



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

Special Court Monitoring Program Update # 64
Trial Chamber I - CDF Trial
Status Conference – 25 November 2005

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Summary

The bench convened this second status conference less than one month after the first one, citing the lack of “any meaningful progress” in the defense case and the defense teams’ “major noncompliance” with the Trial Chamber’s directions. This bumpy start to the defense case can be partially attributed to a lack of precision in the Trial Chamber’s management order, as well as an overall lack of coordination and preparation on the part of the defense teams. Moreover, this second status conference served to highlight tensions between the Defense Office and the defense teams which could undermine efforts at a cohesive defense strategy. At the end of this second status conference, the bench affirmed its intentions to proceed as scheduled in January, but expressed some concerns as to whether the defense teams themselves would be ready.

Disagreement Over Disclosure Requirements

On 21 October 2005 the Trial Chamber issued an Order Concerning Preparation and Presentation of the Defense Case (hereinafter “October 21st Order”). Pursuant to this Order, defense teams were to file a list of their intended witnesses, expert witnesses, and exhibits. The witness list was to include a summary of the anticipated testimony of each witness, an explanation of the relevance of each witness’s testimony to the indictment, and the estimated duration of testimony for each witness. The Trial Chamber also ordered defense teams to produce a chart indicating the paragraph of the indictment to which each piece of testimonial and documentary evidence corresponds. The defense teams limited their compliance with the October 21st Order, submitting that

it contravenes the presumption of innocence, the Special Court Rules of Procedure and Evidence, and the principle of equality of arms.¹

The bench maintains that it is only requiring the defense to provide basic information necessary for the Court's management of the defense case. Defense teams argue that the bench's requirements amount to a premature and imbalanced order for defense disclosure. In their written submission, the defense teams argued that the prosecution bears greater disclosure requirements than the defense because of the presumption of innocence. The defense noted that the Trial Chamber has discretion to compel defense disclosure under Rule 73ter in exceptional circumstances, but only at the Pre-Defense Conference (currently scheduled for 11 January 2006).²

The Trial Chamber rejected these arguments in form and substance, finding the defense submission to be in "contravention" of the October 21st Order, and thus called this second status conference on 25 November 2005 to address these issues of non-compliance.

Bench Rejects the Form of Joint Defense Submission

Judge Itoe noted that, although the accused persons are being tried jointly, their defenses are conducted separately. He explained that a joint response was "inappropriate" because it tends to obfuscate each defendant's respective and distinct arguments. The Trial Chamber thus rejected the Joint Defense Materials on formalistic grounds and prohibited any future joint filings without prior authorization.

The bench also took issue with the defense request for partial modification of the October 21st Order, holding that any objection to the Order itself should have been filed by separate motion. The Legal Assistant for the Fofana defense team, Andrew Ianuzzi, suggested on behalf of all three defense teams that the Trial Chamber deem the Joint Defense Materials a motion.³ The bench rejected this proposal, finding no legal or statutory basis for the request and holding that the Joint Defense Materials amounted to a "contravention of the Court's order" that did not merit the convenience of conversion to a motion.

Bench Rejects the Substance of the Joint Defense Submission

The bench concluded that the Joint Defense Materials failed to comply with the October 21st Order for four primary reasons: 1) the defense teams refused to submit the names of the witnesses they intended to call, 2) they provided inadequate summaries of anticipated witness testimony, 3) they refused to submit any exhibits, and 4) they refused to submit the required evidence chart.

¹ See *Prosecutor v. Norman et al.*, SCSL-2004-14-T, Trial Chamber I, Joint Defense Materials Filed Pursuant to 21 October 2005 Order of Trial Chamber I and Request for Partial Modification Thereof, 17 November 2005.

² *Ibid.* On 7 December 2005, just prior to the Court's December recess and the publication of this weekly report, the prosecution moved Trial Chamber I to order the disclosure of all written defense witness statements pursuant to Rule 73ter. The bench issued an Order for Expedited Filing that same day, requiring that defense teams file their response to the prosecution's motion by 4pm on 8 December 2005, only one hour before the court was scheduled to recess for the holiday.

³ Because Mr. Ianuzzi is not counsel, he does not enjoy the right of audience before the Trial Chamber. However, the bench granted him permission to address the Court on certain discreet issues during this status conference. For further discussion of this issue, see "Tensions Between the Defense Office and Defense Teams" below.

Names of Intended Witnesses

While defense teams insisted that the names of witnesses should only be disclosed 14 days prior to their testimony date, the bench countered that this holds true only for witnesses who have been granted protective measures by the Court. The bench noted that, with the exception of the Kondewa team, none of the defense teams had filed any request for protective measures and therefore had no grounds for withholding the names of their intended witnesses from disclosure.

Summaries of Anticipated Testimony

The wording of the October 21st Order left ample room for interpretation, apparently creating confusion amongst the defense teams as to how much detail was required for the summaries of anticipated testimony. Defense teams quoted the Trial Chamber as requiring “a little more detail” than merely the name of geographic location about which the witness would testify. The bench insisted that the defense witness summaries were wholly inadequate as they failed to furnish sufficient detail for the bench to manage the defense case. The bench attempted to give an example of sufficient detail by suggesting that the witness summaries that the prosecution disclosed for its witnesses were appropriate. The defense teams rejected this suggestion, again citing disparate disclosure requirements for the prosecution and the defense.

Intended Exhibits

The Trial Chamber found that the defense submission exhibited “either a lack of preparedness ... or a lack of co-operation” with regard to their intended documentary evidence. Mr. Ianuzzi explained that the Fofana team had not finished reviewing the evidence and did not “intend” to file any exhibits at the time of their submission, but that they might opt to do so in the future. He offered to provide jurisprudence in support of this interpretation of the word “intends”. Presiding Judge Boutet rejected this interpretation, noting that defense teams would have to seek leave from the bench to file any exhibits after the deadline had passed.

Chart of Defense Evidence

In their written submission defense teams called the requirement to submit a chart of their evidence “unduly burdensome” and in contravention of the presumption of innocence, insisting that such a requirement is only appropriate for the prosecution and that there is no provision for this defense requirement under the Rules of Evidence and Procedure. The Presiding Judge agreed that the Rules do not explicitly require such a chart from the defense, but maintained that it was a “reasonable request” in accordance with the Trial Chamber’s “responsibility to manage trial proceedings and ensure that a fair and expeditious trial is conducted”.

Norman Team Pleads for More Time and Resources

In response to the Trial Chamber’s charge of “major non-compliance” amongst the defense teams, counsel for the first accused attempted to explain that his team’s work had been hindered by both the “attitude of our client”⁴ and “the availability of time and resources”. These comments provoked demonstrated impatience from the bench, as the defense had five months since the close of the prosecution’s case to prepare its

⁴ The first accused, Sam Hinga Norman, has been contesting the legitimacy of the Special Court’s jurisdiction since the pre-trial stages. In protest of the proceedings, he chooses not to attend the hearings and provides his counsel with only limited information and assistance.

defense materials. Highly conscious of the equality of arms and the Special Court's intention to recognize and incorporate defense practice as the "fourth pillar" of the tribunal,⁵ the judges stressed that no other international tribunal affords this much time for defense preparation.

The Presiding Judge said that he refused to entertain time and resource complaints on the eve of the defense case, noting that the Trial Chamber might have been able to make some accommodations had the defense teams raised these concerns earlier. Nonetheless, by the close of the status conference the bench agreed to take the special needs of the Norman defense team into consideration and eventually extended the date for compliance with the Consequential Order.

Management of Defense Witnesses

Defense teams currently intend to call a combined total of 149 witnesses, which the bench finds "difficult to understand and accept", given that this is more than double the number of prosecution witnesses. The Presiding Judge suggested that defense teams follow the prosecution's example and produce a list of "core" and "back-up" witnesses. The bench considered it appropriate for each defense team to call roughly 25 witnesses, for a total of 75, estimating that it would take four or five trial sessions to complete the testimony for this number of witnesses.

On behalf of the Fofance defense team, Mr. Ianuzzi took this opportunity to suggest that the defense teams and the prosecution discuss the mechanics of calling witnesses amongst themselves, and that the Trial Chamber call another status conference subsequent to that discussion, before the December recess. The prosecution expressed its support for this suggestion, and the Trial Chamber agreed to consider another status conference in the near future.

Apparent Tensions Between the Defense Office and Defense Teams

Generally the right of audience before the Court is reserved to attorneys prosecuting or representing the accused, whether they be assigned counsel, court-appointed counsel, duty counsel or the Principal Defender. This CDF status conference marks the first occasion that a Legal Assistant at the Special Court sought leave to address the Court directly, and the bench readily granted Mr. Ianuzzi permission to do so during this hearing.

The Principal Defender made an extended and heated objection to this practice, thereby publicly highlighting the disconnect between the Defense Office's views on proper procedure and that of the Defense Teams. The Principal Defender particularly objected to Mr. Ianuzzi addressing the Court on behalf of all three defense teams. However, lead counsel for both the first and third accused were present in court, and none of the defense teams objected to Mr. Ianuzzi's representations. Indeed, it appears that there was a prior consensus among the defense teams that the Mr. Ianuzzi speak on their behalf. Moreover, Arrow Bockarie, Co-Counsel for the Fofana defense team was seated next to Mr. Ianuzzi and visibly urged him to stand up and address the Court on numerous occasions during the status conference.

⁵ See First Interim Report: "From Mandate to Legacy: The Special Court for Sierra Leone as a Model for 'Hybrid Justice'", UC Berkeley, War Crimes Studies Center, April 2005.

Notably, the Principal Defender did not object to the content of any of Mr. Ianuzzi's submissions, but rather he disputed his authority to make them. Despite their apparent willingness that the Fofana Legal Assistant speak on their behalf, none of the defense counsel present in court countered the Principal Defender's objection. The bench simply noted that it had granted Mr. Ianuzzi leave to speak as it saw fit, and that the court room was not the appropriate forum to address these internal defense conflicts.

Prospect of an On-Time Start for the CDF Defense Case?

On 28 November 2005, Trial Chamber I issued its Consequential Order requiring the defense teams to apply for any protective measures no later than 30 November 2005 and submit all of the previously required defense evidence materials no later than 5 December 2005.

It seems that the CDF defense case may have come to a sort of gridlock, with the defense teams arguing that various points of the Court's Order contravene basic due process principals, and the Trial Chamber itself insisting that the defense posture contravenes the Court's authority. Nonetheless, despite the abundant allegations of contravention and counter-contravention, by all indications the Fofana and Kondewa defense teams will make their new and separate submissions pursuant to the Consequential Order. Given the "resource" issues emphasized by counsel for the first accused, it is not entirely clear whether the Norman defense team will be able to meet this deadline.

Moreover, the trial will certainly not proceed efficiently without effective coordination amongst the defense teams. The apparently strained relations between the Principal Defender and some of the defense teams raise concerns as to the Defense Office's capacity to assist in this effort. Nonetheless, while Presiding Judge Boutet indicated the possibility of postponing the commencement of the CDF defense case, he insisted that it is the Trial Chamber's strong intention to move ahead on 17 January 2006 as scheduled.