



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

-V-

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

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

1 Saturday, 16 June 2012

2 [Status Conference]

3 [Open Session]

4 [Upon commencing at 9.32 a.m.]

09:32:56 5 JUSTICE DOHERTY: Thank you. I see no defendants. I note
6 that I have no accused in Court or no defendants.

7 [Accused enter court]

8 JUSTICE DOHERTY: Before I take appearances, I've been
9 asked to stress to counsel and witnesses in due course that in
09:33:21 10 order to maintain a clear link with people listening in Kigali
11 and a clear record, it is very important that each of us turns
12 off our microphone after we speak.

13 So I will not - just a minute.

14 I am informed that the link has been fixed. So I am first
09:33:56 15 of all going to ask Kigali if they can hear me, and then I will
16 take appearances.

17 Good morning, Kigali. No, can't hear.

18 THE COURT OFFICER: [Kigali] Good morning,

19 Justice Doherty.

09:34:12 20 JUSTICE DOHERTY: Good morning. Can you hear me?

21 No.

22 THE COURT OFFICER: [Kigali] Yes, we can.

23 JUSTICE DOHERTY: Very good. I will now proceed to take
24 appearances. Thank you.

09:34:24 25 For the Prosecution.

26 MR HERBST: Good morning, Your Honour. Robert Herbst,
27 Independent Counsel for the Prosecution.

28 JUSTICE DOHERTY: Thank you, Mr Herbst.

29 MR HERBST: Thank you, Your Honour.

1 JUSTICE DOHERTY: And for the Defence.

2 MR NICOL-WILSON: Good morning, Your Honour.

3 Mel ron Ni col -Wi l son for Hassan Papa Bangura.

09:34:57 4 CHIEF TAKU: May it please Your Honour, Chi ef Char les Taku
5 for Mr Samuel Kargbo.

6 JUSTICE DOHERTY: Thank you, Chi ef Taku.

7 MR METZGER: May it please, Your Honour, Kevi n Metzger for
8 Mr Santi gi e Borbor Kanu.

9 JUSTICE DOHERTY: Thank you, Mr Metzger.

09:35:07 10 MS CARLTON-HANCI LES: Your Honour, Cl ai re Carl ton-Hanci les
11 for Offi ce of Pri nci pal Defe nder, and I am also standi ng in for
12 AF Serry Kamal , who is on hi s way. Hi s leg al assi stant is here,
13 Wara Serry Kamal and we stand in for Bri ma Bazzy Kamara. Thank
14 you.

09:35:41 15 JUSTICE DOHERTY: Now I will now note appearance of the
16 accused. First of all the accused appearing from bail, Mr Kargbo
17 and Mr Bangura, are they present in Court?

18 CHIEF TAKU: Yes, Your Honour. Mr Kargbo is in Court.

19 MR NICOL-WILSON: Your Honour, Mr Bangura is in Court.

09:36:13 20 JUSTICE DOHERTY: Thank you. Gentlemen, please sit down.

21 I am looking at the video screen in Kigali, and I see that
22 we have two - Mr Kanu is present and Mr Kamara is present.

23 Gentlemen, do you hear me speaking to you?

24 THE COURT OFFICER: [Kigali] Can you repeat that,
09:36:46 25 Justice Doherty?

26 JUSTICE DOHERTY: I note that Mr Kanu is present on the
27 video screen and Mr Kamara is present on the video screen. Can
28 both Mr Kanu and Mr Kamara hear me speaking?

29 THE ACCUSED: We hear you loud and clear.

1 JUSTICE DOHERTY: Thank you very much. And we will now
2 proceed with the pre-trial conference in accordance with Rule 73
3 as scheduled.

4 Counsel is aware - Mr Kanu, Mr Kamara, please sit down.

09:37:22 5 Counsel is aware that --

6 THE ACCUSED: Thank you, Ma'am.

7 THE COURT OFFICER: [Kigali] Madam, can I speak to the
8 Court, please?

9 JUSTICE DOHERTY: Yes, Madam Court officer. What did you
09:37:34 10 want to say?

11 THE COURT OFFICER: [Kigali] Madam, the interpretation
12 machine came to Kigali last night. So basically it is not
13 connected for Mr Kanu and Mr Kamara, but they can both understand
14 English. But when they want to speak, they want to speak in
09:38:11 15 Krio.

16 JUSTICE DOHERTY: I'll just speak to our interpreter here.
17 Mr Interpreter, will you be able to interpret what has been
18 said by Mr Kamara or Mr Kanu if they speak in Krio from Kigali?

19 MR INTERPRETER: I will be able if I can hear them, but the
09:38:39 20 reason now is I cannot hear them.

21 JUSTICE DOHERTY: Mr Interpreter, can you hear me in the
22 booth?

23 THE INTERPRETER: Yes, I can. But apparently you are not
24 hearing me. Can you hear me now?

09:39:06 25 JUSTICE DOHERTY: Mr Interpreter, I can hear you now that I
26 have switched onto the right channel. Are you able to
27 interpreter for the two accused in Kigali if they speak in Krio?

28 THE INTERPRETER: Okay now that the telephone line has been
29 fixed. I think I can hear them now and if that is the case, then

1 I would be able to interpret.

2 JUSTICE DOHERTY: Fine. If you have a problem, please
3 alert us, as they are entitled to hear what is said.

4 THE INTERPRETER: I will.

09:39:47 5 MR KAMAL: Your Honour, I'm sorry. I am AF Serry Kamal.
6 With me is WS Serry Kamal for the third accused Ibrahim Bazy
7 Kamara. I'm sorry I'm late.

8 JUSTICE DOHERTY: What happened, Mr Serry Kamal?

9 MR KAMAL: [Microphone not switched on]

09:40:33 10 JUSTICE DOHERTY: Counsel, I will start with the more
11 mundane parts of the pre-trial conference as set out in the
12 original document filed on 1 May.

13 Now, as I have noted the documentation filed following that
14 direction, and I have seen and read the Prosecution pre-trial
09:40:52 15 brief, and I have noted their admissions by the parties, et
16 cetera, that are not in dispute.

17 I have no issues to raise in the matters 2(i), (ii), and
18 (iii). Has counsel got any issues to raise in relation to items
19 2(i), (ii), and (iii)? I will take you in the order of
09:41:24 20 seni ori ty.

21 Mr Taku, have you any issues to raise on 2(i), (ii), and
22 (iii)?

23 CHIEF TAKU: Your Honour, I have nothing to raise. I just
24 wanted to place on record that my filings in this case were on
09:41:47 25 the 22nd of May. I received a notice on the 22nd of May. When I
26 got the decision, the decision stated that it was late. I didn't
27 want to bother you with anything on the matter, because the
28 schedule order addition took was acceptable to me and I thought
29 that I would be able to put this on record only.

1 JUSTICE DOHERTY: Thank you, Chief Taku.

2 As I hoped to make clear in my subsequent decision, I
3 treated your filing as a combination of Rule 100 - a Rule 100
4 submission in relation to your client, Mr Kargbo, plus a comment
09:42:36 5 on the scheduling time.

6 So as far as the Rule 100 submissions were concerned, they
7 were within the time-frame provided by the Rules and they were
8 admitted.

9 CHIEF TAKU: Thank you, Your Honour. I took that course
09:42:54 10 because at that time - point in time, I didn't know how you were
11 going to decide. That's why I took that course, out of caution,
12 really. And thank you very much, Your Honour.

13 And may I dare say, as far as I am concerned, the decision
14 in regard to Mr Kargbo is sound jurisprudence and it deals with
09:43:18 15 the fundamental issue which we've confronted many times in
16 international law, but we didn't find any settled jurisprudence
17 on the issue. So perhaps in the advancement of the law in that
18 area. And thank you so much for that.

19 JUSTICE DOHERTY: It's not often I get a compliment like
09:43:39 20 that. Thank you.

21 Mr Metzger, I think you are the next in seniority.

22 MR METZGER: I am very much obliged to the Court.

23 Your Honour, I think, similarly dealt with the document
24 that we filed in terms of it being out of time. The stated
09:43:57 25 reason that at the time the Scheduling Order was made we were not
26 in effect counsel in the case. I think being met properly by the
27 objection that - but certainly by the 12th I was instructed and
28 on my way to Kigali.

29 But had you, as it were, taken it into account, the

1 document that was filed was simply agreeing with the four points
2 that were put there. Since things have changed, and Your Honour
3 has come to a different decision based on submissions from the
4 Prosecution and borrowing from, shall we say, domestic -
09:44:45 5 internationally domestic jurisdictions, it is something that I
6 have come across, and we are not particularly concerned. It is a
7 good and proper way of proceeding with the matter, as far as
8 Mr Kargbo is concerned.

9 The only other point that we had wanted to raise, which
09:45:06 10 Your Honour and the Court will understand I raise because of the
11 particular situation of my lay client, really related to the
12 logistics of trying this case, and Mr Kanu would have preferred,
13 obviously, to be here. Logistically that has been impossible,
14 and I think one has to deal with the realities. But the Court
09:45:37 15 should note that having been, as it were, on the other side, on
16 the last occasion on the 15th of July I believe it was, it can be
17 very difficult to follow proceedings when there is something like
18 a two-second delay. I don't know if that's the position today.

19 JUSTICE DOHERTY: One of the matters that I am going to
09:46:02 20 spend some time on this morning is sorting out the timing of this
21 trial. I am conscious of several things. There is a two-hour
22 difference between us and Kigali. The prisoners have to be
23 transported back before lockdown in the Kigali central prison.
24 They have to eat at a time that is reasonable to them. And we
09:46:27 25 have to have breaks and at a time that is reasonable to us.

26 So I have thought of a possible scenario. However, it will
27 be discussed before any ruling is made. And I will bear in mind
28 also, and ask counsel to bear in mind, this possibility of a
29 delay between us speaking and Kigali hearing.

1 So we will try and adopt a pause when we finish speaking
2 before the next person speaks.

3 MR METZGER: I am very much obliged, Your Honour. Those
4 were my submissions.

09:47:04 5 JUSTICE DOHERTY: Thank you.

6 Mr Nicol-Wilson.

7 MR NICOL-WILSON: Your Honour, we do not have very much to
8 say in respect of 2, 1, 2, and 3, but I want to re-emphasize that
9 we have filed the Defence brief which sets out in general terms
09:47:34 10 the nature of our defence in this particular matter.

11 JUSTICE DOHERTY: Thank you. I have received it and I have
12 read it.

13 Mr Herbst, have you any matter to add to what you have
14 already filed? I noted that you filed in accordance with 1, 2,
09:47:52 15 and 3.

16 MR HERBST: Yes, Your Honour. Thank you very much.

17 And if Your Honour will permit me just to state that it is
18 an honour for me to participate in proceedings of this Court, and
19 I appreciate the opportunity to be of service to the Court in
09:48:07 20 this capacity.

21 The only thing I would add with respect to the list of
22 witnesses is that we've tried to streamline the Prosecution's
23 case so that after 334 and Mr Kargbo testify, we do not
24 anticipate calling Mr Mansaray.

09:48:33 25 Depending on how Your Honour rules on the issue of
26 privilege and the exception that we have proffered to the Court,
27 we still have on our list Mr Daniels and the Principal Defender.

28 It's our view that Investigator Saffa is available to
29 testify if it becomes necessary, but I am not sure that it will

1 be necessary, depending on how things go.

2 We've asked Your Honour to take judicial notice of the AFRC
3 judgement in our papers, and if Your Honour were to accept that
4 proposition, we don't think that Mr Johnson or a member of the
09:49:24 5 OTP staff would need testify.

6 And finally, as Your Honour knows, we have suggested that
7 it's not necessary to call Ms Alagenda; just to admit the e-mail
8 that she wrote on 30 November 2010.

9 So we think that our case can go in fairly expeditiously,
09:49:57 10 and I just wanted to - since one of the issues was our list of
11 witnesses, I just wanted to apprise the Court and counsel of our
12 present intention in that regard.

13 JUSTICE DOHERTY: Thank you, Mr Herbst.

14 For purposes of record, I note that you have made those
09:50:14 15 applications for taking notice of the AFRC judgement. For
16 purposes of record, I note that it was in relation to the
17 credibility issue of TF1-334. If that is not correct, perhaps
18 you could put on record now what aspect of the AFRC judgement do
19 you want noted?

09:50:40 20 MR HERBST: Yes, Your Honour. In addition to the
21 credibility of the witness, we are offering that so that it is
22 clear what the role of the witness was in the AFRC judgement and
23 the importance - the relative importance of his testimony to that
24 of other witnesses, and that's something that we submit
09:51:05 25 respectfully to the Court is a matter that the Court can decide
26 based on its own judgement.

27 We can argue from the judgement - once Your Honour takes
28 judicial notice of it, we can then talk - argue in closing
29 argument or otherwise what - the significance of the portions of

1 the judgement that refer to 334's testimony.

2 But we don't think it's necessary to provide, for example,
3 an opinion of a member of the OTP staff to that effect. It's
4 just something that, in our view, the Court can determine for
09:51:49 5 itself.

6 JUSTICE DOHERTY: Thank you. That in many ways brings me
7 to the next item, which is 2(iv) a list of exhibits that the
8 prosecutor intends to offer, stating, where possible, whether or
9 not the defense has any objection to authenticity. Counsel will
09:52:13 10 note its authenticity rather than admissibility or weight.

11 So we have had an occasion, both in writing and this
12 morning orally from Mr Herbst, that he will be seeking to admit
13 an e-mail from Alagenda - or to Alagenda and parts of the AFRC
14 judgement.

09:52:38 15 I again will go around counsel for the Defence in turn and
16 ask what, if any - if they wish to make submissions on those now,
17 or whether they will reserve on the e-mail until tender or it's
18 put to the witness, and the AFRC judgement is a separate issue.

19 So I'll go through, again, in the same - Mr Serry Kamal, I
09:53:08 20 think you're more senior to a few of the people there. But I
21 can't quite remember whether it's you or Chief Taku who is the
22 more senior.

23 CHIEF TAKU: I've been practicing at the bar for the past
24 28 years, twelve of them at the commission of criminal tribunals,
09:53:28 25 so I think maybe he may be --

26 MR KAMAL: I have not been practicing before the bar, but I
27 have been practicing for 43 years.

28 JUSTICE DOHERTY: You wouldn't be giving your age away,
29 would you?

1 MR KAMAL: No, that's my daughter who is also my - no, I
2 believe [Microphone not activated]. Mr Metzger can go to that
3 point.

4 JUSTICE DOHERTY: I see.

09:54:02 5 MR KAMAL: [Microphone not activated].

6 JUSTICE DOHERTY: Very well. I note that you would adopt
7 his argument.

8 Chief Taku, it's you then. There are two documents in
9 issue at the moment.

09:54:15 10 CHIEF TAKU: Your Honours, I would take the opportunity to
11 say that considering the Scheduling Order that you made with
12 regard to the participation of Mr Kargbo, deferring matters
13 concerning sentencing to the end of the case, it will not be
14 appropriate for me to make any submissions on this very important
09:54:53 15 issue.

16 And furthermore, from the moment that Mr Kargbo's name was
17 placed on the list as a witness, he's entirely in the hands of
18 the Independent Prosecutor for that purpose. At the end of the
19 trial, he will revert to my custody. But as far as making any
09:55:25 20 suggestions about conduct of the trial now, I'm afraid we cannot
21 really participate as such.

22 I also wanted, Madam, to inform the Court that after these
23 proceedings today, when I was coming I lost my aunt, who is a
24 dependent. I lost my mother ten years ago and now her junior
09:55:53 25 sister. Part of me is gone once more, so I will leave for
26 Cameroon to go and bury her. I had to show respect for this
27 Court and the importance of this process.

28 So for us, the conduct of the trial now is concerned,
29 Mr Kargbo is a witness, and generally I will not want to

1 interfere as much as possible or to offer any opinions, except if
2 Your Honour in your wisdom deems that my opinion can assist the
3 Court.

09:56:30 4 JUSTICE DOHERTY: Chief Taku, first I want to sympathise
5 with your sad loss. It's always a difficult occasion when you're
6 in another country and someone that you have depended on leaves.
7 So first I would say that sympathy.

8 Second, I note your submissions, that you will not - in the
9 light of your client's plea, that appears appropriate. We will
09:56:58 10 excuse your appearance on compassionate grounds to allow you to
11 travel.

12 CHIEF TAKU: Thank you.

13 JUSTICE DOHERTY: I am informed that the accused wish to
14 speak to the Court about something. I don't know what it is, but
09:57:30 15 we'll deal with this particular matter now we have started, and
16 then I will ask the accused.

17 First of all, I want to know if Mr Kamara and Mr Kanu - can
18 you hear me and can you hear what the lawyers are saying clearly?

19 THE ACCUSED KANU: Yes, my Lord.

09:57:52 20 THE ACCUSED KAMARA: Yes, my Lord, we are getting you.

21 JUSTICE DOHERTY: Good.

22 Mr Kamara, Mr Kanu, I heard a voice, but I did not hear an
23 interpretation because we were speaking over each other.

24 THE ACCUSED KANU: Yes, Your Honour. We are getting you,
09:58:23 25 but not loudly. And another thing --

26 JUSTICE DOHERTY: Mr Kanu, I am going to continue with the
27 submissions of the lawyers, and then I am going to ask you what
28 it is you need to say. But I will speak more slowly and hope
29 that you can hear me better. So please be seated, and I will

1 hear what your counsel has to say also about the matter I've
2 raised. Please have a seat.

3 Mr Metzger, I think if you could address on this
4 evidentiary point only, please.

09:59:06 5 MR METZGER: Indeed, Your Honour.

6 It is anticipated there will be submissions on the
7 Alagenda e-mail, and I can outline that for the moment very
8 briefly.

9 In terms of the fact that it was sent by her - written by
09:59:24 10 her and it is accurate, there is no issue taken. The point - and
11 I hope that I've made that clear in the Defence pre-trial brief.
12 The point is the use to which the Prosecution wish to put it -
13 and if it is prove a specific date - then issue is taken with it.

14 The other matter - I cannot now recall what the other
09:59:46 15 matter was.

16 JUSTICE DOHERTY: It is to do with portions of the AFRC
17 judgement and an application to take judicial notice of parts of
18 them.

19 MR METZGER: It seems to me that we could ill resist an
09:59:58 20 application to take judicial notice of that judgement; however,
21 if it is a question of the credibility of TF1-334, then the
22 Prosecution, we would say, raises an issue which could have great
23 ramifications in this case because it goes to the ultimate issue:
24 If the Court has to take judicial notice of his credibility at
10:00:27 25 that time, and then applies it to him and his evidence in this
26 case, well, then of course we are all wasting our time here. So
27 that would be where any such objection would lie.

28 JUSTICE DOHERTY: Very well, Mr Metzger. I've noted that.
29 Mr Nicol-Wilson, is it?

1 MR NICOL-WILSON: Your Honour, I would adopt the arguments
2 of Mr Metzger, and I would also want to emphasize that the e-mail
3 of Ms Alagenda Will have to be dealt with at a point wherein the
4 Prosecution seeks to get it admitted.

10:01:06 5 As far as issues of authenticity is concerned, we do not
6 take up any issue. But if the e-mail is going to be tendered for
7 purposes of weight or admissibility, then we'll raise an issue at
8 that stage.

9 JUSTICE DOHERTY: On these two issues, first the issue of
10:01:41 10 the Alagenda e-mail, that will be dealt with as suggested by
11 Mr Metzger when it is put to the witness, and we'll then deal
12 with: (a), its admissibility; and (b), its weight, if any, as it
13 is tendered. I will deal with any objections at that point. So
14 it may be put to the witness. We will deal with it in due
10:02:13 15 course.

16 On the matter of judicial notice of parts of the AFRC
17 judgement, I will consider that - not exactly by consent, but
18 without objection - judicial notice of parts of that judgement
19 can be brought before the Court; however, every trial turns on
10:02:38 20 its own facts and every trial turns on its own evidence. And
21 whether a witness is credible in one trial may not necessarily
22 follow that he's credible in another. Therefore, again, it will
23 be a question of fact to weigh up the credibility after the
24 witness has been heard.

10:02:59 25 The Court will not be bound by a previous finding.

26 Again, I have not got the precise paragraphs in the AFRC
27 judgement. And Mr Herbst will, in due course, notify us of the
28 relevant paragraphs. So I will admit them in accordance with one
29 of the Rules 92 or 93 with the caveat that I have just

1 pronounced.

2 I will now move on to item 3 on the schedule and that is
3 the Defence. I have had filings from the Defence counsel, and I
4 would merely ask if there are to be any other statements.

10:03:53 5 Chief Taku, I will not ask you in the light of what you
6 have said.

7 I will ask Mr Serry Kamal if there are any other matters of
8 law or fact other than what has been filed.

9 MR KAMAL: No, Your Honour.

10:04:08 10 JUSTICE DOHERTY: Very well. Mr Metzger, any other matters
11 other than what has been filed?

12 MR METZGER: Your Honour, I'm still awaiting a formal
13 report that hopefully will detail the dates that Mr Kanu was, as
14 it were, receiving treatment at King Faisal Hospital in Kigali.
10:04:35 15 I have informally disclosed to my learned friend the information
16 I have at present, but I think as things stand at the moment
17 that, and depending on the Prosecution identifying a specific
18 call on the call records as pertaining to Mr Kanu's involvement
19 in this case, then I would seek to call other evidence. But I
10:05:04 20 don't understand that to be the position, so I don't think there
21 will be.

22 JUSTICE DOHERTY: I did read what you wrote Mr Metzger, and
23 my first and initial reaction was: Is Mr Kanu raising an alibi
24 under Rule 67(A)(ii) when I read that, because if he is, then he
10:05:27 25 should give - under the Rules of Procedure and Evidence, notice
26 is given.

27 MR METZGER: Your Honour, one did the best that one could
28 with the information that is available. The Prosecution's case
29 spans time. Any alibi that he is given can only relate to

1 specific calls which the Prosecution have not, as it were, chosen
2 to prove. And therefore, what the Defence has done is reserved
3 its position at the earliest opportunity should it be called upon
4 to rely on the evidence - on the Defence of alibi. It does not
10:06:02 5 seem to arise at this particular point in time, but if I am told
6 different, then, yes, we will be making a relevant application.

7 JUSTICE DOHERTY: I understand.

8 Mr Herbst, can I just ask you on that one discrete matter
9 about specific call times and dates? If that has been disclosed.

10:06:31 10 MR HERBST: Your Honour, we have disclosed in its entirety
11 the call record in this case that was made available to us.

12 Let me say that I treated disclosure in this case as open -
13 what we call open file discovery. Everything that was produced
14 in my investigation was turned over in its entirety to the
10:07:02 15 Defence counsel. When I did that more than a year ago, I did
16 request reciprocal discovery.

17 And it relates to this point that Your Honour asked, which
18 is why I am going about this in a rather roundabout way.

19 Mr Metzger has identified in his Defence brief both a manual log
10:07:28 20 and a statement from Mr Sam Kargbo which I have not - neither of
21 which has been disclosed to me despite my request therefore. I
22 cannot tell from Mr Metzger's brief whether he is making or will
23 make an argument in this case that it was impossible for the
24 calls alleged by the Prosecution to have taken place.

10:07:57 25 It was never my understanding before receiving that Defence
26 brief that such an assertion would or could be made based on
27 what - the limited knowledge that I had learned while in Rwanda
28 about the accessibility of telephones to the convicts.

29 I think, respectfully, that really the - not just with

1 respect to the alibi and the question of whether Mr Kanu was
2 present in a position to be able to make the call, in this one
3 critical call that he is alleged to have made in late November of
4 2010, which is a period that I understand that Mr Metzger does
10:08:48 5 not contend that he was away from the prison that early. My
6 understanding is that it starts either on the 14th of December or
7 the 8th of December.

8 But it seems to me that the time has long passed by which
9 both an alibi notice should have been tendered and the assertion
10:09:18 10 made candidly in reciprocal disclosure manner as to whether - as
11 to what precisely the Defence argument is going to be in this
12 case so that we could - we could meet it in - either when it's
13 raised or, more properly, in a brief rebuttal case. We could
14 pursue the question of the accessibility of the phones and put a
10:09:44 15 witness on while we're in Rwanda or otherwise.

16 So I would respectfully request, especially since we are
17 going to conduct the trial in faith as part of it is here, then
18 we're going to move to Rwanda and then we're going to come back
19 here, to expedite the process, it would be appreciated if we
10:10:10 20 could get some clarification of that.

21 I did not, to answer Your Honour's specific question,
22 having said that, I did not during the course of my investigation
23 or preparation for the case, intend to identify specific calls
24 from the call record because it's my understanding that the call
10:10:31 25 record is not informative with respect to the identification of
26 those calls.

27 JUSTICE DOHERTY: That actually also brings me to a point
28 that you raised in one of your last submissions which was the
29 reciprocal disclosure.

1 So let me just quickly review what you've said and ask -
2 before I ask counsel to respond.

3 In order to try and move things forward, am I to
4 understand, Mr Metzger, that you are unable give the notice
10:11:27 5 concerning Kanu and whether he was able, in the prison at the
6 time, because you do not have information from the hospital
7 authorities in Kigali. Is that your first point?

8 MR METZGER: Your Honour, that is my first point. I do not
9 have it in a form that I can put before the Court. Just before
10:11:51 10 travelling to this Court, I did receive information about
11 specific dates and that's the information that I have disclosed
12 to my learned friend this morning.

13 But as I say the second point is that the Defence in any
14 case must know the case it is that they are to meet. And if the
10:12:15 15 Prosecution are to rely on specific calls, such as the 29th of
16 November, as I understand from the testimony of TF1-334, then
17 there is no alibi for that call. If it is a course of conduct
18 from the 16th was December until the 21st - sorry, 16th of
19 November until the 21st of December, then there can be no alibi.
10:12:40 20 But as I last understood it, and bearing in mind what my learned
21 friend Mr Herbst has said, when Henri Matisse starts to paint a
22 painting, you're highly unlikely to know what it is unless he's
23 finished or he's fully advanced.

24 The Prosecution case is either that we are relying on
10:13:06 25 specific calls or the broad-brush approach. We have seen the MTM
26 records and have invited the Prosecution to identify, on that
27 list of records, any calls that he says relate to calls made by
28 Mr Kanu or an other, with Mr Kanu being present so that we can
29 deal with it, and I don't think it's the Prosecution case that

1 they can do so.

2 JUSTICE DOHERTY: Well, it's beginning to appear to me that
3 we will have to hear the evidence. I feel unable to make a
4 realistic ruling in a vacuum in this - in this situation before
10:13:49 5 me.

6 I am prepared to request the court officer under Rule 33 to
7 approach the authorities in Rwanda. I understand there is a good
8 working relationship between the Court and the authorities. If
9 it would assist to have the records of the King's Faisal Hospital
10:14:22 10 made available to you. I can make that request if it would
11 assist you.

12 MR METZGER: I took the opportunity to have a quick look to
13 have a look at the Principal Defender's reaction. It seems that
14 the Defence office may find that useful. I personally have been
10:14:35 15 able to deal with people in Rwanda very well, and I don't
16 unnecessarily want an order made formally, and I know that the
17 Defence office, with the weight of the Court Officer behind it,
18 informally can probably create a better machine for material to
19 be available.

10:15:01 20 JUSTICE DOHERTY: Very well. I will not make an order, but
21 I will indicate to the Court Officer that it would be helpful to
22 have this information, if she would use her good offices.

23 MR METZGER: Very much obliged.

24 MS CARLTON-HANCILES: Already, Your Honour, the Court
10:15:16 25 Officer is on the way trying to ensure that we get the relevant
26 information from Rwanda.

27 JUSTICE DOHERTY: Thank you, Ms Carlton-Hanciles. In that
28 case, I will take no further action, but we can revisit the issue
29 should it arise.

1 MR METZGER: Your Honour, may I say before you pass on from
2 this point, for the avoidance of doubt, and in order to assist
3 the Prosecution in any way that I can, I am happy to have
4 available a copy of the manual telephone records for Mr Herbst at
10:15:50 5 some point in time before close of business today.

6 JUSTICE DOHERTY: Well, that would be helpful because
7 Mr Herbst, as I have indicated, in his last filing raised the
8 issue of reciprocal disclosure under Rule 67, and that was going
9 to be my next issue.

10:16:09 10 MR METZGER: I shall address it when it is raised.

11 JUSTICE DOHERTY: Very well. [Microphone not activated]

12 In theory, the next item on our agenda should be the timing
13 of the Court. But let us - I would prefer to deal with these
14 evidentiary and procedural issues before I move onto the
10:16:44 15 mechanics, and I will therefore note that counsel for the
16 Prosecution has stated that there was no - he was awaiting
17 reciprocal disclosure. And having reread the Rules - I note that
18 my reading of the Rules is not necessary mandatory, but I can
19 order it. So let me first ask counsel if they are making a
10:17:18 20 reciprocal disclosure other than what has been put in their
21 statements to the Court.

22 Again, I'll start with - I'll leave Chief Taku out of it
23 because his situation being different, and I will start with
24 Mr Serry Kamal who beats me by about five years in the working
10:17:45 25 stakes.

26 MR KAMAL: I am grateful, Your Honour. I have nothing
27 further to add. I will add this to whatever I wish to disclose
28 to my learned friend.

29 JUSTICE DOHERTY: Thank you, Mr Serry Kamal. I will note

1 that.

2 Mr Metzger, disclosure.

3 MR METZGER: Your Honour, I speak from the perambulator,
4 bearing in mind the experience of those who have spoken before
10:18:25 5 me, and, indeed, Your Honour.

6 I have a statement from Mr Sam Kargbo, which I am prepared
7 to disclose to the Prosecution, but I want the Prosecution case,
8 as it were, nailed very firmly to the mast in terms of what it is
9 the Prosecution is alleging in relation to the specific calls
10:18:50 10 concerning Mr Kanu in relation to dates, in relation to any
11 numbers that it is said were called.

12 If the Prosecution is not prepared to do this, and we serve
13 upon them this material and the Prosecution case then changes, it
14 would create a very great difficulty for the Defence of Mr Kanu,
10:19:18 15 because we have prepared the case on a specific basis.

16 Insofar as the complaint about reciprocal disclosure is
17 concerned, I should just say that at the time when all Defence
18 counsel were looking at material that had been prepared for
19 disclosure as early as, I believe, August - late August last
10:19:44 20 year, before Defence counsel could meet to deal with that, the
21 contract was suspended in this case.

22 Now, I can't speak for others, but it is very difficult to
23 get three lawyers together in a case of this import when that
24 which binds them to their client, as it were, has been cut off.

10:20:11 25 So if there has been an issue in relation to reciprocal
26 disclosure, I can only say that in no small part the fact that
27 our contracts were suspended, in terms that we didn't have - as
28 it were, we were no longer instructed until we were told that we
29 were going to be instructed again as at about the 15th of May,

1 but for the Scheduling Order. That is when we would have been
2 reinstructed.

3 I say that in defence of the Prosecution not having had the
4 material that he now has from us as at September of last year.

10:21:24 5 JUSTICE DOHERTY: Mr Nicol-Wilson.

6 MR NICOL-WILSON: Your Honour, I have no further
7 disclosures to make beyond what has already been disclosed.

8 JUSTICE DOHERTY: Mr Herbst, you have heard each of the
9 counsel to say they have made full disclosure of what they have,
10:21:51 10 and Mr Metzger has raised reciprocal issues or technical issues.
11 Do you wish to reply to that before I make a ruling?

12 MR HERBST: Your Honour, just briefly.

13 I do recognise the point of my learned friend Mr Metzger
14 with respect to the suspension of the contract. I am not
10:22:20 15 concerned about what's past. What's past is past.

16 I do appreciate the fact that he's indicated he's willing
17 to produce the statement of Mr Sam Kargbo, which I do think is
18 appropriate under the reciprocal discovery provisions.

19 The only other concerned that I have - and this does not
10:22:45 20 apply to counsel for Mr Bangura, because I think he did make an
21 effort in his brief to set forth in some detail what it is that
22 his client would say upon testifying. I didn't see any similar
23 level of detail with respect to the other lawyers, so it's my
24 understanding that some indication should be made in some detail
10:23:20 25 with respect to what the anticipated testimony of the accused are
26 going to be, and, in addition, any other witnesses who they
27 intend to call. But it does not appear, with some limited
28 exceptions, that there are going to be other such witnesses. So
29 I can't complain about that.

1 But I would point out that, especially in light of the
2 great detail in which the Prosecution laid out its anticipated
3 testimony of its witnesses, not just in the brief, but in more
4 detail in our disclosures back in July of 2011, I would request
10:24:13 5 some additional reciprocal disclosure in terms of what the
6 defendants or accused are expected to say when they get on the
7 stand to permit - I think the language of the Rule is: In
8 sufficient detail to permit a proper cross-examination.

9 JUSTICE DOHERTY: Mr Metzger said he was prepared to give
10:24:39 10 you Mr Sam Kargbo's statement, but he put a pretty big caveat on
11 that, that he wanted dates and numbers of calls before he could
12 give it.

13 Now, how would you be set for that?

14 MR HERBST: Yes, Your Honour. Thank you for reminding me.
10:24:59 15 I'd forgotten that part of his presentation.

16 I would say that when we initially looked at the records,
17 we found them less than informative in terms of information
18 that would be required to fix specific calls, and I will look
19 again over the weekend to see whether that will change.

10:25:39 20 But our contention here is that the system in Rwanda, to
21 the extent that we understand it, permitted the accused, for
22 various reasons, to facilitate telephone contacts with those on
23 the outside, without the phone numbers necessarily showing up.
24 And I am grateful, because I would like to see the manual log,
10:26:06 25 which I understand he will be turning over today without
26 condition.

27 Mr Metzger indicated that he would be turning over the
28 document - the actual document that he has by close of business
29 today, and we will examine that as well. Once we have that - and

1 we will look again at the call records that we have, and see
2 whether we can identify any pertinent calls.

3 But it has so far not been the Prosecutor's position it's
4 our burden to do that, in light of the ease with which telephone
10:26:46 5 contacts to people on the outside could be made without detailed
6 records being kept of who the callers were.

7 JUSTICE DOHERTY: I am cognisant of the fact that Rule
8 67(C) is not a mandatory provision; it is one where Defence may.
9 And since the burden of proof never moves from the Prosecutor, I
10:27:25 10 am reluctant to make mandatory orders. However, I note that
11 Mr Metzger is willing to disclose some dates and numbers of
12 calls, and Mr Herbst is willing to receive those.

13 I will therefore not make any ruling on the giving of Sam
14 Kargbo's statement until that exchange has been done. And if,
10:27:58 15 following that exchange, counsel for the Prosecution wishes to
16 pursue an application for further disclosure, I will entertain it
17 when it arises.

18 So I am now leaving Mr Metzger to hand over the document
19 that he is willing to hand over, and I will revisit the issue
10:28:24 20 when it is again raised by counsel.

21 That's the reciprocal matter.

22 I am not now going to move on, unless somebody has some
23 other relevant evidentiary matter, to deal with the notice of
24 amended agenda which was circulated in by my Associate following
10:28:46 25 our perusal of the various documents filed by both sides.

26 First, is there any other issue that I have not dealt with
27 before I can move onto that part of the agenda?

28 MR METZGER: Your Honour, not an issue as such. I think in
29 relation to judicial notice, I meant I made a note just to remind

1 Your Honour. I think you want *92bis* on the judicial notice
2 point. That's all.

3 JUSTICE DOHERTY: I couldn't remember whether it was 92 or
4 93.

10:29:21 5 MR METZGER: Your Honour.

6 JUSTICE DOHERTY: I should be able to read this after all
7 these years without looking them up, but that is a - Mr Herbst,
8 if you will indicate the paragraphs pursuant to Rule *93bis*, I
9 will be grateful.

10:29:38 10 Now, I will therefore move onto item number 1 on the
11 amended agenda, which is issues concerning the jurisdiction
12 raised by counsel for Kanu.

13 Mr Metzger, those were your arguments.

14 MR METZGER: Indeed they were, Your Honour.

10:30:15 15 JUSTICE DOHERTY: I have identified, as best I can, what I
16 thought were the relevant paragraphs.

17 MR METZGER: Indeed you have, Your Honour. I'm just
18 perhaps moving not as quickly, as I was taking the opportunity to
19 try and find the telephone documents, to get onto the submissions
10:30:36 20 that I made which I do rely on.

21 In specific terms - if you will bear with me. Just give me
22 one moment to get myself up to speed. Yes. Paragraphs 13 to 23
23 of our submissions.

24 Respectfully, I don't want to spend a great deal of time or
10:31:19 25 occupy a great deal of time with the Court, having tried to
26 identify, as best as I could, the relevant rules and provisions.

27 In strict terms, if I may, as it were, try and bring the
28 kernel of the argument before the Court.

29 The proposition that the defense makes is this: The

1 relevant provisions dealing with the question of contempt before
2 the Court generally tends to deal with issues when the Court is
3 in process; that is to say, a Trial Chamber hearing the case, a
4 witness who has already given evidence, but before the conclusion
10:32:07 5 of said trial, or a witness who is about to give evidence being
6 interfered with in the manner alleged by the Prosecution.

7 However, in the instant case there is a rather different
8 scenario. Trial Chamber II dealt with and heard at great length
9 the evidence in this case and delivered a judgement of some
10:32:38 10 substance. I've got a bound copy here. The defendant then took
11 issue with the decision of the Court and appealed to the Appeals
12 Chamber who dealt with their appeals and the case was concluded.

13 Now, in most of the common law jurisdictions, when that
14 happens and one has exhausted all one's appeals, the Court -
10:33:12 15 whether it be the Trial Chamber or Appeals Chambers - effectively
16 becomes functus officio. It has completed its purpose in the
17 administration of justice as far as those particular persons are
18 concerned.

19 Now, I do bear in mind that there are provisions or
10:33:39 20 provisions exist, I think Rule 120 or thereabouts, which allow
21 for a review of the Appeal Chamber's decision. As I understand
22 it, the circumstances in which such a review may take place are,
23 for obvious reasons, fairly stringent.

24 Now the Prosecution in this case alleges - and I note for
10:34:08 25 the purposes of this submission that what the Prosecution seem to
26 be suggesting is merely contacting a person who has been a
27 witness in a case, and for - in relation to Mr Kanu's case that
28 would be TF1-334, who at that time was no longer a protected
29 witness having lost his protection I believe - or his protection

1 having been rescinded by Trial Chamber II in the Charles Taylor
2 case in 2008 I believe.

3 JUSTICE DOHERTY: May I intervene at this point?

4 MR METZGER: Your Honour.

10:34:49 5 JUSTICE DOHERTY: The original protective measure order for
6 TF1-334 was made, I think it was by Trial Chamber I if my memory
7 is correct. It was rescinded but only for the Taylor trial, if
8 I - that is my understanding of the ruling. TF1-334 asked to
9 have those protective measures rescinded in that trial. Are you
10:35:28 10 saying that the fact that he requested the rescission and the
11 rescission was made effects his status in all of the other trials
12 and the order of Trial Chamber 1?

13 MR HERBST: Your Honour, exactly. It seems to me that one
14 can either have one's cake whole or one can eat it. Once the
10:35:55 15 witness has had his special measures rescinded, bearing in mind
16 the pseudonym 334, as I understand it, was particular or unique
17 to him throughout the proceedings. Once the Trial Chamber, as it
18 were, accedes to that request and he testifies openly, well,
19 then, the position cannot be that there are other protective
10:36:26 20 measures in place from another Trial Chamber because that
21 Trial Chamber that allows such testimony would, itself, be
22 following foul of the previous protective measures. And it is in
23 those circumstances that we would submit that once the protective
24 measures had been rescinded, he was no longer a protected witness
10:36:51 25 within the context of the Special Court jurisdiction.

26 JUSTICE DOHERTY: But surely even if he was protected by
27 use of a pseudonym or not protected by use of a pseudonym, it
28 wouldn't mean that he could not be interfered with, threatened,
29 or in some other way harassed and with immunity. That appears to

1 me what you're saying. Actually, you also appear to have moved
2 off from your first argument about the Court being functus
3 officio but we'll come back to that.

10:37:44 4 MR METZGER: I am, of course, directed by the driver that
5 is Your Honour.

6 Perhaps if I stay with the point that Your Honour has
7 raised in relation to the question of protection - it is, and
8 must remain, in our submission, that if a witness is - has lost
9 his protection or given it up, he has given it up. The issue
10:38:06 10 about whether or not said person can be interfered with, clearly
11 it is correct that somebody can be interfered with even if after
12 they have given their evidence.

13 So the issue then that has to be raised is what is the
14 level of interference? How does it then breach the Rules?
10:38:29 15 Because in terms of the Special Court jurisdiction, it has to be
16 an interference or some other interaction with that witness with
17 a view to interfering with the administration of justice. And
18 therefore, the actus reus itself is that. That is what the
19 Prosecution have to show, and the specific intent that goes with
10:39:05 20 that on the part of the person so doing the interfering.

21 Now, I have elsewhere suggested that the Prosecution have
22 taken a rather broad-brush approach to this case. The
23 Prosecution's case it seems to me is that anybody who spoke to
24 Witness TF1-334 on behalf of, if they can prove it, any one of
10:39:29 25 these defendants, was by necessity, because he was being asked to
26 recant - or recount as I think it was called in the very
27 beginning - that in itself amounts to an interference that falls
28 within the Rules, forgetting for the moment the issue of functus
29 officio. If that is the case, then the Prosecution's case does

1 not, as it were, take into account a situation where a person
2 believing himself to be innocent or "not guilty," which ever
3 terminology one wishes to use, despite the verdict of a Court,
4 and a verdict of an appeal chamber, cannot if invited, ask a
10:40:22 5 witness who has given evidence to reconsider, because that person
6 fully believes that that witness gave a wrong evidence as against
7 him in the first place.

8 That isn't what we argue, but I'm taking it in the abstract
9 bearing in mind the case that the Prosecution put forward. It
10:40:46 10 therefore falls foul, in my respectful submission, of looking at
11 the position with a view to presenting a case before Your Honour,
12 that shows that there has been a wrongful interference with a
13 person who was at one time a witness in a manner that would
14 interfere with the administration of justice.

10:41:07 15 JUSTICE DOHERTY: Excuse me, Mr Metzger. What you're
16 addressing on now is really the crux of the case. It seems to me
17 it's a point of law whether a person - it's a point of law in
18 fact where a person who is innocent can approach a witness
19 because those are all the factual issues in this case.

10:41:28 20 What you have said in the submission you made is that this
21 Court is functus officio at the time the alleged incidents took
22 place, and what follows from that?

23 MR METZGER: Well, if the Court --

24 JUSTICE DOHERTY: And it appears to me the protection issue
10:41:56 25 is becoming a little bit of a red herring, because I also want
26 you to bear in mind that when an order is made, an order is made.
27 The fact that a Court case finishes doesn't mean that the order
28 automatically lapses, dies, or is of no effect. And whilst
29 you're addressing those two points, I am going to quickly find

1 the rule about second Chambers and first Chambers on protective
2 measures.

3 MR METZGER: Shall I just pause for a moment for Your
4 Honour to do that?

10:42:36 5 JUSTICE DOHERTY: If you don't mind.

6 MR METZGER: Sure.

7 JUSTICE DOHERTY: It's 75(F) and (G) and 75(I), and
8 particularly 75(J), which reads as follows:

9 "If the Chamber seized of the seconds proceedings rescinds"
10:43:24 10 which was the Taylor trial, "varies or augments the protective
11 measures ordered in the first proceedings, these changes shall
12 apply only with regard to the second proceedings."

13 So that is a mandatory provision, so the revelation of
14 names, et cetera, in the Taylor trial, does not effect, it would
10:43:50 15 appear to me from that Rule, the status of the witness in the
16 first proceedings.

17 MR METZGER: Would Your Honour like me to address you on
18 that point?

19 JUSTICE DOHERTY: Yes, certainly, if you're going to
10:44:08 20 persuade me to change my mind.

21 MR METZGER: I shall refrain from commenting about
22 persuasion. I shall do my best.

23 As far as 75(F) is concerned, which I think is the first
24 Rule that Your Honour mentioned, it talks about what happens in
10:44:27 25 the, if you like, potential immutability of protective measures.
26 So that if you look at F1, once they have been ordered, then
27 effectively unless they are and until they are rescinded, varied,
28 or augmented in accordance with the procedures set out here, they
29 remain; they're immutable.

1 As far as the other Rules are concerned, if we just pass
2 briefly at (G), party seeking to rescind because of the specific
3 circumstances of 334. I am not fully acquainted with - I recall
4 Your Honour saying that it was he who applied to rescind.

10:45:19 5 Whatever happened, there was an application to rescind and that
6 was granted.

7 In this particular case, it was done in the second Chamber
8 seized of the proceedings. Now, historically Trial Chamber I
9 gives the protected measures. In my respectful submission, as I
10:45:46 10 will recall the case from memory, Trial Chamber II supported and
11 may have even augmented those provisions in the AFRC case, and
12 now we are looking at the Charles Taylor case where
13 Trial Chamber II who didn't make the first protected measures
14 order but the second, now rescinds the order that has been made.

10:46:10 15 If one looks then from (H) through to (J), the question of
16 what was the effect of that application and the ensuing order?
17 The effect is to decrease the protective measures. In fact, it
18 wasn't to decrease, it was to eradicate them. In those
19 circumstances, the duty of Trial Chamber II was to obtain all
10:46:36 20 relevant information via 75(H), all relevant information from the
21 chamber in the first proceedings, the second proceedings as the
22 case may be, and then consult before making any such decision.

23 One would assume - and I think that Your Honour can take
24 judicial notice of the fact that that would have been done and
10:47:02 25 was, in fact done in this particular case - which leads us
26 skipping merrily along past (I) to (J) and the point that Your
27 Honour, as it were, rests on.

28 If the Chamber, seized of the second proceedings, rescinds
29 varies or augments the protective measures ordered in the first

1 proceedings, these changes shall apply only with regard to the
2 second proceedings. So that in respect what has happened is in
3 the second proceedings, Trial Chamber II - or the third
4 proceedings, as we shall put it, Trial Chamber II, as then
10:47:44 5 constituted, was rescinding an order that applied, respectfully,
6 not just to what happened in those proceedings, because
7 Trial Chamber II was similarly constituted when it dealt with the
8 AFRC case, but also what it had done in relation to the second
9 proceedings.

10:48:05 10 The question therefore, perhaps, to consider is what
11 happens to the order that was made in the first proceedings? And
12 I think that is the point that Your Honour is making. Does it
13 die as a result of the order made by Trial Chamber II, or is it
14 protected and does it remain in force by virtue of (J)?

10:48:30 15 Respectfully, we would submit that it cannot remain in
16 force because - and one may have to go and look at the order made
17 for 334 in Trial Chamber II in the AFRC case when it was
18 considering the first order, because it may well have been that
19 in making that order, some - and I cannot now recall off the top
10:48:58 20 of my head - some attention was paid to the order that was made
21 in Trial Chamber I.

22 And therefore in all the circumstances, in my respectful
23 submission, I agree. We've perhaps spent rather too long on this
24 point, because insofar as 334 is concerned, this argument may
10:49:18 25 better relate to the other witness. But insofar as 334 is
26 concerned, protected or otherwise, it is my understanding that
27 the Prosecution's case on this has been once Mr Herbst became
28 aware that he was no longer protected, that that wasn't a fulcrum
29 in the Prosecution case.

1 So we're back to the argument, really, about whether or not
2 the Court was functus officio, whether or not a person, believing
3 he was innocent, can either directly or via an intermediary or
4 via somebody speaking to him inviting him to get involved,
10:50:01 5 discourse with a witness who has given evidence in this case
6 after that has been concluded without, as it were, attracting
7 contempt charges.

8 JUSTICE DOHERTY: Those are your submissions, are they?

9 MR METZGER: Yes, Your Honour, in strict terms. Anything
10:50:28 10 that I have missed out should properly be in my submissions.

11 JUSTICE DOHERTY: Certainly I have read those submissions,
12 rest assured of that.

13 MR METZGER: I'm much obliged.

14 JUSTICE DOHERTY: Mr Herbst, is there anything that you
10:50:34 15 wish to say in reply?

16 MR HERBST: Yes, Your Honour. If I move over here, can
17 Your Honour hear me?

18 JUSTICE DOHERTY: Yes, I can.

19 Can Mr Kanu and Mr Kamara in Kigali hear?

10:51:00 20 THE ACCUSED KANU: We can hear, but we cannot understand --

21 JUSTICE DOHERTY: The gentlemen say they can hear, but they
22 cannot understand.

23 Is it you don't understand because it's very legal, or
24 you're not hearing the right language?

10:51:16 25 THE ACCUSED KANU: We are hearing the language, but, you
26 know, for, like, this procedure --

27 THE ACCUSED KAMAL: We want him to raise his voice. We are
28 not getting him clearly.

29 JUSTICE DOHERTY: Very well. I will advise him to do that.

1 Mr Herbst, the accused in Kigali cannot hear you clearly,
2 so I will ask Mr Court Attendant to get that microphone closer to
3 where you are.

4 MR HERBST: Thank you. Thank you, Your Honour. Also the
10:51:49 5 wire is quite short.

6 JUSTICE DOHERTY: That one is.

7 MR HERBST: Is that better? Can you hear me now? I will
8 try to keep my voice up.

9 JUSTICE DOHERTY: Mr Kamara, Mr Kanu, can you hear me
10:52:20 10 better now?

11 THE ACCUSED KANU: Yes, Your Honour. We are listening.

12 JUSTICE DOHERTY: Yes, they can.

13 MR HERBST: Actually, I am having trouble hearing them.

14 JUSTICE DOHERTY: They are very faint, but years of
10:52:32 15 experience have taught me to listen closely.

16 MR HERBST: I will try to follow Your Honour's lead in that
17 regard.

18 Well, first of all on jurisdiction, Mr Metzger suggested
19 that the Rules really provide for past or present instances of
10:53:02 20 attempts to pervert the processes of justice, to bribe a witness,
21 to attempt to interfere with a witness in other respects, and not
22 what occurs in the future after the proceedings are over. He
23 said that in common law countries, once the court is finished, it
24 effectively goes out of existence and that's it.

10:53:36 25 That's not my experience in one common law country, where
26 any obstruction of justice that occurs may be dealt with by a
27 court, because that is in the court's inherent power. Any court
28 that does not have the inherent power to deal with attempts to
29 obstruct its processes cannot really function effectively. So

1 Rule 77 clearly reflects that the Court has inherent power to
2 punish contempts and to deal with attempts to bribe or otherwise
3 interfere with a witness or to disclose the identity of a
4 protected witness after the proceedings after the witness has
10:54:41 5 testified, and it must be so.

6 Now, the modalities of how this is done may differ, but
7 clearly the Rule provides that the Court can deal with it
8 summarily itself, and it can also do it in this case, which is to
9 appoint an independent prosecutor to investigate and then
10:55:09 10 determine what to do after receiving its report.

11 So even though it was implicit in the Court's order
12 appointing me to investigate the matter that the Court had
13 jurisdiction, because otherwise I would not have been able to be
14 appointed and not be able to function in that capacity, and so I
10:55:50 15 didn't consider it part of my ken to deal with the issue up to
16 now.

17 But as long as it's been raised, I have gone back and
18 looked at the Rule, and it seems to me that the Rule clearly
19 provides for such jurisdiction, because it not only mentions the
10:56:17 20 Court's inherent power right up in section (A) of Rule 77, but in
21 subsection (iv) it permits the court to punish for a contempt
22 anyone who threatens, intimidates, causes any injury, or offers a
23 bribe to or otherwise interferes with a witness who has given
24 evidence in proceedings before a Chamber.

10:56:46 25 Now, my learned friend Mr Metzger suggested that one can
26 only have either the cake whole or eat it too. It seems to me
27 that if one - if the Court has jurisdiction to hear a review - or
28 a petition for a review, or a pardon, or a commutation long after
29 the underlying proceedings have terminated, it must have

1 jurisdiction similarly to deal with the contempts under Rule 77.
2 Otherwise, one would have its cake and eat it too.

3 Article 21, I think, therefore seems, in my view, to cut
4 the other way. I interpret it not as Mr Metzger does, but as
10:58:08 5 buttressing the Court's power to effectuate its proceedings and
6 to do justice and to protect the administration of justice long
7 after the appeals have been exhausted in any particular case.

8 Now I want to address something that Mr Metzger said,
9 because I think he misapprehends the nature of the case we intend
10:58:35 10 to present to this Court.

11 He suggests that an accused, after a proceeding is over,
12 can go to a witness who has testified and ask him to reconsider
13 his testimony. I would submit to the Court, respectfully, that
14 assuming that the witness is permitted to have any contact - I
10:59:06 15 mean, the accused is permitted to have any contact at all, either
16 directly or indirectly, with a witness - and that has to do with
17 the issue of whether the witness is protected. I'll get to that
18 in a minute. But even if the witness is not protected, it all
19 depends on the context and the way in which an approach is made.

10:59:24 20 So, for example, if one were to go to a witness and say -
21 and generally such approaches are done through counsel and are
22 done in an appropriate way to make sure that a witness is not
23 interfered with. But assuming that one goes directly, one could
24 conceivably say, You know, Mr Witness, I really think that your
10:59:50 25 testimony was faulty in the following respects. Would you
26 reconsider? And I am not suggesting all of that would
27 necessarily be appropriate, but that's not our case.

28 If an accused goes to a witness direct or indirectly
29 through others and says, Hey, we're good buddies. We've know

1 each other a long time. Help me out. Deny what you said before
2 and doesn't mention truthfulness or untruthfulness, I submit that
3 that's a different kettle of fish and goes to the question of the
4 specific intent that my learned friend has raised.

11:00:43 5 It is true we've undertaken the burden of proof in this
6 case to prove that the approach that was made to this witness was
7 made corruptly with an intent to interfere with the
8 administration of justice.

9 Moreover, if the accused directly or indirectly goes to the
11:01:08 10 witness and says, We want you to help us. And if you help us, we
11 are putting modalities in place to compensate you; in other
12 words, if a bribe is offered.

13 I note specifically that Rule 77 singles out the offer of
14 financial compensation as a specifically prohibited means of
11:01:39 15 interference. If one does that, then one clearly is acting with
16 a specific intent to obstruct justice.

17 So I wanted to just clear that up to make sure we are
18 understanding what the Prosecution's case is and is not.

19 So I do think that the Court clearly has jurisdiction.

11:02:07 20 Let me just say with respect to Rule 75, which I've just
21 looked at again, it does appear to me that the question really is
22 whether paragraph (J) at the end - whether the language "These
23 changes shall apply only with regard to the second proceedings"
24 means the Chamber of the Court, or the specific trial or trial or
11:02:49 25 appellate proceedings in which the rescinding of the protective
26 measures occurs. And that, I think, is an issue that I have not
27 researched. And again, I think that is - is probably something
28 that the Court may have to - may want to consider in determining
29 whether, in fact, any protections survive the rescinding of 334's

1 protective measures in the Taylor trial.

2 Thank you, Your Honour.

3 JUSTICE DOHERTY: Thank you.

4 I'll just pause to make a ruling on that.

11:03:51 5 MR METZGER: I was wondering if I could make a very short
6 reply.

7 JUSTICE DOHERTY: Points of law only. You know my
8 attitude, Mr Metzger, after all these years. But points of law.

9 MR METZGER: Well, it was a matter raised by my learned
11:04:08 10 friend, and I will obviously of course take your ruling on this.

11 Two things. In relation to the question, and it is a point
12 of law, of whether or not the protection of TF1-334 has any
13 bearing in this argument at all when the Prosecution has, in its
14 pre-trial brief as I recall it, as it were, given away that point
11:04:35 15 as far as 334 is concerned? I know that Your Honour raised the
16 question that we were discussing - or rather identifying the
17 functus officio point. But I just wanted to raise that, as
18 hopefully not as an example of the shifting sides or sands or
19 moving goal post, but it had been my understanding in seeking to
11:04:57 20 understand the Prosecution case that this was not an issue as far
21 as 334 is concerned and Mr Kanu, but it now seems to be an issue.

22 JUSTICE DOHERTY: Well, I didn't think it was an issue
23 either, but I thought that it was you that raised it, not me.
24 And if I raised it, I must have got myself round a corner without
11:05:15 25 intending to.

26 MR METZGER: Well, I'm hoping to clarify now from
27 Mr Herbst, is it an issue or is it not an issue? Because if it's
28 not an issue, can we not waste time discussing the protectiveness
29 or otherwise of 334 as far as --

1 JUSTICE DOHERTY: Mr Metzger, I think the answer lies in
2 the indictment. The indictment relating to 334 is obstruction,
3 interference, I haven't got the precise wording --

4 MR METZGER: -- of a witness not protected.

11:05:41 5 JUSTICE DOHERTY: Yes. And the revelation issue is in
6 relation to TF1-033.

7 MR METZGER: Ah, yes. Well, in those circumstances, being
8 better informed about the Prosecution case, but as FE Smith would
9 say, "none the wiser". I have nothing further to say.

11:06:03 10 JUSTICE DOHERTY: Facetiousness doesn't go down well in
11 this Court, as you all know. Well, some of you know. Others
12 don't.

13 THE COURT OFFICER: [In Kigali] Justice Doherty?

14 JUSTICE DOHERTY: Yes, Kigali.

11:13:55 15 THE COURT OFFICER: [In Kigali] Could you tell the Court
16 officer to answer the phone, please?

17 JUSTICE DOHERTY: I will do that.

18 This is a ruling on objection to jurisdiction made by
19 counsel for Kanu.

11:16:23 20 The issue of whether protective measures are in place in
21 relation to TF1-334 has ceased to be an issue and I will make no
22 further comment upon it, but I will rule on it if it should arise
23 again. The issue, therefore, is whether this Court is
24 functus officio and if it therefore must follow whether it has
11:16:56 25 jurisdiction to entertain any further applications, in this
26 particular case an allegation of contempt under Rule 77.

27 I do not consider that Article 21 of the Statute is
28 relevant or helpful in this situation. Article 21 provides for
29 review, "Where a new fact has been discovered, not known at the

1 time of the proceedings, which could have been decisive in the
2 proceedings. "

3 Therefore, Article 21 involves a fact that has been
4 discovered which was not known which could have been a factor in
11:18:26 5 reaching a decision.

6 This is a case alleging a new incident which the Prosecutor
7 has alleged and will, in due course, seek to show was a contempt.

8 I do not agree that Rule 77 contemplates that any such
9 actions are limited to a live trial and the power is only to deal
11:19:00 10 with incidents that arise during a live trial.

11 To take such an argument to a commonsense conclusion will
12 mean that only incidents of contempt that arise during a hearing
13 or up to the time of decision can be dealt with under Rule 77;
14 and therefore, a breach of any order made during the trial cannot
11:19:30 15 be dealt with and can be ignored or breached with impunity, and
16 such orders are not limited to protective measures: They include
17 any other form of order.

18 This would not, in my view, be an exercise of an inherent
19 jurisdiction in a court to ensure its orders are upheld, even
11:20:05 20 after the trial is completed, because an order normally follows
21 on the completion of the trial.

22 I also adopt the ruling of this Court in its decision of 18
23 March 2011 on the issue of jurisdiction, when it held that it
24 must follow that this Trial Chamber has jurisdiction to deal with
11:20:38 25 contempt of court in cases that have already been completed.

26 Otherwise, such offences could be committed with impunity when it
27 ruled it had jurisdiction, and strictly the issue should not have
28 been raised again.

29 I also say as an aside that it has always been my

1 understanding in common law that the concept of *functus officio*
2 is limited to magistrate's courts. That was where I was taught.
3 However, I am not going to go into that line of argument, because
4 I have made a ruling for other legal reasons.

11:21:30 5 I therefore consider the Court has jurisdiction, and I do
6 not uphold the objection.

7 I will therefore now proceed onto the second item on the
8 extra agenda.

9 I note the time. We will break at 11.30 in accordance with
11:21:52 10 our provisions. There are two reasons for this: First, our
11 tapes only run for two hours; and secondly, I am conscious of the
12 fact that the people in Kigali are two hours ahead. So it's
13 really half past 1.00 and lunchtime for them, and in fairness
14 they should be allowed to have a break.

11:22:15 15 So the second issue is the calling of certain lawyers.

16 Now, Mr Herbst, you have made it clear to us this morning
17 that Mr Ibrahim Mansaray will not be called, so I am going to
18 delete his name from that list on the extra agenda item. I
19 presume that your applications will relate to
11:22:53 20 Ms Claire Carlton-Hanciles and Mr Andrew Daniels; am I correct in
21 that?

22 MR HERBST: Your Honour, you are correct. I just wanted
23 to - just a point of inquiry. There was another submission that
24 Mr Metzger made. It didn't deal with jurisdiction, but it was
11:23:10 25 included in the paragraphs that Your Honour cited. I didn't know
26 whether Your Honour wanted to deal with that submission or not,
27 even though Mr Metzger did not raise it orally. But in paragraph
28 20, he does make an issue, and I don't know --

29 JUSTICE DOHERTY: Mr Herbst, it wasn't raised in front of

1 me, and therefore I didn't deal with it.

2 MR HERBST: Thank you, Your Honour.

3 JUSTICE DOHERTY: Perhaps it would be more sensible,
4 gentlemen and ladies, that we adjourn at this point and start
11:23:59 5 afresh to listen to Mr Herbst's application and the other matters
6 that have been filed in reply.

7 Normally we have half an hour. I am going to ask Kigali:
8 Is half an hour is long enough to accommodate Mr Kamara, Mr Kanu,
9 and our staff getting some lunch?

11:24:23 10 Kigali, can you hear me? Because we are going to take a
11 break now, and I want to know if you need half an hour or three
12 quarters of an hour? Can Kigali hear me?

13 THE COURT OFFICER: [Freetown] Elaine, can you hear?

14 THE COURT OFFICER: [In Kigali] Yes, we can hear you.

11:24:55 15 Your Honour, Mr Kanu and Mr Kamara would like to address
16 the Court before they go to lunch. Is that okay?

17 JUSTICE DOHERTY: Very well. I will allow them to address.
18 But normally - normally - an accused addresses through counsel.
19 It is not a proper procedure to address directly. So they better
11:25:20 20 tell me first of all what it's about. And if I consider it
21 should be dealt with by counsel, I will say so.

22 So please, which gentleman is going to speak first? Can
23 you raise your hand so we know for purposes of record who is
24 speaking first?

11:25:38 25 THE ACCUSED KAMARA: I will speak first, Your Honour.

26 JUSTICE DOHERTY: Mr Kamara is going to speak. Now,
27 Mr Kamara's counsel is here, and if I think this is a matter to
28 be dealt with by counsel, I will say so.

29 Please speak, Mr Kamara.

1 THE ACCUSED KAMARA: Thank you very much, Your Honour.

2 JUSTICE DOHERTY: Mr Kamara, it may be better to sit down
3 so you are closer to the microphone, if you don't mind, so we can
4 hear you clearly.

11:26:11 5 THE ACCUSED KAMARA: Thank you, Your Honour. I have
6 certain things that I want to raise so that you can take note of
7 them. Because I raised it with my lawyer, but I and my lawyer
8 have no confidentiality. We have no privacy. By right, there
9 are some documents that are to be filed which I should have
11:26:43 10 copies of because it's my case, but none of that is happening. I
11 am restricted to even contact my lawyer. Even to talk to him, I
12 don't have any access. That's the first point.

13 The other point that I want to raise is about my condition.
14 Now, I understand that after the adjournment they will take us to
11:27:08 15 Rwanda local prison, which I believe is against this Court's
16 jurisdiction, according to you. And you are one of the Judges
17 who tried me and gave me the 75 years that I am serving.

18 JUSTICE DOHERTY: [Microphone not activated].

19 THE ACCUSED KAMARA: You judged me under international
11:27:29 20 minimum standard. Wherever I am serving my sentence, you never
21 told me that I should go to a local prison to serve my prison
22 term. But now if you're referring me to be taken to a local
23 prison, then I wonder where I am going? I am not sure that I can
24 cooperate with these contempt proceedings, because my health is a
11:27:50 25 priority.

26 I have long years that you've given me - I can say "you,"
27 because you are in front of me now - 45 years in prison, and to
28 take me to a place which is a local prison, from here to where I
29 am, where they say it's an international prison, is about one and

1 a half or two hours' drive for me to be able to attend Court
2 every day and return.

3 I just want to know how many international prisons do we
4 have in this country? One is in Kigali, and the other one that
11:28:28 5 you are referring to that I don't know.

6 So I just want to remind you, My Lord, I can't accept to be
7 in that condition. I can't accept to be in that condition.
8 Otherwise I won't attend this Court, because my health is a
9 priority. I have a long jail term that I am going to serve. I
11:28:48 10 need to protect my health. I can't be in a public place where
11 you have many prisoners, where so many people are using one or
12 two toilets. I am not sure that I can adjust to such standards.

13 And the other thing, to just make things clear to you,
14 Mpanga Prison, we left there at 8.43 this morning. And just by
11:29:18 15 the officials' protocol, they started wasting our time up to
16 8.43, and we arrived in Kigali very close to this Court about
17 10.31. So if we leave at 7.00 or 7.30, in fact, we would have
18 arrived here at such a time to attend the Court.

19 So taking me to - sorry, what do you call the place? - this
11:29:46 20 local prison, you're adding more jail conditions to me apart from
21 my 45 years. So I have to say this - and my brother is a
22 witness - he has been to that prison and he has seen.

23 So I'll stop here, and he will tell you. Thank you,
24 My Lord, for your attention.

11:30:08 25 JUSTICE DOHERTY: Thank you, Mr Kamara.

26 Mr Kanu, are you wishing to speak, or do you want your
27 lawyer to speak on your behalf?

28 THE ACCUSED KANU: Yes, Your Honour. As my brother --

29 JUSTICE DOHERTY: Well, as I say, if this is something to

1 do with things between you and your counsel, I will intervene.

2 So tell me what you wish to say.

3 THE ACCUSED KANU: Yes. I just want to buttress what my
4 brother, Mr Kamal, has said. From Mpanga Prison it's just two
11:30:47 5 hours' drive. I do not see why they should take us to a local
6 prisoner, where there are about 7,000 to 8,000 prisoners and only
7 one toilet. For my brother, he has 45 years and I have 50 years.

8 On Monday I have to see my doctor. I have told
9 Ms Hanciles. She is aware of that. This is the problem. That's
11:31:18 10 a local prison. It's a local prison. The document is here with
11 us. I've been there for seven days.

12 JUSTICE DOHERTY: Is that what you wish to say, Mr Kanu?

13 THE ACCUSED KANU: From Mpanga Prison to here it's just two
14 hours' drive from 7.00 to 9.00, which should be 7.00 Sierra Leone
11:31:58 15 time, to take us to a local prison. Mamie, I am not sure that's
16 right.

17 That's where I'll stop.

18 JUSTICE DOHERTY: Thank you, Mr Kanu.

19 I've just been advised that the time has run out of the
11:32:16 20 tape, but I also will come back and address this issue.

21 So we will resume - Kigali - is 30 minutes enough time or
22 do you need more time? Kigali?

23 THE ACCUSED KAMARA: I don't know where we will be,
24 My Lord.

11:32:40 25 THE COURT OFFICER: [In Kigali] [Overlapping speakers]
26 Elaine, we can't hear you very well.

27 JUSTICE DOHERTY: Let --

28 THE ACCUSED KANU: Are you taking us back?

29 JUSTICE DOHERTY: No, no. We're not finished. We're only

1 having a break so you can have something to break. Let us break
2 for 30 minutes. If Kigali requires a little longer they can
3 notify Mr Court Attendant and he can come and tell me and I will
4 make whatever I think is an appropriate direction. We will
11:33:08 5 adjourn to 12.05.

6 Please adjourn the Court until 12.05.

7 [Break taken at 11.34]

8 [Upon resuming at 12.14 p.m.]

9 JUSTICE DOHERTY: Mr Kamara and Mr Kanu are not in position
12:15:03 10 in Kigali. Can Kigali hear me? Plus I seem to be missing
11 Mr Serry Kamal.

12 Oh, he's got a junior. It's all right.

13 Where the Kanu and Kamara accused?

14 THE COURT OFFICER: [Freetown] Elaine, can you hear us?
12:15:43 15 Kigali, can you hear us?

16 THE COURT OFFICER: [Kigali] Your Honour, can you hear me?

17 JUSTICE DOHERTY: I can hear you, but I'd like you to get
18 closer to the microphone, please. I'm looking for Kanu and
19 Kamara. I don't see them.

12:16:00 20 THE COURT OFFICER: [Kigali] I have just had a call from
21 the prison guards to say they are going to be ten minutes late.

22 JUSTICE DOHERTY: Mr Metzger, Mr Serry Kamal, they are
23 going to be another ten minutes.

24 I've made some notes on the matters that they raised, but I
12:16:20 25 am not going to say anything in their absence. But have you any
26 problem if we proceed on this procedural matter dealing with the
27 next item on the agenda, which is the calling of
28 Ms Carlton-Hanciles and Mr Andrew Daniels in their absence?

29 MR METZGER: Without benefit of instructions, which is

1 perhaps the best position to be in, personally I would have no
2 objection to proceeding.

3 JUSTICE DOHERTY: They did he make it clear they didn't
4 quite understand some of these technical things that were being
12:16:59 5 argued, so --

6 MR METZGER: So be it.

7 JUSTICE DOHERTY: - but I will of course speak to them when
8 they come back.

9 MR METZGER: I am very much obliged.

12:17:08 10 JUSTICE DOHERTY: Thank you.

11 There are two submissions - in fact, maybe three
12 submissions in relation to the calling of Ms Carlton-Hanciles and
13 Mr Andrew Daniels.

14 Mr Herbst, I will invite you to speak first because
12:17:25 15 basically the applications are yours.

16 MR HERBST: Yes, Your Honour. Thank you.

17 Your Honour, as I indicated in my additional submission or
18 additional statement of anticipated trial issues in requests for
19 a subpoena the issue or the crime - the applicability of the
12:18:03 20 crime fraud exception is one of exceeding importance in my
21 respectful view.

22 As the jurisprudence of the international courts develops,
23 there is - as I readily admit - no specific recognition of the
24 exception in Rule 97. There is some explicit recognition of it,
12:18:42 25 as Mr Metzger was kind enough to point out in his submission, in
26 the Defence code of conduct - or the code of conduct for
27 attorneys, and he cited a provision. And there are similar
28 provisions, I understand, in the codes that apply to the conduct
29 of counsel in other tribunals, that speak to the proposition that

1 if a Defence lawyer knows of a crime to be committed or
2 understands that his services are being used in furtherance of an
3 offence, that the privilege may well be lost, as abused.

4 We have done our best to look at the evolving jurisprudence
12:19:47 5 in the tribunals, and the only case that we were able to find is
6 the one that I cited to the Court in my submission, the recent
7 decision in the Kardzic ICTY.

8 JUSTICE DOHERTY: I can say we have tried to find that case
9 and haven't been able to find it. So if you have either a quote
12:20:18 10 from it or a spare copy, it would be very helpful. Because we
11 have made an effort to locate it.

12 MR HERBST: Your Honour, yeah. I gave a link. Did you try
13 the link in my submission and it didn't come up? Okay. Give me
14 one minute.

12:20:35 15 JUSTICE DOHERTY: One of the other computer experts in the
16 office tried very hard.

17 MR HERBST: I understand. I have a copy of it and I will,
18 of course, give a copy to the Court. Just before I give it up,
19 let me just cite to the Court the provision. In the discussion
12:21:08 20 of the applicable law, it sites Rule 65B of the Rules of
21 Detention.

22 And I understand this is not exactly on point, because it's
23 not in an evidentiary context, but it sheds light, in our view,
24 on the place of the exception in the developing law relating to
12:21:30 25 the privilege. And it says:

26 "All such communication shall be privileged unless the
27 Court Officer has reasonable grounds to believe that the
28 privilege is being abused in an attempt to: (ii), "interfere
29 with or intimidate witnesses; (iii), interfere with the

1 administration of justice. "

2 (i) and (iv) are not relevant, as they relate to escapes,
3 arranging an escape or otherwise endangering the security and
4 safety of the detention unit. I hand this up to the clerk.

12:22:19 5 My submission to the Court is that apart from the
6 particulars of this case, it is, in my respectful view,
7 absolutely essential that the international courts recognise the
8 same exception to the privilege embodied in the crime fraud
9 exception that has been part of the common law in both the UK and
12:22:52 10 the United States, and I am advised - although I cannot cite
11 provisions to the Court - or cases to the Court as I did in my
12 submission with respect to the first two - in other common law
13 countries as well.

14 The reason is absolutely clear and critical. It is that,
12:23:15 15 for the same reason that a court has jurisdiction to protect its
16 processes and to protect the administration of justice, that is
17 its fundamental charge. It must have jurisdiction to hold, and
18 it ought to hold not just as a jurisdictional matter, but as a
19 jurisprudential matter; that the privilege is lost when it is
12:23:45 20 used as part of a scheme or with an intention to interfere with
21 the processes of justice and to intimidate a witness, or to
22 interfere with a witness, or to bribe a witness, and there is no
23 international customary law that we know of, no norms, no
24 standards inconsistent with the application of that exception.

12:24:12 25 And I did cite to the Court Rule 72*bis* (iii), which permits
26 the Court to apply general principles of law derived from other
27 legal systems not otherwise inconsistent with the Statute,
28 agreement and Rules, or with international customary law or
29 internationally recognised norms and standards.

1 We know of no law, norms, or standards, inconsistent with
2 the admission of communications made in furtherance of the
3 scheme, or attempt to bribe, or interfere with witnesses, or to
4 interfere with the administration of justice, or to obtain legal
12:24:52 5 advice or assistance in aid of such scheme or attempt.

6 Now, our case - and one of the benefits of laying out in
7 great detail one's case as the Prosecutor is that it is clear for
8 all to see that that is precisely what the evidence is going to
9 show in this case.

12:25:22 10 It's clear from the testimony of 334, of Mr Kargbo, and
11 from the testimony of the lawyers themselves that we proffered in
12 our pre-trial brief, that that is what occurred here.

13 So we urge the Court to hold that the exception may be
14 applied in this Court, and we cited the cases, which I won't
12:26:00 15 repeat, but in paragraph 5 of our submission, we cited the UK and
16 US cases that support the admission of this proffered testimony
17 from Mr Daniels and the Principal Defender in these
18 circumstances.

19 As we indicated - I think the application of the exception
12:26:44 20 would be sufficient. But there is an issue with respect to
21 Mr Daniels, as he advised us as to whether the legal professional
22 privilege - or what we call the attorney-client privilege - is
23 applicable in his case at all. Because at the time of the
24 relevant communications that he had with Mr Kamara and Mr Brima,
12:27:08 25 Mr Brima was not a client, and Mr Kamara appears to have been a
26 former client who was seeking to have Mr Daniels again assigned
27 as counsel, but he had not yet been assigned. So the issue there
28 is whether an attorney-client relationship existed to which the
29 basic privilege applies, even before we get to the exception.

1 Now, I do recognise I don't have quite as much experience
2 as Mr Serry Kamal or the Court, but almost. My practice has
3 included many years as a criminal defence lawyer and a civil
4 rights lawyer, and I am cognisant of the importance, generally,
12:27:58 5 of the attorney-client privilege and how important it is to
6 preserve the privilege when it is not being abused. I recognise
7 that the privilege can attach at an early stage when a client
8 first begins to seek advice.

9 So I advance the second argument that I just made with some
12:28:28 10 caution, because I do not want to intrude on the basic privilege.
11 But as I understand the conversations as they developed with
12 Mr Daniels, it is not clear to me that an attorney-client
13 privilege existed and, of course, on that issue the burden of
14 production and persuasion, would be on the defence seeking to
12:29:06 15 apply the privilege.

16 Now, if Your Honour recognises the exception to the
17 privilege, then, Your Honour, then we would urge you to consider
18 the propriety of an issuance of a subpoena to Mr Daniels that has
19 indicated to us that he will not appear voluntarily, but would
12:29:40 20 accept a subpoena by e-mail, and, as an officer of the Court,
21 would abide by the subpoena.

22 So I've done my best to lay out for the Court, in paragraph
23 8 of my submission, my view that the requisites of a subpoena are
24 met in this case.

12:30:11 25 There is a legitimate forensic purpose for the testimony,
26 as it contains statements from the accused Kamara that he and
27 others were contemplating having 334 and other insider witnesses
28 change their testimony and to use such recantations to support a
29 review by which their previous judgement against them might be

1 reversed.

2 Thus, the communications that Mr Daniels would testify to
3 provide general support for the charges, but, more specifically,
4 corroborate the testimony of 334 and Mr Kargbo that they were
12:31:05 5 told in December 2010 that a lawyer was coming from Ghana to
6 speak the 334 about recanting his testimony.

7 In addition to there being a legitimate forensic purpose,
8 it's our view that the necessity requirement is also met, as the
9 subpoena is likely to elicit evidence material to an issue in the
12:31:34 10 case which cannot be obtained without issuance of a subpoena,
11 because Mr Daniels has advised that he will not appear without a
12 subpoena, and he's not in the country.

13 Now, we do say in a footnote in our submission that we have
14 an exchange of e-mails with Mr Daniels in which, as a courtesy to
12:32:02 15 him, I summarised what he had told me through my communication
16 with him. He sent back an e-mail - and I shared these e-mails
17 with Defence counsel. He's --

18 MR METZGER: I rise. I'm so sorry, I don't mean to
19 interrupt. There is an objection to --

12:32:25 20 JUSTICE DOHERTY: [Microphone not activated].

21 MR METZGER: There is an objection, Your Honour, to the
22 Prosecution repeating anything that they may have got from
23 Mr Daniels in open court on the basis that until Your Honour
24 rules on the matter, the subject matter of their communications
12:32:48 25 themselves, if it is covered by legal professional privilege,
26 ought not to be aired in open Court.

27 JUSTICE DOHERTY: Mr Herbst.

28 MR HERBST: Your Honour, I was not going - and I don't
29 think my footnote describes the specific communications. I was

1 not necessarily going to tender the e-mails in open court,
2 although they have been - certainly until Your Honour provides
3 more guidance in that regard, but they have been shared with the
4 Defence. And I was just going to generally state that in a
12:33:36 5 return e-mail, Mr Daniels confirmed with one relatively
6 insignificant, in our view, exception, the accuracy of what I had
7 given him as a summary.

8 So together the e-mails constitute a written statement from
9 Mr Daniels, albeit unsworn.

12:34:09 10 So that's the only exception to the necessity requirement.
11 If that - if that written statement were admitted, then, of
12 course, there would be no necessity. But as I understand the
13 Defence response, at least with respect to some accounts, not
14 all, there is not unanimity on the point, but at least with
12:34:32 15 respect to some Defence counsel, they would object to that
16 introduction of that statement. So we think the necessity
17 requirement is met in that regard.

18 And finally, if the Court determines that the testimony is
19 not LCP privileged, lawyer-client privileged because of the crime
12:34:59 20 fraud exception, then no other relevant immunity or relevant
21 testamentary privilege would exist in relation to the witness in
22 question, and all requisites for the issuance of the subpoena
23 would be present.

24 So I don't necessarily want - I haven't in this oral
12:35:21 25 submission to the Court provided in detail or stated in detail
26 how the communications with the Principal Defender or Mr Daniels,
27 buttress the case that will be submitted through the two direct
28 witnesses. However, I have provided that information in our
29 prior filings. And so it's available to the Court, should the

1 Court need further information about - about our views with
2 respect to that issue.

3 All right. I think that completes my submission, Your
4 Honour.

12:36:13 5 JUSTICE DOHERTY: Mr Herbst, before you sit down I have two
6 questions. The first question relates to an interpretation of
7 Rule 97. Our Rule 97 says communication between lawyer and
8 client cannot be ordered unless the client consents or the client
9 has voluntarily or the client has alleged an effective
12:36:37 10 assistance.

11 Basically, who does the privilege vest in? Is it in the
12 lawyer or is it in the client?

13 MR HERBST: Your Honour, under our law and my understanding
14 of the law in common law countries, the privilege is the
12:37:02 15 client's, not the lawyers. But when it was abused, it is lost by
16 the client. And that is, in our view, the situation here.

17 I recognise that there is no explicit language in this Rule
18 that recognises the crime fraud exception to the privilege. But
19 just as the earlier rule - cited in Your Honour's earlier ruling
12:37:39 20 about the timing of sentencing, did not explicitly permit the
21 Court to delay sentencing past the relatively short timeframes in
22 those Rules. It is our submission to the Court that the
23 importance or the policies underline the crime fraud exception
24 are sufficiently important that they must be applied in this
12:38:13 25 case.

26 It's our submission that when this Rule 97 was promulgated,
27 the applicability of the exception was not considered. And the
28 question is, again, whether clients can be permitted with
29 impunity to seek legal advice, communicate with lawyers in aid of

1 a scheme to obstruct justice, to pervert justice, to interfere
2 with the administration of justice, to bribe a witness who has
3 already testified, and whether they can do that. And then in a
4 Prosecution later institute, whether they can have the benefit of
12:39:00 5 the privilege for those communications that were had with an
6 intention and in furtherance of the scheme - the corrupt scheme.

7 JUSTICE DOHERTY: And my second question related to
8 Ms Claire Carlton-Hanciles. Her position is a position of a
9 Principal Defender.

12:39:28 10 First of all, does she have a client-lawyer relationship?
11 And secondly, does that position vest any difference in her to
12 retained counsel?

13 MR HERBST: Your Honour, I thought about that issue late,
14 and I have no - I've done no research to examine into that issue.
12:40:05 15 And I am insufficiently familiar with how the Principal
16 Defender's position interfaces with counsel actually applied and
17 with her charge, with her duties, to be able to be of assistance
18 to Your Honour. Although, I readily acknowledge Your Honour has
19 identified an important issue, and I have nothing but the deepest
12:40:42 20 respect for the Principal Defender who is here in court.

21 I don't know whether it would be appropriate for her to
22 address that issue or not. I suspect that she would have much
23 more significant things to say about it than I did. I took the -
24 I will say to the Court in apologising for not considering that
12:41:07 25 issue, that to the extent that there is interface by the
26 Principal Defender with the accused or with people already
27 convicted, and to the extent that they are seeking counsel, if
28 they are just seeking the appointment of counsel, and no
29 privilege communications are made in connection with - with that

1 request, then it would seem to me that a good argument would
2 exist for the privilege not applying. But again because of my
3 concern that the privilege generally not be intruded upon when
4 there is no application of the crime fraud exception, I was
12:42:02 5 reluctant to take a position that suggested in any way that her
6 role, to the extent that she receives communications of substance
7 that would otherwise be privilege, I did not want to take at a
8 position that suggested that her role was subordinate in any way;
9 although, I have not, in the course of my investigation of the
12:42:30 10 preparation for this case, I have not actually inquired, as I
11 guess I should have, into that issue that Your Honour has raised.

12 JUSTICE DOHERTY: Thank you, Mr Herbst.

13 Now, my understanding from the reading of the documents
14 filed is this issue will be raised by counsel on behalf of
12:42:54 15 Mr Kamara and counsel on behalf of Mr Kanu only. If that is
16 incorrect, then I'd like to know it now.

17 CHIEF TAKU: May it please the Court, while not directly
18 involved in this, but as a matter of law, I think that the
19 decision that Your Honour will take will have a significant legal
12:43:24 20 implication far outside this courtroom. It will affect legal
21 practice as we know throughout the world. And I say this because
22 it is a very, very important issue in law that will happen many
23 times in international tribunals where we practice, and also in
24 the national courts. So it is a very, very important issue.
12:43:49 25 This is what I can say.

26 With Ms Carlton-Hanciles, what I will say is this: Apart
27 from the role that she plays with regard to this case, there may
28 be a need to review the duties of a Principal Defender as
29 somebody apart from the day-to-day the issue she takes about

1 cases that come before the Court, her interaction with foreign
2 governments, for example, the government of Rwanda and others, in
3 getting information that may help both sides in the particular
4 proceedings, that may help this Court in the administration of
12:44:41 5 justice.

6 I do not take a position on this. I am here otherwise as a
7 lawyer who practices before many other courts to say that this
8 decision that Your Honour will take will have -

9 JUSTICE DOHERTY: Just pause Mr Taku. Is there a problem
12:44:59 10 with our communication? Oh, it's me.

11 Sorry, I apologise. My light was still on.

12 THE COURT OFFICER: Your Honour, they think we have a
13 problem with Kigali.

14 JUSTICE DOHERTY: What happens happened?

12:45:19 15 THE COURT OFFICER: I think we have lost the link to
16 Kigali.

17 JUSTICE DOHERTY: Sorry to interrupt you in mid-sentence,
18 Chief Taku but can we just pause and see if we can get the link
19 back, if that's all right.

12:46:18 20 THE COURT OFFICER: I am told we are back on, Your Honour.

21 JUSTICE DOHERTY: We are with Kigali, so please continue
22 your submissions.

23 CHIEF TAKU: I take no position on this. My own
24 intervention is because I am happy that this matter has arisen.

12:46:37 25 It hasn't arisen, at least to my knowledge, in other
26 international criminal tribunals that I have participated since
27 1999. It is a very, very, very important issue, and whatever
28 decision with regard to Your Honour will take, will have an
29 impact on the practice of the legal profession as we know before

1 international tribunals. This is all I can say now, Your Honour,
2 and thank you very much for your kind attention.

3 JUSTICE DOHERTY: Thank you, Mr Taku.

4 Mr Serry Kamal, you have filed a document on behalf of your
12:47:13 5 client, Mr Kamara, and I would ask you to address on this point.
6 And you will have noted the two questions I asked Mr Herbst, and
7 I will also be asking you to address on those two questions.

8 MR KAMAL: Thank you, Your Honour.

9 Your Honour, I have already stated in my pre-trial Defence
12:47:42 10 in extenso our position regarding legal professional privilege,
11 paragraphs 2 to 9, and I will just concern myself with the
12 practical workings of the invidious position in which the Public
13 Defender finds herself.

14 I think a few minutes ago the defendants in Kigali
12:48:29 15 complained that they have not been served with the documents to
16 help them advise their clients, particularly my own client,
17 Mr Bazy. This is because the Prosecution has called
18 Ms Carlton-Hanciles as a witness. She is not able to discharge
19 her functions assisting the Defence.

12:49:08 20 And if she cannot do that, then we will not be able to
21 grant the accused or defendant the privileges which he should
22 enjoy by virtue of the Articles of Special Court and the Rules of
23 Procedure and Evidence, because they will not have enough
24 information to defend themselves. And the right to a fair trial,
12:49:42 25 and even the equality of arms would, with respect, be violated.
26 That is one of the extreme cases.

27 My Lady, as far as Mr Daniels is concerned, I would just
28 want to illustrate one very simple - very, very simple thing.
29 Mr Daniels was on the team representing Bazy. Mr Daniels was

1 expecting to be appointed a pro bono counsel for the defendants.
2 You ask yourself - or one asks oneself: When does the privilege
3 end between a client and his attorney or solicitor? Are you free
4 after the end of the trial to go on and violate the privilege if
12:50:45 5 you are a solicitor? I would say not. And as my learned friend
6 quite clearly conceded, the privilege sometimes is conferred much
7 earlier than when even proceedings are contemplated.

8 In my humble submission, Mr Daniels, up to the time he
9 spoke to my client, if he spoke to him at all, was bound by the
12:51:27 10 privilege - professional privilege, and anything that transpired
11 between him and his client cannot be exposed.

12 We are asked to adopt the procedure about crime fraud which
13 is adopted in the UK and United States. It has not yet been
14 adopted in the international arena. You are inviting --

12:52:08 15 JUSTICE DOHERTY: Has it ever arisen in the international
16 arena?

17 MR KAMAL: I don't believe it has. I don't know of any
18 instance, and my learned friend has not been gracious enough to
19 give us any instance.

12:52:24 20 JUSTICE DOHERTY: Actually, what he said was that he wasn't
21 aware of anything. So in fairness to him, it wasn't that he
22 didn't intend to.

23 MR KAMAL: Your Honour, it's a criminal matter that he
24 alleges. He has to prove beyond a reasonable doubt.

12:52:39 25 I am just looking at it purely from a practical point of
26 view. If this privilege is breached in any manner, it will
27 result in great hardship to a client, and that is a cornerstone
28 of the common law jurisprudence; that communications between a
29 client and his solicitor and client should be privileged.

1 I do not wish to say anything more.

2 JUSTICE DOHERTY: Thank you, Mr Kamal.

3 Mr Nicol-Wilson is rising to his feet.

4 MR NICOL-WILSON: Yes. Your Honour, this is an issue I did
12:53:32 5 not raise in the defense submissions, but definitely this is an
6 issue that the defense for Hassan Papa Bangura is very much
7 concerned about. And inasmuch as we are going to adopt whatever
8 arguments will be proffered by the counsel for Kanu, we still
9 want to lend our own points to this discourse.

10 My Lord, we think the position is well established within
11 the Rules of Procedure and Evidence of the Special Court, Rule
12 77, and I will answer a question you posed to the Independent
13 Counsel, that the privilege is vested in the client. And so --

14 JUSTICE DOHERTY: That's Rule 97.

12:54:09 15 MR NICOL-WILSON: Yes, Rule 97.

16 That the privilege is vested in the client, and it's only
17 the client who can waive this privilege. And 97 itself has
18 highlighted the exceptional circumstances under which the
19 privilege can be waived, and I think in this particular case the
12:54:29 20 Independent Counsel has not been able to justify any one of the
21 exceptional situations in which the privilege can be waived.

22 So I think we should confine ourselves within the ambit of
23 Rule 97, especially in view of the fact that this issue has not
24 been raised in any other international tribunal before, and I
12:54:52 25 think Rule 97 covers it extensively, and I think we should be
26 confined to the provisions of Rule 97.

27 That is all I wish to say.

28 JUSTICE DOHERTY: Yes, Mr Metzger. You have a submission
29 on this matter?

1 MR METZGER: Indeed we do, Your Honour.

2 Can I start by answering, in the best way that I can, the
3 two questions you asked. First of all, 97.

4 Rule 97 makes it clear, as does the international
12:55:30 5 jurisprudence, both in the international courts and national
6 jurisdictions - in common law jurisdictions that privilege
7 attaches to the client.

8 Secondly, as far as Ms Carlton-Hanciles is concerned as
9 Principal Defender, we would submit that it applies to her as
12:55:52 10 equally as it would apply to other lawyers. More particularly,
11 we say that the Rules of the Special Court deal specifically with
12 that. I can take Your Honour to those in due course to deal
13 specifically with the role of the Principal Defender and the
14 Defence office.

12:56:19 15 So if you like, as far as Ms Carlton-Hanciles is concerned,
16 the privilege is doubly entrenched, in our respectful submission.

17 Would Your Honour like me to develop my argument or take
18 any one of those as the principal point?

19 JUSTICE DOHERTY: We have a specific issue before us, and
12:56:49 20 that is whether there is an exception for communications that
21 involve an illegality or a possible illegality, so there is that
22 one major issue which applies to both Mr Daniels and
23 Ms Carlton-Hanciles. So I really would like to hear more about
24 that.

12:57:12 25 And it appears to me from what has been said - I also
26 consider that Ms Carlton-Hanciles' office - which is why I raised
27 it with Mr Herbst, is not - I am not saying - I am not ruling
28 that it's different, but it's not the same relationship, and
29 that's a practical fact. Now, does that practical fact affect

1 the legal relationship and the legal application to the Rules?
2 That's the question.

3 MR METZGER: In that case, Your Honour, let me start in
4 this way. Respectfully, the Special Court jurisprudence does not
12:57:57 5 allow of a crime fraud exception. Rule 97 is very clear. It
6 does not allude to crime fraud, and all the research that we have
7 done and we have included in the pre-trial Defence brief those
8 matters which I say deal with the exceptions.

9 That really takes us to Article 12, I believe, of the codes
12:58:31 10 of conduct which tells us, effectively, what the position is in
11 relation to the role of Defence counsel as a witness.

12 I'm taking it in stages. There is nothing there that
13 allows, for example, Rule 97 to be read as providing the crime
14 fraud exception when allied with that. If we then move on to
12:59:15 15 Article 14, which deals with the scope of representation. There
16 is nothing there that allows of the crime fraud exception, in my
17 respectful submission.

18 What it does say, in fact, at 14(A)(ii): "Defense counsel
19 shall abide by a client's decisions concerning the objectives of
12:59:40 20 representation if not inconsistent with counsel's duties under
21 the Code and with defence counsel's best professional judgement,"
22 et cetera.

23 The reason I raise that is because, of course, if counsel
24 feels that in discussing an issue with a client the possibility
13:00:00 25 of a crime is being discussed, then counsel himself would be
26 bound under his code of conduct to either withdraw from the case,
27 or to take appropriate action.

28 Let us bear in mind that in this particular case - and the
29 cliché of having one's cake and eating it, unfortunately, rears

1 its not necessarily ugly head - but the Prosecution are saying in
2 this case as far as Mr Daniels - who is the only remaining
3 lawyer, so to speak, at issue - putting Ms Carlton-Hanciles to
4 one side - that the discussions with Mr Daniels do not reveal
13:00:42 5 that Mr Daniels was going to be involved in any criminal
6 enterprise; or that Mr Daniels was suggesting that he was being
7 asked to do anything criminal; or that Mr Daniels was concerned
8 that the request that was being made of him would or could
9 potentially relate to a criminal offence: That of contempt.

13:01:14 10 Going logically forward from there, and adopting the
11 argument I think Mr Serry Kamal put forward earlier - and if
12 required, I can take Your Honour to what I say are authorities on
13 these matters that support the contention that I put forward - at
14 a very early stage if Mr Daniels was contacted with a view to him
13:01:41 15 being counsel, pro bono or otherwise, that contact itself falls
16 under lawyer-client privilege.

17 So in real terms, the Prosecution's claim for the crime
18 fraud exception fails, as it were, at the first hurdle. Because
19 in order to show that it befits the crime fraud exception, it
13:02:10 20 would have had to show that Mr Daniels had inklings of there
21 being crime fraud involved here, and that is not something that I
22 recall my learned friend alluding to, either orally in submitting
23 to Your Honour, or in the documents that he has filed, or in the
24 side communications we have had by electronic means.

13:02:33 25 So that is the general provision, Your Honour, as far as
26 that is concerned. But I move on further under the Code of
27 Conduct for Defence counsel at the Special Court, in particular
28 to Article 17 which deals specifically with confidentiality.

29 Now I believe that I reproduced those in the pre-trial

1 brief, but effectively there is a wide-ranging attempt at dealing
2 with the issue of confidentiality, and in my respectful
3 submission, if Your Honour wishes me to elaborate on anything I
4 shall, but try to put it, as it were, in a nutshell, what it is
13:03:28 5 saying here is that that relationship is sacrosanct, the
6 communications are sacrosanct, and the only circumstances - the
7 exceptions provided therein - relate to matters where counsel is
8 likely to be facing some sort of disciplinary charges, where it
9 is considered that counsel has provided ineffective
13:03:52 10 representation, and where counsel's own rights as a suspect
11 himself would be abrogated if he could not adduce that evidence.

12 So in my respectful submission, in short, what Article 17
13 does is it provides an extension to the provisions of Rule 97.
14 Rule 97 has no exceptions. Article 17 allows exceptions in order
13:04:29 15 for the lawyer to be able to rely on privileged concerns to
16 assert his innocence of let us say a disciplinary or other
17 charge.

18 Now there is a final exception under Article 17(C)(iii)
19 which may read - I suppose one could read as being the next best
13:04:59 20 thing to a crime fraud exception.

21 What it says there:

22 "Where it is necessary to prevent an act which Defence
23 criminal reasonably believes is a criminal offence within the
24 territory which it may occur and/or; (b), may result in death or
13:05:17 25 substantial bodily harm to any person unless the information is
26 disclosed."

27 The difficulty for the Prosecution in seeking to rely on
28 this is Mr Daniels expresses no such opinion, and in my
29 respectful submission it is -

1 JUSTICE DOHERTY: Sorry, I didn't quite understand that.

2 MR METZGER: The onus here, under 17(C)(iii) is on Defence
3 counsel. Defence counsel in that particular circumstance is
4 Mr Daniels. And we could apply the same thing to
13:05:57 5 Ms Carlton-Hanciles, but for present purposes if we use
6 Mr Daniels as the main example - because he is counsel - he is
7 the person whose - who has to express the opinion or come to the
8 conclusion before 17(C)(iii) applies, and he hasn't done so.

9 JUSTICE DOHERTY: My understanding of the briefs before us
13:06:24 10 or the submissions before me, filed and orally, is that
11 Mr Daniels would be prepared to give evidence if subpoenaed. So
12 my initial reaction, until I hear to the contrary, is that he's
13 not exercising any - he, himself, is not exercising any claim to
14 confidentiality under Article 17.

13:06:51 15 MR METZGER: I agree, Your Honour, but such material has
16 already been obtained by the Prosecution in their communications
17 with Mr Daniels do not actually state that he believed that a
18 crime was about to be committed. It also does not state that he
19 had concerns for the safety of any individual.

13:07:18 20 It being the case that the Prosecution's case is ensconced
21 in the potential threat to 334, as far as Mr Kanu is concerned,
22 or the potential bribery for him to change his evidence, these
23 are the only two areas upon which the Prosecution can say there
24 is the likelihood of a crime fraud exception. And unfortunately,
13:07:46 25 on a proper reading, in my respectful submission, of these
26 Articles and of the Rules, if there is to be a crime fraud
27 exception as far as Mr Daniels or Ms Carlton-Hanciles are
28 concerned, they must be the ones to be uncomfortable enough to
29 raise the matter.

1 And despite being spoken to by the Prosecution, neither of
2 them has raised that matter to the Prosecution. It is the
3 Prosecution's opinion, and the Prosecution seeks to, as it were,
4 prejudge, in my respectful submission, the ultimate issue for
13:08:25 5 this Court, as to whether or not the accused person whose case
6 you are considering, has committed this offence by saying that in
7 considering their communications with their clients there is
8 already, therein, this predilection to committing this offence.
9 And Your Honour's hands would be respectfully tied from there on.

13:09:00 10 That is what I have to say in relation to the crime fraud
11 exception. Other than that, to the best of my ability, I have
12 been unable to come across anything in the international
13 jurisprudence. And my submission on that would be the reason
14 being that in the international courts, people do consider the
13:09:20 15 equivalent of Rule 97, wherever it is, as sacrosanct.

16 In effect, my learned friend from the Prosecution suggested
17 that you could read, in similar terms, that if it is not
18 inconsistent with Rule 97, the crime fraud prevention could apply
19 in this particular case. Respectfully, it is wholly inconsistent
13:09:58 20 with Rule 97. It is wholly inconsistent with whatever else
21 exists in the Rules, particularly Article 17 which I have taken
22 Your Honour and the Court to via a process so that we haven't
23 missed anything out.

24 And now if Your Honour wishes to me to deal with, or
13:10:27 25 elaborate on any other point on which I have addressed you thus
26 far, I would wish then to go to the Rules of Procedure and
27 Evidence and discuss the question of Ms Carlton-Hanciles.

28 JUSTICE DOHERTY: Please continue.

29 MR METZGER: Section 2 deals with Defence counsel. Rule 44

1 talks about effectively the appointment and qualifications of
2 counsel, and Rule 45 deals with the establishment and maintenance
3 of a Defence Office, the head of whom is the Principal Defender.

13:11:16 4 Rule 45(A) says that the Defence office, the head of whom
5 is the Principal Defender, shall: "In accordance with the
6 Statute and Rules, provide advice, assistance, and representation
7 to the suspects being questioned by the Special Court or its
8 agents under Rule 42", et cetera.

9 In this particular case, respectfully, all accused persons
13:11:37 10 in this case and their communications with the Principal Defender
11 or Defence office surely come within these provisions and cannot
12 be questioned or gainsaid.

13 45(B): "The Defence office shall fulfil its functions by
14 providing, inter alia, that is to say the three matters listed in
13:12:10 15 Roman numerals thereunder, but of course, by the use of the Latin
16 phrase, this is not an exhaustive list:

17 "Initial legal advice and assistance by duty counsel...

18 legal assistance as ordered by the Special Court in
19 accordance with Rule 61...

13:12:32 20 adequate facilities for counsel in the preparation of the
21 defence."

22 Now, if we look more particularly at Roman numerals (i) and
23 (ii), a request by an accused person in Rwanda of the Principal
24 Defender about getting pro bono counsel or about, shall we say
13:12:58 25 getting advice to consider whether they could have their
26 sentences reviewed, must fall fairly and squarely underneath
27 those provisions. And that is precisely the role that
28 Ms Carlton-Hanciles would have been fulfilling.

29 45(C) lends weight to the submissions that I have made thus

1 far.

2 "The Principal Defender shall, in providing an effective
3 Defence, maintain a list of highly-qualified criminal defence
4 counsel whom he [or she] believes are appropriate to act as duty
13:13:37 5 counsel or to lead the Defence or appeal of an accused."

6 And it then goes on to say what those counsel should be.
7 So it is to the Principal Defender, and to no other person, to
8 whom the accused persons in Rwanda must go in order to have
9 access to counsel in order to tap into that list of highly
13:14:02 10 qualified criminal defence counsel. And that falls within these
11 Rules.

12 Now those are effectively the only sections I wish to refer
13 Your Honour to, but of course the whole of the Rules are open to
14 my learned friend for comment in due course. What it is hoped
13:14:30 15 that we have succeeded in doing in these submissions is pointing
16 out that the Principal Defender is there as a lawyer, as an
17 administrator to the defendant, and that all communications in
18 relation to the conduct of the Defence are thereby privileged,
19 and if we look at Rule 97, we say in their entirety.

13:14:59 20 Now by way of, if you like, ancillary submission, and
21 stepping back a little bit from the Rules, applying the, shall we
22 say, the cloak of practicability which has already been referred
23 to by my learned friends on this side. If one looks at the whole
24 of the setup of the Special Court for Sierra Leone or other such
13:15:36 25 tribunals, if the Prosecution were able on the basis of its case
26 to call the Principal Defender to give evidence about contact
27 with an accused person, and to utilise that contact and the
28 communications between those two parties in a criminal case
29 against such accused person, then surely that brings the whole of

1 international justice into disrepute.

2 Surely the message that this application would send out, if
3 successful to the world, is that when you are charged with an
4 offence before such a tribunal, there is no point speaking to the
13:16:33 5 Defence Office. There is no point speaking to the Principal
6 Defender because they can be subpoenaed, and you do not have a
7 right to prepare your case. You do not have the rights
8 provided for example, in this case under Article 17 of the
9 Statute of the Special Court, which entitles you to a fair and
13:17:06 10 public trial. The fair trial rights. You do not have a right to
11 be informed about the case against you. You do not have a right
12 to have adequate time and preparation for your facilities. You
13 do not have a right to defend yourself.

14 And surely that last point, you do not have a right to
13:17:30 15 defend yourself, must be the greatest aberration of all if it
16 were to be allowed.

17 In general terms, if Your Honour will bear with me for just
18 one moment, I wanted to include a few words in my submission
19 about legal professional privilege.

13:18:04 20 Without going, as it were, into the history of legal
21 professional privilege, the editors of the current edition of
22 Archibald, which I think is the, I think, most widely used
23 criminal practitioner's book in the United Kingdom, described
24 legal professional privilege as being commonly classified in
13:18:28 25 modern usage under the two subheadings of litigation privilege,
26 which attaches to communications in connection with, in
27 contemplation of, and for the purpose of adversarial legal
28 proceedings; and legal advice privilege, which attaches to
29 communications between a professional legal advisor acting as

1 such and his client, although there is a considerable overlap
2 between the two.

3 Your Honour may see why I wanted to use that definition.
4 Because in the particular circumstances of this case, Mr Daniels
13:19:09 5 was counsel for Mr Kamara at his trial. Clearly, there is a
6 relationship already between them as lawyer and client. When he
7 was contacted, it would appear, even on the Prosecution's case,
8 that he was contacted with a view to taking up proceedings as a
9 lawyer.

13:19:32 10 So on both those grounds, or both those limbs, in my
11 respectful submission when one applies that definition, he is a
12 lawyer who had a client, and was likely to have a potential
13 client, and therefore is covered by that privilege.

14 I think in real terms, the same test applies if one were to
13:19:57 15 then look at Ms Carlton-Hanciles in her capacity qua lawyer.

16 JUSTICE DOHERTY: Mr Metzger, I think the Archibald we have
17 here is a bit older than one you are referring to. But if you
18 have a section on it, it would be helpful if you are citing so I
19 can look at it in the library copy.

13:20:27 20 MR METZGER: [Microphone not activated].

21 JUSTICE DOHERTY: No, I am not asking for it now.
22 Definitely not. But just a reference, please.

23 MR METZGER: Yes, I can refer Your Honour - in terms of the
24 reference, I have been referring to Chapter 12, paragraph 7, in
13:20:49 25 the current, that is to say, 2012 edition of Archibald, with 3rd
26 supplement, although this is in the main body of the work.

27 I would also then refer, Your Honour, if it assists, to
28 Chapter 12, paragraph 12, and I can say very shortly what that
29 says. It says that all confidential communications between a

1 lawyer and his client relating to a transaction in which the
2 lawyer has been instructed for the purpose of obtaining legal
3 advice will be privileged, provided that they are directly
4 related to the performance by the lawyer of his professional duty
13:21:35 5 as legal advisor of his client.

6 This actually refers to the Three Rivers case in 2004, but
7 again at 1212 your Honour will see that.

8 There are very many more. In fact, it's surprising, in a
9 sense, to understand that just on the issues of legal
13:21:59 10 professional privilege there are, once one has reduced it to what
11 we are looking at, some 90 hits in the current edition of
12 Archibald. I don't propose or even I wouldn't want to raise all
13 of that before this Court. It is helpful background reading.

14 But by reading those materials and raising these two for
13:22:23 15 Your Honour's attention, it seems to me that we have correctly
16 advanced the understanding of the principle of legal professional
17 privilege, certainly as it applies to the United Kingdom.

18 It is hoped that my submissions on the crime fraud
19 exception, as is related to the Special Court for Sierra Leone
13:22:52 20 and its, shall we say, legal and doctrinal architecture, leave no
21 room for the principle of the crime fraud exception. We needn't
22 say ever, but in the particular circumstances of these two
23 instances that the Prosecution seek to invoke it for.

24 Unless there are any other matters that I can address Your
13:23:20 25 Honour on, those are our submissions.

26 JUSTICE DOHERTY: One question, Mr Metzger: In the case of
27 Ms Carlton-Hanciles, does the code of professional conduct that
28 you've referred me to apply to her?

29 MR METZGER: Short answer, Your Honour: Yes.

1 JUSTICE DOHERTY: Thank you.

2 Just before I invite a reply on points of law, ideally -
3 ideally - it would have been good to have some sort of amicus to
4 address on Ms Carlton-Hanciles' position because it is - the
13:24:03 5 provisions relating to Principal Defenders in this Court are not
6 exactly unique, but certainly this is the first international
7 tribunal to such an office.

8 But I don't have an amicus to call on, and I think in the
9 circumstances it's not really appropriate to call on

13:24:23 10 Ms Carlton-Hanciles herself, because she is subject of the
11 ruling, and I do not consider it appropriate to call on her.

12 So I will have to make a decision on what's before me.

13 Chief Taku, I can see you are rising to your feet.

14 CHIEF TAKU: Yes, My Lord. Unfortunately, I do not have
13:24:46 15 the jurisprudence here. But international jurisdiction ordains
16 that - or empowers you to invite an amicus yourself on the issue
17 to advise on the issue. So that is my suggestion, Your Honour.
18 It is sufficiently important that at least - as I earlier said,
19 whatever decision is taken here will affect international law as
13:25:13 20 we know it, other courts.

21 MR METZGER: Might I make a suggestion just on that point?
22 It seems to me that in order to allow matters to proceed, that it
23 may be prudent for Your Honour to give a preliminary examination
24 of this matter based on the submissions that have been heard.

13:25:45 25 If Your Honour comes to the conclusion that there is a
26 possibility that this application will succeed, because of the
27 effect that that is likely or may have on Ms Carlton-Hanciles, at
28 that point in time consider appointing an amicus.

29 But if, having looked at all the material, Your Honour

1 comes to the conclusion that any exception, if there be such,
2 hasn't or does not apply in the particular circumstances of this
3 case, then it may be that Your Honour can of good conscience rule
4 that and proceed without the benefit of an amicus because her
13:26:31 5 position would not be affected. It's just, as it were, a
6 suggestion rather than anything else.

7 JUSTICE DOHERTY: Thank you, Mr Metzger.

8 Mr Herbst, have you any points of law on which to reply?
9 You will have noted I asked some questions in the course of
13:26:45 10 submissions, and comment on those questions would also be
11 helpful.

12 MR HERBST: Thank you, Your Honour.

13 If it does please the Court, I do have some reply along
14 those lines to offer the Court. One concern is with the issue
13:27:10 15 that the who learned counsels just addressed.

16 I think that in citing Rule 45(A), Mr Metzger has pointed
17 to the reason why the Principal Defender did not feel it
18 necessary either to invoke the privilege when I was talking to
19 her, or to write a brief here. That is because Rule 45(A)
13:27:48 20 specifically limits her charge, that is, that the scope of her
21 duties as Principal Defender, to suspects being questioned by the
22 Special Court or its agents - that's one - and two, accused
23 persons before the Court.

24 At the time of all of the communications sought to be
13:28:13 25 introduced by the Prosecution that the Principal Defender had
26 with the accused, they were neither suspects being questioned by
27 the Special Court, nor accused persons before the Special Court.
28 They were, rather, communications in which they were asking about
29 the appointment of counsel - this is my understanding - the

1 appointment of counsel to assist them in preparing a review.

2 So I would submit, now having been prompted to look again
3 at the scope of the Principal Defender's duty and the Rule, that
4 none of these communications were privileged in the first place
13:29:19 5 because of the scope - the limited scope of the duties that the
6 Principal Defender has.

7 Now, I haven't conferred with the Principal Defender as to
8 the questions that were asked, but I suspect - or have reasonable
9 grounds to believe, based on what I now understand to be the
13:29:47 10 limited scope of the office, that in fact the issue of privilege
11 may never have arisen in the first place.

12 Now, I also think, in light of the submissions made by my
13 learned brethren of the Defence, that with respect to Mr Daniels,
14 I ought to hand up to the Court, in a nonpublic way, if the Court
13:30:32 15 will accept it, the e-mails between Mr Daniels and myself so that
16 Your Honour can fully appreciate what Mr Daniels said about
17 Mr Kamara being a former client and so forth without - I don't
18 particularly want to burden the public record with it in light of
19 the statements made by the Defence, but I think that might be
13:31:06 20 helpful to the Court.

21 Did Mr Daniels have any concerns about a crime being
22 committed? I don't know. I did not ask that question, because I
23 don't think that question is relevant under the crime fraud
24 exception, and I've cited to the Court the *Banque Keyser Ullman*
13:31:30 25 *v. Skandia* case, which is not the only case making this clear,
26 ([1986] 1 Lloyd's Rep 336) that it is irrelevant whether or not
27 the lawyer is aware that he or she is being used for that
28 purpose; in other words, the purpose of obtaining advice with the
29 intention of carrying out an offence. It's the client's intent

1 and state of mind that is pertinent; not the defence lawyer's.

2 And the petard on which my learned friend Mr Metzger is
3 hoisted, is that while this is an issue of first impression, and
4 I acknowledge that, as far as the evidentiary context is
13:32:25 5 concerned, whether the privilege - the exception should be
6 applied in the evidentiary context, there is clearly percolating
7 in the Code of Conduct a crime fraud exception because Mr Metzger
8 acknowledged in his submission that a Defence counsel can breach
9 the privilege if it is being abused by the client seeking legal
13:32:56 10 advice in aid of a crime. That must be because there is a crime
11 fraud exception. If there were not, he would not be able to
12 breach the privilege.

13 But the confusion that I suggest my learned friend has, is
14 the confusion between the existence of a crime fraud exception
13:33:18 15 under common law and the requisites of that, which have nothing
16 to do with whether Defence counsel is aware that he is being
17 used, he or she is being used, and the counsel in the Code of
18 Conduct, which is directed to counsel, that he should breach the
19 privilege based on the crime fraud exception when, and I quote
13:33:45 20 the language in Article 17(C)(iii), the problematic language that
21 the Defence cannot overcome in my respectful view:

22 "When necessary to prevent an act which Defence Counsel
23 reasonably believes (a) is a criminal offence within the
24 territory in which it may occur; and/or (b) may result in death
13:34:16 25 or substantial bodily harm to any person unless the information
26 is disclosed."

27 This is an injunction, an instruction to Defence counsel
28 that they must breach the privilege when it's abused and it is
29 lost to prevent an act which Defence counsel reasonably believes

1 is a criminal offence. It's the crime fraud exception being
2 applied in one context. So the notion that the jurisprudence of
3 the courts, this Court and any other court, should be bereft of
4 the exception - the crime fraud exception, is frankly in my view
13:34:56 5 completely unpersuasive, completely, completely unpersuasive.

6 Now, the concerns from policy point of view about the
7 applicability of the crime fraud exception are warranted concerns
8 and the law in both the UK and US addresses that. We don't apply
9 the crime fraud exception willy-nilly. There is a preliminary
13:35:34 10 finding that the court makes before considering whether to admit
11 the evidence, and of course there is no jury here but we would
12 urge the Court to adopt the same principle, and that is when
13 looking at the proffered testimony of the Prosecution's case as a
14 whole, that when there is reasonable grounds to believe - and the
13:36:07 15 other literal formation is sometimes a prima facie case - but
16 that has been used less and less in recent times because its
17 meaning tends to be a little obscure, but when there is
18 reasonable grounds to believe that the privilege had been abused,
19 then the court can admit, preliminarily admit, the testimony, and
13:36:36 20 then it's up to the trier of fact to weigh the testimony with all
21 the other evidence in the case and determine whether to use it.

22 Now, the only message that would be sent out, I am
23 therefore saying to the Court, where the crime fraud exception
24 held to be applicable in international tribunals, as they are in
13:36:59 25 other courts around the world, is that you can't use lawyers to
26 interfere with the administration of justice. Because it's only
27 when there is substantial evidence to believe that that has
28 happened that the weighty policies of the privilege are to be
29 invaded. And it is impossible, in our respectful submission to

1 the Court, to look at the fabric of this evidence as a whole and
2 not conclude that that is precisely what the accused were doing
3 in this case.

4 Now I'm not familiar with Archibald, but I am confident
13:37:56 5 that if it surveys the law of the attorney-client privilege it
6 has a section about the crime fraud exception.

7 JUSTICE DOHERTY: It does.

8 MR HERBST: I took my -

9 JUSTICE DOHERTY: And so does Blackstone. I've looked them
13:38:20 10 both up.

11 MR HERBST: I took my cases, Your Honour, the description
12 of the crime fraud exception, from the law society of London
13 which cited the same cases and the same principles, and I
14 apologise for not being familiar with Archibald. I would like to
13:38:33 15 see a copy of it myself for my education at some point. But I
16 notice that my learned friend did not allude to those provisions.

17 Again, I say that Article 12, Article 14, Article 14(A)(ii)
18 has nothing inconsistent with the applicability of the crime
19 fraud exception and in fact Article 17 is the icing on the cake
13:39:05 20 which demonstrates without a doubt that there is percolating in
21 the Defence Code of Conduct a crime fraud exception. And
22 therefore what we are asking the Court to do is only to take one
23 further step in the evolution of the jurisprudence of these
24 international tribunals; and that is, to apply it in an
13:39:28 25 evidentiary context as it is applied in the common law countries
26 that we have spent a lot of time discussing this morning and this
27 afternoon.

28 But I agree with my learned friends that this is a very,
29 very important issue for resolution. It is a matter of first

1 impression in evidentiary context. The policies of the exception
2 are of long standing and of critical importance, and I see no
3 reason - and I have heard no reasons - that ought to be credited
4 not to apply the exception in the evidentiary context as we seek
13:40:13 5 to do here.

6 And I think that's it, Your Honour. Thank you very much.

7 JUSTICE DOHERTY: Thank you, counsel.

8 MR METZGER: There is just a matter of correction, if I may
9 put it in that way. In my learned friend's response on the law,
13:40:40 10 I think he misconstrued my submissions on Article 17 by saying I
11 was saying there is no exception. I was very careful to state
12 that such exception as there can be in the provisions, lead to a
13 subjective duty to Defence counsel, not an objective view of what
14 it is or what it isn't.

13:41:06 15 So, for example, when looking at 17(iii) my learned friend
16 submitted that counsel must. In fact, what 17(C)(iii) says is
17 that, notwithstanding the foregoing paragraphs in relation to the
18 duty of counsel, so (B) - paragraph (B) above and Article 13,
19 counsel may reveal information which has been entrusted to him in
13:41:38 20 the following circumstances. He relies on (iii) which I raised
21 to the Court because I wanted it to be clear because what (iii)
22 does is place a duty on Defence counsel. So it doesn't say
23 something which one - which is reasonably a criminal offence. It
24 must be the subjective view of the relevant Defence counsel, in
13:42:02 25 this case Mr Daniels. And it was that correction that I wanted
26 to make so I wouldn't have continue to think about the French
27 poet and author Jean Giraudoux who says that: No poet
28 interpreted nature as freely as a lawyer interpreters fact.
29 Thank you.

1 CHIEF TAKU: Mr Kargbo is seeking leave of the Court to
2 leave the room temporarily.

3 JUSTICE DOHERTY: He may be escorted out.

4 CHIEF TAKU: Thank you, Your Honour.

13:42:35 5 JUSTICE DOHERTY: Thank you.

6 Well, I can say that this is a fraught subject, and I now
7 find that not only is it a fraught subject but I am the one who
8 has the start the jurisprudence and that in itself is an onerous
9 task.

13:43:02 10 Having listened to argument, I think what I may do is I'm
11 going to reserve, over the weekend, it is clear from all
12 submissions that a fully reasoned decision is required in this
13 case, in this submission. And what I think I will do is outline
14 my decision and then reserve for a more fully argued and reasoned
13:43:28 15 decision if one is likely to be published. I will also give
16 thought to what I have been invited to do by Counsel Chief Taku
17 on the amicus matter. I'll also address those things in my mind.

18 So I will reserve until Monday morning on this particular
19 application.

13:43:54 20 MR HERBST: Your Honour, I wonder if I might make a
21 suggestion, for the Court to consider - depending on what your
22 decision is. If Your Honour decides to consider the exception,
23 then we - we need to get Mr Daniels here. So I wonder whether
24 the Court would, conditionally - of course it does not bind the
13:44:26 25 Court in any way - whether the Court would conditionally issue a
26 subpoena so that we can e-mail him so that we can make
27 arrangements to get him here at a time when either here or Rwanda
28 when the court will be sitting.

29 JUSTICE DOHERTY: I am not going to be able to issue one

1 today, but what I will do, because (A), I just don't have the
2 facility today to do it; and secondly, our CMS will be - is
3 closed. But what I will do is, if I make a decision to subpoena
4 Mr Daniels, I will come in armed with it on Monday morning, and
13:45:11 5 it will be sent immediately.

6 MR HERBST: As it pleases the Court.

7 JUSTICE DOHERTY: The next issue on our agenda is the
8 actual scheduling of the trial. But before I go to the
9 scheduling of the trial, I want to deal with some matters raised
13:45:45 10 by the accused convicted persons concerning their complaints.

11 There were two complaints raised orally by Mr Kamara and
12 Mr Kanu.

13 Now, first of all, Mr Kamara and Mr Kanu, can you hear what
14 I'm saying?

13:46:11 15 THE ACCUSED KANU: Yes, my Lord.

16 THE ACCUSED KAMARA: Yes my Lord.

17 JUSTICE DOHERTY: Good. The first one is to do with
18 contact --

19 THE INTERPRETER: Could you speak louder a little bit.

13:46:26 20 JUSTICE DOHERTY: The first thing was the communications
21 between Mr Kamara and Mr Serry Kamal.

22 I acknowledge that doubt is a very important and that it
23 goes to the trial rights of the accused under Article 17. What I
24 cannot do is interfere with those communications, but I can make
13:46:50 25 some form of direction or request to the Court Officer to
26 facility those communications, and I will do that. I will ask,
27 first of all, direct Mr Serry Kamal to communicate with his
28 client; and secondly, I will ask the Court Officer to facilitate
29 that communication.

1 Mr Serry Kamal, I've deliberately not invited you to
2 comment on this because I'm aware of privilege and other matters,
3 and I don't think it's appropriate for me to ask you about those
4 things, so I have not done so.

13:47:34 5 The second matter is to do with where the accused persons
6 are staying during their time attending the court. You have both
7 told me that it takes one and a half to two hours to travel from
8 the prison facility you are in now to Kigali. And from what you
9 tell me, you seem to say you want to do that, four hours' travel
13:48:11 10 every day, instead of staying at the central prison, and your
11 argument is that the central prison is not of the same calibre as
12 where you're staying, and you say it is not an international
13 prison.

14 First of all, I would remark that in the course of my work,
13:48:37 15 both as a lawyer and as a Judge, I have visited many prisons, and
16 that includes Pademba Road Prison in Freetown, which I have been
17 to more than once, as you possibly know.

18 At that time I have never heard of an international prison
19 and a national prison being some sort of different status.
13:49:05 20 Likewise, I have never heard of an international prisoner or a
21 person who is detained that is of a different status to any other
22 person convicted by a court, be they a national court or a
23 magistrate's court. Convicted persons have the same status.

24 Under our Rules certain standards are set for you, and
13:49:42 25 those standards are in our terms and conditions of detention.
26 They say that: A detained person shall be provided with his or
27 her own bed and sufficient bedding, which shall be cleaned; that
28 you will have sanitary conditions which are clean, decent, and
29 dignified; and you will have requirements that take care of your

1 health, hygiene, and human dignity.

2 From what you, yourselves, have told me this morning, you
3 will be sharing sanitary conditions with some other people. You
4 said two or three others. So it's not exclusive, but then it's
13:50:44 5 not exclusive at home, either. I have no good reason to say that
6 the place you're going to be in does not conform to our detention
7 standards.

8 But even if I did have some reservation, my powers are
9 limited. Under Rule 33, it is the Court Officer who is
13:51:20 10 responsible for ensuring that the rights of an accused person in
11 detention are met in accordance, and the Court Officer has to be
12 mindful of the need to ensure respect for human rights and the
13 fundamental freedoms. I have no doubt that the Court Officer was
14 very careful when she weighed up the difference between a
13:51:46 15 four-hour journey by road for you and for others every day, and
16 having you somewhere that is closer and easier to accommodate
17 you.

18 This Court, that is, Trial Chamber II, in its ruling in the
19 case of *The Prosecutor v. Taylor* in November 2006, has said that
13:52:14 20 only in limited circumstances may a Trial Chamber review the
21 administrative decisions of the Court Officer, and that is only
22 where they are closely related to the fundamental trial rights of
23 an accused. Where you stay, provided it complies with the
24 standards I have stated, then I cannot interfere unless it
13:52:45 25 affects your trial rights.

26 I have absolutely no doubt that in fulfilling her duties,
27 the Court Officer has carefully assessed that where you will stay
28 will meet those standards, so I cannot make a ruling that changes
29 that decision.

1 Mr Kamara, did you hear what I said?

2 THE ACCUSED KAMARA: You have to come again, Ma'am.

3 JUSTICE DOHERTY: I've said two things, Mr Kamara: First
4 of all, we're going to make sure you are able to speak to
13:53:28 5 Mr Serry Kamal. That's the first thing.

6 The second thing is that I cannot, and will not, interfere
7 with where you are staying during this hearing, and I do that for
8 several reasons.

9 The information I have is that where you're staying meets
13:53:56 10 our detention rule standards. The second reason is I can only
11 interfere with an administrative decision if it affects your fair
12 trial rights, and this does not.

13 I understand. I know that you wrote to the Court in
14 December asking to come back to Pademba Road Prison. I have been
13:54:29 15 to Mpanga Prison, and I know what the standards are there. So I
16 am confused on what you are telling me.

17 So again, Mr Kamara, have you heard what I said?

18 THE ACCUSED KAMARA: Yes. I got you now loud and clear,
19 Ma'am.

13:54:55 20 JUSTICE DOHERTY: Thank you, Mr Kamara.

21 Mr Kanu, did you hear what I said?

22 THE ACCUSED KANU: Yes, Your Honour. I am getting you loud
23 and clear. But I really want to say something.

24 JUSTICE DOHERTY: If it's challenging what I said, you
13:55:09 25 can't continue. I've heard what you said and I've listened to it
26 carefully. So if it's the same thing again, we're going to move
27 on. Is it the same thing again?

28 THE ACCUSED KANU: You are talking about Pademba Road?

29 JUSTICE DOHERTY: Yes.

1 THE ACCUSED KANU: You have been told, but you don't know
2 where we are talking about. Where we are, we have over 10.000
3 people. You cannot compare that place with Pademba Road.
4 Pademba Road is over - we are talking about 1.000 people. Then
13:55:49 5 you are talking about 10.000 people. Then the Court Officer is
6 telling you different thing. So --

7 JUSTICE DOHERTY: Mr Kanu, I've made a decision. I am not
8 going to go behind it again.

9 Now, counsel, that leaves us with the one last matter -

13:56:13 10 THE ACCUSED KANU: I do not think --

11 JUSTICE DOHERTY: Mr Kanu, please do not argue with me.

12 THE ACCUSED KANU: I do not think I will stay in that place
13 and come to your Court. No, I will not do that.

14 JUSTICE DOHERTY: Well, I'm not putting you up in a hotel.

13:56:32 15 The third matter - and I'm hoping we can deal with it
16 shortly, because I'm thinking of the tape - is how we are going
17 to schedule this hearing.

18 I've looked at times myself because of the two-hour
19 difference between ourselves and Kigali. I thought to myself
13:56:51 20 about making sure the accused detainees get back to the facility
21 and also get time to eat, because they are two hours ahead of us.

22 I have in mind that we can try starting earlier here. Now,
23 we have to be realistic. Transport's not easy in this town, and
24 we have many staff who have to be in with us as well as counsel
13:57:31 25 themselves. So I propose that we start at 9.00. That's the
26 first question. Does that pose a problem for anyone, or has
27 anyone got a comment on that? That would be 11.00 in Kigali.

28 MR HERBST: Your Honour, my understanding is that would not
29 be a problem for the Prosecution.

1 MR KAMAL: 9.00 will not be a problem for me.

2 MR NICOL-WILSON: Your Honour, as long as it is not a
3 problem for Mr Kamal, it will not be one for me.

4 JUSTICE DOHERTY: [Microphone not activated]

13:58:16 5 MR METZGER: Ditto.

6 JUSTICE DOHERTY: Chief Taku, I know you will not be
7 present for a few days, but will it --

8 CHIEF TAKU: It wouldn't be a problem. Just in respect of
9 when the scheduling for the sentencing will be, then I will
13:58:33 10 present my case. It will not be a problem because it will apply
11 to that stage in the proceedings also.

12 JUSTICE DOHERTY: Thank you. If we were to sit for two
13 hours from 9.00, that would bring us to 11.00 and 1 o'clock in
14 Kigali, which is a reasonable time for people in Kigali to have
13:58:51 15 some lunch. And if we were to take three-quarters of an hour
16 then instead of the usual half-hour, it might allow them that
17 leeway.

18 If we were to resume at 11.45 and sit to 1.15, then that's
19 a fairly reasonable time for those of us here to have a lunch
13:59:20 20 break. Again if I sat 45 minutes and then resume at 2.00 and sit
21 until 3.30, 3.30 being 5.30 in Kigali. And bearing in mind that
22 Mr Kamara and Mr Kanu have to be transported back before
23 lockdown.

24 Those are my suggestions and I put them before counsel to
13:59:38 25 see if they would work, at least for this coming week.

26 Now, I'll deal with that first.

27 MR HERBST: I'm sorry, Your Honour. I missed - I heard 9
28 to 11, and then 11.45 to 1.15, but I didn't hear the third leg.

29 JUSTICE DOHERTY: At 2 o'clock to 3.30.

1 Mr Herbst, normally this Court sits to 4.30, but I'm
2 bearing in mind the fact that we've got this two-hour difference.

3 MR HERBST: Your Honour, the Prosecution is quite dedicated
4 and doing everything possible to make sure that the trial is as
14:00:13 5 fair as possible, and we have no objection.

6 JUSTICE DOHERTY: Counsel for the Defence.

7 MR METZGER: We are content with that.

8 JUSTICE DOHERTY: Now, Mr Metzger in his submissions has
9 raised issues concerning the time in Kigali.

14:00:33 10 I feel, having reflected upon it, that I will, of course,
11 entertain it, Mr Metzger, for fairness to the accused. That's an
12 exceptionally important matter. But I would suggest that maybe
13 it would be more appropriate, at least at the end of the next
14 week after we see how things go, to review that situation then.
14:00:55 15 I think that would be best. Unless you have a submission to make
16 now?

17 MR METZGER: No, I am content with Your Honour reviewing
18 it. Just from experience - and of course I have not experienced
19 where they are being held now - but it would be helpful to have
14:01:10 20 some time with Mr Kanu before we have to call evidence or deal
21 with any issues in Kigali, and that's really the point that I was
22 trying to make.

23 JUSTICE DOHERTY: Well, certainly we will accommodate that,
24 Mr Metzger.

14:01:26 25 MR METZGER: Thank you.

26 JUSTICE DOHERTY: Mr Court Attendant has informed me that
27 Mr Kanu has a doctor's appointment on Monday. Do you know
28 anything about that, Mr Metzger?

29 MR METZGER: No, Your Honour. I'm afraid I did speak to

1 him this morning before we came into Court, but it seemed that
2 the conditions that were prevalent on his mind were those which
3 have been raised before Your Honour at this point in time. I
4 know that he has been seen on a number of occasions, but
14:01:58 5 specifically as far as Monday is concerned, I cannot assist.

6 JUSTICE DOHERTY: It is always wiser that counsel speaks on
7 behalf of a client in these situations. So possibly what I will
8 ask you to do, Mr Metzger, is ask you to speak to Mr Kanu on this
9 matter, ascertain the time, and then ascertain whether a Rule 60
14:02:25 10 waiver would be something he would consider. And if he doesn't,
11 then we will deal with that when you tell us what the situation
12 is. I would prefer you deal with it.

13 I think it's more appropriate that you deal with it. It's
14 not my preference; it's the proper procedure.

14:02:45 15 MR METZGER: Would Your Honour wish for me to, as it were,
16 bring that to your attention when we resume, or perhaps later on
17 to pass the information?

18 JUSTICE DOHERTY: I think it's best that we do it in open
19 court, because other counsel are present and they may wish to
14:03:08 20 decide. If there has to be an adjournment, we should deal with
21 it in open court and on the record. So we'll deal with it maybe
22 first thing Monday.

23 MR METZGER: So be it.

24 JUSTICE DOHERTY: Are there any other matter to be raised?
14:03:24 25 Yes, Mr Kamal.

26 MR KAMAL: Yes, Your Honour. This question of
27 communicating with my client. He is not now at Mpanga Prison.
28 He's at Kigali. We don't know where he is, and we don't know
29 what number to contact him. So the personal communication will

1 still be zero.

2 JUSTICE DOHERTY: No, well, let me see.

3 Mr Carlton-Hanciles has a --

4 MR KAMAL: She's a witness.

14:03:57 5 JUSTICE DOHERTY: Do you know a contact number? Well, I'm
6 asking you that --

7 MS CARLTON-HANCILES: Yes.

8 JUSTICE DOHERTY: -- as the presiding officer here in this
9 court.

14:04:05 10 MS CARLTON-HANCILES: Yes, Your Honour, I have a contact
11 number for counsel for them to talk to their clients in Kigali.

12 JUSTICE DOHERTY: Well, if you have any feelers, personal
13 problem with you giving it direct to counsel, in light of the
14 application before me that's not decided, I would ask you to pass
14:04:26 15 to my Associate, who in turn will give it to counsel immediately.

16 MS CARLTON-HANCILES: I will, Your Honour. I have my phone
17 outside.

18 JUSTICE DOHERTY: Any other matters? Yes.

19 CHIEF TAKU: Yes, Your Honour. My flight out of here is on
14:04:42 20 the 21st, so I will be in Court until then. So on the 21st I
21 will leave. So I want to put that on the record.

22 JUSTICE DOHERTY: Oh, thank you. I thought you were going
23 immediately. That's helpful, Mr Taku.

24 CHIEF TAKU: Getting a flight from here to Cameroon is very
14:05:00 25 difficult.

26 JUSTICE DOHERTY: Mr Herbst, is there something?

27 MR HERBST: Yes, Your Honour, two matters. One is that I
28 mentioned in the course of the colloquy about the application of
29 the privilege and the exception, that I had suggested handing up

1 to the Court the Daniels e-mails to actually consider. I
2 neglected to actually follow-up on that and do it. That's one
3 issue.

14:05:39 4 The second issue relates to the release or continued bail
5 status of Mr Bangura.

6 JUSTICE DOHERTY: Well, of course, both accused. I am
7 definitely coming to that.

8 I've reflected on the e-mails, and in the light of what
9 Mr Metzger has said I will not read them. I will decide on the
14:05:54 10 issues before me.

11 MR NICOL-WILSON: Your Honour, if I got the Independent
12 Counsel clearly - he mentioned something about the continued
13 release of bail status of Mr Bangura.

14 JUSTICE DOHERTY: Well, at the end of every hearing there
14:06:21 15 is a decision made on whether an accused is on bail or on remand.
16 So we're coming to that point now in this case.

17 MR NICOL-WILSON: Okay, Your Honour. Because I will want
18 to continue --

19 JUSTICE DOHERTY: Yes, please make your submission on this
14:06:37 20 point. We will deal with them one at a time, because Mr Kargbo
21 is also in that position.

22 MR NICOL-WILSON: As Your Honour pleases. Your Honour, I
23 would like to --

24 MS CARLTON-HANCILES: Your Honour, before Mr Nicol-Wilson
14:07:01 25 begins, I just want to maybe correct the record. I heard you
26 call the name "Kargbo", but the person who spoke was Kamara, not
27 Kargbo.

28 JUSTICE DOHERTY: Thank you. I'm notorious for misnaming
29 people.

1 Mr Nicol-Wilson, your client was on bail.

2 MR NICOL-WILSON: Yes, Your Honour.

3 JUSTICE DOHERTY: And the case is now opened.

4 MR NICOL-WILSON: Yes, Your Honour.

14:07:32 5 JUSTICE DOHERTY: And the question will arise to his status
6 now that the case is now open.

7 MR NICOL-WILSON: Yes, Your Honour.

8 Your Honour, I will want to apply that Mr Bangura continue
9 to enjoy the release granted to him by this Court when he first
14:07:48 10 appeared. Specifically, Your Honour, Mr Bangura has complied
11 with the terms of the bail condition ordered by this Honourable
12 Court since his first appearance.

13 He has reported at the agreed time, and this is at the
14 Registrar's office and has not in any way violated any of the
14:08:34 15 conditions granted to him by this Honourable Court.

16 Additionally, Your Honour, Mr Bangura has not interfered
17 with any witnesses for the Prosecution. He continues to be of
18 good conduct, and is ready, willing, and able to submit to the
19 jurisdiction of the Court throughout these proceedings.

14:09:10 20 Your Honour, should the Court require, Mr Bangura will be
21 able to provide sureties for his release, but I will submit
22 that that condition should not be imposed as a requirement for
23 bail, in view of the fact that he has surrendered himself in the
24 absence of sureties. Mr Bangura has also surrendered his only
14:09:41 25 travelling document, a Sierra Leonean passport, as was ordered by
26 Your Honour during the last proceedings.

27 Your Honour, I would therefore respectfully crave your
28 indulgence for him to continue to enjoy the status of bail
29 throughout these proceedings.

1 JUSTICE DOHERTY: Thank you.

2 CHIEF TAKU: May it please the Honourable Court, I would
3 respectfully apply that the bail of Mr Kargbo be extended. My
4 application, Your Honour, is premised on the following things:
14:10:31 5 (1), as soon as you granted be able, the Honourable Registrar
6 communicated the terms of the bail to me and to Mr Kargbo. I
7 would hereby tender that form itself.

8 Your Honour, for purposes of certainty, I applied to the
9 honourable Registrar to issue a certificate of good conduct - a
14:11:37 10 certificate of compliance with all the conditions that were
11 ordered by this Court, and the Court Officer ordered on 3 May
12 2012 that a certificate issue. Here is a copy of the
13 certificate. It is a certificate of good conduct within the
14 period of his bail.

14:12:53 15 JUSTICE DOHERTY: Thank you. I've read both documents.

16 CHIEF TAKU: Yes, Your Honour.

17 Now, Your Honour, in your decision of the scheduling order,
18 dated 1 June 2012, in paragraph 8, in deferring the sentencing of
19 Mr Kargbo to the end of the trial, you cited the provisions of
14:13:21 20 Rule 101(B) and 19(ii) and (iii). In other words, you've granted
21 bail to Mr Kargbo, who is now on the Prosecution witness list;
22 who is also now under the witness protection programme of the
23 Court and will have ample opportunity to demonstrate his
24 cooperation with the office of the Court Officer and also be in a
14:13:50 25 position to comply with paragraph 8 of this order for good
26 conduct of the trial ordered 1st of June, 2012.

27 So, My Lord, we respectfully, Your Honour, ask the Court to
28 release him on bail. That release on bail additionally allowed
29 him to have the ability to comply with the terms of his plea

1 agreement. If his movement is restrained, he will not have the
2 ability to fully comply with the terms of his plea agreement, and
3 that will be prejudicial to him in the sentencing hearing.

4 With that, Your Honour, we respectfully submit and pray the
14:15:03 5 Honourable Court to grant our application.

6 JUSTICE DOHERTY: Please.

7 MR HERBST: Your Honour, in view of the certificate
8 tendered by counsel for Mr Kargbo, I see no reason to alter the
9 conditions of bail on release in his case, and I join in the
14:15:37 10 application - or I have no objection to the application that he
11 can be continued on release under the present conditions.

12 I'm sorry to say that I cannot say the same with respect --

13 THE COURT OFFICER: Your Honour, may I interrupt. We have
14 run out of tape.

14:16:38 15 JUSTICE DOHERTY: I am informed that it will only take a
16 few minutes to change the tapes, so we will not adjourn. We will
17 just sit here.

18 THE COURT OFFICER: We can proceed, Your Honour.

19 JUSTICE DOHERTY: Mr Herbst, I am informed that the tape
14:17:52 20 has been changed and we can continue. You had prefaced your -
21 you were now dealing, I think, with Mr Bangura.

22 MR HERBST: Yes, Your Honour.

23 I believe I was saying that unfortunately I cannot take the
24 same position with respect to Mr Bangura's continued release.

14:18:10 25 That is because in the last 24 hours I have received information
26 that leads me to believe that Mr Bangura has, in fact, violated
27 the conditions of release in this regard.

28 First of all, it's my understanding, and in my recollection
29 from the transcript of the Initial Appearance, in which Your

1 Honour will recall I was not able to be present, but another
2 appointed counsel stood in for me, that the conditions of
3 Mr Bangura's bail are similar to Mr Kargbo's in that he was not
4 to contact any witness or alleged victim directly or indirectly
14:18:57 5 and was to be on good behaviour.

6 The information I've received in the last 24 hours is that
7 Mr Bangura has reached out to contact 334 in the last week and
8 communicated to him in substance that he had received 334's
9 statements and asked him - or indicated to him - he needs his
14:19:29 10 help, and what he said about the help is that, If you can deny
11 the statements in which you mentioned my name, it would be of
12 great help or benefit to me.

13 So I consider that to be - and then yesterday, I am further
14 informed that Mr Bangura called 334 on his cell phone. 334
14:20:08 15 basically put him off, but - and the call lasted about a minute
16 and 40 seconds, if my recollection is correct. So I consider
17 that information to be evidence of not only the violation of the
18 condition of his release not to contact a witness or alleged
19 victim directly or indirectly but as evidence of a continued
14:20:45 20 course of conduct to interfere with the administration of
21 justice; in effect, it's another instance of the conduct that was
22 charged.

23 So that's the basis of my application to the Court, that he
24 be remanded pending the trial of the case. I will note that
14:21:13 25 there is always an increased risk of flight when trial is upon
26 the accused, but I'm not essentially relying as much on that as I
27 am about the conduct which concerns me. In Mr Kargbo's case I
28 don't believe there is any risk of flight, and I believe he will
29 continue to appear as he, you know, has in the past whenever he

1 was needed.

2 But I am constrained to say that unfortunately I cannot say
3 the same about Mr Bangura.

4 JUSTICE DOHERTY: Yes, Mr Wilson.

14:21:58 5 MR NICOL-WILSON: Your Honour, just a brief reply to
6 submissions by the Independent Counsel.

7 I will start with the last point, that he believes
8 Mr Bangura is a flight risk because proceedings have started. I
9 would say he's not because his conduct in the past and his
14:22:18 10 conduct even today shows that he's not a flight risk. He's fully
11 informed about these proceedings. He knows today is a Status
12 Conference and on Monday the proceedings will start in earnest
13 but yet still he's here in Court.

14 Also when the other in lieu of indictment was served on
14:22:42 15 him, he voluntarily surrendered himself to the Court, and he took
16 a plea here, and he did not run away. And he had ample
17 time to move out of the jurisdiction from the time he was
18 admitted today and the time before today's appearance in Court
19 but yet he still did not move out of the jurisdiction. So I
14:23:02 20 would say he's not a flight risk, Your Honour.

21 On the issue of contact, this is a very ambiguous
22 situation. Firstly, I will start by saying that the Independent
23 Counsel has not provided any certificate showing that my client
24 has not complied with the bail conditions imposed, nor has he
14:23:26 25 provided any evidence of contact with 334 behind saying that he
26 has been informed, which in itself amounts to hearsay.

27 I will submit that the information I have received from my
28 client is that he continues to, whilst moving open around
29 Freetown, he normally sees 334 and the co-accused. I am also

1 informed that even though the - there is an argument that the
2 co-accused is under the witness protection system, but he
3 continues to live under the same roof with 334. That is my
4 information. I am not sure, Your Honour.

14:24:30 5 But the point I am trying to hammer home is that Freetown
6 is so small that there is every likelihood for people to meet in
7 different rendezvous, notwithstanding the protective measures
8 that have been put in place. But my information is that my
9 client has never contacted 334 asking him to help - asking him
14:24:52 10 for help, nor has he violated any of the conditions of the bail.

11 And I think rather than the Independent Counsel making the
12 statement viva voce he should have submitted some tangible
13 evidence to the effect that such contact have been documented so
14 that the Court will be able to assess it beyond a reasonable
14:25:17 15 doubt.

16 So I would insist again, Your Honour, and I would draw your
17 attention to Rule 65(C) which says that:

18 "An accused may only make one application for bail to the
19 Judge or Trial Chamber unless there has been a material change in
14:25:35 20 circumstances."

21 I will submit that I have made an application before on
22 behalf of the accused when this matter was first summoned for
23 hearing before Your Honour, and I will submit that there has been
24 no material change in circumstances because when the matter
14:25:53 25 started it was very logical that - a logical sequence of the
26 event is that the trial will proceed after the plea has been
27 taken. So I would submit that there has been no material change
28 in circumstances.

29 And I would say that the Prosecutor has not appealed

1 against your decision to grant bail to Mr Bangura. He has merely
2 objected. And so there is no basis under Rule 65 for his
3 objection to be tolerated at this point because bail had already
4 been granted in accordance with Rule 65(C) and he has not
14:26:42 5 complied with the provisions of Rule 65(G) in his - in appealing
6 against your decision to grant bail.

7 I will continue to maintain that Mr Bangura will continue
8 to be of good behaviour and will continue to surrender himself to
9 the jurisdiction of this Court, and will furthermore warn him not
14:27:11 10 to have any indirect contact with 334 or the co-accused because
11 he has indicated to me that he has not had any direct contact
12 with 334 and the co-accused. But I will continue to plead with
13 him not to have any indirect contact and to just stay away until
14 the end of these proceedings.

14:27:34 15 I would crave your indulgence, Your Honour, for him to
16 continue to enjoy the bail conditions imposed upon him during his
17 Initial Appearance. Thank you.

18 JUSTICE DOHERTY: Just a point of clarification,
19 Mr Nicol-Wilson, when bail was granted to Mr Bangura last year,
14:27:54 20 the Prosecution did not object. So there was no reason why they
21 should appeal to something that they had not objected to
22 originally.

23 MR NICOL-WILSON: As Your Honour pleases.

24 MR HERBST: Your Honour, very briefly in reply.

14:28:10 25 Because I received this information so recently and was
26 unable to prepare any written submission on this, I do have 334
27 available to give testimony if Your Honour believes it's
28 necessary. He has the number of Mr Bangura in his cell phone,
29 and he can testify in a few minutes to the contacts if Your

1 Honour feels it's necessary.

2 So I did at least make that provision so the Court, if it
3 wished, could make that inquiry.

4 I also do want to assert that my application is, as Your
14:28:50 5 Honour has noted, based on change of circumstances at the time
6 last year we did not oppose release. We didn't have the
7 information that we do now.

8 JUSTICE DOHERTY: Thank you.

9 This is a decision on two applications relating to the bail
14:33:42 10 of the accused persons Bangura and Kargbo. Once a trial
11 commences, a person comes within the control of the Court, and
12 the Court normally considers their status during the hearing.

13 I have no reason to disbelieve the matters put forward by
14 counsel for the Prosecution, that a complaint was received, and I
14:34:08 15 have no reason to disbelieve that there was no basis for the
16 complaint.

17 Such an allegation, albeit a hearsay one, are not made
18 lightly. I consider that this is a serious turn of events. For
19 that reason the accused Bangura will be remanded in custody and
14:34:33 20 his bail is now revoked.

21 In relation to the defendant Kargbo, no objection has been
22 made to the extension of his bail, notwithstanding the fact that
23 he also is in the custody of the Court. However, I am concerned
24 to hear, not from his own counsel but from someone else, that he
14:34:54 25 is sharing accommodation with 334. I will require information on
26 this particular matter on Monday morning.

27 Mr Kargbo's bail is extended and I will ask his counsel to
28 address me on Monday morning about his accommodation.

29 MR TAKU: Thank you, My Lord.

1 JUSTICE DOHERTY: So that I thought was the end of
2 everything, but I've just been passed up a note which I will read
3 out. An information has come from Kigali that the accused Kamara
4 wants me to be informed that if I insist on him being kept in
14:35:36 5 Kigali prison, he will not cooperate with the Court.

6 I put that on record. And if he refuses to cooperate with
7 the Court, and if he is not here on Monday, I will consider the
8 provisions of the rules relating to persons who deliberately
9 absent themselves and I will make whatever ruling is appropriate
14:35:58 10 in light of the circumstances at that time.

11 Mr Kamal, this was - should really have gone to you as much
12 as to me. I make no ruling in relation to your client because
13 you have not had an opportunity to speak to him.

14 MR KAMAL: That is exactly what I was going to say.

14:36:16 15 It's unfortunate that the document went to you. I would
16 have thought that it should have come to me, since I am
17 representing him.

18 JUSTICE DOHERTY: I am going to pass it over to you, but I
19 want you to know it came to me because it's coming from a Court
14:36:32 20 Officer and a Court Officer normally addresses the Bench. I
21 don't see any impropriety. Because Mr Kamara himself or one of
22 them said they were going to do it.

23 So I will pass this over to you.

24 Mr Kamal.

14:36:47 25 MR KAMAL: I was only going to say that I have just
26 received a business report from Court Officer giving me a
27 telephone number, and I shall endeavour to contact my client at
28 my own expense.

29 JUSTICE DOHERTY: We will try and assist you.

1 MR KAMAL: I would -- [Overlapping speakers]

2 JUSTICE DOHERTY: I will ask if you can be assisted.

3 MS CARLTON-HANCILES: He will be assisted, Your Honour.

4 JUSTICE DOHERTY: If there is no other matters, I want to
14:37:20 5 thank counsel for sitting so long today. We had all hoped it
6 would be much shorter.

7 Mr Metzger.

8 MR METZGER: Your Honour, yes. Two minor matters. It
9 would appear that Your Honour hasn't had a similar note passed up
14:37:36 10 about Mr Kanu whose appointment is actually at 9.00 a.m. on
11 Monday. That's a note that was passed to me presumably using the
12 same telegraph system which reached Your Honour.

13 And it seemed prudent to mention that bearing in mind we
14 are supposed to start at 9.00, and if he has got a doctor's
14:37:56 15 appointment, which he is allowed to go to by yourself, he
16 certainly won't be here at 9.00.

17 JUSTICE DOHERTY: Well, shall we deal with that at 9.00?
18 Because you will need to take instructions --

19 MR METZGER: Indeed.

14:38:06 20 JUSTICE DOHERTY: -- as to what his attitude is, and I do
21 not want to preclude you from taking these instructions. And
22 we'll deal with that at 9.00.

23 MR METZGER: I shall avail myself of the same assistance,
24 hopefully, as my learned friend.

14:38:22 25 And one final thing I had wanted to say. Just for the
26 record, I have written to Mr Herbst about this.

27 It appears to me from the Rule 66 disclosures that the
28 Prosecution gave that there is a record of contact with 334
29 because the document served suggests that this was a contact

1 summary. I have asked for full disclosure of all contact between
2 334 and the relevant people who were handling him as disclosed by
3 the material that we've been shown, and Mr Herbst very kindly
4 says I have everything he has.

14:39:01 5 Respectfully, I am putting it on the record, that it's
6 clear from what's been disclosed to me, that everything he has,
7 if that's what's he served to me, isn't everything that there is
8 because if it's a summary then clearly there is presumably a
9 redacted or fuller version elsewhere, and the Defence are
14:39:23 10 entitled to have that before embarking on cross-examination of
11 334.

12 Those are the matters I raised.

13 JUSTICE DOHERTY: Mr Herbst.

14 MR HERBST: Yes, Your Honour. Thank you.

14:39:32 15 First of all, I wonder if it might be helpful to the
16 parties and the Court if while Mr Metzger were inquiring with
17 respect to the medical appointment on Monday, first whether the
18 appointment is at 9.00 Kigali time or 9.00 our time. And also
19 the - and I don't - I am not interested in being privy to this
14:40:01 20 information, but it might assist the Court to understand a little
21 bit more about what the nature of the medical problem is and
22 whether the medical appointment could be changed to accommodate
23 the Court schedule or not. That's, again, nothing that I am
24 interested in hearing about. But it seems to me to make sure
14:40:23 25 that things go forward and go smoothly and to respect the right
26 of the defendant to be present during the proceeding, it might
27 assist the Court and the parties in knowing that. That's one
28 issue.

29 JUSTICE DOHERTY: Well, the reason I did ask Mr Metzger to

1 check that was because I didn't really know whether it was Kigali
2 time or our time and that's why I'd said we'll have to deal with
3 it on Monday morning when I know A, what time it is, because if
4 it's Kigali time obviously he will be here, and there are
14:41:02 5 provisions that allow for him to be absent or present and those
6 are set in the rules, and I will deal with them as soon as I know
7 the situation.

8 As to his medical condition, et cetera, that's private. If
9 it's something Mr Metzger feels is important and will affect the
14:41:21 10 trial, I have no doubt he will tell me or tell us.

11 MR HERBST: Your Honour, the second issue relates to the
12 contact summary which is about, I think, three pages or so and
13 the disclosures relating to the statements that 334 gave to
14 investigators and - investigators of the OTP.

14:41:46 15 I wanted to make sure that we had all relevant
16 communications so that what I did was I asked during the course
17 of my investigation for all descriptions of the pertinent
18 communications starting with the first report of the - of the
19 approach that was made in this case.

14:42:14 20 I have been advised that - that I have everything that
21 pertains to that. And, in fact, when you look at the summary, it
22 corresponds in certain ways to the actual memoranda of
23 interviewer statements themselves. So it's a little confusing as
24 to how it's set up and the computer programme isn't the greatest,
14:42:43 25 but I am also advised that in my efforts to get everything, and I
26 may have even intruded on the OTP's confidentiality concerns in
27 some respects, but my understanding is now that they do have
28 everything relating to contacts and communications that occurred
29 once the approach was reported.

1 JUSTICE DOHERTY: Mr Herbst, there wasn't an application to
2 make an order against you, so I don't think it's necessary to
3 deal with it, but I hope that what you've told us clarifies the
4 issues for Mr Metzger. If Mr Metzger still has some reservations
14:43:43 5 or doubts, I have no doubt that he will apply in accordance with
6 Rule 67 or 68 for that disclosure, and I'll entertain it at the
7 time.

8 So if there is no other matters - again, my apologies for
9 sitting so late - we'll adjourn until 9.00 on Monday morn.

14:44:02 10 Please adjourn Court.

11 [Whereupon the Status Conference
12 adjourned at 2.43 p.m.]

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