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SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

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

Registrar: Herman von Hebel

Date: 12th of February 2008

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

Public Document

DECISION ON THE SESAY DEFENCE TEAM'S APPLICATION FOR JUDICIAL REVIEW OF THE REGISTRAR'S REFUSAL TO PROVIDE ADDITIONAL FUNDS FOR AN ADDITIONAL COUNSEL AS PART OF THE IMPLEMENTATION OF THE ARBITRATION AGREEMENT OF THE 26TH OF APRIL 2007

Office of the Prosecutor:
Peter Harrison
Vincent Wagona
Reginald Fynn

Defence Counsel for Issa Hassan Sesay:
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:
Charles Taku
Kennedy Ogeto
Lansana Dumbaya

Court Appointed Counsel for Augustine Gbao:
John Cammegh
Scott Martin

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

SEIZED of the Application for Judicial Review of Registry's Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Decision of the 26th of April 2007 filed publicly, with public and *ex parte* confidential annexes, by Mr. Wayne Jordash, Lead Counsel for the First Accused, Issa Hassan Sesay, ("Defence") on the 5th of September 2007 and the Addendum filed on the 7th of September 2007 ("Motion");

MINDFUL of the Response to the Motion filed by the Registrar on the 17th of September 2007 ("Response") and the Reply thereto filed by the Defence on the 24th of September 2007 ("Reply");

NOTING that the Office of the Prosecutor ("Prosecution") has filed no response to the Motion;

MINDFUL of the Decision of the Arbitrator in the Matter of an Arbitration Pursuant to Article 9 of the Legal Service Contract and Article 22 of the Directive on the Assignment of Counsel and in the Matter of an Arbitration between Mr. Wayne Jordash, (Claimant), on the one hand, and on the other, the Principal Defender of the Special Court for Sierra Leone (1st Respondent) and the Registrar of the Special Court of the Special Court for Sierra Leone (2nd Respondent), rendered on the 26th of April 2007 ("Arbitration Decision")

MINDFUL of the Interim Order concerning the Application for Judicial Review ("Order") dated the 1st of November 2007;

MINDFUL of the Submissions filed by the Registrar and the Office of the Principal Defender on the 5th of November 2007 and the further Submission filed by the Registrar on the 8th of November 2007;

NOTING the Submissions filed by the Defence on the 5th of November 2007 and the further Submission filed by the Defence on the 7th of November 2007;

PURSUANT to Article 17 of the Statute of the Special Court ("Statute") and Rules 26*bis* and 54 of the Rules of Procedure and Evidence ("Rules");

HEREBY ISSUES THE FOLLOWING DECISION:

I. BACKGROUND

1. Mr. Wayne Jordash is Lead Counsel for the Sesay Defence Team in proceedings where his indigent client stands trial with two other Accused Persons, also indigent, namely, Morris Kallon and Augustine Gbao. Each Accused has a Defence Team which is contractually bound to ensure their defence up to the completion of their trial by virtue of a Legal Service Contract under defined terms and conditions which include an agreed remuneration clause. Mr. Jordash subscribed to these conditions in the contract which he himself signed as Assigned Counsel and as Case Manager for the Sesay Defence Team.[1]

2. Mr. Jordash, who has been representing the Accused Sesay since July of 2003, has been conducting the Defence of his client Sesay for the past three years after this trial commenced on the 5th of July 2004, on those terms and on the then agreed remuneration. It is this remuneration that Mr. Jordash is seeking to have revised.

3. In a Motion filed on the 5th of April 2006, Learned Counsel Mr. Wayne Jordash, sought the intervention of this Chamber to order that additional resources be granted to him by the Registrar on the strength of the "Exceptional Circumstances" which he laid out in his Motion.[2] It was premised principally on the "size and complexity" of the Sesay case.[3] The Chamber dismissed the application on the grounds that it lacked jurisdiction because the statutory remedy of arbitration had not been exhausted.[4]

4. On the 16th of November 2006, the Sesay Defence initiated arbitration procedures pursuant to the Legal Service Contract and Article 22 of the Directive on the Assignment of Counsel, seeking a review of the Registrar's decision of the 10th of March 2006 that denied the Sesay Defence's

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[1] Application for Judicial Review of Registry's Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Decision of 26th of April 2007, 5 September 2007 [Application for Judicial Review], Annex F.

[2] Application for Review of the Registrar's Decision (10th March 2006) on the Sesay Defence "Exceptional Circumstances" Request (25th November 2005), 5 April 2006 [Application for Review of Decision on the Exceptional Circumstances Request].

[3] *Ibid.*, pp. 5-6.

[4] Decision on Defence Application for Review of the Registrar's Decision on the Sesay Defence "Exceptional Circumstances" Motion (TC), 15 November 2006 [Decision on Exceptional Circumstances Motion], p. 6.

application for review of his remuneration on the basis of "exceptional circumstances" as provided for in the Legal Service Contract.[5]

5. On the 26th of April 2007, the Arbitrator rendered a Decision and 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 sizable to amount to exceptional circumstances as to warrant the provision of additional resources under the special consideration clause in the Legal Service Contract.[6]

6. Negotiations between the Parties took place on the 20th and 21st of July 2007 on the implementation of the Arbitrator's decision ("Negotiations").[7] While a consensus was reached on a number of points including a significant increase in the amount of funding available, disagreement persists as to whether the allocation by the Registrar of additional funds for the hiring of additional Defence Co-Counsel until the end of the Defence case is necessary to implement the Arbitration Decision.

7. On the 5th of September 2007, Mr. Jordash, filed an Application for a Judicial Review of Registry's Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Decision of the 26th of April 2007.[8] The Registrar, on the 17th September 2007, filed a Response to the Application, and Learned Counsel for the Defence filed a Reply to it on the 24th of September 2007.[9]

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[5] Application for Judicial Review, Annex F at Article 4. *See also* Application for Judicial Review, Annex F at Article 9 (Article 9 provides in part that "any dispute between the DOSCSL [Defence Office of the Special Court for Sierra Leone] and Contracting Counsel arising out of the interpretation or application of this Agreement which is not settled by negotiation shall be subject to the procedure contained in Article 22 of the Directive on the Assignment of Counsel." Article 22 of this Directive provides for an arbitration procedure).

[6] Decision of the Arbitrator In the Matter of an Arbitration Pursuant to Article 9 of the Legal Service Contract and Article 22 of the Directive on the Assignment of Counsel and in the Matter of an Arbitration between Wayne Jordash, Assigned and Lead Counsel for Issay Sesay (Claimant) and the Principal Defender of the Special Court for Sierra Leone (1st Respondent) and the Registrar of the Special Court for Sierra Leone (2nd Respondent), 26 April 2007 [Arbitration Decision], para 7.16.

[7] Application for Judicial Review, para 3; Submission by the Registrar 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, 17 September 2007 [Response to Application for Judicial Review], paras 11-12. *See also* Application for Judicial Review, Confidential Annexes B, I, L, M, N, O, P, Q, R and U.

[8] *See* Application for Judicial Review.

[9] *See* Response to Application for Judicial Review.

II. SUBMISSIONS OF THE PARTIES

1. Submissions of the Defence

8. In his *Ex Parte* Confidential Filing of the 5th of April 2006, seeking additional funds under the rubric of "Exceptional Circumstances", Mr. Jordash recounts the reasons which he advances to justify his request, including that:

> 1. Additional funds were to ensure that Mr. Sesay was adequately represented given the "size and complexity" of the case: that the case against Mr. Sesay was approximately 50% larger and significantly more complex than any other Accused at the Special Court and that the case was one of the biggest cases before any of the International Criminal Tribunals.[10]
>
> 2. [t]he case against Mr. Sesay is significantly more complex than *some* of the other Accused at the Special Court [...]. The Sesay case is significantly larger and more complex than all other cases at the Special Court.[11]

9. In his Application for Judicial Review of the Registrar's 40% offer for additional funding filed on the 7th of September 2007, Mr. Jordash, in a bid to reinforce his claim for more funds to be made available to his Defence Team, further advances this same argument as one of the three reasons he details to distinguish the Sesay case from others stating that:

> given the size and complexity of the Sesay case, the increased work load of the Defence case and the independent finding that the original budget of (25,000 USD per month) is inadequate.[12]

10. In Confidential Annex C attached to the Application for Judicial Review, the Sesay Defence provided its submissions during the Arbitration Proceeding, including a comparison of the Sesay Defence case to that of the cases of the Second and Third Accused as well as comparing his case to that of the Defence Teams in the AFRC and CDF cases.[13]

11. The second argument which Mr. Jordash advances to buttress his claim is that he is entitled to additional funding **"given the resources that the Registry has made available to the Taylor Defence Team for a smaller and less complex case."**[14] In effect, Mr. Jordash pegs the quantum of the entitlements for his client's case on the resources that were made available to the completely new

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[10] *See* Application for Review of Decision on the Exceptional Circumstances Request, para 8(a).
[11] *Ibid.*, para 12.
[12] Application for Judicial Review, para 4.
[13] Application for Judicial Review, Confidential Annex C.
[14] *See* Application for Judicial Review, para 4 [emphasis added].

Defence Team in Ex President Charles Taylor's case. He claims that this same Registrar who acceded to the request of the Taylor Defence Team for more resources, should equally accord even more funds to the Sesay Defence Team, because, as he argues, his case is bigger than the Taylor Defence Team's case.

12. The third reason which Mr. Jordash advances to sustain his claim is that he is entitled to more resources "given the size of the resources provided to the Prosecution Team as a whole and in particular the RUF trial."[15]

2. The Registrar's Submissions on the Sesay Defence Team's Requests for Additional Funding

13. The Registrar submits, following the rendering of the Arbitration Decision, that both Parties held meetings to negotiate how additional fees were to be calculated.[16] He contends that they agreed that a 40% enhancement of the 25,000 USD maximum monthly payment under the Legal Service Contract would properly compensate the Sesay Defence Team.[17] It is noted that the 40% increase raises the Sesay Defence Team's previously existing renumeration of 25,000 USD per month to 35,000 USD per month.[18]

14. The Registrar submits the Sesay Defence Team failed to bring up the issue of additional funds for an additional Counsel until the final negotiation meetings held on the 20th and 21st of June 2007. The Registrar further submits that it was agreed at these meetings to consider the issue of providing funds for additional Counsel for the Sesay Defence.[19] The Registrar submits however, that the 40% enhancement allows the Sesay Defence to recruit and compensate additional Counsel and further submits that he was willing to provide extra funds to be used for the temporary extra reinforcement of the Defence Team.[20]

15. In a letter dated the 23rd of July 2007, the Registrar proposed, in order to accommodate the Sesay Defence's request for funds for immediate funds for additional Counsel, the monthly budget cap of 35,000 USD for the Sesay Defence will be raised to 45,000 USD while their defence case is

[15] *Ibid.*, para 4.
[16] Response to Application for Judicial Review, para 11.
[17] *Ibid.*, para 12.
[18] *Ibid.*, para 15.
[19] *Ibid.*, paras 12, 14-19.
[20] *Ibid.*, para 17.

ongoing. After the Sesay Defence case is presented, the cap would be lowered to 25,000 USD in order to account for the temporary increase during the ongoing Sesay case.[21] The Registrar submits that the distribution of funds and composition of a Defence Team rests with Lead and Assigned Counsel and that some Defence Teams at the Special Court use more than one Defence Counsel but within the framework of their allocated budget. The Registrar further submits that the 40% enhancement allows the Sesay Defence Team to recruit additional Counsel should they really wish to do so.[22]

16. The Registrar states that the Sesay Defence Team has rejected the Registrar's offer to compromise on and accommodate the need for additional funds.[23]

III. DELIBERATIONS

1. Jurisdiction

17. At the outset, the Trial Chamber considers it necessary to determine whether or not it has jurisdiction to judicially review the decision of the Registrar not to provide additional funds for an additional Counsel as a part of the implementation of the arbitration decision.

18. Under the Statute and Rules of the Special Court, the Trial Chamber is vested with the authority and obligation to guarantee to the Accused Person, a fair trial and further, to ensure the proper administration of justice.

19. Article 17 of the Statute provides for the protection of the rights of the accused and states, *inter alia*, that the accused shall be entitled to a fair hearing and be guaranteed "adequate time and facilities for the preparation of his or her defence".[24]

20. Rule 26*bis* of the Rules further provides that:

> The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in

[21] Application for Judicial Review, Annex K.
[22] Response to Application for Judicial Review, paras 17-21.
[23] *Ibid.*, p. 10.
[24] Statute of the Special Court, Article 17(2) and (4)(b).

> accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.[25]

21. In accordance with the Statute and Rules, We consider that the Chamber may, in limited circumstances dictated by the interests of justice, judicially review decisions of the Registrar where they may affect fundamental trial rights of an accused and impact negatively on the statutory requirements of Article 17 of the Statute and Rule *26bis* of the Rules.[26]

22. The current Application raises the issue of whether or not the Sesay Defence Team has been provided with adequate resources to properly conduct the defence of the Accused Sesay. As the Chamber has noted, each Accused before the Court is entitled to be granted adequate time and facilities for the preparation of his defence under Article 17(4)(d) of the Statute. The Chamber is satisfied that the Registrar's decision, in this regard, could impact on the rights of the Accused under Article 17 and that it therefore can invoke its inherent jurisdiction in these circumstances to review the Registrar's refusal to provide additional funds for an additional Counsel as a part of the implementation of the Arbitration Decision of the 26th of April 2007.

2. Arguments Advanced by the Sesay Defence

2.1. Size and Complexity of Sesay's Case

23. In relation to the issue of the size and complexity of the Sesay case, the Chamber is of the opinion that it is not necessarily the number of Counts on the Indictment or the extensive number of witnesses that a party seeks to or in fact calls to establish his case that determines its size or its complexity.

24. We say this because it is, on the contrary, trite law that what is necessary for judicial purposes, is the quality of the witnesses who, even though numerically small, can better and more effectively establish any given case than if their numbers were multiplied. In this regard, we lay more emphasis

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[25] Rules of Procedure and Evidence of the Special Court, Rule 26*bis*.

[26] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision on Applicant's Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel (TC), 6 May 2004 [*Brima* Decision on Denial to Enter a Legal Service Contract], para 39. This finding was endorsed by the Appeals Chamber in *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-AR73, Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara (AC), 8 December 2005, paras 72-78 [Appeals Chamber Decision on Re-Appointment of Counsel]. *See also Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Confidential Motion on Detention Issue, 3 March 2005, paras 17-19.

on the quality, the credibility, the focus and the probative value of the testimony of witnesses on matters which are relevant to the core issues that relate to the crimes alleged in the Indictment.

25. The Chamber notes here that the Sesay Defence Team had originally indicated that it would be calling 149 "Core" witnesses and that Learned Counsel, at the behest of the Chamber, recently reduced that number quite significantly.[27]

2.2. Equality of Arms between the Sesay Defence Team and the Taylor Defence Team

26. Mr. Jordash claims that "bearing in mind that the Sesay Defence case is the most sizeable and complex case at the Special Court, the resources required ought to be equal to or larger than those provided to the Taylor Defence Team. This would ensure that the minimum guarantee of equality of arms - guaranteed by the Registry in the Taylor case - is also guaranteed in the Sesay case."[28]

27. In making such a claim, it is the Chamber's understanding that Mr. Jordash, motivated by the financial allocations that have been made available to the Taylor Defence Team, is seeking to rewrite the remunerative clauses of the Sesay Legal Service Contract that has no bearing whatsoever on, or relationship with, the Taylor Trial.

28. While we fail as a Chamber to appreciate the basis on which Mr. Jordash is assessing the size and the complexity of the Taylor case, we would only observe here that the Taylor case has been relocated to The Hague in the Netherlands. The Defence Team for Taylor, which at that time was completely and entirely new to the case, was put together in an emergency after the demise of the initial Defence Team that was headed by Learned Counsel, Karim Khan.[29] It has emerged from the proceedings in Trial Chamber II that this new Team has Mr. Taylor's immense Presidential documentation to scrutinise and to master for purposes of efficiently and effectively conducting his defence within very limited timeframes, and particularly of ensuring a proper and thorough cross examination of the Prosecution witnesses. We observe here that Mr. Jordash has been involved in the

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[27] Sesay- Filing of Documents in Compliance with Scheduling Order Concerning the Preparation and the Commencement of the Defence Case, Dated 30th October 2006, 5 March 2007; 8th February 2008 Notice of Changes to Sesay Defence "Core" Witness List and Notice of Prospective Call Order of Witnesses, 8 February 2008.

[28] Application for Judicial Review, para 6.

[29] The Chamber notes that the Taylor Defence Team was appointed as counsel on the 17th of July 2007, over two months after the Arbitration Decision in this case was rendered. The size and complexity of the Taylor case and the resources of the new Taylor Defence Team were not factors considered by the Arbitrator in rendering the Arbitration Decision. *See Prosecutor v. Taylor*, SCSL-2003-01-T, Principal Defender's Decision Accepting the Withdrawal of Mr. Karim Khan as Assigned Counsel to Mr. Charles Ghankay Taylor, 14 June 2007. *See also Prosecution v. Taylor*, SCSL-2003-01-T, Principal Defender's Decision Assigning New Counsel to Charles Ghankay Taylor, 17 July 2007.

Sesay case since July 2003 and that he cannot compare his situation to that of the new Taylor Defence Team that was given a limited timeframe to get ready and proceed with the trial.

29. The Chamber, in this regard, is of the view that the remuneration that has been arrived at for the Taylor Defence Team should under no circumstances impact the Sesay Defence case or remuneration for the Sesay Defence Team, nor should it be used as a yardstick to resolve the current dispute, which has no jurisdictional relationship whatsoever to the Taylor case.

30. The Chamber opines that Mr. Jordash should not assess his case against the background of Taylor's case, where the cost of that trial is supposed to be and will indeed be much higher than it is for the entire RUF Trial (that is taking place here in Freetown) because of the delocalisation of the Judges, the Staff, the witnesses and other logistics to The Hague. He should rather, in our opinion, view his costs against the background and conditions laid down in the Legal Service Contracts in his, Sesay's and the entire RUF case and as it concerns not only his Client but also his Client's Co-Accused, Morris Kallon and Augustine Gbao, all of whom are being tried locally.

31. We do observe here that Mr. Jordash's personal appreciation of the complexity of Mr. Taylor's case could or may well turn out to be a misjudgement on his part because he neither knows any more than he must have been told about it, nor does he have a mastery of the evidence that the Prosecution and the Defence will call in the course of the Taylor proceedings. Indeed, the Chamber is of the opinion that Learned Counsel, Mr. Jordash, cannot, in these circumstances, make a judgement on a subject as complex as this for which he is neither factually nor evidentially equipped to arrive at the conclusion he has made in comparing the Sesay and the Taylor cases.

32. Mr. Jordash, to support his argument cites the *Tadic* case.[30] The Chamber agrees with the *Tadic* principle but only to the extent that equality of arms means that each Party must have a reasonable opportunity to defend its interests **"under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent"**[31] and that "the Trial Chamber **shall therefore provide every practicable facility it is capable of granting** under the Rules and Statute when faced with a request by a Party for assistance in presenting its case."[32]

33. It is the Chamber's view that the scenario envisaged in the *Tadic* case is more related to the doctrine of equality of arms that a Chamber is supposed to ensure in handling the rights between the

[30] *Prosecutor v. Tadic*, IT-94-1-A, Judgement (AC), July 15 1999, paras 43, 44, 48 and 52.
[31] *Ibid.*, para 48 *citing Kaufman v. Belgium* [1986] 50 DR 98, 115 [emphasis added].

Prosecution and the Defence in any given case. In the Chamber's view this principle, which is grounded on a very solid foundation, applies more to the procedural balances that are to be observed and maintained by the Chamber within the confines and context of the doctrine of fundamental fairness to all the Parties in a case, the Prosecution and the Defence alike, so that no Party, within the context of its case, is disadvantaged. It does not mean that the means placed at the disposal of the Defence Teams must be the same in all Defence cases, albeit in the same Court, because this may, and must indeed vary depending on the particular and peculiar circumstances of each case, be it the Prosecution's or the Defence's.

34. In this regard, it is our considered view that the doctrine of equality of arms applies and should only apply to Parties in the same case and in the same proceedings. It cannot be, as Mr. Jordash seems to be submitting, that the arms in one case and scenario such as Taylor's, should be used as a measuring rod for the means and arms that should be provided in a completely different case and situation such as Sesay's.

35. Indeed, the Chamber would be creating an opening for financially speculative expeditions if Parties were allowed and given the latitude to alter and to make additional claims for their cases on the basis of the seemingly attractive and advantageous financial conditions which apply to another case, like Taylor's, and which as we have recognized is different and placed in a different context.

36. It is therefore the considered opinion of the Chamber that the Taylor case element which Mr. Jordash is citing to justify his claim is extraneous, unfounded and inapplicable to the Sesay case.

2.3. Equality of Arms between the Prosecution and the Sesay Defence Team

37. One of the arguments that has always been raised by Mr. Jordash to sustain his alleged violation of the doctrine of equality of arms by the Chamber is that the Prosecution is provided with more financial and human resources (about seven lawyers appearing at any one time for the Prosecution as he submits) when he is only assisted by one Co-Counsel and with much less financial resources than those placed at the disposal of Prosecution by the Registrar.[33]

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[32] *Ibid* [emphasis added].

[33] *But see* Transcript of 21 July 2004; Transcript of 5 October 2004; Transcript of 4 February 2005; Transcript of 26 April 2005; Transcript of 23 November 2005; Transcript of 22 March 2006; Transcript of 7 July 2006; Transcript of 31 May 2007; Transcript of 11 October 2007.

38. The Chamber would like to draw Mr. Jordash's attention to the fact that the Prosecution is an independent Statutory Organ of the Special Court that has varied and different functions as enshrined in the provisions of Article 15 of the Statute.[34] Even if it were conceded that the Prosecution is represented at any one time by more than one Counsel, an allegation which is not accurately presented, Mr. Jordash knows that the entire Defence Teams of the three Accused Persons who Prosecuting Counsel are proceeding against jointly, are also represented by a good number of Lawyers at any given time including some Legal Assistants and/or Interns, just as the Prosecution is at any given time. The allegation of a breach of the principle of equality of arms in these circumstances therefore lacks any merit.

39. In addition, the Chamber would like to reaffirm the principle that the Prosecution bears the burden of proving beyond a reasonable doubt, every count and every essential element of those counts, while the Defence only needs to raise a reasonable doubt in order to secure the acquittal of the Accused. This reality, we consider, might justify the attribution of more resources and more time to enable the Prosecution to accomplish this very heavy and delicate task. The Chamber, in this regard, refers to its decision in the CDF case[35] in which we cited and relied on the ICTY Appeals Chamber Decision in *Oric* where the Learned Justices in that case had this to say:

> The Appeals Chamber has long recognized that "the Principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee." At a minimum, "equality of arms obligates a judicial body to ensure that neither party is put as a disadvantage when presenting its case," certainly in terms of procedural equity. This is not to say, however, that an Accused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution. The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defence strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavour which may require less time and fewer witnesses.[36]

40. We remain guided by this dictum and accordingly conclude that Mr. Jordash's appeal for additional funds, in so far as it is predicated on the resources placed at the disposal of the Prosecution and or to the Defence Team of the Taylor's case, is untenable because it is ostensibly without any legal foundation or justification.

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[34] *See* Statute of the Special Court, Article 15.

[35] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order to the First Accused to Re-file Summaries of Witness Testimonies (TC), 2 March 2006, p. 3.

[36] *Prosecutor v. Oric*, IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case (AC), 20 July 2005, para 7.

3. Conclusion

41. The Registrar, like all of the organs of the Special Court, has the responsibility for ensuring the respect of the rights of the Accused pursuant to Article 17 of the Statute. His responsibility in this regard has been delegated in part to the Defence Office in accordance with Rule 45 of the Rules.[37] It is, therefore, clear that it is the Registrar and the Defence Office who bear the principal responsibility of ensuring that the Defence Teams for each Accused before the Court are provided with adequate resources.[38]

42. In the present case, the Arbitrator found that the case against Issa Sesay "is sufficiently serious, complex or sizable to amount to exceptional circumstances as to warrant the provision of additional resources under the special consideration clause in the Legal Service Contract."[39] During the negotiations that were subsequently held to implement this decision, the Registrar agreed to effectively increase the maximum cap on the monthly payments to the Sesay Defence Team by 40%.[40] The Registrar also agreed to provide funds for an international investigator at the P-3 level for a period of four months.[41]

43. The Sesay Defence also sought funds additional to this 40% increase in order to hire an additional Counsel for the Sesay Defence Team. During the negotiations, the Registrar offered to provide the Defence with a further 10,000 USD per month, that is, a cap of 45,000 USD per month, for the duration of the presentation of the defence case of the Accused Sesay on the condition that this amount would then be "clawed back" during the remainder of the trial hearings. The Registrar maintains that this proposal was consistent with the arbitration decision.[42]

44. The Chamber has carefully reviewed all of the materials that have been submitted to it relating to this Motion and concludes that the 40% enhancement to the maximum payment to the

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[37] Appeals Chamber Decision on Re-Appointment of Counsel, para 84. *See also* paras 80-81.

[38] *See* Confidential Legal Service Contracts in Partial Fulfillment of the Chamber's Interim Order of 1 November 2007, 5 November 2007, Annex A, Legal Service Contract No. 2005/03, p. 1; Addendum to the Legal Service Contract and Contract Specification, Rule 19. The decision of the Registrar refusing the motion by the Sesay Defence for "exceptional circumstances" consideration was eventually referred to arbitration for determination in accordance with Article 22 of the Directive on the Assignment of Counsel: *See* Decision on "Exceptional Circumstances" Motion.

[39] Arbitration Decision, para 7.16.

[40] The Sesay Defence Team was given a lump sum payment of 370,000 USD in order to represent this 40% increase in the monthly cap on payments from November 2003 until November 2006. With regard to future work from December 2006 until the end of the hearings, the Sesay Defence Team was given a maximum cap of 35,000 USD per month instead of the 25,000 USD cap that had previously been provided for. *See* Submission by the Registrar, paras 13-14.

[41] Application for Judicial Review, Annex B, Letter from Registrar dated 13 July 2007.

Defence Team effectively implements the Arbitration Decision of the 26th of April 2007. It was, therefore in our considered opinion, reasonable for the Registrar to argue that he has satisfied the Defence's request for funds to hire an additional Counsel within the framework of this 40% increase. The Registrar offered to increase the maximum monthly payment to the Sesay Defence Team by a further 10,000 USD during the duration of the presentation of the Sesay Defence case on the condition that this amount be taken back during the remainder of the hearings in the RUF trial.

45. The Chamber notes that if this arrangement were accepted, it could have resulted in a larger sum of money being disbursed to the Sesay Defence that would be later recouped at the end of the Sesay Defence case and the other Defence cases. The Chamber is also satisfied that this proposal was reasonable and could have provided additional assistance to the Sesay Defence Team when they claim it was needed most and would have provided smaller resources when the demands on the Sesay Defence are correspondingly smaller.

46. In effect, we find that the Registrar was exercising his discretion in his capacity as an Administrative Official in deciding that this amount was adequate to meet up with the Sesay Defence aspirations and application. In this regard, it is our view that the Courts will not interfere with the exercise of discretion by an administrative official except where it is so unreasonable that no rational authority could have arrived at a similar conclusion.[43]

47. In determining whether the Registrar had properly exercised his administrative discretion in the *Brima* case, this Chamber stated:

> As a matter of law, and we so hold, a discretion cannot be exercised when the issue in respect of which it is purported to be exercised, is not provided for by law, or where the exercise of such a discretion is either contrary to the law or manifestly unreasonable. [44]

Furthermore, it is well established that for discretion to be exercised validly it must have been exercised reasonably, fairly and justly. [45]

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[42] Application for Judicial Review, Annex B, Letter from Registrar dated 13 July 2007; Annex K, Letter from Registrar dated 23 July 2007; Annex O, Letter from Registrar dated 1 August 2007.

[43] *See Hadmore Productions v. Hamilton* [1983] 1 AC 191, 220 (holding the Court may set aside a judge's exercise of his discretion where no reasonable judge, regardful of his duty to act judicially, could have reached the same decision).

[44] *Brima* Decision on Denial to Enter a Legal Service Contract, para 97.

[45] *See Mobil Oil Australia Limited v. Federal Commissioner of Taxation* [1953] 113 C.L.R. 475, 504 (holding "what the law requires in the discharge of a quasi-judicial function is judicial fairness"). *See also Wales v. Osmond* [1986] 159 CLR 656, 662; *Hadmore Productions v. Hamilton* [1983] 1 AC at 220.

48. In light of all of the circumstances, the Chamber finds that the offer of the Registrar is not only fair, but also just and reasonable and would certainly have alleviated any concerns or reservations the Defence might have had as to its ability to proceed with their Client's case.

49. It is indeed the Chamber's view that the clear option for the Sesay Defence to adopt immediately, in the circumstances and given the status of other related cases, was, and still remains, given the circumstances surrounding this and other related cases, the employment of an additional Counsel within the framework of the global resources that have now been granted and offered to it, rather than wait, to our mind, erroneously and misguidedly, for or expect to receive the same or identical resources as those attributed to the very recently and hurriedly constituted Taylor Defence Team before doing so.

50. We therefore reject the Defence request to quash the Registry's offer to provide 10,000 USD per month for an additional Counsel and its claw back provision.

51. The Chamber further reiterates that the resources provided to the Taylor Defence Team are irrelevant to the present matter and accordingly reject the Defence request for an Order to be issued to the Registrar to provide the Sesay Defence Team with the same resources that he has made available to the Taylor Defence Team.

52. The Chamber, in the light of the foregoing analysis, is indeed satisfied that the Registrar's decision refusing to provide Mr. Jordash, Lead Counsel for the Sesay Defence Team, with funds in addition to the 40% enhancement to enable him to hire an additional Counsel during the presentation of the Sesay Defence case, is fair and reasonable and does not violate the rights of the Accused under Article 17 of the Statute. Consequently, the Chamber finds no reason to invoke the exercise of its inherent jurisdiction to modify or annul the Registrar's Decision.

IV. DISPOSITION

FOR THESE REASONS, the Application is dismissed in its entirety.

Done at Freetown, Sierra Leone, this 12th day of February 2008

Hon. Justice Pierre Boutet

Hon. Justice Benjamin Mutanga Itoe
Presiding Judge
Trial Chamber I

Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]