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

Special Court Monitoring Program Update #35 Trial Chamber I - RUF Trial 6 May 2005

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Witness profiles at a glance Attendance of the accused Witness protection and security: Witness and victims protection officer asleep Closed sessions Evidence at trial Legal and procedural issues

The RUF trial resumed sitting on Tuesday this week after a ten-day adjournment, during which his Honour Judge Boutet conducted contempt proceedings for the five alleged contemnors in the AFRC trial *[1]*. Proceedings were further cut short by a plenary meeting on Friday afternoon, hence reducing the usual four and one half-day week to two days and two half-days. A further two witnesses were called, bringing the number of Prosecution witnesses called thus far in the RUF trial to 32. A further 66 witnesses are slated to be heard from the Prosecution's core witness list.

As the majority of the proceedings were conducted in closed session, a discussion of procedural issues dominate this report, with an overview of two rulings made by the Chamber being the most significant issues discussed this week.

Witness profiles at a glance

Witness TF1-129 and *Witness TF1-125's* personal details were disclosed in closed session. Both Witnesses testified in English.

Attendance of the accused

The first accused, Issa Sesay, was absent from proceedings on Thursday morning (12 May 2005) visiting the hospital. He was otherwise in attendance of the proceedings. The second accused, Morris Kallon, was in attendance throughout the week. The third accused, Augustine Gbao, remains absent from the trial and refuses to acknowledge the legitimacy of the court.

Witness protection and security: Witness and victims protection officer asleep

The witness and victims protection officer assigned to support the witnesses at trial took frequent naps this week and was heard snoring by members of the courtroom. At one point mid-week, the officer fell off his chair after having fallen asleep.

Closed sessions

While the trial resumed, the majority of the proceedings took place in the absence of the public, after the Chamber ruled that Witness TF1-129's testimony should be heard entirely in closed session. The Chamber did, however, caveat their ruling by stating that relevant portions of the witness's testimony that "do not touch and concern his identity and professional profile but are germane to charges in the indictment" would be made public after close scrutiny by the court. In their ruling, the Chamber noted that this was consistent with "the letter and spirit of the norm requiring public hearing while at the same time affording protection to the witness as to his identity".

The Chamber continues to ensure that a witness's right to testify in closed session is invoked only in exceptional circumstances and generally speaking, the level of closed sessions has decreased since the beginning of the trials. However, while this most recent ruling may be considered consistent with the theory of holding a public trial, in practice, it seems highly unlikely that those who attended the public gallery that day will subsequently read through transcripts on-line or watch the tapes of proceedings in the court library. As such, the right of the accused to have his trial heard in public may effectively be lost in this instance.

Evidence at trial

Witness TF1-125 testified to events that occurred during the junta period in the eastern province of Kenema. According to a table issued as part of the Prosecution's pre-trial brief, his testimony is being led to prove allegations related to counts 1, 3, 4, 5, 9 and 10 under the Indictment.

The witness testified that the AFRC (which he described as being an amalgamation of the RUF and the Sierra Leonean military forces) formed an administrative headquarters or "secretariat" in Kenema town shortly after President Kabbah's overthrow in May 1997. The secretariat is alleged to have been under the leadership of the Secretary of State, Eddie Kanneh, an ex-SLA soldier. The witness alleged that Colonel Sam Bockarie (aka "Mosquito") and Colonel Issa Sesay were based in Kenema, even though no evidence of their presence at the secretariat was led by the Prosecution. The witness later explained that Issa Sesay lived in the compound next to his, and was in charge of twenty RUF combatants who harboured arms and ammunition subsequently supplied to combatants at Tongo field. He further alleged that he had once seen Sesay leave the compound with the Chief Police Officer (CPO), the Regional Commissioner and several other men in a white jeep. He heard from other police officers the next day that Sesay had flogged the CPO and the regional commissioner.

The witness then described the arrest and execution of four civilian suspects at the Kenema police station. According to the witness, the civilians were accused of "tarnishing the AFRC's image" at a critical stage of the junta's development by wearing military fatigues while committing a domestic burglary. The civilians were allegedly shot by a gunman prior to being brought to the station. No nexus between the alleged execution of the suspects and any of the three accused appeared to have been established by the Prosecution under examination-in- chief.

The witness then went on to describe initial hostilities between the RUF/AFRC forces and the Kamajors. In an attempt to form an alliance with the Kamajors after Kabbah's overthrow, Eddie Kanneh is alleged to have invited the Kamajor spiritual leader, Kamoh Brima Bangura, to join the SLA. Bangura's refusal resulted in his arrest and a subsequent shoot-out between the Kamajors and the RUF/SLA combined forces. Bangura's house was allegedly looted thereafter.

Kanneh and Mosquito are then said to have issued general orders for the arrest of all suspected Kamajor collaborators. The witness recalled one instance in particular, at the beginning of 1998, where seven suspected Kamajor collaborators were arrested, including BS Massaquoi (Chairman of the Kenema Town Council) Brima Kpaka and Andrew Quee. Massaquoi and Kpaka are alleged to have developed septic wounds from having been tied up at the order of Mosquito. They were

released on bail, though Mosquito subsequently ordered their re-arrest, shortly after the AFRC government was ousted from Freetown. Kpaka escaped arrest but Massaquoi was brought to the Kenema police station by the SLA military police and, along with five other suspects, was repeatedly assaulted. The Prosecution tendered a police diary into evidence that included a logged entry of the event. The witness had heard that these six people were later killed by General Mosquito and his men.

A large part of the cross-examination this week took place in closed session, to protect this witness's identity. However, during open session, defense counsel questioned the witness extensively regarding certain entries in the police station diary that pointed to civilians being able to report violations to the police during the junta occupation period. This included three incidences where civilians had travelled to Kenema police station to report incidences that were occurring in the diamond mines in Tongo field in late 1997 and early 1998. Counsel seemed to be raising this as part of a defense against the allegations of forced mining and enslavement against his client, Issa Sesay, in that civilians had freedom of movement at the time they were allegedly being held against their will in Tongo.

Legal and procedural issues

Unsigned Witness Statements said to Prejudice the Defense's Ability to Cross-Examine Witnesses

The defense argued strenuously this week that Trial Chamber I should order the prosecution to have its witnesses sign all unsigned witness statements. The rationale behind the argument related to the effect that cross-examining a witness on an unsigned witness statement has on the defense's ability to effectively challenge the witness's evidence.

Quoting from their Honours' decision on witness statements in the CDF trial *[2]*, counsel for the first accused argued that the defense had been denied the "ultimate and most definitive way of proving a statement". Counsel for the third accused bolstered this argument by stating that the issue related to a determination of best practice rather than admissibility. He noted that, while the ICTY judgments in the *Blaskic [3]* and *Musema [4]*cases (cited in the CDF decision *[5]*) had affirmed their Honours' position that unsigned statements can be admissible, it was not considered the good practice at the "ad hoc" tribunals for witness statements to be unsigned. He invited the Chamber to take judicial notice of the fact that many national jurisdictions (as well as the international tribunals) generally ensure that witness statements are prepared with a degree of regularity. He further suggested that the Chamber issue a practice direction relating to the manner in which witness statements should be prepared and order that the prosecution retroactively apply their direction in accordance with Rule 54 of the Rules. It was, in his opinion, "in the interests of justice" that witness statements "are as accurate as justice can allow". In his submission, if the judges were to allow for a large batch of witness statements to be submitted to the defense that remained unsigned by the witness, the court would be setting a bad precedent for the International Criminal Court and other jurisdictions.

The prosecution responded by stating that it wished to be able to consider the submissions and deliver its response in writing.

The Chamber appeared to disagree with defense counsel's oral submissions. The judges asserted that the approach adopted by counsel was overly technical and inflexible and more suited to national jurisdictions than international tribunals. Judge Thompson opined that the Chamber would not evaluate the probative value of a witness statement on the basis of whether it was signed. Judge Boutet seemed unconvinced that the issue hampered the defense's ability to cross-examine effectively. He noted that the defense primarily used witness statements to establish inconsistencies between a witness's statement and his or her testimony. In his opinion,

the fact that a witness statement was unsigned would not detract from counsel's ability to do this. While he agreed with counsel for the third accused that it would be better practice to have signed witness statements, he seemed to be of the opinion that unsigned witness statements should still be admissible. In response to counsel's suggestion that the judges should issue a practice direction relating to the issue, the Presiding Judge Itoe added that the judges did not want to legislate and noted that the CDF decision clearly set out the basis for the constitution of witness statements. However, in light of the prosecution's request and "working in the principle of equality of arms", his Honour Judge Itoe determined that the defense should reduce their arguments to written submissions. "We would like to evolve as much as international criminal jurisprudence is evolving," his Honour said.

Reliability is not a Function of Admissibility

During the course of hearing legal arguments about the merit of submitting original (rather than photocopied) documents as exhibits, his Honour Judge Boutet pointed out that, unlike the Rules guiding the admission of evidence at the *ad hoc* tribunals, which call upon the Chambers to determine the probative value of evidence prior to admitting it, evidence is admissible at the Special Court once it is shown to be relevant: the question of its reliability is determined thereafter, and is not a precondition to admissibility *[6]*. His Honour noted in particular the Appeals Chamber's recent decision relating to the Fofana bail application in the CDF trial *[7]*. In that decision, their Honours' stated: "Although the probative value of particular items in isolation may be minimal, the very fact that they have some relevance means that they must be available for counsel to weave into argument and for the Judge to have before him in deciding what to make of the overall factual matrix" *[8]*. This recent decision may give the Prosecution a wide ambit within which to argue that exhibits and documents that have limited probative value or are unreliable should be determined admissible, on the grounds that they are connected to proving the counts under the Indictment.

1.) Of five defendants in the contempt proceedings, Brima Samara, defense investigator for the first accused, is charged with contempt of court in violation of Rule 77(A)(ii) of the Special Court Rules and is alleged to have knowingly disclosed the identity of Witness TF1-023 to family members of the first accused. Mr Samara's case closed on 9 May 2005. Judgment is yet to be delivered. The other four defendants are each joined in separate contempt proceedings and are charged with contempt of court in violation of Rule 77(A)(iv) of the Rules and are alleged to have threatened and intimidated Witness TF1-023 who was giving evidence in proceedings before Trial Chamber II on 9 March 2005.

2.) Decision on Disclosure of Witness Statements and Cross Examination (16 July 2004) SCSL-2004-14-T, at para. 21.

3.) *Prosecutor v Blaskic, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule and Additional Filings* , (26 September 2000). Under paragraphs 15-16 of the decision, the Appeals Chamber of the ICTY determined the usual meaning of a witness statement to be "an account of a person's knowledge of a crime, which is *recorded through due procedure* in the course of investigation into the crime" [emphasis added].

4.) *Prosecutor v Musema*, Judgment, 27 January 2000. At para. 85, unsigned witness declarations and records of questions put to witness statements and answers given were also determined by the Trial Chamber to constitute witness statements.

5.) Decision on Disclosure of Witness Statements and Cross Examination (16 July 2004) SCSL-2004-14-T, at para. 10.

6.) Rule 89(C) of the Rules of Evidence and Procedure for the Special Court states that: “A Chamber may admit any relevant evidence.” This compares with Rule 89(C) of the Rules of Evidence and Procedure for each of the ICTY and the ICTR, which states that: “A Chamber may admit any relevant evidence *which it deems to have probative value*. [emphasis added]”

7.) Fofana Appeal Against Decision Refusing Bail (11 March 2005) SCSL-04-14-AR65. Available on-line at: http://sc-sl.org/CDF-decisions.html.

8.) Id. , at par. 23.

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