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SCSL-04-15-T
(25688 - 25701)

25688

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

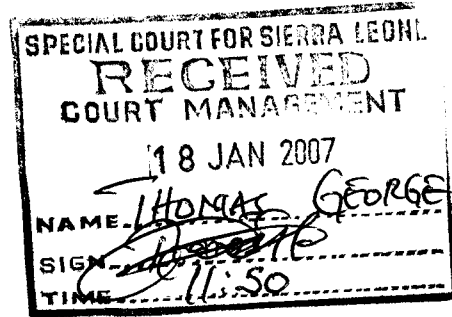
Hon. Justice Pierre Boutet, Presiding

Hon. Justice Benjamin Itoe,

Hon. Justice Bankole Thompson

Registrar: Mr. Lovemore G. Munlo, SC

Date filed: 18th January 2007



Issa Hassan Sesay

-v-

The Registry

Case No: SCSL - 04 - 15 - T

Logistical resources

**Application seeking adequate resources pursuant to Rule 45
and/or pursuant to the Registrar's duty to ensure equality of arms
(Application I)**

Office of the Principal Defender

Vincent Nmehielle

Defence Counsel

Mr. Wayne Jordash

Ms. Sareta Ashraph

1. The resources provided by the Registry/ Office of the Principal Defender (the “Defence Office”) to prepare and present the defence for Mr. Sesay are wholly inadequate, bearing in mind the size and complexity of the case and the amount of work required to ensure effective preparation. The resources (financial and otherwise¹), as currently provided, disadvantage the Sesay Defence (the “Defence”) to such an extent that it cannot properly prepare the defence case.
2. The following is an application seeking an order from the Trial Chamber to compel the Defence Office and/or the Registry to provide specified resources to ensure an effective defence and a fair trial pursuant to Article 17 of the Statute of the Special Court. The Defence has requested these resources but the Defence Office has refused to provide them or offer any alternatives. The Defence seeks an expedited exchange of pleadings and decision in order to ensure that ongoing prejudice is expeditiously remedied and to ensure that the Defence preparations are not further delayed or hindered by the lack of resources.
3. The following resources are sought as a matter of absolute urgency:
 - (i) A second office: at a minimum to be the same size as the present office provided (approximately 15 feet by 7 feet);
 - (ii) A second networked computer (to be shared between 2 Counsel and 3 legal assistants);
 - (iii) One vehicle for the sole use of the Sesay defence team throughout the remainder of its case;
 - (iv) A witness management officer dedicated to finding and locating witnesses, until the Witness and Victim’s Unit are able to act in this capacity (at the time the Defence case is opened); and
 - (v) Funding for one investigator with international experience throughout the remainder of the Sesay defence case.

¹ The Defence excludes for the purposes of this Motion the issue of adequate fees and/or expenses for Counsel or Legal Assistants. The issue of adequate funding for Counsel (above a P1 level during the defence case) and DLA for defence team members (consistent with other professionals at the court) is being adjudicated through arbitration with the Registry/Defence Office through the process outlined in Article 22 of the Directive on the Assignment of Counsel and will not be addressed in this Motion.

The Law

4. The principle of equality of arms has been described as the most important element of a fair trial and is widely recognised as a fundamental principle of customary international law².

Practical Objective of Equality of Arms³

5. Equality of arms does not mean that that every aspect of the trial process has to be slavishly viewed to achieve complete parity with the Prosecution.⁴ The real focus of the principle instead compels “a judicial body to ensure that neither party is put at a disadvantage when presenting its case”.⁵ International Tribunals must interpret the principle of equality of arms more broadly than domestic courts and the Defence “must enjoy all the measures which may be granted so as to help them present their case”.⁶ In *Tadic* the ICTY stated: “the Chamber shall 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”⁷ an approach which has been endorsed by the ICTR on many occasions.

Breach of Duty: failure to provide adequate resources

² This fundamental status is reflected in numerous international instruments. Article 3 common to the Geneva Conventions prohibits the passing of sentences by judgments that do not afford “all the judicial guarantees which are recognized as indispensable by civilized peoples” (Article 3(d) of the Geneva Conventions of 12 August 1949). The International Covenant on Civil and Political Rights (“ICCPR”) guarantees essential elements of a fair trial which have been interpreted by as involving at a minimum equality of arms. See also Article 7 of the African Charter on Human and People’s Rights, Article 6(1) of the European Convention on Human Rights and Article 8(1) of the American Convention on Human Rights. In the specific realm of international criminal law, Article 67 of the International Criminal Court and Article 20 of the International Tribunals for Yugoslavia (“ICTY”) and Rwanda (“ICTR”) specifically guarantee the rights of the accused to a fair hearing and to minimum guarantees including the right to have adequate time and facilities to prepare the defence. The principle of equality of arms is “firmly accepted” in the jurisprudence of the ICTY and has been held to be at the heart of fair trial guarantees” (*Prosecutor v. Tadic*, 15th July 1999, Case No. IT-94-1-A, 15th July 1999, at para. 44). Article 17 of the Statute of the Special Court for Sierra Leone (“the Statute”) mirrors this international commitment to the principle of equality of arms.

³ In the case of *Tadic*, Judge Vohrah stated that “the principle is intended in an ordinary trial to ensure that the defence has means to prepare and present its case equal to those available to the Prosecution which has all the advantages of the State on its side.” (*Prosecutor v. Tadic*, Case No. IT-94-1, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements, 27th November 1996). In criminal proceedings the principle is therefore of the utmost importance and should, much as possible, elevate the defence to the level of the Prosecution in its ability to prepare and present its case.

⁴ *Prosecutor v. Kayishema*, Case No. ICTR - 095-1, 21st May 1999, at para 60.

⁵ *Prosecutor v. Tadic*, Case No. IT-94-1-A, 15th July 1999, at para 48.

⁶ *Prosecutor v. Radoslav Brdanin and Momir Talic*, IT-99-36/1, 11th September 2000 at pp. 2.

⁷ *Prosecutor v. Tadic*, 15th July 1999, Case No. IT-94-1-A, at para. 52.

6. The Registry/Defence Office has an irrevocable duty to provide the Defence with adequate resources for the preparation of its case. Rule 45 inter alia states that the Defence Office must provide “adequate facilities for counsel in the preparation of the defence”. The Defence submits that the Defence Office have failed to ensure adequate resources and are in breach of Rule 45. The Registry has failed to ensure equality of arms in breach of Article 17 of the Statute of the Special Court.

Factual basis for Requests

7. The present Motion is predicated upon the following features of the Defence case and the resources allocated by the Defence Office pursuant to Rule 45. Since December 2003, the Defence have located and interviewed over 250 witnesses. This has been achieved with only one national investigator (employed since November 2003 at \$600 per month) and one international investigator (employed at P3 level for a total of 6 months). The Defence (now consisting of 2 Counsel, 3 legal assistants and one national investigator) are trying to locate 250 of these witnesses for re-interview. 240 witnesses live within Sierra Leone. The remainder are resident within West Africa or Asia. The Defence is trying to locate all of the witnesses to be able to assess who will be called to give evidence.
8. The Defence has one office (15 feet by 7 feet) with 2 desks and one networked computer. There is (cramped) desk space for three persons. The Defence has never been allocated a vehicle for its exclusive use within Sierra Leone. The Defence has not received any assistance from the Defence Office witness management officer. At the time of writing the officer had tendered his resignation and is not expected to be able to assist in locating witnesses in the next four months or at all. The Defence Office does not provide any substantive assistance with locating and organising witnesses. It does not – and has not - provided *any* assistance as regards other aspects of substantive defence preparation including legal research, evidential collation or any other aspect of case management. The Defence Office has provided an Outreach officer who thus far has provided three weeks of Outreach work over an 18 month period. The Defence anticipates that this officer will provide approximately 4 weeks more before the commencement of the

defence case on the 2nd May 2007. This work will not involve any assistance in locating specific defence witnesses.

9. The Prosecution's case similarly involved over 300 witnesses and a core list of about 100 witnesses. The Prosecution has a team of at least 25 investigators (13 national and 12 international). Whilst these were divided between three cases⁸ this would suggest that they were able to call upon at least 10 investigators at any given time to ensure the efficacy of the RUF prosecution. This calculation does not take into account national and international Counsel who were working on the RUF case.⁹ Counsel and legal assistants for the Prosecution have their own networked computer and desk.
10. It is difficult to assess the number of four wheel drive vehicles the Prosecution has to enable these personnel to travel up country whenever they choose in search of witnesses but it must be at least 5 and is probably more. Additionally the Prosecution has a dedicated team of 2 investigators (with their own four wheel drive vehicle) whose sole task it is to search and locate specific witnesses.

Sesay defence Requests

A second office and a second networked computer

11. The desk and storage space provided by the Defence Office is completely inadequate to prepare an effective defence involving 83 prosecution witnesses, the marshalling of 250 defence witnesses and over 100,000 pages of documents. During the Prosecution case the Defence has improvised and used the public café ("The Special Fork") and the library to work. Alternatively Counsel and their legal assistants have balanced their lap tops on their knees in the office. The national investigator does not have any office space. The request for desk space for each member of the team speaks for itself. The Defence Office has thus far declined to act upon this oft repeated request. It is noteworthy that the office space allocated to each member of the Defence Office Staff is vastly larger to that allocated to each member of the Sesay team. The Principal Defender's office (for his sole use) is approximately twice the size of the Sesay team office as is the office for the three Duty Counsel, all of whom have their own desks and computers. Moreover this request is

⁸ Taylor was not arrested until early 2006 and was not therefore an investigative priority.

⁹ During the RUF prosecution case, the prosecution trial team consisted of 4 Counsel and a Case Manager.

not just an issue of adequate resources but also pertains directly to the maintenance of legal privilege and safety and security of protected witnesses. The Defence is not prepared to continue to work on papers involving confidential material and protected defence witnesses in public spaces such as the Special Fork or the Court library.

12. The Sesay Defence has been allocated one networked computer. This is the sole working access for five lawyers to conduct legal research, prepare documents and generally case manage. The inequity of this speaks for itself. It is grossly unfair to provide each Prosecution Counsel with their own computer and yet expect a team of 5 defence lawyers to share one. It is equally unfair to provide the Defence Office with a room for its staff which contains 5 networked computers, used mainly by Defence Office interns¹⁰ who do not assist the Sesay defence team. It is noteworthy that every member of the Defence Office staff has their own networked computer. None of these staff assist the Sesay Defence with any substantive legal work or research.

One vehicle for the sole use of the Defence throughout the remainder of its case.

13. The Defence are working full time in trying to find and re-interview 250 witnesses. It is estimated that this will involve continuous trips to the provinces from January until the end of the Sesay defence case. The Witness and Victim's unit can assist in bringing witnesses to Freetown *when* the witnesses have been located. The Transport section of the court has been extremely accommodating throughout the Prosecution case.¹¹ However court transport is (naturally) limited by the need to provide transport to the whole court and by a policy that limits the number of trips it can conduct on behalf of the Defence to two at any given time. There are currently two other defence teams that must be accommodated. **The Defence is currently unable to investigate due to transport accommodating the requirements of the Kallon team.**¹² There must be a two day

¹⁰ It is an unfortunate indictment of Registry policy that all professionals at the court including temporarily employed interns, except for Defence Counsel, appear able to secure individual access to their own networked computer. It is equally unfortunate that the Defence Office appears unconcerned by this "anomaly" and instead places undue restrictions upon Defence teams in the use of the computers in their "staff room".

¹¹ We accept the Principal Defender's categorisation that our team has "generously benefited" from their provision and we have nothing but praise for the section and the drivers.

¹² Please see email received by Counsel on the 8th January 2007 from Ms. Bronwyn Grieve, Legal Assistant to the Sesay team; Annex A

interval between each trip. We estimate that the Transport section will be able to provide around 2 months of trips to the provinces in the next four months. Applying a somewhat optimistic estimation of being able to re-interview 2 witnesses a day this will enable the Defence to re-interview about 120 witnesses before the start of defence case.

14. This provision does not even start to deal with the real issue which is the task of locating the witnesses. The Defence needs to have the ability to travel when and where it chooses to be able to find its witnesses who may have moved from the village where they did the initial interview. The national investigator, who is naturally involved in this procedure, does not have a vehicle. The Defence Office has the sole use of 2 vehicles. One is used exclusively by the Principal Defender. The other vehicle cannot be used "up country" and in any event must remain in Freetown to enable the Defence Office staff and defence teams to travel to and from work.
15. In order to prepare the defence we need unfettered access to a vehicle so we can conduct searches for witnesses when we decide and not when transport is available or can be arranged. This provision – with court transport – would allow our team to investigate continuously through the next 8 months and provides some hope of finding all the witnesses and potential witnesses.
16. It is regretful that the team has to allocate qualified lawyers full time to the investigation (rather than substantive legal work) due to the fact that the Defence Office has allocated only one investigator to the Sesay team but to then be handicapped further by being forced to use public transport to conduct part of its investigation prevents effective preparation. It is impossible to prepare the Defence case *in time* when travel, outside of the official transport provision, involves the use of taxis and the *poda poda*. The RUF Prosecution team throughout the RUF case had the exclusive use of at least 5 vehicles, a dedicated search team, the potential of being able to call upon a minimum of 10 (out of a possible 25) investigators at any given time and also access to the same court transport provision. The Defence whilst managing a similar number of witnesses has one national investigator, no vehicle and no search team. It is grossly unfair, impracticable and ultimately impossible.

A witness management officer dedicated to finding and locating witnesses until the Witness and Victim's Unit are able to act in this capacity

17. The Defence Office has one witness management officer. At the time of writing the witness management officer had not assisted the Defence team in any respect. Moreover the Officer has handed in his resignation. The Defence Office has rightly identified a need for this officer. As noted above the Prosecution has a dedicated search team working full time with their own vehicle. This team, consisting of 2 investigators and one driver, has been used to search for witnesses to enable them to be interviewed. The issue is one of necessity and proportionality. The Sesay Defence is trying to marshal approximately 250 witnesses. It is reasonable, looking at the RUF, AFRC and CDF trials to estimate that the Prosecution (prior to the arrest of Mr. Taylor) has been trying to locate approximately three times that number. The Defence ought thus to be allocated a similar facility, albeit reduced proportionately. It is grossly unfair to provide the Prosecution with resources to fund this essential facility but to deny the defence any provision whatsoever.

Funding for one investigator with international experience throughout the remainder of the Sesay defence case;

18. The Defence has received funding for an investigator with international experience for 6 months over a 3 ½ year period. This has been granted in interrupted periods of 2 months due to claimed funding difficulties. This has made it impossible to find professional investigators who rightly expect to be given firm dates of potential employment. The disjointed grant of each 2 months period has prevented the team from attracting and keeping professional investigators. Whilst the Prosecution has a permanent army of international and national investigators (from police forces and investigative agencies from around the world) the Defence has been informed by the Defence Office that they are unable, at this time, to grant our application for a *single* investigator with international experience.¹³ The Principal Defender has stated that we ought to wait until the end of January 2007 when we *might* be granted some provision. The Defence are expected to “make do” with one national investigator struggling to investigate alleged crimes in 8

¹³ See Annex A for the Defence motivation.

districts. The \$600 per month (with \$600 expenses) he receives is derisory compared to the investigative budget allocated to the Prosecution for its 25 investigators.

19. More importantly the Defence has a substantial number of investigative tasks remaining that cannot be carried out by anyone in the current team. The tasks¹⁴ require investigative skills that no-one in the team (including the national investigator) possess. Moreover no-one in the team has the time to spend locating this specific evidence in the next few months as the Defence is overwhelmed with conducting local investigations, witness interviews and drafting. It is fanciful to imagine that the finding and re-interviewing of 250 witnesses in the next four months could be achieved with less than 4 people working full time.
20. Moreover the Defence team has tried to locate many of the witnesses who fall into category (i)¹⁵ but to no avail. The Defence needs a professional investigator with appropriate professional education and skills to locate and make contact with these various personnel. It is unfair to expect lawyers to be able to conduct high level investigations and prepare the remainder of the case. It is completely unrealistic to expect a former Sierra Leonean police officer to assist with the local investigation and simultaneously to conduct the international aspects of the investigation. It is logical to assume that the Prosecution's 12 international investigators have all been gainfully employed for the last 4 years investigating the 10 accused. In light of this fact the Sesay Defence request for a single international investigator for an additional 6 months (12 months provision in total) is eminently reasonable.

Conclusion

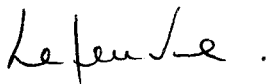
21. The Defence Office has failed to provide any degree of parity in the resources allocated to the Sesay team. The resources provided could not be less without being completely absent. In the circumstances of a defence case involving up to 300 witnesses scattered across the whole of Sierra Leone the provision, such that it is, prevents an effective defence.

¹⁴ See Annex A.

¹⁵ See Annex A.

22. The Sesay Defence, by virtue of the size and complexity of its case, has been most affected by this inadequate funding and has struggled throughout the prosecution case to cope with the work load. This has involved working excessively long hours, working for free for approximately 20-30% of the time, placing legal assistants (qualified lawyers) on subsistence incomes and Counsel on reduced hourly rates, working in the Special Fork and from home, relying upon friends and relatives of the Accused to assist and hiring taxis and poda podas (funded by team members and not reimbursable by the Court) to conduct investigations.
23. In most instances the resources allocated by the Defence Office have been obtained only after huge administrative struggles and regrettably often only after issuing threats to seek remedies from the Trial Chamber.¹⁶ These struggles have themselves hugely affected the effectiveness of the defence preparation. It is a testament to the talents and diligence of the legal assistants employed by the team that Counsel have thus far been able to manage to operate with any degree of effectiveness. The situation is demoralizing, exhausting and wholly unfair. The very fact that 5 defence lawyers are being forced to work in a room the size of a cupboard (and that this compares so poorly with all other professionals employed by the court including Defence Office Staff) speaks volumes, not just about the overall resources available to the Defence, but also the priorities of the Registry and the Defence Office.
24. The requests herein are the very minimum that are necessary to be able to prepare the defence. In truth much more is needed but the Defence will be able, with a struggle, to cope if the requests herein are granted. Otherwise a fair trial is impossible.

Dated 18th January 2007



f.p Wayne Jordash

Sareta Ashraph

¹⁶ For example, obtaining the first four months of funding for an international investigator.

25698

BOOK OF AUTHORITIES

- i. *Prosecutor v. Tadic*, Case No. IT-94-1-A, 15th July 1999 (readily available on the ICTY website)
- ii. *Prosecutor v. Tadic*, Case No. IT-94-1, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements, 27th November 1996 (readily available on the ICTY website)
- iii. *Prosecutor v. Kayishema*, Case No. ICTR-095-1, 21st May 1999 (readily available on the ICTR website)
- iv. *Prosecutor v. Radoslav Brdanin and Momir Talic*, IT-99-36/1, 11th September 2000 (readily available on the ICTY website)

ANNEXES

- A. Email received by Counsel on the 8th January 2007 from Ms. Bronwyn Grieve, Legal Assistant to the Sesay team

ANNEX A

25701

-----Original Message-----

From: Bronwyn Grieve

Sent: 08 January 2007 15:32

To: Sareta Ashraph; Wayne Jordash

Subject: Transport problems

Hi Wayne and Sareta,

Stef may already have emailed you about transport issues, but just to let you know, we are having problems with getting cars. Before we left, we all filled out the MOPs and memoranda and gave them to Arnold to get signed by the PD. But he was not around to sign them, so they were signed today and given to transport by Stef. I advised transport before leaving of my intention to go to Kono. However, Stef was told today that there can only be two cars upcountry at any one time and the Kallon team have booked the cars for the same time as us, so we miss out. This is going to be an ongoing problem leading up to the trial. I think we should raise the issue with the PD as a first step, but we really need to get some fast results. Let me know how you want us to approach this and I'll get onto it tomorrow when I get back.

Cheers

Bron