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SCSL-04-15-T
(30620 — 30657)

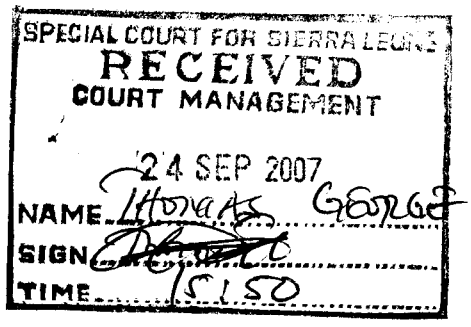
THE SPECIAL COURT FOR SIERRA LEONE

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

30620

Registrar: **Herman von Hebel**

Date filed: **24th September 2007**



The Prosecutor

-v-

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No: SCSL-04-15-T

Defence Reply to the Submission by the Registry in Relation to 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 26th April 2007"

Defence
Wayne Jordash
Sareta Ashraph

Registry
Herman von Hebel
Nikolaus Toufar

1. On 5th September 2007 the Defence filed its Application for Judicial Review.[1] On 17th September 2007 the Registry filed its Response.[2] Herewith the Defence files its Reply.

I. PRELIMINARY ISSUES

2. The Defence objects to the Registry's attempt to personalise the issues which concern this application.[3] First, the suggestion that there was any offence intended by the erroneous reference to the Deputy Registrar, Ms. Binta Mansaray, as the "Secretary to the Registrar"[4] is denied. The Defence apologises for the error, which self evidently was not intended nor could amount to any form of insult.

3. Second, the suggestion that the Defence characterisation of the Registry's decision-making as "irrational" and "partisan" is a personal attack on the Registrar is misplaced. These terms represent legitimate criteria with which to judge the correctness or otherwise of the Registry's decision-making. The Registry itself uses the term irrational in its own submissions so it is difficult to understand the cause for complaint.[5]

4. The Defence agrees with the Registry that the standard of review is whether the Registry "failed to observe any basic rules of natural justice or to act with procedural fairness toward the person affected by the decision, or if he has reached a decision which no sensible person who has applied his mind to the issue could have reached ("the reasonableness test").[6] A decision which no sensible person who has applied his mind to the issue could have reached is plainly irrational. Equally, a decision which is partisan, biased, or fails to take into account relevant considerations (or takes into account irrelevant considerations) represents a failure to observe basic rules of natural justice or to act with procedural fairness. These are legal issues and not personal ones.

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[1] *Prosecutor* v. *Sesay et al.*, SCSL-04-15-817, "Application for Judicial Review of the Registry's Refusal ("the Refusal") to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Decision of 26th April 2007", 7th September 2007; (the "Application").

[2] *Prosecutor* v. *Sesay et al.*, SCSL-04-15-822 "Submission 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', 5th September 2007", 17th September 2007; (the "Response"). It is unclear why the Registry filed its submissions pursuant to Rule 33(B) of the Rules of Procedure and Evidence. Rule 33(B) provides the Registry with the discretion to make oral or written representations to Chambers on issues arising in the context of a case. It is not applicable to the present situation wherein the Registry is a party to the proceedings and must respond. In the interests of judicial economy the Defence regards the submissions as the Response.

[3] Para. 2 of the Response.

[4] Ibid, para. 2.

[5] Ibid, para. 29.

[6] Ibid, para. 3 quoting *Prosecutor* v. *Martic*, IT-95-11-PT, "Decision on Defence's Motion for Review of Registrar's Decision Denying Additional Legal Aid Funds", 6th December 2005, page 3. *See also*, *Prosecutor* v. *Krajisnik*, IT-00-39-PT, "Decision on Defence's Motion for An Order Setting Aside the Registrar's Decision Declaring Momcilo Krajisnik Partially Indigent for Legal Aid Purposes", 20th January 2004, in which it was stated that a decision would also be quashed if the decision maker had "taken into account irrelevant material ore failed to take into account relevant material" (para. 16).

5. Finally the Registry's attempt to label the Defence critique of the decision-making as irrational and partisan, as showing "a considerable lack of respect for the Special Court and its organs", demonstrates a fundamental misapprehension about the nature of criminal proceedings.[7] An arbitrary and irrational decision attacks the integrity and reputation of the Special Court, not the party seeking a review of such a decision. The Registry's assertion fails to appreciate the role of the judiciary in protecting the Accused and the trials from decisions of this nature which, if left unchallenged, risk bringing the administration of justice into disrepute.

Reply

6. Rather than clarifying issues, the Registry's Response provides further proof of procedural unfairness. It reveals an approach to defence funding characterised by an unwillingness or inability to approach the issues fairly, by taking into account irrelevant considerations and ignoring relevant considerations. The abject refusal to explain the basis for the funding Decision – in the Response or at any time since the original application in April 2005 – is an abuse of administrative discretion which continues to undermine the fairness of Mr. Sesay's trial. The lack of explanation, when combined in light of the manifest unfairness of the decision, is powerful proof of a decision which a reasonable decision maker – taking into account the size and complexity of the Sesay case on its own and in comparison with other cases at the Special Court as well as the funding being made available to the Prosecution – could not have reached.

Registry' submissions

Lack of relevant explanation

7. The Registry has failed to address the crucial arguments concerning the size and complexity of the Sesay case and the funding being made available to the Prosecution.

8. The Registry has purported to conclude that there is no "reason for the provision of such additional funds for" an additional counsel[8] but has neglected to explain how or why it has arrived at this decision. This decision, to be procedurally fair and based upon the relevant considerations, requires an assessment of the workload as indicated by the size and complexity of the case. These are the arguments *advanced in detail* in i) the original April 2005 application; ii) the second 20-page application for additional funds (25th November 2005);[9] iii) the Points of Claim prepared for the arbitration;[10] and finally iv) the present Defence Application for Review.[11] The Registry's Response fails to address a single argument advanced by the Defence concerning the size and complexity of the

[7] Para. 2 of the Response.
[8] Ibid, para. 17.
[9] Application, Confidential Annex F.
[10] Application, Confidential Annex C.
[11] *See* paras. 36-48 of the Application.

Sesay case.[12] It is not possible for the Registry to claim procedural fairness whilst refusing to address these fundamental issues.

Registry's conclusions

9. Instead the Registry focuses on tangential or irrelevant issues (i), ii), iii) below), makes unsubstantiated claims (iv) or falls into manifest error in its approach (v) and vi) below):
   i) it was agreed between the Defence and the Registry that a "40% enhancement would properly and adequately compensate the team in the form of additional fees";[13]
   ii) at "no time did the Sesay Defence Team's quantification of additional payment due to it include the costs of employing additional Co-Counsel for future work";[14]
   iii) the Sesay team failed to request, in a timely manner, additional funds for an additional Co-Counsel;[15]
   iv) the Registry does not see any "reason for the provision of such additional funds" for the purpose of employing another Co-Counsel" (no reason is proffered for this conclusion);[16]
   v) any comparison with other defence teams and the funding available to them is "ill conceived.... [The] arbitrator, in his award, assessed the Sesay defence case on its own complexity";[17]
   vi) the Registry is under no obligation to compare the Sesay case with the Taylor Case; indeed such a suggestion is "irrational".[18]

II. Errors of Law

A: Failure to explain the Decision

10. A decision that repeatedly *ignores* relevant reasoning – without more – provides cogent proof of arbitrary decision-making. A funding decision purporting to provide adequate funds to the defence that fails to address, explicitly or implicitly, the most fundamental considerations (size and complexity of the case; work involved; and size of the opposing prosecution team) must be procedurally unfair. The Registry failed to address the submissions made by the Defence in paragraphs 36-38 of the Application ("The Need for additional Counsel During the Sesay Defence Case"). The Registry failed repeatedly to provide any relevant reasoning for its funding decisions over the last 2 years.[19] It is not known how or why the Registry arrived at its conclusion that no funds were required for another Counsel. It must be presumed that the Registry has no basis for its decision that would stand up to scrutiny or no basis at all.

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[12] E.g., paras. 18 and 23 of Response.
[13] Ibid, para. 14.
[14] Ibid, para. 14.
[15] Ibid, para. 18.
[16] Ibid, para. 17.
[17] Ibid, para. 27.
[18] Ibid, para. 29.
[19] *See, infra*, para. 22 of this Reply.

B: Failure to understand the basis for the Arbitrator's decision

11. It is submitted that the Registry's approach is tainted by i) a failure to understand the basis of the Arbitrator's decision and ii) the illogical conclusion that comparison with other cases at the Special Court would not assist in deciding the funding required in the Sesay case.[20]

12. It is an error of law for the Registry to assert that any comparison with other defence teams and the funding available to them is "ill conceived, if not contradictory to the Sesay Defence Team's own earlier submissions.... [The] arbitrator, in his award, assessed the Sesay defence case on its own complexity".[21] This is further proof that the Registry erred in its approach to the funding issue. The Arbitrator 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 sizeable to amount to exceptional circumstances as to warrant the provision of additional resources".[22] The Registry was under a duty thus to implement the Award with reference to the other cases at the Special Court, including the Taylor case. It failed in this duty.

13. Moreover, a reasonable decision maker, properly directing himself, could not have concluded that reasonable resources could be determined without reference to other cases at the Special Court. This is the *only* reasonable approach and consistent with the Registry's own payment scheme and the exceptional circumstances clause (4A) of the Legal Service Contract which is based on the premise that an accused can obtain additional funds on proof of *relative* size and complexity.[23]

C: Comparison with the funding of the Prosecution Team: *Equality of Arms*

14. The Registry failed to address or to attempt to address the submissions made by the Defence in paragraphs 46-48 of the Application ("Comparison with funding of the Prosecution Team"). These issues are highly relevant to i) the reasonableness of the Registrar's overall approach concerning the funding of the Defence compared to the Prosecution; and ii) the merits of the present Application and the reasonableness of the Registrar's Decision. The Registry cannot properly assert that its funding decisions are reasonable in relation to the size and complexity of the Sesay Defence case but wilfully neglect to address the decisions it has made concerning the level of resources provided to the Prosecution – especially in the face of allegations that it has acted, and continues to act, to favour the Prosecution in breach of Article 17 of the Statute of the Special Court ("The Statute").

15. The Registry has not provided a single reason to explain:

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[20] Ibid, para. 27.
[21] Ibid, para. 27.
[22] Application, Confidential Annex A, Award, para. 7.16; emphasis added.
[23] Application, Confidential Annex F.

i) the conclusion that the Sesay Defence does not require additional funding for a third Counsel but the RUF Prosecution team required up to 7 Counsel per trial session during the presentation of a similar sized case, involving a similar number of witnesses;[24]

ii) the decision to continue i) to fund the RUF prosecution team, after the close of its case, to allow for at least 4 trial lawyers plus a case manager (when logically its workload is less than that of the Sesay Defence Team) whilst ii) refusing to provide a modest $30,000 to provide a third Counsel for the Sesay team during the currency of the defence case;

iii) the continued funding for an ever-expanding Prosecution team. This despite: i) the obvious and demonstrable diminution in the Prosecution workload due to the closure of the AFRC and CDF trials and the RUF prosecution case and ii) the huge size of the current Prosecution team which currently comprises an army of 17 lawyers at the trial level, 4 at the Appeals Level, 25 investigators, and a huge number of support staff; [25] and

iv) how, in light of the 10 international investigators working full-time for the Prosecution since the inception of the court in 2001, it arrived at the conclusion that the provision of one international investigator to the Sesay Defence during the presentation of its case could be characterised as an "exceptional" provision.[26]

16. The Registry's unwillingness or inability to provide an explanation for the manifest inequalities of funding for the Prosecution is evidence of an institutional bias. The fact that the Prosecution Team in the RUF case is – and always has been – absurdly bigger than the Sesay Defence Team and the fact that the Prosecution continues to expand whilst the remainder of the court, from the Stenography section to the Defence Office, is being forced to downsize clearly calls out for an explanation. In the absence of any explanation for these flagrant disparities it must be presumed that the Registry has no answer or none that would demonstrate that the treatment of the Defence generally, or specifically in relation to the disputed Decision, is well founded or reasonable.

Registry's systemic failure to provide a reasonable interpretation of "adequate funds" for the defence

17. The presumption referred to above is buttressed by a demonstrable history of the Registry's dereliction in its treatment of defence funding at the Special Court. *The Registry has consistently failed to provide adequate resources to Defence teams except when compelled by order of a Trial Chamber or an independent arbitrator.* This history demonstrates that the Registry's approach to the Defence has been – and continues to be – characterised by an inability or unwillingness to approach issues of defence funding fairly and properly. This history is relevant to the present Application because it provides proof that the Registry has repeatedly fallen into error when purporting to

[24] *See* Reply, Annex A, for a breakdown of each trial session and the number of Prosecuting Counsel.
[25] *See* Application, para. 46. Since 5th September 2007, the date the Application was filed, the Prosecution has advertised for another post at a P3 level.
[26] Response, para. 15.

calculate and interpret "adequate resources". The present Application, when viewed in light of the previous failings as set out in Annex B to this Reply, gives rise to a powerful presumption that the Registry is likely to have erred (once again) by failing to take into account relevant considerations (e.g., size and complexity, equality of arms, etc.) and by taking into account irrelevant considerations (e.g., desire for convictions; fear of hostile media comment, etc.).

C: Failure to compare with the Taylor Case

18. The Registry has erred when concluding that it is under no obligation to compare the Sesay case with the Taylor Case.[27] Such a comparison would not only be logical but the terms of the Arbitrator's findings propose exactly this comparison.

19. It is incorrect to state that the "resources provided for the Taylor case were specifically ordered by the Trial Chamber based on the specific circumstances of that case, including issues of complexity, geographical scope of the case, distances between The Hague as (sic) basis for the proceedings and Sierra Leone and Liberia as (sic) base for investigations and other relevant factors".[28] First, the order from the Trial Chamber did *not* state that the order was based upon the "specific circumstances" of the Taylor case. The order was based on the demonstrable failure of the Registry to provide essential resources to the Taylor Defence. This was despite continued efforts by Defence Counsel and the Defence Office which were ignored by the Registry. The Registry clearly misdirected itself and failed to appreciate – or concern itself with – the level of funds required to provide *adequate* resources to the Taylor defence.

20. Second, whilst there may be peculiarities in the Taylor case that require specific funding, none of these relate to the funding of Counsel or their Legal Assistants. There is nothing in the Taylor case that necessitates greater funds for more Counsel and Legal Assistants than the Sesay Defence. The fact that the Registry is constrained to refer to, but not specify, "other relevant factors"[29] to justify the funding decision is instructive. The only reasons proffered by the Registry that relate to the funding of 3 Counsel and 3 Legal Assistants are those of complexity and the geographical scope of the case. The Sesay team outlined in detail and provided in tabular form a comparison between the Sesay case and the Taylor case in its Application, showing the larger temporal and geographic reach of the Sesay Indictment.[30] The Registry has ignored this comparison. Moreover, the Taylor pre-trial defence brief sets out the narrower issues in dispute in the Taylor trial as compared to the RUF trial.[31] By its own

[27] Ibid, para. 29.
[28] Ibid, para. 29.
[29] Response, para. 29.
[30] Application, paras. 39-45 and Annex W.
[31] Application, para 42.

admission, the Registry failed to take into account these relevant comparative factors because it regarded the comparison as "irrational".[32] This is not a reasonable approach to the issue of funding.

21. The remaining factors relied upon by the Registry to justify the 100% larger Taylor budget – the distances between the Hague, Liberia, and Sierra Leone – could reasonably justify an increase in the funding for the investigations and/or the travel budget, but cannot be assumed to lead to greater work on the part of Counsel or their Legal Assistants; this rests upon the size and complexity of the case. The Registry's inability to explain these erroneous assertions is powerful proof of arbitrary decision-making. The Defence reiterates its submission that no reasonable decision maker, properly directing himself (that is comparing the two cases for complexity and size) would have arrived at the conclusion that the Taylor case deserved twice the funds of the Sesay case *and* that the latter was not deserving of an additional one-off payment of $30,000 for a third Counsel.

III. Irrelevant Considerations

A: Timing of the Application for funds for additional Counsel

22. The Response focuses in large part on side issues. The issue is not when or how the Sesay Defence requested additional funds for Counsel but the fact that the request was made and whether there exists a reasonable basis for the request. As indicated above this latter issue has never been adequately addressed by the Registry: neither in i) the Response to the first request for additional funding in April 2005; ii) the Response to the second request in November 2005;[33] iii) during the arbitration hearing;[34] nor iv) in the present Response.

23. The attempt by the Registry to suggest that the Defence only raised the issue of the need for additional Counsel during the "final negotiation meetings on 20th and 21st June 2007"[35] is demonstrably false and an unnecessary distraction. First, it is clear from a reasonable interpretation of the 25th November 2005 application that the Defence was requesting additional funds to hire more personnel. The fact that the Registry seeks to reinterpret the obvious does not change this fact.[36] Second, as noted in the Application,[37] the Registry previously insisted that the issues to be decided at the Arbitration were not

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[32] Ibid, para. 29.
[33] Annex C; Refusal letter from Registrar Munlo to Sesay Defence team, 10th March 2006.
[34] At 13.04 during the Arbitration the Arbitrator enquired of the Registry "what would you consider to be exceptional, to come within the consideration of special considerations?" (*see* Application, Confidential Annex G). The four members of the Registry present purported to answer the question but at 13.31 the Arbitrator concluded that the Registry was unable to provide any real insight into the issues. The arbitrator in his decision concluded that the Registry was unable to posit any criteria that would give rise to exceptional circumstances giving rise to the payment of additional funds (Application, Confidential Annex A). In other words, the Registry declined to provide adequate funds to the Sesay team since November 2005 but is unable to explain the explain the basis of this so-called funding decision.
[35] Response, para. 22.
[36] Ibid, para. 16. *See* particularly, Application, Confidential Annex F at p. 2, para. 2; p.12, para. 1; p. 13, D.1; p. 14, para. D.2; and p.19, para. F for references to the Defence requirements.
[37] Para. 24.

that "of a special consideration payment as such, rather a request for additional funds to hire an additional counsel".[38] This was referred to in the Application but ignored in the Response. Thirdly, the Registry repeated its insistence during the 16th April 2007 Arbitration hearing that "the claimant's request for special consideration was to hire an additional counsel ... because of the complex nature of their case at trial".[39] Fourthly, during the Arbitration hearing, the Defence predicated its arguments for more funds on the need for more Counsel.[40]

24. Finally, the Defence, in an attempt to engage the Registrar in a productive discussion, wrote the Registry on the 18th April 2007 (two days after the arbitration hearing) to solicit funds specifically to hire more Counsel[41]. Sadly, the Defence was not afforded the courtesy of a response. The points outlined within, particularly the issue of the huge disparity with the size of the Prosecution team, were again ignored and to this day remain unanswered.

B: So-called right to select a third Counsel

25. The issue is *not* whether Assigned Counsel has the right to distribute funds to pay for a third Counsel.[42] This prerogative is of no value if the funds provided are inadequate. The fact that some Defence Teams have employed more than one Co-Counsel[43] is equally irrelevant since no other team has a case adjudged by an independent arbitrator to be of exceptional size and complexity and thus in need of greater funds.

26. It must be noted that under the pre-arbitration budget, Mr. Jordash was paid at Co-Counsel rates and Ms. Ashraph at Legal Assistant rates. Mr. Kneitel and our other Legal Assistants were paid at a rate which was 57% of the Legal Assistant rate set by the LSC. In terms of P levels – bearing in mind that Mr. Jordash and Ms. Ashraph are liable to pay 40% taxes (unlike UN or Special Court staff members) and do not receive benefits afforded to staff such as recruitment, security, and fuel allowances or paid leave – Mr. Jordash was paid at a P3 level and Ms. Ashraph at a P2 level.[44]

27. The 40% enhancement allows Counsel and Legal Assistants to be paid at the LSC rates; that is to say, the same rates other teams have been paid since the inception of their contracts. The 40% enhancement has the practical effect of allowing Mr. Jordash and Ms. Ashraph to be paid at the equivalent of P4 and P3 levels respectively, bearing in mind the reductions and lack of benefits aforementioned. No reasonable decision maker, when addressing his mind to these facts and the history of the arbitration proceedings, would thus conclude that any additional counsel should be

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[38] Application, Confidential Annex U.
[39] Application, Confidential Annex G, p. 73, lines 13-20.
[40] Application, Confidential Annex U, p. 89, lines 25 through p.90, line 1.
[41] Annex D; Letter to Registry from the Sesay Defence team, 18th April 2007.
[42] Response, para. 17.
[43] Ibid, para. 17.
[44] Confidential Annex F; Current Sesay Defence Plan.

funded from this new enhanced budget. (This proposition demonstrates that the Registry either has failed to conduct the necessary calculations and/or presumes that Defence representatives ought to work for less than the Prosecution. The unfairness of this proposition requires no further comment).

C: The amount of funds agreed: the 40% enhancement

28. As a preliminary remark the Defence objects to the Registry's publication of the private details of Counsels' fees and size of the back-pay due to the team in the public Annex A of the Response. It is plain that this was by design and indisputably unnecessary. It infringed on the privacy of the Defence team members and ought not to have been done.

29. Even more regrettable is the fact that the figures provided in Annex A[45] appear designed to insinuate that the back-pay received by the current team did not accurately reflect what was owed to the team and was thus improperly obtained. This is categorically refuted. This mistaken view arises from the wildly inaccurate and demonstrably unreliable financial records of the Registry, which fail to accurately record payments made to the team. This so-called financial record includes the bizarre suggestion that the present Lead Counsel was the only person working on the case for the first 8 months of the RUF trial.[46] A reasonable Registry would have realised thus that its own records could not be relied upon, and certainly should not be used to make implied assertions of an inflammatory nature. The Registry has had ample opportunity to inspect the accounts (including those provided to them by the Sesay Defence on 9th May 2007) and rather than rushing to raise the spectre of fraud in a public forum, the Registry ought to have reflected on the blatant discrepancies in their own records and sought to rectify them.[47] The Defence regards the demonstrably false assertions as deeply offensive and do not expect them to be repeated.

30. In any event, the Registry agreed that 40% was an appropriate enhancement for back-pay and future pay given the size and complexity of the case. It ill behoves the Registry to now refuse to provide $30,000 to fund additional Counsel simply because of its mistaken view that the Sesay team ought not to have received the amount of back-pay that the Registry agreed was appropriate. The Defence agrees with the Registry that at "no time did the Sesay Defence Team's quantification of additional payment due to it include the costs of employing additional Co-Counsel for future work".[48] The 40% enhancement agreed therefore has little or no relevance to the present Application.

31. The Registry and its various personnel are well aware that the meeting of 21st May 2007[49] was a preliminary meeting between Ms. Ashraph, Ms. Frediani, and Ms. Sanusi. The Sesay team submitted

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[45] Response, Annex A.
[46] Response, Annex A.
[47] *See* Confidential Annex E for a discussion of some of the obvious inaccuracies.
[48] Response, para. 14.
[49] Annex F; Response to Minutes.

calculations of back-pay on 9th May 2007[50] and requested that the Registry provide figures for discussions at least 24 hours prior to the meeting. None were provided. The meeting therefore had to focus primarily on the Sesay team calculations of back-pay. While suggestions were put forward by the Registry as to rates of enhancement for future pay, no calculations were available and so all offers were taken under advisement. It was the later meetings, on the 20th and 21st June 2007, in which the Registrar and Lead Counsel were *first* present that the totality of the defence requests could be – and were – discussed.

32. This fact is evidenced by Ms. Ashraph's response to the minutes of the 21st May 2007 meeting which makes it abundantly clear that the Defence understood that the 40% enhancement proposed at the meeting related solely to the issue of back-pay and would allow the defence to be paid "at the recommended rates".[51] This was not disputed by the Registry at that time.

33. The fact remains that the Registry agreed that the 40% enhancement would fund the current team's back-pay[52] and such an enhancement would ensure that the Sesay defence team would be paid at the LSC-recommended rates of pay for the remainder of the RUF trial. It did not provide funding for an expansion of the team or for additional resources. It did not – and was not intended to – allow for the employment of another Counsel. This must be obvious since the Registrar agreed to consider our (repeated) request for funds for a new Counsel on the 20th and 21st June 2007. Clearly this would make little or no sense if the parties had agreed that the 40% enhancement was supposed to represent full and final settlement of the Arbitrator's award.

IV. Conclusion

34. There is no reasonable basis for refusing the Defence requests – either funding for an additional Counsel or the same funding the Registry provided to the Taylor Defence Team – and no reason has been offered by the Registry. The Defence has sought repeatedly to engage the Registry in reasoned discussions about the size and complexity of the Sesay Defence case but to no avail. This is manifestly unfair. An Accused at the Special Court ought to be able to advance reasoned arguments concerning its need for funding and expect them to be reviewed and a reasoned response provided. The funding for a Defence team and an Accused ought not to be dependant on arbitrary factors, such as the profile of the Accused and the appearance of fairness, but should depend on observable factors with reasoned assessments. A refusal ought to be based upon fair trial reasoning – not financial expedience or worse. The Registry's approach, failing to deal with the salient issues and failing to offer reasonable assessments of the size and complexity of the Sesay case, lacks either reason or

[50] Annex H of the Application.
[51] Annex F; para. 4 reads "An enhancement of 40% will allow us to have been paid at the recommended rates".
[52] Application, Confidential Annex. B; para. 2.

fairness. The Decision should be quashed and the Registrar be ordered to provide adequate funding consistent with the Taylor funding and, more importantly, consistent with Article 17 of the Statute.

Dated 24th September 2007

Wayne Jordash
Sareta Ashraph

BOOK OF AUTHORITIES

Prosecutor v. *Sesay et al.*, SCSL-04-15-817, "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 26th April 2007", 7th September 2007.

Prosecutor v. *Sesay et al.*, SCSL-04-15-822, "Submission 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", 17th September 2007.

Prosecutor v. *Martic*, IT-95-11-PT, "Decision on Defence's Motion for Review of Registrar's Decision Denying Additional Legal Aid Funds", 6th December 2005.

Prosecutor v. *Krajisnik*, IT-00-39-PT, "Decision on Defence's Motion for An Order Setting Aside the Registrar's Decision Declaring Momcilo Krajisnik Partially Indigent for Legal Aid Purposes", 20th January 2004.

ANNEXES

A Tabular listing of number of Prosecution witnesses called and number of Prosecution Counsel available to lead live witnesses per trial session in the RUF Prosecution case.

B Registry's previous approach to the interpretation of "adequate resources" pursuant to Article 17

C Letter from Registry to Sesay Defence team, 10th March 2006.

D Letter to Registry from the Sesay Defence team, 18th April 2007.

E Errors in the Registry's financial records and calculations (as contained in Annex A of the Response).

F Confidential Annex: Current Sesay Defence Case Plan.

G Defence Response to Minutes (24th May 2007) of the meeting with the Registry dated 21st May 2007.

Annex A:
Tabular listing of number of Prosecution witnesses called and number of Prosecution Counsel available to lead live witnesses per trial session in the RUF Prosecution case.

Trial session	Live witnesses	Prosecution Counsel
July 2004	12	7
October 2004	6	4
January-February 2005	7	7
April-May 2005	8	5
July-August 2005	9	6
November-December 2005	12	5
February-April 2006	12	5
June-August 2006	10	4

Annex B:
Registry's previous approach to the interpretation of "adequate resources" pursuant to Article 17

i. The Registry previously sought to argue that it was reasonable to expect the Sesay team – consisting of 2 Counsel, 3 Legal Assistants, and one investigator – to work in a 15-foot by 7-foot office.[1] This despite the presence of much larger rooms for all UN staff members. Trial Chamber I ordered the Registry to provide adequate working space to the Defence.[2]

ii. The Registry previously sought to argue that it was reasonable for 2 Counsel, 3 legal assistants and one investigator to share one networked computer.[3] This despite all other professionals, including interns, being supplied with a computer per person. Trial Chamber I ordered the Registry to provide a second networked computer.[4]

iii. The Registry previously sought to argue that it was reasonable for the Defence to not have access to *any* vehicle to conduct investigations (except for those from the Special Court pool of vehicles). This despite the provision of 9 vehicles assigned to the Office of the Prosecutor, 7 of which are assigned to the Investigations Section.[5] Trial Chamber I ordered the Registry to provide a vehicle to be used by the Sesay defence for the remainder of the presentation of the Sesay Defence case.

iv. The Registry has consistently refused to engage with the efforts made by the Defence Office to obtain adequate resources for the Defence teams. As noted by the Defence Office in January 2007, the Defence Office had sought to "engage the Registry at every available opportunity to allocate more resources for the Defence"[6] but with little or no success.

v. The Registry refused to provide adequate resources for the Defence in the Taylor case, notwithstanding continued efforts by the Defence Office and Defence Counsel to obtain

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[1] *See Prosecutor* v. *Sesay et al.*, SCSL-04-15-688, "Joint Response of the First and Second Respondent to Application Seeking Adequate Resources Pursuant to Rule 45 and/or Pursuant to the Registrar's Duty to Ensure Equality of Arms (Application for Logistical Resources)", 22nd January 2007 ("Joint Response").
[2] *Prosecutor* v. *Sesay et al.*, SCSL-04-15-691, "Decision on Sesay Defence Application I – Logistical Resources", 24th January 2007.
[3] Ibid.
[4] *See* Joint Response.
[5] *Prosecutor* v. *Sesay et al.*, SCSL-04-15-678, "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)", 12th January 2007.
[6] Joint Response, at para. 8.

them. To ensure fairness and the continuation of the trial, it was necessary for Trial Chamber II to issue an order that the Registrar "ensure logistically the accused has adequate facilities, in accordance with Article 17 of the Statute, without delay".[7]

vi. The Registry refused to provide adequate resources to the Sesay Case – or even to provide reasons for its refusal – for two years (i.e., since November 2005) when the issues were first brought to its attention. The independent Arbitrator expressed significant disquiet at the inability of the Registry to explain the basis for its decision-making.[8] The Registry was compelled to provide further resources.

[7] *Prosecutor* v. *Taylor*, Transcript, 4th June 2007, p. 99.
[8] Application, Confidential Annex A: Arbitrator's Decision, p. 30, para. 7.16.

Annex C:
Letter from Registrar Munlo to Sesay Defence team, 10th March 2006

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +39 0831 257000 or +232 22 297000 or +39 083125 (+Ext)
UN Intermission 178 7000 or 178 (+Ext)
FAX: +232 22 297001 or UN Intermission: 178 7001

30637

10 March 2006

Ref: REG/097/2006

Mr. Wayne Jordash
Lead Counsel, Sesay Team
Office of the Principal Defender
Special Court for Sierra Leone.

Dear Mr. Jordash:

Re: APPLICATION FOR EXCEPTIONAL CIRCUMSTANCES BASED ON EXCEPTIONAL CIRCUMSTANCES

I have carefully considered your application in this matter, it is clear to me that your team is getting considerable Legal Support from the Defence Office.

I note from the information you have supplied that there is currently no experienced local Lawyer on your team who would assist in the efficient taking and proofing of statements of witnessed here in Sierra Leone where the bulk of witnesses for the defence of your client would come from. In this regard I notice that since the resignation of Mr. Serry-Kamal no attempt has been made to replace him with an experienced lawyer. It may be prudent, considering that the public funds that are available are for indigent persons who cannot afford to pay for their own defence that your team should give serious consideration in replacing Mr. Serry-Kamal with an experienced local lawyer.

I also notice that since July 2003 when the Sesay team was formed there has been a very high turnover of Lawyers/Legal Assistants, some of them are inexperienced Law Students. This is not in the interest of the accused person, as he needs to have continuity of experienced personnel who have institutional memory of his matter to be working on his case. This is also a factor that may escalate Legal costs for your team.

The argument that the approach of the defence case will increase the workload of the Sesay team is true to all defence teams. The workload of all defence teams is bound to increase during this time. However this does not mean that the Registry should pre-determine the amount that will be needed. To do so would be speculative. Defence teams are paid after producing a fee note. The Defence Office will honour any fee note that the Sesay Team will produce during the course of the defence team provided that such fee note is within the budget and has been assessed and agreed to by the Defence Office. Those matters cannot be pre-empted or pre-judged now.

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JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +39 0831 257000 or +232 22 297000 or +39 083125 (+Ext)
UN Intermission 178 7000 or 178 (+Ext)
FAX: +232 22 297001 or UN Intermission: 178 7001

My view is that there are no complexities in Sesay's case that amount to exceptional circumstances to justify Special Consideration of the sort you are talking about. I do not believe that Mr. Sesay's case is more complex than that of any other accused persons. In this regard, the Special Consideration envisaged by the Registry in the addendum to the Legal Service Contract enables the continued remuneration of Defence Counsel for their services beyond the initial 8 months period that was agreed to and in excess of the initial US$400,000 that was agreed to. The Defence Office and the Registry have already addressed this issue to ensure the continued remuneration of counsel until the completion of trial. Accordingly, all you need is to ensure that your team is composed of experienced Lawyers and Legal Assistants and present each bill incurred by your team to the Defence Office for assessment and approval as per established rules and within established budget as contained in your case/stage plan.

From the foregoing I am afraid that I have to advise you that your application has not been successful.

Yours sincerely,

Lovemore Munlo, SC
Registrar
Special Court for Sierra Leone

Annex D:
Letter to Registry from the Sesay Defence team, 18th April 2007

30640

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

SESAY DEFENCE TEAM

PHONE: +232 22 297214 • FAX: +232 22 297299

18th April 2007

Mr. Herman von Hebel
Acting Registrar

Dear Mr. von Hebel,

As you will be aware the Sesay team has grave concerns regarding the lack of funding of the defence teams and the impact this may have on the running of the RUF trial. Some of the concerns may be ameliorated or removed in the event that the arbitrator decides in our favour on the two issues before him but this cannot be guaranteed. The arbitrator has indicated that he will inform the parties of his decision on the 26th April 2007 at 2 pm. I write however because time is short and in the event that the arbitrator rules against the Defence this will leave our team in an impossible position with little or no time to file the appropriate applications to the Trial Chamber. Moreover we will be left unable to fulfil our duties to our client and the court and with no time to obtain any remedy without seeking an adjournment of the trial. I would therefore ask you to come to a view as soon as possible.

The current budget for the defence teams is USD 75,000 per three month stage and these funds are to cover payment for Counsel and legal assistants, daily living allowance (DLA) for team members and approved travel expenses for all team members. We would urge you to re-consider this budget and consider the impact a full-time trial will have on both (i) my ability to employ appropriate assistance and (ii) the likely effect on the smooth running of the court. The figures just do not add up and are untenable for professionals trying to prepare one of the biggest individual defence cases *ever* to have been tried before an international Tribunal.

At best they allow me to maintain a team consisting of myself, a co-counsel (Ms Ashraph) and one legal assistant (Jared Kneitel). On our calculations, when the trial moves to full-time, the present budget provides funds equivalent to two UN P2 and one P1 post[1].

[1] Please see Annex A for a detailed analysis of the effects of a full time trial on the budget.

I hope you will agree that these funds appear to be wholly inadequate to fund a large International War Crimes case. They are much less than those available in other ad hoc Tribunals and at the ICC and they do not allow for the employment of either sufficient or sufficiently experienced personnel.

It is simply not possible to prepare, proof and call up to 100 witnesses (selecting them from a possible 320), with only three people; one of whom will be in court at all times. This cannot be achieved without the real possibility of lengthy court adjournments and without placing intolerable pressures upon each member of my team. I note already before the trial commences that we are all working 7 day weeks and 12 – 15 hour days and this is with the assistance of an international investigator whose contract expires before the first witness will be called (mid June 2007).

Moreover the rates of remuneration available for even the existing team members are derisory when (i) considering the seriousness of the case and when (ii) viewed alongside all other comparable professionals at the court.

I would respectfully ask you to look again at this issue. I hope you will agree that thus far my team has conducted itself with a high degree of professionalism. I would ask you to bear this in mind when you consider this request for reconsideration. I would not ask for more funds and still be fighting this issue nearly 2 years after I raised these problems unless I genuinely believed that my 3 person team is mentally and physically unable to fulfil our duties to our client without more assistance. I would also ask you to bear in mind that I have 12 years of experience in criminal defence and understand what is required in terms of the amount of resources necessary to prepare a case of this size and complexity. I do not believe that thus far this issue has been considered by anyone with the same or even the requisite expertise to be able to come to a proper determination.

I write in the hope that you will re-consider this issue before the trial commences. I am strongly of the view that a fair minded person who properly considers the proposition of presenting a 100 witness defence by a team of 3 defence lawyers at the suggested rates of remuneration will conclude that this is both unrealistic and unfair. In the event that you feel unable to reconsider this issue I hope you will appreciate that my ethical and professional duties oblige me to raise this issue with the Trial Chamber before the start of the defence case.

I will also be seeking advice from my Bar Council (England and Wales) to ascertain exactly the extent of my professional obligations in circumstances where (i) I believe that our physical and mental health is endangered by a working environment which will require 7 day weeks and up to 20 hour days and where (ii) the rates of remuneration are patently unreasonable and exploitative.

I would urge you to take into account the following:

The false economy which appears to govern the funding of the defence
The present funding arrangements imply that I will be in court alone (or with an intern) whilst Ms. Ashraph and Mr. Kneitel will be preparing up to 10 witnesses at any one time. In the event that one of us is unable to work due to illness or any other unforeseen contingency I will forced to apply for an adjournment of the proceedings. It ought to be obvious that the cost of an adjournment to the court far outweighs providing us with additional funds from the outset. I note that during the Prosecution case of a similar size the Prosecution relied upon at least four rotating in-court Counsel (Mr. Harrison, Ms Alagendra, Mr. Bangura and Mr. Werner (one P5, one P4 and two P3's) as well as a full time Case Manager, several interns and at least 10 investigators. This number of Counsel and investigators enabled the Prosecution to proof and prepare witnesses whilst at the same time other counsel was leading witnesses in court. It enabled them to work in reasonable circumstances, with reasonable working hours and with reasonable breaks.

My team has no such luxury. There will be no rotation in court and no respite for any of my team. In these circumstances illness is not just a possibility it is inevitable. I hardly need to point out the obvious effects of working 7 day weeks and up to 20 hour days in this hardship post. My team and I are already exhausted and we have three months of concentrated work ahead of us. I have no doubt we are at risk of becoming ill and possibly long term ill. It is my ethical duty to protect my team and I respectfully suggest the Registry owes a similar duty of care to the defence, notwithstanding we are sub-contracted to the court.

I have tried to raise this with the Office of the Principal Defender over the last 18 months, both from the perspective of being a human being and also a professional lawyer. I have no idea why an institution purportedly mandated to support defence teams would not appreciate these obvious facts or offer any reasoned explanation to justify their failure to assist. The fact that no one in this institution has any real practical experience in defending International criminal cases might explain the lack of real engagement on this issue.

Compared to the Prosecution and the Office of the Principal Defender
The unfairness of this situation vis a vis the funds available to the Prosecution ought to be obvious. During the currency of the Sesay defence the Prosecution will be relying upon four Counsel (Mr. Harrison, Mr Hardaway, Mr Wagona and Ms Mamattah). This is without taking into account other counsel who reside within the OTP ranks, an army of investigators and a huge number of logistical support staff. **My small team of three will be alone but for one intern (a student) a local investigator and one witness officer (engaged full time in locating witnesses).**

The following factors also ought to be considered:

1. The Prosecution appear not have downsized in the last 6 months notwithstanding that two trials have been completed. The present compliment of Counsel include: Steven Rapp, Christopher Staker, James Johnson, Karim Agar, Peter Harrison, Joseph Kamara, Brenda Hollis, Maja Dimtrova, Tamara Cummings-John, Amira Hudroge, Lynn Hintz, Shyamala Alagendra, Urs Wiedemann, Charles Hardaway, Vincent Wagona, Wendy Tongeren, Penelope Sutherland, Penelope Mamattah, Alain Werner and Mohammed Banguara. This is supplemented by 28 investigators and 4 operational assistants. Whilst I accept that the Prosecution must have additional resources (compared to the Defence) this is a veritable army of staff dedicated to only two live trials, one of which is well past its investigative and case presentation stage. In this context our request for additional funds to hire another counsel or additional legal assistants *at this time* is eminently reasonable and proportionate.

2. Additionally the Prosecution have been recruiting heavily for the Taylor case; as you are no doubt aware they are presently recruiting one new P4 and one new P3 investigative position to add to the aforementioned army. This is in addition to several P4 positions which have been recruited in the last 2 months. It is difficult to understand how a court which pleads *absolute* poverty nevertheless continues to add staff to an already bloated Prosecution team. (In the same vein I note that thus far the Registry has refused to allocate funding for a defence expert above a P3 level but the Prosecution have nevertheless been able to instruct 11 experts in the Taylor case).

3. The Defence Office has at least 6 lawyers at D1, P4, P3 and P2 levels and several support staff. I note that in 2005 this office cost the court $600,000. We are unaware of the current budget but since that time the Principal Defender has been elevated from a P5 to D1 and several other staff members have been promoted in pay scale. My team has certainly not benefited in accordance with the budget or any increase in the budget. None or negligible legal support is provided to defence teams. The Principal Defender appears to have arrived at the conclusion that 3 people are sufficient to present Mr. Sesay's defence case but his office requires 11 staff. I hesitate to criticise any institution in this court or any individual but the irrationality of this state of affairs ought to be obvious to any reasonable decision maker.

I would respectfully ask that you consider these issues and properly review the current state of staffing in my team. My team is prepared to work long hours (with a percentage of those hours provided pro bono) but the present situation endangers the fairness of the trial, the smooth running of the court, the health of my team and the reputation of the court. In relation to the final point I would point out to you that the disparity of resources will be more than obvious to any observer during

the currency of our defence case since I will be on my feet alone facing four opposing lawyers while the Defence Office is replete with many more. I hope that you will look again at these issues. I am copying this letter to the Trial Chamber so that they are aware of the issues which I will raise in the event that you are unable to offer any reasonable solution.

Regards,

Wayne Jordash
Lead Counsel, Sesay Defence team

Cc Honourable Judges of Trial Chamber I

ANNEX A

The concerns are also clear from a further examination of the figures.

A: Rates of pay

Annex 1 of the Legal Services Contract (LSC) sets out the proposed hourly rates for members of the Defence Team. These are USD 110 per hour for Lead Counsel, USD 90 per hour for Co-Counsel, and USD 35 for Legal Assistant for out-of-court preparation and USD 500 per day for Lead Counsel and USD 350 per day for Co-Counsel for court days.

During the course of the RUF trial thus far, Mr. Jordash (Lead Counsel) has been paid at USD 80 per hour of out of court preparation and USD 340 per court day. Ms. Ashraph (Co-Counsel) is paid at a rate of USD 40 per hour for out of court preparation and USD 170 per court day. Legal assistants with the Sesay Defence team are paid at USD 20 per hour for out of court preparation.

Mr. Jordash and Ms. Ashraph are therefore paid at Co-Counsel and Legal Assistant rates respectively. It is also instructive that their rates differ widely from the rates paid to members of other defence teams. Legal Assistants are paid at insulting low rate (57% of the figure given as guidance in the LSC), particularly considering their qualifications and experience.

B: Hours worked pro bono due to lack of funds

Even given these much lower rates of pay, as compared both to the recommendations of the LSC and the rates of pay to other defence teams, Sesay team members work a substantial amount of properly billable time without pay as a result of lack of available funds.

In November 2005, in the Sesay team's application for special consideration, the team calculated that between 1st November 2003 – 31st August 2005, Lead and Co-Counsel undertook legal work without payment for 15-30% of the time. Due to air travel and daily living allowance being drawn from the same budget as legal fees, the money available for legal fees for Counsel for December 2006-February 2007, is

approximately USD 30,000. Should this be split between Counsel equally (i.e. with each Counsel receiving USD 5,000 per month), Ms. Ashraph will have worked pro bono for approximately 40% of that stage plan.

In relation to our legal assistant, the position of Mr. Kneitel, is instructive. Mr. Kneitel is a qualified attorney and has been working with the Sesay team since November 2005. Excepting his low rate of pay, Mr Kneitel, from 1st June 2006 to 31st October 2006, worked 736 properly billable hours. He received payment for 500 hours and therefore worked without payment for 32% of the time.

C: The issue of DLA

The Directive on Assignment of Counsel (DAC) provides, again in mandatory terms, that both travel expenses and DLA "shall be reimbursed/paid" to all members of the Defence Team who do "not usually reside in [*sic*] city where the particular stage of the procedure is being conducted".

Despite this mandatory provision, legal assistants on the Sesay team do not receive DLA unlike every other international professional at the Court excluding interns and short term consultants. This is for purely budgetary reasons as payment of DLA is drawn from the same budget from which legal fees are paid.

Put briefly, should legal assistants, receive DLA, as is clearly envisaged by the DAC, the additional level of expenses would be $10,350 per legal assistant or 13.8% of the budget.

As stated previously, even with Counsel and Legal Assistants working at much reduced rates of pay and with legal assistants not receiving rates of pay, all team members work significant pro bono hours due to an already existing lack of funds.

As you are aware, the defence team are the only group not normally resident in Sierra Leone, whose salary levels rise and fall with the cost of air travel and the number of days they need to spend inside Sierra Leone to properly prepare their cases.

D: The effect of a full-time trial

The amount of time worked pro bono, as set out above, is of course in the context of a trial which is 'in court' 6 weeks out of every month. As the RUF trial moves to full-time, the increased number of court days and also days of DLA, will mean that the amount of properly billable hours Counsel and Legal Assistants will be made to work pro bono due to lack of funds will spiral to completely unacceptable levels. That would be on the basis that team members are paid insulting low rates and without legal assistants receiving DLA. Clearly if the team were to raise its rates to those recommended by the LSC (and those of other defence teams) and

were to pay its legal assistants DLA as stated in the DAC, all most all out-of-court preparation would go unpaid.

Increased court days
The figures then: In relation to the increased number of court days (with Counsel paid at present reduced rates of USD 340 and USD 170 for Lead and Co-Counsel respectively), USD 15,300 pays for 30 court days for Lead and Co-Counsel for 30 days within the three-month period. Once the RUF trial begins to run full-time, refreshers for 60 days will cost $30,600. This represents 40% of the budget being spent before taking into consideration payment for out of court preparation for Counsel and legal assistants and DLA and travel expenses for a three-month period, as currently required by the Registry.

Should the team increase its rates of pay to those indicated by the LSC as being appropriate (that is, USD 500 and USD 350 for Lead and Co Counsel, respectively), it would result USD 25,500 ring-fenced for court days for a 6 week trial, making up 34% of the budget. In the case of a full-time trial, court days at these rates would cost USD 51,000 or 68% of the budget. This would leave USD 24,000 to cover out-of-court preparation hours, travel expenses and DLA for the Sesay defence team. This is both unacceptable but also completely unfeasible.

Increased DLA
Currently Counsel are in Sierra Leone for approximately 46 days every three months (totalling $5290 each). DLA therefore represents 14% of the budget for a trial which runs for 6 weeks' every 3 months on the basis that legal assistants do not receive DLA.

As the trial moves to full-time, Counsel will be in Sierra Leone for entire three-month period, with the result that DLA per person will amount to $10,350 per person. If both Counsel are to receive DLA, this will mean $20,700 out of a budget of $75,000 (27.6%) will be dedicated to DLA.
As stated above, should legal assistants receive DLA as is clearly envisaged by the DAC, the additional level of expenses would be $10,350 per legal assistant. Therefore for the theoretical team of 3 people, the level of DLA that accrues in a three month stage, is $31,050 or 41.4% of the overall budget. In practice, should the 3 Sesay team legal assistants receive DLA, $51,750 or 69% of the budget.

The cumulative effect of the above figures:
The above figures must be read together to understand the full impact of a full-time trial on the already inadequate budget.

A: On the assumption that (i) the Sesay team remains at its reduced rates of pay and (ii) its legal assistants do not receive DLA, the effect of a full-time trial is as follows:

	Figures (USD)	% of budget

Cost of DLA:	20,700	27.6
Cost of court days	30,600	40.0
	51,300	67.6

This means that there is USD 23,700 or 31.6% of the budget available to pay for the hours of out-of-court preparation for all team members and for travel expenses. Given the number of out-of-court hours billed and the level of travel expenses paid previously, this amount of money is insufficient, regardless of the rate per hour charged by the team members.

The Registry is also asked to note that as the Sesay Defence team is presenting its case in the coming months, the number of out-of court preparation is likely to rise significant in comparison to hours worked during the prosecution case.

B: On the assumption that (i) the Sesay team increased its rates of pay to those indicated in the LSC as being appropriate (ii) its legal assistants do not receive DLA, the effect of a full-time trial is as follows:

	Figures (USD)	% of budget
Cost of DLA:	20,700	27.6
Cost of court days	51,000	68.0
	71,700	95.6

This means that there is USD 4,300 or 4.4% of the budget available to pay for the hours of out-of-court preparation for all team members and for travel expenses.

C: On the assumption that (i) the Sesay team remains at its reduced rates of pay and (ii) its legal assistants do receive DLA, the effect of a full-time trial is as follows:

One legal assistant:

	Figures (USD)	% of budget
Cost of DLA:	31,050	41.4
Cost of court days	30,600	40.0
	61,650	81.4

This means that there is USD 13,350 or 17.8% of the budget available to pay for the hours of out-of-court preparation for all team members and for travel expenses.

Two legal assistants:

	Figures (USD)	% of budget

Cost of DLA:	41,400	55.2
Cost of court days	30,600	40.0
	72,000	95.2

This means that there is USD 3,000 or 4.8% of the budget available to pay for the hours of out-of-court preparation for all team members and for travel expenses.

Three legal assistants:

	Figures (USD)	% of budget
Cost of DLA:	51,750	69.0
Cost of court days	30,600	40.0
	82,350	109.0

This means that the budget of USD 75,000 will have been overspent by USD 7,350 and there will be no funds available to pay for the hours of out-of-court preparation for all team members and for travel expenses, even at reduced rates of pay.

D: On the assumption that (i) the Sesay team increased its rates of pay to those indicated in the LSC as being appropriate (ii) its legal assistants do receive DLA, the effect of a full-time trial is as follows:

One legal assistant:

	Figures (USD)	% of budget
Cost of DLA:	31,050	41.4
Cost of court days	51,000	68.0
	82,750	109.4

This means that the budget of USD 75,000 will have been overspent by USD 7,700 and there will be no funds available to pay for the hours of out-of-court preparation for all team members and for travel expenses.

Two legal assistants:

	Figures (USD)	% of budget
Cost of DLA:	41,400	55.2
Cost of court days	51,000	68.0
	92,400	123.2

This means that the budget of USD 75,000 will have been overspent by USD 17,400 and there will be no funds available to pay for the hours of out-of-court preparation for all team members and for travel expenses, even at reduced rates of pay.

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Three legal assistants:

	Figures (USD)	% of budget
Cost of DLA:	51,750	69.0
Cost of court days	51,000	68.0
	102,750	137.0

This means that the budget of USD 75,000 will have been overspent by USD 27,750 and there will be no funds available to pay for the hours of out-of-court preparation for all team members and for travel expenses, even at reduced rates of pay.

The fact of the matter is that all members of the Sesay defence team should be paid at the rates that are indicated by the LSC as appropriate and indeed rates that resemble rates paid to other defence teams. Moreover, as envisaged by the DAC, legal assistants should receive DLA. Unfortunately, under the current budget, such a situation would result in the current budget being overspent by between USD 7,700 – USD 27,750, depending on the number of legal assistants. It is important to note that regardless of the number of legal assistants, the budget is overspent before all team member has been paid for out-of-court preparation and before any travel expenses are paid.

Even in the least desirable situation, that of Counsel and Legal Assistants continuing at their reduced rates of pay - which according to the LSC guidelines, the rates of pay to other defence teams and indeed the prosecution teams are totally inappropriate – as well as no legal assistants receiving DLA, only USD 23,700 remains to cover payments for hours of out-of-court preparation and travel expenses for all team members.

USD 23,700 is insufficient to cover the out-of-court hours of preparation that will be done by at least 4 members of the defence team over a three month period before travel expenses are deducted. Even assuming there are no travel expenses (which is unlikely as Counsel need to get to Sierra Leone), the amount, if split equally between Counsel and Legal Assistants, would result in each team member being paid USD 5925 for three months' work or USD 1975 per month.

The Sesay team, already working significant hours for free due to the inadequate budget, is simply not prepared such an inappropriate and frankly insulting level of pay. We would ask the Registry to give serious consideration to this matter so as to avoid any adverse effect on the running of the RUF trial.

Annex E:
Errors in the Registry's financial records and calculations (as contained in Annex A of the Response)[1]

Mr. Jordash's payment from July 2003-November 2004

1. In relation to the calculations of monies paid out to the Sesay Defence team from July 2003 – November 2004, it is not the case that Mr. Jordash earned the sum of $36,000 for 1 year and 5 mths' work (working out at $2117.60 a month).

2. Mr. Jordash was actually paid $36,000 for the period July 2003 - October 2003 inclusive.

3. From November 2003 to November 2004, Mr. Jordash submitted fee notes to the Registry (via the OPD). The hours submitted and paid are set out on page 4 of the Sesay's team post-arbitration proposal, dated 9th May 2007[2]. In summary, Mr. Jordash billed 1532 hours and, due to caps operating as a result of the limited budget, was paid for 850 hours during this time frame (that is to say, 45% of hours were worked pro bono). The Registry has failed to record that payment was made by the Registry to Mr. Jordash for 850 hours' work (totalling $68,000) from November 2003-November 2004.

Lead Counsel's rate

4. From November 2003 to September 2005, the Registry lists Mr. Jordash's 'Court *approved* rate' as $90 per hour. This is the Court approved rate of Co-Counsel and was thus not applicable to Lead Counsel. Mr. Jordash has been listed on every single stage and case plan since November 2003 as Lead Counsel and has also been the Lead Counsel from that time.

5. The recommended rate used by the Registry in its calculations is therefore inaccurate. The correct Court-approved rate for Mr. Jordash's position on the team is $110/hr. This fatally undermines the Registry's calculation of the monies owed to the Defence team, since the difference between the LSC-recommended rates and the rate actually paid out to Mr. Jordash is $30 for every hour worked rather than $10. This was the proper hourly downfall which had to be compensated.

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[1] There are many errors in the Registry's financial calculations. The few listed are not intended to be exhaustive but are indicative of the overall unreliability of the records.
[2] Application, Annex H.

The appearance of Ms. Ashraph

6. The calculations put forward by the Registry in Annex A of its submissions show Ms. Ashraph commenced work on to the Sesay Defence team in March 2005. The Registry's calculations suggest that (i) Mr. Jordash was the only defence representative on the Sesay team for the first 8 months of the trial and (ii) received a sum of $2,117 per month. This is manifestly inaccurate; if for not other reason than Ms. Ashraph has been a member of the Defence team since November 2003.

7. From November 2003 to February 2005 (inclusive), Ms. Ashraph billed 1654 hrs and was paid for 1245 hours (working 25% of hours pro bono). Throughout the case, Ms. Ashraph has been paid at $40; 44% of the LSC-recommended rate of $90/hr. To pay Ms. Ashraph for these hours at the recommended rates would require an uplift of $62,250; a sum not forming part of the Registry's calculations of the downfall.

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +39 0831 257000 or +232 22 297000 or +39 083125 (+Ext)
UN Intermission 178 7000 or 178 (+Ext)
FAX: +232 22 297001 or UN Intermission: 178 7001

Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the ***Confidential*** Case File.

Case Name: The Prosecutor – v- Sesay, Kallon & Gbao
Case Number: SCSL-2004-15-T
Document Index Number: 823
Document Date 24th September 2007
Filing Date: 24th September 2007
Number of Pages:13 **Confidential Page Numbers: 30653-30655**
Document Type:-**Public and Confidential Annexe F**

☐ Affidavit
☐ Indictment
☐ Correspondence
☐ Order
☐ **REPLY**

Document Title: **Defence Reply To The Submissions By The Registry in Relation To Sesay '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 26th April 2007'**

Name of Officer:

Thomas P K George.

Signed

30656

Annex G:
Defence Response, dated 24th May 2007, to Minutes of Meeting between Ms. Ashraph, Ms. Sanusi and Ms. Frediani on 21st May 2007.

30657

SCSL Defence-Sesay
05/24/2007 06:27 PM

To: Shakiratu Sanusi/SCSL@SCSL, Sophie Frediani/SCSL@SCSL
cc:
Subject: Note re: 21st May 2007 post arb meeting

Dear Shaki and Sophie,

I have seen Shaki's notes of our meeting on 21st May 2007. I agree with the details of the notes which correctly state that the Sesay team will not push the issue of payment for past members of the team and payment for pro bono hours (following assessment) at this stage. I wish to emphasise that in releasing of what is likely to have been thousands of dollars in fees, the Sesay team has recognised both the need to have the process move along as quickly as possible and the financial realities of the Court.

I wish to make clear, however, that it is the position of the Sesay team thåt the hours that have been certified as properly billable *should be paid at the rates which are indicated in the Legal Services Contract* . The fact is that since our time on the RUF trial, the Sesay team has been billing often double the number of hours at half the rate of other teams, something the Defence Office, in its role of bills assessor, could not have been unaware of. Given the long history of this matter – the lack of support from the OPD and unreasoned rejection by the Registry - "the apparent inability to the Respondents to posit the circumstances in which the Special Consideration Clause would apply..." during the arbitration itself, has been viewed in a poor light by our team. We are, at this stage, simply asking that we be properly paid for work that has been already certified as properly done.

The Sesay team is happy to discuss the financial constraints faced by the Registry in coming to an agreement; it is also happy to listen to substantive arguments backed up with reasoning. What it is not prepared to do, however, as I said in the meeting, is to listen to assertions motivated by budgetary reasons dressed up as a substantive pseudo-legal arguments. We are willing to discuss the start date of the enhancement, given the realities of the finances and the case itself and in the interests of resolving this matter quickly. However, an assertion that the Sesay case suddenly became more complex on, for example, the date of the arbitration judgment or at the close of the Prosecution case comes across as an obvious play by the Registry to limit its financial liability in the face of the arbitration decision.

The figures that the current Sesay team is owed are set out in the proposal, dated 9th May 2007. An enhancement of 40% will allow us to have been paid at the recommended rates. The matter of a 20% enhancement applying from 1st June 2007, on the assumption that DLA is paid separately from the budget, is being discussed and an answer will be forthcoming once the examination-in-chief of Sesay is concluded. Please keep me informed of the results of any internal discussions between the Registry and the Defence Office in relation to this matter. As the issue of funding affects the planning and presentation of Mr. Sesay's case, we favour a quick resolution of the issues.

Best,

Sareta