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SCSL-04-15-T
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SPECIAL COURT FOR SIERRA LEONE

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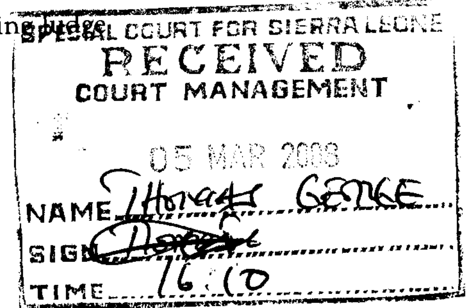
TRIAL CHAMBER I

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



Registrar: Herman von Hebel

Date: 5th of March 2008

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

Public Document

WRITTEN DECISION ON SESAY DEFENCE APPLICATION FOR A WEEK'S ADJOURNMENT - INSUFFICIENT RESOURCES IN VIOLATION OF ARTICLE 17(4)(b) OF THE STATUTE OF THE SPECIAL COURT

Office of the Prosecutor:
Mr. Stephen Rapp
Mr. James C. Johnson
Mr. Peter Harrison
Mr. Charles Hardaway

Defence Counsel for Issa Hassan Sesay:
Mr. Wayne Jordash
Ms. Sareta Ashraph

Defence Counsel for Morris Kallon:
Mr. Charles Taku
Mr. Kennedy Ogeto
Mr. Lansana Dumbuya
Ms. Tanoo Mylvaganam

Court Appointed Counsel for Augustine Gbao:
Mr. John Cammegh
Mr. Scott Martin

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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;

SEIZED of the Sesay Defence Application filed on the 4th of February, 2008, for a One Week's Adjournment - Insufficient Resources in Violation of the Statute of the Special Court;

MINDFUL of a similar but Oral Application made by the Sesay Defence team before the Chamber on Friday the 1st of February, 2008;

MINDFUL of the Chamber Oral Decision delivered in Court soon after the said Application was made, dismissing the said February 1st Oral Application;

MINDFUL of the Written Application and Submissions followed by lengthy Oral arguments made by Learned Lead Counsel for the Sesay Defence, Mr. Jordash, in support of the said Application that was filed on the 4th of February, 2008;

MINDFUL of the Oral Response to the said Application made instantaneously in Court at the behest of the Chamber on Monday, the 4th of February 2008 by Mr. Charles Hardaway, Learned Counsel for the Prosecution, urging the Chamber to dismiss the said application for a week's adjournment;

MINDFUL of the provisions of Article 17 and particularly those of Article 17(4)(b) of the Statute of the Special Court;

MINDFUL of the provisions of Rules 26*bis*, 73*ter*(c), 73*ter*(d), 90(f)(i) and 90(f)(ii) of the Rules of Procedure and Evidence;

MINDFUL of our Chamber Oral Decision delivered soon after our deliberation granting Mr. Jordash's Application for a week's adjournment and the Orders made and laid down by the Chamber in that Oral Decision;

MINDFUL of our indication in that Oral Decision that a Reasoned Written Decision will be issued;

HEREBY ISSUES THE FOLLOWING WRITTEN AND REASONED DECISION AS INDICATED IN ITS ORAL DECISION DATED THE 4TH OF FEBRUARY 2008:

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I. BACKGROUND

1. The facts briefly stated are that Learned Counsel, Mr. Wayne Jordash, is the Lead Counsel for the Defence Team of the 1st Accused, Issa Hassan Sesay. In the conduct of the Defence Case for his Client, he had already called 28 Defence Witnesses before he made this application on Monday, the 4th of February, 2008.

2. On Friday the 1st of February, 2008, he made an application to have this case adjourned to Tuesday the 5th of February, 2008, so as to dispose of time to prepare for the calling of the other witnesses. He complained of a lack of financial resources which he says were denied him by the Registrar.

3. During a Status Conference held by the Chamber on the 27th of November, 2007[1], Mr Jordash, after a lengthy exchange with the Chamber on the duration of his client's case, informed us that he would close it by mid March 2008; a commitment which he reiterated in Court on the 19th of February, 2008.[2] We considered this date line reasonable in the circumstances.

4. By an Oral Ruling issued thereafter, following a protracted deliberation, the Chamber dismissed Mr. Jordash's application for want of any legal basis to justify its being granted. We ordered that the next witness be called. He was, and after concluding his evidence on the same day, we adjourned the proceedings to Monday, the 4th of February, 2008, for the next Defence Witness to be called.

5. On the 4th of February, 2008, when we resumed the session with the expectation of taking a new Defence Witness, Mr. Jordash produced before the Chamber, a filed, yet-to-be served, but what we perceived to be an application similar to the one we had dismissed on Friday the 1st of February, 2008, and which he this time, introduced in the form of a written Motion. He filed it on that same day, the 4th day of February, 2008. In the application, he sought a week's adjournment of the proceedings.

6. The Chamber, after another prolonged deliberation immediately after hearing the submissions, granted Mr. Jordash's application for the one week's adjournment but ordered that he

[1] Transcript of 27 November 2007, Status Conference, p. 21, paras 2-9.
[2] Transcript of 19 February 2008, p. 26, lines 22-23.

respects his engagement to the Chamber made and taken on the 27th day of November, 2007, that the case of his client shall be closed on or before Thursday, the 13th of March, 2008.

II. SUBMISSIONS OF THE PARTIES

7. The submissions, briefly stated, are as follows.

FOR THE APPLICANT:

8. Basically, Mr Jordash's application is premised on a lack of adequate resources by his Team to secure the attendance of and to prepare for the testimony of his Defence witnesses. In particular, Mr. Jordash again raised the issue of the imperative necessity for additional resources to be provided for him to engage another Counsel for the duration of his Client's case.

9. He argues that he and Ms. Ashraph, a Counsel in his Team, are over-worked and overstretched and cannot, under such circumstances, and with the limited human resources which they dispose of, properly ensure the defence of their client as provided for in Article 17(4)(b) of the Statute.

10. Mr Jordash, to emphasise the point he is further making, puts across the following argument 'No other Personnel at the Special Court is expected to work under such working periods for such extended periods of time and the working conditions are taking a toll on the physical and mental well-being of our team members.'[3] He further argues that he lacks insufficient team members of sufficient experience to prepare witnesses.

11. He again restates the argument that the case against Issa Sesay on its own and/or in relation to the other cases at the Special Court, is sufficiently serious, complex and sizeable to amount to exceptional circumstances which should warrant the provision of additional resources under the special consideration clause in the Legal Services Contract.

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[3] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-T, Sesay Defence Application for a Weeks Adjournment - Insufficient Resources in Violation of Article 17(4)(b) of the Statute of the Special Court (TC), 4 February 2008, para 16. [*Sesay*, Application]

12. In summary, the Sesay Defence Team premises its application for the one week's adjournment on the following grounds:

i. the inability to properly identify and prepare viva voce witnesses for immediate trial readiness; and

ii. the inability to carry out the remaining associated tasks given the number of lawyers on the Team.

FOR THE PROSECUTION:

13. Mr. Charles Hardaway, Learned Counsel for the Prosecution was only served with the Motion in the course of the presentation of this application by Mr. Jordash in Court that morning. He of course could not provide a written reply to it as would ordinarily have been expected. In view of the instantaneity and urgency of the application, Mr. Hardaway, prompted by the Chamber on his readiness to make any submissions impromptu in reply to Mr. Jordash's application and submissions, had this to say:

> 'Your Honour, for the record, the Prosecution does oppose the Defence request for an adjournment. The major basis for that opposition is the fact that the Prosecution's Case closed on the 2nd of August 2006. We are now in February 2008. It's approximately 18 months since the close of the Prosecution's case for the Defence in - for the Defence for the First Accused in order to get their witnesses together.'[4]

14. In essence, the focus of Mr Hardaway's objection to granting this application is on the fact that the Defence cannot be entitled to a week's adjournment for the reasons advanced when they have had all the time to organize and prepare their Defence Case since the Prosecution closed its case on the 2nd of August, 2006.

III. APPLICABLE LAW

15. Article 17 of the Statute, in its provisions that are relevant to this application provides as follows:

> Article 17(1): All Accused shall be equal before the Special court.
>
> Article 17(2): The Accused shall be entitled to a fair and public hearing subject to measures ordered by the Special Court for the protection of victims and witnesses.

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[4] Transcript of 4 February 2008, p. 52, lines 19-26.

Article 17(4): In the determination of any charge against the Accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality.

Article 17(4)(b): To have adequate time and facilities for the preparation of his or her defence and to communicate with Counsel of his or her own choosing.

16. Rule 26bis of the Rules of Procedure and Evidence provides as follows:

The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules with full respect for the rights of the Accused and due regard for the protection of victims and witnesses.

17. Rule 73ter(c) of the Rules provides:

The Trial Chamber or a Judge designated from among its members may order the defence to shorten the estimated length of the examination-in-chief for some witnesses.

18. Rule 73ter(d) of the Rules provides:

The Trial Chamber or Judge designated from among its members may order the defence to reduce the number of witnesses, **if it considers that an excessive number of witnesses are being called to prove the same facts.**

19. Rule 90(f) provides as follows:

The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:

90(f)(i). Make the interrogation and presentation effective for the ascertainment of the truth;

90(f)(ii). Avoid wasting time.

IV. DELIBERATION

20. The Chamber would like to observe here that Mr. Jordash has been Counsel on the Sesay case since July 2003 and has constantly, very consistently, and without any interruptions, been present to defend his Client's interests in Court since the Prosecution commenced their case on the 5th of July, 2004 and closed it on the 2nd of August, 2006.

21. On the 25th of October, 2006, the Chamber issued its Rule 98 Decision on this case. This Decision put each of the Defence Teams on notice regarding those allegations contained in the

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indictment which it considered, cannot be sustained because no evidence capable of supporting them had been adduced by the Prosecution.

1. Basis of the Defence Application

22. Mr Jordash affirms that 'on numerous occasions since the filing of the Motion, the Defence has raised the issue in Court and has complained of the unreasonable burden being placed upon Counsel and the Legal Assistants due to the size and complexity of the Defence Case and the inadequate resources provided by the Registry'.[5]

23. The Sesay Defence states that it is, in the circumstances, 'unable to effectively prepare the defence with the current resources and in time to continue without delay' and that the 'Defence applies for a one week adjournment' and furthermore, that 'the Defence anticipates that it will require further adjournments within the next few weeks as the existing team continues to struggle to cope with the influx of witnesses, the associated legal tasks, and the various contingencies which arise.'[6]

24. 'Since 7th January 2008', the Sesay Defence states, 'Ms. Ashraph and Mr. Kneitel have re-interviewed/proofed approximately 45 witnesses coming through the witness house. Witnesses to be heard live in Court were also interviewed by Mr. Jordash. Currently, as the Sesay Defence Team is expecting 46 witnesses into the witness house for re-interview in order to determine which of the witnesses will be put before the Court either viva voce or under Rule 92....every witness will have to be interviewed concerning their knowledge of the whole conflict in order for the Defence to make sensible and reasoned decisions about the merits of the particular witness.'[7] Mr. Jordash further argues that 'it is simply not possible to prepare, proof and call up to 100 witnesses selecting from a possible 320, with only 3 people.'[8]

25. From the above submissions, it is clear that the Application for a week's adjournment made by Mr. Jordash is premised on a lack and absence of Defence Witnesses in Court and also on the lack of resources to put together a team that can cope with and execute the tasks that the Sesay Defence has to assume in order to continue to call witnesses and to properly present their Client's case. The

[5] *Sesay*, Application, *supra* note 3, para 1.
[6] *Ibid*, para 8.
[7] *Ibid*, para 9.
[8] *Ibid*, para 13.

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application for one week's adjournment, in effect, was made because Learned Lead Counsel, Mr. Jordash, had run out of Defence Witnesses to enable him to continue with presenting his client's case on the day he made the application.

26. Mr. Jordash, in order to strengthen his arguments, makes an analogy between his Staff and Staff Members of the Special Court by stating that 'no other personnel at the Special Court is expected to work under such working conditions for such extended periods of time...'.[9] He further argues that because of the size and complexity of his case, he should be granted additional resources so as to enable him to employ an additional Counsel to reinforce his Team.

27. In this regard, we would want to state here, in order to dispose of these 2 issues, that neither Learned Counsel, Mr. Jordash, nor any of his Collaborators who are all privately and independently contracted by the Special Court, are Staff Members within the definition of the Staff Rules and Regulations of the Special Court and furthermore, that the issue of additional remuneration for his team has now been laid to rest following our recent Decision[10] on this very subject dated the 12th of February, 2008.

2. Mr. Jordash's Implication in this Case

28. In arriving at a decision on this Application, it is important to examine Mr. Jordash's implication in the case. In this regard, the Chamber would like to again observe here that he has been Counsel for the 1st Accused, Sesay, since July 2003. He was subsequently engaged for this purpose by virtue of a Legal Services Contract[11] with properly defined terms including a remunerative clause which Mr. Jordash signed up to, not only as Assigned Counsel but also, as Case Manager for the Sesay Defence Team.

29. In his capacity as a Case Manager of the Team, Mr. Jordash, under the agreed remuneration, took on the responsibility of ensuring and preparing diligently and well in advance, a proper defence strategy for his Client as the Prosecution's case proceeded. This was to be achieved by distilling, as the Prosecution's case progressed, the evidence adduced on the material facts that are relevant to the

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[9] *Ibid*, para 16.

[10] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on the Sesay Defence Team's Application for Judicial Review of the Registrar's Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Agreement of the 26th of April 2007 (TC), 12 February 2008. [*Sesay*, Decision on Judicial Review]

[11] *Ibid*, Legal Service Contract dated the 1st of October, 2005, signed by Mr. Jordash as Assigned Counsel and Case Manager for the Sesay Defence Team.

allegations which have been made in the Indictment and in testimony against his Client who, through his regular and constant paper briefs to, and occasional in-Court consultations with Mr. Jordash in the course of the proceedings, has all along manifested his personal, factual, and strategic mastery of his case.

30. More importantly, Mr. Jordash, in close consultation with his client, should have determined progressively, and this, since the commencement of the Prosecution's case on the 5th of July, 2004, the identity of the Defence Witnesses that were needed to rebut those allegations and facts that were testified to by Prosecution witnesses, in fulfilment of this objective.

31. We say this because Mr. Jordash had to depend on his client to assist him to identify issues and witnesses, to interview them, to carry out a forensic analysis of their proposed evidence, and thereafter, to determine those witnesses he was to call in order to properly present his Client's case. The Chamber considers that this process should have been envisaged and commenced since July 2003 by Mr. Jordash when he came into this case and after which he has maintained a very close Solicitor/Client relationship with the 1st Accused up to date.

32. We in fact have cause to conclude, from the very lengthy, searching and thorough questions in cross examination of the Prosecution Witnesses by Mr. Jordash during the conduct of their case, that he was already sufficiently equipped with a good knowledge of the facts and information on which he based that exhaustive and thorough cross examination.

3. An Overview of the Proceedings

33. In order to understand the Decision and Orders made by the Chamber on this application, a historical overview of the proceedings before us is, to our mind, necessary.

34. In effect, this Chamber was seized of 2 cases: the CDF and the RUF Trials. As part of our strategy to achieve the statutorily desired objective of expeditious trials for each the 3 Accused Persons in the 2 Cases, we put in place, a system of double tracking with the 2 cases, alternating their hearings every 6 weeks. In this context, if we were hearing the CDF case for instance, Mr. Jordash and his Defence Team, during the duration of the CDF proceedings, were released from the intensity of Courtroom activity. This enabled or should have enabled him and his Team to dedicate themselves entirely to the preparation of all components and aspects of their RUF case.

35. The CDF case, which was the first that we started, commenced on the 3rd of June, 2004. The RUF Case kicked off on the 5th of July, 2004. We alternated their hearings accordingly. The Prosecution in the RUF case, called a total of 85 Witnesses to prove its case against the 3 Indictees. The Prosecution closed its RUF proceedings on the 2nd of August 2006. We rendered our Rule 98 Decision on the 25th of October, 2006.

36. Since we were still on with the CDF Case, it was expected that Mr. Jordash would commence his client's defence case in January 2007.[12] He indicated a preference for the month of April 2007[13] so as to allow him time to interview and prepare his witnesses for testimony. In view of the importance the Chamber attached, and still attaches to the necessity for Mr. Jordash to properly prepare his Client's case, we fixed the commencement of his Defence case for the 3rd of May, 2007 during which time the Chamber counted on the Sesay Defence Team to take advantage of the late start of their Client's case, to identify, interview, and fully screen their witnesses in preparation for testimony with effect from that date.

37. In a Chamber scheduling Order dated the 30th of October, 2007 fixing the date for the commencement of the defence case for the 1st Accused, Sesay, we imposed on the Sesay Defence Team, the lighter burden and obligation, to file, on or before the 16th of February, 2007, a list of the witnesses they intended to call and to provide to the Prosecution, in lieu of their entire statements,[14] only a detailed summary of the facts they were to testify to.

4. Presentation of the Sesay Defence Case by Mr Jordash

38. The Sesay Defence Team, led by Learned Lead Counsel, Mr. Jordash, after this long lapse of time, commenced presenting its case on the 3rd of May, 2007 with the testimony of the 1st Accused himself, pursuant to the provisions of Rule 85(c) of the Rules of Procedure and Evidence. His testimony was concluded only on the 26th of June 2007. Thereafter, the Chamber heard the testimony of the 2 other Defence witnesses[15] from the 26th to the 28th of June, 2007, and adjourned the RUF trial to October, 2007.

[12] Transcript of 27 October 2006, p. 37, lines 28 and 29 and p. 38 lines 1-2. Mr. Jordash said here that he would have preferred to start in January but that 'there are certain things which have to be done to get ready'.
[13] Transcript of 27 October 2006, p. 15, lines 14, 15 and 21. Also p. 16, lines 2-9 in a Status Conference and on p. 37, lines 14 & 15. Transcript of 2 August 2006, p. 86, paras 23-26 on Mr. Jordash's wish for the Defence Case beginning as soon as possible in the New Year at the latest. Also p. 87 lines 9-19. Further See p. 90, lines 16-21.
[14] Rule 73ter(B)(d)(iv), para 2, of the Rules of Procedure and Evidence.
[15] Testimony of DIS302 and DIS301.

39. During this interim period of the adjournment of the continued presentation of the Sesay Defence Case, it was naturally expected that the Sesay Defence Team would exercise all diligence to mobilize all their potential and essential witnesses in order to avoid any testimonial interruptions. It is on this understanding that we resumed hearing 2 Sesay Defence Witnesses[16] on the 4th and 5th of October, 2007 even before we delivered the Sentencing Judgement in the CDF Case on the 9th of October 2007. After that Judgement, we fully resumed the proceedings in the RUF Case with the hearing of the testimony of the next series of the Sesay Defence Witnesses.

40. The Chamber would like to indicate here that the decision it is taking on this application is predicated on Mr. Jordash's long involvement in the Sesay Defence Case and on the apparent repetitiveness of some facts in the testimony of Witnesses who have so far testified for the 1st Accused.

5. The Chamber's Stand on Multiplicity of Witnesses

41. In a Status Conference held on the 27th of November, 2007,[17] we pointed this out very lengthily to Learned Counsel Mr. Jordash and invited him to cut down on the number of his witnesses. He subsequently did but not as drastically as we expected.

42. In fact, it is on the basis of repetitious testimony of a number of his witnesses on certain issues, that we ordered Mr. Jordash, on Monday, the 4th of February, 2008, whilst ruling in favour of his application for a week's adjournment, to reduce to a strict minimum, his long list of witnesses and to avoid calling those who are not only repetitive of each other, but also contribute largely to unnecessarily delaying the proceedings and increasing the size of the Sesay case.

43. This duplication of the evidence, in the Chamber's view, has, to a large extent, occasioned the heavy work load that Mr. Jordash is now complaining about. We are compelled, as a Chamber, to observe that it has also resulted in an unnecessary consumption of valuable Court time and sometimes rendered inefficacious, the application of the notion of judicial economy.

44. It is furthermore, the Chamber's view, that if the witnesses on these issues which are regarded as relevant for purposes of enabling the Defence to challenge the allegations in the indictment and the testimony of the Prosecution witnesses were properly assessed, the Sesay Defence Team would

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[16] DIS074 and DIS177.

[17] Transcript of 27 November 2007, Status Conference.

drastically have minimised the burden of work which it is now complaining about. Indeed, they should in fact have reduced to a strict minimum, the number of witnesses that is necessary to establish these facts for an eventual assessment particularly so where we have always, as a Chamber, at one time or the other in the course of these proceedings, given this directive to all the Parties in this Case.

6. Repetitive Testimony

45. A demonstration of such testimonial repetitiveness relates to the evidence led on the following issues and facts that the Defence seeks to establish, coupled with an unnecessarily detailed emphasis and consistently repetitive testimony relating to the pre - 30th November 1996 events that have a connection only to the pre-indictment era of the conflict, even if it is conceded that a historical introduction of these issues is, to a limited extent, relevant.

46. Evidence of repetitiveness in testimony includes mainly the following amongst others:

a. That civilians who were working on Sesay's and in other farms or on RUF projects were well treated and well fed by Sesay.

b. That Sesay was generous and kind to the civilians.

c. That the RUF provided free Schools and free Education to all civilian children as well as to those of the combatants.

d. That there were RUF hospitals with RUF Medic Staff and that free consultation, treatment and drugs were provided to civilians by RUF staff in those hospitals.

e. That civilians who cultivated farms for RUF Commanders did so wilfully, happily, singing and dancing in the process, were very well fed, and were never forced, least still, at gunpoint, to do the work.

f. That civilians who were involved in diamond mining were not forced by the combatants to perform this task but rather, did so voluntarily and not at gun point and that they did it in their interests because they took a share

in the proceeds on a conventional quota - 2 pile system that was agreed upon with their 'Supporters' who employed, supported and took care of them.

47. We observe in this regard, that his Defence strategy which consists of leading evidence of Defence witnesses who are unnecessarily numerous and repetitive of each other on the same or similar facts, contributes to delaying the proceedings and to violating the very statutory rights of his Client to a fair and expeditious trial which he is seen, and rightfully holds himself out, to be protecting.

48. We say this with due regard to the fact that the Prosecution, which after-all carries the heavier burden than the Defence in criminal proceedings, after listing 266 witnesses, ended up calling only 85 of them to prove their case against the 3 Accused Persons whereas the Sesay Defence Team for Sesay alone, on the contrary, still projects calling as many as more than 100 witnesses to establish his defence and to cast a shadow of doubt on his culpability.

49. On this issue of the number of witnesses that are required to establish any Party's case, this Chamber has had this to say in its Decision on the Sesay Defence Application for the Attribution of Additional Resources on the grounds, where Mr. Jordash argued, *inter alia*, of the bigger size and complexity of the Sesay case as compared the others in the Special Court, and particularly, Charles Taylor's in The Hague:

> 'In relation to the issue of the size and complexity of the Sesay Case, the Chamber is of the opinion that it is not necessarily the number of counts on the indictment or the extensive number of witnesses that a Party seeks to call or in fact calls to establish his case that determines its size or its complexity...... We say this because it is, on the contrary, trite law that what is necessary for judicial purposes is the quality of the witnesses who, even though numerically small, can better and more effectively establish any given case than if their numbers were multiplied. In this regard, we lay more emphasis on the quality, the credibility, the focus and the probative value of the testimony of witnesses on issues which are relevant to the core issues that relate to the crimes alleged in the Indictment.'[18]

50. In this regard, the Chamber would like to observe here that if the Sesay Defence Team has characterised its case as big and complex, it would appear to be more because of their Defence strategy of multiplying its own burden by investing their useful energies in interviewing, proofing, and calling a number of witnesses who have turned out to be manifestly repetitive of each other in their testimony on certain facts and issues.

51. In order to resolve the issue of multiplying witnesses on the same facts and issues, the Chamber would, as we have always done in the course of these proceedings, rely on and apply the provisions of Rule 73ter(d) of the Rules which stipulate as follows:

> The Trial Chamber or Judge designated from among its members may order the Defence to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts.

7. Corroboration in International Criminal Justice

52. We take the stand against the practice of an unnecessary multiplicity of witnesses in proceedings, not only because of its repugnancy to the judicial process and practice but also because this Chamber is cognizant of the well established principle in International Criminal Law that there is no requirement that the evidence of a single witness as to a particular fact be corroborated before it can be accepted. [19] On this issue, and to reinforce this principle, it was held in the Akayesu Case that 'the Chamber can rule on the basis of a single testimony provided such testimony is, in its opinion, relevant and credible'. [20] It was also held by the Appeals Chamber of the ICTY in the Alekovski Case that 'the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration'. [21]

53. The Chamber recognises however that it is a normal and accepted principle of practice that a party can only credibly establish its case through evidence and better still, where it is testimonially and or documentarily corroborated, by calling more witnesses than just one. The Chamber in this regard, is indeed cognisant of the need to have some pieces of evidence to be corroborated in certain circumstances so as to enhance its probative value when the Chamber is evaluating the credibility of all the witnesses who have testified to these facts.

8. Corroboration and Repetitiveness

54. Although we say here that corroboration should not be ignored in certain situations and even where this may not be statutorily required, we equally say that this cardinal and well established principle should not provide a platform or a justification for Parties to adduce evidence that is

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[18] *Sesay*, Decision on Judicial Review, *supra* note 10, paras 23-24.

[19] Judge Richard May and Marieke Wierda, *International and Comparative Criminal Law Series - International Criminal Evidence*, (New York: Transnational Publishers, 2002), p. 120.

[20] *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement (TC), 2 September 1998, para 135.

unnecessarily long or repetitive even if it were conceded that these repeated facts which rebut or contradict the core allegations that have been made by the Prosecution in the Indictment as well as in the testimony of their witnesses, were relevant.

55. The Chamber would like to mention here that Learned Lead Counsel, Mr. Jordash, has, on some occasions, reminded this Chamber of the fact that his Client has been held in detention since March 2003[22] and that he is entitled to a speedy and expeditious trial. Even though we share Mr. Jordash's view in this regard, it is also true, and we have often reminded him of his own responsibility to contribute to our achieving this goal through the length of his questioning in cross examination during the Prosecution's case then, and now, in his examination-in-chief and re-examination of his Defence Witnesses.

9. Have the Provisions of Article 17(4)(b) of the Statute been Violated?

56. The Sesay Defence Team alleges that the rights of their Client, under Article 17(4)(b) of the Statute, have been violated. In this regard, the Chamber holds the view that if the breach of that provision is entirely or contributively occasioned by the conduct of the Accused's Defence Team as we hold, in the light of the preceding analysis, it is indeed the case here, Mr. Sesay would be, and is in fact estopped from complaining of or seeking a redress for such a breach on the grounds of the legal maxim of *volenti non fit injuria*.

57. We say this because from the foregoing analysis, it is abundantly clear that the Defence strategy and options adopted by the Sesay Defence Team of calling witnesses who have proven to be repetitive of each other with the attendant consequences of duplicating the evidence, hence delaying the proceedings by unnecessarily increasing the size and duration of the case which in itself is ordinarily not as complex as Mr. Jordash is characterizing it, is and remains largely contributive to any claims or allegations that are made, of a breach of Sesay's rights under Article 17(4)(b) of the Statute. The Sesay case, as we have implicitly held,[23] can after all, be conducted with the now available resources placed at their disposal by the Registrar, and which we consider reasonably adequate in the context of the real and objective dimensions of the case.

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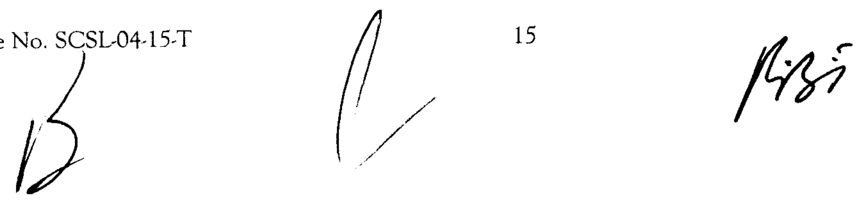
[21] *Prosecutor v. Alekovski*, IT-95-14-1/A, Judgement (AC), 24 March 2000, para 62.
[22] Transcript of 1 February 2008, p. 69.
[23] *Sesay*, Decision on Judicial Review, *supra* note 10.



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58. It is therefore our considered opinion, as we have held in our Decision on Additional Funding, that the Registrar's decision in these circumstances, does not violate the rights of the Accused under Article 17(4)(b) of the Statute. We reiterate this stand here and accordingly dismiss Mr. Jordash's submissions in this regard for want of merit.

10. Equality of Arms

59. Mr. Jordash, again to buttress his case as to why he is unable to mobilize his Defence Witnesses so as to meet up with the hearing schedule of the Chamber, argues that the principle of equality of arms *vis a vis* the Prosecution has been violated in this case and states as follows:

> 'I note that during the Prosecution Case of a similar size, the Prosecution relied upon at least 4 rotating in-Court Counsel as well as a full time Case Manager, several interns and at least, 10 investigators.'

60. Even though Mr. Jordash has not specifically mentioned the case in question, the Chamber would like to draw Learned Counsel's attention to the fact that even if it were conceded that the Prosecution has 4 rotating lawyers, the fact he has not mentioned is that they assume the responsibility of prosecuting 3 Accused Persons each of who has a Defence Team with at least 3 Counsel in each Team. Counsel in these Defence Teams equally relay and back themselves up just as Prosecuting Counsel do.

61. In addition, and as we have already observed, the Prosecution bears a greater burden of proof than the Defence does in any criminal proceeding. In this regard, and we wish to reiterate, that it is the Prosecution that bears the heavy burden of proving the case against the Accused Persons beyond reasonable doubt. The Defence only bears the lighter burden to 'poke specifically targeted holes'[24] into, or generally to raise a reasonable doubt in the Prosecution's case.

62. The Chamber therefore, in dismissing once more, Mr. Jordash's submission in this application where he again alleges that the principle of equality of arms has been violated, relies on and confirms the position it took on a similar issue that he raised earlier, in the Additional Funding Decision[25] where we had this to say:

[24] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order to the First Accused to Re-file Summaries of Witness Testimonies, 2 March 2006 at p. 3, quoting *Prosecutor v. Oric*, IT-03-68-A, Interlocutory Decision on Length of the Defence Case, 20 July 2005, para. 7.

> 'In addition, the Chamber would like to reaffirm the principle that the Prosecution bears the burden of proving beyond a reasonable doubt, every count and every essential element of those counts, while the Defence only needs to raise a reasonable doubt in order to secure the acquittal of the Accused. This reality, we consider, might justify the attribution of more resources and more time to enable the Prosecution to accomplish this very heavy and delicate task.'

V. CONCLUSION

1. The Impropriety of the Application for a Week's Adjournment

63. From the foregoing analysis and given the extraordinarily long time that the Chamber had placed at the disposal of the Sesay Defence Team before now to identify, assemble and prepare their witnesses for testimony, our reaction to Mr. Jordash's application of the 4th of February, 2008 for a week's adjournment and for reasons that are stated in it, was one of astonishment.

64. This was in part because of the engagement Mr Jordash had made earlier and reiterated in Court on the 19th of February, 2008[26] and the latitude the Chamber had given to the Sesay Defence Team to prepare their witnesses in readiness for testimony. We observe here that the Chamber, issued constraints and orders, to Mr. Jordash that whilst one witness is testifying, there must be at least 2 standby witnesses ready to step in the Courtroom either as soon as the testimony of one is concluded, or in the event of any unforeseen eventuality.[27] This application therefore, in the light of the above, amounts to a breach of this Chamber's Directives and Orders and should ordinarily have warranted its outright dismissal for being unjustified.

65. In view however of the fact that We reviewed the implications of a dismissal of the application and the negative impact it might have on the continuation and expeditiousness of these proceedings, the Chamber, after a deliberation on all the issues at stake, has decided to exceptionally grant the application for a week's adjournment in order to enable Mr. Jordash, who in fact had no witnesses at all ready to testify before us on the day he made this application, to reorganize himself within that week and to prepare the rest of his witnesses for testimony from Tuesday, the 12th of February, 2008, until the close of his Case which the Chamber has fixed for the 13th of March, 2008.

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[25] *Sesay*, Decision on Judicial Review, *supra* note 10, para 39.
[26] Transcript of 19 of February 2008, page 26, lines 22-23.
[27] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-T, Consequential Orders Concerning the Preparation and Commencement of the Defence Case (TC), 28 March 2007, para 10.

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VI. DISPOSITION

66. The Chamber, in order to ensure the expeditiousness of the trial as dictated by Article 17(4)(c) of the Statute and Rule 26bis of the Rules of Procedure and Evidence, and by virtue of the provisions of Rule 73ter(d) of the said Rules, issues as following Orders:

i. That the Case is accordingly adjourned to Tuesday, the 12th of February, 2008.

ii. That the Defence Case for 1st Accused must be closed on or before Thursday, the 13th of March, 2008 in conformity with the engagement made by Learned Lead Counsel, Mr. Jordash, during the Status Conference that was held on the 27th of November, 2007.[28]

iii. That Mr. Jordash further reduces to a strict minimum, the list of Witnesses who he intends to call for the Defence of the 1st Accused.

iv. That the reduced list of the Defence witnesses who are yet to be called, be filed by Mr. Jordash on or before the 12th of February, 2008, including a detailed summary of their testimony with a view to avoid repetitiveness and an unnecessary duplication of evidence.[29]

The Chamber further consequentially Orders as follows:

i. That the Sesay Defence Team shall review the list of all the remaining witnesses to ascertain that they are not repetitive of previous testimony.

ii. That very limited emphasis should henceforth be placed on facts which have already been testified to or to those which relate to episodes and events prior to the 30th of November, 1996.

iii. That the Orders relating to a multiplicity of witnesses and an unnecessary duplication of evidence or repetitiveness in testimony shall apply to all the Defence Teams who are yet to call Defence Witnesses in the RUF Case.

iv. **THAT THESE ORDERS BE CARRIED OUT.**

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[28] Transcript of 27 November 2007, p. 21, paras 2-9.

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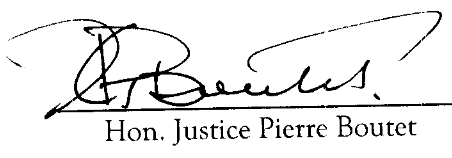
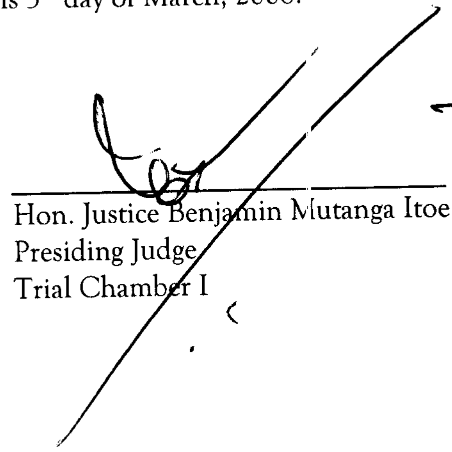
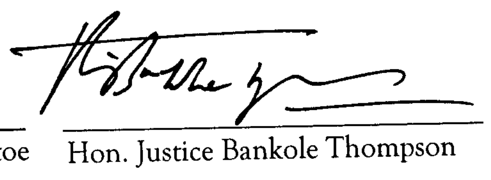
Appended as an Annex to this Decision is our Chamber Decision dated the 12th of February, 2007, in Case No. SCSL-04-15-T, *On the Sesay Defence Team's Application for Judicial Review of the Registrar's Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Agreement.*

Done at Freetown, Sierra Leone, this 5th day of March, 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]

[29] Transcript of 4 February, 2008, p. 65, lines 15-29.

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SPECIAL COURT FOR SIERRA LEONE

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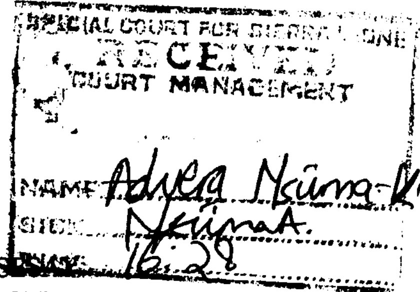
TRIAL CHAMBER I

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



Registrar: Herman von Hebel

Date: 12th of February 2008

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

Public Document

DECISION ON THE SESAY DEFENCE TEAM'S APPLICATION FOR JUDICIAL REVIEW OF THE REGISTRAR'S REFUSAL TO PROVIDE ADDITIONAL FUNDS FOR AN ADDITIONAL COUNSEL AS PART OF THE IMPLEMENTATION OF THE ARBITRATION AGREEMENT OF THE 26TH OF APRIL 2007

Office of the Prosecutor:
Peter Harrison
Vincent Wagona
Reginald Fynn

Defence Counsel for Issa Hassan Sesay:
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:
Charles Taku
Kennedy Ogeto
Lansana Dumbaya

Court Appointed Counsel for Augustine Gbao:
John Cammegh
Scott Martin

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;

SEIZED of the Application for Judicial Review of Registry's Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Decision of the 26th of April 2007 filed publicly, with public and *ex parte* confidential annexes, by Mr. Wayne Jordash, Lead Counsel for the First Accused, Issa Hassan Sesay, ("Defence") on the 5th of September 2007 and the Addendum filed on the 7th of September 2007 ("Motion");

MINDFUL of the Response to the Motion filed by the Registrar on the 17th of September 2007 ("Response") and the Reply thereto filed by the Defence on the 24th of September 2007 ("Reply");

NOTING that the Office of the Prosecutor ("Prosecution") has filed no response to the Motion;

MINDFUL of the Decision of the Arbitrator in the Matter of an Arbitration Pursuant to Article 9 of the Legal Service Contract and Article 22 of the Directive on the Assignment of Counsel and in the Matter of an Arbitration between Mr. Wayne Jordash, (Claimant), on the one hand, and on the other, the Principal Defender of the Special Court for Sierra Leone (1st Respondent) and the Registrar of the Special Court of the Special Court for Sierra Leone (2nd Respondent), rendered on the 26th of April 2007 ("Arbitration Decision")

MINDFUL of the Interim Order concerning the Application for Judicial Review ("Order") dated the 1st of November 2007;

MINDFUL of the Submissions filed by the Registrar and the Office of the Principal Defender on the 5th of November 2007 and the further Submission filed by the Registrar on the 8th of November 2007;

NOTING the Submissions filed by the Defence on the 5th of November 2007 and the further Submission filed by the Defence on the 7th of November 2007;

PURSUANT to Article 17 of the Statute of the Special Court ("Statute") and Rules 26*bis* and 54 of the Rules of Procedure and Evidence ("Rules");

HEREBY ISSUES THE FOLLOWING DECISION:

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I. BACKGROUND

1. Mr. Wayne Jordash is Lead Counsel for the Sesay Defence Team in proceedings where his indigent client stands trial with two other Accused Persons, also indigent, namely, Morris Kallon and Augustine Gbao. Each Accused has a Defence Team which is contractually bound to ensure their defence up to the completion of their trial by virtue of a Legal Service Contract under defined terms and conditions which include an agreed remuneration clause. Mr. Jordash subscribed to these conditions in the contract which he himself signed as Assigned Counsel and as Case Manager for the Sesay Defence Team.[1]

2. Mr. Jordash, who has been representing the Accused Sesay since July of 2003, has been conducting the Defence of his client Sesay for the past three years after this trial commenced on the 5th of July 2004, on those terms and on the then agreed remuneration. It is this remuneration that Mr. Jordash is seeking to have revised.

3. In a Motion filed on the 5th of April 2006, Learned Counsel Mr. Wayne Jordash, sought the intervention of this Chamber to order that additional resources be granted to him by the Registrar on the strength of the "Exceptional Circumstances" which he laid out in his Motion.[2] It was premised principally on the "size and complexity" of the Sesay case.[3] The Chamber dismissed the application on the grounds that it lacked jurisdiction because the statutory remedy of arbitration had not been exhausted.[4]

4. On the 16th of November 2006, the Sesay Defence initiated arbitration procedures pursuant to the Legal Service Contract and Article 22 of the Directive on the Assignment of Counsel, seeking a review of the Registrar's decision of the 10th of March 2006 that denied the Sesay Defence's

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[1] Application for Judicial Review of Registry's Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Decision of 26th of April 2007, 5 September 2007 [Application for Judicial Review], Annex F.

[2] Application for Review of the Registrar's Decision (10th March 2006) on the Sesay Defence "Exceptional Circumstances" Request (25th November 2005), 5 April 2006 [Application for Review of Decision on the Exceptional Circumstances Request].

[3] *Ibid.*, pp. 5-6.

[4] Decision on Defence Application for Review of the Registrar's Decision on the Sesay Defence "Exceptional Circumstances" Motion (TC), 15 November 2006 [Decision on Exceptional Circumstances Motion], p. 6.

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application for review of his remuneration on the basis of "exceptional circumstances" as provided for in the Legal Service Contract.[5]

5. On the 26th of April 2007, the Arbitrator rendered a Decision and found:

> That the case against Issa Sesay on its own and/or in relation to the other cases at the Special Court, is sufficiently serious, complex or sizable to amount to exceptional circumstances as to warrant the provision of additional resources under the special consideration clause in the Legal Service Contract.[6]

6. Negotiations between the Parties took place on the 20th and 21st of July 2007 on the implementation of the Arbitrator's decision ("Negotiations").[7] While a consensus was reached on a number of points including a significant increase in the amount of funding available, disagreement persists as to whether the allocation by the Registrar of additional funds for the hiring of additional Defence Co-Counsel until the end of the Defence case is necessary to implement the Arbitration Decision.

7. On the 5th of September 2007, Mr. Jordash, filed an Application for a Judicial Review of Registry's Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Decision of the 26th of April 2007.[8] The Registrar, on the 17th September 2007, filed a Response to the Application, and Learned Counsel for the Defence filed a Reply to it on the 24th of September 2007.[9]

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[5] Application for Judicial Review, Annex F at Article 4. *See also* Application for Judicial Review, Annex F at Article 9 (Article 9 provides in part that "any dispute between the DOSCSL [Defence Office of the Special Court for Sierra Leone] and Contracting Counsel arising out of the interpretation or application of this Agreement which is not settled by negotiation shall be subject to the procedure contained in Article 22 of the Directive on the Assignment of Counsel." Article 22 of this Directive provides for an arbitration procedure).

[6] Decision of the Arbitrator In the Matter of an Arbitration Pursuant to Article 9 of the Legal Service Contract and Article 22 of the Directive on the Assignment of Counsel and in the Matter of an Arbitration between Wayne Jordash, Assigned and Lead Counsel for Issay Sesay (Claimant) and the Principal Defender of the Special Court for Sierra Leone (1st Respondent) and the Registrar of the Special Court for Sierra Leone (2nd Respondent), 26 April 2007 [Arbitration Decision], para 7.16.

[7] Application for Judicial Review, para 3; Submission by the Registrar pursuant to Rule 33(B) of the Rules of Procedure and Evidence in relation to the Sesay Team's "Application for Judicial Review of the Registry's Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Decision of 26 April 2007" dated 5 September 2007, 17 September 2007 [Response to Application for Judicial Review], paras 11-12. *See also* Application for Judicial Review, Confidential Annexes B, I, L, M, N, O, P, Q, R and U.

[8] *See* Application for Judicial Review.

[9] *See* Response to Application for Judicial Review.

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II. SUBMISSIONS OF THE PARTIES

1. Submissions of the Defence

8. In his *Ex Parte* Confidential Filing of the 5th of April 2006, seeking additional funds under the rubric of "Exceptional Circumstances", Mr. Jordash recounts the reasons which he advances to justify his request, including that:

> 1. Additional funds were to ensure that Mr. Sesay was adequately represented given the "size and complexity" of the case: that the case against Mr. Sesay was approximately 50% larger and significantly more complex than any other Accused at the Special Court and that the case was one of the biggest cases before any of the International Criminal Tribunals.[10]
>
> 2. [t]he case against Mr. Sesay is significantly more complex than *some* of the other Accused at the Special Court [...]. The Sesay case is significantly larger and more complex than all other cases at the Special Court.[11]

9. In his Application for Judicial Review of the Registrar's 40% offer for additional funding filed on the 7th of September 2007, Mr. Jordash, in a bid to reinforce his claim for more funds to be made available to his Defence Team, further advances this same argument as one of the three reasons he details to distinguish the Sesay case from others stating that:

> given the size and complexity of the Sesay case, the increased work load of the Defence case and the independent finding that the original budget of (25,000 USD per month) is inadequate.[12]

10. In Confidential Annex C attached to the Application for Judicial Review, the Sesay Defence provided its submissions during the Arbitration Proceeding, including a comparison of the Sesay Defence case to that of the cases of the Second and Third Accused as well as comparing his case to that of the Defence Teams in the AFRC and CDF cases.[13]

11. The second argument which Mr. Jordash advances to buttress his claim is that he is entitled to additional funding **"given the resources that the Registry has made available to the Taylor Defence Team for a smaller and less complex case."**[14] In effect, Mr. Jordash pegs the quantum of the entitlements for his client's case on the resources that were made available to the completely new

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[10] *See* Application for Review of Decision on the Exceptional Circumstances Request, para 8(a).

[11] *Ibid.*, para 12.

[12] Application for Judicial Review, para 4.

[13] Application for Judicial Review, Confidential Annex C.

[14] *See* Application for Judicial Review, para 4 [emphasis added].

Defence Team in Ex President Charles Taylor's case. He claims that this same Registrar who acceded to the request of the Taylor Defence Team for more resources, should equally accord even more funds to the Sesay Defence Team, because, as he argues, his case is bigger than the Taylor Defence Team's case.

12. The third reason which Mr. Jordash advances to sustain his claim is that he is entitled to more resources "given the size of the resources provided to the Prosecution Team as a whole and in particular the RUF trial."[15]

2. The Registrar's Submissions on the Sesay Defence Team's Requests for Additional Funding

13. The Registrar submits, following the rendering of the Arbitration Decision, that both Parties held meetings to negotiate how additional fees were to be calculated.[16] He contends that they agreed that a 40% enhancement of the 25,000 USD maximum monthly payment under the Legal Service Contract would properly compensate the Sesay Defence Team.[17] It is noted that the 40% increase raises the Sesay Defence Team's previously existing remuneration of 25,000 USD per month to 35,000 USD per month.[18]

14. The Registrar submits the Sesay Defence Team failed to bring up the issue of additional funds for an additional Counsel until the final negotiation meetings held on the 20th and 21st of June 2007. The Registrar further submits that it was agreed at these meetings to consider the issue of providing funds for additional Counsel for the Sesay Defence.[19] The Registrar submits however, that the 40% enhancement allows the Sesay Defence to recruit and compensate additional Counsel and further submits that he was willing to provide extra funds to be used for the temporary extra reinforcement of the Defence Team.[20]

15. In a letter dated the 23rd of July 2007, the Registrar proposed, in order to accommodate the Sesay Defence's request for funds for immediate funds for additional Counsel, the monthly budget cap of 35,000 USD for the Sesay Defence will be raised to 45,000 USD while their defence case is

[15] *Ibid.*, para 4.
[16] Response to Application for Judicial Review, para 11.
[17] *Ibid.*, para 12.
[18] *Ibid.*, para 15.
[19] *Ibid.*, paras 12, 14-19.
[20] *Ibid.*, para 17.

ongoing. After the Sesay Defence case is presented, the cap would be lowered to 25,000 USD in order to account for the temporary increase during the ongoing Sesay case.[21] The Registrar submits that the distribution of funds and composition of a Defence Team rests with Lead and Assigned Counsel and that some Defence Teams at the Special Court use more than one Defence Counsel but within the framework of their allocated budget. The Registrar further submits that the 40% enhancement allows the Sesay Defence Team to recruit additional Counsel should they really wish to do so.[22]

16. The Registrar states that the Sesay Defence Team has rejected the Registrar's offer to compromise on and accommodate the need for additional funds.[23]

III. DELIBERATIONS

1. Jurisdiction

17. At the outset, the Trial Chamber considers it necessary to determine whether or not it has jurisdiction to judicially review the decision of the Registrar not to provide additional funds for an additional Counsel as a part of the implementation of the arbitration decision.

18. Under the Statute and Rules of the Special Court, the Trial Chamber is vested with the authority and obligation to guarantee to the Accused Person, a fair trial and further, to ensure the proper administration of justice.

19. Article 17 of the Statute provides for the protection of the rights of the accused and states, *inter alia*, that the accused shall be entitled to a fair hearing and be guaranteed "adequate time and facilities for the preparation of his or her defence".[24]

20. Rule 26*bis* of the Rules further provides that:

> The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in

[21] Application for Judicial Review, Annex K.
[22] Response to Application for Judicial Review, paras 17-21.
[23] *Ibid.*, p. 10.
[24] Statute of the Special Court, Article 17(2) and (4)(b).

accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.[25]

21. In accordance with the Statute and Rules, We consider that the Chamber may, in limited circumstances dictated by the interests of justice, judicially review decisions of the Registrar where they may affect fundamental trial rights of an accused and impact negatively on the statutory requirements of Article 17 of the Statute and Rule 26*bis* of the Rules.[26]

22. The current Application raises the issue of whether or not the Sesay Defence Team has been provided with adequate resources to properly conduct the defence of the Accused Sesay. As the Chamber has noted, each Accused before the Court is entitled to be granted adequate time and facilities for the preparation of his defence under Article 17(4)(d) of the Statute. The Chamber is satisfied that the Registrar's decision, in this regard, could impact on the rights of the Accused under Article 17 and that it therefore can invoke its inherent jurisdiction in these circumstances to review the Registrar's refusal to provide additional funds for an additional Counsel as a part of the implementation of the Arbitration Decision of the 26th of April 2007.

2. Arguments Advanced by the Sesay Defence

2.1. Size and Complexity of Sesay's Case

23. In relation to the issue of the size and complexity of the Sesay case, the Chamber is of the opinion that it is not necessarily the number of Counts on the Indictment or the extensive number of witnesses that a party seeks to or in fact calls to establish his case that determines its size or its complexity.

24. We say this because it is, on the contrary, trite law that what is necessary for judicial purposes, is the quality of the witnesses who, even though numerically small, can better and more effectively establish any given case than if their numbers were multiplied. In this regard, we lay more emphasis

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[25] Rules of Procedure and Evidence of the Special Court, Rule 26*bis*.

[26] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision on Applicant's Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel (TC), 6 May 2004 [*Brima* Decision on Denial to Enter a Legal Service Contract], para 39. This finding was endorsed by the Appeals Chamber in *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-AR73, Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara (AC), 8 December 2005, paras 72-78 [Appeals Chamber Decision on Re-Appointment of Counsel]. *See also Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Confidential Motion on Detention Issue, 3 March 2005 paras 17-19.

on the quality, the credibility, the focus and the probative value of the testimony of witnesses on matters which are relevant to the core issues that relate to the crimes alleged in the Indictment.

25. The Chamber notes here that the Sesay Defence Team had originally indicated that it would be calling 149 "Core" witnesses and that Learned Counsel, at the behest of the Chamber, recently reduced that number quite significantly.[27]

2.2. Equality of Arms between the Sesay Defence Team and the Taylor Defence Team

26. Mr. Jordash claims that "bearing in mind that the Sesay Defence case is the most sizeable and complex case at the Special Court, the resources required ought to be equal to or larger than those provided to the Taylor Defence Team. This would ensure that the minimum guarantee of equality of arms - guaranteed by the Registry in the Taylor case - is also guaranteed in the Sesay case."[28]

27. In making such a claim, it is the Chamber's understanding that Mr. Jordash, motivated by the financial allocations that have been made available to the Taylor Defence Team, is seeking to rewrite the remunerative clauses of the Sesay Legal Service Contract that has no bearing whatsoever on, or relationship with, the Taylor Trial.

28. While we fail as a Chamber to appreciate the basis on which Mr. Jordash is assessing the size and the complexity of the Taylor case, we would only observe here that the Taylor case has been relocated to The Hague in the Netherlands. The Defence Team for Taylor, which at that time was completely and entirely new to the case, was put together in an emergency after the demise of the initial Defence Team that was headed by Learned Counsel, Karim Khan.[29] It has emerged from the proceedings in Trial Chamber II that this new Team has Mr. Taylor's immense Presidential documentation to scrutinise and to master for purposes of efficiently and effectively conducting his defence within very limited timeframes, and particularly of ensuring a proper and thorough cross examination of the Prosecution witnesses. We observe here that Mr. Jordash has been involved in the

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[27] Sesay- Filing of Documents in Compliance with Scheduling Order Concerning the Preparation and the Commencement of the Defence Case, Dated 30th October 2006, 5 March 2007; 8th February 2008 Notice of Changes to Sesay Defence "Core" Witness List and Notice of Prospective Call Order of Witnesses, 8 February 2008.

[28] Application for Judicial Review, para 6.

[29] The Chamber notes that the Taylor Defence Team was appointed as counsel on the 17th of July 2007, over two months after the Arbitration Decision in this case was rendered. The size and complexity of the Taylor case and the resources of the new Taylor Defence Team were not factors considered by the Arbitrator in rendering the Arbitration Decision. *See Prosecutor v. Taylor*, SCSL-2003-01-T, Principal Defender's Decision Accepting the Withdrawal of Mr. Karim Khan as Assigned Counsel to Mr. Charles Ghankay Taylor, 14 June 2007. *See also Prosecution v. Taylor*, SCSL-2003-01-T, Principal Defender's Decision Assigning New Counsel to Charles Ghankay Taylor, 17 July 2007.

Sesay case since July 2003 and that he cannot compare his situation to that of the new Taylor Defence Team that was given a limited timeframe to get ready and proceed with the trial.

29. The Chamber, in this regard, is of the view that the remuneration that has been arrived at for the Taylor Defence Team should under no circumstances impact the Sesay Defence case or remuneration for the Sesay Defence Team, nor should it be used as a yardstick to resolve the current dispute, which has no jurisdictional relationship whatsoever to the Taylor case.

30. The Chamber opines that Mr. Jordash should not assess his case against the background of Taylor's case, where the cost of that trial is supposed to be and will indeed be much higher than it is for the entire RUF Trial (that is taking place here in Freetown) because of the delocalisation of the Judges, the Staff, the witnesses and other logistics to The Hague. He should rather, in our opinion, view his costs against the background and conditions laid down in the Legal Service Contracts in his, Sesay's and the entire RUF case and as it concerns not only his Client but also his Client's Co-Accused, Morris Kallon and Augustine Gbao, all of whom are being tried locally.

31. We do observe here that Mr. Jordash's personal appreciation of the complexity of Mr. Taylor's case could or may well turn out to be a misjudgement on his part because he neither knows any more than he must have been told about it, nor does he have a mastery of the evidence that the Prosecution and the Defence will call in the course of the Taylor proceedings. Indeed, the Chamber is of the opinion that Learned Counsel, Mr. Jordash, cannot, in these circumstances, make a judgement on a subject as complex as this for which he is neither factually nor evidentially equipped to arrive at the conclusion he has made in comparing the Sesay and the Taylor cases.

32. Mr. Jordash, to support his argument cites the *Tadic* case.[30] The Chamber agrees with the *Tadic* principle but only to the extent that equality of arms means that each Party must have a reasonable opportunity to defend its interests **"under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent"**[31] and that "the Trial Chamber **shall therefore provide every practicable facility it is capable of granting** under the Rules and Statute when faced with a request by a Party for assistance in presenting its case."[32]

33. It is the Chamber's view that the scenario envisaged in the *Tadic* case is more related to the doctrine of equality of arms that a Chamber is supposed to ensure in handling the rights between the

[30] *Prosecutor v. Tadic*, IT-94-1-A, Judgement (AC), July 15 1999, paras 43, 44, 48 and 52.
[31] *Ibid.*, para 48 citing *Kaufman v. Belgium* [1986] 50 DR 98, 115 [emphasis added].

Prosecution and the Defence in any given case. In the Chamber's view this principle, which is grounded on a very solid foundation, applies more to the procedural balances that are to be observed and maintained by the Chamber within the confines and context of the doctrine of fundamental fairness to all the Parties in a case, the Prosecution and the Defence alike, so that no Party, within the context of its case, is disadvantaged. It does not mean that the means placed at the disposal of the Defence Teams must be the same in all Defence cases, albeit in the same Court, because this may, and must indeed vary depending on the particular and peculiar circumstances of each case, be it the Prosecution's or the Defence's.

34. In this regard, it is our considered view that the doctrine of equality of arms applies and should only apply to Parties in the same case and in the same proceedings. It cannot be, as Mr. Jordash seems to be submitting, that the arms in one case and scenario such as Taylor's, should be used as a measuring rod for the means and arms that should be provided in a completely different case and situation such as Sesay's.

35. Indeed, the Chamber would be creating an opening for financially speculative expeditions if Parties were allowed and given the latitude to alter and to make additional claims for their cases on the basis of the seemingly attractive and advantageous financial conditions which apply to another case, like Taylor's, and which as we have recognized is different and placed in a different context.

36. It is therefore the considered opinion of the Chamber that the Taylor case element which Mr. Jordash is citing to justify his claim is extraneous, unfounded and inapplicable to the Sesay case.

2.3. Equality of Arms between the Prosecution and the Sesay Defence Team

37. One of the arguments that has always been raised by Mr. Jordash to sustain his alleged violation of the doctrine of equality of arms by the Chamber is that the Prosecution is provided with more financial and human resources (about seven lawyers appearing at any one time for the Prosecution as he submits) when he is only assisted by one Co-Counsel and with much less financial resources than those placed at the disposal of Prosecution by the Registrar.[33]

[32] *Ibid* [emphasis added].
[33] *But see* Transcript of 21 July 2004; Transcript of 5 October 2004; Transcript of 4 February 2005; Transcript of 26 April 2005; Transcript of 23 November 2005; Transcript of 22 March 2006; Transcript of 7 July 2006; Transcript of 31 May 2007; Transcript of 11 October 2007.

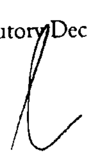
38. The Chamber would like to draw Mr. Jordash's attention to the fact that the Prosecution is an independent Statutory Organ of the Special Court that has varied and different functions as enshrined in the provisions of Article 15 of the Statute.[34] Even if it were conceded that the Prosecution is represented at any one time by more than one Counsel, an allegation which is not accurately presented, Mr. Jordash knows that the entire Defence Teams of the three Accused Persons who Prosecuting Counsel are proceeding against jointly, are also represented by a good number of Lawyers at any given time including some Legal Assistants and/or Interns, just as the Prosecution is at any given time. The allegation of a breach of the principle of equality of arms in these circumstances therefore lacks any merit.

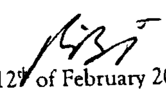
39. In addition, the Chamber would like to reaffirm the principle that the Prosecution bears the burden of proving beyond a reasonable doubt, every count and every essential element of those counts, while the Defence only needs to raise a reasonable doubt in order to secure the acquittal of the Accused. This reality, we consider, might justify the attribution of more resources and more time to enable the Prosecution to accomplish this very heavy and delicate task. The Chamber, in this regard, refers to its decision in the CDF case[35] in which we cited and relied on the ICTY Appeals Chamber Decision in *Oric* where the Learned Justices in that case had this to say:

> The Appeals Chamber has long recognized that "the Principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee." At a minimum, "equality of arms obligates a judicial body to ensure that neither party is put as a disadvantage when presenting its case," certainly in terms of procedural equity. This is not to say, however, that an Accused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution. The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defence strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavour which may require less time and fewer witnesses.[36]

40. We remain guided by this dictum and accordingly conclude that Mr. Jordash's appeal for additional funds, in so far as it is predicated on the resources placed at the disposal of the Prosecution and or to the Defence Team of the Taylor's case, is untenable because it is ostensibly without any legal foundation or justification.

[34] *See* Statute of the Special Court, Article 15.
[35] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order to the First Accused to Re-file Summaries of Witness Testimonies (TC), 2 March 2006, p. 3.
[36] *Prosecutor v. Oric*, IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case (AC), 20 July 2005, para 7.





3. Conclusion

41. The Registrar, like all of the organs of the Special Court, has the responsibility for ensuring the respect of the rights of the Accused pursuant to Article 17 of the Statute. His responsibility in this regard has been delegated in part to the Defence Office in accordance with Rule 45 of the Rules.[37] It is, therefore, clear that it is the Registrar and the Defence Office who bear the principal responsibility of ensuring that the Defence Teams for each Accused before the Court are provided with adequate resources.[38]

42. In the present case, the Arbitrator found that the case against Issa Sesay "is sufficiently serious, complex or sizable to amount to exceptional circumstances as to warrant the provision of additional resources under the special consideration clause in the Legal Service Contract."[39] During the negotiations that were subsequently held to implement this decision, the Registrar agreed to effectively increase the maximum cap on the monthly payments to the Sesay Defence Team by 40%.[40] The Registrar also agreed to provide funds for an international investigator at the P-3 level for a period of four months.[41]

43. The Sesay Defence also sought funds additional to this 40% increase in order to hire an additional Counsel for the Sesay Defence Team. During the negotiations, the Registrar offered to provide the Defence with a further 10,000 USD per month, that is, a cap of 45,000 USD per month, for the duration of the presentation of the defence case of the Accused Sesay on the condition that this amount would then be "clawed back" during the remainder of the trial hearings. The Registrar maintains that this proposal was consistent with the arbitration decision.[42]

44. The Chamber has carefully reviewed all of the materials that have been submitted to it relating to this Motion and concludes that the 40% enhancement to the maximum payment to the

[37] Appeals Chamber Decision on Re-Appointment of Counsel, para 84. *See also* paras 80-81.
[38] *See* Confidential Legal Service Contracts in Partial Fulfillment of the Chamber's Interim Order of 1 November 2007, 5 November 2007, Annex A, Legal Service Contract No. 2005/03, p. 4; Addendum to the Legal Service Contract and Contract Specification, Rule 19. The decision of the Registrar refusing the motion by the Sesay Defence for "exceptional circumstances" consideration was eventually referred to arbitration for determination in accordance with Article 22 of the Directive on the Assignment of Counsel: *See* Decision on "Exceptional Circumstances" Motion.
[39] Arbitration Decision, para 7.16.
[40] The Sesay Defence Team was given a lump sum payment of 370,000 USD in order to represent this 40% increase in the monthly cap on payments from November 2003 until November 2006. With regard to future work from December 2006 until the end of the hearings, the Sesay Defence Team was given a maximum cap of 35,000 USD per month instead of the 25,000 USD cap that had previously been provided for. *See* Submission by the Registrar, paras 13-14.
[41] Application for Judicial Review, Annex B, Letter from Registrar dated 13 July 2007.

Defence Team effectively implements the Arbitration Decision of the 26th of April 2007. It was, therefore in our considered opinion, reasonable for the Registrar to argue that he has satisfied the Defence's request for funds to hire an additional Counsel within the framework of this 40% increase. The Registrar offered to increase the maximum monthly payment to the Sesay Defence Team by a further 10,000 USD during the duration of the presentation of the Sesay Defence case on the condition that this amount be taken back during the remainder of the hearings in the RUF trial.

45. The Chamber notes that if this arrangement were accepted, it could have resulted in a larger sum of money being disbursed to the Sesay Defence that would be later recouped at the end of the Sesay Defence case and the other Defence cases. The Chamber is also satisfied that this proposal was reasonable and could have provided additional assistance to the Sesay Defence Team when they claim it was needed most and would have provided smaller resources when the demands on the Sesay Defence are correspondingly smaller.

46. In effect, we find that the Registrar was exercising his discretion in his capacity as an Administrative Official in deciding that this amount was adequate to meet up with the Sesay Defence aspirations and application. In this regard, it is our view that the Courts will not interfere with the exercise of discretion by an administrative official except where it is so unreasonable that no rational authority could have arrived at a similar conclusion.[43]

47. In determining whether the Registrar had properly exercised his administrative discretion in the *Brima* case, this Chamber stated:

> As a matter of law, and we so hold, a discretion cannot be exercised when the issue in respect of which it is purported to be exercised, is not provided for by law, or where the exercise of such a discretion is either contrary to the law or manifestly unreasonable.[44]

Furthermore, it is well established that for discretion to be exercised validly it must have been exercised reasonably, fairly and justly.[45]

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[42] Application for Judicial Review, Annex B, Letter from Registrar dated 13 July 2007; Annex K, Letter from Registrar dated 23 July 2007; Annex O, Letter from Registrar dated 1 August 2007.

[43] *See Hadmore Productions v. Hamilton* [1983] 1 AC 191, 220 (holding the Court may set aside a judge's exercise of his discretion where no reasonable judge, regardful of his duty to act judicially, could have reached the same decision).

[44] *Brima* Decision on Denial to Enter a Legal Service Contract, para 97.

[45] *See Mobil Oil Australia Limited v. Federal Commissioner of Taxation* [1953] 113 C.L.R. 475, 504 (holding "what the law requires in the discharge of a quasi-judicial function is judicial fairness"). *See also Wales v. Osmond* [1986] 159 CLR 656, 662; *Hadmore Productions v. Hamilton* [1983] 1 AC at 220.

48. In light of all of the circumstances, the Chamber finds that the offer of the Registrar is not only fair, but also just and reasonable and would certainly have alleviated any concerns or reservations the Defence might have had as to its ability to proceed with their Client's case.

49. It is indeed the Chamber's view that the clear option for the Sesay Defence to adopt immediately, in the circumstances and given the status of other related cases, was, and still remains, given the circumstances surrounding this and other related cases, the employment of an additional Counsel within the framework of the global resources that have now been granted and offered to it, rather than wait, to our mind, erroneously and misguidedly, for or expect to receive the same or identical resources as those attributed to the very recently and hurriedly constituted Taylor Defence Team before doing so.

50. We therefore reject the Defence request to quash the Registry's offer to provide 10,000 USD per month for an additional Counsel and its claw back provision.

51. The Chamber further reiterates that the resources provided to the Taylor Defence Team are irrelevant to the present matter and accordingly reject the Defence request for an Order to be issued to the Registrar to provide the Sesay Defence Team with the same resources that he has made available to the Taylor Defence Team.

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52. The Chamber, in the light of the foregoing analysis, is indeed satisfied that the Registrar's decision refusing to provide Mr. Jordash, Lead Counsel for the Sesay Defence Team, with funds in addition to the 40% enhancement to enable him to hire an additional Counsel during the presentation of the Sesay Defence case, is fair and reasonable and does not violate the rights of the Accused under Article 17 of the Statute. Consequently, the Chamber finds no reason to invoke the exercise of its inherent jurisdiction to modify or annul the Registrar's Decision.

IV. DISPOSITION

FOR THESE REASONS, the Application is dismissed in its entirety.

Done at Freetown, Sierra Leone, this 12th day of February 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]