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SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before: Hon. Justice Benjamin Mutanga Itoe, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Pierre Boutet

Registrar: Mr. Herman Von Hebel

Date: 30th June 2008

PROSECUTOR Against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

Public Document

WRITTEN REASONED DECISION ON MOTION FOR ISSUANCE OF A SUBPOENA TO H.E. DR. AHMAD TEJAN KABBAH, FORMER PRESIDENT OF THE REPUBLIC OF SIERRA LEONE

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TRIAL CHAMBER I ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, Hon. Justice Bankole Thompson and Hon. Justice Pierre Boutet;

SEISED of the "Sesay Application for Issuance of A Subpoena to Ahmed Tejan Kabbah", filed publicly by Counsel for the First Accused, Issa Hassan Sesay, ("Counsel for Sesay") on the 28th of February, 2008 ("Sesay Application"), whereby Counsel for Sesay requests the Trial Chamber to issue a subpoena to H.E. Dr. Ahmad Tejan Kabbah, the Former President of the Republic of Sierra Leone (hereinafter referred to as "Dr. Kabbah") compelling him to meet with Counsel for Sesay for a pre-testimony interview, and to appear as a witness in the RUF trial on behalf of the First Accused ("Application");

NOTING the Defence Addendum to Sesay Defence Application for the Issuance of A Subpoena to Former President Ahmed Tejan Kabbah", filed publicly on the 29th of February, 2008 ("Addendum to Sesay Application");

NOTING the "Prosecution Response to Sesay Application for Issuance of A Subpoena to Former President Ahmed Tejan Kabbah", filed publicly on the 4th of March, 2008 ("Response to Sesay Application"), opposing the Sesay Application;

NOTING the Defence Reply to the Prosecution Response to Sesay Application for Issuance of A *Subpoena* to Former President Ahmad Tejan Kabbah", filed publicly on the 5th of March, 2008 ("Sesay Reply");

NOTING the oral ruling of the Chamber on the 13th of March 2008, in which it ordered that H.E. Alhaji Dr. Ahmad Tejan Kabbah appear at a pre–hearing interview and then in Court to testify for and on behalf of the Third Accused, if called as a defence witness, on Thursday the 24th of April, 2008, that the Registrar to Cause a Copy of the said Subpoena to be served upon H.E. Alhaji Dr. Ahmad Tejan Kabbah and to transmit copies of this Order and the Subpoena to the responsible authorities of the Government of Sierra Leone;

NOTING that the Chamber indicated at that time that a reasoned written Decision on this matter would be forthcoming;

PURSUANT TO Rule 54 of the Rules of Procedure and Evidence ("Rules");

ISSUES THE FOLLOWING DECISION:

I. SUBMISSIONS

1. In his Motion, Counsel for Sesay ("Applicant") requests the Chamber to issue, pursuant to Rule 54, a subpoena to Dr. Kabbah Former President of Sierra Leone to compel him to appear as a witness in the RUF trial on behalf of the First Accused, Issa Hassan Sesay and to meet with the Applicant in advance of his proposed testimony.[1]

2. In response, the Prosecution submits that the Application should be denied and the Motion dismissed.[2]

3. The Defence submits that the evidence Dr. Kabbah could give would materially and substantially assist in proving Mr. Sesay's innocence in regard to Counts 15-18 of the Consolidated Indictment. It states further that this evidence is unique and could not be obtained from any other person.[3]

4. The Defence further submits that it has made repeated attempts to contact Dr. Kabbah since 2004 and while, in meetings held in 2007, the former President indicated a willingness to be interviewed through the then Chief of Protocol, Mr. Daramy, no such meeting has materialised. The Defence avers that Dr. Kabbah has not responded to any correspondence from the Defence since he left office in August 2007.[4]

5. The Prosecution in its response submits that although the question posed by the Application concerns whether a subpoena should be issued, which may be secondary to whether, at this point in the trial, such an Application should be heard on its merits.[5]

6. The Prosecution avers that Dr. Kabbah was not named in the list of witnesses produced by the Accused Sesay.[6] It, therefore, submits that to add him as a witness, the Defence must pursuant to an earlier order, show good cause.[7] It further contends that if the Defence seeks to add any witness

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[1] Sesay Motion, para. 1.
[2] Prosecution Response to Sesay Motion, para. 31.
[3] Application, para.3.
[4] *Ibid.*, para. 4. See Annex A to the Application detailing the repeated attempts by the Defence to contact Dr. Kabbah. See also Annexes B and C of the Addendum.
[5] Response, para. 2.
[6] *Ibid*, para. 3.
[7] *Ibid*

or to modify this list after the 16th of February 2007 it is only permissible to do so only upon good cause being shown.[8]

7. It is also the Prosecution's contention that other previous orders of the Trial Chamber require that the Defence provide a detailed summary of each witness' testimony and that the Defence may only withhold the names or any other identifying data to its witnesses until 42 days prior to their testimony at trial.[9]

8. The Prosecution submits further that in the CDF trial the Accused Norman had included Dr. Kabbah on his witness list.[10]

9. The Prosecution, likewise, raises the issue of timing of the Application. According to the Prosecution, in order for Dr. Kabbah to be a witness in the RUF case, the Trial Chamber would be required to: a) grant leave to add him to the witness list upon showing good cause; and b) grant an extension of time for the closing of the case for the First Accused or grant relief from the orders that the identity of a witness must be disclosed 42 days before they testify and that a witness must be placed on a list of upcoming witnesses at least 14 days before the witness testify.[11]

10. The Prosecution further asserts that the facts set out in the Application show that over three years the First Accused attempted to communicate with Dr. Kabbah, and yet there is no explanation offered as to why he waited until 14 days before the Sesay Defence case is to end before bringing an application to the Trial Chamber. Hence, the Prosecution submits that such a delay cannot be justified in the circumstances of this case, in particular, the fact that the Prosecution closed its case over 18 months ago.[12]

11. In its reply, the Defence submits that the Prosecution's overall objections ought to be given little or no weight. The Defence further submits that the Prosecution is attempting to elevate procedural issues above the substantive merits of the application. The Defence also submits that the Prosecution's submission that the Trial Chamber ought to resolve the preliminary procedural issues of modifying Sesay Defence witness list; granting an extension of time for the closing of the case for

[8] Prosecutor v. Sesay et al, SCSL-2004-15-T-659, "Scheduling Order Concerning the Preparation and the Commencement of the Defence Case," 30 October 2006, para. 1. This deadline was subsequently extended to 5 March 2007, pursuant to SCSL-04-15-T-705, "Decision and Order on Defence Application for an Adjournment of 16th February Deadline for Filing of Defence Material," 7 February 2007.
[9] Response, para. 3.
[10] Ibid., para. 5.
[11] Ibid., para. 6.

the First Accused, Issa Hassan Sesay, or be asked to grant relief from the orders that the identity of a witness be disclosed 42 days before the witness testifies; and that a witness must be placed on a list of upcoming witnesses at least 14 days before the witness testifies, before considering the substantive merits of the motion, ought to be rejected.[13]

12. The Defence, in its reply, further submits that it ought to be trite law and obvious to any party that it would be highly improper (and possibly dangerous) to name and list as a defence witness any person who had not consented to this course of action, and that this clearly applies—and even more so in the case of a former President of the Republic of Sierra Leone who arguably had actively avoided attempts to obtain his cooperation to become a witness for the Sesay Defence. The Defence contends that not only would this have misled the Court and the parties but it would also have been impossible for the Sesay Defence to provide a *bona fide* summary of the testimony or place the person into a genuine witness list.[14]

13. In addition, the Defence states that the Prosecution had previously contested that (i) persons who have not indicated their willingness to testify would not be entitled to protection under the applicable protective measures Decision of November 2006 and also (ii) to meet the Rule 69 test of "exceptional circumstances" an applying party must establish "sufficient facts supporting the subjective fears of witnesses [and] must also provide evidence from other sources indicating an objective basis for assessing whether a threat to the witnesses' security exits". The Defence also argues that the Prosecution, in its response, has failed to explain how this test is properly satisfied in the case of a proposed witness who has refused to meet the Defence.[15]

14. The Defence, in its reply, urges the Chamber to reject the Prosecution's argument that the Merits of the Application should not be considered on the grounds that the Trial Chamber had ordered the Defence case for the First Accused, Issa Hassan Sesay, to be closed on or before the Thursday, 13th of March, 2008 and that there had been a lack of due diligence on the part of the Defence.[16]

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[13] Ibid., para. 8.
[14] Reply, para. 2.
[15] *Ibid.*, para. 3.
[16] *Ibid.*, para. 4.
[17] Ibid., para. 5.

II. APPLICABLE LAW

15. The Chamber notes that the applicable statutory provision for granting subpoenas is Rule 54. The said Rule 54 prescribes the standard for issuance of a subpoena in these terms:

> 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 the purposes of an investigation or for the preparation or conduct of the trial.

16. The Trial Chamber recalls further that in its seminal Decision on the issuance of a subpoena, by a 2-1 majority it laid down the legal standard in these terms: The applicant... must... show that the measure is necessary (the "necessity" requirement) and that it is for the purposes of an investigation or for the preparation or conduct of the trial (the "purpose" requirement).[17] Enunciating this standard, the Chamber relied upon the Decision of the ICTY Appeals Chamber in *Prosecutor v. Halilovic*[18] and *Prosecutor v. Kristic*.[19] In this regard, guidance was also sought from the Decision of the Trial Chamber in *Prosecutor v. Bagosora*[20] where that Chamber stated as follows:

> First, the proposed injunction must be *necessary* in order for the requesting party to obtain the material sought. Further, the requested material must be *relevant* to the proceedings.[21] Accordingly, with respect to subpoenas directed at individuals, the Defence must demonstrate that it has made "reasonable attempts to obtain the voluntary cooperation of the parties involved and has been unsuccessful", and the Defence "must have a reasonable belief that the prospective witness can materially assist in the preparation of its case."[22]

17. Addressing the nature and scope of the Special Court's authority to issue a subpoena, under Rule 54, our Appeals Chamber had this to say:

> The determination whether a subpoena should be issued is in the discretion of the Trial Chamber. This is emphasised in Rule 54 by the word "may", a Trial Chamber may issue a subpoena as may be necessary. There is nothing in this rule

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[17] Ibid., para. 28.
[18] *Prosecutor v. Halilovic*, 'Decision on the Issuance of Subpoenas", 21st June 2004, paras. 6-7, 10 ("*Halilovic Appeals Decision*").
[19] *Prosecutor v. Krstic*, "Decision on the Application for Subpoenas", 1st July 2003, paras. 10-11, ("*Krstic Appeals Decision*").
[20] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004, Trial Chamber ("*Bagosora* Decision"), para. 4.
[21] *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged between Zejnil Delalic and Zdravcko Mucic, 11 November 1996, para. 39.
[22] See *Bagosora* Decision, para. 4.

> that makes it mandatory on the Trial Chamber to issue a subpoena. Consequently, in adjudicating an interlocutory appeal from a discretionary decision resulting in the refusal to issue a subpoena, appellate intervention will only be justified in limited circumstances when the Appellant can demonstrate a discernible error.[23]

Instructively, the Appeals Chamber went on to say :

> The Court will grant a subpoena if it is "necessary" to bring to court an unwilling, but important, witness. The phrase in Rule 54 "necessary for the purposes of...preparation or conduct of the trial" requires the applicant to show that it is necessary for purposes to issue a subpoena or other order so as to bring evidence to Court. That is satisfied if the applicant shows that the subpoena is likely to elicit evidence material to an issue in the case which cannot be obtained without judicial intervention. The key question is whether the effect that the subpoena will have is necessary to try the case fairly.[24]

Continuing, the Chamber reasoned as follows:

> It is incumbent on the party seeking to compel a reluctant witness to testify to satisfy the Chamber that a subpoena should be issued. The Trial Chamber is entitled to look carefully at the proposed evidence and may decline to issue a subpoena if the proposed evidence fails to address a sufficiently material issue. In doing so, the Trial Chamber does not conduct a "premature evaluation" of the probative value of the evidence, as suggested by the Appellant Fofana. Rather, the Trial Chamber assesses whether issuing a subpoena to compel a reluctant witness to testify may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. With particular reference to the present case, the Trial Chamber correctly identified a series of factors that may be relevant to this inquiry: Whether the information will be of material assistance to the applicant's case will depend largely upon the position held by the prospective witness in relation to the events in question, any relationship he may have or have had with the accused which is relevant to the charges, the opportunity which he may reasonably be thought to have had to observe those events or to learn of those events and any statements made by him to the applicant or to others in relation to those events.[25]

In conclusion, the Chamber found thus:

> It was correct for the Trial Chamber to look both at whether the information sought to be obtained through the subpoena was necessary, as part of the purpose requirement, and then to consider whether the subpoena was a necessary measure under the "necessity requirement".[26]

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[23] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-16-T-688, Decision on Interlocutory Appeals against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, 11 September 2006, para. 8 ("Appeals Chamber Subpoena Decision").
[24] *Ibid.*, para.9.
[25] *Ibid.*, para. 21
[26] *Ibid.*, para. 25.

III. DELIBERATIONS

18. Thus guided, this Chamber now proceeds to address the critical question for determination for the purposes of disposing of the instant application, namely, whether the Defence has fulfilled the prescribed legal standard to justify the exercise by the Chamber of its discretion to grant the orders sought. In this regard, the Chamber reiterates that an application for the issuance of a subpoena pursuant to Rule 54 must satisfy the Chamber that the evidence sought to be proffered meets the "legitimate forensic purpose" and "necessity" criteria as previously described.

19. Consistent with the Chamber's reasoning in its CDF Subpoena Decision that the applicant must demonstrate a reasonable basis for the belief that the information to be provided by the prospective witness is likely to be of material assistance to the applicant's case, or that there is at least a good chance that it would be of material assistance to the applicant's case, in relation to clearly identified issues relevant to the forthcoming trial, We find significantly that the proposed testimony is likely to be of material assistance to the defence of the First Accused. This findings is made in two major respects;

> (i), as shown by the First Accused, that the proposed testimony is likely to show that the First Accused was doing his best to protect the detained UNAMSIL peacekeepers, and to reinstate the stalled disarmament process, and (ii), that the former President can testify about issues integral to the defence of the First Accused and may show that the, First Accused, was not ordered to attack or co-ordinate attacks against the said UNAMSIL peacekeepers but acted alone.

20. Further, the Chamber wishes to emphasise that, as a matter of law, for the purposes of Rule 54, the statutory authority for the issuance of a subpoena, as an instrument of judicial compulsion backed by the threat and power of criminal sanctions for non-compliance, is to be used sparingly.[27] The Chamber also opines that convenience is not a sufficient justification for the issuance of a subpoena,[28] and that when the evidence sought to be proffered can be obtained through other means, it would be inappropriate to grant such an order.[29]

21. Based on the foregoing principles of law and applying the same to the facts and circumstances in support of the instant application, especially the nature and purpose of the evidence

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[27] Halilovic Appeal Decision, para. 10.
[28] *Ibid.*
[29] *Ibid*, para. 7, *See* also *Milosevic*, para.41.

sought to be adduced, the Chamber is satisfied that the Defence has met the prescribed legal standard for the issuance of a subpoena under Rule 54 thereby justifying the exercise by the Chamber of its discretion to grant the orders sought.

IV. DISPOSITION

22. Being thus satisfied, the Chamber pursuant to Rule 54 of the Rules,

23. **HEREBY GRANTS** the Application by Counsel for the First Accused for the issuance of a subpoena directed to H.E. Alhaji Dr. Ahmad Tejan Kabbah, the former President of the Republic of Sierra Leone, for a pre-testimony interview and for testimony at this trial.

ORDERS that H.E. Alhaji Dr. Ahmad Tejan Kabbah shall testify, if called as a defence witness, on Thursday the 15th of May, 2008.

Hon. Justice Benjamin Mutanga Itoe appends a Separate Concurring Opinion to this Decision.

Done at Freetown, Sierra Leone, this 30th day of June 2008.

Hon. Justice Pierre Boutet	Hon. Justice Benjamin Mutanga Itoe Presiding Judge Trial Chamber I	Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]