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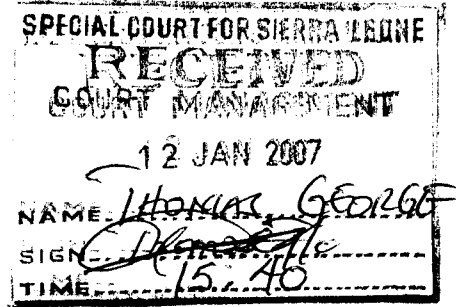
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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 12 January 2007



THE PROSECUTOR

Against

**Issa Hassan Sesay
Morris Kallon
Augustine Gbao**

Case No. SCSL-2004-15-T

**PROSECUTION RESPONSE TO APPLICATION SEEKING ADEQUATE
RESOURCES PURSUANT TO RULE 45 AND/OR PURSUANT TO THE
REGISTRAR'S DUTY TO ENSURE EQUALITY OF ARMS (APPLICATION 1-
LOGISTICAL RESOURCES AND APPLICATION 2 - EXPERT PROVISION)**

Office of the Prosecutor:
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Mr. Shekou Touray
Mr. Charles Taku
Mr. Melron Nicol-Wilson

Defense Counsel for Augustine Gbao
Mr. Andreas O'Shea
Mr. John Cammegh

Office of the Principal Defender
Mr. Vincent O. Nmehielle

I. INTRODUCTION

1. The Prosecution files this Consolidated Response to two motions by the Sesay Defence namely, Application seeking adequate resources pursuant to Rule 45 and/or pursuant to the Registrar's duty to ensure equality of arms (Application I)¹ (hereafter, *the Logistical Resources Motion*), and Application seeking adequate resources pursuant to Rule 45 and/or pursuant to the Defence Office/Registrar's duty to ensure equality of arms (Application II) (hereafter, *the Expert Provision Motion*)².
2. The Prosecution notes that neither of the motions names the Prosecutor as party on their cover sheets. Furthermore, the Trial Chamber in its Order for expedited filings³ relating to the applications makes no reference to the Prosecutor as a party to which that order is directed. However, the Prosecutor is a party to the proceedings in which the motions are filed, and has a right to respond. It is acknowledged that many of the matters that are raised in the motions do not affect the Prosecution, and the Prosecution therefore does not seek to respond to all of the substantive matters they raise, or take a position on the relief that they request. However, in both motions, the Sesay Defence makes certain factual assertions

¹ *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-15-T-672, "Application seeking adequate resources pursuant to Rule 45 and/or pursuant to the Registrar's duty to ensure equality of arms (Application I)" ("**Logistical Resources Motion**"), 9th January 2007.

² *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T-674, "Application seeking adequate resources pursuant to Rule 45 and/or pursuant to the Defence Office/Registrar's duty to ensure equality of arms (Application II)" ("**Expert Provision Motion**"), 10th January 2007.

³ *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T-675, "Order for Expedited Filings", 10th January 2007.

relating to resources allocated to the RUF Prosecution team which the Prosecution considers incorrect and feels obliged to correct. The Prosecution also has an interest and a duty to make any necessary submissions on general issues of law and procedure that may be raised in the motions.

II. LEGAL ISSUES

3. The Prosecution submits that the Registrar has the primary responsibility in the determination of matters relating to remuneration of counsel under the legal aid system of the Special Court, and by extension, of matters related to the resources to be provided to Defence counsel.⁴ The Trial Chamber should only intervene if it is shown that the circumstances are such that the Accused's fair trial rights have not been respected. It is for the Defence to establish that this is the case.⁵
4. Equality of arms between the Defence and the Prosecution does not necessarily amount to the material equality of possessing the same financial and/or personal resources.⁶ As both the Appeals Chamber of the ICTY and the Appeals Chamber of the ICTR have indicated, the principle of equality of arms does not imply that

⁴ Prosecutor v. Milutinovic et al., "Decision on Interlocutory Appeal on Motion for Additional Funds", Case No. IT-99-37-AR73.2, Appeals Chamber, 13 November 2003, para. 19.

⁵ See generally *ibid.*, paras. 19-24.

⁶ *Ibid.*, para. 23.

there must be parity of resources between the Prosecution and Defence, such as the material equality of financial and personnel resources.⁷

5. The case law acknowledges that in international criminal justice systems, as in national criminal justice systems, the Prosecution typically requires greater resources than the Defence. Under the Statute, the Prosecutor is charged with the responsibility for the investigation and prosecution of large scale crimes committed over long periods of time by large numbers of people. At the trial stage of proceedings, the Prosecution has the burden of proving all elements of all crimes beyond a reasonable doubt, while the defence bears no burden at all, and need only point to a reasonable doubt in relation to one essential element of each crime in order to obtain an acquittal. Additionally, the Prosecution bears certain procedural burdens to which the defence is not subject, such as disclosure requirements under Rule 68. In a multiple accused trial, at the trial stage, the Prosecution bears the burden of proving the guilt of a number of different accused beyond a reasonable doubt, while each Defence team is charged only with the issue of whether there is a reasonable doubt in respect of the guilt of a single accused.

6. The question can therefore never be whether the Defence has the same resources as the Prosecution, but whether the resources reasonably available to the Defence are such that the Defence is put at a substantial disadvantage as regards the

⁷ *Prosecutor v. Kayishema and Ruzindana*, "Judgement (Reasons)", Case No. ICTR-95-1-A, Appeals Chamber, 1 June 2001, paras 67-69; *Prosecutor v. Kordic and Cerkez*, Judgement, Case No. IT-95-14/2-A, Appeals Chamber, 17 December 2004, para. 176.

Prosecution when presenting its case in court.⁸ This appears to be freely conceded by the Defence in paragraph 5 of the Logistical Resources Motion and paragraphs 5 and 6 of the Expert Provision Motion,

7. The Prosecution takes no position on whether the Defence has established in the Logistical Resources Motion and Expert Provision Motion that the level of resources provided to the Sesay Defence team, as described in these motions, are such that it is put at a substantial disadvantage as regards the Prosecution when presenting its case in court, or are such that the fair trial rights of the Accused Sesay under Article 17 of the Statute have otherwise been violated by the circumstances described in those motions.

III. FACTUAL ISSUES

8. In Paragraph 16 of the Logistical Resources Motion, the Sesay Defence asserts that, “...*The RUF Prosecution team throughout the RUF case had exclusive use of at least 5 vehicles, a dedicated search team, the potential of being able to call upon a minimum of 10 (out of a possible 25) investigators at any given time and also access to the same transport provision...*”.⁹

9. The Prosecution takes issue with the assertion that *throughout* the RUF case it has had *exclusive use* of 5 vehicles. The RUF Prosecution Team has never had

⁸ *Prosecutor v. Kordic and Cerkez, Judgement*, Case No. IT-95-14/2-A, Appeals Chamber, 17 December 2004, para. 175.

⁹ See also paragraphs 9 and 10 of the *Logistical Resources Motion*.

exclusive access to any vehicle of its own, and no vehicles assigned to the Investigations Section were ever for the exclusive use of RUF matters. The use of vehicles for purposes related to the RUF case was subject to availability and prioritized official needs. Of the 9 vehicles assigned to the Office of the Prosecutor as a whole (not counting the Prosecutor's and Deputy Prosecutor's vehicles), 7 have been assigned to Investigations Section, one to Legal Operations and one to Prosecutions Section. These 9 vehicles constitute a notional average of less than one vehicle in relation to each of the accused in the custody of the Special Court.

10. The Prosecution also takes issue with the assertion that the RUF Prosecution team was able to call upon "a minimum of 10 (out of a possible 25) investigators at any given time". In the Investigations Section of the Office of the Prosecutor, there are currently 25 persons with professional police investigations experience, however this includes those exercising supervisory, ancillary and support functions. In addition to the Chief of Investigations, the Investigations Commander, and Chief of Witness Management, there are 11 investigators (a notional average of just over one in respect of each of the accused presently in the custody of the Special Court) and 6 witness management support officers (a notional average of just over one half in respect of each of the accused presently in the custody of the Special Court).

11. The Prosecution further takes issue with the statement that the RUF team had 4 lawyers and a case manager. Even if this *were* true, this would represent an average of just over one lawyer, and a quarter of a case manager, in respect of each of the three accused in the RUF trial. In fact, only one of the Prosecution lawyers worked exclusively on the RUF case. The other lawyers divided their time between more than one case. There are currently some 15 trial lawyers in the Prosecutions Section of the Office of the Prosecutor (in addition to the other staff), which is an average of one and a half lawyers for each of the accused presently in the custody of the Special Court. The RUF Prosecution team had a case manager up to April 2006, but his role was taken by an intern, who recently was promoted to case manager.

IV. THE RELIEF SOUGHT IN THE EXPERT PROVISION MOTION

12. The Expert Provision Motion requests an order from the Trial Chamber to fund the two proposed experts “to a level commensurate with their experience and expertise” (at paragraph 15). However, it does not state precisely what that remuneration would be. The Prosecution submits that it would be difficult, in the absence of any precise figure, for the Trial Chamber to give the Defence a “blank cheque” to determine for itself what it considered appropriate to pay its expert witnesses, or to give the proposed expert witnesses a “blank cheque” to name

their fee. Paragraph 12 of the Motion suggests that the remuneration should be at the D-1 level, which OTP understands would amount to some \$230 per day.

13. Paragraph 10 of the Expert Provision Motion states that “...*the Defence Office will not fund any expert above the rate of a United Nations P3...*” which translates to a rate of “\$136.50/£75 a day”. The Prosecution feels obliged to draw attention to the Practice Direction by the Registrar on payment of allowances to witnesses, in which the position of expert witnesses is dealt with separately.¹⁰ In Article 16 of that Directive, the stipulated daily rate for payment of expert witnesses allowance is \$200. This amount obviously exceeds the stated P3 daily rate cited in the motion.

14. The Prosecution notes that in the AFRC case, the Defence were able to retain a senior-ranked military expert as a joint witness for all three accused, who produced a voluminous report and testified for several days. The Prosecution does not know what this expert was paid, but presumably his remuneration was either at the standard rate paid by the Defence Office or at the standard rate in the Directive.

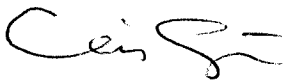
¹⁰ Practice Direction on Allowances for Witnesses and Expert witnesses, adopted on 16 July 2004, Art 16 - Attendance Allowance.

V. THE MERITS OF THE PROSECUTION CASE

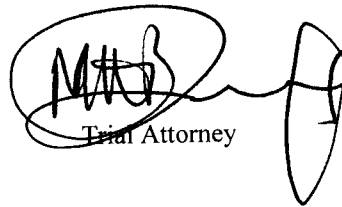
Paragraph 14 of the Expert Provision Motion makes certain observations on the merits of the Prosecution case in this trial. The Prosecution submits that it is not appropriate to make submissions of this nature in a motion of this type. However, the Prosecution does not deny the legitimacy of the Defence desire to call an appropriately qualified expert military witness.

Filed in Freetown 12 January 2006

For the Prosecution



Deputy Prosecutor



Trial Attorney

Index of Authorities

Orders and Filings

1. *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-15-T-672, “Application seeking adequate resources pursuant to Rule 45 and/or pursuant to the Registrar’s duty to ensure equality of arms (Application I)”, 9th January 2007.
2. *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T-674, “Application seeking adequate resources pursuant to Rule 45 and/or pursuant to the Defence Office/Registrar’s duty to ensure equality of arms (Application II)”, 10th January 2007.
3. *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, “Order for Expedited Filings”, 10th January 2007.

Decisions

1. *Prosecutor v. Milutinovic et al.*, “Decision on Interlocutory Appeal on Motion for Additional Funds”, Case No. IT-99-37-AR73.2, Appeals Chamber, 13 November 2003..
<http://www.un.org/icty/milutinovic/appeal/decision-e/031113.htm>

2. *Prosecutor v. Kayishema and Ruzindana*, “Judgement (Reasons)”, Case No. ICTR-95-1-A, Appeals Chamber, 1 June 2001.

<http://69.94.11.53/ENGLISH/cases/KayRuz/appeal/index.htm>

3. *Prosecutor v. Kordic and Cerkez*, Judgement, “Decision on Interlocutory Appeal on Motion for Additional Funds” Case No. IT-95-14/2-A, Appeals Chamber, 17 December 2004, para. 175.

<http://www.un.org/icty/kordic/appeal/decision-e/041217.htm>

Practice Directions

1. Practice Direction on Allowances for Witnesses and Expert witnesses, adopted on 16 July 2004.