



U.C. Berkeley War Crimes Studies Center
Sierra Leone Trial Monitoring Program
Weekly Report

**Special Court Monitoring Program Update #11
Trial Chamber I - CDF Trial 5 November 2004**

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Disputes Regarding Witness Statements

Summary

The third session of the CDF trial began this week, and under the new trial timeline it is slated to continue for an unprecedented six weeks before the court breaks for a one month recess. Two more witnesses were heard, one in open session and one in closed session, bringing the total number of witnesses called in the CDF trial thus far to 20. The session began with a status conference on the morning of 1 November. The examination in chief of Witness TF2-021 took place the following day, and cross examination of this witness continued through Wednesday. The remaining two days were primarily spent in closed session while the chamber heard testimony from Witness TF2-201.

The first witness called this week testified to his conscription into the CDF forces as a child soldier who was initiated into the Kamajor fighting group. He further testified to the crimes he participated in while acting as a Kamajor, including shooting a civilian woman, killing a police officer, and acts of cannibalism by the "yamortor squad." His testimony addressed a number of charges from the indictment, including unlawful killings, looting and burning, and the use of child soldiers.

Status Conference

Rather notably, none of the accused parties were present at the Monday status conference. First accused Sam Hinga Norman has been absent since his abrupt refusal to attend trial on 19 September, and Moinina Fofana and Allieu Kondewa have only appeared on a few occasions since that time [1]. Defense counsel for Hinga Norman stated that their client was currently refusing to attend trial because he claimed he had not been properly served with the combined indictment, and he would remain absent until the bench considered a pending motion that had been filed on this point. In an informal interview, counsel for the first accused elaborated that Hinga Norman had not been formally arraigned under the new consolidated indictment, and he was concerned that the charges from the initial indictment had not been quashed. It appeared that Moinina Fofana and Allieu Kondewa were refusing to attend at Hinga Norman's request.

Among the matters considered in the status conference were conditions of detention, trial preparation and logistics, translation issues, and judicial management matters including the number of witnesses to be called by the prosecution. In response to a previous request from the bench, the prosecution reported that they had cut down the number of witnesses to be called for the CDF case, and they had filed a revised list that now included 100 core witnesses and 58 back-up witnesses. Acting judge Boutet expressed appreciation on behalf of the bench for continued prosecutorial efforts to restrict the number of witnesses, and the prosecution stated that it would continue to review and revise the core witness list. Counsel for the second accused noted that it would be difficult for the defense to prepare for cross-examination if they did not know whether back-up witnesses would ultimately be called; however, the potential disadvantage to the defense teams was of less concern to the bench than its general interest in expeditious proceedings, and Judge Boutet noted that the chamber would continue to maintain a back-up witness list.

The court additionally considered the matter of a letter from the three accused that had been addressed to the Principal Defender regarding an alleged wrongful application of the rules concerning court-appointed counsel. Judge Boutet stated that the bench had made a clear decision about the status of counsel, and he claimed that they would not address the issue again. Defense counsel for the second accused raised the possibility of a conflict of interests between his status as court-appointed counsel and his own duty to work strictly in the interests of his client, a requirement of the civil law system of his home country. This issue was readdressed at trial the following morning.

Formal status of defense counsel

Status of court-appointed counsel

Trial proceedings began on Tuesday with further questions about the re-designation of some of the defense teams as court-appointed counsel. In the ensuing discussion, it became clear that this new relationship between the accused parties, their defense teams, and the bench itself had not been fully resolved to the satisfaction of all parties. In particular, the individual defense teams and the Office of the Principal Defender did not appear to be collaborating, leading Judge Thompson to comment that “we have a legally untidy, unsatisfactory situation here.”

Defense counsel for the first accused expressed concern that her status as court-appointed counsel might compromise her ability to thoroughly represent her client if she was acting without his consent. According to the bench, her re-designation made her answerable to the court itself, and she was not required to receive instructions from Hinga Norman. Counsel noted that she had been given instructions and privileged information by her client that she would be unable to use in cross-examination without his consent. She expressed concern that since her client was not permitting her to use the instructions he had previously given her, she would only be able to represent him on matters of law, and she would not be equipped to effectively cross-examine witnesses.

Conflict with civil law principles

Counsel for the second accused also expressed discomfort with his designation as court-appointed counsel, and he maintained that he would be faced with an ethical dilemma if his client were to ask him not to attend court. According to the Dutch civil law system under which he practiced, counsel claimed that the interests of the client were the only interests that he was permitted to serve. If his client instructed him not to attend court, he would have to comply with his client's request. However, his status as court-appointed counsel made him an officer of the court, and he would be required to appear in spite of his client's instructions.

Judge Boutet noted that while he was concerned about this conflict between national bars, the Special Court was not bound by the rules of any other bar, and the rules of the Court itself should govern the status of counsel. Counsel noted that the president of the Amsterdam bar had informed him that he would not be permitted to act against his client's instructions: the Dutch code of conduct applies to him even when he is before an international tribunal. The bench responded that to be assigned as court-appointed counsel is to implicitly submit to the rules of the tribunal. The bench and counsel appeared to reach a philosophical impasse: the bench maintained that counsel was appearing by virtue of having submitted to the authority of the court, and counsel maintained that he was able to appear by virtue of being a member of the Dutch bar.

Counsel pointed out that if the court was to push its reasoning to an extreme, lawyers from civil law countries could be excluded from participating in such tribunals, because to accept the principle of answering to the court before the client would be to violate the codes of conduct from their home jurisdictions. This point was substantial in light of the composition of the court itself, which is predominantly comprised of counsel from common law jurisdictions such as Australia, the United Kingdom, the Canadian federal system, the United States, and Sierra Leone. Two of the three trial chamber justices are from countries with mixed common and civil law traditions, and Presiding Judge Itoe pointed out that both legal systems were interacting within the tribunal. However, court procedure thus far has appeared to favor the application of common law principles and practices. Testimony of Witness TF2-021

After discussion regarding the status of counsel, the prosecution called their nineteenth witness, an eighteen year old former child soldier who testified to his participation in Kamajor attacks during the period between 1997 and 1999. In light of the witness's age, the court psychologist from the Witness and Victims Support Unit was present throughout the majority of his testimony.

Capture and initiation into Kamajor society

Count 8 of the indictment addresses the initiation and conscription of child soldiers during the conflict, which is brought as an "other serious violation of international humanitarian law."

The witness stated that he had been captured in Pendembo by rebels and separated from his parents at the age of nine. He remained with the RUF rebels for two years at their base in Ngehun until Kamajors attacked the village in the end of 1997. During the course of the attack, the Kamajors captured three women and seven young boys, including the witness. The witness testified that the oldest boy in the group was fifteen. The indictment specifies under Count 8 that "enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities" constitutes a violation of international humanitarian law: in light of this, establishing the age of both the witness himself and the captured children was significant for the prosecution's case.

The witness described how the Kamajors looted property and burned huts in the village during the course of the attack. While marching to Kenema, the Kamajors allegedly forced the three female captives into the river and shot them because they were presumed to be the wives of rebels. The physical violence and mental suffering counts in the indictment include unlawful killing of civilians who were suspected of collaborating with the rebels [2].

The captured boys were brought to the CDF office in Kenema, where they were told by their captor ? a man who identified himself as "German" ? that they would be taken to the village of Talia Yawbecko and initiated into the Kamajor society. The initiation ceremony took place in the bush, and it was allegedly performed under the instructions of Allieu Kondewa, the third accused. The witness stated that there were over 400 initiates, approximately 20 of whom were in the age range of the witness himself, and they were instructed to remove their shirts. They were marked with a razor blade and told to smear a black substance on their bodies, and Kondewa instructed

them not to bathe for a week. At the end of the week they were taken to a graveyard and made to run in two lines. They were beaten and given a potion to smear on their bodies for fighting. A man referred to as “Dr. Jigbao” allegedly registered the names of the initiates, and Kondewa collected money from them.

Attack on Masiaka

The witness testified that he was given a gun at “Base Zero” in Talia Yawbecko and was instructed how to shoot. The initiates were taken on Kamajor missions in the surrounding villages. On one of these missions they attacked rebels in the town of Masiaka; during the course of the attack, the Kamajors allegedly looted property from civilians in the town. The witness described how he personally shot an unarmed woman as she was running towards him. Kamajor forces caught a number of women between the ages of 16 and 18 who were taken from Masiaka to Base Zero. According to the witness, Allieu Kondewa had stated that he wanted women to marry, and about four of the captured women were taken to his house.

Before the witness could provide more details about what had transpired with the women, the defense objected that forced marriage was not included among the charges of the indictment. The prosecution had previously requested leave to amend the indictment in order to include charges of sexual violence such as forced marriage, but the request was denied by the trial chamber [3]. The defense argued that the court should not hear evidence regarding forced marriage or sexual violence; such evidence would fall outside the scope of the indictment. The prosecution pointed out that while the indictment did not specifically include counts of sexual violence, the circumstances surrounding the abduction of women may fall under other counts, including “physical violence and mental suffering” (counts 3 and 4) and “terrorizing civilian populations and collective punishments” (counts 5 and 6).

The defense maintained that sexual offenses are fundamentally different from the other counts in the indictment. Judge Thompson seemed to support the position of the defense in claiming that he would not be inclined to admit evidence suggesting that women were forced into marriage: since the court was already on record as refusing the count of forced marriage, he expressed concern that it might compromise the integrity of the proceedings. Judge Boutet reiterated the prosecution’s position by claiming that some of the other counts might be addressed by hearing this evidence.

The debate was abandoned, and the witness did not give any further details regarding forced marriage. He testified that Kondewa left with the women for another village, and he had heard that Kondewa initiated them into the Kamajor society. The bench pointed out that such details are admissible as hearsay evidence, but there are some questions as to their probative value.

Attack on Kenema

The indictment specifies that an attack took place in Kenema on 15 February 1998 during which Kamajors killed and injured a number of civilians and police officers. Counts 1 and 2 of the indictment address the charge of unlawful killings, including the killings in Kenema, and the charges are brought as crimes against humanity and violations of Common Article 3 of the Geneva Conventions [4].

The witness first established that he saw Allieu Kondewa, Moinina Fofana, and Sam Hinga Norman at Base Zero. Hinga Norman allegedly arrived by helicopter when he visited the base. He brought arms and ammunition to the base, and young boys would carry it from the helicopter to the armament store. The witness was sent on a mission to Gbendema, a Kamajor base, and Hinga Norman met the fighters there with additional arms and ammunition from Liberia to be used in an attack on Kenema. The fighters proceeded from Gbendema to “SS Camp” near Kenema,

where they met enemy forces and exchanged fire. Upon reaching Kenema, policemen opened fire on them and they were forced to retreat to Gbendema. While the troops were regrouping in Gbendema, they were instructed to kill any young men caught in Kenema. Arms were distributed after the meeting and they returned to attack Kenema a second time.

The witness testified that at the time of the invasion, the Kamajors believed that the Kenema police had turned against them and were acting in support of rebel forces. Upon entering Kenema, Kamajor troops proceeded to the police barracks and began shooting under beds and through ceilings. The witness claimed that a number of police officers were killed during the shooting. In particular, he testified in detail to his own participation in the killing and subsequent burning of a police officer in a field near the barracks. In subsequent testimony, the witness claimed that he was twelve years old at the time of this attack, and his age could be verified based upon a "Kamajor certificate" issued at the time of his initiation. The certificate was deemed authentic by the witness and admitted into evidence.

Testimony regarding cannibalism

The witness testified that other "collaborators" civilians who were presumed to be working in the interests of the rebels were caught and burned by the Kamajors. Other "collaborators" were captured by a group known as the "yamortor squad." There were murmurs in the public gallery at this point in the testimony, and some members of the gallery broke into laughter: according to a Mende-speaking observer, "yamortor" is a term from the Mende tribe that roughly translates as "soft to eat." The witness testified that the yamortors took their captives to their own base in Kenema, where they were tied up and prompted to admit that they were collaborating with the rebels. During cross-examination, the witness claimed that he was made a member of the yamortor squad and participated in cannibalism that transpired at their base. A commander would order the squad to kill a captive "collaborator." The internal organs were removed and fried in oil, and the yamortors ate the fried organs with bread and gravy.

Defense counsel objected that cannibalism was not included as a charge of the indictment, and no details beyond the killing of captives could qualify as relevant evidence. Counsel requested to have the testimony regarding cannibalism removed from the record out of concern that it might have a prejudicial effect. The judges initially reminded counsel that they were not participating in a jury trial: judges are trained in the process of evaluating evidence, and they can make a determination as to whether the evidence has probative value. The bench determined that the evidence would remain on record, though it would be treated as if it had entered the record inadvertently and would be generally disregarded.

6 January 1999 invasion of Freetown

The witness testified that he was informed by his commanding officer that their troops would be sent to support ECOMOG forces during the January invasion of Freetown. Detailed testimony regarding this combined AFRC/RUF invasion was heard in the RUF trial last month from the perspective of an AFRC insider witness [5]. The Kamajor troops were transported to Freetown via helicopter and arrived at the Cockerel Barracks. The witness noted that a number of boys were brought there to fight by other commanders. The troops fought alongside ECOMOG forces. After the fighting subsided, the troops departed for Bumpah.

The witness stated that he subsequently returned to Freetown to disarm with his companions, some as young as ten, at the Brookfields Hotel. He was fourteen years old at the time.

Cross-Examination of Witness TF2-021

In keeping with one of the consistent strategies of the defense thus far, cross-examination by counsel for Hinga Norman focused on expense payments to the witness. Counsel commented that the weekly allowance combined with free food created an attractive inducement for the witness, and he noted that the combined payments and benefits were more substantial than the witness's earnings before he came to Freetown to testify. The prosecution objected that the defense was insinuating that the witness was being paid for his testimony. Judge Thompson agreed that this line of questioning can become argumentative, as it seemed to take the form of a critique of the prosecutorial process. The defense counsel withdrew the use of the term "inducement" at the urging of the bench, and he changed the focus of his cross-examination to demonstrating that the witness was relieved that the Kamajors had effectively freed him from the RUF rebels.

Counsel for Kondewa and Fofana appeared to adopt the strategy of attempting to demonstrate that their clients were not in positions of responsibility vis-a-vis the alleged crimes. Counsel for Kondewa prompted the witness to state that the CDF had a war council, and Kondewa was not a member of the war council. Furthermore, when fighting for the Kamajors, the witness stated that he was under the command of ECOMOG some of the time. Counsel for Fofana asked whether the witness knew of several other individuals, including Kosseh Hindowa, "an important name," adding that "some wonder why he hasn't been indicted." Judge Itoe interjected that counsel was raising a controversial topic and should proceed with his cross-examination. As with the issue of witness compensation, the possibility that the prosecution may have indicted the wrong individuals is a recurrent theme in the defense's case.

Closed session testimony of Witness TF2-201

The remaining two days of trial this week were held in closed session. According to a recent ruling by the bench, court monitors are permitted to attend closed sessions, but monitoring reports are restricted to procedural matters and may not include any witness testimony.

All applications are heard in closed session on a case-by-case basis, and the arguments by both sides regarding the merits and drawbacks of hearing testimony from a particular witness in closed session are made without the public gallery present. The prosecution's application for closed session for Witness TF2-201 was contested by counsel for the first accused, who argued that the public nature of a trial enhances the veracity of a witness's testimony. According to this argument, members of the public can come forward to contest the evidence offered by the witness. When the bench asked for clarification as to how the public would go about contesting witness testimony, counsel elaborated that the witness would be aware of the risk of being contradicted, which would produce a greater incentive for him to tell the truth.

Citing jurisprudence from the ICTY, counsel further claimed that the public should have an opportunity to assess the fairness of the proceedings. Judge Thompson acknowledged the nexus between a fair and a public trial, noting that the public nature of a trial provides an external check on the witness's testimony. Counsel concluded her objection by stating that the truth-finding function of the court is assisted by the public nature of a trial, and the defense and the court itself would be deprived if the application for closed session was granted.

Applications for closed session are brought in closed session, and the bench delivers its ruling on closed session applications before the public gallery. The application was decided in favor of the prosecution. Counsel for the first accused asked the bench to provide a justification for its ruling in accordance with Rule 79, which specifies that "the Trial Chamber shall make public the reasons for its order." Judge Boutet responded that the reasons had been given. Counsel stated that the order itself would not suffice as the reasoning behind the order, and she reiterated that no reason for the closed session ruling had been given. At the end of the closed session testimony, counsel again requested that the court provide reasons for its ruling. This request was not

acknowledged by the bench, and Presiding Judge Itoe announced abruptly that the court would recess.

Evidentiary disputes regarding witness statements

During the brief open session on Friday morning, defense counsel for the first accused raised the evidentiary matter of how witness statements are effectively recorded by the prosecution. Counsel pointed out that Witness TF2-021 had refuted significant parts of the evidence recorded in his witness statements during his oral testimony earlier in the week, and she claimed that the court should have a means of evaluating the credibility of these statements in light of the witness's *viva voce* testimony. Claiming that the prosecution's method of recording evidence leaves the defense at great disadvantage, counsel argued that the prosecution should include the original statement in the language in which it was recorded as well as its interpretation into English so that there could be a way of determining whether translation errors had occurred. If the statements are put forward as an accurate record of what was said, counsel argued, there must be a way of evaluating the disparity between the statements and *viva voce* testimony.

Judge Thompson responded on behalf of the bench that it did not have sufficient evidence to make an objective evaluation of the credibility of the witness's testimony. The prosecution claimed that the material requested by the defense team would not assist the court in making this determination: the core of his testimony had centered on his role as a child soldier in the CDF and the fact that he participated in combat, and this core evidence was not effectively challenged in cross-examination. According to the prosecution, the areas in which the greatest number of inconsistencies occurred were the least relevant aspects of the witness's testimony. Defense counsel disputed this characterization and reiterated the importance of being able to determine how significant the interpretation issues might be. The bench stated that it would issue a written decision on the matter.

- 1.) For an explanation of Norman's refusal to attend trial the week of 24 September, please refer to Special Court Update Number 5 .
- 2.) Amended Consolidated Indictment, paragraph 23 states "civilians, including women and children, who were suspected to have supported, sympathized with, or simply failed to actively resist the combined RUF/AFRC forces were termed 'collaborators' and specifically targeted by the CDF. Once so identified, these 'collaborators' and any captured enemy combatants were unlawfully killed."
- 3.) Decision of 20 May 2004 on prosecution request for leave to amend the indictment.
- 4.) 5 February 2004 Indictment, section 25.
- 5.) In particular, please refer to Report 8, testimony of Witness TF1-167.