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SIERRA LEONE TRIAL MONITORING PROGRAM
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Trial Chamber I - RUF Trial
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Summary

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Summary

The CDF trial resumed on Tuesday, following the adjournment of the case since June 2006. The defence case for the first accused was closed this week, after the Appeals Chamber issued its decision echoing the Trial Chamber's dismissal of the defence motion requesting a subpoena against President Kabbah. The evidence of the remaining witness for the first accused, Chief Norman, was submitted in document form as the witness was unable to travel to Freetown. The opening of the defence case of the second accused, Moinina Fofana, was delayed as Fofana is currently suffering from a case of the chickenpox.

During the Status Conference on Tuesday, Counsel for the second accused asked that proceedings be delayed until his client makes a full recovery. When the Chamber reconvened on Friday, counsel reported that there was limited improvement in the accused's condition and that he had been unable to meet with Fofana due to his ongoing quarantine. Proceedings were adjourned until Monday, 18 September 2006.

Status Conference and the Health of the Second Accused

A Status Conference was held on September 12th in order to discuss the continuation of the CDF case, which has been adjourned since June, and the commencement of the defence case of the second accused, following the completion of the defence case for the first accused.

The first accused filed a motion the previous week indicating the defence team's confusion over the proper procedure to follow in terms of closing its case. In particular,

counsel asked the Court for guidance in light of his inability to call their remaining witness, as well as the decision issued by the Appeals Chamber, rejecting the Defence's application for the issuance of a subpoena against President Kabbah.¹ President Kabbah was listed as the first witness for the Norman team, but the rejection of the subpoena application by both the Trial and the Appeals Chambers meant that he would not testify in the defence of the First Accused. Furthermore, the Trial Chamber had ordered in June 2006 that the defence case of the first accused be closed upon completion of the testimony of the other remaining listed witness, Major-General Abdul-One Mohammed, in September 2006. The Norman team has thus far been unable to bring Major-General Mohammed from Nigeria to Freetown to testify due to his ongoing ill health.² In its application, the Norman team indicated that the witness continued to be unable to travel and that they thus wished to submit into evidence documents in lieu of his oral testimony under Rule 89(C) and 92*bis*. The Chamber allowed the motion.³ In its decision the Chamber ordered that "Counsel for Norman shall now exercise their option to close the Defence Case for the First Accused on Friday, 15th of September 2006"⁴, which counsel did during Friday's proceedings.

Discussions surrounding the health of the second accused, Moinina Fofana, figured prominently in the proceedings, presided over by Justice Boutet. Counsel for the second accused, Mr. Pestman, indicated that his client was currently in quarantine in the detention facility due to a case of the chickenpox from which he was suffering. Consequently, counsel had been unable to communicate with his client and, expecting a recovery in the following days, requested for the trial session to be postponed until Monday.

The Fofana defence team tried to assuage the concerns of the Court over the elapsing time in the trial session. They indicated that they might be able to make further cuts to their current witness list, as per the filings made in August, and further indicated that they anticipated being able to move quickly through their witnesses, perhaps hearing two a day. The Kondewa defence team estimated that its defence case would run approximately three to four weeks in length. Accordingly, the defence cases of the second and third accused seem likely to be complete by the end of October.

The Chamber convened proceedings again on Friday. Counsel for the Second accused again reiterated Fofana's inability to attend proceedings on account of his continued ill health. Mr. Powles indicated that it was only once they would be able to meet with their client that they would be in a position to commence the defence case on his behalf. Counsel also indicated that the exact date that this would be feasible remained uncertain and was subject to his client's full recovery from the chickenpox. The Chamber subsequently adjourned proceedings until Monday morning, when it indicated that it

¹ 'First Accused Request to Admit Certain Documents in Lieu of Oral Testimony of Major-General Abdul-One Mohammed Pursuant to Rules 89(C) and 89bis and Request for Clarification on Procedure For Closing', SCSL-14-686, 8 September 2006.

² *Ibid.*

³ SCSL Rules of Procedure and Evidence, available at <<http://www.sc-sl.org/documents.html>>

⁴ 'Decision on Norman Request to Submit Documents In Lieu of the Testimony of Abdul-One Mohammed Pursuant to Rule 89(C) and 92*bis*', SCSL-14-694, 15 September 2006

hoped Counsel for the second accused would be able to guide it more definitively in terms of the start date of their defence case.

Health of the First Accused

The health of the first accused, Chief Norman, was also addressed during the week's Status Conference. Counsel noted that the ongoing problems caused by the slipped disc in Norman's hip have meant that he has experienced increasing difficulty in accessing basic facilities like the telephone and toilet in the detention facility. The Principal Defender also addressed the court on the matter and stated that various options were being looked into in order to remedy the situation. Norman continues to wait for the needed surgery on his hip, which must be arranged in another country, outside of Sierra Leone.

Before proceedings closed for the day, counsel for the first accused asked for the leave from the Chamber for his client to speak. With the consent of the bench, Norman stated "My mobility is very slow now, and I would like,...so that I could assist in the expeditiousness of this trial, to be in court as early as possible, and this is on behalf of my two other colleagues, because they help me most in doing some of the sanitary works that the hospital nurses are not in a position to do. That is the request."⁵ Norman also extended his gratitude to the bench and the prosecution for their contributions in bringing the trial to its current stage. The Presiding Judge responded by reiterating the bench's concern about the health of accused persons and further stated that "it is a human right, it is an entitlement and, of course, it is also an emanation of the presumption of innocence; you have a right to be healthy whilst you take your trial. And we have done everything we judicially can to promote that interest."⁶ Justice Thompson assured Norman that his interests and good health were paramount in their minds, however there is still no specific date set by the Registry for when the needed surgery may occur.

Appeals Chamber Decision on Kabbah Subpoena

The Appeals Chamber issued a decision on 11 September 2006 regarding the application made by the Norman and Fofana teams for an appeal against the decision of the Trial Chamber refusing to issue a subpoena to President Kabbah.⁷ The majority rejected the application, with Justice Robertson dissenting. The Norman and Fofana teams had alleged that in its Impugned decision Trial Chamber I had erred in law by setting the standard too high for the issuance of a subpoena and that it had erred in the exercise of its discretion in refusing to issue the subpoena. The teams also took particular issue with Justice Itoe's separate and concurring opinion, which they allege was based on irrelevant considerations (as to whether the Court could issue a subpoena against a head of state) that undermined the majority decision.

The Chamber firstly considered the alleged error of law, regarding the legal standard utilized for issuing a subpoena, upon which the appeal was partially based pursuant to

⁵ SCSL Transcript, 15 September 2006, page 21, lines 3-9

⁶ *Ibid.*, lines 20-24

⁷ 'Decision on Interlocutory Appeals Against Trial Chambers Decision Refusing to Subpoena the President of Sierra Leone', SCSL-14-688, 11 September 2006.

Rule 106 of the Rules of Evidence and Procedure. Accordingly, the Appeals Chamber looked at the tests used by the Trial Chamber, which primarily consisted of the standards emanating from ICTY and ICTR jurisprudence, particularly the test articulated in the ICTY Appeals Chamber jurisprudence (*Halilovic* and *Kristic* cases). The SCSL Appeals Chamber deemed this to be an appropriate standard to use, rejecting the Fofana team's argument that the decision rested on the misinterpretation of relevant jurisprudence. Again, in its decision the Appeals Chamber stated that it did not find any errors of law with the Trial Chamber's judgment of the legal standard for the issuance of a subpoena, which the appellants deemed to be too high. Rather, it found the Trial Chamber to be correct to emphasize that a subpoena, "as an instrument of judicial compulsion, should be used sparingly"⁸. In answering the question of whether the Trial Chamber had erred in the exercise of its discretion, after reviewing the arguments advanced by the teams based on greatest responsibility, individual responsibility and superior responsibility amongst others, the Appeals Chamber stated that it would "not intervene to substitute its own discretion where no error has been established"⁹ Finally, with respect to the submission made regarding Justice Itoe's concurring opinion, the Appeals Chamber stated that no appeal may arise from a concurring or dissenting opinion and that such an appeal may only challenge the majority decision.

⁸ *Ibid.*, paragraph 29

⁹ *Ibid.*, paragraph 39