



U.C. BERKELEY WAR CRIMES STUDIES CENTER
SIERRA LEONE TRIAL MONITORING PROGRAM
WEEKLY REPORT

Special Court Monitoring Program Update # 72
Trial Chamber I - RUF Trial
March 10, 2006

by Alison Thompson
Senior Researcher

Summary

Witness Profiles at a Glance
Witness Motivation and the Presumption of Innocence
Witness TF1-113 Testimony
Witness TF1-108 Testimony
The Tensions of Cross-Examination

Summary

The Prosecution continued to bring their case against the three accused in the RUF trial this week. The question of witness motivation previously raised by defence counsel was taken up again during Monday's proceedings. The debate also touched on the bench's evaluation of witness testimony, as Jordash contended that Prosecution witnesses must be assumed to be lying in order to maintain the presumption of innocence. The Bench indicated that this sort of judgment would only be conducted at a later stage and that arguments regarding witness motivation may only be presented during closing arguments. The two insider witnesses on the stand this week testified about the RUF chain of command, the commanders' use of forced labour and the particular roles of the three accused. Witness TF1-113, who also testified in the AFRC trial, remained on the stand from the previous week and was thoroughly cross-examined by the three defence teams. Witness TF1-108, a key witness in the Prosecution's case against Gbao, was subsequently led in evidence. The cross-examination of this witness by counsel for the third accused will resume during next week's proceedings. As these two insider witnesses were submitted to rigorous cross-examinations during the week's proceedings many of the tensions involved with this form of examination were particularly evident. The Bench intervened on a few occasions when they perceived defence counsel to be in danger of pushing a witness too far. However, other instances of seemingly aggressive or condescending questioning by defence counsel went unnoted by the Trial Chamber.

Witness Profiles at a Glance

Witness TF1-113, an insider witness for the Prosecution, was cross-examined by counsel for the first and third accused. The witness continued her testimony from the previous week's proceedings, which she began on March 2nd. She also testified at the AFRC trial in 2005.

Witness TF1-108 testified in Mende in partly closed session. He acted as a civilian commander for the RUF from 1996-2000. The cross-examination of this witness by counsel for the third accused will continue next week.

Witness Motivation and the Presumption of Innocence

Two interrelated arguments made on the previous Friday - namely, the right of an accused to be presumed innocent until proven guilty and the right of counsel to question a witness in relation to their motivation in testifying - were again discussed in this week's proceedings. The debate regarding witness motivation was initially invoked during Jordash's cross-examination of Witness TF1-113. Jordash had questioned the witness regarding any possible financial incentive she may have had when making her decision to testify. When the argument was first raised the Prosecuting attorney, Peter Harrison, had objected to this questioning. He submitted that the Trial Chamber had previously ruled that counsel could not impute that a witness was testifying due to monetary factors during the submission of evidence. As the debate took on a tangential nature, Jordash posited that in order to act in accordance with the principle of the presumption of innocence the Bench must assume that all prosecution witnesses are in effect lying. The bench had argued that they were not in a position to evaluate witness testimony during the submission of evidence and that they did not presume witnesses for either the Prosecution or the Defence to be lying during this phase of the trial. They insisted that all evidence would be evaluated, and judgments rendered, at a later date.

On Monday these arguments were again taken up and Jordash, with the support of counsel for the third accused, insisted that counsel had the right to explore any form of motivation that a witness may have in coming to testify at trial. The bench however insisted on clarifying the meaning of the presumption of innocence and Justice Thompson explicitly restated the principle does not involve a corresponding presumption regarding the credibility of prosecution witnesses at this stage in the admission of evidence. Boutet also indicated that he did not share Jordash's interpretation of the presumption of innocence. An oral decision was issued regarding the Prosecution's objection in which Justice Boutet reiterated the Trial Chamber's earlier position, which it had issued orally on 2 December 2005.¹ The presiding judge stated that at this point in the proceedings counsel was entitled to enquire which expenses have been reimbursed by WVS but not to question their actual motivation in testifying. Harrison's objection was therefore sustained. The issue of witness motivation has been an ongoing one in the RUF trial, with the Prosecution citing three previous incidents where the issue has arisen. In his arguments Jordash noted that it was a constant issue in a country with the extreme levels of poverty of Sierra Leone. Justice Thompson appeared to be particularly sensitive to the issue as he was concerned that Jordash was imputing illegal behaviour on the part of the court by implying that witnesses were committing perjury due to monetary incentives. Whether the money given to witness for their daily living allowances and the reimbursement of various expenses then pushes people to lie is something that the defence will now have to raise in their closing arguments.

Witness TF1-113

The cross-examination of Witness TF1-113 resumed on Monday, marking the third day of questioning by counsel for the first accused. Jordash questioned the witness extensively on the RUF's alleged use of forced labour. He suggested that rather than the civilians being forced to work they did so voluntarily in exchange for health care and education. The witness denied this and reiterated that the labour was not compensated in any way. The cross for the first accused came to a close after the witness denied that Peter Vandi was area commander for the RUF in Kailahun District in 1996. She contended that during the period in question Issa Sesay, the first accused, was the senior RUF commander for the district.

Counsel for the second accused declined to cross-examine the witness. Counsel for the third accused began then began the first cross-examination for which he had received instructions

¹ Transcript, 2 December 2005, pg 11-29

from his client.² As questions related to the series of locations where the witness lived during the conflict, proceedings moved into closed session. With proceedings back in open session Cammegh's questions focused on the alleged role of Gbao, his client, in the RUF and the Prosecution's allegations regarding his individual criminal responsibility. Cammegh suggested that Gbao was, contrary to the witness' testimony, not a G5 commander and was never a member of the G5. Rather, he contended that Gbao was supervisor of the RUF's Internal Defence Unit (IDU), a central component of the Gbao defence's theory. The IDU was described as a separate unit that investigated instances of alleged misconduct on the part of RUF soldiers and collected intelligence from the front lines.

The defence's strategy to show that all sides in the conflict committed atrocities became evident during Cammegh's cross. The witness denied any knowledge of an alleged incident in 1996 where over 200 people were killed by Kamajors at Moa River, despite Cammegh insisting that this attack was common knowledge. The witness similarly denied any knowledge of alleged CDF attacks in Kenema, when Kamajors placed burning tires around their civilian victim's necks. After restating many of the questions surrounding these events several times the Bench intervened and indicated that counsel should move on as the cross-examination was becoming repetitive. However, Justice Thompson also indicated that he wanted to go on record that he treats with contempt any criticism that the Trial Chamber has been too tolerant of lengthy, repetitious cross-examinations.³ While Cammegh moved on to other topics it was evident that the witness was increasingly impatient and frustrated with counsel's attempts to discredit her testimony. After Cammegh pointed out the discrepancies in the number of civilian prisoners held by the RUF in Kailhaun town, indicating that she had put the number at 67 in a 2003 statement, 65 in a 2004 statement and finally 67 while being led in evidence, the witness lashed out. She angrily told the court that if Cammegh, who is himself international counsel, had been in Sierra Leone when the war broke out, had witnessed the atrocities and had seen his own relatives killed, he would not be launching such accusations against the witness.

The cross-examination by counsel for the third accused continued into the following day's proceedings. In addition to the defence's contention that Gbao was not in fact a G5 commander, Cammegh suggested that Gbao was not present in Kailahun town the day the witness alleged that Sam Bockarie executed the 67 civilian prisoners, in the presence of Gbao and Sesay. Cammegh also indicated apparent inconsistencies between her statements to the Prosecution and her testimony in court regarding how many bodies she saw when she arrived at the roundabout and how many prisoners she witnessed being killed. The witness again blamed such inconsistencies on those translating and taking down the statements for the Prosecution. While the bench further cautioned Cammegh about the repetitive nature of his questions, Cammegh refused to cede. He argued that his questions related to the single worst atrocity contained in the indictment, which he hopes to defeat, and that this was his one opportunity to question the witness about these events.

Questions continued regarding the various positions Gbao held with the RUF hierarchy, thereby getting to the heart of the Prosecution's theory of individual criminal responsibility in the RUF. This witness is central to the Prosecution's case against Gbao, therefore reflecting the lengthy and arduous nature of the cross by his counsel.

² Augustine Gbao has in the past refused to communicate with his defence team in protest over his counsel. This is also the first trial session that Gbao has attended in approximately two years. The reason for the apparent turn around may reflect Hinga Norman's own decision to participate in the trial as Norman is said to exert influence over all of the accused.

³ A recent draft version of the Trial Monitoring Program's Interim Report was circulated to Chambers. The report observes that Trial Chamber I has allowed for particularly lengthy cross-examinations and has often taken a non-interventionist stance in such matters. Please find the final version of the report at <<http://socrates.berkeley.edu/~warcrime/documents/SecondInterimReport.pdf>>

Witness TF1-108

The Prosecution employed a novel approach in leading this witness in evidence in open session by using the pseudonym 'New York' when referring to his native village. While this did not eliminate all need for closed session it did enable proceedings to occur largely in open session, thereby successfully balancing the protection rights of the witness, enshrined in Rule 75⁴, and maintaining the public nature of the trial.

Witness TF1-108 testified that he held the position of civilian commander for the RUF from 1996 to 2000. In this position the witness organized the civilians of his village in accordance with the RUF's wishes. The witness testified about the various positions that the three accused held within the RUF chain of command, having allegedly gained first hand information from his time working with the organization. He identified Gbao as the liaison between the civilians and RUF fighters and labeled him as the G5 commander from 1995-96 as well as the chief security officer from 1996-99. The witness also testified extensively about the forced labour the civilians of his village endured under RUF control. The witness identified Gbao as being in charge of these forced labour programs.

The prosecution witness alleged that he had seen groups of young boys, members of SBUs, carrying weapons and engaging in physical beatings throughout Kailahun, Pendembu and Daru. He specifically identified all three of the accused as having several SBUs, a crime outlined in Count 12 of the Amended Indictment.⁵ The Defence immediately seized upon this evidence as not having been disclosed by the Prosecution and therefore argued that it was inadmissible. Counsel for the second accused objected on the basis that there is no allegation of physical violence in the Kailahun District in the indictment. On Wednesday these arguments were taken up in the morning session and Harrison (for the prosecution) argued that the evidence in question was contained in proofing notes of March 2005, which were given to the Defence as part of the disclosure process. Harrison also maintained that counts 1 and 2 of the indictment relate to physical violence for all of Sierra Leone, including Kailahun district, at all times relevant to the indictment, thereby including the beatings carried out by SBUs. He emphasized the systematic nature of the alleged crimes.

In contrast, Jordash argued that the Prosecution had to go much further than the global allegations upon which they were relying. He stated that he was not concerned about disclosure regarding SBUs but rather the specific factual allegations related to the three boys in particular as having guns, using physical violence and the disclosure of their ages. Furthermore, Jordash reminded the court that the Prosecution's allegations regarding child soldiers may carry with them sentences of over ten years for the accused, hence highlighting both the gravity of the charge and the need for the prosecution's allegations under the indictment to be specific in this regard, in order to ensure the rights of the accused enshrined in Article 17 (and in particular to know the case against him) were upheld. He also indicated his ongoing frustration with the Bench's stance in allowing, what Jordash alleged to be, the submission of new evidence by the Prosecution through the inclusion of the supplementary witness statements.⁶ Mr. Touray further argued that the prejudicial value of the evidence in question outweighed any probative value it had.

Justice Boutet indicated that the defence needed to satisfy him that the Prosecution had fundamentally failed to disclose information that was available to them. Furthermore, Justice Itoe noted that not only did Counts 1 and 2 of the indictment relate to physical violence but that as

⁴ Rules of Procedure and Evidence, available at <<http://www.sc-sl.org/rulesofprocedureandevidence.pdf>>

⁵ Amended Consolidated Indictment, The Prosecutor vs. Sesay et al., 13 May, 2004, available at <<http://www.sc-sl.org/Documents/SCSL-04-15-PT-12-6192-6202.pdf>>

⁶ The Sesay defence team has filed numerous motions protesting the admission of such statements, which they claim often contain new evidence and relate to new charges against the accused. Jordash complained that the Bench has not properly addressed the jurisprudence contained in these defence motions. He called for a more contextual approach to the submission of evidence.

Count 13 related to abductions and forced labour, and that forced labour necessarily constituted a physical act, beatings could be included in the count.

An oral decision on the objection by defence counsel was delivered by the Trial Chamber after a short recess. The objection was overruled and a reasoned ruling was indicated to be forthcoming.

After the decision was issued the Prosecuting attorney, Mr. Alain Werner, continued to lead the witness in the direct. The witness alleged that his younger sister, at the time only a young girl, was captured from where she lived in Talia and taken to one of the RUF training bases located in Bunumbu. Furthermore, he testified about an incident whereby one of his wives was gang raped by eight members of the RUF in 1998. He stated that she died the same week due to the injuries she sustained during the incident. The witness alleged that he reported the incident to Gbao, who told him that those dying at the war front were more important than his wife being raped. The following day's proceedings saw the conclusion of the examination-in-chief after a few questions related to the witness' alleged encounter with some women from Kono, two who had been captured by Gbao and were forced to become his wives and two who had entered into forced marriages with Sesay.

The cross-examination of Witness TF1-108 by counsel for the first accused was carried out entirely in closed session. The cross continued into Friday morning's proceedings and ended just before the lunch recess. As has occurred previously during the cross-examination of Prosecution witnesses in the RUF case, the presiding judge reminded counsel to be wary of pushing the witness too far in his insistent questioning. Justice Itoe brought up a further procedural issue during the cross-examination: he complained that Jordash's cross was 'completely divested' from his client. This comment followed a series of questions posed by Jordash that related specifically to Gbao (who is represented by O'Shea, as lead counsel) and his command authority within the RUF hierarchy. Itoe remarked that Jordash's cross would be more concise if he limited himself to matters related to his client as the three defences were in essence being conducted as if the accused were being tried separately. Jordash responded that as the Prosecution contends that Sesay is responsible for all alleged crimes committed by Gbao through the principle of command responsibility he does not have the 'luxury' of ignoring those crimes.

Mr. Shekou Touray, counsel for the second accused, conducted the initial hour of his cross-examination of Witness TF1-108 in closed session. Back in open session Touray questioned the witness on how he had come to know that Gbao allegedly reported to Kallon, Sesay and Bockarie, as well as how he knew the whereabouts of Kallon, the second accused, throughout the indictment period. Mr. Touray attempted to discredit the witness by questioning his political affiliations, noting that he voluntarily became a member of the RUF party in 2001. The witness denied ever having campaigned for the party but Touray was careful to emphasize that the witness had explicitly sought to become a member of the party after working for the RUF as a civilian commander. He suggested that everything the witness had done during the conflict represented a voluntary contribution to the war effort of the RUF.

Counsel for the third accused commenced his cross-examination in closed session, which continued until the end of the day. During the cross Cammegh focused on the defence's theory as to the promotions and hierarchy within the RUF. He again suggested that Gbao was head of the IDU, rather than G5 commander, which the witness denied.

The Tensions of Cross-Examination

This week saw two important insider witnesses for the prosecution rigorously cross-examined by defence counsel. The cross-examination of witnesses remains a particularly sensitive area as the Trial Chamber must strike a balance between often competing interests. In particular, the Bench must manage the rights of the accused to question evidence in court on the one hand with the need to protect witnesses from aggressive badgering and the risk of re-traumatization on the other. This tension is particularly apparent with the cross-examination of insider witnesses, as

crime-base witnesses are often not questioned as intensely due both to the nature of their evidence and their usually undisputed victim-hood. Insider witnesses are, however, sometimes victims themselves, and can be equally as vulnerable as crime-base witnesses.

Detailed and vigorous cross-examinations are indispensable to a fair trial and it is an especially encouraging element to see given the criticism of the performance of defence counsel at the court.⁷ However, there have been instances where counsels have seemingly crossed the line. The Trial Chamber issued several cautions to defence counsel this week after questioning became too insistent, warning them not to push a witness too far. Other instances, however, have gone unnoted. This has been the case particularly where counsel has employed patronizing language with the witness in their attempts to discredit them. For example, while in closed session this week one defence counsel asked a witness whether a female family member of hers had been a “naughty girl” and had had an affair with an RUF commander. While not overtly aggressive, such language is not only condescending but also personally insulting to the witness. It is simply not necessary to the conduct of a thorough cross-examination and counsel should be equally as rebuked by the Bench in such instances as they are when it is a case of more explicit badgering.

⁷ Justice in Motion: The Trial Phase of the Special Court for Sierra Leone. Human Rights Watch. October 2005, Volume 17, No. 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>
