SCSL-04-15-T
(26004-26012)

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SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before:	Hon. Justice Bankole Thompson, Presiding Judge Hon. Justice Pierre Boutet Hon. Justice Benjamin Mutanga Itoe
Registrar:	Mr. Lovemore G. Munlo SC
Date:	28th of February 2007

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

Public Document

DECISION ON DEFENCE APPLICATION II

Office of the Prosecutor:
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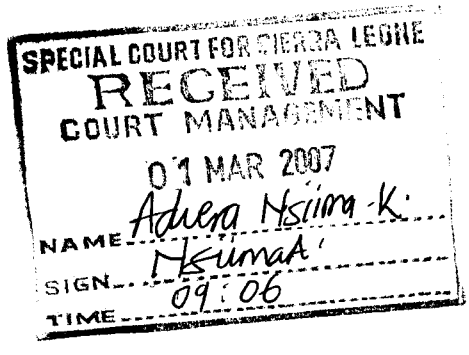

TRIAL CHAMBER I ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Bankole Thompson, Presiding Judge, Hon. Justice Pierre Boutet, and Hon. Justice Benjamin Mutanga Itoe; 26005

SEIZED of the 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) filed publicly by Defence Counsel for the First Accused, Issa Hassan Sesay, ("Defence") on the 10th of January 2007 ("Application II");

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");

THE TRIAL CHAMBER ISSUES THE FOLLOWING DECISION:

I. BACKGROUND

1. On the 9th and on the 10th of January 2007, the Defence filed two applications (hereafter referred to individually as "Application I"[1] and "Application II," and collectively as "Applications") seeking orders from the Trial Chamber to compel the Defence Office and/or Registry to provide certain specified additional resources to the Defence. The Office of the Principal Defender ("Defence Office") filed its initial Response to the Applications on the 12th of January 2007.[2] In addition, the Prosecution also filed a joint Response to the Applications on the same day. On the 15th of January 2007, the Defence filed its Reply to the Prosecution Response. On the 17th of January 2007, this Chamber issued an Order requiring, *inter alia*, that the Defence immediately re-file both the Applications on the Registrar and the Defence Office ("Respondents").[3] Application II was, accordingly, re-filed on the Respondents on the 18th of January 2007.[4] A Joint Response was filed by

[1] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, 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), 9 January 2007.
[2] See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Order for Expedited Filings, 9 January 2007. In its initial Response, the Defence Office submitted that it was not the primary party to the Application, being "directly under the Office of the Registrar and subject to the general and specific directions of the Registrar." The Defence further submitted that this Chamber has ruled that the Defence Office does not have "institutional autonomy and independence as a separate organ of the Court." The Defence Office requested the Defence to redirect the Application to the Registry.
[3] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Order on Defence Applications, 17 January 2007.
[4] See also a *Corrigendum* thereto filed by the Defence on the same date.

the Respondents on the 22nd of January 2007, and the Reply to this Joint Response was filed on the 23rd of January 2007. 26006

2. On the 24th of January 2007, this Chamber issued a Decision partially granting Application I.[5]

II. SUBMISSIONS OF THE PARTIES

A. Application II

3. By Application II, the Defence seeks an order from this Chamber to compel the Registry and/or the Defence Office "to provide reasonable resources to employ two appropriately qualified military experts to ensure a fair trial for the accused pursuant to Article 17 of the Statute,"[6] on the basis that the currently-allocated resources are inadequate, and render the Defence unable to properly prepare its case.[7]

4. Specifically, the Defence requests that the Defence Office provide funding for two experts to be remunerated at the D1 pay level.[8] However, according to the Defence, the Defence Office has refused to fund any experts at a rate higher than the United Nations P-3 level.[9]

5. The Defence further submits that the Prosecution employed a military expert for several months, and based on its own search for appropriate experts, the Defence believes that the Prosecution's expert was not paid in accordance with the P-3 scale.[10]

6. The Defence submits that the denial of funding for these experts "places Mr. Sesay at a huge disadvantage in being able to present this evidence which is self evidently fundamental to his

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[5] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Sesay Defence Application I – Logistical Resources, 24 January 2007. While various documents filed in this matter contained joint submissions with respect to Application I and Application II, the present Decision will only take into consideration submissions made with respect to Application II.

[6] Application II, para. 2.

[7] *Ibid.*, para. 1.

[8] *Ibid.*, para. 12. The Defence wishes to employ two expert witnesses "with substantial experience in insurgency movements, militia organizations, and guerrilla armies," and the Defence Office has agreed that both experts can provide useful evidence (*Ibid.*, paras. 9-10).

[9] *Ibid.*, paras. 10-11. The Defence states that neither proposed expert will accept the work at that pay level, given their expertise and level of experience (20-38 years of experience for each expert). The Defence further submits that at both this Court and the ICTY, the P-3 pay grade corresponds to five to eight years of professional experience. The Defence claims that this indicates the Defence Office either refuses to fund defence experts with remuneration commensurate with their experience, or believes that five to eight years of professional experience is sufficient to qualify a witness as an expert.

[10] *Ibid.*, para. 13.

defence,"[11] and that this creates an imbalance between the resources available to the Prosecutor and the Defence amounting to a violation of the principle of equality of arms.[12]

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B. Prosecution Response

7. The Prosecution submits that Article 16 of the Registrar's Practice Direction on Allowances for Witnesses and Expert witnesses stipulates a daily payment allowance of $200 for expert witnesses, which exceeds the P-3 daily rate cited by the Defence in its Application.[13]

C. Defence Reply to the Prosecution Response

8. The Defence states that the Prosecution is mistaken as to the policy for remuneration of expert witnesses, and that it is required to request the Defence Office for funding, and that thereupon the Defence Office decides on a number of weeks' worth of P-3 funding to the experts for the preparation of their reports.

9. The Defence asserts that the Prosecution did not indicate the rate at which their military expert was paid, and that the Prosecution did not deny that he was paid at a level above that of a P-3.[14]

D. Registrar/Defence Office Joint Response

10. In their Joint Response, the Respondents argue that the Defence has failed to exhaust its available administrative remedies, and thus the matter does not fall within this Chamber's jurisdiction. Alternatively, the Respondents argue that the Defence has failed to demonstrate that the Accused's rights were violated due to inadequate provision of resources.

11. The Respondents state that the Defence entered into a Legal Services Contract ("LSC") with the Defence Office on the 1st of October 2005. Under Article 24 of the LSC's Contract Specifications, the Defence Office is responsible for employing experts for the Defence.[15] They observe that Article 4 of the LSC permits the Defence to submit requests to the Defence Office for payments of Special Considerations, including "payment for additional fees. . . or the provision of

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[11] *Ibid.*, para. 15.
[12] *Ibid.*, para. 15.
[13] Prosecution Response, para. 13.
[14] Defence Reply, para. 9. The Defence also takes exception to the Prosecution statement that the AFRC defence was able to retain a senior military expert as a joint witness for all three of the AFRC accused, stating that the witness in question was criticized for lacking experience and for lacking a basis for his conclusions.
[15] Joint Response, paras. 9-10.

services of an exceptional nature."[16] They also contend that Article 9 of the LSC states that any disputes arising from the interpretation or application of the LSC which are not settled by negotiation are subject to the arbitration clause of Article 22 of the Directive on the Assignment of Counsel ("Directive").[17] The Respondents further contend that by failing to invoke the provisions of Articles 4 and 9 of the LSC, the Defence has failed to exhaust its remedies under the LSC.[18]

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12. In addition, the Respondents state that administrative decisions of the Registry may be reviewed by the President of the Special Court under Rule 19(A) of the Rules, and that consequently, the President has inherent supervisory jurisdiction over the present matter.[19]

13. The Respondents also submit that under Article 24 of the LSC's Contract Specifications, experts are paid directly by the Defence Office from funds allocated for that purpose and, therefore, the Defence Office is limited by the funds it was allocated and the instructions it has received from the Registry. [20]

E. Defence Reply to the Registrar's/Defence Office Joint Response

14. The Defence submits that the Respondents' claim that this Chamber has no jurisdiction is misconceived,[21] and that Article 4 of the LSC refers to an agreement between the Defence and the Defence Office relating to the exchange of legal services for "Consideration." The Defence states that Consideration is defined in Article 4 as payment for the Defence team,[22] and makes no reference to logistical or expert support.

15. The Defence further asserts that Article 9 of the LSC does not apply to the matter at hand, in that it admits that the Respondents have provided resources equal to or greater than that provided for in the LSC and there is no dispute about the interpretation or application of the LSC, as referred

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[16] *Ibid.*, para. 17.
[17] *Ibid.*, paras. 18-19.
[18] *Ibid.*, para. 20.
[19] *Ibid.*, para. 22. Furthermore, the Respondents assert that the judicial review of administrative Registry decisions is available only under exceptional circumstances, and cannot substitute for a general power of review. (*Ibid.*, para. 23, *citing Prosecutor v. Taylor*, SCSL-03-01-PT, Decision on Urgent and Public Defence Motion Requesting Removal of Camera from Conference Room, 30 November 2006).
[20] *Ibid.*, para. 14. The Respondents assert that the Defence Office has ensured that defence team requests are met on the basis of the resources available, and states that the Defence has benefited more from these resources than most other defence teams have, citing special requests for additional allocations made by the Defence Office to the Registry. Therefore, they assert, the Defence is incorrect in asserting that the remuneration of witnesses at the P-3 level is irrational. The Defence Office concludes that it has been unable to secure additional funding for experts from the Registrar due to the Court's limited funding (*Ibid.*, paras. 15-16).
[21] Reply, para. 2.
[22] *Ibid.*

to in Article 9. It argues that there is nothing arising from the LSC in this matter which requires arbitration.[23]

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16. The Defence asserts that the proper issue for this Chamber to consider is whether the Respondents have provided sufficient resources to meet the requirements of Rule 45 and Article 17, and that it is proper for this Chamber to make such a determination and that by contrast, any arbitration pursuant to Article 9 of the LSC is limited to a consideration of the LSC.[24] In this regard, the Defence states that the only standard applicable to this matter is whether the Respondents have provided sufficient resources to ensure that the Defence is not disadvantaged in presenting its case.[25] The Defence asserts that if the Registry's policies, including the LSC, cannot be reasonably interpreted to achieve this goal pursuant to Article 17, those policies must be struck down as being *ultra vires*.

III. APPLICABLE LAW

17. As to the applicable law, this Chamber re-emphasizes that Article 17 of the Statute governs the rights of the Accused before the Court, and that specifically Article 17(2) entitles the Accused "to a fair and public hearing," while Article 17(4)(b) entitles the Accused to, at a minimum, "have adequate time and facilities for the preparation of his or her defence."

18. Further, it is noteworthy that Rule 45 directs the Registrar to "establish, maintain, and develop a Defence Office, for the purpose of ensuring the rights of the accused," and that among the functions of the Defence Office, according to this Rule, is its responsibility to provide "adequate facilities for counsel in the preparation of the defence."

19. In addition, Article 22 of the Directive provides that:

> Any dispute between the Principal Defender and Assigned Counsel or Contracting Counsel, arising out of the interpretation or application of the Provisional Assignment Agreement or Legal Service Contract, which is not settled by negotiation shall be submitted to arbitration by a single arbitrator agreed to by both parties. Should the parties

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[23] *Ibid.*, para. 4.

[24] *Ibid.*, para. 4. Furthermore, the Defence states that it has been attempting to have its funding issues arbitrated since November 2006, but an arbitrator has not been agreed upon and the Defence Office has failed to acknowledge four letters regarding this issue since 5th January 2007 (*Ibid.*, para. 6). The Defence further asserts that arbitration would not resolve the problem swiftly enough to avoid irremediable harm to the Defence case (*Ibid.*).

[25] *Ibid.*, para. 12. The Defence further asserts that in the absence of sufficient funds, the trials must be stopped until sufficient funds are secured.

be unable to agree on a single arbitrator within thirty days of the request for arbitration, then each party shall proceed to appoint one arbitrator and the two arbitrators thus appointed shall agree on a third. Failing such agreement, either party may request the appointment of the third arbitrator by the President of the Special Court. The decision rendered in the arbitration, including payment for the costs of the arbitration, shall constitute final adjudication of the dispute.

Inherent power of the Trial Chamber to Review Administrative Decisions

20. Significantly, this Chamber has previously held that it has inherent jurisdiction to review the legality or reasonableness of administrative decisions where such decisions impact adversely upon the right of the Accused to a fair trial.[26] The Appeals Chamber of the Special Court endorsed this view of the law.[27]

21. The basis of this inherent jurisdiction, according to this Chamber, is the judiciary's authority to uphold the administration of justice "in a regular, orderly, and effective manner."[28] Furthermore, in a recent confidential Decision the Chamber indicated that in limited circumstances and in the interest of justice, it may review the decisions of the Registrar where those decisions may affect the fundamental trial rights of the accused and thus violate the requirements of a fair and expeditious trial enshrined in Article 17(2) of the Statute and Rule 26*bis* of the Rules.[29]

Equality of Arms Principle

22. Established jurisprudence makes it clear that the equality of arms between Prosecution and Defence "does not necessarily amount to the material equality of possessing the same financial

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[26] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-PT, Brima-Decision on Applicant's Motion against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004, paras. 65,129-132.

[27] See *Ibid.*, 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, 8 December 2005, paras. 76.

[28] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-PT, Brima-Decision on Applicant's Motion against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004, para. 57.

[29] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Confidential Motion on Detention Issue, 3 March 2005, paras. 17-19. In this Decision, the Chamber also noted that this holding is in accord with decisions handed down by the ICTY and ICTR. In particular, the Trial Chamber of the ICTY has held that "the only inherent power that a Trial Chamber has is to ensure that the trial of an accused is fair". See *Prosecutor v. Blagojević et al.*, IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 7. However, the Appeals Chamber of the ICTY has held that "it is not ordinarily appropriate for a Chamber to consider motions on matters that are within the primary competence of the Registrar." See *Prosecutor v. Delalić et al.*, IT-96-21-A, Order on Esad Landžo's Motion for Expedited Consideration, 15 September 1999, para. 3.

and/or personal resources."[30] Rather, "equality of arms obligates a judicial body to ensure the neither party is put at a disadvantage when presenting its case."[31]

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23. Furthermore, allegations of belief without appropriate supporting evidence would not be sufficient to establish any violation of such principle.[32]

IV. DELIBERATION

24. Having thus restated the applicable law to applications of this type, this Chamber, consistent with one of its recent decisions, opines that certain applications involving disputes between the Defence, on one side, and the Defence Office and the Registrar, on the other side, cannot be entertained where prescribed statutory remedies as to resolution have not been exhausted.[33] In that decision, the Chamber noted that Article 22 of the Directive provides for arbitration of any dispute between the Defence Office and Contracting Counsel arising from the LSC, and that it could not intervene in the matter until this remedy had been invoked and exhausted.

25. Similarly, the Chamber wishes to observe that, from the nature of the present dispute the inference is again irresistible that this issue also falls within the primary administrative purview of the Registrar of the Special Court, and ordinarily, at this point in time, is not one amenable to judicial review by the Trial Chamber. The Chamber so finds and holds that, *at this point in time*, it possesses no jurisdiction to review Application II.

26. Predicated upon the foregoing considerations, the Chamber rules that the filing of Application II before the Chamber is premature and that it cannot entertain the said application until the statutory remedy of arbitration has been exhausted.

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[30] *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-A, Judgement, 1 June 2001, para 69.

[31] *Ibid.*, *quoting Prosecutor v. Tadic*, IT-94-1-A, Judgement, 15 July 1999, para. 48. See also *Prosecutor v. Oric*, IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005.

[32] See, generally, *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-A, Judgement, 1 June 2001, para 72.

[33] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision of Defence Application for Review of the Registrar's Decision on the Sesay Defence "Exceptional Circumstances" Motion, 15 November 2006, para. 16. In addition, the Appeals Chamber has held that the Chamber's inherent jurisdiction may be exercised "only in the silence of the regulations applicable to the matter in question." See *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, 8 December 2005, paras. 71, 135.

27. However, as to the submission of the Defence that the refusal of the Defence Office to provide funding for its expert witnesses amounts to denial of the equality of arms principle, the Chamber's response is that there is absolutely no concrete evidence to support this contention. The position of the Defence, at best, on this issue is merely speculative. 26012

V. DISPOSITION

28. Application II is accordingly **DISMISSED** in its entirety for lack of jurisdiction.

Done at Freetown, Sierra Leone, this 28th day of February 2007

Hon. Justice Benjamin Mutanga Itoe

Hon. Justice Bankole Thompson
Presiding Judge
Trial Chamber I

Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]