



U.C. Berkeley War Crimes Studies Center  
 SIERRA LEONE TRIAL MONITORING PROGRAM  
 WEEKLY REPORT

Special Court Monitoring Program Update #55 Trial Chamber 1 - CDF Trial 20 September 2005

by Kyra Sanin, Senior Researcher

Background Purpose of the Hearing Summary of the Oral Arguments Confusion as to Standard of Evidence Outcome

## Background

Following the conclusion of the prosecution's case in July 2005,[1] counsel for the three CDF accused each filed a Motion for Judgment of Acquittal under Rule 98,[2] arguing that the prosecution failed to present evidence which, if believed, could support a conviction against the accused. Based on the written and oral submissions of the parties, the Judges have the option of upholding the charges and continuing with the trial on the charges as they stand, or dismissing specific allegations, dismissing individual counts, or even dismissing the entire indictment.

The hearing for comments and arguments on the CDF Motions for Judgment of Acquittal was originally scheduled for Friday, 16 September 2005. But for undisclosed reasons and with only three days notice, the Trial Chamber postponed the hearing until Tuesday, 20 September 2005. This last minute schedule change caused some complications for international counsel, who had flown to Freetown specifically for this half-day long hearing on Friday the 16 th.

## Purpose of the Hearing

There was some confusion as to the purpose of the hearing. The defense teams submitted their briefs by 4 August 2005, and the prosecution submitted its response by 18 August 2005. During the last trial sessions prior to the recess, the bench had indicated that it would give specific instructions to the parties on what to address in their oral submissions. However, it appears that the email communication from the Trial Chamber during the recess gave only general guidelines, advising the parties to give a summary of their arguments and make any points they felt relevant or useful.

The Presiding Judge commenced the hearing by instructing the defense parties to give a 30 minute summary of their respective submissions, but *not* to read from their briefs. The Court afforded the prosecution an opportunity to respond to each defense argument. In answer to an objection from the prosecution, the Bench clarified that defense counsel could, during its oral submission, raise arguments in response to the prosecution's reply brief and issues "collateral" to those raised in the defense's written submissions, but that entirely "novel" issues would be precluded. The distinction between "novel" and "collateral", the Bench concluded, is one for judicial determination.[3]

## Summary of Oral Arguments

While the hearing on the Motions to Acquit would usually be the forum for the defense to argue against the weight of the prosecution's evidence and for the prosecution to argue that it had adequately met its burden, counsel on both sides focused their oral submissions more on legal arguments than evidentiary issues, probably in part because of the time limits imposed by the bench. With the exception of counsel for the second accused, who argued that the evidence does not support a conviction for either individual or command responsibility, the defense teams did not use this Rule 98 hearing to challenge the sufficiency of the prosecution's evidence. Similarly, the prosecution did not aggressively assert that it had met its burden of proof.

### First Accused, Sam Hinga Norman

Mr. Norman was not present in court, in his continued protest against the Special Court's jurisdiction. His defense attorney noted Mr. Norman's on-going objection that he was never arraigned or properly served with the indictment, and then moved on to make three brief arguments: 1. the prosecution has generally failed to meet the "sufficiency of the evidence" standard as established by Rule 98, 2. the prosecution has attempted to include a charge of "extended" Joint Criminal Enterprise without specifically pleading it as such in the indictment, and 3. the imprecision and uncertainty of the elements of Counts 6 and 7 of the indictment (Terrorizing the Civilian Population and Collective Punishments) defeat the Court's jurisdiction over this charge.

The prosecution countered the first argument by agreeing with the "sufficiency of the evidence" standard, and generally insisting that the evidence presented has indeed passed this threshold. The prosecution addressed the second argument by laying out the three main elements of "extended" Joint Criminal Enterprise<sup>[4]</sup> and listing the identification numbers of various witnesses whose testimony arguably supports this charge. Finally, the prosecution maintained that terrorism is clearly a crime under international customary law. Moreover, it argued that a challenge to the vagueness of terrorism is essentially a challenge to the quality or elements of the charge, which in turn affects the Court's jurisdiction. The prosecution contends that, as Rule 98 deals solely with the sufficiency of the evidence presented, it is not the vehicle for jurisdictional matters and they must be reserved for closing argument.

### Second Accused, Moinina Fofana

Counsel for the second accused began by citing the Special Court's unique budgetary constraints and its limited mandate to prosecute only those who bear the greatest responsibility. He argued for a subjective standard <sup>[5]</sup> under which there is room for acquittal on specific incidents alleged in the indictment (if not entire counts), thus allowing the court to pare down the proceedings and continue more efficiently. However, he did not cite any jurisprudence in support of this argument.

Counsel went on to argue against the prosecution's assertion that jurisdictional matters cannot be addressed at a Rule 98 hearing, challenging both the Court's personal jurisdiction over his client and its jurisdiction over Counts 6 and 7 of the indictment, as noted by counsel for the first accused.

The Fofana defense then squarely attacked the prosecution's characterization of the evidence with regard to modes of liability. He stated that there can be no joint criminal enterprise where the Kamajors' <sup>[6]</sup> common purpose was the legitimate plan to wage war against the invading RUF and AFRC forces, noting that they were even backed by the international community in this endeavor. Moreover, he argued that the evidence fails to show a superior/subordinate relationship between Moinina Fofana and any of the perpetrators of any crimes, mentioning that there is jurisprudence which finds that command responsibility does not exist over an "unspecified assortment of

attackers”.<sup>[7]</sup> Moreover, even assuming a relevant group of identifiable subordinates, Fofana’s defense counsel argued that there is no evidence that he had either *de jure* or *de facto* control over those actors.

The prosecution responded to these arguments by identifying points of evidence that it argues prove Moinina Fofana was in charge of operations, that he took the place of Sam Hinga Norman in his absence, and that he gave orders to commit specific atrocities. The prosecution also pointed to evidence that Fofana allegedly killed two people himself.

In addition to these efforts to show individual and command responsibility, the prosecution argued that aiding and abetting the criminal acts in question is a mode of liability under individual criminal responsibility, noting Fofana’s alleged support of Hinga Norman. The prosecution generally emphasized the key role it claims Fofana played by controlling food, arms and ammunition for the CDF and by publicly addressing Kamajors at numerous locations listed in the indictment.

Third Accused, Allieu Kondewa

Counsel for the third accused elected to rely entirely on their written submission, noting only that the appropriate standard of proof is not “sufficiency of evidence”, but rather “proof beyond a reasonable doubt”, in mistaken reliance on the pre-amendment version of Rule 98.<sup>[8]</sup>

The prosecution simply responded by agreeing that the standard is “proof beyond a reasonable doubt”, that the prosecution bears the burden of proof, and that it accepts that burden.

### **Confusion as to Standard of Evidence**

Remarkably, none of the defense teams, nor the prosecution, nor the bench came to any agreement as to the standard of evidence laid out in the amended Rule 98.

As mentioned above, counsel for the first accused described the standard of evidence under Rule 98 as “sufficiency of evidence”, but then he went on to state that the test to be applied is no different from the test under the previous Rule, which begs the question of why the plenary judges would have bothered to change the wording.<sup>[9]</sup>

The prosecution confused matters further by seeming to agree with the “sufficiency of evidence” standard, but then re-inserting language similar to the pre-amendment Rule concerning a “reasonable trier of fact” and the establishment of guilt “beyond reasonable doubt”.<sup>[10]</sup> No such language exists in the current Rule.

Counsel for the third accused was the only voice in court to recognize the disparate treatment of the standard of evidence by all parties present. Unfortunately, in his attempt to clarify this confusion, he incorrectly characterized the standard as “proof beyond a reasonable doubt”, quoting from the old Rule.

### **Outcome**

Thus, at the close of the hearing, no clear standard of evidence was ever established. The Presiding Judge concluded the hearing by noting that Trial Chamber I had not yet made a decision on the motions, and that it would do so as soon as possible. Nonetheless, the Presiding Judge cautioned the parties against waiting for the bench’s decision, and advised them to continue their preparations for trial in January. Given that the standard of evidence is a crucial baseline measure for acquittal, it is difficult to determine how the bench will assess the arguments

presented or indeed weigh the Prosecution's evidence when this standard has yet to be clearly established.

- 1.) The CDF trial began on 3 June 2004, and the prosecution concluded its case on 14 July 2005 after testimony by 75 witnesses during five trial sessions. (SCSL Press Release, 19 September 2005, "Oral Arguments Scheduled for Tuesday in CDF Case").
- 2.) "If, after the close of the case for the prosecution, there is no evidence capable of supporting a conviction on one or more counts of the indictment, the Trial Chamber shall enter a judgment of acquittal on those counts." Rule 98, as amended 14 May 2005. The wording of the previous Rule 98 was: "If, after the close of the case for the prosecution, the evidence is such that no reasonable tri bunal of fact co uld be satisfied beyond a reasonable doubt of the accused's guilt on one or more counts of the indictment, the Trial Chamber shall enter a judgment of acquittal on those counts."
- 3.) However, Judges Itoe and Thompson seemed to indicate that they would accept novel arguments after all. Judge Itoe made the point that a written submission can never exhaust all potential arguments, and that the Trial Chamber scheduled this opportunity for oral submissions to allow counsel to supplement their briefs. Judge Thompson observed that one of the advantages of international tribunals is that they favor a more flexible approach, rather than the rigid technical approach of the national systems.
- 4.) 1. a A plurality of persons, 2. The existence of a common plan (shared intent) to commit a crime under the statute, and 3. The participation of the accused. Extended Joint Criminal Enterprise is informally referred to as JCE3, as it is the third and most inclusive form of the crime.
- 5.) Mr. Koppe set out arguing for an *objective* standard, and it was only when the Presiding Judge commented that he was directly contradicting the argument in his written brief that counsel stated that it was, in fact, a *subjective* standard for which he was advocating.
- 6.) The Kamajors are a traditional hunting society that comprised a majority of the Civil Defense Forces. Frequently, parties in court refer to the Kamajors and the CDF interchangeably.
- 7.) Mr. Victor Koppe, counsel for second accused, Moinina Fofana, Official Transcript, on 19 September 2005, p. 31, line 3. . Mr. Koppe did not give a specific case citation for this jurisprudence in his oral presentation, nor is one provided in the Fofana Motion for Judgment of Acquittal, although the quotation appears on page 20 of the Motion, registry page 13564.
- 8.) See note 2, *supra*.
- 9.) See note 1, *supra* for the wording of the pre-amendment Rule 98. The wording of the amended Rule 98 is in line with both the ICTY and ICTR concepts.
- 10.) Mr. Kamara for the prosecution, Official Transcript, 20 September 2005, p. 11, beginning line 14.



**WSDHANDACENTER**  
FOR HUMAN RIGHTS & INTERNATIONAL JUSTICE  
*Stanford University*

This publication was originally produced pursuant to a project supported by the War Crimes Studies Center (WCSC), which was founded at the University of California, Berkeley in 2000. In 2014, the WCSC re-located to Stanford University and adopted a new name: the WSD Handa Center for Human Rights and International Justice. The Handa Center succeeds and carries on all the work of the WCSC, including all trial monitoring programs, as well as partnerships such as the Asian International Justice Initiative (AIJI).

A complete archive of trial monitoring reports is available online at:

<http://handacenter.stanford.edu/reports-list>

For more information about Handa Center programs, please visit:

<http://handacenter.stanford.edu>

---