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SCSL-04-15-T  
(25785 — 25792)

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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: 22 January 2007

SPECIAL COURT FOR SIERRA LEONE	
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Issa Hassan Sesay

-v-

The Registry

Case No: SCSL-2004-15-T

*Expert Provision*

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Joint Response of the First and Second Respondent to Application Seeking Adequate Resources Pursuant to Rule 45 and/or Pursuant to the Registrar's Duty to Ensure Equality of Arms (Application II).

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Registrar (First Respondent)

Mr Lovemore G. Munlo SC

Principal Defender (Second Respondent)

Mr Vincent O. Nmehielle

Defence Counsel

Mr Wayne Jordash

Ms Sareta Ashraph

## I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. On 9 January 2007, Mr. Wayne Jordash and Ms. Sareta Ashraph, Counsel for Mr. Issa Hassan Sesay (hereinafter “the Sesay Team”), filed two applications before Trial Chamber I seeking adequate resources pursuant to Rule 45 and/or pursuant to the Registrar’s duty to ensure equality of arms (*Application I – Logistical Resources* and *Application II – Expert Provision*).<sup>1</sup>
2. In both motions, the Sesay Team named the Office of the Principal Defender (“Defence Office”) as the sole party and requested an order for expedited exchange of pleadings which order was granted on 10 January 2007 by the Honourable Justice Bankole Thompson, Presiding Judge, Trial Chamber I.<sup>2</sup>
3. On 12 January 2007, the Defence Office filed a joint response to the two applications stating that it is not the “primary party” to the applications.<sup>3</sup> On the same day, the Defence filed their Reply to the Defence Office Response.<sup>4</sup>
4. On 17 January 2007, Trial Chamber I issued an Order on the Defence Applications directing the Sesay Team to re-file their applications naming the Registrar and the Defence Office as first and second respondents respectively.<sup>5</sup> The Chamber further ordered that any Response to the said applications by the Registrar and the Defence Office be filed by noon on 22 January 2007.
5. This Response is hereby filed jointly by the Registrar and the Defence Office in compliance with the Trial Chamber’s Order on the Defence Applications.

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<sup>1</sup> *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-04-15-T-673, “Application seeking adequate recourses pursuant to Rule 45 and/or pursuant to the Defence Office/Registrar’s duty to ensure equality of arms” (*Application I-Logistical Resources* and *Application II-Expert Provision*), 9 January 2007.

<sup>2</sup> See *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-04-15-T, “Order for Expedited Filing”, 10 January 2007.

<sup>3</sup> *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-04-15-T-676, “Response to Application Seeking Adequate Resources Pursuant to Rule 45 and/or Pursuant to the Registrar’s Duty to Ensure Equality of Arms” (*Applications I and II*), 12 January 2007.

<sup>4</sup> *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-04-15-T-677, “Defence Motion Seeking an Immediate Consideration of the Merits of the Defence Motion for Adequate Resources Pursuant to Rule 45 and/or Pursuant to the Registrar’s Duty to Ensure Equality of Arms” (*Applications I and II*), 12 January 2007.

<sup>5</sup> See *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-04-15-T-681, “Order on Defence Applications”, 17 January 2007.

6. In order to comprehensively address the issues, this Response will address the specific issues raised by the Sesay Team in *Application II – Expert Provision*.<sup>6</sup> A separate Response is filed in respect of *Application I – Logistical Resources*.

## II. RESPONSE TO THE SESAY MOTION ON EXPERT PROVISION

### A. General Remarks on the Roles of the Registry and the Defence Office

7. Under Rule 45 of the Rules of Procedure and Evidence of the SCSL, the Registrar was directed to establish, maintain and develop a Defence Office “for the purpose of ensuring the rights of suspects and accused persons”. The Defence Office fulfils this function by, among other things, providing initial legal advice by duty counsel situated reasonably close to the detention facility; legal assistance as may be ordered by the Court in accordance with Rule 61 if the accused is without means, as the interests of justice may require; and *adequate facilities for counsel in the preparation of the defence*.
8. In the discharge of these functions, the Defence Office seeks to act as autonomously as possible within the administrative and budgetary parameters set by the Registry in order to uphold the letter and spirit of Article 17 of the Statute of the Court – consistent with the doctrine of “equality of arms.” Since its establishment, the Defence Office has consistently championed the Defence cause, including engaging the Registry at every available opportunity to allocate more resources for the Defence of the accused persons currently before the Court.

### B. Considerations

9. The Sesay Team entered into a Legal Services Contract (“LSC”) with the Defence Office on 1 October 2005. Under the LSC, the Sesay Team undertook to provide legal services for the accused and to conduct his defence in return for certain remuneration.
10. Under the LSC, the Defence Office undertook to provide logistical support to the various defence teams to enable them to perform their work. In the main, the Defence Office provides office space, office equipment and other types of support as specified in the

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<sup>6</sup> See reference in footnote 1.

LSC. This support includes funding to hire experts and investigators based on the requests by the respective defence teams. Such funds are not part of the specific allocations made available to each team, but are mentioned as a separate item in the LSC.

11. In their application, the Sesay Team contends that the Registry/Defence Office has failed to provide adequate resources to effectively defend their client, given the size and complexity of their case.<sup>7</sup> More specifically, the applicants claimed that the resources allocated for them to retain two military experts are so “inadequate” that they “disadvantage” the Sesay Defence case.<sup>8</sup>

12. Article 24 (Experts) of the LSC (Contract Specifications) provides:

Experts will be approved by the DOSCSL and employed on the basis of Short-Term Service Agreements (SSA). Experts may be employed for several Defence Teams, as long as conflict of interests can be avoided.

Contracting Counsel must ensure that experts are instructed and managed in an efficient and effective manner.

Experts will be paid directly by the DOSCSL from funds allocated for that purpose.

13. Based on this undertaking, the Defence Office is obliged to provide experts to the Sesay Team. Therefore, the Defence Office and the Registrar do not contest the need for the Sesay Team to hire, in principle, the named military experts, or indeed other experts, that will aid in the defence of their client. In this regard, the Defence Office and the Registrar do not disagree with paragraphs 4 to 8 of the application. Neither do we contest the Sesay Team’s need for experts, as stated in paragraphs 9 and 10 (indeed, such are needs that the teams must decide for themselves). In fact, a close reading of paragraph 10 and the rest of the application confirm that the Sesay Team is only disputing the level of remuneration that the Defence Office and the Registrar can provide. The Sesay Team want the experts to be remunerated at D -1 level while the current budget and previous practice fixed the remuneration at professional level 3.

14. Article 24 of the LSC specifies that “experts will be paid directly by the DOSCSL [the Defence Office] from funds allocated for that purpose.” It is, therefore, evident that, in

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<sup>7</sup> See Sesay Team Motion, para. 1.

<sup>8</sup> See Sesay Team Motion, para. 1.

the provision of such expert services, the Defence Office is limited by those designated funds which, in turn, are part of the general budget parameters applicable at the Court.

15. While the Defence Office would have wished to provide a higher level of funding for the Sesay Team's proposed experts, it was limited by the funds it was allocated for the provision of such services and, as a result, the instructions by the Court's Budget Office on how to distribute those among the 10 Defence Teams. The Registry and the Defence Office, therefore, reject the assertion that the remuneration was set at P-3 level based on "irrational" considerations.
16. Within the general framework of budget submissions, the various budgetary proposals by the current and previous Principal Defenders to the Registrar have sought to increase the amount of funding available for experts, including investigators, but those attempts have been unsuccessful in view of the Court's limited funding.
17. Article 4 of the LSC states:

Defence Counsel may submit a request to the DOSCSL for payment of Special Considerations. Such Special Considerations may include payment for additional fees [...] or the provision of services of an exceptional nature. Requests for Special Considerations will be dealt with through the same procedure as that of the Settlement of Disputes.

18. Article 9 of the LSC, which deals with Settlement of Disputes, states:

Except for appeal of decisions in accordance with Article 19 of the DOSCSL Contract Specification, *any dispute between the DOSCSL 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.*

19. Article 22 of the Directive on the Assignment of Counsel states:

Any dispute between the Principal Defender and Assigned Counsel or Contracting Counsel, arising out of the interpretation or *application* of the Provisional Assignment Agreement or *Legal Service Contract, which is not settled by negotiation shall be submitted to arbitration by a single arbitrator agreed to by both parties.* Should the parties be unable to agree on a single arbitrator within thirty days of the request for arbitration, then each party shall proceed to appoint one arbitrator and the two arbitrators thus appointed

shall agree on a third. Failing such agreement, either party may request the appointment of the third arbitrator by the President of the Special Court. The decision rendered in the arbitration, including payment for the costs of the arbitration, shall constitute final adjudication of the dispute.<sup>9</sup>

20. By not invoking the provisions of Article 4 and, subsequently Article 9 of the LSC, it is respectfully submitted that the Sesay Team has not exhausted the remedies available to them pursuant to the LSC to secure appropriate funding for their experts from the Defence Office/Registry.<sup>10</sup>
21. As the Sesay Team is aware, the Defence Office has in the past 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. Under the LSC, the Sesay Team may submit requests for “Special Consideration” to address matters not specifically provided for under the LSC.<sup>11</sup> Requests for special consideration are examined by the Registrar on the basis of allocated and available funds. The Registry does not possess separate budgetary means set aside for the purpose of granting such requests. The Court is funded by voluntary contributions and works by yearly budgets approved by the Management Committee.
22. Furthermore and in any event, even outside of the domain of the LSC, administrative decisions by the Registry are amenable to review by the President of the Special Court pursuant to his supervisory function over the Registrar under Rule 19(A) of the RPE. The mere fact that the fair trial rights of the accused may be implicated does not necessarily mean that the matter may not be addressed administratively under the President’s inherent supervisory jurisdiction.<sup>12</sup>
23. While a violation of the fundamental rights of an accused person under Article 17 may be reviewed by a Trial Chamber pursuant to its inherent jurisdiction to ensure a fair trial for

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<sup>9</sup> Directive on the Assignment of Counsel (adopted on 1 October 2003).

<sup>10</sup> On the basis of this same provision, the Sesay Team has requested arbitration on an issue of interpretation of the LSC. The parties are working on selecting a suitable arbitrator.

<sup>11</sup> Special Consideration is addressed under Article 4 of the LSC and the Addendum.

<sup>12</sup> This position is consistent with the practice of other international tribunals. For example, see *The Prosecutor v. Ferdinand Nahimana, Hassan Ngeze, Jean Bosco Barayawiza*, ICTR-99-52-I, “Decision on the Defence Motion for Declaratory relief from Administrative Measures Imposed on Hassan Ngeze at the UNDF”, 9 May 2002.

each accused,<sup>13</sup> a Chamber's exercise of such review powers is the exception rather than the rule.<sup>14</sup> Indeed, it is well established in the jurisprudence of international criminal courts that judicial review of administrative decisions by the Registry, and by implication its delegates, is only available in exceptional circumstances and cannot be used as a substitute for a general power of review.<sup>15</sup>

24. In view of the above, it is submitted that issues raised in the Defence request fall within the administrative preserve of the Registry and that the application by the Sesay Team to the Trial Chamber is premature.

### III. CONCLUSION AND PRAYER FOR RELIEF

25. For the reasons stated in this Response, the Registry/Defence Office respectfully request that this Honourable Chamber dismiss the motion by the Sesay Team. This matter does not fall within its jurisdiction as available administrative remedies are yet to be exhausted by the applicants.

26. In the alternative, the Registry/Defence Office respectfully submit that the Trial Chamber should dismiss the Sesay Team's motion as it is without merit. Indeed, the applicants contended but failed to substantiate that their client's Article 17 rights were violated because inadequate resources were provided to them.

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<sup>13</sup> See *Prosecutor v. Brima*, 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", 6<sup>th</sup> May 2004, paras. 55-65 (The Chamber held that it had authority, based on its inherent jurisdiction, to review the legality or reasonableness of the Registrar's administrative decisions on detention matters, particularly in the light of the mandatory provisions of Article 17(4)(d) of the *Statute of the Special Court*) and *Prosecutor v. Norman*, SCSL-04-14-T, "Decision on Confidential Motion on Detention Issue", 2<sup>nd</sup> March 2005 paras. 8-10, 14, 17, (affirming that the Chamber may, in limited circumstances in the interests of justice, review decisions of the Registrar where they may affect the fundamental trial rights of an accused and hence negatively impact on the guarantees under Article 17).

<sup>14</sup> *Prosecutor v. Taylor*, SCSL-03-01-PT-110, "Decision on Defence Oral Application for Orders Pertaining to the Transfer of the Accused to The Hague", 23 June 2006.

<sup>15</sup> *Prosecutor v. Taylor*, SCSL-03-01-PT-137, "Decision on Urgent and Public Defence Motion Requesting Removal of Camera from Conference Room", 30 November 2006.

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Respectfully submitted,



FUR Lovemore G. Munlo SC

Registrar

NIKOLAUS TOUTAC  
LEGAL ADVISOR TO THE REGISTRAR

22 January 2007



PP Vincent O. Nmeielle

Principal Defender