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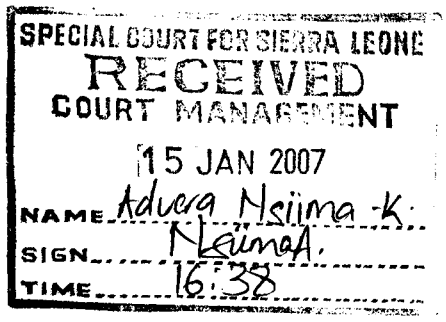
THE SPECIAL COURT FOR SIERRA LEONE

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

Registrar: **Mr. Lovemore G. Munlo, SC**

Date filed: **15th January 2007**



Issa Hassan Sesay

-v-

The Office of the Principal Defender ("The Defence Office")

Case No: SCSL – 04 – 15 – T

Logistical and Expert resources

Reply to Prosecution Response to the Applications seeking adequate resources pursuant to Rule 45
and/or pursuant to the Registrar's duty to ensure equality of arms
(Application I and II)

Office of the Principal Defender
Vincent Nmehielle

Defence Counsel
Mr. Wayne Jordash
Ms. Sareta Ashraph

Introduction

1. The Defence herewith files its Reply to the Prosecution Response ("The Response")[1] to the Motion seeking adequate logistical resources ("Logistical Application")[2] and the Motion seeking adequate resources pertaining to the employment of experts ("Expert Application").[3]

Legal Issues

2. It is accepted that the Prosecution "has an interest and a duty to make necessary submissions on general issues of law and procedure that may be raised in the motions"[4] seeking additional resources. The interests of justice would have been enhanced if the Response had fairly and squarely detailed the resources that they had needed (and used) to prepare their case. This information would have contextualized the merits of the Logistical and Expert Applications and would have further demonstrated the huge unfairness visited upon the Defence by the Defence Office and/or the Registry. Unfortunately the Response is long on denial but, for reasons best known to the Office of the Prosecutor, short on any useful detail.

Substantive Response to Response

Procedural burdens

3. The Prosecution observes that it "bears certain procedural burdens to which the defence is not subject, such as disclosure requirements under Rule 68."[5] This is correct. However in the context of the RUF trial these were not particularly onerous given their resources. The available evidence demonstrates that the

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[1] *Prosecutor* v. *Sesay*, SCSL-04-15-678, "Prosecution Response to Application seeking adequate resources pursuant to Rule 45 and/or 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)," 12 January 2007.
[2] *Prosecutor* v. *Sesay*, SCSL-04-15-T-672, "Application seeking adequate resources pursuant to Rule 45 and/or pursuant to Rule 45 and/or pursuant to the Registrar's duty to ensure equality of arms (Application I)," 9 January 2007.
[3] *Prosecutor* v. *Sesay*, SCSL-04-15-T-674, "Application seeking adequate resources pursuant to Rule 45 and/or pursuant to the Defence Office/Registrar's duty to ensure equality of arms (Application II)," 10 January 2007.
[4] Paragraph 2 of the Response.
[5] Paragraph 5 of the Response.

Prosecution benefited substantially from considerably more time and resources than the Defence. The Defence was unable to commence working until March 2003 or thereabouts and could not commence investigations until late 2003. The Prosecution had commenced their activities almost a year prior to this time. It had a full time Case Manager throughout its case (a P3 qualified lawyer employed until April 2006) and it had an army of personnel and equipment (interns, typists, translators, national/international investigators, exhibit officers, witness management officers and other support staff working full time as well as at least 9 potential vehicles at any given time).

4. Moreover the additional burdens were not especially onerous. Whilst the Prosecution had to build a case against the three RUF accused this ultimately consisted of 371 witnesses and approximately 9 Lever Arch files of exhibits. The Defence, which for the majority of the time consisted of 4 lawyers and one investigator (with no vehicle), involves 300 witnesses in total and about 3 lever arch files of exhibits. As concerns the Rule 68 material in the RUF case the material consisted of 4 lever arch files. The majority of this was disclosed after the completion of their case (August 2006 and thereafter) as a result of the Taylor investigation. The remainder of the Rule 68 material was served within the same statements comprising the Rule 66 material. The additional procedural burden thus consisted of nothing more than redacting the Rule 66 and 68 materials, photocopying them 3 times and delivering them to each of the Accused.

Factual Issues

Vehicles

5. The Prosecution takes issue with the Defence assertion that throughout the RUF case it has "exclusive use of 5 vehicles." The Prosecution accepts however that they have daily access to 9 vehicles. This would suggest that on any given day throughout the pre-trial period and until the closure of its case the Prosecution, on average, could call upon 3 vehicles for its sole use. The reality is that 3 would have been the very bare minimum available at any one time bearing in mind that

the CDF case was not heard at the same time as the RUF case and the AFRC trial did not start until a year after the RUF trial and for much of the time did not overlap with it. In other words the RUF prosecution team, when dealing with a similar number of witnesses had access to at least 3 vehicles per day whereas the Defence has none.

Investigators

6. The Prosecution declines to provide the salient information: *what was the number of working investigators before and throughout the RUF prosecution case?* The Prosecution admits to *"currently"* having 25 investigators.[6] The fact that some of them are allocated to other supporting roles does not alter the view of the overall strength of the Prosecution team or its resources. The allocation of some of this number to "supervisory, ancillary and support functions"[7] is a luxury which the Defence, with one investigator and no vehicle, can ill afford. The fact, however, that the Prosecution has 25 investigators at a time when the AFRC and CDF cases have closed is highly instructive. This would suggest that currently there are 25 investigators employed on two cases: the RUF and the Taylor case. This is a notional average of 12.5 per case. This does not even begin to factor in the extended period for investigation granted to the Prosecution *prior* to the arrests of the accused. The Defence has one investigator, a similar number of witnesses to organize and less than half the time enjoyed by the Prosecution.

Lawyers

7. The Prosecution declines to provide the salient information, namely: *how many lawyers (or interns), part time or otherwise worked on the RUF case during its preparation and until its completion?* It is unfortunate. Whilst it is true that some of the lawyers on the RUF case worked on the AFRC case, over 50% of the

[6] Paragraph 10 of the Response.
[7] Paragraph 10 of the Response.

witnesses were common to both cases[8] so the Prosecution assertion (that they were divided between cases[9]) needs to be approached with a degree of circumspection. Moreover, as noted above, if there are 15 trial lawyers *currently* working in the Prosecution's section, then to be gainfully employed suggests that there are, even now, a notional 7.5 lawyers working full time on the RUF case.

The Relief Sought

8. The Defence is seeking funding for the experts to a level commensurate with their experience and expertise: a D1 level, *during the preparation of their reports*. The Prosecution misunderstands the position as regards the way in which the Defence experts are funded. In order to obtain funding for an expert Counsel must approach the Principal Defender with a request for funding. The Principal Defender will then decide on the number of weeks of P3 funding to be allocated to the witness, for the preparation of their reports. It is not known what criteria are used to make this decision. At the time the witness arrives in Freetown to give evidence the funding is payable pursuant to the "Practice Direction on Allowances for Witnesses and Expert Witnesses, Adopted on 16th July 2004." The Practice Direction does not appear to apply to the time when experts are conducting their underlying research and drafting their report.[10]

9. It is instructive that the Prosecution declines to disclose to the Trial Chamber what remuneration was available and paid to their military expert. However the Prosecution does not deny that the expert was funded above a P3 level. The Defence submits that it is not possible to find a sufficiently robust and experienced expert *in this field* for this level of remuneration. It is highly mischievous for the Prosecution to imply that the Defence request (for D1

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[8] *Prosecutor* v. *Sesay*, SCSL-04-15-PT (6154-6166), "Decision on Prosecution Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT," 11 May 2004, paragraph 5 for reference to the Prosecution submissions.

[9] Paragraph 11 of the Response.

[10] For example, Article 16 of the Practice Direction on Allowances for Witnesses and Expert Witnesses inter alia notes: "(A) The Special Court shall provide expert witnesses with an attendance allowance as compensation for wages, earnings and time lost as a result of testifying." The rest of the Article deals with the amount payable pursuant to (A).

remuneration) may not be meritorious given that in the AFRC case "the Defence were able to retain a senior-ranked military expert as a joint witness for all three accused"[11] when the witness in question was hugely criticized (over four days) for his lack of experience and lack of basis for his conclusions. The Prosecution understandably relies upon these criticisms in the AFRC case. It is submitted that proper funding in the RUF case will provide the Defence with the opportunity to obtain experts unaffected by such criticism. The fact that the Prosecution have failed to disclose the payment demanded by their expert– and instead have sought to thwart the Defence submissions by such a suggestion – amply illustrates where their true concerns lie on this issue.

The Merits of the Prosecution Case

10. The Defence knows of no rule of international law which prevents the Defence from criticizing the Prosecution evidence, in this type of Motion or any other type.[12] The Prosecution was entitled to refute the Defence assertion (that they abandoned their own Military expert in the RUF case because the evidence was either unhelpful or would not stand up to proper scrutiny) in their Response or at any stage of the proceedings.

Dated 15th January 2007

Wayne Jordash

Sareta Ashraph

[11] Paragraph 14 of the Response.
[12] Final Paragraph of the Response.

Book of Authorities

Orders and Decisions

Prosecutor v. *Sesay*, SCSL-04-15-PT (6154-6166), "Decision on Prosecution Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT," 11 May 2004.

Motions

Prosecutor v. *Sesay*, SCSL-04-15-T-672, "Application seeking adequate resources pursuant to Rule 45 and/or pursuant to Rule 45 and/or pursuant to the Registrar's duty to ensure equality of arms (Application I)," 9 January 2007.

Prosecutor v. *Sesay*, SCSL-04-15-T-674, "Application seeking adequate resources pursuant to Rule 45 and/or pursuant to the Defence Office/Registrar's duty to ensure equality of arms (Application II)," 10 January 2007.

Prosecutor v. *Sesay*, SCSL-04-15-T, Prosecution Response to "Application seeking adequate resources pursuant to Rule 45 and/or pursuant to the Defence Office/Registrar's duty to ensure equality of arms (Application I and II), 10 January 2007.

Prosecutor v. *Sesay*, SCSL-04-15-678, "Prosecution Response to Application seeking adequate resources pursuant to Rule 45 and/or 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)," 12 January 2007.

Practice Directions

Practice Direction on Allowances for Witnesses and Expert Witnesses, Adopted on 16th July 2004.