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Summary

The CDF trial continued with the Prosecution's cross-examination of the first accused, Chief Sam Hinga Norman. It focused on Norman's own alleged command and control of the CDF as well as the roles of his co-accused, Fofana and Kondewa, in the conflict. Peter Penfold, the former British High Commissioner to Sierra Leone, also took the stand this week as the second witness to be called in the CDF defence case. His testimony ended in controversy as he described the Indictment as a grave injustice. The Prosecution's cross-examination focused on Penfold's personal friendship with Norman as well as his own explicitly critical opinions of the Special Court. Former Vice President Dr. Albert Joe Demby subsequently testified on 9 and 10 February. Procedural issues relating to the application of the joint criminal enterprise doctrine also arose this week, when counsel for the third accused attempted to intervene while witnesses called by other defence teams were being cross-examined by the Prosecution. The Trial Chamber decided to proceed cautiously and allow such interventions on a case by case basis.

Witness Profiles at a Glance

Chief Samuel Hinga Norman, the first accused, testified under cross-examination for the first part of this week. He testified in English.

Mr Peter Penfold held the position of British High Commissioner to Sierra Leone from March 1997 until March 2000. His appointment as High Commissioner followed several

prior visits to Sierra Leone since joining the diplomatic service in 1963. Now retired, Mr Penfold has over 20 years of service in Africa. He testified in English.

Dr Albert Joe Demby, the former Vice President of the Republic of Sierra Leone, was born in 1934 in Kenema. Demby qualified as a medical doctor in 1969 and practiced until Kabbah appointed him Vice President in 1996; a position he held until 2002. He testified in English.

The Prosecution's Cross-Examination of Norman

Much of the Prosecution's cross-examination focused on the command and control that Norman allegedly exercised over the Kamajors. During the cross Norman maintained that he had never controlled the Kamajors. He also reiterated the fact that while he was at "Base Zero" in Talia, the CDF headquarters in the Bonthe district, the Kamajors operating in the battlefield were under ECOMOG's control. The prosecuting attorney continued to question Norman about this alleged control, asking him how ECOMOG had maintained its command over the Kamajors from Liberia, given they had only entered Sierra Leone in early 1998. Norman conceded that ECOMOG did not issue any commands from Liberia and that there were no ECOMOG forces present when the Kamajors attacked Koribundu. However, he stated that they were present for the attacks on Tongo Field and Kenema. The Prosecution also referred to the previous testimony of insider witnesses. It noted that those witnesses had accused Norman of planning the attack on Tongo and of giving orders to the Kamajors to capture Koribundu and kill all rebels, accusations that Norman denied. Subsequently, Norman denied any knowledge of the Death Squad¹, of having seen child soldiers at Talia or of having seen any prisoners brought back to Talia (with one exception). He also maintained that his sole role while at Base Zero was to organize rudimentary military training for the Kamajors.

The Prosecution introduced several pieces of documentary evidence during cross-examination in an attempt to undermine the credibility of Norman's testimony under direct. This included the introduction of a letter of appointment relating to the CDF from 1997, which tended to negate Norman's claim that the CDF did not officially come into existence until the creation of the National Coordinating Committee (NCC) in 1999.²

The Prosecution also introduced into evidence a calendar produced by the CDF in 2001, when Norman still held the position of National Coordinator. The calendar was created at Norman's request to memorialize the contribution of the CDF in the restoration of the country's democratically elected government. While Norman initially stated that the information contained in the calendar was, to the best of his knowledge, correct, he soon reneged on this statement. After having read through a paragraph under a picture of him that detailed his role in the CDF, Norman noted that while the calendar described him as the founder of the Kamajors, they had existed for countless generations within the Mende tribe. The Prosecuting attorney also read out the paragraph below Moinina Fofana's picture, which described him as the National Director of War and stated: "As far

¹ The Prosecution alleges that the Death Squad was a CDF militia that Norman controlled.

² The letter was entitled "Civil Defence Force of Sierra Leone (CDF S/L) headquarters" and Norman's signature appeared on it, authorized by a stamp which had within its boundary the words 'Co-ordinator CDF – SL'. While the prosecuting attorney suggested that this letter indicated the existence of the CDF as early as 1997, Norman maintained that while the term was used at Talia it remained unofficial until 1999.

as the Sierra Leone Civil Defence Forces are concerned, they don't say war unless he say they say war."³ Norman claimed that while he approved the overall calendar, the actual descriptive information it contained was provided by the Director of Personnel.

During cross-examination, the Prosecution also questioned Norman on the roles played by the second and third accused, Moinina Fofana and Allieu Kondewa respectively, and the relationship that existed between the men while at Base Zero. Norman testified that Fofana was merely an elder rather than Norman's deputy and that Kondewa held the position of High Priest but did not assist Norman to coordinate the forces. The prosecuting attorney suggested to Norman that it was Kondewa who introduced the concept of being 'bullet-proof' to the Kamajors' immunization process, and that this concept had not previously existed in the society. The Prosecution further suggested that, following the 1997 coup, Kondewa developed a new system of Kamajor initiation that effectively transferred authority over the Kamajors from individual chiefs to Norman himself. Norman vigorously denied these allegations. He also denied any knowledge of the reasons for which Kondewa was eventually removed from his position as High Priest.

The Prosecution ended its cross-examination with a series of questions to which Norman repeatedly responded in the negative. He maintained that he never met or gave orders to the Death Squad, that he was never aware of members of the CDF killing, looting or terrorizing civilians and that he was not aware of the use of child soldiers prior to the reinstatement of the Kabbah government. The prosecuting attorney asked "So, to put it simply, your defence is to deny each and every criminal allegation made against you by the witnesses that have been called by the Prosecution?" to which Norman responded "I deny them, my Lord."⁴ The prosecuting attorney subsequently asked "Isn't the truth, Chief Norman, that you find yourself wholly unable to answer these allegations and have simply resorted to a blanket denial of everything in order to escape the consequences of your action?". Norman denied this and pointed to the fact that he was never given the chance to answer to the Prosecutions allegations prior to the trial. The Prosecution closed its cross-examination on this note.

Testimony of Peter Penfold, former British High Commissioner to Sierra Leone

Peter Penfold held the position of British High Commissioner to Sierra Leone from March 1997 until March 2000. His appointment as High Commissioner followed several prior visits to Sierra Leone since joining the diplomatic service in 1963. Now retired, Mr Penfold has over 20 years of service in Africa. Mr Penfold testified that he worked with Norman upon arrival in Freetown in 1997 while trying to institute military training assistance programmes. At the time, he had discovered systemic corruption and mismanagement within the Sierra Leone army. Penfold then met with Kabbah several times in the spring of 1997 to discuss these issues. This included a meeting during which he advised the President of rumours of unrest in the army and of a possible coup attempt. Penfold then proceeded to narrate in detail the events of Sunday, 25 May 1997, the day of the AFRC coup. He spoke of the terror inflicted on the civilian population of Freetown by the rebel forces.

³ Transcript, February 6, 2005, pg 62, lines 10-12

⁴ Transcript, February 7, 2006, pg 81, lines 6-9.

In the days that followed the coup, with Kabbah having fled the country, the witness testified that he received various reports that Chief Norman had been attempting to organize and rally loyal officers of the SLA in an attempt to force the coup to stand down. At that time, Penfold also learnt that Norman himself had gone into hiding amidst threats to his life. Norman is alleged to have escaped the country soon after aboard a US war ship. Penfold was subsequently evacuated from the country and relocated to Conakry in early May, where President Kabbah was also living in exile. Penfold corroborated points of Norman's own testimony, particularly regarding the accused's time in Conakry, his relations with the President and the establishment of the CDF.

Penfold told the court that he toured many regions in his efforts to help rehabilitate and restore the country after the democratically elected Kabbah government was restored. He noted that when he met with various chiefdom heads of the Kamajors in places like Bo and Pujehun, they made little (if any) reference to Chief Norman and did not give any impression that they had operated under his command. Penfold said he had the impression that people took orders from their local chiefdom authorities and that whenever Norman's name came up it was clear that he was held in high regard by the civilian population. The Examiner-in-Chief asked Penfold if he had any observations regarding Norman that he would like to share with the court. Penfold responded that in his dealings with Norman, he found him to be a man of integrity and a caring human being. This character evidence was followed by a visibly emotional moment whereby Penfold stated: "I feel, like many others, (Norman) is a hero, not a war criminal and I believe his indictment here is a grave misjustice."⁵ At that point the Presiding judge, Justice Boutet, intervened and made it clear that the court did not need to be lectured, that the trial would proceed in accordance with the rule of law and that the bench took offence to Penfold's comments. Penfold immediately apologized, however Justice Thompson expressed his desire for the witness' last comments to be deleted from court records and he further admonished Penfold for his statement. Justice Itoe added that Penfold's comments were quite prejudicial to the role of the Prosecution and amounted to disrespect for this arm of the court. Justice Boutet, in explaining why Penfold's comments were particularly insulting to the court, stated "we were...very concerned by the comment of what we know and observe is a diplomat; a person who knows what he is saying, and he knows the words he is using and, therefore, I can only presume that he intended to say what he did. And that is why I took offence."⁶ As such, the Chamber decided that Penfold's final comments would stay on record. They would, however, be accorded absolutely no weight.

While counsel for the second accused declined the opportunity to cross-examine the witness, counsel for the third accused, Mr. Margai, used the occasion to question Penfold regarding the relationship that existed between Norman and Kabbah in much the same manner as he had questioned Norman. Penfold also disclosed his opinion that all command and control of the CDF was clearly vested in ECOMOG.

Mr. De Silva, Chief Prosecutor, carried out the cross-examination on behalf of the Prosecution.⁷ The cross focused on the ongoing friendship that exists between Penfold and Norman, as well as between their families, in an attempt to show the bias of

⁵ Transcript, February 8, 2006, pg 51, lines 12-14.

⁶ Transcript, February 8, 2006, pg 53, lines 3-8.

⁷ While the previous Chief Prosecutor rarely appeared in court, Mr. De Silva has had a somewhat regular presence during the current CDF trial session.

Penfold's testimony. De Silva described the two as being 'great friends'. The Prosecution stated that it did not dispute the vast majority of Penfold's testimony and questions would accordingly largely focus on the witness' final comments. De Silva questioned Penfold regarding whether, when he made his comment about the Indictment being a grave injustice, he was making about a comment on the motives of the Prosecution. Penfold denied insinuating any bad faith on the part of the Prosecution and indicated that he had already apologized to the court for his comments. The prosecuting attorney extensively questioned Penfold on his often vocal opinion of the court and entered into evidence a 2005 article from the journal African Affairs, in which Penfold was interviewed and asked for his perspective both on the conflict and the tribunal. In the article, the Prosecution emphasized the passage where Penfold was quoted as saying that those who had to fight the rebel forces, which had embarked on horrendous atrocities, had to fight 'fire with fire'. Penfold testified that while in the article he stated that members of the CDF might have committed some terrible deeds he had never personally met anyone who said that they had suffered such atrocities at the hands of the CDF.

De Silva also questioned Penfold on Kabbah's inexperience with military matters, given his background as a lawyer and his past work with the United Nations. As such the prosecuting attorney contended that Norman was a necessary and perfect fit as National Coordinator with his extensive experience with the military. This implied that the President, while holding the official title of Commander in Chief, really knew very little about the military aspects of his government, which he left to Norman to control. While Penfold agreed that there were few experienced loyal military men left at the time, he did not concede that Kabbah was simply a figurehead, as the Prosecution seemed to be implying. Penfold also agreed with the Prosecution that Norman was an inspirational leader and a man of action. However, Penfold qualified the prosecution's characterization of Norman as "a man who leads from the front" by saying that it was only when Norman was appointed to lead that he would lead. This appeared effectively to thwart the Prosecution's attempts to present Norman as exercising the 'greatest responsibility' for the commission of crimes throughout the period of the conflict.

Testimony of Dr Albert Jo Demby, former Vice President of the Republic of Sierra Leone

Dr Albert Joe Demby, the former Vice President of the Republic of Sierra Leone, was born in 1934 in Kenema. Demby qualified as a medical doctor in 1969 and practiced until Kabbah appointed him Vice President in 1996; a position he held until 2002. His testimony initially focused on events in the conflict prior to 1996. Although this period falls outside that of the Indictment, there were elements of this portion of his testimony that remained relevant to the case.

Demby spoke about the evolution of the Kamajor movement, characterized as a voluntary mass movement of people, composed of men, women and children, which existed under the command control of chieftdom authorities. He corroborated several elements of Norman's testimony, including Norman's description of the Kamajor movement, and the initiation and immunization processes of the Kamajor society. Demby also testified about the SLPP's support of the Kamajors after the party was elected in 1996, as well as the ongoing problems experienced in the Sierra Leonean Army leading up to the 1997 coup. The witness introduced new information regarding apparent rumours that circulated following the coup which alleged that Norman and

Demby would have carried out a coup themselves, with the support of the Kamajors, had the AFRC not done so. Demby vigorously denied that there was any truth to these rumours.

Demby further testified that while he was in hiding at Lungi he became aware that Norman had been appointed National Coordinator of the CDF and that Norman's primary purpose was to coordinate the activities of the Kamajor fighters and ECOMOG forces in Liberia. While at Lungi, Demby told the court that he was shown a cache of arms by General Khobe. The arms are alleged to have been provided by the private mercenary company, Sandline International. Demby further alleged that these arms would be supplied to the Kamajors at Base Zero after "getting the proper clearance from Kabbah". His testimony highlighted Kabbah's knowledge of Norman's activities at Base Zero and the continued need for his authority over matters involving the defence of the country. Demby's testimony further emphasized the purported administrative nature of the National Coordinating Committee, of which Norman was a member, rather than its alleged military nature as the Prosecution claims. Dr. Demby will continue his testimony next week.

Procedural Issues With Respect to Joint Criminal Enterprise

Trial Chamber I confronted a novel procedural issue this week. The Chamber had to determine the right (if any) of counsel for a co-accused person to intervene during the cross-examination of witnesses that he had not called. The issue arose in relation to the doctrine of Joint Criminal Enterprise (JCE)⁸, which the Prosecution is relying upon to prove the co-perpetration of crimes committed by each of the three accused and their subordinates. The Indictment contends that the three accused participated in a common plan, purpose or design (joint criminal enterprise) to use any means necessary to defeat the RUF and to gain control over the territory of Sierra Leone⁹. The application of the JCE doctrine in this manner has been regarded by some early commentators as novel, as it appears that the prosecution is seeking to introduce criminality related to the *jus ad bellum* element of the conflict (that is, the element related to the body of law that governs the resort to hostilities and encompasses the ban on aggression and waging aggressive war).

The procedural issue arose after counsel for the third accused, Charles Margai, continued to intervene during the cross-examination of witnesses that were not called by his defence team. He was subsequently admonished and often silenced by the bench for intervening inappropriately, but despite the visible frustration of the Presiding Judge, Justice Boutet, he continued to attempt to intervene. Margai argued that, given his client was jointly culpable with the other co-accused under the doctrine JCE, he had every right to intervene when testimony was affecting the interests of his client. Judge Boutet emphasized that these were not Margai's witnesses, and that as he did not carry out the

⁸ The charge of JCE comprises the following three elements: firstly, a plurality of persons. Secondly, the existence of a common purpose that involves the commission of a crime provided for in the Statute. Lastly, the participation of the accused in the common purpose is required. This participation can take the form of assistance in, contribution to or execution of the common purpose. Please see *Prosecutor v. Vasiljevic*, Judgment, Appeals Chamber, ICTY, Case No. IT-98-32-A, pg 34. For further information on JCE please see *Prosecutor v. Tadić*, Appeal Chamber, ICTY, Case No. IT-94-1-A.

⁹ Amended and Consolidated Indictment, paragraphs 12-21.

examination-in-chief it was not his place to intervene during the Prosecution's cross-examination of them. Furthermore, Judge Boutet noted that Margai had already had the opportunity to cross-examine the witnesses and as such, if he wished to raise a point during the Prosecution's cross-examination he should confer with counsel for the first accused, who had actually called the witnesses in question. Margai responded that given he was allowed to cross-examine these defence witnesses, he should concomitantly be allowed to intervene at any point during which they were on the stand to protect his client's interests. He therefore implied that the right to cross-examine witnesses called by counsel for a co-accused person necessarily precipitated the right to intervene during the Prosecution's cross-examination of those same witnesses. Perhaps due to the fact that Judge Boutet was not sympathetic to this position, Mr. Margai asked to hear the opinions of the two other judges, who had up until then been relatively silent on the issue. After a brief deliberation, Trial Chamber I gave an oral ruling on the matter. The Chamber determined that the right of counsel for a co-accused (in this case, Margai) to raise objections during opposing counsel's cross examination of a defence witness, should be limited by the extent to which the testimony elicited directly affected the interests of that counsel's client. As such, Margai was allowed to raise objections during the proceedings only when the testimony in question directly implicated his client. Furthermore, that Chamber determined that what constitutes the direct implication of an accused person would be decided by the bench on a case-by-case basis. While the judges stated that they did not consider this to be the usual procedure in the conduct of criminal trials, it was evident that the charge of JCE, a relatively novel area of international criminal law, required a more nuanced approach to the conduct of the trial and the complex procedural issues arising from it. The possible prejudicial effect of witness testimony is a key concern for the Defence with respect to the application of this doctrine.



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