



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

-V-

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

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

1 [Tuesday, 19 June 2012]

2 [Open session]

3 [Accused present]

4 [Upon resuming at 9.02 a.m.]

09:02:42 5 JUSTICE DOHERTY: Good morning. I will first take  
6 appearances, but I will also indicate that I have been informed  
7 there are some problems concerning the Prosecutor.

8 Before I do that, I will check that everyone in Kigali can  
9 hear me. Kigali, can you hear me clearly?

09:03:09 10 Mr Herbst, I note you are present. I want to know can you  
11 hear me? I'm not hearing anything from Kigali. Mr Court  
12 attendant, can you please check the situation? I'm guessing the  
13 Prosecutor is telling me he can hear but I don't know because I  
14 can't hear him. Let's get this checked out.

09:04:00 15 MR HERBST: Your Honour, good morning. This is the  
16 Prosecutor.

17 JUSTICE DOHERTY: Thank you, Mr Herbst. I've heard you  
18 now.

19 I note also Mr Kanu and Mr Kamara are present in the Court.

09:04:16 20 THE COURT OFFICER: He is speaking but I don't know why  
21 we - yes, Your Honour Mr Kanu and Mr Kamara are present in Court.

22 JUSTICE DOHERTY: Thank you. I will now proceed to take  
23 other appearances.

24 Appearances, please.

09:04:33 25 MR NICOL-WILSON: Your Honour, Melron Nicol-Wilson for  
26 Hassan Papa Bangura.

27 CHIEF TAKU: May it please the Court, I appear for  
28 Mr Kargbo.

29 JUSTICE DOHERTY: Thank you.

1 MR KAMAL: I appear for Brima Bazzy Kamara.

2 JUSTICE DOHERTY: Thank you.

3 MR KAMAL: [Microphone not activated] Santi gie Bobo Kanu,  
4 sorry.

09:05:11 5 JUSTICE DOHERTY: Mr --

6 MS CARLTON-HANCILES: Your Honour, I was only standing in  
7 for Mr Kevin Metzger and he's now here.

8 MR METZGER: My apologies to the Court for my tardy arrival  
9 this morning. I'm here for Mr Kanu.

09:05:38 10 JUSTICE DOHERTY: Thank you.

11 I note appearance for Mr Kargbo; is that correct Mr Taku?

12 CHIEF TAKU: Yes, Your Honour.

13 JUSTICE DOHERTY: And Mr Bangura from custody.

14 MR NICOL-WILSON: Yes, Your Honour.

09:05:57 15 JUSTICE DOHERTY: We'll proceed. I'm now addressing the  
16 Prosecutor as well as counsel here present. I was informed early  
17 this morning that there may be health problems involving the  
18 Prosecutor. I note that he is in Court and I think it is best  
19 that he address us on that issue himself.

09:06:22 20 Mr Herbst, can you inform us of the situation, please?

21 MR HERBST: Your Honour, it appears that I have some sort  
22 of bug, probably a virus. It doesn't appear to be more serious  
23 than that. I have some fatigue but I would like to proceed at  
24 least through opening statements, if that is a possibility.

09:07:05 25 JUSTICE DOHERTY: That will be the proper procedure to  
26 adopt and I will then ask you to give us your opening statement.  
27 At the end of that we will then review the situation.

28 Chief Taku is on his feet. Please pause.

29 CHIEF TAKU: May it please Your Honour, before we adjourned

1 on Saturday you did order us to address you on a particular issue  
2 regarding Mr Kargbo and Witness 334.

3 JUSTICE DOHERTY: I haven't forgotten that at all. That's  
4 very much at the top of my mind, and I had thought it might be  
09:07:43 5 appropriate to deal with that later. But if you're raising it  
6 now perhaps we'll get it over and done with. It might be an  
7 issue that could be the subject of cross-examination for all I  
8 know. So please continue to address me on that.

9 CHIEF TAKU: Yes, Your Honour. Thank you very much. It is  
09:08:06 10 appropriate that we address it now because thereafter Your Honour  
11 will require to make an order about the presence of Mr Kargbo  
12 here while the evidence is being led because he's on the witness  
13 list for the Prosecutor. So at some point in time before the  
14 trial commences, you're required to order that he get to the  
09:08:39 15 witness protection room so that evidence is being led so that he  
16 doesn't sit here and listen to the testimony of another witness.  
17 I do not know the order in which the Prosecutor intends to call  
18 evidence, but he indicates when he is leading evidence it will be  
19 desirable that Mr Kargbo does not really sit here in the  
09:08:57 20 courtroom at that point in time. That said, Your Honour, may I  
21 address the issue.

22 If I understood the issue correctly, your Honour, at page  
23 95 of the transcript - no, pages 93 and 94 of the transcript, my  
24 learned colleague stated clearly I will submit that the  
09:09:41 25 information I've received from my client is that he continues to  
26 while moving up and around Freetown [indiscernible] and the four  
27 accused. I'm also informed that even though there is an argument  
28 that the co-accused under the witness protection system but he  
29 continues to live under the same roof with 334, that is my

1 information. I'm not sure, Your Honour. I'm relying what my  
2 colleagues - I'm not sure. He merely brought this to your  
3 attention.

4 The order Your Honour made at page 96 was.

09:10:27 5 THE COURT OFFICER: [Kigali] Your Honour, can I interrupt  
6 the Court, please.

7 MR HERBST: Your Honour, there's a technical problem here.  
8 Let me explain. When a lawyer is speaking as Chief Taku was just  
9 speaking, the simultaneous interpretation is heard at the same  
09:11:01 10 time and it becomes very difficult to understand what the counsel  
11 is saying. So I had significant difficulty following

12 [microphone not activated] said because in conjunction with the  
13 two voices at the same time - I don't know what can be done about  
14 that - but [indiscernible] if possible that it be dealt with  
09:11:32 15 because it's very difficult and at times impossible to understand  
16 what is being said.

17 JUSTICE DOHERTY: Very well, Mr Herbst. I will ask  
18 Chief Taku to have a seat and I will address the interpreter and  
19 then the technicians.

09:11:51 20 Mr Interpreter, we're informed that the interpretation and  
21 counsel's address are being heard in English at the same time in  
22 Kigali and it's obviously very difficult to hear two voices at  
23 once. Can you tell me what the technical situation is?

24 THE INTERPRETER: Your Honour, I think the technicians are  
09:12:11 25 the best people to answer that question. We are merely  
26 interpreting all that is being said in Court.

27 JUSTICE DOHERTY: Thank you. I'll ask the Court attendant  
28 to see if we can find out what's happening. Mr Herbst, are you  
29 still getting two voices?

1 MR HERBST: When your Honour was speaking [i ndi scerni ble]  
2 questions to the interpreter, there was no second voice  
3 conflicting with Your Honour's voice, and when the interpreter  
4 was speaking, Your Honour was not speaking and therefore I could  
09:12:53 5 hear loudly and clearly. Unfortunately, I really could not tell  
6 you right now what Chief Taku has already told the Court. It was  
7 that di ffi cul t to fol low.

8 JUSTICE DOHERTY: Whi lst the techni ci ans are trying to get  
9 to the bottom of this problem, I will tell you what Chief Taku  
09:13:19 10 submitted. He referred to an issue that arose on Saturday. He  
11 referred to pages 93 to 94 of the transcript.

12 THE INTERPRETER: Your Honour, can we conti nue the  
13 interpretation or just wait? Because if we do he may not hear  
14 again as you speak.

09:13:39 15 JUSTICE DOHERTY: I think you don't need to interpret this  
16 because I'm repeating what's already been said. So don't bother  
17 interpreting what I'm saying, and then I'll tell you when to pick  
18 up the interpretation again because I'm only repeating what's  
19 already been said.

09:13:56 20 THE INTERPRETER: Very well, Your Honour.

21 JUSTICE DOHERTY: So Ki gal i, Chi ef Taku was referring to a  
22 matter that arose on Saturday where other counsel had stated that  
23 Mr Bangura saw Wi tness TF1-334 and Mr Kargbo around Freetown and  
24 also stated that he believed they were li vi ng under the same  
09:14:36 25 roof. I had raised concerns on Saturday and I had asked for a  
26 report on that, and we're now deal ing wi th that. So I'm now  
27 going to swi tch off my mi crophone and check what the si tuati on is  
28 wi th the techni ci ans.

29 THE INTERPRETER: Your Honour, the techni ci an is here in

1 the interpreter's booth and he would like to proffer an  
2 explanation.

3 JUSTICE DOHERTY: Thank you, Mr Interpreter. If you could  
4 do that because I'm thinking of various ways forward. So please  
09:17:59 5 explain and we will all hear.

6 THE INTERPRETER: The interpretation is supposed to be  
7 simultaneous interpretation. However, because there's a slight  
8 delay in one of the lines, it's coming out at the same time and  
9 confusing the parties in Kigali. So what I would recommend is  
09:18:26 10 for there to be a pause between - like when Chief Taku is  
11 speaking, he pauses, the interpretation goes through, then he  
12 speaks again and he pauses again.

13 THE COURT OFFICER: The problem is that Chief Taku or  
14 whoever is speaking on the floor will not know when the  
09:18:49 15 interpretation is done so I don't know how we sort that out.

16 THE INTERPRETER: It will be sorted out in the booth.  
17 Chief Taku should just focus on speaking and pausing and the  
18 booth will do the interpretation and then continue.

19 JUSTICE DOHERTY: Chief Taku, I think this is one of the  
09:19:08 20 issues that came up actually as a preliminary matter on Saturday  
21 morning. What we will do is this: I would ask you to continue,  
22 to pause. If it's not working, we will defer your matter and we  
23 will hear from the Prosecutor, who will not have the same problem  
24 speaking to us, and that will allow the technicians more time.  
09:19:33 25 So please proceed with your statement, pausing at the end of each  
26 sentence.

27 CHIEF TAKU: Thank you, Your Honour. At page 96, lines 21  
28 to 29, Your Honour ordered as follows:

29 "However, I'm concerned to hear not from his own counsel,

1 but from someone else, that he is sharing accommodation with 334.  
2 I will require information on this particular matter on Monday  
3 morning."

09:20:55 4 Pursuant to this order, I'm now respectfully providing the  
5 following information: (1), in the disclosures and the witness  
6 statements that are before Your Honour, including the statements  
7 from co-accused, the nature of the special relations between all  
8 of them, in particular Mr Kargbo, one - have been disclosed, and  
9 he had been very, very candid from day one.

09:21:57 10 From those statements, it is obvious that they were not  
11 living together. They set up every meeting by telephone, and  
12 that when Your Honour granted bail and set the bail conditions,  
13 those bail conditions have been followed to the letter. The  
14 certificate which was tendered speaks to this and the disclosures  
09:22:53 15 from the statement - his very candid statement from day one,  
16 speak to this fact. We rely on them. I would rely more  
17 especially on the presumption of regularity. Additionally, we'll  
18 furnish the Court with this confidential document from the  
19 Registry through witness protection indicating that Mr Kargbo has  
09:23:41 20 an accommodation in the area of Freetown that the Court  
21 indicated - the Court confined him to specific area of Freetown,  
22 and the witness protection and Kargbo have complied with this.

23 Mr Kargbo is married with two young children. There is no  
24 reason why he will live another man. He's a Christian with  
09:24:20 25 Christian values. There's no reason he would be living with  
26 another man, abandoning his wife to go and stay with another man.  
27 Besides, as Your Honour knows, 334 had been under the witness  
28 protection programme for as long as the number of cases he  
29 testified before this Court in which he was protected, and



1 therefore the WVS and the Registry would never have allowed him  
2 to live with another person.

3 That allegation in a way is an attempt to challenge the  
4 entire fundamental basis of the indictment, because it is the  
09:25:17 5 vigilance of the Prosecutor - Independent Prosecutor in making  
6 sure that the protective measures given to 334 were respected  
7 that this case could come about, and I do not know about 334  
8 complaining. He will complain. He complained about the earlier  
9 contact - conduct of this case, and he will complain again if  
09:25:44 10 anything happened.

11 As I said, Your Honour, the nature of the special relations  
12 between Mr Kargbo and that witness had been disclosed from day  
13 one during the investigation and by the filings which have made  
14 the sentencing information provided to the Court. We have not  
09:26:08 15 hidden anything but to say that they are living together,  
16 Your Honour, is clearly not correct, and I take cognisance of the  
17 fact that my colleagues said he didn't know. It was not vouch.  
18 He didn't vouch for the information provided. He merely passed  
19 the information he received to Your Honour.

09:26:29 20 I also recognise the fact that Your Honour, as preliminary  
21 matter, said that the nature of the relationship may become an  
22 important issue in the course of the trial when evidence is led.  
23 I hope they wait until that moment and lead the evidence. What  
24 they make of it we will know. But to say that on that  
09:26:48 25 representation alone they should rescind his bail. Your Honour,  
26 in the light of the information furnished I think it will not be  
27 fair. That will be the humble submission on this matter.

28 Before I sit down, at the end of the ruling Your Honour  
29 will make a determination as to whether he should sit here when

1 the trial proceeds, or he should move to the witness protection  
2 he needs when he will be brought in at the appropriate moment  
3 when he is supposed to testify.

4 Thank you very much for your kind attention.

09:27:24 5 JUSTICE DOHERTY: Thank you for your submission,  
6 Chief Taku.

7 Mr Herbst, you've heard the explanation given by counsel.  
8 The matter was actually raised by the Court and I technically do  
9 not require a reply, but if there's any matter you wish to  
09:27:44 10 comment upon, I will hear it.

11 MR HERBST: Your Honour, thank you. First, I just wanted  
12 to report to the Court that I'm getting feedback first from my  
13 own statement. I'm hearing my own voice repeated to me.  
14 Secondly, the interpretation proceeded fine for most of what  
09:28:27 15 Chief Taku said, but as we went on I guess the pauses became less  
16 and less and the problem resurfaced. There's no need to repeat  
17 what Chief Taku said. I heard enough. But I just again want to  
18 report that to the Court so that perhaps in future the problem  
19 could be continued to be worked on. I did want to - I did want  
09:28:57 20 to add that I had also made inquiry in response to Your Honour's  
21 direction and was advised by 334 that the allegation had no basis  
22 in fact, and I appreciate Chief Taku's greater elaboration, and  
23 what I learned is consonant with what I heard of Chief Taku's  
24 presentation.

09:29:35 25 I also if the Court would permit me to go into address very  
26 briefly two other preliminary matters that also came out  
27 Saturday. I do not yet have the benefit of the transcript of  
28 Saturday's session, but by my own notes the Court asked for us to  
29 identify for the Court the portions of the AFRC judgment to be

1 taken judicial notice of [indiscernible] that we would be asking  
2 the Court to review and take notice of.

3 I have had a chart of those portions of the judgment  
4 prepared, and I believe that in the courtroom there are copies of  
09:30:46 5 that chart for the Court and for all Defence counsel. If that is  
6 true, I would ask Mr Akimbobola to hand those copies up to the  
7 Court and to Defence counsel. That's the first matter. And  
8 after that is done, or if I can get confirmation of the fact  
9 those copies are in the courtroom, then I would like to very  
09:31:20 10 briefly address the second preliminary matter.

11 JUSTICE DOHERTY: I will have that checked. I see  
12 Mr Akimbobola has some papers in his hand. I will ask for them  
13 to be collected and checked by my associate, so please pause  
14 while we do that.

09:32:36 15 Mr Herbst, I've looked briefly at this compilation, and my  
16 initial reaction is that this does show paragraphs as directed by  
17 the Court. I will - I have asked that they be distributed to  
18 counsel for the Defence. I am going to allow counsel for the  
19 Defence some time to look at them, and after they have looked at  
09:33:11 20 them, I will then invite comment on tender under Rule 92*bis*.

21 There has been a preliminary indication from Mr Metzger that they  
22 could be admitted; however, now that we have the hard copy, it is  
23 important that it's examined and dealt with. So I will hold  
24 these and I will stand down the admission to allow counsel to  
09:33:39 25 consider it. So please proceed on to your second point.

26 MR HERBST: Thank you, Your Honour. Let me report before I  
27 get to that second point two things: (1) that the simultaneous  
28 translation that was going on while Your Honour was speaking  
29 contains the same problem; and (2), that I've been advised by the

1 Court personnel here that the problem is likely to take some time  
2 to correct because we [inaudible] hearing simultaneously the  
3 speaker and the translator. So I was asked by Ms Bola-Clarkson  
4 to communicate that to the Court.

09:35:04 5 The second preliminary matter that I wanted to raise is  
6 that in response to Mr Metzger's - one of his submissions with  
7 respect to the telephone records and telephone logs and in  
8 connection with the telephone at the Rwanda prison, we have  
9 [indiscernible] to identify pertinent and relevant calls from the  
09:35:44 10 telephone record. We have made a preliminary effort to do that  
11 over the weekend, and last night by e-mail I sent to all Defence  
12 counsel a list of the pertinent and potentially pertinent  
13 telephone calls that we've identified so far, so that Defence  
14 counsel could be on notice as soon as possible in response to  
09:36:28 15 their request. I will note that the telephone record from which  
16 these calls were identified has been available from the time of  
17 our Rule 66 disclosure a year ago, but we had not identified any  
18 specific calls in our disclosure. But having, in effect, did not  
19 notice that there would be some Defence inquiry and possibly  
09:37:11 20 evidence from Sam Kargbo who was mentioned by Mr Metzger in Court  
21 on Saturday [indiscernible], we decided to go back and take a  
22 closer look at the list that I provided to defence counsel last  
23 night is the result of that effort. I just wanted to make that  
24 on record to the Court and particularly before I delivered my  
09:37:54 25 opening statement, because I do intend to make some reference to  
26 a few of those calls in the opening.

27 JUSTICE DOHERTY: Thank you, Mr Herbst, there are actually  
28 now a total of three matters in front of me: First, I will  
29 accept the explanation given by Chief Taku relating to the

1 accommodation of the defendant Samuel Kargbo, particularly as it  
2 is vouched for by counsel for the Prosecution, item 1.

3 Item 2 are the transcripts. They have been circulated to  
4 Defence counsel and it will be stood down until Defence counsel  
09:38:47 5 have had an opportunity to consider them. Admission will then be  
6 considered. Item 3, Mr Metzger, you have heard Mr Herbst  
7 informing us that the document was conveyed to you. Can you  
8 confirm that you have received it?

9 MR METZGER: Regrettably, Your Honour, I have just this  
09:39:12 10 minute had a copy handed to me, having been, as it were, somewhat  
11 discomforted by my lack of usual access to internet facilities.  
12 From what I have seen, of course I am grateful to the independent  
13 Prosecutor, this changes things or potentially changes things  
14 significantly.

09:39:40 15 The Prosecution have adopted hitherto, that is to say,  
16 before the production of our pre-trial Defence brief, they have  
17 adopted effectively a broad-brush approach. This is the position  
18 prove, as Defence, that these calls did not take place. Even  
19 when I raised this matter with Mr Herbst when I was still in the  
09:40:19 20 UK and had access to the internet on a regular basis, it was said  
21 to the Defence that the Prosecution did not intend to rely on any  
22 calls because, and I quote, the Prosecution's case was that  
23 telephones were being passed to people to speak to.

24 Bearing in mind the evidence in this case --

09:40:55 25 MR HERBST: Your Honour, I'm sorry to interrupt, but I  
26 cannot understand what Mr Metzger is saying in the last two or  
27 three sentences because of the simultaneous translation.

28 MR METZGER: May I take it shortly. I want some time to  
29 reflect on what has been served, and I am concerned that the

1 goalposts of this particular, if you'll excuse the expression,  
2 match have suddenly been moved significantly. On the back of  
3 submissions by the Defence that the Prosecution's pre-disclosures  
4 and its pre-trial brief which were supposed to disclose  
09:42:03 5 everything that the Prosecution has and intended to rely on, did  
6 not rely on telephone calls at specific times when that evidence  
7 was available to the Prosecution and respectfully, the  
8 Prosecution alone. The only telephone numbers which are  
9 disclosed in the pre-trial brief which I re-perused last night,  
09:42:37 10 are purportedly telephone numbers for Mr Hassan Papa Bangura. I  
11 have personally checked those numbers against the calls that were  
12 mentioned, but no telephone number up until my receipt of this  
13 document purportedly has ever been provided to us for Mr Kargbo,  
14 for whatever reasons.

09:43:15 15 As I indicated earlier, it may be best for me to peruse  
16 what has now been provided to us to see quite where the  
17 Prosecution seem to be coming from, and I hope left field is not  
18 the position, and to make a more informed submission to Your  
19 Honour about this. Because respectfully, the reliance on that  
09:43:43 20 telephone number at this particular stage would require special  
21 application to Your Honour. It is not in compliance with the  
22 Rules. It is evidence that has hitherto not been disclosed. So  
23 I ask for that time to be added on to the other time to look at  
24 the materials we have been - I hesitate to use the word  
09:44:07 25 "bombarded" with.

26 JUSTICE DOHERTY: Not exactly an appropriate word in the  
27 circumstances. But I note it.

28 Mr Herbst, did you hear anything that was said by  
29 Mr Metzger? Because if you did not, I will paraphrase it as

1 accurately as I can.

2 MR HERBST: Your Honour, I believe I did hear what  
3 Mr Metzger said.

4 JUSTICE DOHERTY: I will allow counsel for the Defence, not  
09:44:57 5 just Mr Metzger, but any other relevant counsel, to have some  
6 time to, in Mr Metzger's words, reflect on this disclosure. I  
7 will determine how much time after we deal with the next matter,  
8 which is if we can now proceed to the opening statement by  
9 independent counsel.

09:45:35 10 MR METZGER: In the light of the submissions that I have  
11 just made, Your Honour, I wonder if it would be prudent not to  
12 have the independent counsel's opening statement, as he has  
13 already stated he wishes to refer to some of these matters.

14 JUSTICE DOHERTY: Would those possibly include this? Let  
09:46:05 15 me ask him. That's a more sensible thing to do.

16 Mr Herbst, will your opening statement refer: (a), to the  
17 AFRC paragraphs; and (b), to any of the phone calls that have  
18 recently been disclosed to counsel for Kanu? And incidentally,  
19 should be disclosed to other counsel.

09:46:45 20 MR HERBST: Your Honour, first of all, the disclosures were  
21 made to all counsel. Perhaps I did not make that clear. Because  
22 I did refer to Mr Metzger's request. Every communication that  
23 deals with the disclosure of evidence has been made to all  
24 counsel from the beginning, including the one last night. I hear  
09:47:13 25 a beeping but I'll go on if you can hear me. Can you hear me?

26 JUSTICE DOHERTY: I can hear you very clearly.

27 MR HERBST: Thank you, Your Honour. To answer  
28 Your Honour's specific question, it was not my intention to refer  
29 to any paragraphs of the judgment in my opening statement. There

1 is other evidence that has been already disclosed that pertains  
2 to the importance of 334's as an insider witness in the case and  
3 I was going to refer generally to that, but not to anything  
4 specific.

09:48:01 5 With respect to the telephone calls, I was going to refer  
6 to the calls - three calls were disclosed from the prison to  
7 Mr Kargbo on November 30, 2010. Those calls are in essence  
8 consistent with the testimony of 334 and Mr Kargbo of the events  
9 that we now know from the witness Alagendra which were reported  
09:48:52 10 in her e-mail which was long ago disclosed to counsel, occurred  
11 on November 30, rather than November 29 as was earlier reported  
12 in the witness statements. So I was going to refer to those  
13 three calls.

14 Let me say that while it is true that - I believe it to be  
09:49:21 15 true - that the phone number for Mr Kargbo was not specifically  
16 disclosed, the telephone records containing all these calls were  
17 disclosed. I never received a request from Defence counsel to  
18 identify Mr Kargbo's phone number. Of course, had I done so I  
19 would have disclosed it. But to answer Your Honour's specific  
09:50:02 20 question, I was going to refer to those calls in the opening.

21 JUSTICE DOHERTY: Thank you, Mr Herbst.

22 In the light of Mr Metzger's statement that he wants time  
23 to reflect, that could mean many things and the first thing that  
24 occurs to a mind such as mine is that he may well want to take  
09:50:38 25 instructions before we proceed. I think in fairness,  
26 notwithstanding that I accept what you've told me, that they did  
27 not receive a request, et cetera, in fairness I will allow him  
28 some time to look at the document, the phone calls - not the AFRC  
29 one - and if necessary to take instructions. I will therefore



1 adjourn the Court for one hour to allow that to be done. I will  
2 reconvene in one hour, which is - let us make it a round number -  
3 I will reconvene at 11 o'clock our time, which is 1 o'clock your  
4 time, and I will then proceed from that point on. If it turns  
09:51:35 5 out that Defence counsel - any Defence counsel - requires some  
6 further time to take instructions, they can notify my associate  
7 and information will be conveyed to other counsel immediately. I  
8 will act upon it.

9 MR METZGER: Your Honour, before the Court is adjourned,  
09:51:59 10 may I simply respond very briefly to what my learned friend the  
11 independent Prosecutor has said about no request being from the  
12 Defence counsel.

13 JUSTICE DOHERTY: I don't think that's really necessary,  
14 Mr Metzger. It will all come up in the course of submissions,  
09:52:18 15 et cetera, I have no doubt.

16 MR METZGER: Indeed. I just wanted to put him on notice  
17 that I hope he doesn't expect that a trial by ambush is  
18 necessarily going to be accepted by Defence.

19 JUSTICE DOHERTY: One other matter which emanates from my  
09:52:38 20 offices is that I presume all counsel are aware that I issued two  
21 documents yesterday: One is a subpoena to Mr Andrew Daniels and  
22 the other is a request to amicus curiae, who has been identified  
23 as Professor William Schabas. And in relation to the position of  
24 the Principal Defender, I am assured by the Registrar that those  
09:53:07 25 documents have been conveyed to the respective parties and I will  
26 not say anything further until we get the respective replies.

27 CHIEF TAKU: Your Honour, may it please Your Honour, I just  
28 wish to remind the Court about the position of Mr Kargbo if the  
29 trial is to start now as a witness and also as somebody sitting

1 here in this particular position.

2 JUSTICE DOHERTY: What I consider the proper procedure is  
3 his bail will be extended for the next hour. He is to my mind  
4 entitled to hear the opening statement because he is still a  
09:53:49 5 defendant before the Court and evidence that may be adduced could  
6 well affect him. Once 334 is called, I will ask him to move out  
7 of the Court and remain with WVS. I say this with some  
8 reservation, because different courts have different attitudes to  
9 co-witnesses remaining in a court while one witness is giving  
09:54:25 10 evidence. Even in my own jurisdiction the difference between the  
11 courts in Northern Ireland and the courts in England are  
12 different on this point. It goes to weight. However, for  
13 purposes of transparency and to avoid any conflict later, I will  
14 make that order.

09:54:49 15 CHIEF TAKU: Thank you, My Lord. I couldn't understand  
16 because that last Saturday he was granted bail. Your Honour  
17 requested the explanation which has been accepted, so I presume  
18 that bail continues.

19 JUSTICE DOHERTY: At the end of every day we look at these  
09:55:07 20 things. Every single day that issue arises for both accused.  
21 Except the accused in Kigali, who are subject of a different  
22 order. So at the end of the day we'll revisit this. If there's  
23 no other matters, I will --

24 MR NICOL-WILSON: Your Honour, I'm extremely happy you've  
09:55:32 25 mentioned looking at the bail status of the accused persons, so I  
26 want to put you on notice that I will be applying again for bail  
27 for Mr Hassan Papa Bangura, and I'm at your disposal as to the  
28 exact time that the application can be made.

29 JUSTICE DOHERTY: My practice is to deal with it at the end

1 of the day's session.

2 MR NICOL-WILSON: As Your Honour pleases.

3 CHIEF TAKU: My Lord, I just wanted to say that I will

4 also - I understand the position of the Court, but we will

09:56:07 5 respectfully urge the Court to look at the bail stage by stage in

6 the proceedings because I already have permission to leave on

7 Thursday and I will not be here for the rest of the proceedings,

8 but look at it stage by stage during the period that he testifies

9 and thereafter before the sentencing. Your Honour would look at

09:56:32 10 it from stage by stage. Your Honour, that will be okay. If not,

11 I would be very, very reluctant to leave knowing that this

12 application will be renewed on a daily basis. It will leave a

13 very, very heavy weight on me.

14 JUSTICE DOHERTY: We've got two days before you leave.

09:56:50 15 We'll see how the evidence and everything is coming in, and I

16 will do my best to make a decision on the issue without going

17 against my basic procedure to look at it daily. But we will deal

18 with that, be reassured.

19 CHIEF TAKU: Thank you, Madam.

09:57:11 20 JUSTICE DOHERTY: Mr Metzger, you speak first and then I

21 will invite Mr Herbst to speak.

22 MR METZGER: I was simply rising to thank Your Honour for

23 the decisions that you have given in respect of quite thorny

24 issues and to say it is my understanding that for the greater

09:57:35 25 good Your Honour has issued the subpoena in relation to Mr Andrew

26 Daniels but continues to consider the Rule 97 point and does

27 accept, I think, as we all do, the grave and weighty nature of

28 the issue that we've all been considering.

29 Thank you, Your Honour.

1 JUSTICE DOHERTY: Mr Herbst, I think I heard your voice?

2 MR HERBST: Yes, Your Honour, you did. Thank you. I  
3 wanted to ask a procedural question. After the Prosecutor opens,  
4 is it the procedure for a Defence counsel to open at this point?  
09:58:35 5 Or later on in the proceedings?

6 JUSTICE DOHERTY: Mr Herbst, under our Rule, you will open.  
7 If at the end of the Prosecution case there is a decision to  
8 present a Defence case, then the Defence counsel may, if they  
9 wish, make an opening statement, but they are not obliged to do  
09:59:00 10 so. So at the end of the Prosecution case, that issue may well  
11 arise again.

12 MR HERBST: Thank you very much for that clarification,  
13 Your Honour.

14 JUSTICE DOHERTY: We will now adjourn for one hour to allow  
09:59:19 15 counsel to consider their position. Please adjourn Court for one  
16 hour.

17 [Adjournment taken at 9.59 a.m.]

18 [Upon resuming at 11.02 a.m.]

19 JUSTICE DOHERTY: I said the Court to resume at 11.00. We  
11:03:06 20 seem - oh, some people - Kigali, can you hear me? I notice  
21 Mr Kamara and Mr Kanu are not in their places.

22 THE COURT OFFICER: [Kigali] [Indiscernible] on their way  
23 to the courtroom. They are not kept near us when we adjourn so  
24 they are literally on their way.

11:03:34 25 JUSTICE DOHERTY: I understand. Is Mr Herbst in Court?  
26 Yes, I can see him, thank you.

27 MR HERBST: Yes, Your Honour, I'm here.

28 JUSTICE DOHERTY: Thank you. I notice Mr Metzger is not  
29 present. Mr Serry Kamal or Mr Melron Nicol, has anybody got any

1 information concerning Mr Metzger?

2 MR NICOL-WILSON: He is on his way.

3 JUSTICE DOHERTY: I have had a message through my associate  
4 that counsel requires more time. Can you please address me on  
11:04:23 5 this? I'm anxious obviously to get the Court case moving.

6 Chief Taku, it doesn't apply to you so I won't ask you to address  
7 on it.

8 CHIEF TAKU: Exactly, Your Honour.

9 MR NICOL-WILSON: Your Honour, I will certainly require  
11:04:42 10 more time to be able to look at the documents submitted by the  
11 defendant counsel, the reason being that I was not in the AFRC  
12 trial and I will need to crosscheck references to - on this  
13 document to the actual judgment itself that was delivered in the  
14 AFRC case. So this is an issue for which I will not require one  
11:05:03 15 or two hours. I will require at least a day to be able to go  
16 through and decide whether I have any objection to  
17 [Overlapping speakers].

18 JUSTICE DOHERTY: Well, the tender - well, it's not being  
19 tendered. It's being brought in under a different Rule for  
11:05:17 20 judicial notice, and it's not going to be referred to by counsel  
21 for the Prosecution. He has said, "I will not refer to any AFRC  
22 paragraphs in my opening address", so that's not going to apply.  
23 So if that's the only reason, then there's no reason why we can't  
24 start with you. So I'll continue -

11:05:47 25 MR NICOL-WILSON: Very well, Your Honour. I fully agree  
26 with you.

27 JUSTICE DOHERTY: Mr Serry Kamal, what is the situation  
28 with your --

29 MR KAMAL: Your Honour, it's a question of the telephone

1 numbers that were given to us over the weekend. In fact, was it  
2 last night? Last night. And we really need time to crosscheck  
3 them against long lists of telephone calls that we have.  
4 Especially as we have three calls for the 30th of November, and  
11:06:19 5 these are the periods within the time - the time period in the  
6 indictment.

7 JUSTICE DOHERTY: But if there's only three telephone  
8 numbers --

9 MR KAMAL: There are not three. There are actually - there  
11:06:37 10 are about - sorry to interrupt. There are about ten numbers.  
11 No, six, and others to Kojo Graham, and these have to be checked  
12 against a long list of telephone calls. And they are very  
13 important so far as the indictment is concerned, especially as  
14 they were not disclosed by the Prosecutor in his disclosure  
11:07:15 15 statement.

16 JUSTICE DOHERTY: It would appear that Mr Prosecutor is  
17 disputing that, but I'm not going to go into that arena because  
18 that's not going to move us forward.

19 MR KAMAL: Your Honour, the obligation is on him to  
11:07:31 20 initially disclose and then we will then ask questions. I stand  
21 corrected. He has certain things he has to prove.

22 JUSTICE DOHERTY: Let me hear Mr Metzger next, please.

23 MR METZGER: I find myself apologising again for keeping  
24 Your Honour waiting. This was due to the fact that I had  
11:07:58 25 commenced the work, trying in earnest to allow this matter to  
26 continue as speedily as possible. One general comment before we  
27 continue.

28 Regrettably, it seems to me that I must ask for the Court  
29 to take judicial notice of the fact that whilst we are in this

1 jurisdiction, that any emails sent after working hours will not  
2 reach us as counsel or is unlikely to reach us as counsel because  
3 we do not have the facilities to receive them until the following  
4 morning before Court at the very earliest, and that is if the  
11:08:42 5 Defence Office has had the facility itself to receive the  
6 material and copy it to us.

7 Now, insofar as the two points --

8 JUSTICE DOHERTY: Sorry, Mr Metzger, I'm only going to  
9 interrupt you because apparently we have interrupted the -  
11:09:03 10 Mr Kamara and Mr Kanu's lunch, and I think in fairness I should  
11 let go and let them finish their food. So I'm going to inform  
12 Kigali that your client and Mr Serry Kamal's client are excused  
13 appearance in order to finish their meal.

14 MR METZGER: Indeed I'm grateful, and I'm sure they will be  
11:09:22 15 too.

16 JUSTICE DOHERTY: They may be taken out and allowed to  
17 finish in peace.

18 Please continue, Mr Metzger.

19 MR METZGER: I'm very much obliged. Insofar as the AFRC  
11:09:42 20 matters are concerned, by way of comment, because I note that  
21 Your Honour will in due course give us time, and Your Honour will  
22 know that my involvement in the AFRC trial preceded the material  
23 that we are looking at here by it would seem now some years, but  
24 I may be getting too old to remember exactly.

11:10:04 25 Now - but in general terms, when the Prosecutor stated that  
26 he wanted judicial notice taken of certain things said in that  
27 judgement, I did not for the life of me, call me naïve if you  
28 must, imagine that there would be 22 pages of references relied  
29 on by the Prosecution, the first page of which does nothing other

1 than, respectfully, to bring back the horrors of that particular  
2 trial and those particular times and has nothing to do with  
3 either of the Rwandan convicts in principal terms.

4 I say that - just so that we can look at it by way of  
11:10:50 5 example, paragraphs 420 to 421 have nothing to do with Mr Kanu or  
6 Mr Kamara and refer to another defendant in that case and a  
7 prominent figure in this country during those times which  
8 respectfully I'm sure my learned friend the Prosecutor did not  
9 mean to, as it were, seek to adduce material like that simply to  
11:11:17 10 inflame. But in order to, as it were, meet the points that are  
11 made, this will require some significant time. I took the  
12 opportunity of - once I became involved in this case - obtaining  
13 the transcript of the judgment in that case.

14 As I've indicated, and I think as Your Honour is fully  
11:11:47 15 aware, the product of clearly a lot hard work over a lot of time  
16 that Your Honour was involved in. This is a hefty document. And  
17 the purpose is, as it becomes clear, that the Prosecution  
18 sometimes expects us to be blessed with clairvoyant gift.  
19 Because of the oblique way in which some of the material he puts  
11:12:14 20 is relied on, it seems to me that we must respectfully ask for  
21 some substantial time to go through that document. I think a day  
22 is optimistic. But as we will cross that bridge in due course, I  
23 merely, as it were, flag that for us to look at.

24 The more important question for Your Honour right now would  
11:12:42 25 be in relation to the telephone calls. I can say to the best of  
26 my ability, and I think now the Defence team have asked the  
27 Defence Office to provide every scrap of material that has been  
28 served by the Prosecution in this case, in case we haven't been  
29 careful enough. But all the material - and I thought I had



1 everything barring what came in last night up until this  
2 morning - all the material we have has never disclosed  
3 Mr Kargbo's number. This places us in somewhat of a quandary,  
4 bearing in mind the defendant's Article 17 rights to a fair trial  
11:13:23 5 and adequate time for preparation, et cetera. I need not repeat  
6 that mantra before, Your Honour is fully aware of the full  
7 implications of that article.

8 But it seems to me that the fundamental failure by the  
9 Prosecution to disclose a telephone number and ascribe that  
11:13:49 10 telephone number to Mr Kargbo until the day after - I shall  
11 rephrase that. Until after working hours on the day when this  
12 trial was supposed to start as evidence must fall foul of  
13 Your Honour's ruling from this Court when I was, as it were, in  
14 the position that my learned friend Mr Herbst is today in Kigali  
11:14:18 15 on the 15th of July last year. And therefore it seems to me that  
16 if it is material that the Prosecution proposes to rely on, there  
17 must be a formal application for leave to be given to rely on it.

18 I say this because it is clear to me that the first  
19 telephone number is a number that I'm aware of. In informal  
11:14:46 20 disclosure, the Prosecution ascribed that number to Mr Bangura.  
21 Now the second telephone number is a number that I have not seen  
22 before in the form that it is in the email my learned friend sent  
23 for our attention last night. The - having taken the opportunity  
24 of consulting the telephone log, coincidentally page 42 was one  
11:15:24 25 of the three of four pages in my theological quest which I did  
26 print out. It's a 42-page document.

27 And --

28 JUSTICE DOHERTY: Do you mean the telephone list is a  
29 42-page document?

1 MR METZGER: That is right. The list of the telephone  
2 numbers that was obtained, as I understand it, from the service  
3 providers MTN. In fairness, I think the first three pages of  
4 those numbers may have been redacted because they are black, or  
11:15:49 5 it may just be that they don't exist. So it's a 42-page document  
6 on which 39 pages are covered pretty much like the document I'm  
7 holding up for the Court to see. The three numbers appear on  
8 page 42. I beg your pardon, there are three numbers at the times  
9 and on the date suggested by the Prosecution on page 42 which  
11:16:22 10 are, with the greatest respect to my learned friend, different  
11 numbers from the number that is cited on the document that we  
12 were given notice of yesterday or today, whichever way you look  
13 at it.

14 Now, this puts us in a slightly difficult position because  
11:16:42 15 if the Prosecution are relying on the number here, and I'll read  
16 that out for the record - perhaps I shouldn't. Perhaps it would  
17 be best, Your Honour, if I - we all have working copies of this  
18 document - if I pass the document for Your Honour to look at just  
19 in case it impinges on any protected witness situation. I don't  
11:17:05 20 think it does.

21 If you forgive me - it is the last - or not the last three  
22 numbers, there are two sets of numbers before general comment  
23 about calls from Mr Kojo Graham or to Kojo Graham and other  
24 people. I haven't got to that part yet. But the second of the  
11:17:31 25 two sets has a number with the international code for Freetown  
26 followed by what seems like a "22". Now, I don't know whether  
27 judicial notice can be taken of telephone prefixes in Sierra  
28 Leone, but it's clear that a 22 prefix is different from a 33  
29 prefix. A 22 prefix, to the best of my understanding, without

1 seeking to give evidence in this Court, would have to be a Sierra  
2 Leone landline. A 33 prefix would have to be a Sierra Leone  
3 mobile line, and possibly Comium.

4 So the first hurdle we have is, is the number on that sheet  
11:18:22 5 the number the Prosecution are relying on? Because if it is,  
6 then that is completely new evidence and it doesn't actually  
7 tally with the telephone number on the 42-page schedule. If it  
8 is the first number, then it may be that Your Honour will need to  
9 hear argument as to the Prosecution's attribution, because  
11:18:53 10 attribution of that telephone number appears to have changed in  
11 the interim. And I say this having looked at page 42 of the  
12 Rule 66 pre-trial disclosures served by Mr Herbst last year.

13 So this is the difficulty that we're under. First of all,  
14 we need clarification in relation to that; and secondly, if it is  
11:19:16 15 new evidence, then leave must be sought before it can be referred  
16 to.

17 In my respectful submission from Your Honour whether or not  
18 it becomes a feature in the case? And if it is an old feature,  
19 then we have been misinformed at some point in time, and we need  
11:19:36 20 to get to the bottom of that.

21 Just in passing, if Your Honour were to continue reading  
22 down that e-mail, there are references to other persons. Those  
23 references may or may not impinge on the decision that Your  
24 Honour has, as it were, for the time being made in relation to  
11:20:06 25 Rule 97 because they would relate to calls to erstwhile or  
26 potentially future - at the time lawyers of the accused in  
27 Rwanda. And of course insofar as the first name on that list is  
28 concerned, that is not a name that has ever been relied on as I  
29 understand it, by the Prosecution in this particular case. It is

1 a matter that causes me serious concern. I don't think it's  
2 fatal but it is serious concern because Your Honour will know  
3 that at least at the time I was involved in the AFRC case, Your  
4 Honour will know that that person was one of my co-counsel. I  
11:21:06 5 don't understand the reason for this purported present disclosure  
6 and again would seek clarification of it as soon as possible. I  
7 do not assume for one moment that Mr Herbst intends calling that  
8 witness, because we have never been disclosed with anything that  
9 suggests he made direct contact, or any of his investigators,  
11:21:30 10 made contact with that person.

11 I don't think that I can properly comment on anything else.  
12 The matters in relation to Mr Daniels are as it were sub judice.  
13 And finally after a little bit of reflection about your Honour's  
14 ruling, I was wondering if we could deal with that in this way.  
11:22:02 15 The first paragraph - if I can find it now. If Your Honour will  
16 bear with me one moment. Out of an abundance of caution, Your  
17 Honour has ruled at page 2, paragraph 1, in what may or may not  
18 be a final manner as far as the position is in relation to Rule  
19 97. But in continuing consideration with the assistance of an  
11:23:10 20 amicus brief, it may be I fully understand that Your Honour will  
21 revisit that position.

22 The difficulty, of course, is under Rule 77 procedures, if  
23 the Defence wish to appeal, we need to seek leave to do so and we  
24 need to seek leave to do so within seven days of the ruling. I  
11:23:39 25 was wondering, Your Honour, if in the circumstances if you were  
26 to treat this as a final ruling, may we seek that leave now? And  
27 if it is not a final ruling, then of course to state so for the  
28 record so that we don't have to do anything about it until the  
29 final point is reached.

1 JUSTICE DOHERTY: Mr Metzger, there's basically two rulings  
2 in that interim decision: One is in relation to Daniels, which  
3 is final. In other words I'm saying I've made a decision but I  
4 need to give a reasoned decision and I'm going to do that. And  
11:24:21 5 in relation to the Principal Defender, I'm not making any  
6 decision until I get an amicus brief for several reasons:  
7 Because it's a particular point of law, her position; and  
8 secondly, she wasn't represented and should have arguments put  
9 forward on her behalf.

11:24:49 10 So the second ruling is definitely not a final decision,  
11 and therefore there's no decision to appeal. On the first  
12 ruling, yes, there could be an appeal because it's particularly a  
13 legal point and it's an interlocutory ruling. So which one are  
14 you talking about?

11:25:11 15 MR METZGER: It would be the first ruling, although I do  
16 note - and that is why I put the caveat on the end of it, that  
17 although Your Honour has made the ruling, it's effectively quite  
18 a wide ruling in respect of that and Your Honour has reserved the  
19 position once you've heard further material to decide on whether  
11:25:40 20 privilege existed in the particular circumstances of this case.  
21 But in view of the importance of this matter and the, shall we  
22 say, dearth of authority or Rules of Procedure in relation to  
23 this point we've had to go through different documents in order  
24 to be able to assist Your Honour in the best way that we could.  
11:26:11 25 And bearing in mind that this is an argument brought by the  
26 Prosecution seeking to rely on something outside the current  
27 jurisprudence, and to bring it into the jurisprudence, it is for  
28 those reasons that we would say it is an important matter of law  
29 where we would seek your Honour's permission to go to the Appeals

1 Chamber on this matter. We do understand that it's not a stay of  
2 proceedings whatsoever. It's an interlocutory matter and that  
3 would be obviously dealt with outside these proceedings.

11:27:04 4 JUSTICE DOHERTY: Do I understand you are now making an  
5 oral submission that leave should be given? Because there are  
6 two legs to any irreparable damage. I would need to look it up  
7 but you know there are two parts to it.

8 MR METZGER: I'm very grateful to my learned friend. I  
9 think Your Honour may have been referring to Rule 73B, which  
11:28:07 10 relates to effectively a motion before Your Honour at the  
11 pre-trial stage.

12 JUSTICE DOHERTY: Yes, it's a conjunctive ground of  
13 exceptional circumstances and irreparable prejudice. I'm  
14 hesitating here because there's several issues in front of me and  
11:28:30 15 I want to deal with them. One of them is the issue of these  
16 telephone numbers, et cetera, and what you're basically saying to  
17 me is two things: (A), you need time; and (b) they shouldn't be  
18 in front of me at all. I think that's what you're saying. I  
19 want to be sure.

11:28:57 20 MR METZGER: They shouldn't be in front of Your Honour at  
21 all if they are new. And if they are not new, then Mr Herbst  
22 will have to explain why it is that the - if there's an error -  
23 I'm looking here at the whole picture - if there's an error  
24 because somebody typed the wrong number when they put in the  
11:29:20 25 e-mail and he is referring clearly to those numbers on the  
26 schedule, which I have to assume is the position, then we would  
27 need to be told why there's a change in attribution as to whose  
28 phone that was. Because that has not been disclosed to us  
29 beforehand, and that would be new material.

1 JUSTICE DOHERTY: You're saying that he is precluded from  
2 bringing that before the Court.

3 MR METZGER: Your Honour, yes. Without your permission, of  
4 course.

11:29:52 5 JUSTICE DOHERTY: Under which provision? I'm looking now -  
6 I'm just going to open up 66, 67, et cetera.

7 MR METZGER: Yes, Your Honour, 66 effectively deals with  
8 the disclosure of materials, and in this case the Prosecution  
9 purported to have dealt with such disclosure by the 66  
11:30:30 10 disclosures that were served on us around - can't remember now -  
11 prior to July last year, I think. I beg your pardon, I think it  
12 may have been shortly after July. And of course there's a  
13 continuous obligation which tells us that that should take place  
14 no later than 60 days before the date of trial or as otherwise  
11:31:00 15 ordered by a Judge of the Trial Chamber. That's 66(A)(ii) -  
16 don't take issue on inspection, et cetera. 66(B) - where  
17 information or materials are in the possession of the Prosecutor,  
18 the disclosure of which may prejudice further or ongoing  
19 investigations or for any other reason may be contrary,  
11:31:25 20 et cetera, the Prosecution may apply effectively in camera but  
21 with notice to be relieved from the obligation to disclose. I  
22 don't believe there has been any such application to Your Honour  
23 in this case, so I take it that that doesn't apply.

24 And really, that's where we are, together with what it  
11:31:48 25 would seem to me to be evidence - I mean, to be the ruling and  
26 the transcript of what took place on 15 July last year itself  
27 when we were reliably, we believed, informed that the Prosecution  
28 had served on us everything that he had in this case, because it  
29 was going to be open disclosure. And I think those word were

1 repeated on Friday.

2 JUSTICE DOHERTY: Saturday.

3 MR METZGER: Yes, indeed, Saturday. Sorry, I seem to have  
4 lost a couple of days last week.

11:32:34 5 JUSTICE DOHERTY: The obligation is a continuing obligation  
6 under the Rules. Now, I will obviously be inviting the  
7 Prosecutor to reply, but I do recall that he said the disclosure  
8 that you have now received was as a result of a request for  
9 disclosure from counsel - from you yourself I think were the  
11:33:06 10 counsel in question, and he responded as soon as he got that  
11 request.

12 MR METZGER: Your Honour is quite correct. Mr Herbst did  
13 say it was as a result of my request. Let me repeat the request  
14 so the Court is fully aware: Can you please tell me what  
11:33:25 15 telephone numbers the Prosecution are relying on as the numbers  
16 that you say Mr - well 334 was spoken to by my late client - it  
17 having been the Prosecution case all along that they could not  
18 point to any such numbers. I wanted it set in stone. He asked  
19 for disclosure of material that I had available, which I then  
11:33:59 20 provided. And I remember indicating that as a result of  
21 providing the material, I hope it was that the Prosecution  
22 weren't then going now to try and find evidence to just counter  
23 what we had done, because I didn't understand that to be the  
24 procedure of this Court, or any Court, for that matter, that was  
11:34:29 25 purporting to act fairly.

26 So in real terms, it has been Prosecution's case until  
27 apparently today that they could not rely on any numbers and that  
28 the procedures, as I understand it, in Rwanda were so, for want  
29 of a better word, I hesitate to use the word "slack". Were so



1 imprecise that they couldn't rely on any of the records. But of  
2 course the MTN records come from an independent service provider,  
3 an independent service provider from whom the Prosecution  
4 obtained those records. Those records were served on the Defence  
11:35:16 5 Office and was available to both the Prosecution and the Defence  
6 for some considerable time.

7 The Prosecution have been invited to rely or tell us, as it  
8 were, ab initio, right from the very start. Well, what numbers  
9 are you relying on? Hence in the pre-trial Defence brief for  
11:35:36 10 Mr Kanu the words "the broad-brush approach taken by the  
11 Prosecution in this case". We know that calls were made from  
12 Rwanda and we believe phones were passed from person to person.  
13 But it is, has been, and it seems always will be the Prosecution  
14 case that as far as the date of the 29th of November, which is  
11:35:59 15 now rapidly evolving into the date of the 30th of November, which  
16 is a significant change, in my respectful submission, when I have  
17 been to Rwanda on two occasions to speak with my lay client and  
18 to collate evidence, to simply try and go behind the evidence of  
19 334, who has categorically stated he was contacted on the 29th of  
11:36:23 20 November.

21 So if one looks at it in this way, I'm not complaining  
22 about the Prosecution's continuing duty, because clearly he does  
23 have that duty. What I'm complaining about on behalf of Mr Kanu  
24 is - and I'm really sorry to use the word "ambush" twice in one  
11:36:53 25 day. Thankfully not in the same session. But what appears to be  
26 the Prosecution setting up a position, see which way the Defence  
27 are going to go, and then ambushing the Defence, coming out now  
28 with material which we have not addressed because the  
29 Prosecution - whose case it is to prove - has not relied on it

1 hi therto.

2 So it's the issue of fairness. The issue of fairness in  
3 disclosure, the issue of fairness in Prosecution, the issue of  
4 giving the Defence adequate time and facilities, and if those  
11:37:36 5 facilities aren't as adequate as they normally are, the  
6 opportunity to use what facilities they have in an adequate  
7 manner to properly represent their defendant.

8 JUSTICE DOHERTY: And what do you say is adequate time?

9 MR METZGER: As far as the telephone calls are concerned, I  
11:38:00 10 think if Your Honour would hear if Mr Herbst first because I have  
11 made certain claims, which I believe to be true, so that we see  
12 exactly what the Prosecution's claim is. The adequate time, if  
13 Your Honour were minded to allow him to introduce new evidence  
14 would be sufficient time for the Prosecution to put in all the  
11:38:21 15 evidence on this front that they wish to rely on so that the  
16 Defence can then look at that material and see what time then is  
17 required to deal with it.

18 I shall need to have a conference with my lay client  
19 certainly about those telephone calls, and I'm grateful to my  
11:38:41 20 learned friend for, as it were, referring this Court to the  
21 authority that he did on - I'll get it right now - Saturday,  
22 because that, in my respectful submission, supports the  
23 contention that as things stand at present, particularly in the  
24 circumstances of this case, my client in Rwanda and I cannot have  
11:39:10 25 confidential discussions about this case unless I'm in Kigali.  
26 So I would wish to take instructions at that point in time, and  
27 it needn't delay us - if I can suggest a way forward.

28 Once, of course, Your Honour has heard from my learned  
29 friend, it may come to a situation where once we know everything

1 that's going to be thrown at us, we do the best that we can from  
2 here. Perhaps even have cross-examination of the relevant  
3 witnesses, reserving, if Your Honour will allow us to at that  
4 point, so that when this seat moves to Kigali we can take proper  
11:40:00 5 instructions in a proper manner, and we can revisit those issues  
6 either from there or when this Court returns back to its natural  
7 seat.

8 JUSTICE DOHERTY: I'll ask Mr Herbst to respond.

9 Mr Herbst, I'm going to deal only with this disclosure and  
11:40:23 10 evidentiary matter. The leave to appeal matter I'm going to  
11 stand over for - until I resolve this one.

12 MR HERBST: Thank you, Your Honour. If Your Honour just  
13 gives me a minute, because I was not - I did not have available  
14 to me until a short while ago the transcript of Saturday's  
11:41:00 15 proceeding which I've been looking at to refresh my recollection  
16 of what was said and what [i ndi scernible].

17 But first let me respond, if I may, to the charge that has  
18 been heard twice now in this Court of a trial by ambush. Which -  
19 by the way, I should say I'm sitting down when I address the  
11:41:37 20 Court.

21 JUSTICE DOHERTY: That was at my direction.

22 MR HERBST: Thank you, Your Honour. The charge of trial by  
23 ambush is, I must say, I find very ironic in light of the  
24 complete and utter open file --

11:42:03 25 THE COURT OFFICER: Your Honour, may I interrupt. I am  
26 told that the court reporter, the stenographer cannot hear very  
27 clearly.

28 MR HERBST: Well, I'm speaking right into the microphone so  
29 there must be an issue with the microphone. Maybe I'm too close

1 to it. Is that better?

2 THE COURT OFFICER: No.

3 MR HERBST: Then I do not know what to do to remedy the  
4 probl em.

11:42:40 5 THE COURT OFFICER: [Kigali] Your Honour, can I ask the  
6 court reporter to turn her microphone up because there's a volume  
7 switch at the side so if she could use that and turn the volume  
8 up maybe that would help.

9 JUSTICE DOHERTY: I'm able to hear.

11:43:09 10 THE COURT OFFICER: I think it's better now. We've turned  
11 up her volume.

12 JUSTICE DOHERTY: Mr Herbst, please continue.

13 MR HERBST: Is - this hopefully this will be better now. I  
14 was saying that I find the trial by ambush charge ironic in light  
11:43:29 15 of the complete open file discovery that was given in this case  
16 precisely to avoid a situation of trial by ambush.

17 Nothing in this case was held back. Every document, every  
18 fact, every statement that was obtained in the course of my  
19 investigation was rendered, disclosed to the Defence in this  
11:44:02 20 case. The great bulk of it in the initial disclosures more than  
21 a year ago. When the Alagenda e-mail came to light, it was  
22 immediately disclosed. That email, by the way, which not just  
23 suggests but makes clear the date of the calls that Mr Metzger  
24 was referring to was in all likelihood November 30 rather than  
11:44:40 25 29, and with respect to the telephone records from which the  
26 email delivered last night - which I do not have a copy because I  
27 do not yet have working quarters here and I was in a hotel  
28 without - which did not permit me to even print out my own  
29 email - but the underlying telephone records of the prison phone

1 was identified and made available to counsel in the Rule 66  
2 disclosures.

3 It is those numbers at those times on those dates from  
4 which the email was taken, and it is the numbers in the record  
11:45:41 5 rather than the email which I have not examined in light of  
6 Mr Metzger's suggestion that is there is a typo, which there may  
7 very well be, but it is the record in the - it is the number in  
8 the email - in the record rather than email that is the operative  
9 number. Now, let's be real, I would suggest, about this.

11:46:10 10 The records of all these calls were available to the  
11 Defence even though the Prosecution inadvertently did not  
12 apprehend - did not understand the evidentiary incriminating  
13 nature - or the corroborating nature of the calls that were in  
14 the records available to everyone in this case.

11:46:40 15 Now, Mr Bangura's phone number, Mr Kargbo's phone number,  
16 was available to the accused in this case because they called it.  
17 It was not beyond the ken of Mr Metzger to inquire about if he  
18 were to look at the phone records, which I am sure that he did,  
19 and compared them to the manual log which he went - or apparently  
11:47:23 20 went to Rwanda to obtain which we did not have. I would not be  
21 surprised if he looked at the records - and if he did not, but he  
22 certainly had available from his clients the phone numbers of  
23 Mr Kargbo - and I'm focusing on those three calls because those  
24 are the calls that I had intended to refer to in the opening.

11:47:47 25 So the information was available. There was no - and I  
26 said - and the transcript reveals, of Saturday - the transcript  
27 is clear that until I was asked by Mr Metzger as a preparatory  
28 step to his disclosing the statement of Mr Sam Kargbo to me,  
29 until he asked on Saturday for me to identify the specific calls

1 in the record which might be relevant and pertinent to the case  
2 which I might want to use, which I had not heretofore intended to  
3 use, it was not until then that we went back in response to his  
4 inquiry to look. And as soon as we found calls that are  
11:48:47 5 pertinent or might be pertinent such as the Kojo Graham call,  
6 which if it's necessary I can explain why that might be pertinent  
7 even though, yes, it is true, we had not - we had no intention to  
8 call Mr Graham. We have not spoken to Mr Graham.

9 But there was reference - there is reference in the  
11:49:11 10 evidence, as Your Honour will hear, to a lawyer coming from Ghana  
11 to coordinate the efforts of the accused to obtain a review and  
12 to deal with the witnesses.

13 There were two lawyers from Ghana, Mr Daniels and  
14 Mr Graham. So again in an abundance of caution in response to  
11:49:53 15 the request to identify pertinent calls, we put those in. We put  
16 in one call from Mr Daniels. We put three calls in from  
17 Mr Bangura - and when I say "from", I mean "to" - that involve  
18 him and three calls with respect to Mr Kargbo.

19 Now, as I understand the Rules, we have complied with them.  
11:50:27 20 We complied with Rule 66 in every respect. We disclosed  
21 immediately everything in our investigation and even without a  
22 request of the Defence pursuant to 66(A)(iii), we permitted the  
23 Defence to inspect the telephone records, which could have been  
24 material to the Defence for their analysis so that they would  
11:51:12 25 have equal access to them as we did, even though until after  
26 Saturday, when I again represented that we had not found the  
27 requisite formula, we did not appreciate the value. The value  
28 was not apparent to me.

29 So I think the proper question, as I understand the Rules,

1 is the question that Your Honour asked of the Defence, which is  
2 not to exclude the evidence but how much time would be necessary  
3 for them to prepare, as they had not already done so in their own  
4 analysis of the record, now having the information provided by  
11:52:05 5 the Prosecution to prepare to send.

6 I have to say that I don't apprehend the critical nature  
7 suggested by my learned friend Mr Metzger of the date - the  
8 one-day difference in date. Mistakes can be made with respect to  
9 date. I don't find it a particularly material issue. But if he  
11:52:40 10 does, he can obviously make whatever inquiry on cross-examination  
11 of the witnesses 334, Mr Kargbo, and Mr Saffa, who had a  
12 significant hand in preparing the witness statement of Mr 334  
13 which contains the November 29 date.

14 I understand that sometimes when one asks for more specific  
11:53:24 15 evidence, the evidence comes out adverse to one when one looks at  
16 it. But we did not act in bad faith in this case. We acted in  
17 all good faith to provide more discovery than the Rules require  
18 precisely so there could be no trial by ambush and the rights of  
19 the accused protected, recognised.

11:53:55 20 And I must say I'm not offended by the accusation of trial  
21 by ambush. These are adversarial proceedings, but I find it  
22 ironic to be in the position where twice the subject of the  
23 charge. I will say that I will leave it entirely up to the Court  
24 and counsel, whatever time anyone feels is necessary. So it's  
11:54:35 25 all right with me. I'm prepared to open today. I'm prepared.  
26 But I'm willing to open tomorrow. Whatever people think is  
27 appropriate.

28 JUSTICE DOHERTY: Thank you, Mr Herbst.

29 MR NICOL-WILSON: Your Honour, I would want to address the

1 issue of the Independent Counsel relying on the calls he had  
2 mentioned in the e-mail circulated to us last night and which he  
3 just mentioned he will rely on during his opening statement. I  
4 just want to put the Court on notice that the three calls to  
11:55:33 5 Mr Bangura that he had mentioned in his e-mail falls outside the  
6 time frame.

7 MR HERBST: I'm sorry to interrupt, Your Honour, but we  
8 lost the link. We lost the audio. We did not hear what  
9 counsel - I guess it was Mr Nicol-Wilson, I believe - was saying  
11:56:03 10 from the beginning.

11 JUSTICE DOHERTY: Let me try. Can you hear me, Mr Herbst?

12 MR HERBST: Yes, Your Honour. I can.

13 JUSTICE DOHERTY: I will paraphrase what he said in case  
14 the line gets lost again. It seems I have a slightly better line  
11:56:24 15 than anybody else. The submission by counsel was that he  
16 intended to put the Court on notice that three calls to Bangura  
17 listed in your e-mail were outside the time - the temporal  
18 jurisdiction.

19 MR NICOL-WILSON: Yes, Your Honour. It's outside the time  
11:56:45 20 frame in the Order in Lieu of Indictment which has been served on  
21 Mr Bangura, which listed the time frame as on or about  
22 27 November 2010 to 16 December 2010. The Independent Counsel  
23 now wants to rely on calls made on 12 November, 13 November, and  
24 26 November. I just want to put the Court on notice.

11:57:20 25 JUSTICE DOHERTY: That obviously is going to be a matter  
26 for objection if and when that evidence is put into Court.

27 This is a ruling on an issue relating to evidence. The  
28 duty to disclose is a continuing duty. It is provided in  
29 Rule 67(D) which states that:



1 "If either party discovers additional evidence or  
2 information on materials which should have been produced earlier,  
3 that party shall promptly notify the other party and the Trial  
4 Chamber."

12:03:47 5 I am satisfied that the disclosure available to Prosecution  
6 and directed by the Court in July 2011 was made in accordance  
7 with the Rules.

8 It was following an application to counsel for the  
9 Prosecution via the Court by counsel for Kanu that arose from the  
12:04:21 10 original disclosure that further additional evidence or  
11 information was discovered.

12 I am satisfied that the Defence were promptly notified  
13 thereafter.

14 Given the nature of that further disclosure, I consider  
12:04:46 15 that the Defence is entitled to take instructions upon it. I  
16 will therefore allow to tomorrow morning to counsel for the  
17 Defence to consider and seek instructions.

18 If there is a continuing problem of getting instructions, I  
19 will then consider Mr Metzger's alternative suggestion - it  
12:05:24 20 wasn't so much a suggestion; more of an aside - to allow the  
21 re-opening of cross-examination. However, that is an issue to be  
22 met with caution and I will deal with it if and when it arises.

23 I would also caution counsel from using emotive terms in  
24 their submissions. It doesn't really help any of us.

12:05:54 25 So we will adjourn the opening until tomorrow morning at  
26 9.00.

27 Now, that leaves two issues as far as I am concerned: One  
28 is the length of the AFRC transcripts. I should note that I have  
29 not had a full opportunity to look at them deliberately, because

1 I consider counsel should put evidence before the Court. The  
2 Court shouldn't read it in advance. But in the light of what has  
3 been said, Mr Herbst, I would invite you to look at this document  
4 and see if there are matters that are extraneous to what you seek  
12:06:40 5 to bring before the Court in relation to Witness TF1-334 and  
6 thereby decrease it.

7 If, having done that reconsideration, you are of the view  
8 that the matters - all of the matters must go in, then I may well  
9 consider, since the obligation is on me to take judicial notice,  
12:07:11 10 to look at the document and decide which matters I consider  
11 relevant and reduce the document. I will not make any order and  
12 I will not look at the document until I have heard a response  
13 from counsel.

14 In the light of that directive, counsel for the Defence is  
12:07:35 15 not obliged to examine this document deeply until we revisit it.  
16 Preferably, I would like to be able to do that sometime in the  
17 course of tomorrow in the early afternoon.

18 The third issue before me is put forward by Mr Metzger,  
19 counsel for Kanu, who is seeking leave to appeal.

12:08:00 20 Mr Metzger, I have remarked in passing there are two legs  
21 to such an application. I see no reason in our Rules why it  
22 shouldn't be made orally; however, I do require those to be  
23 addressed. I will set a time for you to address them, and I will  
24 set a time limit for your application and for counsel for the  
12:08:32 25 Prosecution's response.

26 I've been told there's only one minute left in the tape so  
27 much as I would like to hear more, events have overcome us and I  
28 will adjourn the Court now whilst we're on the tape, switch off  
29 my microphone, and if there's something important that has to be

1 said, we will wait and change the tape.

2 [Microphone not activated]

3 Well, I think I know what Chief Taku's is. Very well.

4 Please change the tape and - will this take long?

12:09:20 5 MR KAMAL: My case is just an observation so we will not  
6 continue with the same mistake.

7 When I --

8 JUSTICE DOHERTY: Just a minute, Mr Serry Kamal. We have  
9 to change the tape so if you could please have a seat and we'll  
12:09:34 10 deal with it. Oh, it's been changed. Please continue.

11 MR KAMAL: I have [microphone not activated] I have looked  
12 at the relevant page in the list of telephone numbers, page 42,  
13 and as far as Mr Kargbo, the ruling relates to in relation to  
14 Mr Kargbo, I can see no telephone number answering the number  
12:09:59 15 that is disclosed. I stand corrected.

16 JUSTICE DOHERTY: Now you're putting evidence before me  
17 that I'm going to eventually have to adjudicate on, so I'm going  
18 to leave that.

19 MR KAMAL: What has been disclosed to us is not correct.  
12:10:13 20 That's who I'm saying. There's an error.

21 JUSTICE DOHERTY: It's not one I can correct unfortunately.

22 MR KAMAL: I'm just bringing it to the notice of  
23 Independent Prosecutor.

24 JUSTICE DOHERTY: I see. I understand. Thank you.

12:10:29 25 CHIEF TAKU: Your Honour, Mr Kargbo seeks permission to use  
26 the gents.

27 JUSTICE DOHERTY: Yes.

28 [Accused Kargbo leaves courtroom]

29 MR METZGER: I just wanted to make it clear, Your Honour,

1 that when I was asking for time to consider what the Prosecution  
2 was relying on, I wanted that time after the Prosecution has told  
3 us this is what now we are relying on, because the e-mail that I  
4 passed to Your Honour tended to suggest we are still looking.

12:11:15 5 But as far as the opening is concerned, just so my learned  
6 friend knows what the position is - and I apologise if in any way  
7 he felt personally wounded or discommodated by the adversarial  
8 proceedings, the Defence are content were he wanting to open his  
9 case. The issue that we took here is a very discrete point, and  
10 in fact Mr Serry Kamal's comment - observations just now kind of  
11 show the sort of issues that are here. But one of the major  
12 pieces of information that we required from the Prosecution was  
13 the attribution of the second set of numbers which they say is  
14 Mr Kargbo's phone.

12:12:08 15 Now, I'm content if my learned friend is saying that, Well,  
16 we've given you all the information and it's there in the  
17 pre-disclosure so that if I cross-examine certain witnesses and  
18 it turns out that that assertion is now incorrect, he will not  
19 say that I have not done my best in spirit and in the best spirit  
12:12:33 20 of being professional to want him to look again at what he has  
21 asserted. I say no more about it than that.

22 JUSTICE DOHERTY: Well, are you saying we can open the  
23 proceedings now?

24 MR METZGER: Insofar as the Defence for Kanu is concerned,  
12:12:49 25 if the Prosecution wishes to open its case, I thought I was doing  
26 also Mr Herbst a service as I know in terms of recent events he  
27 may have been more comfortable in not sitting a full day. But  
28 for our purposes, we came here today ready to have an opening and  
29 to hear evidence being - chomping at the bit, as it were, to

1 start cross-examining.

2 But as I said, this is a discrete point. He wants to deal  
3 with that in his opening. I've given him warning in the best  
4 traditions of the bar that there are problems that we're  
12:13:29 5 concerned about what he believes to be proper disclosure. It may  
6 just be erroneous, but I shan't be teaching him to suck eggs. If  
7 the matter remains as it is, then it may well be that when I'm  
8 asking certain questions of people, there may be some  
9 difficulties; that's all.

12:13:57 10 JUSTICE DOHERTY: Chief Taku, if it's about Mr Kargbo I'm  
11 going to clarify this whole thing about when we're starting.

12 CHIEF TAKU: Thank you, my Lord.

13 MR NICOL-WILSON: Your Honour, I don't know whether this is  
14 an appropriate stage for me to renew my application for bail.

12:14:13 15 JUSTICE DOHERTY: Just let me find out what - Mr Herbst has  
16 two problems: My ruling, plus a health issue. So let me see  
17 what he wants to do.

18 Mr Herbst, there was an indication early this morning that  
19 for health reasons you may not wish to sit all day. I have made  
12:14:35 20 a ruling. Of course it's subjects to review in the light of what  
21 has been said, but I'm now putting an onus on you to let me know  
22 if you feel ready to continue after the break.

23 MR HERBST: Your Honour, I don't have a copy of my e-mail,  
24 so I'm not sure I've understood Mr Metzger - the thrust of  
12:15:05 25 Mr Metzger's statement that the information in the e-mail is  
26 erroneous. And if he is indicating that it's just a typo, that's  
27 one thing. But if there's some suggestion being made by  
28 Mr Serry Kamal or Mr Metzger that the issue is more substantive  
29 with respect to the phone number, of course I would like to hear

1 it.

2 I don't want to open on evidence that is inaccurate, and at  
3 the same time I appreciate Your Honour's inquiry. I'm not  
4 feeling 100 per cent up to snuff. My opening is, I don't know,  
12:15:59 5 20 minutes or a half hour. I might be able to do it if I were  
6 pressed to do it; on the other hand, I would be just as happy to  
7 do it first thing in the morning.

8 JUSTICE DOHERTY: I'm not going to review the decision to  
9 adjourn until tomorrow.

12:16:35 10 Mr Herbst is unclear about some points on your submission,  
11 Mr Metzger. Obviously it's not my place to interpret for either  
12 of you. That would be improper. All I can offer to do is if you  
13 have a further point of clarification and it would assist through  
14 the Registry to convey that information to Mr Herbst, I have no  
12:17:01 15 objection to you doing so.

16 MR METZGER: I'm most obliged to Your Honour. My learned  
17 friend reminded me earlier of the adversarial nature of these  
18 things, and I have given him as fair warning as any counsel in my  
19 position could. I think - and I hope - you will forgive me if I  
12:17:20 20 keep my powder dry and await the opportunity to cross-examine the  
21 relevant person. I hope it won't have to be him.

22 JUSTICE DOHERTY: Some chance of that.

23 Now, we will adjourn until tomorrow therefore for the  
24 combination of reasons that I've already said.

12:17:38 25 Now, Mr Taku, you are going to address on Mr Kargbo's  
26 position.

27 CHIEF TAKU: Before I go to the substance of the matter, I  
28 had a discussion with Mr Herbst - and he can confirm that -  
29 because of the circumstances surrounding himself when he left

1 Kigali, he had to prepare Mr Kargbo by phone from Kigali and that  
2 is the reason why Mr Kargbo moved to the safe house where there  
3 are facilities in which he can adequately prepare him from that  
4 location.

12:18:19 5 From what he told us, I don't think he has been able to  
6 prepare him as such even though he will put him on the witness  
7 stand. With that being the case, Your Honour, we respectfully  
8 apply that his bail be extended so that the Prosecutor has  
9 adequate time to prepare him in an environment which is conducive  
12:18:46 10 to him at the appropriate time - any time that he deems fit from  
11 Kigali.

12 Also, Your Honour, if his bail were cancelled he would not  
13 have the opportunity to comply with the undertakings he made in  
14 his plea agreement and also the Scheduling Order, Your Honour.  
12:19:11 15 They are dated 1 June 2010, are clearly indicated in paragraph 8  
16 that one of the issues that the Court would take into  
17 consideration is if there is substantial collaboration with the  
18 Prosecutor which is ongoing, and we did advise the Court this  
19 morning on an issue that was of concern to the Court. Your  
12:19:38 20 ruling this morning, Your Honour, provides an additional reason  
21 why his bail be extended.

22 I will not be here from Thursday, Your Honour, and I would  
23 have loved to remain through the entire process to follow this  
24 case. There are many new issues of law that are coming up which  
12:20:01 25 in my twelve years of practice at the international tribunals  
26 I've not met them before, at least two of them. I would have  
27 loved to sit through the trial, but I will read the transcripts  
28 and I will come back. And I personally undertake that I will  
29 continue to follow up to make sure Mr Kargbo remains of good

1 behaviour and complies with all the conditions that Your Honour  
2 will impose.

3 If there are additional conditions that Your Honour intends  
4 to impose, it is fine by us. But we respectfully, Your Honour,  
12:20:41 5 urge the Court to extend his bail. That's my humble application.

6 JUSTICE DOHERTY: Mr Herbst, you've heard this first  
7 application. I understand there will be a second one. What is  
8 your response, please.

9 MR HERBST: I have no objection, Your Honour. I have no  
12:21:04 10 objection to the application.

11 JUSTICE DOHERTY: Thank you. The defendant Mr Kargbo  
12 applies for an extension of his bail. There is a reference in  
13 submissions before me to a plea agreement. This is not a matter  
14 into which the Court will delve, but I note and accept that he is  
12:23:18 15 with WVS and I note that there is no objection to the extension  
16 of his bail, and accordingly I will extend his bail on the same  
17 conditions. That's that matter.

18 CHIEF TAKU: Thank you very much, Your Honour.

19 MR NICOL-WILSON: Your Honour, I would want to renew my  
12:23:47 20 application for bail for Mr Hassan Papa Bangura. Your Honour, I  
21 will submit that the most important consideration for the  
22 granting of bail is whether the accused will appear for his  
23 trial.

24 I would say that the accused appeared at the initial  
12:24:26 25 hearing. He took a plea. He submitted to the bail conditions  
26 relating to reporting days and time at the Special Court and even  
27 appeared for his trial on Saturday. The accused, therefore, does  
28 not pose any flight risk. He has also surrendered his only  
29 travelling document, which is a Sierra Leone passport, to the



1 Court, as stipulated in your order during the initial hearing.

2 Your Honour, the accused has moved way beyond his military  
3 past to becoming a successful businessman, a loving father, and a  
4 husband. He is the sole proprietor of his business, and at the  
12:25:46 5 moment his business cannot function which will have adverse  
6 effects on the well-being of his family.

7 Your Honour, on Saturday one of the issues that was raised  
8 which prompted the cancellation of his bail was that he had  
9 interfered with Witness 334. I will submit, Your Honour, that  
12:26:26 10 this is a court of law and such allegations have to be proven and  
11 shall not just be admitted by the Court by means of hearsay. I  
12 will submit that up until today, the Independent Counsel has not  
13 been able to substantiate that allegation, and the claim is  
14 vigorously denied by the accused.

12:27:00 15 The call record of Witness 334 will show that the accused  
16 did not, at any time, make a phone call to him with a view of  
17 trying to interfere. The mobile number of the accused is  
18 well-known. We've all taken judicial notice of that. And I was  
19 expecting the Independent Counsel to provide a copy of the call  
12:27:32 20 records of the accused - of TF1-334, to at least verify his  
21 claim, to substantiate his claim that the accused had attempted  
22 to interfere with 334.

23 My Lord, the severity of the charges that the accused is  
24 facing does not in itself attract a flight. The charges are one  
12:28:14 25 for which if, even at the end of the day, the accused is found  
26 culpable, a fine can even be levied against him. This is unlike  
27 the charges other accused persons have faced in the AFRC, the  
28 RUF, the CDF, and the Charles Taylor trials, wherein a fine  
29 alternative is not provided for under the Rules, unlike this

1 particular case where we have the alternative of a fine.

2 Your Honour, I would respectfully crave your indulgence for  
3 the accused to be granted bail, and the accused has already  
4 indicated that he will comply with whatever condition is being  
12:29:39 5 imposed in fulfillment of a bail requirement. In particular, the  
6 accused is willing to increase his reporting times at the Court,  
7 taking into consideration the fact that the Court will be moving  
8 to Kigali, hopefully next week, and the accused is willing to  
9 report on a daily basis instead of reporting once a week which  
12:30:19 10 was ordered in your initial granting of bail. The accused is  
11 also willing to surrender title deeds of documents of property  
12 amounting in excess of 20 million leones as part of the  
13 conditions of bail should that be desired by this Court.

14 The accused also has credible sureties, people of standing  
12:31:03 15 in the Sierra Leone society, who are willing to come forward and  
16 stand as sureties for him and vouch that the accused will always  
17 be available whenever he is needed by this Court. Your Honour,  
18 there is a likelihood that these proceedings will go beyond the  
19 initial expected duration, and the presumption of innocence will  
12:31:41 20 not be strengthened by the continued incarceration of the  
21 accused.

22 At the moment I sympathise with the medical condition of  
23 the Independent Counsel, and there is a likelihood that we might  
24 have to take that into consideration from time to time and the  
12:32:05 25 proceedings will not move as speedily as we will want it to. In  
26 view of all the foregoing, Your Honour, I am respectfully  
27 applying that Mr Hassan Papa Bangura be admitted to bail.

28 JUSTICE DOHERTY: I was just trying to recall or check my  
29 notes. The point put forward by Independent Counsel concerning

1 contact with 334, was it by phone?

2 MR NICOL-WILSON: Yes, Your Honour.

3 JUSTICE DOHERTY: I see. Thank you.

4 MR HERBST: Your Honour, if I can clarify.

12:32:49 5 JUSTICE DOHERTY: Yes, please respond, Mr Herbst.

6 MR HERBST: I wanted to answer your Honour's question. I  
7 said, I guess, Saturday when this came up, that my information  
8 was that there had been two contacts: One in person the prior  
9 week at Sweissy in which Mr Bangura told 334 that he needed his  
10 help and wanted him to deny that part of 334's statements in  
11 which 334 had mentioned Mr Bangura's name; and then on Saturday  
12 there was a contact by phone - and I don't recall whether I had  
13 provided this information to the Court, but I see here that my  
14 notes reflect that the call was on - it was at 12.28 p.m. It was  
12:33:26 15 a minute and 42 seconds, I believe, in duration, and the number  
16 in 334's phone, again if I didn't make a typo - is 23278290913.

17 MR NICOL-WILSON: Sorry, your Honour.

18 MR HERBST: So I do provide that information. It's my  
19 understanding that's Mr Bangura's phone number at the present  
12:34:05 20 time.

21 I don't really have more to submit than what I did on  
22 Saturday, your Honour, except to point out that the additional  
23 information of additional contemptuous activity - criminal  
24 activity theoretically, I think, does increase the risk of  
12:35:22 25 flight, makes it a bit greater. But as I said then, the concern  
26 was about the contact and the unfortunate nature of it, and I do  
27 recall that there is in evidence, and it will come out, that at  
28 one point Mr Bangura at the time of these events did advise 334  
29 that the person that he most had a fear of - I'm paraphrasing -

1 was Mr Bangura.

2 JUSTICE DOHERTY: Thank you. Mr Nicol-Wilson, you were  
3 trying to say something.

4 MR NICOL-WILSON: Yes, your Honour, the number the  
12:36:23 5 independent counsel mentioned is not Mr Bangura's number. And  
6 your Honour, we have a system of registration of mobile numbers  
7 in Sierra Leone, so the independent counsel should provide  
8 evidence now that it appears as if he is the one buttressing  
9 these allegations - should provide evidence showing that this  
12:36:47 10 number actually belongs to Mr Bangura. I would submit it does  
11 not. It does not, and Mr Bangura did not in any way call 334 and  
12 spoke with him for 42 seconds.

13 Your Honour, I would give an additional information to this  
14 Court with regard to witness 334 based on information I received  
12:37:09 15 from Mr Bangura, and that is the only time Mr Bangura has spoken  
16 to 334 since the commencement of these proceedings was when 334  
17 called Mr Bangura on his own mobile number and informed him that  
18 he has lost his wife, and Mr Bangura responded by saying, "You  
19 are not supposed to be calling me." That is the only  
12:38:04 20 conversation, and I think I should bring that to the information  
21 of the Court. That is the only conversation they have had since  
22 the commencement of these proceedings.

23 And if given an opportunity to, I'll be able to get the  
24 record of Mr Bangura's phone to show that a phone call - a call  
12:38:24 25 was received from 334 by Mr Bangura, even though I will not be  
26 able to get record of the conversation - but that was the  
27 conversation.

28 Your Honour, I'm also not comfortable with the fact that  
29 the independent counsel is objecting - or making an allegation of

1 contact based on information he has received, the truthfulness of  
2 which has not been tested. I think to very great extent this is  
3 inadmissible hearsay and the Court should not rely on that. That  
4 has to be proven beyond all reasonable doubt that Mr Bangura made  
12:39:15 5 a contact with 334 for him to suffer from the consequences of  
6 such a contact.

7 He has been incarcerated since Saturday just on the basis  
8 of this allegation, which is still unsubstantiated.

9 JUSTICE DOHERTY: Mr Nicol-Wilson, you are re-opening your  
12:39:43 10 application, when really I only allowed you to clarify one point.  
11 You are starting all over again.

12 MR NICOL-WILSON: As your Honour please.

13 JUSTICE DOHERTY: I still consider there is a risk of  
14 nonappearance by the accused Hassan Papa Bangura, notwithstanding  
12:41:51 15 the very strong and effective submissions on the part of his  
16 counsel. Although they are persuasive, I am still not prepared  
17 to reinstate the bail. The issues of contact and the factual  
18 issues concerning contact between him and 334 can be the subject  
19 of cross-examination, which would then be an opportunity to  
12:42:18 20 review this. I'm therefore not admitting that bail today.

21 Those are the only matters. Somewhere along the line I'm  
22 going to have to set a time to hear this two-legged - pronged  
23 application, but I'm not going to set it right now, Mr Metzger,  
24 because I'm also thinking of setting a time limit for the  
12:42:41 25 submission.

26 I'm going to adjourn Court until tomorrow at 9 o'clock.  
27 I'm hoping everyone will be ready and raring to go at that time.  
28 Please adjourn Court until 9 o'clock tomorrow morning.

29 [Whereupon the Court adjourned at 12.43 p.m.]

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until 9.00 a.m. the following day]