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Summary

Oral arguments on the Norman and Fofana Motions for an Issuance of a Subpoena Ad Testificandum to President Kabbah¹ were heard by Trial Chamber I on Tuesday. The Attorney General, representing the President, argued, in rebuttal of the defence's submissions, that Kabbah was not subject to the authority of the Special Court. Furthermore, if a subpoena was indeed issued the Attorney General noted that the President would not necessarily obey it. The prosecution focused its arguments against the motion in question on the alleged relevance of a decision in the *Milosevic* case, which set out standards required for the issuance of a subpoena by a court. Witnesses led in evidence by the Norman defence team this week included former Vice President Dr. Demby, who continued his testimony from the previous week. M.T. Collier, an elder of Talia, and Osman Vandy, a Kamajor fighter, also testified.

Witness Profiles At A Glance

M.T. Collier is the fourth witness called by the Norman defence team in the CDF trial. He testified in Mende. He was born in Talia Yawbecko, where he has lived most of his life. He is currently 75 years old and is considered a respected elder of his village.

Osman Vandi, alias Vanjawai was born in Levuma Bagbo and is currently 51 years of age. While he works as a diamond miner he has also been a Kamajor since 1995 and achieved the rank of task force commander. He testified in Mende.

¹ The Norman and Fofana motions for issuance of a subpoena ad testificandum to President Kabbah, 15 and 16 December, 2005, SCSL-04-14-T

Oral arguments

Oral Arguments regarding the motion for the issuance of a subpoena to President Kabbah had been rescheduled, in accordance with witness testimony and the availability of the Attorney General, from the previous week to the morning of 14 February. The Trial Chamber heard the oral submissions from counsel for the first and second accused, followed by submissions from the Prosecution and the Attorney General.

The four parties involved made these oral arguments in addition to the previously tendered written submissions. The submissions are a result of the President's refusal to voluntarily cooperate with the requests of counsel for Norman and Fofana to appear as a factual witness. While the two defence teams argue that the President is indeed compellable as an important factual witness in the trial, the Attorney General submits that Kabbah's position as a Head of State should make him immune from testifying.

Mr. Arrow Bockarie, counsel for the second accused, began by submitting that the Trial Chamber has the power, through the court's Rules of Evidence and Procedure² and its Ratification Act³, to issue a subpoena to any individual within the Special Court's jurisdiction. Bockarie noted that Rule 8, which relates to requests and orders, of the Rules of Procedure and Evidence, was of particular relevance as it calls on the government of Sierra Leone to cooperate with all organs of the Special Court at all stages of the proceedings. Furthermore, that Rule states that all requests made by the Court will be complied with in accordance with Article 17 of the Statute. Bockarie further submitted that the constitutional protections that the President enjoys are only with respect to National courts, an argument he claims is supported by a decision taken by the Appeals Chamber with respect to Charles Taylor.⁴ Bockarie summed up his arguments as follows: Firstly, that the President is in a position to provide material assistance to issues like Mr. Fofana's alleged culpability; secondly, he is in a position to speak specifically to Mr. Fofana's alleged command responsibility; thirdly, the President could provide information on the duties associated with the position of Director of War. Under the questioning of the Presiding Judge, Bockarie maintained that the evidence Kabbah could be expected to give was the only means of obtaining this information.

Dr. Jabbi, lead counsel for the first accused, supported and added to Bockarie's arguments. He noted further applicable rules from the Rules of Evidence and Procedure, such as Rule 77 that related to Contempt of the Special Court. Jabbi also argued that the anticipated evidence of the President goes to the core of many of the allegations contained in the Indictment and he outlined the particular paragraphs⁵ for which he contended Kabbah's testimony would be factually indispensable.

After hearing the oral arguments of the two defence teams who filed the motion, the Chamber heard the Prosecution's oral submission. Despite attempts by the two defence

² SCSL Rules of Procedure and Evidence, available at <<http://scsl-server/sc-sl/new/rulesofprocedureandevidence.pdf>>

³ Special Court Agreement Ratification Act, available at <<http://scsl-server/sc-sl/new/Documents/SCSL-ratificationact.pdf>>

⁴ SCSL Appeals Chamber Decision, May 31, 2004, SCSL-03-01-I-095, Rendering of decision on motion made under protest and without waiving immunity accorded to a head of state requesting the Trial Chamber to quash the indictment and declare null and void the warrant of arrest and order for transfer of detention 23 July 2003 (immunity motion).

⁵ Indictment, Prosecutor v. Norman, paragraphs 13, 14, 17, 18, 20 and 21

teams in their written submissions to challenge the *locus standi* of the Prosecutor to make submissions on this point, the bench made it clear that they did not wish to be deprived of hearing the Prosecutor on the matter. Mr. Desmond De Silva, Chief Prosecutor, submitted that the *Milosevic* case, in a decision issued on December 9, 2005, was an important precedent in determining the criteria for the issuance of a subpoena. This particular decision of the ICTY related to the rejection of an application made for the interview and testimony of the heads of state Blair and Schroeder, which De Silva contended was of the same nature as the application made by the defence in the CDF trial.⁶ The decision set out a standard for issuing a subpoena to a prospective witness - a standard that, De Silva argued, the defence had failed to meet. De Silva also argued that as war crimes tribunals often have political aspects, particular care must be taken with respect to issuing subpoenas in order to prevent witnesses from being publicly humiliated as part of a political agenda once they are on the stand. The Prosecution argued that the Trial Chamber should consider two factors in its decision; the first being whether the information in possession of the witness is necessary for the resolution of specific issues in the trial. The Chief Prosecutor dismissed the necessity of Kabbah's testimony, given the theory of Norman's defence thus far was that no crimes committed by the CDF. Secondly, De Silva argued that the Trial Chamber should consider whether the witness possessed information that was obtainable by other means. De Silva again pointed to the defence theory raised by Norman thus far, which he contended was based on the denial of all alleged crimes. The Prosecution concluded their submission by stating that what the defence has said in terms of their need to have Kabbah testify is infinitely short of the threshold established in the decision issued in the *Milosevic* case to compel current serving Head of State to testify, and as a result, the application should fail.

Mr. Carew, the Attorney General and representative of President Kabbah, followed the Prosecution's lead and based his submission on the international jurisprudence of the *Milosevic* case. He also argued that there was nothing the President could add to Demby's testimony, that the President was thousands of miles away when the alleged crimes occurred. Furthermore, he noted that Norman never once alleged that Kabbah issued any illegal commands. As well as adopting the legal authorities submitted by the Prosecution, he introduced an additional argument regarding the Court's right to safeguard it from having its authority publicly diminished. He stated that "assuming that your Lordships grant the subpoena, we submit and we request that this Honourable Court should not act in vain. No court in any part of the world has ever made orders that will make them look – that will diminish their authority because it's difficult to enforce."⁷ The Attorney General continued on to say that he considered that "the purpose of making this application...is to embarrass His Excellency the President...and they get personal satisfaction that they have brought the head of state before a court."⁸ Once the Attorney General had completed his submission The Presiding judge, Justice Boutet, asked him to clarify his response should the court issue the subpoena, to which Mr. Carew replied that as long as the President had not been indicted or committed any offence he could not imagine himself ordering his arrest. Justice Thompson immediately questioned the Attorney General on this stance and noted that a court does not decide to issue orders purely on the basis of whether its directives will be complied with. As the sole Sierra Leonean judge on the trial Thompson spoke with particular authority about

⁶ The bench later questioned De Silva on his perceived distinctions between the two cases

⁷ Transcript, February 14, 2006, page 74, lines 17-22

⁸ Transcript, February 14, 2006, page 76, lines 27-29, page 77, lines 1-4

the ongoing dilemma faced by courts of law between upholding the principle of legality and acting on other extraneous, often political, factors.

Following the replies of both the first and second accused to the submissions of the Prosecution and the Attorney General, the bench indicated that the motion would be considered and that a decision on the matter would be issued in due course.

Continued Testimony of Albert Demby

Dr. Demby continued his testimony in direct from the previous week and spoke about the numerous investigations that were conducted by the CDF into alleged crimes perpetrated by the Kamajors. He spoke of instances where the Kamajors were accused of burning down houses with civilians trapped inside and how subsequent investigations found that the actual perpetrators were rebels dressed in Kamajor costume. Demby himself investigated the alleged killing of civilians at CDF checkpoints. He testified that not all of those killed in such cases were civilians and many were in fact rebels who were carrying arms and ammunition under their clothing. In the process of Kamajors firing at these disguised rebels, Demby stated that civilians were sometimes, regrettably, caught in the cross fire.

The witness also elaborated on the structure of the CDF after the government's reinstatement in 1998 and the creation of the NCC. He testified that General Khobe was responsible for all military matters and that the National Coordinating Committee functioned as a purely administrative body. Demby completed his evidence in chief by noting the great lengths to which the government had gone in order to demonstrate its deep appreciation for the Kamajors and their efforts in defending the country. This tended to reinforce the defence's theory that President Kabbah approved and supported all Kamajor activity during the conflict.

Both counsel for the second and third accused took the opportunity to cross-examine Demby. However, it was the cross-examination conducted by counsel for the third accused, Charles Margai, that directly challenged Demby's evidence. Margai noted that Demby had testified during the direct that between August 1997 and February 1998 he did not travel to Conakry, which the witness confirmed. Counsel then noted that there was evidence before the court that during this period Demby was present at a meeting in Conakry with the President and Peter Penfold, the second witness called by the Norman team, amongst others, during which the President gave a considerable sum of money to Chief Norman in support of the CDF. Despite this evidence, to which Penfold had testified during his examination-in-chief, Demby maintained that he was never present at, and knew nothing about, such a meeting. The apparent discrepancy between the two men's testimony thus remains unresolved. While Margai attempted to tender a letter addressed to the President of the UN Security Council and signed by President Kabbah, dated August 2000, regarding the jurisdiction of the court, Justice Thompson claimed that the document represented the 'usurpation of court's role as sole adjudicator'. Margai withdrew the letter and concluded his cross-examination.

During its cross-examination of Demby, the Prosecution attempted to establish that the Kamajor society that developed as a national defence system was markedly different from the traditional hunting societies that existed prior to the war. Demby was thus questioned on the evolution of the initiation and immunization ceremonies and the exact role of the Kamajors in Sierra Leonean society prior to the coup. The Prosecution also questioned Demby on his knowledge of CDF activities while he was based at Lungi

following the coup. Demby maintained that he had no knowledge of when CDF attacks took place and whether ECOMOG forces were involved at this time. Demby also testified that prior to the coup it was the Paramount Chiefs who were in control of the Kamajors and that following the coup and prior to the arrival of ECOMOG forces it was General Khobe in command of the allied forces. Demby refused to elaborate on Norman's responsibilities during this time as he stated that he was not familiar with his terms of reference as National Coordinator.

At this point the Prosecution introduced the summary of the witness' evidence, provided to the court in December 2005 by the Norman defence team. Prosecuting attorney Kevin Tavener noted that the summary stated that Demby was to testify regarding "How Norman was sent to the Sierra Leone/Liberia border to help organise a Kamajor resistance..."⁹ The lead Prosecutor noted that the evidence of the witness in court was that he was unaware of the nature of Norman's activities in Sierra Leone at this time. He would therefore need to consult the witness' actual statement to the defence in order to determine whether this discrepancy could be seen to put the witness's credibility into question or whether the discrepancy arose from an omission by the defence in the summary in question.

While lead counsel for the third accused, Charles Margai, attempted to intervene repeatedly on the grounds that he was an officer of the court, the bench disallowed his involvement as they saw it as an issue between the Prosecution and counsel for the first accused, who was responsible for the summary.¹⁰ The bench asked that Jabbi make the statement in question available to the Prosecution in the spirit of the principle of equality of arms and reciprocity. However, the following morning Demby himself explained the apparent discrepancy between his statement to the Prosecution and his testimony by indicating the differences in the two questions he was responding to. The cross-examination thus continued and Demby was further questioned on the investigations he conducted into instances of alleged unlawful behaviour on the part of the CDF, as well as his findings in such cases. After a brief re-examination by Jabbi, Demby's evidence concluded and the next witness was called.

Testimony of M.T. Collier

M.T. Collier is the fourth witness called by the Norman defence team in the CDF trial. He testified in Mende. He was born in Talia, Yawbecko, where he has lived most of his life. He is currently 75 years old and is considered a respected elder of his village. The witness testified that he joined the Kamajor society in 1996 after learning that the initiation process undertaken by initiates meant that they were immune to bullets and other weapons capable of inflicting serious injury. Collier stated that his main motivation for joining the Kamajor society was one of self-defence: he did not want to engage in battle so much as to protect his own life. Collier also testified that after the government had been overthrown the people of Talia dispatched several civilians to the Liberian border in order to find Norman and inform him that the people of Talia continued to support him and would be honoured to host him. After attaining Kabbah's approval to do

⁹ Transcript, February 15th, 2006, pg 35, lines 4-6.

¹⁰ The right of defence counsel to intervene when it is not their witness on the stand has become an ongoing issue in the CDF trial. Defence counsel contend that because of the charge of Joint Criminal Enterprise their interests are nevertheless at stake however the Trial Chamber ruled that they will decide on such interventions on a case by case basis when the direct interests of counsel's client is involved. Please see Trial Monitoring Project Report No. 68, February 10, 2006.

so, Norman subsequently arrived in Talia by helicopter. He brought with him various supplies including food as well as arms and ammunition. Talia soon became known as Base Zero, the CDF base where a War Council was established. Collier testified that various Paramount Chiefs in the region relocated to the town and that Paramount Chief Quee was Chairman of the War Council. Collier further testified that while Norman was in Talia he never saw him issue orders to the Kamajors, and never knew him to be involved in payment for the initiation ceremonies.

As Collier was a common defence witness, Bockarie and Margai, respective counsel for the second and third accused, also conducted examinations-in-chief. Both lead evidence related to their clients' activities while in Talia at Base Zero. While Collier contended that he did not know what Fofana's role as Director entailed, he testified that Kondewa, the third accused, carried out the initiation and immunization processes as High Priest. Collier testified that people clamoured to be initiated and that Kondewa did not force anyone to participate in such ceremonies. Margai also questioned Collier on previous testimony given by witnesses for the Prosecution, who had alleged that Kondewa was one of those responsible for deciding how the war was to be conducted. Collier denied this and elaborated on the chain of command that existed in each chieftdom. He identified the battalion commanders as those actually issuing orders to the Kamajors and sending them into battle.

Collier also specifically addressed the testimony of Prosecution witness TF2-014, who testified in March 2005, that Kondewa had killed an initiate, burnt his body and subsequently used the ashes in initiation ceremonies. Again, Collier denied these allegations and said that as a town elder he surely would have heard about such an incident had it happened. He also denied allegations of the murder of Mustapha Fallon, which is alleged to have occurred in the presence of Kondewa and Fofana, and similarly the murder and skinning of Alpha Dauda Kanu, which is alleged to have occurred in the presence of all three accused. Collier then proceeded to provide character evidence for Kondewa. The Prosecution took issue with this¹¹, but the Trial Chamber ruled that this evidence was indeed admissible. Margai proceeded with his line of questioning and concluded his examination-in-chief shortly thereafter.

The Prosecution sought to discredit Collier's testimony in the cross by revealing the connections between the witness (and his family) and Norman and the Kamajors. Collier denied that any of his daughters were ever married to Norman and he also denied the Prosecution's allegations that his son Ibrahim was a member of the group of Kamajors known as the Death Squad, which was allegedly under the command of Norman. While Collier eventually acknowledged that he had other family members who belonged to the Death Squad, he claimed not to know what sort of activities the group was engaged in, to the visible frustration of the lead Prosecutor. Collier also denied having seen children under the age of fifteen carrying weapons around Talia and denied having seen prisoners brought back to town by the Kamajors following battle. When Collier was questioned on what exactly he saw the Kamajors doing in Talia he

¹¹ The Prosecution argued that character evidence only 'muddied the waters' at this time and that under Rule 89(c) it should not be allowed. While the Chamber allowed it the Presiding judge did caution Margai that if he led with this evidence he would be opening the door for the Prosecution to then question character, even after the close of their case.

responded that “I saw them being supplied with rice, they would cook that rice and eat and they would depart.”¹²

Interpretation Issues

Throughout Collier’s testimony both Jabbi and Margai intervened on numerous occasions to indicate what they considered as discrepancies between what the witness was actually saying in Mende and the English interpretation of it. While the judges initially showed frustration with Jabbi for the interruptions they too became concerned that the witness’ testimony was at risk of being distorted. The interpreter’s use of words such as “died” rather than “killed” or, most seriously, “fighting against” rather than “fighting for”, were pointed out by defence counsel. These apparent inaccuracies were thus put to the interpreters by the bench and the interpreters were subsequently able to explain exactly what the witness had stated. The Head of the Translation Unit noted that as the interpreters are trained professionals they will not hesitate to indicate when they have made an error. Furthermore, she indicated that as all the translation that occurs in court is recorded any apparent inconsistencies can be verified and corrected, thereby ensuring a high degree of accuracy.¹³

Testimony of Osman Vandy

The final witness called by the Norman defence this week was Osman Vandy, alias Vanjawai, who testified in Mende. He was born in Levuma Bagbo and is currently 51 years of age. While he works as a diamond miner he has also been a Kamajor since 1995 and achieved the rank of task force commander. As a Kamajor fighter Vandy was sent to Bo by his chiefdom authorities. Initially, he fought in cooperation with the SLA in this southern province. He subsequently worked in cooperation with ECOMOG forces after the overthrow of the Kabbah government. Vandy stated that he met Norman on the third occasion that he was summoned to Talia, at which time Vandy himself was accused of murder. He testified that his case was put before the War Council during this visit and that the elders did not allow Norman to intervene in their decisions. Vandy indicated that it was the War Council, not Norman, who made the initial decision to hang him. It was also the council that then reversed this decision and ordered an investigation into the alleged crime and found Vandy not guilty. The defence was thus able to buttress its position that Norman did not exert control over the War Council or issue orders for it to carry out. Vandy also testified that once he had been appointed as a task force commander he travelled to Lungi with other Kamajors to meet President Kabbah. During the meeting Vandy alleged that Kabbah instructed the Kamajors to work under the control of ECOMOG forces and to assist them in navigating the country’s terrain. Vandy returned to Talia via helicopter with arms and ammunition. Vandy testified that he did not receive orders from anyone other than ECOMOG and SLA soldiers, nor did he receive arms or food from anyone else during the conflict. Vandy’s testimony thus lent support to the defence’s contention that Norman did not issue commands to the Kamajors and that Kabbah was ultimately in control.

¹² Transcript, February 17, 2005, page 67, lines 21-22

¹³ Personal communication with the Head of the Translation Unit, Rebekkah Ehret, March 2006.



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