



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

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**Trial Chamber I - CDF Trial**  
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**Summary**  
**Kabbah Subpoena Decision**

**Summary**

This final week of the CDF trial session saw proceedings reconvene on June 15<sup>th</sup>, due to difficulty in locating the few remaining witnesses in the Norman defence case. Upon recommencement of the trial, the Trial Chamber issued its long awaited decision on the Fofana and Norman joint Defence motion to issue a subpoena to President Kabbah.<sup>1</sup> Kabbah is currently listed as the first witness in the Norman defence case. In the majority decision (Thompson J dissenting) the Trial Chamber dismissed the Defence's motion, representing a major setback for the defence of the first and second accused. It is rumoured that Chief Norman, the first accused, maintained President Kabbah's supreme importance as a witness by saying that if he testified there would be no need to call any other witnesses in his defence case.

Recommencement on Thursday was somewhat short-lived as Dr. Jabbi, lead counsel for the first accused, requested that the Trial Chamber adjourn until the following morning to give the judges time to discuss certain outstanding issues of concern regarding Norman's health, a point of major speculation within the local media. Jabbi indicated that the Court's doctor had examined Norman and that he was now in a position to recommend immediate action for his client's condition. According to counsel, Norman requires a hip replacement operation, a form of surgery that is only available outside of Sierra Leone. Jabbi further indicated that, thus far, the team had not received a satisfactory response from either the detention facility officials or the Registrar with respect to organizing proper arrangements for the necessary treatment. Counsel again indicated that if the surgery were organized in an expedient fashion, disruptions to future trial sessions could

<sup>1</sup> 'Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena *Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone', SCSL-04-14-T, 13 June 2006

be avoided by having the procedure performed during the upcoming summer recess. The Presiding Judge reminded Jabbi that, given the accused's detention, there were administrative as well as legal obstacles to counsel's recommended course of action. The Chamber also noted that they would prefer for Jabbi to outline a specific, feasible judicial action he desired from the bench as recourse to the difficulties he faces in arranging for his clients proper medical treatment.

Justice Boutet did, however, issue the following statement from the Trial Chamber:  
 "The Chamber, while recognizing that the Registrar in the discharge of his duties and responsibilities to oversee and supervise the administration of the detention centre and the detainees of the Special Court, do urge the Registrar to intensify the action that he has already undertaken to provide remedial solution to the medical problems of the first accused, Mr. Sam Hinga Norman."

Counsel for Norman seemed satisfied with this intervention and promised to pursue the matter.

The Presiding Judge then adjourned the CDF case until after the summer recess, due to the unavailability of the Norman team's remaining witness<sup>2</sup>, when the trial will reconvene in September 2006 with a status conference scheduled for the 12<sup>th</sup> of that month.

### **Kabbah Subpoena Decision**

The initial written motions requesting the issuance of the subpoena were filed with the Trial Chamber by the Fofana and Norman defence teams on December 15 and 16, 2005, respectively.<sup>3</sup> Both the Prosecution and the Attorney General of Sierra Leone submitted that the application should be denied and the motions dismissed. After hearing oral arguments from the Norman and Fofana defence teams, as well as from the Attorney General and the Prosecution in February, the Trial Chamber took approximately four months before it issued its decision on Tuesday of this week.

The Trial Chamber's 'Decision on Motions of Issuance of a Subpoena to President Kabbah'<sup>4</sup> was issued much later than expected, considering the first accused has the President listed as the first witness to be called in his defence. As the Norman defence case is in its final stages the possibility of closing the case this session, as planned, has been in question as all parties awaited the issuance of this critical decision by the Trial Chamber.

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<sup>2</sup> [With the Kabbah subpoena motion denied, the Norman team's remaining witness continues to be unable to travel to Sierra Leone from Nigeria at this time due to ill health.](#)

<sup>3</sup> 'Fofana Motion for Issuance of a Subpoena *Ad Testificandum* to President Ahmad Tejan Kabbah', 15 December 2006, and 'Norman Motion for Issuance of a Subpoena *Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone', 16 December 2006

<sup>4</sup> 'Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena *Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone', SCSL-04-14-T, 13 June 2006

In the majority decision, with Justice Thompson dissenting, Justice Boutet and Justice Itoe went through the various submissions made by all parties, focusing on arguments related to the ‘purpose’ requirement and the ‘necessity’ requirement contained within the advanced legal standard for the issuance of a subpoena, Rule 54.

The Rule<sup>5</sup> stipulates the following:

‘At the request of either party or of its own Motion, a Judge or a Trial Chamber may issue such Orders, Summonses, Subpoenas, Warrants and Transfer Orders as may be necessary for purposes of an investigation or for the preparation or conduct of a trial.’

The Chamber stated that it found that the defence’s submissions, which maintained that President Kabbah is in possession of information highly relevant to the Consolidated Indictment and that his failure to testify would effectively deprive the Chamber of important evidence, did not manage to meet the threshold set forth in Rule 54. The Chamber reasoned that the arguments advanced either failed to “demonstrate that the proposed testimony would materially assist the case of the First or Second Accused”, as dictated by the purpose requirement, or failed to “show that the proposed testimony is necessary for the preparation or conduct of the trial”, as stipulated by the necessity requirement.<sup>6</sup> The Chamber specifically referred to the fact that by adopting each others submissions, the two defence teams failed to show the materiality of the evidence for the team adopting the other parties’ arguments.

In the decision, the Chamber rejected the argument that President Kabbah was in a unique position to offer exclusive insights into determining who bears the ‘greatest responsibility’ and noted that the President is not the sole source of pertinent information as the Fofana team had itself cited the former Vice President, former members of the CDF National Coordinating Committee and former members of the War Council, amongst others, as offering potential insight into the relative culpability of the three accused. As the Chamber considered that this information could be obtained by other means (that is, through the testimony of other figures of authority) the ‘necessity’ criteria was not fulfilled. Furthermore, the Trial Chamber reasoned that the argument that Kabbah could be one of the persons who bears the greatest responsibility does not absolve the other accused of their own individual criminal responsibility. Accordingly, the testimony of Kabbah would not materially assist the case and he should, as such, not be compelled to testify. While the Chamber acknowledged the difficulty for the defence teams to provide very specific aspects of Kabbah’s potential testimony given his refusal to meet with the teams and provide a pre-testimony interview, the majority decision did state that “an applicant is not allowed for that purpose to embark on a ‘fishing expedition’.”<sup>7</sup> The decision also lamented the lack of specificity of the application with respect to indictment-related issues and cited the general assertions it contained,

<sup>5</sup> Rules of Procedure and Evidence, Rule 54, available at <<http://scsl-server/scsl/new/rulesofprocedureandevidence.pdf>>

<sup>6</sup> ‘Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena *Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone’, SCSL-04-14-T, 13 June 2006, paragraph 32

<sup>7</sup> *Ibid.*, paragraph 47

regarding the potential impact of the testimony on the process of deliberation with respect to any of the crimes or modes of liability, as insufficient to substantiate the arguments advanced in the motions.

Justice Itoe's separate concurring opinion was of a substantially different nature than the majority decision.<sup>8</sup> Justice Itoe focused on his view of the "legal impossibility and impermissibility" for the Trial Chamber to issue the requested subpoena. He contended that President Kabbah, as sitting head of state, enjoys immunity from process under Sierra Leonean law, particularly Article 48(4) of the Constitution of Sierra Leone. Furthermore, the subpoena's illegality also made it unenforceable, implying that a court should not act in vain. The separate concurring opinion also supported the Prosecution's submitted jurisprudence from the Appeals Chamber at the ICTY of the *Kristic* case, which noted that there exist some categories of Government Officials who do enjoy immunity. He subsequently referred to heads of state as "The Princes who govern us"<sup>9</sup>, revealing a rather elitist perspective on modern democratic government. Itoe also noted the consequences of the issuance of the subpoena and argued that by issuing the order the "interests of peace, law and order and the stability of the Country and of its Institutions"<sup>10</sup> may be put in jeopardy. He contended that the subpoena should accordingly not be issued.

The dissenting opinion in this majority decision came, somewhat surprisingly, from Justice Thompson, the one Sierra Leonean member of the Chamber.<sup>11</sup> It was widely speculated that he would deny the motion due to the difficult political position the issuance of the subpoena could potentially place him in. However, in his ten page opinion, Thompson J. stated that his disagreement with the majority stems from "reasons anchored in the nature, scope, meaning and application of the Rule..." used as the legal standard to be met by the application. He stated his opinion that it is of paramount importance that the Chamber remain flexible in their process of receptivity of evidence in order to assist in the ascertainment of the truth of the events and allegations laid out in the Indictment. He also argued that this was a fundamental requirement of the doctrine of equality of arms and the principle of fairness, and that it is particularly relevant to Article 17(4) of the SCSL Statute, that ensures that accused persons are entitled to have witnesses testify on their behalf.

Justice Thompson advanced the argument that the injunction of Rule 89 is that the reliability of evidence should not be assessed at this stage of the admission of evidence, but only once all evidence has been heard, thereby making the tests of 'forensic purpose'

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<sup>8</sup> Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority Decision on Motions By Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena *Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, SCSL-04-14-T, 13 June 2006

<sup>9</sup> *Ibid.*, paragraph 132

<sup>10</sup> *Ibid.*

<sup>11</sup> 'Dissenting Opinion of Hon. Justice Bankole Thompson on Decision on Motions By Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena *Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone', SCSL-04-14-T, 13 June 2006

and ‘last resort’ logically flawed. The present assessment of the potential evidence would amount to the “predetermination of its probative value”.<sup>12</sup> Having dismissed the debate over whether the submissions meet the standard, Thompson locates the crux of the debate around whether the SCSL has jurisdiction to issue subpoenas to any person in Sierra Leone. The immunity argument advanced by the Attorney General was rejected by Justice Thompson on the grounds of major legal differences between the case at hand and the ICTY *Milosevic* case cited by the Prosecution and Attorney General in their submissions. He also rejected the idea, advanced by the Attorney General, that a court should base its determinations of the merit of such matters according to whether or not such an order will be complied with and noted it to be in opposition to the principle of legality. In citing Cassese, Thompson argued that the protection of human dignity requires that state agents acting in their official capacity no longer enjoy protection from legal process. He argued that the language of Rule 54 represented a clear directive that must be read plainly and unambiguously and stated the following: “The Rule does not require the Defence to show by clear and convincing evidence or on a preponderance of evidence that the issuing of the subpoena is necessary for the purpose of investigation or for the preparation or conduct of the trial. Any such requirement would be unduly burdensome and exacting.”<sup>13</sup> Thompson concluded by arguing that the Defence had demonstrated by *prima facie* evidence that the issue of the subpoena is necessary for the investigation, preparation and conduct of the trial for the defence case.

With the application dismissed, counsel for the second accused indicated that they would immediately file a motion requesting leave to seek an appeal to the Trial Chamber’s decision. Both the first and second accused have indicated that Kabbah, a common witness, would give key evidence in their respective cases.

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<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, paragraph 23