell that, please.

16 THE WITNESS: RUF.

17 PRESIDING JUDGE: The RUF base where?

18 THE WITNESS: Bopolu, Bopolu. B-O-P-O-L-U. That was in lower  
19 Lofa County.

17:48:02 20 PRESIDING JUDGE: When did they tell you to go and check on  
21 this.

22 THE WITNESS: The RUF that were based in Bopolu asked me and  
23 some other colleagues to go to Kenema.

24 PRESIDING JUDGE: Mention the colleagues, please.

17:48:17 25 THE WITNESS: Like Mike Lamin himself was there. Morris  
26 Massaquoi was there, Bai Bureh was there, Rocky CO was  
27 there and so many other commanders.

28 PRESIDING JUDGE: To go.

29 THE WITNESS: To go to Kenema or any other place where I can





1 find Sam Bockarie and other RUF authorities. So we all  
2 agreed that we cannot rely on the information over media,  
3 so they asked me to go to Kenema and confirm this from  
4 either Sam Bockarie or any other authorities. Indeed,  
17:49:23 5 I met with Sam Bockarie and he confirmed this. Yes, it  
6 was true.

7 MR HARRISON:

8 Q. Tell us when it was that you left for Kenema.

9 A. I told you it was in October to November I left Bopolu  
17:50:13 10 for Kenema and then when I arrived in Kenema, Sam  
11 Bockarie on my return to Bopolu he gave 200 dollars to be  
12 carried to the other colleagues at Bopolu.

13 PRESIDING JUDGE: Liberian or US dollars?

14 THE WITNESS: Yes, American dollars.

17:51:13 15 MR HARRISON:

16 Q. Did you go to Kenema with anyone?

17 A. I travelled to Kenema my second trip along with one Major  
18 Rocky.

19 PRESIDING JUDGE: Your first trip. Was this your first trip.

17:51:27 20 THE WITNESS: Yeah, I went with one Musa Bendu and one  
21 Musa Kamara.

22 MR HARRISON:

23 Q. Is it after the first trip that you received this money?

24 A. It was during the first trip I received the \$200.

17:52:00 25 Q. So what happened next?

26 A. I was given a letter attached to the 200 dollars  
27 instructing all the combatants based in Bopolu to come  
28 home and train the AFRC. That was Sam Bockarie's own  
29 instructions.



1 PRESIDING JUDGE: It was his letter?

2 THE WITNESS: It was given to me by Sam Bockarie.

3 PRESIDING JUDGE: By who? Written by who?

4 THE WITNESS: By Sam Bockarie.

17:52:52 5 PRESIDING JUDGE: Asking?

6 THE WITNESS: Asking and even instructing all the combatants

7 to return home to Sierra Leone.

8 MR HARRISON:

9 Q. What did you do with that letter?

17:53:21 10 A. The letter was taken to my colleagues at Bopolu, together

11 with the money.

12 Q. What happened next?

13 JUDGE THOMPSON: He said the letter was taken. Who took it?

14 THE WITNESS: The letter was taken to my colleagues.

17:53:50 15 JUDGE THOMPSON: By?

16 THE WITNESS: By me.

17 MR HARRISON:

18 Q. What happened next?

19 A. When I arrived at Bopolu, there was a big constraint in

17:54:29 20 security movement by the RUF to travel to Sierra Leone,

21 and I was later sent by the same RUF and some other

22 colleagues like Kuma Hindu [phoen], Bai Bureh, Morris

23 Massaquoi went to Monrovia and we met with the minister

24 at that time was Daniel Chea, asking to have us a transit

17:55:00 25 to Sierra Leone.

26 Q. What happened next?

27 A. The minister deployed soldiers along the border by

28 Liberia and Sierra Leone by Kailahun and then we were

29 given the green light to travel.



1 Q. So what did you do?

2 A. So Rocky CO and myself, together with Bai Bureh travelled  
3 to the last point to enter in Liberia. There we found  
4 most of our friends.

17:56:44 5 MR CAMMEGH: I'm sorry, could I have those names again.

6 MR HARRISON: Would Mr Cammegh like me to repeat them or would  
7 you like the witness? I thin it was Major Rocky and  
8 Bai --

9 THE WITNESS: Bai Bureh, Andrew Kamara [phonetic], Bai Bureh,  
17:57:09 10 Morris Massaquoi, myself and so many others.

11 MR HARRISON: Perhaps this is an opportune time for me to hand  
12 up what I would ask be the next exhibit. It is a chart  
13 of names with a very brief description of who they are,  
14 which has been provided to my friends and perhaps I'll  
17:57:46 15 have to invite them to indicate whether any of them  
16 objects. I'm under the understanding that they don't.  
17 It may abbreviate asking witnesses to repeat names and  
18 spellings. If I can just indicate that none of the  
19 accused names are in this chart and similarly the earlier  
17:58:16 20 exhibit tendered by one of the --

21 PRESIDING JUDGE: Are you tendering these ones, these charts?  
22 Are you tendering them?

23 MR HARRISON: Yes, I am asking that they become the next  
24 exhibit. If Mr Cammegh doesn't have one, I have an extra  
17:58:38 25 one in my right hand. I see some of my colleagues are  
26 looking at the document. I don't want to take advantage,  
27 but I was just going to put the two questions to the  
28 witness, but perhaps I should wait for them to finish  
29 their consultation.



1 JUDGE THOMPSON: I can see Mr Jordash wanting to --

2 MR JORDASH: I'm not quite sure what my learned friend is  
3 going to do with this, but I would object to it being  
4 used as an exhibit. If it is testimony which this  
17:59:52 5 witness will give -- was expected to give, then he can  
6 give it orally. If it is something other than that, then  
7 I would like to know what it is. The title seems to  
8 suggest that it is testimony which the Prosecution expect  
9 him to give, but aside from this table, some of this --  
18:00:31 10 well, some of the evidence contained in this table is new  
11 to me. It is not contained within the witness statements  
12 disclosed and I'm particularly concerned, whilst Mr Sesay  
13 doesn't appear as a figure in the name column, there are  
14 people referred to in this table who were allegedly  
18:00:58 15 performing functions for Mr Sesay. Now, what my real  
16 concern is that we go from the witness statements  
17 disclosed to us to new evidence in the form of a table  
18 disclosed to us at this stage. I don't know what is  
19 coming next; new evidence based upon this table. I don't  
18:01:20 20 know understand why the Prosecution need this table. If  
21 they want to adduce facts about these figures mentioned  
22 in the left-hand column, then that can be done orally.  
23 It is very dangerous, I would submit, to allow this  
24 evidence to go before -- well, to be adduced in this  
18:01:40 25 manner.

26 JUDGE THOMPSON: [Microphone not activated]

27 MR NICOL-WILSON: Your Honour, we support the position  
28 canvassed by counsel for the first accused.

29 JUDGE THOMPSON: Right, what about Mr O'Shea?





1 MR O'SHEA: Well, Your Honours, we have received this document  
2 before in the sense that it has been shown to us before.  
3 I wasn't quite aware that we were going to be putting it  
4 in front of the witness or exhibiting it. I do have  
18:02:20 5 serious difficulties with it becoming an exhibit. First  
6 of all, this is a list of names with a description of  
7 roles and to allow this document to be put in front of  
8 the witness is, in my submission, a convenient way of  
9 avoiding the rule on leading questions, to begin with.

18:02:47 10 Secondly, what is the source of this document? Who  
11 has compiled it? I assume the Prosecution has compiled  
12 it. If the Prosecution has compiled it, is the  
13 Prosecution giving evidence through this document, or is  
14 the Prosecution doing, as Judge Sidhwa said in the case  
18:03:06 15 of Rajic, said acting as a scribe taking down the story  
16 of a witness, in which case in the opinion of that  
17 learned judge, that would be impermissible. And finally,  
18 it would be in contravention of the best evidence rule.

19 JUDGE THOMPSON: Mr Harrison, what is your reply?

18:03:25 20 MR HARRISON: Exhibit 7 is exactly the same document. It is  
21 already an exhibit tendered in exactly the same format  
22 which has names and descriptions tendered by a previous  
23 witness. We had been under the understanding that  
24 because that was by consent, it was agreed that this was  
18:03:44 25 an efficient manner in which the Court could proceed. My  
26 understanding was that was fine. The purpose of this  
27 document is this: A lot of names are uttered. I can't  
28 count the number of times we've been having to stop to  
29 spell names, ask for names to be pronounced again. This



1 document gives a name, gives a spelling and gives very  
2 brief description which is not in way damaging and, in  
3 our submission, is an efficient way to proceed. The two  
4 questions I was going to put to the witness were: How  
18:04:21 5 was this prepared and his role in it.

6 PRESIDING JUDGE: If this document is exactly as Exhibit 7,  
7 why is it necessary?

8 MR HARRISON: It is exactly the same format with new names.

9 PRESIDING JUDGE: If it is, why is this necessary? Why don't  
18:04:37 10 we rely on what is already an exhibit?

11 JUDGE THOMPSON: Well, let me buttress that. If it is exactly  
12 the same format, then that is not the objection, the  
13 objection is the content and also that this document  
14 purports to say that these are names that this particular  
18:05:02 15 witness would refer to in his testimony, and Mr O'Shea's  
16 position is that it would be impermissible if it is  
17 prepared by the Prosecution and they seek to tender this  
18 through the witness, then as in the case that has been  
19 cited, the Prosecution is acting as a scribe. Why not  
18:05:25 20 respond to that objection.

21 MR HARRISON: Yes, I could put the questions to the witness  
22 that he is the one who prepared it with the assistance of  
23 the Prosecution, but the information is coming from him,  
24 prosecution puts it in this format.

18:05:43 25 JUDGE THOMPSON: I believe that would partially dispose of  
26 their objection.

27 MR HARRISON: I said I would pose those questions from the  
28 outset.

29 JUDGE THOMPSON: Perhaps I shouldn't speak for them, but left



1           them speak for themselves.

2   MR JORDASH: It wouldn't dispose of my objection, Your  
3           Honours. If it is prepared by the witness alone, that  
4           might be one scenario. If it is prepared by the witness  
18:06:26 5           alongside a Prosecutor, that is a different scenario and  
6           the latter scenario would involve, if we seek to  
7           challenge this evidence, a cross-examination of the  
8           Prosecutor who assisted this witness in preparing the  
9           document. As my learned friend Mr O'Shea said, it is a  
18:06:46 10          clear way of avoiding leading questions prohibition.

11                 Secondly, if my learned friend wants simply a list  
12           of names to go before Your Honours, I'm not sure I would  
13           object to that, and then when the witness mentioned the  
14           name in his evidence Your Honours and the rest of us  
18:07:07 15          could be referred to the name on the list and we'd all  
16           save time in terms of spelling. But it cannot be right,  
17           I would submit, to have names which we are hearing for  
18           the first time. I look over the page to Colonel Jibao,  
19           CSO for Issa Sesay. Now, I don't know what this witness  
18:07:27 20          will say about Colonel Jibao. I also don't know what  
21           other witnesses may say about Colonel Jibao. He may be  
22           the biggest cause of atrocities in Sierra Leone during  
23           the period of the indictment. I don't know. And that's  
24           what I object to. If the witness has something to say  
18:07:38 25          about Colonel Jibao, then let him say it without  
26           assistance from the Prosecution as part of his evidence  
27           in chief.

28   JUDGE THOMPSON: In other words, you're submitting in a way,  
29           if I could put it colloquially, that there is more in









1 MR HARRISON:

2 Q. Witness, you indicated the people that you went to Sierra  
3 Leone with. What did you do when you got to Sierra  
4 Leone?

18:12:14 5 A. Yes, when I got to Sierra Leone, I met with Sam Bockarie  
6 at Kenema. As I've been saying here, he give the order  
7 for the RUF --

8 PRESIDING JUDGE: We have all that.

9 THE WITNESS: Okay, okay. Then from Kenema we were there and  
18:12:37 10 later he asked us to go to Freetown. The main reason of  
11 Sam Bockarie sending us to Freetown was that he said  
12 since the AFRC have taken over power he has not seen any  
13 outside or international community welcoming the AFRC as  
14 the legitimate government and even with the local  
18:13:05 15 community issues, like the civilians in the country  
16 welcomed the government of AFRC. It was only done by  
17 Corporal Sankoh. This has confused he, Sam Bockarie. He  
18 was not thinking that AFRC was a government that was  
19 recognised. So he gave us another letter that was taken  
18:13:27 20 to Issa Sesay. At that time Issa was representing him in  
21 Freetown. The content of the letter which he gave us in  
22 favour was that we, the RUF, should retreat from Freetown  
23 and start to come to Kenema, Kailahun and Makeni, because  
24 he felt very sure that --

18:13:51 25 MR CAMMEGH: I'm sorry. How are we supposed to get this down?  
26 It is now quarter past 6.00 and my fingers are getting  
27 very tired. Could the witness please just break it down  
28 a little. This is very important.

29 PRESIDING JUDGE: We have the first meeting where they were



1 sent a letter.

2 THE WITNESS: To Liberia.

3 PRESIDING JUDGE: To Liberia, Bockarie containing confirmation  
4 and \$200. Confirmation that the announcement of Foday  
18:14:29 5 Sankoh was true.

6 THE WITNESS: Yes, was very true.

7 PRESIDING JUDGE: Now you're talking of another trip.

8 THE WITNESS: Yes, this is the second trip, from Kenema to  
9 Freetown.

18:14:43 10 JUDGE BOUTET: In your evidence before you went there you said  
11 you had been to the Defence Minister in Liberia and you  
12 were allowed to cross the border to Sierra Leone and  
13 that's where we moved to elsewhere. Did you move back to  
14 Sierra Leone?

18:15:00 15 THE WITNESS: No, you see I've already passed that stage.  
16 I've already explained this that --

17 MR HARRISON: If I can just interject.

18 Q. Witness, can you just start from October/November 1997.  
19 Where did you go then?

18:15:17 20 A. October 1997?

21 Q. October or November 1997?

22 A. We took from Kenema to Freetown.

23 Q. Okay. How many trips had you made to Kenema in 1997?

24 A. From Liberia.

18:15:35 25 Q. Yes?

26 A. I can remember I made only two trips.

27 Q. When was the first trip?

28 A. The first trip was to come and find out whether it was  
29 Corporal Sankoh himself gave the order.



1 Q. When was that?

2 A. I came October.

3 Q. When was the second trip?

4 A. The second trip was in the same October.

18:15:58 5 Q. The second trip you go to Kenema?

6 A. Yes.

7 Q. How long were you there?

8 A. Just there for a few, few weeks, then later Sam Bockarie

9 send us to Freetown to Issa and other commanders in

18:16:14 10 Freetown.

11 MR HARRISON: I think Mr Cammegh may have been dropping a not

12 subtle hint. He might have been reminding me about the

13 time?

14 PRESIDING JUDGE: We're waiting for you to get to a particular

18:16:51 15 point.

16 MR HARRISON: This is a convenient time.

17 PRESIDING JUDGE: We're left in the air like that.

18 MR HARRISON: All right. Well, I'll proceed, if you wish.

19 PRESIDING JUDGE: To see Issa Sesay and other commanders in

18:17:13 20 Freetown. Did you go to Freetown?

21 THE WITNESS: Yes, I went to Freetown.

22 PRESIDING JUDGE: With who?

23 THE WITNESS: With one Major Rocky.

24 PRESIDING JUDGE: Okay. I think we can end it there.

18:17:27 25 MR HARRISON: It is agreeable.

26 PRESIDING JUDGE: Tomorrow we will get along with what

27 happened in Freetown.

28 MR HARRISON: Actually, we won't do that at beginning, but we

29 will do something that will be of interest to the Court



1 before that.

2 PRESIDING JUDGE: Well, you are the navigator.

3 MR HARRISON: I fear the ship is without a rudder.

4 PRESIDING JUDGE: I understand there is a new aircraft that

18:18:04 5 will be conveying 555 passengers. I hope it will be safe

6 to convey passengers to their safe destination. Anyway,

7 well, Mr Witness, we're going to suspend the session

8 here. We'll continue with you tomorrow morning at 9.30.

9 THE WITNESS: Okay.

18:18:59 10 PRESIDING JUDGE: Is that all right?

11 THE WITNESS: It's okay.

12 PRESIDING JUDGE: Well, before Mr Cammegh's fingers completely

13 collapse, we better rise and resume session tomorrow at

14 9.30. Good night.

18:19:16 15 [Whereupon the hearing adjourned at 6.23 p.m., to be

16 reconvened on Wednesday, the 19th day of January, 2005,

17 at 9.30 a.m.]

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EXHIBITS:

Exhibit No. 15 was admitted 26

WITNESSES FOR THE PROSECUTION:

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