690) SCSL-04-15-T (25793 — 25803) 25793

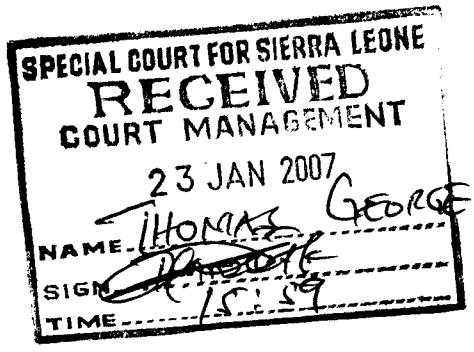
THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

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

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

Date filed: **23rd January 2006**



The Registrar

-v-

Issa Hassan Sesay

Case No: SCSL – 04 – 15 – T

Logistical and Expert Resources

Consolidated Reply to the Joint Responses to the Applications Seeking Adequate Resources Pursuant to Rule 45 and/or Pursuant to the Registrar's Duty to ensure Equality of Arms (Applications I and II)

Registrar (First Respondent)
Lovemore Munlo SC

Defence Counsel
Wayne Jordash
Sareta Ashraph

Principal Defender (Second Respondent)
Vincent Nmehielle

Introduction

1. This consolidated Reply ("Reply") is filed to address the points raised by the first and second Respondents in their Joint Responses ("Joint Responses") dated the 22nd January 2007, to the Defence Applications seeking adequate logistical and expert resources ("Logistical Application" and "Expert Application," respectively).

Jurisdiction of the Trial Chamber

2. The Respondents' approach, alleging that Article 4 and Article 9 of the Legal Services Contract ("LSC") provide an alternative remedy is manifestly misconceived. Article 4 reflects an agreement between Contracting Counsel and the Defence Office concerning the exchange of legal services for "Consideration". Full Consideration is defined in the first paragraph of Article 4 as "pay" for the Sesay team. This definition does not include any reference to logistical or expert resources. Special Consideration[1] (or additional Consideration) therefore does not include special (or additional) logistical or expert resources.

3. Moreover Article 9 of the LSC is not engaged in the present applications. As the Respondents correctly observe, "(I)t is significant that the applicants did not claim to have been denied the logistical resources promised to them under the LSC; but rather that what was provided by the Defence Office is inadequate to meet the needs of their case".[2] In other words there is no dispute about the "interpretation or application of this

[1] The Respondents are well aware that Special Consideration has always been regarded as fees for work. This is clear from their misleading suggestion that the Defence Office has always supported such requests for "Special Consideration" which resulted in the provision of over $35, 000 to cover Counsel's fees that exceeded the amounts stipulated in the LSC". *Prosecutor v. Sesay et al.*, SCSL-04-15-T-689, "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 ("Expert Resources Joint Response")," 22nd January 2007, paragraph 21. The Defence strongly objects to the attempt by the Respondents to embarrass Counsel by disclosing details of private earnings in a public document. The Respondents know that this was not money paid to existing Counsel over and above their hourly or monthly rates. This was money returned to the Sesay budget after the Defence Office and the Registry had accepted they had wrongly depleted the Sesay funds by wrongly paying money to a previous member of the team. In these circumstances and due to the fault of the Defence Office and the Registry the Sesay Defence team had to apply for Special Consideration simply to ensure present Counsel received any remuneration for their services in the pre-trial period. This was paid reluctantly by the Defence Office/Registrar and only after a prolonged and distracting struggle.

[2] Prosecutor v. Sesay et al, SCSL-04-15-T-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 ("Logistical Resources Joint Response")," 22nd January 2007, paragraph 13.

Agreement".[3] In the context of the present Applications (I and II), the Defence accepts that the Respondents have provided resources consistent with, and sometimes more, than that detailed in the LSC.

4. However, given that the LSC unreasonably presupposes that three defence teams could share a room and that one locked filing cabinet would be sufficient per team, this is neither surprising nor particularly noteworthy. In these circumstances there is nothing which arises from the terms of the LSC which requires arbitration. The real question to be decided is whether the Respondents have provided, through the LSC and their various regulations, policies, and practices, sufficient resources pursuant to Rule 45 and Article 17 of the Statute of the Special Court ("Statute"). The LSC is simply one of the ways in which the Respondents are obliged to fulfill these obligations. It is the Trial Chamber, interpreting the whole panoply of implementing mechanisms, who ultimately is the sole arbiter of this question. An independent arbitrator's remit would be limited pursuant to Article 9 to a consideration of the application of the LSC and not these wider questions.[4]

5. It is submitted that the Accused's right to a fair trial is being continuously and systematically undermined by the failures of the First and Second Respondent. In short, *inter alia*, the lack of work space (necessitating the exposure of protected witness documentation in public areas), the lack of computer technology, the lack of ability to investigate (two of the Sesay Legal Assistants have been waiting to travel to Kailahun and Kenema to meet witnesses who have been expecting them for nearly two weeks but are unable for want of a vehicle), and the lack of ability to employ appropriate experts, the enforced reliance on public transport (with the attendant lack of security afforded to all other court professionals) are endangering the Accused's right to a fair and

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[3] Article 9 of the LSC.

[4] The Special Court Trial Chamber's jurisdiction to judicially review the Registrar's Decision was recognized by the Appeals Chamber in the *Brima-Kamara case*. An application for Review of the Registrar's decision by the President on the basis that it is unfair procedurally or substantively, is admissible if an accused has a protective right or interest, or if it is otherwise in the interests of justice. The Appeal Chamber concurred with Justice Pillay's view on the need for a mechanism for judicial review of administrative decisions affecting the rights of the Accused but considered that judicial review, in the "specific situation of the Special Court" falls within the inherent jurisdiction of the Trial Chamber *and* the Appeal Chamber (*Prosecutor v. Brima et al.*, SCSL-2004-16-441, "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," 8th December 2005, paragraphs 72 -78).

expeditious trial. The Defence urges the Trial Chamber to intervene immediately and provide an effective remedy.

Effective Remedy

6. The procedures contained within Article 4 and Article 9, even if applicable, deprives the Defence of an effective remedy to the present under-funding issues. The Defence has been attempting to have issues of funding (related to DLA and team members remuneration) arbitrated since November 2006. The process has not been effective. An arbitrator has yet to be agreed. The Principal Defender and the Defence Office have refused to acknowledge no less than four letters on the subject since the 5th January 2007. The Defence is still waiting for a response. The Defence has just over three months remaining to be prepared for the commencement of its case. Arbitration would not cure any of the mischief caused by the current lack of resources in time to prevent further delay in the current investigation, a loss of potentially valuable experts and ultimately an adjournment of the trial (or irremediable unfairness) in breach of Article 17.

The test - adequacy of resources

7. The Respondents' approach to the obligations placed upon them pursuant to Article 17 of the Statute is misconceived and plainly wrong in law. It is not sufficient for the Defence Office to claim it has "consistently championed the Defence cause"[5] or that it has "not only met its contractual obligations under the LSC, but has exceeded them"[6] nor that it "has always ensured that the request of the various defence teams, including the Sesay team, is met *on the basis of the resources available*".[7] These are interesting benchmarks but not the right ones. Similarly the Registry falls into error when it seeks to establish that it has fulfilled its obligations by reference to "the established regulations and policies of the Special Court",[8] and also when it joins the Defence

[5] For example: *Prosecutor v. Sesay et al.*, SCSL-04-15-T-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 ("Logistical Resources Joint Response")," 22nd January 2007, paragraph 8.
[6] Ibid, paragraph 23.
[7] Ibid, paragraph 22. Emphasis added.
[8] Ibid, paragraph 28.

Office in acknowledging that an allocation of a vehicle "would facilitate" the defence case but then claims that "this matter needs to be viewed in light of the LSC".[9]

8. The *matter* self evidently does not begin and end with an analysis of the terms of the LSC (the terms of which were *de facto* imposed upon Counsel and their clients) nor with the "regulations and policies" of the Special Court (more accurately described as those designed and implemented by the Registry). It would be a legal nonsense to assess the adequacy of resources by reference to whether the Registry (or the Defence Office) had done what it should within the terms of its own LSC and/or policies and/or regulations. The test is whether the Respondents have provided adequate resources. It is not whether they have complied with their own rules and regulations.

9. On the other hand this is not to suggest that the LSC and the policies and regulations implemented by the Respondents are irrelevant to the question of the adequacy of resources. An examination of the way in which the LSC and the policies/regulations discriminates and provides the Defence teams with significantly less resources in every material respect (when compared with the Prosecution and most, if not all, other professionals at the court) provides a useful benchmark from which the adequacy of the resources provided by the first and second Respondent pursuant to Rule 45 and Article 17 may be accurately assessed.

The Respondents Duty

10. The First and Second Respondent's are compelled, consistent with their obligations pursuant to Rule 45 and Article 17 of the Statute, to promulgate directives and implement financial decisions, which provide the Defence with adequate resources. This is not an obligation which can be compromised or qualified. In order to ensure compliance with their duty they must take into consideration the financial resources available to the Prosecution. Comparisons are useful even if they do not tell the whole story. The fact that the Prosecution has been able to purchase and maintain throughout its case[10] *at least* 3 vehicles on a daily basis to allow the RUF prosecution team to

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[9] Ibid, paragraph 30.
[10] See admission to this effect in *Prosecutor v. Sesay et al.*, SCSL-04-15-T-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)," 22nd January 2007, paragraph 9.

search and locate its witnesses (and yet the Registry has failed to provide the Defence - which has a similar number of witnesses - any provision whatsoever) is hugely significant.[11]

11. Moreover the fact that the much larger and plentiful "office space and equipment of Staff Members of the Defence Office is in full compliance with the established regulations and policies of the Special Court"[12] does not provide the Respondents with any meaningful rebuttal of the Defence claims of under funding. What this (and all the other demonstrable inequalities) really shows is that the Registry discriminates against the Defence in the allocation of its resources. This is the *foundation* of our complaint, which remains unanswered.

12. There is ultimately however one question and one benchmark: have the Registry and/or the Defence Office provided adequate resources to ensure that the defence is not "put at a disadvantage when presenting its case".[13] If the LSC, the policies or the regulations promulgated by the Registry do not, or cannot reasonably be interpreted to achieve this aim pursuant to Article 17 of the Statute, they must be struck down as *ultra vires*. If the Respondents fail to achieve this aim they are in breach of their duty, whatever explanations are proffered, reasonable or otherwise. If there are insufficient funds available per se then the trials must be stopped, until funds are found to ensure fair trials.

The Registrar's failure to Respond

13. In the Joint Responses the second Respondent has consistently sought to argue that it has done everything it can to secure additional resources for the Defence. For example

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[11] It is equally significant that the Prosecution have the financial wherewithal to currently employ 25 investigators *at this time* when only one accused (Taylor) is being actively investigated and yet the Registry have failed to provide the Sesay defence with one investigator with international experience for more than 6 months during the whole life span of the court. It is highly relevant that the policy pursued by the Registry dictates that the appropriate desk and office space for defence lawyers should be several times smaller than for all other professionals at the court. It is equally relevant that the Legal Service Contract (LSC) designed by the Registry mandates that the Defence should be provided with a single networked computer whilst its overall policy appears to be to provide all other professionals at the court with one networked computer a piece.

[12] *Id.*, at paragraph 29.

[13] *Prosecutor v Tadic*, Case No. IT-94-1-A, 15th July 1999, at paragraph 48.

the Defence Office claims to have engaged the "Registry at every available opportunity to allocate more resources for the Defence";[14] it asserts that "[U]nsuccessful attempts have been made by the current Principal Defender to secure a container to meet the needs of defence counsel"[15] and it suggests that the "Defence Office has provided as adequate funding (for experts) as possible in the light of its limited budget".[16]

14. It is noteworthy that the Defence Office's assertions appear to acknowledge that the Registry has failed to provide proper resources for the Defence. Whilst this does not sit easily or logically with the bold assertion contained in both Joint Responses that the Defence had "failed to substantiate that their client's Article 17 rights were violated because inadequate resources were provided to them"[17] this is consistent with the Principal Defender's acknowledgement in his letter to the Chief of Administrative Services on the 6th October 2006 (copied to the First Respondent)[18] that the RUF teams had a pressing "need for additional resources" and an extra $125, 000 per team was needed to "cover the costs of additional investigation, consultants, experts and additional Sierra Leonean defence counsel. Whilst the Defence does not agree that this additional funding would be sufficient for the Sesay team (nor that each RUF team has the same needs) this illustrates, at least, that the Second Respondent agrees that there is *significant* under funding for the RUF defence teams in areas routinely accepted to be crucial to the maintenance of fair trial rights.

15. It is accepted that the Second Respondent, given their lack of real independence from the Registry, *might* in principle reasonably be able to suggest that it has done what it can with the resources it has been given by the Registry.[19] This does not provide them

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[14] For example: *Prosecutor v. Sesay et al.*, SCSL-04-15-T-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 ("Logistical Resources Joint Response")," 22nd January 2007, paragraph 8.

[15] Ibid, paragraph 26.

[16] Ibid, paragraph 36.

[17] Paragraph 38 of the Joint Logistical Response and paragraph 26 of the Joint Expert Response.

[18] *See* Annex A of the Joint Logistical Response.

[19] These assertions however ought to be approached with a degree of caution bearing in mind that notwithstanding its 11 members of staff (excluding interns) and an annual budget of £647, 116 (*See* Special Court Web Site: Special Court Budget 2005 – 2006, pp. 17 and 26) it has consistently failed to provide any substantive legal assistance to aid the preparation of Mr. Sesay's case. It is nevertheless an explanation in principle which the Defence accepts might be accurate.

with a defence to any finding that it has breached Rule 45 but it might explain the cause. However this is not an explanation which is open to the Registry.

16. An examination of both the Joint Responses fails to reveal any explanation which might deal with the assertions made by the Second Respondent. It is unclear whether the Defence Office has continuously approached the Registry with pleas for more assistance for the Defence teams or why, if it is true, the Registry has failed to act upon these requests. It is respectfully submitted that the Registry has failed in its duty to provide necessary explanations and can be presumed, in the absence of any Response, to have no explanation for the apparent discrimination visited upon the Defence, the consequential under funding and its ongoing breach of Article 17 of the Statute.

Specific Responses to Respondents Assertions

Second Office (approximately 15 x 7 ft)

17. The Second Respondent agrees that the needs of the Defence teams have not been met.[20] The First Respondent has declined to respond or explain the reasons for this lack of provision. The fact that interns in the Defence Office have more space than Counsel and their legal Assistants is inexplicable. The fact that the First Respondent has allocated space to each member of the Sesay Defence team limited to 5ft x 5ft per person endangers the rights of the Accused and the safety of protective witnesses.

Second Networked Computer

18. The provision of a work station in the staff room to a Legal Assistant for the Sesay Defence team (and the fact that Lead Counsel had to apply by memorandum to the Principal Defender for this limited provision) does not rebut the inference of inadequate computer provision. The room is closed at 5.30 pm when the Defence Office closes. The Sesay team does not finish work until several hours later. The safety of protective witnesses remains endangered by being forced to work in a room which is not exclusive to the team.

One vehicle for the Team's sole use

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[20] *Prosecutor v. Sesay et al.*, SCSL-04-15-T-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 ("Logistical Resources Joint Response")," 22nd January 2007, paragraph 26.

19. The First and Second Respondent agree that an allocation of a vehicle specifically to the Sesay team would facilitate the defence case.[21] The First and Second Respondent fail to address the inability of the court transport to be able to provide enough provision. It is instructive that neither Respondent addresses the real issue: the size of the case against the accused and the size of the defence case. This is the only bench mark in which the issue of a vehicle (or lack thereof) can sensibly be assessed. The Respondents failure to address the request for a vehicle alongside the investigative work (e.g. 250 witnesses to locate) is *prima facie* an error of law and irrational.

A Witness Management Officer for Sesay Team

20. As the Principal Defender is aware the role of the witness Management team Officer is not to help locate witnesses pre-trial. The Defence Office has informed the Defence that this Officer will assist when the witnesses are being brought to Freetown to testify. The Defence need to find the witnesses before it can bring them to Freetown. It cannot do this without a vehicle and a witness management officer whose task it is to help the defence teams locate witnesses. The Respondents offer no explanation as to why they have reached the conclusion that this facility, employed full time by the Prosecution, is not required by the Defence.

Funding for Investigator with International Experience

21. The Defence Office claims to have "amply supported the Sesay team in its investigative" needs.[22] However the First Respondent offers no basis for this conclusion nor is able to rely upon any factual understanding of the Sesay case preparation that would elucidate this conclusion. It is assertion devoid of merit. A reasonable decision maker, properly directing itself, would not arrive at a conclusion of this consequence without proper enquiry. The fact that no such enquiry has taken place, nor factual analysis attempted, demonstrates that the decision of both the First and Second Respondent is based solely upon the availability of resources without regard to any obligation to ensure an equality of arms. A cursory glance at the army of international and national investigators employed by the Prosecution throughout the RUF case ought to have alerted the Respondents to the inadequacy of their provision for the Defence.

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[21] *Id.*, paragraph 30.
[22] *Id.*, paragraph 36.

Expert Provision

22. The first and second Respondent assert that they have tried to increase the amount of funding available for experts but have been unsuccessful in view of the Court's limited funding. This would appear to be an admission that they accept that they have failed to secure adequate funding for the Defence, due to factors beyond their control. However, shortly after this assertion the Respondents appear to contradict themselves by suggesting that the Defence might seek a remedy (namely addition funds) through the arbitration procedure provided by the LSC! This invitation to invoke the arbitration procedure to seek funds, which apparently do not exist, would appear to raise more questions than the Respondents appear willing to answer. Nevertheless there arises a clear inference that the Respondents have implemented a policy of remuneration for Defence experts which fails to take into account relevant considerations, namely the particular subject matter or discipline, the type of expertise, and/or the amount of experience possessed by the particular expert. It is a policy that begins and ends with a consideration of the amount of funds the Respondents have allocated to the expert budget without reference to any other factor. The policy thus fails to provide a rationale scheme for payment of experts.

23. More importantly it fails to take into account the needs of an effective defence having regard to the nature and complexity of the Accused's case. The Respondents have thus failed to answer the Defence complaints or rebut allegations of inadequate funding.

Request

24. The Defence respectfully urges the Trial Chamber to provide all of the resources sought. It is submitted that these are not ostentatious requests. Conversely, they would provide nothing more than the bare minimum necessary to provide an effective defense.

Dated 23rd January 2007

Wayne Jordash
Sareta Ashraph

25803

BOOK OF AUTHORITIES

Decisions

Prosecutor v Tadic, Case No. IT-94-1-A, 15th July 1999.

Prosecutor v. Brima et al., SCSL-2004-16-AR73 **[441]**, "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," 8th December 2005.

Motions

Prosecutor v. Sesay et al., SCSL-04-15-T-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), 22nd January 2007.

Prosecutor v. Sesay et al., SCSL-04-15-T-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 ("Logistical Resources Joint Response")," 22nd January 2007.

Prosecutor v. Sesay et al., SCSL-04-15-T- 689, "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 ("Expert Resources Joint Response")," 22nd January 2007.

Other

Legal Services Contract.

Special Court for Sierra Leone Budget 2005-2006, available at http://www.sc-sl.org/Documents/budget2005-2006.pdf.