



THURSDAY, 26 APRIL 2007

---

Before:

**Mr Berthan Macaulay**

For the Registry:

**Mr Nikolaus Toufar**

For the Defence Office:

**Ms Elizabeth Nahamya**

For the accused Issa Sesay:

**Ms Sareta Ashraph**

26 APRIL 2007

1 THE ARBITRATOR: Good afternoon. May I first apologise for  
2 coming in late. Can I have representation, please.

3 MS ASHRAPH: Sareta Ashraph for the claimant.

4 MS NAHAMYA: Elizabeth Nahamya for the Defence office.

14:53:34 5 MR TOUFAR: Nikolaus Toufar for the Registrar's office.

6 THE ARBITRATOR: This is my award.

7 1.1 By an agreement dated 16 January 2002 (the  
8 'Agreement') made between the Government of the Republic of  
9 Sierra Leone and the United Nations, a Special Court for Sierra  
14:53:34 10 Leone was established, which said Agreement included the Statute  
11 of the Special Court for Sierra Leone. By The Special Court  
12 Agreement, 2002 (Ratification) Act, 2002 the said Agreement was  
13 ratified by the Parliament of the Republic of Sierra Leone and  
14 became law.

14:53:35 15 1.2 Article 14 of the Statute of the Special Court for  
16 Sierra Leone (the 'Statute') provides for the Rules of Procedure  
17 and Evidence of the Special Court. Rule 45 of the Rules of  
18 Procedure and Evidence of the Special Court requires the  
19 Registrar of the Special Court to establish, maintain and develop  
14:53:35 20 a Defence Office, 'for the purpose of ensuring the rights of  
21 suspects and accused.' It further provides that the Defence  
22 Office shall be headed by the 'Special Court Principal Defender,'  
23 the first respondent herein.

14:53:35 24 1.3 Article 4 of the Agreement provided for the  
25 appointment of the Registrar of the Special Court and Rule 33 of  
26 the Rules of Procedure and Evidence of the Special Court ('Rules  
27 of Procedure and Evidence') sets out the functions of the  
28 Registrar of the Special Court (the 'Registrar'), the second  
29 respondent herein.

26 APRIL 2007

1           1.4 Article 17, sub-article 4(d) of the Statute is in the  
2 following terms:

3           '4. In the determination of any charge against the  
4 accused pursuant to the present Statute, he or she  
14:53:35 5 shall be entitled to the following minimum  
6 guarantees, in full equality;

7           (d) To be tried in his or her presence, and to defend  
8 himself or herself in person or through legal  
9 assistance of his or her own choosing; to be  
14:53:35 10 informed, if he or she does not have legal assistance  
11 of this right; and to have legal assistance assigned  
12 to him or her, in any case where the interests of  
13 justice so requires, without any payment by him or  
14 her in any such case if he or she does not have  
14:53:36 15 sufficient means to pay for it.'

16           There is a Directive on the Assignment of Counsel, issued  
17 by the Registrar, which came into force on 3 October 2003.  
18 Article 10 of the Directive on the Assignment of Counsel empowers  
19 the Principal Defender (the first respondent) to assign counsel  
14:53:36 20 to a suspect or accused in the circumstances outlined in the said  
21 article.

22           1.5 On 1 October 2005, the claimant and the first  
23 respondent entered into a legal service contract (the 'Legal  
24 Service Contract') whereby the claimant agreed to provide legal  
14:53:36 25 representation to Issa Sesay before the Special Court upon the  
26 terms and conditions therein set out. The Legal Service Contract  
27 was signed by all the parties to this arbitration.

28           2. Matters leading to the arbitration proceedings:

29           A. Interpretation of Article 4 of the Legal Service

26 APRIL 2007

1 Contract.

2 2.1 By an email dated 20 September 2006, co-counsel for  
3 Issa Sesay wrote to the first respondent setting out their  
4 interpretation of Article 4 of the Legal Service Contract, to  
14:53:36 5 wit; that the said Legal Service Contract made a distinction  
6 between 'Payments' and 'Expenses' and that 'this interpretation  
7 of the LSC (Legal Service Contract) would mean that the Registry  
8 ought not to deduct expenses from the \$75,000 (payment)...'. The  
9 first respondent's view on the interpretation of the said  
14:53:37 10 Article 4 was sought.

11 2.2 By an interoffice memorandum dated 13 October 2006,  
12 the first respondent wrote to the claimant in response to the  
13 email referred to in 2.1 above. In his said memorandum, the  
14 first respondent expressed the opinion, inter alia, that the said  
14:53:37 15 sum of \$75,000 included professional fees and expenses.

16 2.3 In compliance with Rule 22 of the Directives on the  
17 Assignment of Counsel, negotiations, in the form of a meeting,  
18 were held between the claimant and the first respondent as is  
19 evidenced by the minutes of a meeting held on 20 October 2006.  
14:53:37 20 At the end of the meeting, it was quite obvious that the parties  
21 could not agree on the interpretation of Article 4 of the Legal  
22 Service Contract and that the matter would have to proceed to  
23 arbitration. By an interoffice memorandum dated 23 October 2006,  
24 the claimant invoked the arbitration procedures pursuant to  
14:53:38 25 Article 9 of the Legal Service Contract and Article 22 of the  
26 Directive on the Assignment of Counsel.

27 B. Application for special considerations.

28 2.4 On 25 November 2005, the claimant applied to the  
29 second respondent for Special Consideration/Exceptional

26 APRIL 2007

1 Circumstances Request for the Sesay Defence. By a letter dated  
2 10 March 2006, the second respondent wrote to the claimant  
3 conveying his refusal of the claimant's application.

4 2.5 On 5 April 2006, the claimant filed an Ex-parte  
14:53:38 5 Confidential application to the Trial Chamber of the Special  
6 Court, seeking a review of the decision of the second respondent  
7 dated 10 March 2006. On 28 April 2006, the second respondent  
8 filed his response to the claimant's application.

9 2.6 On 15 November 2006, Trial Chamber I of the Special  
14:53:38 10 Court delivered its decision on the application of the claimant.  
11 The application of the claimant was dismissed and the Trial  
12 Chamber I held that the resolution of the dispute 'at this point  
13 in time' is exclusively governed by Article 22 of the Directive  
14 on the Assignment of Counsel. On 16 November 2006 the claimant  
14:53:38 15 invoked Article 22 of the Directive on the Assignment of Counsel  
16 in respect of the second respondent's decision of 10 March 2006  
17 refusing his exceptional circumstances application.

18 3. Appointment of Arbitrator, Terms of Reference and  
19 Preliminary Hearing:

14:53:39 20 3.1 By a letter dated 22 February 2007, I was appointed as  
21 a single Arbitrator to determine the issues between the parties  
22 hereto. By a letter dated 3 March 2007, I wrote to the first  
23 respondent forwarding a copy of the said letter of appointment,  
24 signed by me, signifying my acceptance of the said appointment.

14:53:39 25 3.2 The said letter of appointment set out the Terms of  
26 Reference as follows:

27 "1. In construing the provisions of the Legal  
28 Service Contract, whether expenses (Daily Living  
29 Allowance and flight costs) are separate from

26 APRIL 2007

1 remuneration payable to Defence counsel under  
2 Article 4 of the Legal Service Contract.

3 2. Whether the case against Issa Sesay, on its own  
4 and/or in relation to other cases at the Special  
14:53:39 5 Court, is sufficiently serious, complex or sizeable  
6 to amount to exceptional circumstances such as to  
7 warrant the provision of additional resources under  
8 the Special Considerations Clause in the Legal  
9 Service Contract. "

14:53:39 10 3.3 On 19 March 2007, a preliminary hearing was held at  
11 which the following directives, inter alia, were given:

12 "1. That the claimant delivers points of claim within  
13 seven days from today; the respondents will deliver  
14 points of defence within seven days of receipt of the  
14:53:39 15 points of claim and the claimant will file points of  
16 reply, if any, within five days of receipt of the  
17 points of defence from the respondent.

18 2. That the parties will file an agreed bundle of  
19 documents within seven days of this order. "

14:53:39 20 3.4 In compliance with the aforesaid directives the  
21 claimant filed his points of claim, dated 26 March 2007; the  
22 first and second respondents jointly filed a points of defence,  
23 dated 3 April 2007; and the claimant filed his points of reply  
24 dated 10 April 2007. The agreed bundle of documents was also  
14:53:40 25 filed.

26 4. The hearing:

27 4.1 The hearing commenced on 16 April 2007. At the  
28 hearing, the parties confirmed that they did not intend to call  
29 any witnesses and had not filed any witness statement nor any

26 APRIL 2007

1 agreed statement of facts as provided for in the directives given  
2 at the preliminary meeting referred to above.

3 Counsel on both sides indicated that they were relying on  
4 their arguments contained in the documents they had filed. The  
14:53:40 5 claimant indicated that he was prepared to make additional  
6 arguments to those already canvassed in documents filed. Counsel  
7 for the first respondent expressed similar views and indicated  
8 that she was prepared to expand on the points already made and to  
9 respond to the arguments of the claimant. Based on the

14:53:41 10 foregoing, counsel on both sides reiterated their arguments  
11 already canvassed in their respective documents filed in addition  
12 to expanding on same and responding to several questions put by  
13 the Tribunal to them.

14 5. Article 4 of the Legal Service Contract:

14:53:41 15 5.1 The two questions that fall for determination, as set  
16 out in the Terms of Reference, referred to in section 3.2 above;  
17 require the construction of Article 4 of the Legal Service  
18 Contract. This Article is in the following terms - and I need  
19 not read that out in *extenso*.

14:53:41 20 6. The first question for determination:

21 "In construing the provisions of the Legal Service  
22 Contract, whether expenses (daily living allowance  
23 and flight costs) are separate from the remuneration  
24 payable to Defence under Article 4 of the Legal  
14:53:41 25 Service Contract. "

26 A. The claimant's contentions:

27 6.1 The arguments of the claimant in respect of this  
28 question are to be found in his (i) points of claim, (ii) reply  
29 to respondent's points of defence, and oral arguments before the

26 APRIL 2007

1 Tribunal. The main submission of the claimant in respect of this  
2 first question is encapsulated in paragraph 20 of his points of  
3 claim in the following terms:

4 "20. Accordingly, the clear implications of section  
14:53:41 5 4 (sic) of the LSC are as follows:

6 "(i) The Registrar must pay the Defence team up to  
7 75,000 USD per three-month stage as remuneration for  
8 the professional services rendered by its members,  
9 subject to prior approval and reasonable assessment;  
10 and

11 "(ii) The Registrar must further reimburse members  
12 of the Defence team for any and all reasonable  
13 expenses incurred in the performance of the said  
14 professional services above and beyond the 75,000 USD  
14:53:42 15 amount reserved for fees, subject only to prior  
16 approval and submission of documentation. Any other  
17 reading would be at odds with the plain meaning of  
18 the terms "payment" and "expenses" as unambiguously  
19 used in the LSC, as to which there can be no (sic)  
14:53:42 20 reasonable basis for any difference of opinion."

21 As part of his argument on this first question, the  
22 claimant has laid particular emphasis on paragraph 4 of Article 4  
23 of the Legal Service Contract, which is in the following terms:

24 "Expenses incurred by contracting counsel in the  
14:53:42 25 performance of this Agreement shall only be  
26 reimbursed if approved in the case plan or stage  
27 plans and upon submission of all relevant  
28 documentation to the DOSCSL."

29 6.2 The claimant, in support of his argument, has prayed

26 APRIL 2007

1 in aid, inter alia, the following:

2 (i) 'the general principles of contract interpretation';  
3 and (ii) the 'Controlling Provisions,' to wit; the Legal Service  
4 Contract, the addendum thereto, the Contract Specifications and  
14:53:42 5 annexes 1 and 2, and the Directive on the Assignment of Counsel.

6 6.3 With regard to the rules of construction, the  
7 claimant's starting point is that in interpreting the said  
8 Article 4 of the Legal Service Contract, one should analyse "the  
9 plain language of the disputed portions" of the contract and  
14:53:43 10 examine the whole contract to determine the intention of the  
11 parties to same. He further submitted that it is only when the  
12 contract is ambiguous that it becomes subject to interpretation.  
13 The claimant further submitted that the standard to be applied in  
14 interpreting the contract should be an objective one and that the  
14:53:43 15 interpretation which should be adopted is one that "ascribes the  
16 most reasonable, probable, and natural conduct to the parties."  
17 The other rules of construction canvassed by the claimant are  
18 that: (i) commonsense and good faith are to be applied in the  
19 interpretation process; (ii) the subject matter and surrounding  
14:53:44 20 circumstances are also to be considered; (iii) there should be  
21 some reference to extrinsic evidence; and (iv) in the event of  
22 any ambiguity in the language of the contract, it should be  
23 construed against the drafting party.

24 6.4 In addition to the Legal Service Contract, the  
14:53:44 25 claimant referred to other documents mentioned in section 6.2  
26 above. The claimant, in his arguments before the Tribunal,  
27 maintained that the more relevant paragraphs of Article 4 of the  
28 Legal Service Contract were those set out in paragraph 11 of his  
29 points of claim. The claimant further contended that the first

26 APRIL 2007

1 respondent in engaging the claimant acted pursuant to the  
2 Directive on the Assignment of Counsel and referred to several  
3 articles of the Directive dealing with: (i) the Legal Service  
4 Contract; (ii) payments under the Legal Service Contract; (iii)  
14:53:44 5 travel allowances; and (iv) DLA/DSA. The claimant referred to  
6 this Directive as part of his contention that a distinction is  
7 also made therein between payments/remuneration for work done and  
8 reimbursement for expenses incurred. In particular, the claimant  
9 referred to Article 16(D)(ii) which requires that the Legal  
14:53:44 10 Service Contract should include an agreement as to the amount to  
11 be paid to specified members of the Defence team for work done  
12 and juxtaposed that provision with Article 16(D)(iv), which  
13 simply refers to categories of expenses without setting any  
14 limitation in terms of amount.

14:53:44 15 6.5 As part of his arguments on this first question, the  
16 claimant submitted that the object of the Legal Service Contract  
17 is to ensure that each accused receives the legal service  
18 necessary to ensure that the inalienable rights contained within  
19 Article 17 of the Statute are obtained and maintained throughout  
14:53:45 20 the proceedings. This submission, together with the reference to  
21 Part III of the Directive on the Assignment of Counsel formed the  
22 plank of the claimant's argument for the purposive approach in  
23 construing Article 4 of the Legal Service Contract. The claimant  
24 referred specifically to Article 17(1) and (4)(d). Although the  
14:53:45 25 latter has been set out above, I shall set out the terms of both  
26 these sub-articles as follows:

27 Rights of the accused.

28 "1. All accused shall be equal before the Special  
29 Court. "

26 APRIL 2007

1 "4. In the determination of any charge against the  
2 accused pursuant to the present Statute, he or she  
3 shall be entitled to the following minimum  
4 guarantees, in full equality;

14:53:45 5 (d) To be tried in his or her presence, and to  
6 defend himself or herself in person or through legal  
7 assistance of his or her own choosing; to be  
8 informed, if he or she does not have legal  
9 assistance, of this right; and to have legal  
14:53:45 10 assistance assigned to him or her, in any case, where  
11 the interests of justice so requires, and without any  
12 payment by him or her in any such case if he or she  
13 does not have sufficient means to pay for it."

14 The submission of the claimant is that Article 4 of the  
14:53:45 15 Legal Service Contract is to be interpreted to give effect to  
16 these provisions of Article 17 of the Statute. He submitted,  
17 inter alia, that:

18 "This Article, [Article 17 of the Statute] and the  
19 Legal Service Contract is fundamental, first and  
14:53:46 20 foremost, about providing a minimum of resources to  
21 an accused to prepare his case; a minimum of  
22 resources and equality of resources between accused.  
23 If the Legal Service Contract is ambiguous, but can  
24 be interpreted to achieve that, it must be  
14:53:46 25 interpreted accordingly.

26 "The respondents offer no reasoning to explain why an  
27 accused, who has exercised his choice for either  
28 international counsel, or counsel who reside (sic)  
29 outside of Freetown, or to have the number of legal

26 APRIL 2007

1 service hours reduced. The respondents offer no  
2 explanation why an accused, whose case is more  
3 complex, larger or more serious - in other words,  
4 requiring more work and therefore more people -  
14:53:46 5 should be provided with less legal hours of service. "

6 B. The respondents' contentions.

7 6.6 The respondents' answers to the arguments of the  
8 claimant on this first question are to be found in their points  
9 of defence and their oral arguments before the Tribunal. The  
14:53:46 10 respondents' answer is simply put as follows:

11 "The respondents' position is that the correct  
12 interpretation of the relevant provisions of the LSC  
13 is that expenses are included in the total payment to  
14 counsel. "

14:53:46 15 6.7 The first respondent, in support of their arguments on  
16 this first question, contend that in interpreting Article 4 of  
17 the Legal Service Contract, reference should be made to the Legal  
18 Service Contract itself, the case or stage plan prepared in  
19 accordance with the contract specifications and the rules  
14:53:47 20 thereto. Counsel further argued that each defence team is paid  
21 up to an amount approved in the case or stage plan and that the  
22 requirements of the stage plan are set out in the rules of the  
23 contract specification. Specific reference was made to  
24 Rule 12(e) of the contract specification in the following terms:

14:53:47 25 "12. Each stage plan shall be made using the  
26 template provided by the DOSCSL and must include:  
27 (e) disbursements (other than those related to the  
28 time spent by investigators and experts)... "

29 6.8 In response to claimant's arguments in paragraph 18 of

26 APRIL 2007

1 the points of claim that:

2 "18. The second paragraph of Article 4 clearly  
3 stipulates that members of the Defence team shall be  
4 entitled to an amount not to exceed 75,000 USD per  
14:53:48 5 three-month stage as consideration 'for work  
6 provided' during the period covered by a particular  
7 stage plan. The plain meaning of this portion of the  
8 paragraph is that 75,000 USD shall be payable as  
9 remuneration for professional services rendered; that  
14:53:48 10 is, 'for work provided' by all members of the legal  
11 team for any given three-month stage. "

12 The respondents contended as follows:

13 "It is evident, from a plain reading of the whole of  
14 the relevant provisions referred to by the applicant,  
14:53:48 15 that 50 per cent of the amount approved in the stage  
16 plan can be disbursed during the period covered by a  
17 stage plan; that is an advance. In paying the  
18 balance of payments, the LSC requires receipt of  
19 payments of professional fees 'for work provided';  
14:53:48 20 that is, the remaining 50 per cent of the total of  
21 75,000 USD. The requirement of receipts of payments  
22 for 'work provided' is in relation to paying the  
23 remaining balance of the total amount approved in the  
24 case plan. No reasonable person could interpret a  
14:53:48 25 requirement to provide receipts in order to be paid a  
26 balance due to a party to a contract as an intention  
27 to make a contractual distinction between 'payments'  
28 and 'expenses' . "

29 6.9 The respondents also referred to the Directive on the

26 APRIL 2007

1 Assignment of Counsel and to Articles 16(D) and 20(A) and (E)  
2 thereof dealing with other categories of expenses (DLA/DSA) and  
3 the requirement that travel expenses should be included within  
4 the expenses in the LSC but should be separately itemised.

14:53:48 5 Reference was also made to paragraph 4 of Article 4 of the Legal  
6 Service Contract. Notwithstanding the fact that this provision  
7 has already been set out in this award, I propose to reproduce it  
8 for a fuller understanding of the respondents' arguments:

9 "Expenses incurred by contracting counsel in the  
14:53:59 10 performance of this agreement shall only be  
11 reimbursed if approved in the case plan or stage  
12 plans and upon submission of all relevant  
13 documentation to the DOSCSL."

14 6.10 The respondents also referred to the last sentence of  
14:54:12 15 paragraph 2 of the said Article 4 of the Legal Service Contract  
16 that:

17 "Payments to be made for any period covered by a  
18 stage plan, except for the first stage plan, shall  
19 not exceed an amount of 75,000 USD."

14:54:26 20 At paragraph 22 of the points of defence, the respondents  
21 submitted as follows:

22 "...for expenses, including travel costs and DLA, to  
23 be reimbursed, they must be set out in the case plan.  
24 Article 4 of the LSC stipulates that expenses are to  
14:54:41 25 be reimbursed '...if approved in the case plan or  
26 stage plans...' The case plan is subject to a  
27 financial limit. Therefore, all fees and expenses  
28 must fall within this limit in accordance with the  
29 LSC. To the extent that any distinction is made

26 APRIL 2007

1           between fees and expenses, it must be set out  
2           separately for administrative ease. "

3           6.11 The respondents, in their points of defence, address  
4 two issues that had been raised by the claimant in his points of  
14:55:09 5 claim, to wit: (i) the practice at the Special Court; and (ii)  
6 parity between Defence teams. With regard to the former, the  
7 submission of the respondents is that the practices of the  
8 Special Court, vis-a-vis its employees, should have no bearing in  
9 interpreting a contract between the Special Court and the Defence  
14:55:24 10 team "that was specifically drafted to deal with a publicly  
11 funded regime." With regard to the latter, the respondents, in  
12 their points of defence, contend that the legal aid system at the  
13 Special Court provides for a maximum payment for all the Defence  
14 teams. The gist of the respondents' argument is that it is not  
14:55:40 15 the application of a fixed amount of 75,000 USD every three  
16 months that is in itself discriminatory, in effect, but the  
17 composition of the Defence team that appears to make it so and,  
18 therefore, it is imperative that the Defence team should be  
19 composed and utilised in a way that takes cognisance of the  
14:55:56 20 limited resources available.

21           C. The decision:

22           Applicable law:

23           6.12 Both the Legal Service Contract, Article 9, and the  
24 Directive on the Assignment of Counsel, Article 22, which is the  
14:56:08 25 basis for this arbitration, are silent on the applicable law. At  
26 the outset of the proceedings counsel's attention was drawn to  
27 this lacuna and to the provisions of the Rules of Procedure and  
28 Evidence, Rule 72*bis*, and it was agreed that the English/Sierra  
29 Leone law should be applied.

26 APRIL 2007

1 Rules of construction:

2 6.13 The first question calls for the construction of the  
3 Legal Service Contract made between the parties to these  
4 proceedings and, in particular:

14:56:34 5 '...whether expenses (Daily Living Allowance and  
6 flight costs) are separate from the remuneration  
7 payable to Defence counsel under Article 4 of the  
8 Legal Service Contract.'

9 Under the rules of construction all parties are agreed that  
14:56:46 10 in construing Article 4 of the Legal Service Contract the whole  
11 agreement needs to be looked at. The parties are also in  
12 agreement that in construing the said Article 4, references  
13 should also be made to other documents, to wit: The addendum to  
14 the Legal Service Contract; the contract specification and  
14:57:01 15 annexes 1 and 2; and the Directive on the Assignment of Counsel.  
16 Additionally, the claimant contends that Article 17 of the  
17 Statute should also be looked at.

18 6.14 I would refer to Chitty on Contracts - General  
19 Principles - where the learned authors deal with the general  
14:57:18 20 rules of construction of written agreements. I propose to be  
21 guided by the principles set out therein and would refer, at this  
22 stage, to some of them:

23 "The object of all construction of the terms of a  
24 written agreement is to discover therefrom the  
14:57:30 25 intention of the parties to the agreement. "

26 "The common and universal principle ought be  
27 applied; namely, that (an agreement) ought to receive  
28 that construction which its language will admit, and  
29 which will best effectuate the intention of the

26 APRIL 2007

1 parties, to be collected from the whole of the  
2 agreement, and that greater regard is to be had to  
3 the clear intention of the parties than to any  
4 particular words which they may have used in the  
14:57:53 5 expression of their intent.

6 "Several instruments made to effect one object may  
7 be construed as one instrument, and be read together,  
8 but so that each shall have its distinct effect in  
9 carrying out the main design. "

14:58:09 10 6.15 I agree with counsel that in construing Article 4 of  
11 the Legal Service Contract several documents referred to need to  
12 be looked at in arriving at the true intention of the parties  
13 thereto. The claimant has referred to Article 17 of the Statute.  
14 This Article deals with the rights of an accused but it must be  
14:58:25 15 noted that the accused is not a party to the Legal Service  
16 Contract that falls for determination. Article 17(4)(d) provides  
17 for legal assistance to be given to the accused. In my opinion,  
18 that is a substantive right that the Statute has accorded the  
19 accused. It is consequent upon that right that a scheme for  
14:58:41 20 giving effect to same was established; the Legal Service  
21 Agreement being part of that scheme. It is pertinent to note  
22 that the Legal Service Contract itself makes no reference  
23 whatsoever to the said Article 17 of the Statute. The claimant  
24 has been assigned to the accused Issa Sesay as his counsel at no  
14:58:57 25 cost to the accused. There is no gainsaying the fact that the  
26 sum of 75,000 USD referred to in these proceedings is the same  
27 sum that applies to the other Defence team representing other  
28 accused persons who have been provided with legal assistance  
29 under the said Article 17. I have reviewed both Articles 17(1)

26 APRIL 2007

1 and (4)(d) of the Statute and do not find anything in those  
2 articles, either expressly or by necessary implication, to  
3 support the contention of the claimant that Article 4 of the  
4 Legal Service Contract should be construed in the manner in which  
14:59:28 5 he has canvassed before this Tribunal, and I so hold.

6 6.16 The other documents which have been referred to by  
7 the parties are the addendum to the Legal Service Contract, the  
8 Directive on the Assignment of Counsel and the contract  
9 specifications. The Directive on the Assignment of Counsel is  
14:59:43 10 referred to in the recital clause of the Legal Service Contract.  
11 I would also refer to Articles 1 and 2 of the latter document  
12 which are in the following terms:

13 1. Nature of services.

14 Contracting counsel shall be assigned to provide  
14:59:57 15 legal representation during the trial of the accused,  
16 as defined in the DOSCSL contract specifications, in  
17 accordance with the attached herewith case plan  
18 approved by the DOSCSL on 1 October 2005.

19 2. Provisions of information to the contracting  
15:00:12 20 counsel.

21 The DOSCSL shall provide contracting counsel with  
22 such information as may be required for the discharge  
23 of obligations under this Agreement. Such  
24 information shall include the DOSCSL, contract  
15:00:24 25 specifications, case plan and stage plan templates.

26 A perusal of Article 4 of the Legal Service Contract will  
27 reveal several references therein to the DOSCSL contract  
28 specification, the stage plan and the case plan. The  
29 respondents, in their points of defence, have asserted that stage

26 APRIL 2007

1 plans and case plans have become, in practice, the same work  
2 documents and are used interchangeably in the Legal Service  
3 Contract and I note that this has not been disputed by the  
4 claimant. All the parties in their arguments before this  
15:00:55 5 Tribunal have prayed in aid some, if not all, of these documents  
6 in support of their respective case. Article 17(A) of the  
7 Directive on the Assignment of Counsel provides, inter alia, as  
8 follows:

9 "(A)...Payment under the Legal Service Contract,  
15:01:11 10 including travel expenses and DLA/DSA, shall be made  
11 in accordance with the terms set out in this  
12 Directive, the Legal Service Contract and the  
13 contract specification."

14 I am of the opinion that the several documents referred to  
15:01:24 15 have, to a large extent, the object of establishing a scheme for  
16 the assignment of counsel to accused persons and for that reason  
17 I hold that they can be read together in construing the first  
18 question asked.

19 6.17 Article 4 of the Legal Service Contract makes express  
15:01:40 20 references to case/stage plans, Directive on the Assignment of  
21 Counsel and also to the contract specifications. Case plan and  
22 stage plan are defined in the contract specifications. Rules 11  
23 and 12 of the contract specification prescribe how these plans  
24 are to be made "using the template provided by the DOSCSL..."  
15:01:57 25 Rule 12(e) of the contract specifications expressly provides that  
26 the stage plan must include "disbursements (other than those  
27 related to the time spent by investigators and experts)." The  
28 claimant referred this Tribunal to several articles of the  
29 Directive on the Assignment of Counsel. The claimant contended

26 APRIL 2007

1 that the reference in Article 16(D)(ii) that the Legal Service  
2 Contract should include agreement as to the amounts to be paid to  
3 members of the Defence team when juxtaposed with the provisions  
4 of Article 16(D)(iv) which refers to the "categories" of  
15:02:28 5 expenses, without any reference to amount, supports his  
6 contention that the sum of 75,000 USD is applicable only to  
7 professional fees and doesn't apply to "expenses". The answer of  
8 the respondents to this argument is to be found in paragraphs  
9 20-24 of their points of defence. The respondents contend that  
15:02:47 10 in order for "expenses" (including travel costs) to be reimbursed  
11 they must be set out in the approved case plan. They further  
12 contend that the case plan is subject to a financial limit and  
13 therefore all fees and expenses are subject to that limit.

14 6.18 I agree with the claimant that there is a difference  
15:03:01 15 in the wording of Articles 16(D)(ii) and (iv) of the Directive on  
16 the Assignment of Counsel and that paragraph 4 of Article 4 of  
17 the Legal Service Contract expressly deals with expenses without  
18 any financial limitation being stated therein. I do not,  
19 however, subscribe to the view that such differences are  
15:03:20 20 pre-eminent in determining the intention of the parties to the  
21 Legal Service Contract. I am also of the opinion that in  
22 construing Article 4 of the Legal Service Contract, one should  
23 not pay greater regard to particular words or sections,  
24 especially so when it is common ground that the whole contract  
15:03:33 25 and other documents are to be looked at in construing the said  
26 Article 4. I do not think it can be disputed that the Legal  
27 Service Contract, the contract specifications and the Directives  
28 on the Assignment of Counsel are all part of the scheme whereby  
29 legal assistance is provided to accused persons. Furthermore,

26 APRIL 2007

15:04:04 1 having regard to the nature of such a scheme, it would be an  
2 unreasonable construction to hold that other than the prior  
3 approval and reasonable assessment of the expenses claimed there  
4 should be no limit. In my opinion, from the reading of the Legal  
5 Service Contract, the other documents referred to and the  
6 requirements and role of the case/stage plans, it is quite clear,  
7 and I so hold, that the limit of 75,000 USD applies to both  
8 professional fees and expenses.

15:04:21 9 6.19 Notwithstanding the finding that I have arrived at  
10 above, and in deference to the very forceful and passionate  
11 arguments of the claimant, I propose to deal with his argument  
12 regarding the "distinction" between "payments" and "expenses".  
13 Paragraph 4 of Article 4 provides as follows:

15:04:36 14 "Expenses incurred by contracting counsel in the  
15 performance of this agreement shall only be  
16 reimbursed if approved in the case plan or stage plan  
17 and upon submission of all relevant documentation to  
18 the DOSCSL. "

15:04:48 19 I do not think that it can be disputed that to reimburse  
20 someone is to "pay back" that person or that a "reimbursement" is  
21 a "payment". The reimbursement of the expenses would clearly be  
22 a "payment". I would refer to the claimant's response to a  
23 question put to him during the course of the hearing:

15:05:07 24 "THE ARBITRATOR: Now, if I reimburse your expenses  
25 which you have incurred, could you describe that as a  
26 payment; that you are being paid expenses incurred  
27 already?

28 MR JORDASH: Technically, of course, you can describe  
29 any disbursement of money to me from the respondent

26 APRIL 2007

1 as payment, of course you can. But the real issue, I  
2 would submit, is the distinction between fees and  
3 expenses. The payment issue arises because we say  
4 payment is clearly used in this context to describe  
15:05:32 5 payments. "

6 I would next refer to Article 17(A) of the Directive on  
7 Assignment to Counsel which states, inter alia, as follows:

8 "...Payments under the Legal Service Contract,  
9 including travel expenses and DLA/DSA, shall be made  
15:05:41 10 in accordance with the terms set out in this  
11 Directive, the Legal Service Contract and the  
12 contract specification. "

13 I am in agreement with the arguments of the respondent that  
14 the distinction that the claimant seeks to make is not tenable.  
15:06:00 15 Within the context of construing Article 4 of the Legal Service  
16 Contract, it could best be described as a distinction without a  
17 difference, and I so hold.

18 6.20 In further deference to the arguments advanced by the  
19 claimant that the respondents' interpretation of Article 4 of the  
15:06:12 20 Legal Service Contract; that DLA and travel cost must be deducted  
21 from the sum of 75,000 USD, which I have acceded to by my finding  
22 above, would arbitrarily penalise an accused who chooses to be  
23 represented by an international counsel who would incur greater  
24 expenses. I would, with considerable regret, refer to Chitty on  
15:06:31 25 Contract where the learned authors state, inter alia, as follows:

26 "Intention unequivocally expressed. On the other  
27 hand, where, even by the use of general words, the  
28 intention of the parties is clearly and unequivocally  
29 expressed, the court is bound by it, however

26 APRIL 2007

1           capricious it may be, unless it is plainly controlled  
2           by the other parts of the instrument. "

3           I have not found anything within the Legal Service Contract  
4           and/or the other documents referred to by the claimant to bring  
15:07:00 5           the instant case within the exception.

6           6.21 For the foregoing reasons, I have not deemed it  
7           necessary to address the other arguments of the parties in  
8           arriving at an answer to the first question. My answer,  
9           therefore, to the first question is as follows:

15:07:13 10           "That expenses (Daily Living Allowances and flight  
11           costs) are not separate from the remuneration payable  
12           to counsel under Article 4 of the Legal Service  
13           Contract and the limit of 75,000 USD per three-month  
14           period applies to all payments, fees and expenses  
15:07:29 15           payable to counsel, and I so hold.

16           7. The second question for determination:  
17           Whether the case against Issa Sesay, on its own  
18           and/or in relation to the other cases at the Special  
19           Court, is sufficiently serious, complex or sizeable  
15:07:45 20           to amount to exceptional circumstances as to warrant  
21           the provision of additional resources under the  
22           Special Considerations Clause in the Legal Service  
23           Contract. "

24           A. The claimant's contentions.

15:07:54 25           7.1 The 'Special Consideration Clause' is to be found in  
26           Article 4, paragraph 3 of the Legal Service Contract and it is in  
27           the following terms:

28           "At the end of the trial of the accused, or after  
29           31 October 2004, but not later than 90 days following

26 APRIL 2007

1 the end of the trial of the accused, contracting  
2 counsel may submit a request to the DOSCSL for  
3 payment of special circumstances. Such special  
4 considerations may include payments for additional  
15:08:22 5 professional fees arising out of the continuation of  
6 the trial of the accused past 31 October 2004, or the  
7 provision of services of an exceptional nature.  
8 Requests for special considerations will be dealt  
9 with through the same procedure as that of the  
15:08:35 10 settlement of disputes. "

11 7.2 The matters leading to this arbitration in respect of  
12 this second question have already been set out in section 2.4 to  
13 2.6 above. The arguments of the claimant on this second question  
14 are contained in his points of claim, points of reply and in his  
15:08:54 15 oral arguments before the Tribunal.

16 7.3 In paragraph 34 of his points of claim, the claimant  
17 submits as follows:

18 "34. The second issue, unlike the first, does not  
19 deal with the interpretation of the LSC but rather  
15:09:06 20 with a factual assessment of the size and complexity  
21 of the case against Mr Sesay. The parties are in  
22 agreement as to the validity and operation of the  
23 LSC's so-called 'Special Consideration Clause' which  
24 permits contracting counsel to seek the provision of  
15:09:17 25 addition (sic) funds to the Defence team in  
26 consideration for services of an exceptional nature.  
27 The issue here, as stated above, is whether or not  
28 the claimant has in fact made a proper showing for  
29 the provision of such additional funds. "

26 APRIL 2007

1           7.4 As stated supra, the claimant has incorporated, as  
2 part of his arguments before this Tribunal, his original  
3 application for special consideration made on 25 November 2005,  
4 which said application is to be found at pages 49-68 of the  
15:09:46 5 bundle of documents. The assertion of the claimant is that the  
6 said application "...outlined the exceptional size and complexity  
7 of the case against Mr Sesay." The claimant further asserts that  
8 the application was supported by several pages of proof,  
9 including comparative assessments. The claimant's submission is  
15:10:03 10 that the case against Mr Sesay is disproportionately large and  
11 complex when compared to all other cases at the Special Court and  
12 most cases which have been tried at an international level and  
13 that it falls within the Special Consideration Clause. In  
14 addition to the materials contained in the original application,  
15:10:16 15 the applicant has also furnished this Tribunal with further  
16 material, to wit: Annex B to his points of claim.

17           7.5 In response to the second respondent's rejection of  
18 the claimant's original application, the claimant contends that  
19 the second respondent has failed to give any reasons for the  
15:10:40 20 rejection of its application and that he is at a loss as to what  
21 arguments were being advanced for the rejection of the original  
22 application.

23           7.6 In his points of reply, the claimant contends that the  
24 Arbitrator ought to conduct a *de novo* review of the application  
15:10:54 25 for special consideration, taking into account "any relevant  
26 'facts and figures' presented by the claimant." In the same  
27 document, and in response to the points of defence of the  
28 respondents, the claimant has re-emphasised "(i) the size of the  
29 case against the accused, Issa Sesay; and (ii) the complexity of

26 APRIL 2007

1 the case. "

2 7.7 During the course of the hearing, the claimant  
3 expanded on the several submissions contained in his points of  
4 claim and points of reply as follows:

15:11:18 5 "Moving to the second arbitration, it is respectfully  
6 submitted that the terms of reference are clear and  
7 what is required is a *de novo* hearing. It's  
8 irrational to argue, we would submit, that what this  
9 arbitration could possibly be about is whether the  
15:11:32 10 Registrar, in his decision on 10 March 2006, is a  
11 reasonable decision on the availability of facts at  
12 that point. "

13 Referring to a letter written by the first respondent,  
14 soliciting additional funds for the RUF legal Defence teams  
15:11:46 15 (which includes the claimant), the claimant submitted:

16 "Again, I accept, if the respondents can point to a  
17 letter in which they requested those additional  
18 services for the Norman case, then the argument,  
19 perhaps, has less force. On the face of it, it would  
15:12:04 20 appear they acknowledge that the RUF case is larger  
21 and more complicated and requires greater funds than  
22 the other cases.

23 "It is, following on from that argument, irrefutable,  
24 I would submit, on the criteria we have listed, that  
15:12:17 25 the Sesay case, within the RUF case, is substantially  
26 more complex than the other two cases. "

27 B. The respondents' contentions.

28 7.8 The respondents' answer to the claimant's submissions  
29 on this second question is to be found in their points of

26 APRIL 2007

1 defence, paragraphs 37-74 and also in their oral response at the  
2 hearing.

3 7.9 At paragraph 48 of the points of defence, the  
4 respondents assert as follows:

15:12:44 5 "When a decision falls within the Registrar's  
6 discretion to make, he has a margin of appreciation,  
7 provided that the decision was not 'unreasonable';  
8 the 'unreasonable test' has been identified by the  
9 Trial Chamber of the International Criminal Tribunal  
10 for the Former Yugoslavia as follows:

11 "The administrative decision [of the Registrar] may  
12 [...] be quashed if the Registrar has failed to  
13 observe any basic rules on natural justice or to act  
14 with the procedural fairness towards the person  
15:13:09 15 affected by the decision, or if he has taken into  
16 account irrelevant material or failed to take into  
17 account relevant material, or if he has reached a  
18 conclusion which no sensible person who has properly  
19 applied his mind to the issue could have reached. "

15:13:23 20 7.10 The respondent further contended that the claimant's  
21 request was refused by the second respondent because he  
22 considered that neither the (i) size nor the (ii) complexity of  
23 the Sesay case were of an "exceptional nature" to warrant the  
24 application of the Special Consideration Clause.

15:13:39 25 7.11 With regard to the facts and figures presented by the  
26 claimants, the respondents noted that the facts and figures  
27 presently before the Tribunal are not the same as those presented  
28 in the application before the second respondent and that such a  
29 procedure was erroneous. The respondents further contend that

26 APRIL 2007

1 the case of Issa Sesay is neither large enough nor complex enough  
2 to be treated as of an exceptional nature. The respondents  
3 assert that the figures presented by the claimant with regard to  
4 the number of Prosecution witnesses in the original application  
15:14:09 5 eventually proved to be speculative. In the alternative, the  
6 respondents submit that if the Arbitrator is disposed to consider  
7 the newly submitted figures of the claimant, that they still  
8 consider that those figures (322 witnesses to mount the Defence  
9 of Issa Sesay and 170 core witnesses) do not ascertain a size of  
15:14:28 10 the case of an exceptional nature. The respondents maintain that  
11 the figures relied on by the claimant in their points of claim  
12 are premature.

13 7.12 In relation to the other factors relied upon by the  
14 claimant to bring the instant case within the Special  
15:14:42 15 Consideration Clause, the respondents contend that the case is no  
16 more complex than the other cases before the Special Court and,  
17 as such, is not of an exceptional nature to justify additional  
18 funds under the Special Consideration Clause.

19 C. The decision:

15:14:56 20 7.13 The first issue that falls for determination is  
21 whether the claimant's application for special consideration  
22 should be heard *de novo*, which would allow him to present  
23 additional material or whether the issue before this Tribunal  
24 should be a review of the application before the second  
15:15:13 25 respondent, thereby limiting the facts and figures to those  
26 before the Registrar as contended by the respondents. I have  
27 reviewed the language of the second question and can find no  
28 support for the contention that this Tribunal cannot look at the  
29 application *de novo*, and I so hold. In any event, the

26 APRIL 2007

1 respondents contend that even with the additional facts and  
2 figures submitted, the claimant's case is not of an exceptional  
3 nature to benefit from the Special Consideration Clause.

4 7.14 The claimant, both in his points of claim and points  
15:15:46 5 of reply, and in his arguments before this Tribunal, has  
6 submitted that having regard to the (i) size and (ii) complexity  
7 of the Issa Sesay case, that it falls within the Special  
8 Consideration Clause. In support of that argument, he has  
9 furnished this Tribunal with the matters set out in the original  
15:16:04 10 application and the matters set out in annex B to his points of  
11 claim. In his arguments before this Tribunal, he has highlighted  
12 several factors which he maintains exist in relation to the  
13 Issa Sesay case to justify his contention. I will refer  
14 particularly to his reply to this Tribunal at pages 85 to 87. He  
15:16:27 15 has also referred to a letter written by the first respondent,  
16 which is annex B to his points of reply. It cannot be disputed  
17 that the claimant has put before this Tribunal the facts and  
18 circumstances which he contends amounts to the application of the  
19 Special Consideration Clause.

15:16:45 20 7.15 The respondents, in their points of Defence and in  
21 their arguments, have asserted that the size and complexity of  
22 the Issa Sesay case do not justify the application of the Special  
23 Consideration Clause. It would appear that the wording of this  
24 clause is unique to this Tribunal as counsel were not able to  
15:17:04 25 cite any authorities in support of their arguments on this issue.  
26 During the course of their arguments, the Tribunal sought on  
27 several occasions to ascertain from the respondents what  
28 situation/scenario would amount to a special consideration case.  
29 I would refer to some of the responses that were given to

26 APRIL 2007

1 questions from the Tribunal:

2 "As we earlier said, we do not think taking into  
3 consideration the new facts and figures, especially  
4 one referring to a number of Defence witnesses, even  
15:17:34 5 taking that into consideration, we still think the  
6 case is not one of an exceptional nature.

7 "Now, the work of an exceptional nature I would  
8 define, depending on what the parameters are for you  
9 to determine them as an Arbitrator, which is over and  
15:17:47 10 above what a lawyer would do in the normal course of  
11 legal defence which, in this case, is very difficult  
12 to say, to come to say that my case is much larger or  
13 more larger than every other case because I will be  
14 calling, say, 300 witnesses. "

15:18:01 15 In response to a question from the Tribunal as to whether  
16 the complexity of a case may be an element to warrant special  
17 consideration, the first respondent said:

18 "No, the provision of an exceptional service of an  
19 exceptional nature, based on the complexity that you  
15:18:16 20 are able to prove, may amount. "

21 7.16 As stated supra, reference had been made to a letter  
22 written by the first respondent, annex B to the points of reply.  
23 In that letter, he had referred to several factors why additional  
24 resources were being sought for the RUF Defence team. These  
15:18:35 25 factors are coincidentally mirrored in the arguments of the  
26 claimant. Having regard to material, arguments and circumstances  
27 put forward by the claimant and the apparent inability of the  
28 respondents to posit the circumstances in which the Special  
29 Consideration Clause would apply and my own assessment of the

26 APRIL 2007

1 case made by the claimant, I do find that the case of the  
2 claimant falls within the Special Consideration Clause and,  
3 accordingly, answer the second question as follows:

4 "That the case against Issa Sesay on its own and/or  
15:19:05 5 in relation to other cases at the Special Court, is  
6 sufficiently serious, complex or sizeable to amount  
7 to exceptional circumstances as to warrant the  
8 provision of additional resources under the Special  
9 Consideration Clause in the Legal Service Contract. "

15:19:19 10 In the circumstances, I order that the second respondent do  
11 assess the payment of additional fees due the claimant.

12 8. Costs:

13 8.1 Having regard to the outcome of these proceedings, I  
14 make no order as to costs.

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29