



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

Special Court Monitoring Program Update #36 Trial Chamber 2 - AFRC Trial 13 May 2005

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Summary

Over the past two weeks, proceedings in Trial Chamber II have been held up by a combination of factors, including the suspension of a defense team's investigator and the contempt proceedings that were simultaneously taking place in Trial Chamber I. No witnesses were called and no evidence was heard for this two-week period. Lead counsel for two of the teams sought leave to withdraw from the case, and although much of the reasoning behind this withdrawal was not a matter of public record, it appears that tension between the prosecution and the defense has considerably increased. In written submissions, the prosecution contended that some members of the defense were trying to obstruct the trial process through frequently requesting adjournments. Lead counsel for the first accused expressed his lack of trust in the Office of the Prosecutor, which the prosecution considered to be an unsubstantiated allegation that they were acting in bad faith.

Trial Chamber II had been running efficiently until these recent delays: the judges in the AFRC case would frequently deliberate without adjourning the trial, and breaks from proceedings were limited. The bench now appears to be granting considerable leeway to defense counsels' requests for more time, and the proceedings have been substantially delayed. However, because many of the submissions made in the past two weeks have been confidential, it is unclear whether the bench is being overly cautious or whether the delays reflect the gravity of the issues faced by the trial chamber.

Request for adjournment

At the beginning of the week, defense counsel for the first accused requested an adjournment until a decision was reached on the contempt issue [1]. Although the chamber tried to separate the contempt issue from the ongoing proceedings in the AFRC trial, defense counsel argued that the proceedings directly affected the trial because they involved the team's investigator as well as the spouses of the accused. The defense had appealed the decision of the Chamber that permitted the contempt proceedings to go forward, and they filed a motion seeking a stay of the contempt proceedings as long as the appeal request was pending [2]. In addition to requesting an adjournment of proceedings in Trial Chamber II, counsel asked that the contempt matters take place in the public domain. Counsel read a letter to the bench signed by each of the three accused, stating that they would refuse to attend court until the contempt matter was resolved. The prosecution pointed out that the bench had already ruled that the trial would proceed, and this decision not to participate thus constituted an obstruction of justice. The defense teams were granted a one day adjournment to discuss matters with their clients.

Request to withdraw as counsel

On the following day, counsel for the second accused reported that there had been no change in their clients' positions. The Presiding Judge immediately called for the trial to continue: counsel for the first accused responded that he would be unable to represent his client if the case proceeded, and he would seek leave to withdraw from the case. Counsel for the second accused stated that he was in the same position, though neither team could supply supporting details due to matters covered by attorney/client privilege. The defense was instructed to file *ex parte* submissions in support of their application to withdraw, and the prosecution would respond based upon relevant points of law without reading the defense submissions [3].

The court adjourned until the end of the week to give both parties time to complete their submissions. The prosecution alleged that "this condition precedent to the instruction to Counsel to not attend court, coupled with the history of selective non-attendance and recurrent adjournment applications by the Accused, demonstrate a consistent and underlying pattern of behaviour designed to obstruct the trial process and thereby the course of justice." [4] They pointed out that the defense made eleven applications for adjournment since the start of trial in March. They further alleged that despite the defense's contention that they were without instructions from their clients, "Defense Counsel have instructions and, properly characterized, those instructions are designed to effect a boycott on the trial" [5]. Defense submissions were confidential.

When proceedings resumed it became clear that the defense had already sent a redacted version of their *ex parte* submissions to the prosecution. According to the prosecution, Brima and Kamara's joint submission only referred to "sensitive matters" rather than attorney-client matters, and it appeared to be redacted personal information. The prosecution ordered that it should be disclosed since the defense had not established a foundation for alleging *male fides* on the part of the prosecution. The Presiding Judge agreed, stating that "we cannot entertain any suggestion that the prosecution will make use or misuse of a confidential document, as to do so would be a serious breach of a court order." The Presiding Judge ordered counsel for the first and second accused to lift the *ex parte* status of their joint submission, and counsel were ordered to show cause as to why the documents should not be disclosed to the prosecution. The defense responded that if they needed to disclose the information they would withdraw the document from consideration by the bench.

Judge Lussick asked the defense to clarify whether their only objection to the use of the document was that they did not trust the prosecution. Counsel for the second accused stated that he had "serious reservations" in showing the document to the prosecution. Counsel for the first accused stated that he would go one stage further, adding that he would not trust the prosecution, and he explicitly mentioned a picture on the wall of the prosecution "of a rather demeaning nature" as grounds for why he did not want personal data disclosed. The court adjourned abruptly following these remarks.

When the court reconvened on Thursday, 12 May, lead counsel for the first and second accused were not present. In its majority decision, the chamber ruled that the two would be permitted to withdraw as counsel, and it directed the Principal Defender to assign other lead counsel to the teams. The court adjourned until Monday to give co-counsel for the first and second accused an additional day to prepare for trial proceedings.

1.) In apparent earnestness, defense counsel asked for the adjournment to allow Counsel to "operate in a spirit of stillness, calmness and without undue difficulties." Proceedings of 2 May 2005.

2.) *Joint Defense Application for Leave to Appeal against the Ruling of Trial Chamber II of 5 April 2005*, filed 8 April 2005; *Urgent Joint Defence Motion on Stay of the Contempt Proceedings* filed 3 May 2005.

3.) The application to withdraw as counsel is governed by Rule 45 (E) of the Rules of Procedure, which requires that counsel are only permitted to withdraw “in the most exceptional circumstances.”

4.) *Prosecution Submissions in Response to Application by Defence Counsel to Withdraw from the Case*, SCSL-2004-16, 5 May 2005, at para. 3.

5.) *Id.* at para. 17.