



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

Special Court Monitoring Program Update #62
Trial Chamber I - RUF Trial
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Summary

Trial Chamber I spent the entirety of this week in closed session hearing the testimony of witness TF1-366. This is the 45th witness in the RUF trial, and the 44th witness for the prosecution. He was the only witness to appear before the Trial Chamber this week.

Witness Profile at a Glance

The prosecution called witness TF1-366 to testify as a Group 1, Category C insider. He testified in Mende. Because of concerns for his personal safety, the witness gave testimony in closed session and no further information about him or the content of his testimony is publicly available.

Testimony in Closed Session

The prosecution called witness TF1-366 to testify as a Group 1, Category C insider and took three and half days to complete its examination in chief. Recognizing the Court's preference for an open session and the lengthy nature of this witness's testimony, the prosecution based its request for a closed session on fear for the safety of the witness and his family members, noting reports that a "member of the public" had already "approached" the witness on behalf of one of the accused. Moreover, the prosecution asserted that the specific, detailed information contained in his testimony would be identifying in and of itself.

None of the defense teams objected to the prosecution's request for this extensive closed session. Their reluctance to object may be due to the fact that neither of the trial chambers have ever denied a request to hear evidence in closed session, whether from the prosecution or the defense. Typically defense teams raise some objection based on the public nature of the trials, but it seems that given the detailed, highly sensitive nature of this witness's testimony, the defense teams opted not to consume the Court's time by alternating between open and closed session.

In the earlier stages of the trial, defense teams heartily objected to prosecution requests for closed session, resulting in heated courtroom discussions of the importance of balancing the rights of the accused to a fair and public trial against the need to protect vulnerable witnesses. Trial Chamber I typically responded to these defense objections with lengthy reasoned decisions

articulating the necessity for closed session in a given circumstance.¹ Over time, the judges have begun to suggest other ways of protecting the witness's identity in open session, such as writing (rather than speaking) key bits of identifying testimony and entering this information into evidence as sealed exhibits. They have also ordered that non-identifying portions of the closed session transcripts eventually be made public.

Procedural Issues: Defense Argues for a More Interventionist Bench

Objection for Lack of Foundation

Defense counsel for Issa Sesay raised two substantial objections during the prosecution's examination in chief, on both occasions pleading that the bench intervene to guide or control the prosecution's elicitation of evidence from the witness. The witness was removed from the court room to allow counsel to state their arguments freely without affecting the testimony.

On the second day of examination in chief, counsel for the first accused objected to the witness's statements as lacking an evidentiary foundation. He criticized the way the prosecution was leading the evidence, arguing that it was essentially inviting the witness to make "prejudicial assertions lacking in substance and foundation". Defense counsel argued that, without sufficient foundation, the witness's statements did not constitute evidence at all, but rather were tantamount to a blanket declaration that his client was simply a "bad man". While he conceded that the prosecution was not acting in bad faith, counsel for the first accused nonetheless urged the bench to require that the witness explain how he came to know about the events he described.

Anticipating the bench's suggestion that he reserve this matter for cross-examination, this same defense counsel appealed to the court's desire for an expeditious hearing. He explained that it would require several hours of cross-examination to "fill in these holes that the prosecution could fill at this stage."

Judge Thompson cited prosecutorial discretion, concluding that the form of questioning was allowable because it did not infringe upon any rule of procedure or evidence. He noted, "I don't see my role here as telling the prosecution or the defense how to do their job." The bench overruled the defense objection.

Nonetheless, immediately after the bench rendered this decision, the prosecution proceeded to lay increased foundation for its questions, asking the witness to specify how he came to possess the information which he described to the court, and whether he saw the events himself or heard about them from others.

Objection for Vagueness

The prosecution's efforts to specify the basis for the witness's knowledge faded, and the following day counsel for the first accused again appealed to the bench to intervene in the prosecution's examination in chief, raising more or less the same objection for lack of foundation, but this time attacking what he described as the "vagueness" of the witness's statements.

Judge Thompson commented that, "You may be wanting a more proactive bench, but I don't subscribe to that school of thought." It is worth noting, however, that at points the bench does ask for clarification of the evidence *sua sponte*. It seems that the bench in Trial Chamber I will intervene in order to clarify the record when the evidence is unclear or confusing, but when the evidence is merely vague or lacking in foundation, it is not willing to assist the prosecution (or the defense) by pointing out which gaps should be filled.

¹ For examples of these discussions and decisions, see Special Court Monitoring Reports #5, #6, #13, and #18.

Both Judge Thompson and Judge Itoe suggested that the defense has the advantage if the prosecution is indeed leading vague evidence, because it will ultimately fail the bench's test for weighted credibility. Counsel for the first accused cited the complexity of the indictment and the seriousness of the crimes alleged, asserting that vague evidence in fact aids the prosecution in this circumstance. Defense counsel illustrated his point by citing the requirement of a "widespread and systematic attack" for the establishment of crimes against humanity. He argued that allowing a witness to generally state that a crime occurred throughout the country, without requiring that he specify locations and time periods, unfairly aids the prosecution in proving a widespread and systematic attack.

Judge Thompson distinguished speculative evidence from vague evidence, noting that speculation by the witness is impermissible under the rules. Defense counsel contended that evidence must reach a certain level of clarity in order to be deemed speculative or not.

All three judges insisted that this is a matter for cross examination, and not one for intervention by the bench. They maintained that defense counsel "should credit the court with making a reasonable assessment of the credibility of all of these witnesses", and that by asking the bench to intervene at this stage, defense counsel was in effect asking the judges to serve as "judicial prophets". The objection was thus ruled meretricious.

Notably, upon its resumption of examination in chief, the prosecution again tightened its questions, asking the witness to specify the names of villages and give more precise estimates of the number of people killed or houses burned. The prosecution also showed a renewed commitment to demonstrating that the witness was himself present for the events in question. Thus while the defense may not have succeeded in convincing the bench to intervene and clarify ambiguous testimony, this discussion seems to have stimulated the prosecution to ensure that the evidence it presents is substantially clearer.