



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

Report No. 4

Trial Chamber I - CDF Trial 17 September 2004

Michelle Staggs and Sara Kendall, Senior Researchers

Summary Status of the Court Use of Child Soldiers As a Novel Charge Evidentiary Issues
Treatment of Witnesses and Witness Testimony

Summary

After a five-week recess during the month of August, the Special Court for Sierra Leone resumed the trial session of Civilian Defense Forces (CDF) defendants Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa. Under the combined indictment, the defendants are charged with eight counts of violations of international humanitarian law, including unlawful killings, physical violence and mental suffering, looting and burning, terrorizing civilian populations and collective punishments, and using child soldiers. These crimes are charged primarily as violations of Common Article III of the 1949 Geneva Conventions, with two exceptions: the first count of murder is brought as a crime against humanity, and the use of child soldiers is a novel charge brought under the blanket category of "other serious violations of international humanitarian law."

The CDF case will continue through the end of September, after which the Trial Chamber will resume hearing the Revolutionary United Front (RUF) case. Since no judges for the second Trial Chamber have yet been appointed, the first Trial Chamber will be alternating between the CDF and the RUF cases in the coming months. The start date of the Armed Forces Revolutionary Council (AFRC) trial is still unknown at this time.

The prosecution called three further witnesses who recounted the alleged events of February 1998 in Koribondo and one witness who has testified regarding his capture and conscription as a child soldier. This brings the total number of witnesses heard thus far in the CDF trial to seven [1]. In both examination and cross-examination, the first three witnesses' testimony focused on the burning of houses and looting of property in Koribondo as well as the killing of civilians and alleged rebel sympathizers. The prosecution attempted to demonstrate Sam Hinga Norman's accountability for the atrocities committed in Koribondo by focusing their witness examinations on statements that Norman allegedly made at a town meeting shortly after the considered events took place. The fourth witness described his participation in RUF operations after he was forcibly conscripted following the killing of his father. Two years later, at the age of fourteen, he was captured by CDF forces and underwent an initiation ceremony allegedly performed by the third accused, Allieu Kondewa.

Four of the main issues at trial this week were (i) the status of the court itself; (ii) the use of child soldiers as a novel charge; (iii) evidentiary issues related to credibility and reliability; and (iv) the treatment of witnesses and witness testimony [2].

Status of the Court

The Special Court for Sierra Leone was created by an agreement between the government of Sierra Leone and the United Nations. As such, it exists independently of the domestic legal system of Sierra Leone even though it incorporates two domestic laws into its statute as indictable offenses. A number of challenges to the court's jurisdiction were brought by the defense during the pretrial stages of the proceedings. Although these challenges were formally resolved by the court's own Appeals Chamber in March of 2004, defendant Sam Hinga Norman continued to openly question the jurisdiction of the court this past week at trial.

During pretrial proceedings, the defense had argued that the Special Court's primacy over the Supreme Court of Sierra Leone violated the state's constitution. Arguing further that the statute of the court names crimes that did not exist in the domestic law of Sierra Leone, the defense made the case that the charges violate the prohibition on retroactive criminal liability. The court responded in its decision that it was acting in an international jurisdiction completely outside the sphere of domestic law [3]. On the second day of the re-opened proceedings, defendant Sam Hinga Norman addressed the court directly about this matter during his cross-examination of a witness [4]. Insofar as the issue of the status of the court had been settled by the court itself, Hinga Norman claimed, it was essentially a political imposition upon the people of Sierra Leone. Hinga Norman further objected to the designation of the court as an international tribunal. Stating that the court is supranational and applies international laws, the bench reiterated the position it had taken in its pretrial ruling on the court's jurisdiction. The court does not appear to regard itself as a hybrid entity: it understands its own operations to be taking place entirely outside of the domestic legal system.

Hinga Norman's objections to the court were dismissed by the judges as an effort to politicize the proceedings, whereas the judges considered themselves to be operating under the principle of legality rather than engaging in political rationalizations. In response to Norman's objections, Judge Bankole Thompson's assertion that "this is not a court of politics, it is a court of law" is a recurring claim as the proceedings continue.

Use of Child Soldiers as a Novel Charge

For the first time since the trial began, the court heard testimony from a former child soldier, conscripted to the CDF at age 14. The charge of child recruitment is a novel charge and an indictable offense under Article 4(c) of the court's Statute [5]. While the defense originally contested this charge on the grounds that, at the time child soldiers were conscripted into the CDF, the charge of child recruitment was not as yet a statutorily recognized offense [6], the Appeals Chamber fully and finally decided that individual criminal responsibility for this charge was attributable to each accused in its pre-trial decision of May 2004 [7].

During his testimony, Witness TF2140, aged 21 years old, explained to the court how he was captured by the Kamajors and subsequently initiated into the "born naked society". Allieu Kondewa, the former High Priest of the CDF, is alleged to have performed the initiation ceremony in which the witness participated. Sam Hinga Norman is alleged to be his former commander. Norman verified the closeness of the relationship between the first accused and the witness when he cross-examined the witness referring to him as "my son". The witness also alleged that Moinina Fofana had several "securities", namely, young boys under the age of 14 acting as guards, living in his house in Bo.

The witness also gave detailed testimony as to his initiation ceremony and that of other child soldiers as Kamajors. According to the witness, his hands were tied behind his back and he was put into a cage made of palm fronds with five other boys, some as young as age 10 or 11. It was a precondition to their participation in the initiation ceremony that the boys were virgins. As virgins,

those “pure from women”, were considered immune to gun-fire (“free from bullets”). The initiates were pierced with blades and certain “charms” thought to imbue them with special powers were placed in the wounds on their bodies. During cross-examination, the witness attested to believing these charms, given to him by Kondewa, were the reason he had been spared from death during the war.

Evidentiary Issues

The reliability of certain witness testimony was brought into question by counsel for the second and third accused this week, after it was found that certain statements made by Witness TF2159 during his testimony in court contradicted the computer-generated written statement of the prosecution’s interview with that witness on 3 December 2003. This led the Trial Chamber to extensively examine its decision of 16 July 2004, regarding the disclosure of witness statements and cross-examination [8]. After much discussion between the bar and the bench, the judges ruled that counsel for each of the second and third accused could tender Witness TF2159’s statement from 23 December 2003, marked to show the discrepancies in question, as Exhibit 7 to the trial.

The issue of the reliability of the witness statements themselves was further raised during the court’s motion session, when stand-by counsel for the first accused put forward a motion to have the hand-written notes of the interviewers from the OTP submitted as evidence to the court. The defense argued that, in accordance with Rule 66(A)(ii) of the court’s Rules of Evidence and Procedure (the Rules), the defense was entitled to view these interview notes, as they were material to the preparation of its case. It further argued that, in accordance with the ruling of the ICTY in the *Blaskic* case [9], all documents held by the prosecution had to be disclosed to the defense without delay. Furthermore, following the ruling in the *Kordic* case [10] and the rules of procedure and evidence of the ICTY, the defense argued that statements which were tendered as evidence by the prosecution should be tendered in the form in which they were originally disclosed. The defense argued in the alternative that these hand-written notes would constitute exculpatory evidence to which the defense would be entitled under Rule 68(B) of the Rules.

In support of its argument to have these notes tendered to it, the defense noted that the computer-generated witness statements issued by the prosecution were, in many instances, the result of translations by the OTP from a witness’s interview given in Mende or Krio to English. In certain instances, interview responses had even been translated first from Mende to Krio and subsequently from Krio to English. Furthermore, none of the computer-generated statements issued by the OTP had been signed by the witnesses who had been interviewed.

The prosecution argued that the hand-written notes of interviews with its witnesses should be deemed evidence within the exception of Rule 70(A) of the Rules. Citing *Blaskic* [11], it argued that hand-written notes of the interviewers of the OTP fell within the category of “reports, memoranda or other internal documents prepared by a party” which are “not subject to disclosure or notification”. The defense retorted that those documents were meant to refer to privileged material and as such, would not be admissible as evidence, but that hand-written notes regarding interviews with witnesses whose statements and testimony are material to its case would clearly not fall within this category. The bench reserved judgment on this issue following its further consideration.

Treatment of Witnesses and Witness Testimony

Compensation of Witnesses

A common line of questioning in the defense’s cross-examination of witnesses focused on the material and financial support provided to witnesses appearing in court. At cross-examination,

each witness was questioned regarding the total amount of money he had received from the court. There has been some disagreement at trial as to the nature of this support: it is framed both implicitly and explicitly by the defense as payment for witness testimony, whereas the prosecution regards it as compensation for witness expenses. The defense has attempted to demonstrate that the compensation received by witnesses far surpasses the amount of money they would have made if they had not appeared in court. In one such instance, the defense attempted to show that a witness's compensation for cooperating with the Office of the Prosecutor would have amounted to far more than his annual income. The bench has stated that the prosecution must disclose all amounts paid to witnesses by the Victims and Witnesses Unit, and it appears that this issue of compensation will continue to be raised by the defense as the trial proceeds.

Disclosure of Witness Identities

The court has set up a number of protective measures to shield the identity of witnesses. A Victims and Witnesses Unit has been established within the Registrar to provide support and security to witnesses for both the prosecution and the defense. Either party may apply for non-disclosure of a witness's identity, and thus far all witnesses have testified behind a screen so that they cannot be seen from the public gallery. Some witnesses have been heard by the court during closed sessions that were not attended by the public.

Despite the court's consideration of certain witness testimony during closed sessions, the restriction on revealing the contents of closed session testimony during public proceedings has not always been respected. One member of defense counsel disclosed the name of a witness's brother mentioned in a closed session during his public cross-examination. He was cautioned by Judge Boutet to be mindful of witness protection measures, though it was quite possible that the identity of the witness could have been compromised. This is a particularly sensitive issue given that many attendees of the trial are supporters or family members of defendant Sam Hinga Norman. When addressing a witness that he knew personally, Hinga Norman would comment that it was strange to address the witness formally, and in one instance he asked to refer to a witness as "my son." Subsequent questions from Hinga Norman during his cross-examination of this witness made it evident that the witness had previously lived with the defendant and had received financial support from him.

Translation

During the second round of proceedings, only one witness has testified in English thus far, with the remainder testifying in Mende. The court Registrar has produced a code of ethics for translation which specifies that interpreters and translators "shall convey the entire message, including vulgar or derogatory remarks, insults, mistakes, untruths and any non-verbal clues, such as the tone of voice and emotions of the speaker, which may facilitate the understanding of their listeners or readers."^[12] The English translations frequently mimic the tone of voice of the testifying witness. Translators and interpreters have been trained in simultaneous translation, which means that the translation is provided while the witness is speaking rather than waiting for the speaker to finish several sentences.

Translators occasionally interrupted the proceedings to state that the witness was speaking too quickly, at which point the judge would remind the witness to slow his response and wait for the translation. Judges have encouraged native speakers of Mende from the prosecution and defense teams to correct the translations whenever they appeared to be inaccurate, though there have been few objections to the court translations. Cross-examinations of witnesses by Mende-speaking counsel have resulted in interruptions by the judges, as counsel would occasionally begin another question before the witness's response to the previous question had been fully translated into English. The judges have been particularly concerned with the possibility of gaps in transcripts of the court proceedings that could result from one party speaking over another party as the translation into English or Mende was still being transmitted.

1.) Further witness testimony has been heard by the court in closed session. At the time of this report, monitors are not permitted in the courtroom during closed session. Therefore additional witness testimony has been heard by the Trial Chamber which has not been documented here.

2.) The court session began on 8 September, with Friday 10 September reserved for hearing motions. The following week's session was abbreviated Wednesday morning when the court announced that it would go into closed session until Friday 17 September. Therefore, while the period covered in this report appears to be longer than a week, public access to the testimony was limited to four out of seven days at trial.

3.) "Summary of Decision on Preliminary Motions Based on Lack of Jurisdiction" dated 16 March 2004, available on line at <http://www.sc-sl.org/summary-SCSL-04-14-PT-035.html>.

4.) As noted in the first weekly report, Sam Hinga Norman has chosen to represent himself at trial. He has been appointed stand-by counsel who also engage in cross-examination on his behalf.

5.) Under Article 4 of its Statute, the Special Court has the power to prosecute persons who committed serious violations of international law including: (c) Conscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities ("child recruitment").

6.) See also: <http://www.sc-sl.org/summary-child soldiers.html>.

7.) The recruitment of children was first codified as an offense under the 1998 Rome Statute for the International Criminal Court. In its Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) dated [31 May 2004], the Appeals Chamber ruled by a 2:1 majority (Robertson J dissenting) that it was not necessary for the individual criminal responsibility of the accused to be explicitly stated in a convention for the provisions of that convention to entail individual criminal responsibility under customary international law. The court made it clear that the protection of children is a fundamental guarantee of international law that existed prior to its codification in the Rome Statute, the provisions of the statute being enacted to ensure the effective implementation of an existing customary norm.

8.) Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) dated [31 May 2004].

9.) Decision on Disclosure of Witness Statements and Cross-examination dated 16 July, 2004 (N.B.: This decision is currently not available on-line).

10.) *Prosecutor v Blaskic* (ICTY), 3 March 2000 IT-95-14.

11.) *Prosecutor v Kordic* (ICTY), 26 February 2001 IT-95-14/2.

12.) "Code of Ethics for Interpreters and Translators Employed by the Special Court for Sierra Leone," Article 7(B). Adopted 25 May 2004. Available online at <http://scsl-server/sc-sl/new/interpreters-codeofethics.html>.



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>
