886)

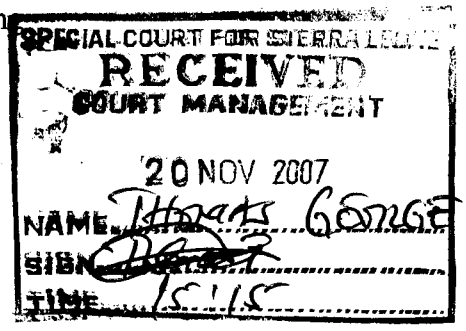
SCSL-04-15-T
(31980 – 31997)

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Mr. Herman Von Hebel

Date filed: 20 November 2007



THE PROSECUTOR **Against** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC
PROSECUTION RESPONSE TO SESAY AND GBAO JOINT MOTION FOR VOLUNTARY WITHDRAWAL OR DISQUALIFICATION OF JUSTICE BANKOLE THOMPSON FROM THE RUF CASE

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I. INTRODUCTION

1. The Prosecution files this Response to the "Sesay and Gbao Joint Motion For Voluntary Withdrawal or Disqualification of Justice Bankole Thompson From the RUF Case" ("**Motion**"), dated 14 November 2007.[1]
2. The Motion requests that Mr. Justice Thompson voluntarily withdraw, or be disqualified, and asserts an alleged appearance of bias based on the "Separate Concurring and Partially Dissenting Opinion of Justice Bankole Thompson" in *Prosecutor v. Fofana and Kondewa* ("**Dissenting Opinion**").[2]
3. The Motion is without merit and should be dismissed.

II. APPLICABLE LAW

4. Rule 15 (A) of the Rules of Procedures and Evidence (the "**Rules**") provides that "[a] Judge may not sit at a trial or appeal in any case in which his impartiality might reasonably be doubted on any substantial ground."
5. The law of the International Tribunals has established a presumption of impartiality in relation to the functioning of any Judge of the Tribunal.[3] To rebut the presumption of impartiality, the reasonable apprehension of bias must be "firmly established".[4] The standard is high because the withdrawal or disqualification of judges for unfounded allegations is as much of a threat to the interests of the impartial administration of justice as is the appearance of bias itself.[5]
6. It is also the case that an absolute neutrality for a judicial officer cannot be achieved, and personal convictions and opinions of judges are not in themselves a basis for inferring a lack of impartiality.[6] By way of illustration, the ICTY Appeals Chamber considered views on torture and held that it is:

> ...difficult to accept that any judge eligible for appointment to the Tribunal – and thus a person of "high moral character, impartiality and integrity", as required by Article 13 of the Tribunal's Statute – would not be opposed to acts of torture. A reasonable and informed observer, knowing that torture is a

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[1] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-880, "Sesay and Gbao Joint Motion For Voluntary Withdrawal or Disqualification of Justice Bankole Thompson From the RUF Case", 14 November 2007.
[2] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T-785, "Judgement", Annex C, 2 August 2007.
[3] *Prosecutor v. Brđanin*, IT-99-36-R 77, "Decision on Application for Disqualification," 11 June 2004, para. 8.
[4] *Ibid,*
[5] *Ibid.*
[6] *Prosecutor v. Delalic, Mucic, Delic, Landzo,* IT-96-21-A, "Judgement," ("***Čelebići Appeal Judgement***"), 20 February 2001, para. 699.

> crime under international and national laws, would not expect judges to be morally neutral about torture. Rather, such an observer would expect judges to hold the view that persons responsible for torture should be prosecuted.[7]

7. Disqualification can only occur where there is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice:[8]

> There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established'.[9]

8. The Appeals Chamber of the ICTY defined the test of impartiality as follows:

> ...a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:
>
> A. A Judge is not impartial if shown that actual bias exists.
> B. There is an unacceptable appearance of bias if:
> i) a Judge is a party to the case, or has a financial or propriety interests in the outcome of the case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
> ii) the circumstances would lead to a reasonable observer, ***properly informed***, to reasonably apprehend bias.[10] [emphasis added]

9. The Motion relies on the *Pinochet* decision, but that case was held to be of limited assistance by the Appeals Chamber in *Čelebići*[11] because the House of Lords disqualified Lord Hoffman on the ground that he "...was disqualified as a matter of law automatically

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[7] *Čelebići* Appeal Judgement, para. 699.
[8] *Prosecutor v. Brdanin and Talić*, IT-99-36/1-T, "Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge," ("***Talić Decision***"), 18 May 2000, para. 18 quoting Mason CJ of the High Court of Australia.
[9] *Ibid.*
[10] *Prosecutor v. Furundžij*, IT-95-17/1-A, "Judgement," ("***Furundžija Appeal Judgement***"), 21 July 2000, para. 189.
[11] *Čelebići* Appeal Judgement, para. 706. The same finding was made by the ICTY Appeals Chamber in the *Furundžija* Appeal Judgement, para. 194.

by reason of his directorship of AICL, a company controlled by a party, AI [Amnesty International]."[12] Two categories of cases were identified in *Pinochet*, Lord Hoffman fell within the first, and the categories were later described the Appeals Chamber in *Čelebići*:

> The first is that, where a judge is party to a litigation or has a relevant interest in its outcome, he is automatically disqualified from hearing the case. The second category is that a judge who is not party to the litigation, but whose conduct or behaviour in some other way gives rise to a reasonable suspicion that he is not impartial, is obliged to disqualify himself.[13]

10. Unlike in *Pinochet*, where Lord Hoffman fell within the first category, Mr. Justice Thompson clearly does not. In *Furundžija* the ICTY Appeals Chamber stated the test for the second category of cases as follows:

> In terms of the second branch of the second principle, the Appeals Chamber adopts the approach that the "reasonable person must be an ***informed*** person, ***with knowledge of all the relevant circumstances***, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.[14] [emphasis added]

11. ICTY cases are clear in holding that a Judge is not disqualified from hearing two or more criminal trials arising out of the same series of events:[15]

> ...it does not follow that a judge is disqualified from hearing two or more criminal trials arising out of the same series of events, where he is exposed to evidence relating to these events in both cases. This applies also to the situation where an accused in the latter case was previously named as a co-accused in the first indictment. A judge is presumed to be impartial.[16]

12. In *Talić* the point was expressly made that "the hypothetical fair-minded observer (with

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[12] *Regina v. Bow Street Metropolitan Stipendary Magistrates and others, Ex Parte Pinochet Ugarte (No 2,)* ("***Pinochet Decision***"), [1999] 2 WLR 272, p. 284,.

[13] *Čelebići* Appeal Judgement, para. 704.

[14] *Furundžija*, Appeal Judgement, para. 190 (emphasis added); *Talić* Decision, para. 15: the test is "...whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgement) would be that [the Judge]... might not bring an impartial and unprejudiced mind." See also *Talić* Decision, para. 8. The preceeding principles were applied by the Appeals Chamber of the Special Court in *Prosecutor v. Sesay*, SCSL-2004-15-58, "Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber", **("Sesay Appeal Decision")**, 13 March 2004, para. 4.

[15] *Prosecutor v. Kordić and Čerkez*, "Decision on the Application of the Accused for Disqualification of Judges Jorda and Riad", 21 May 1998, pp. 2-3: see also Bureau Decision of 4 May 1998, quoted in John R.W.D. Jones and Steven Powles, *International Criminal Practice*, Oxford University Press, 2003, para. 2.1.64.

[16] Bureau Decision of 4 May 1998, quoted in John R.W.D. Jones and Steven Powles, *International Criminal Practice*, Oxford University Press, 2003, para. 2.1.65.

sufficient knowledge of the actual circumstances to make a reasonable judgment)...",[17] "would know that the judges of this Tribunal are professional judges, who are called upon to try a number of cases arising out of the same events, and that they may be relied upon to apply their mind to the evidence in the particular case before them."[18]

13. Moreover, a Judge cannot be disqualified on the sole basis of a position taken by that Judge in a preceding case.[19] In *Talić* a Defence application was dismissed where the Defence sought to disqualify Judge Mumba because she had been a member of the Appeals Chamber on the *Tadić* appeal. The Appeals Chamber held that there was an international armed conflict in Bosnia and Herzegovina, an issue that would also arise in the *Talić* trial.[20] The statement of law applied by the *Talić* Trial Chamber was:

> ...whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgement) would be that [the Judge], having participated in the *Tadić* Conviction Appeal Judgement, might not bring an impartial and unprejudiced mind to the issues in the present case [...] It is *not* whether she would merely decide these issues in the same way as they were decided in that case. The distinction is an important one.[21] [emphasis in original]

III. ARGUMENT

14. The Motion selectively cites passages from the Dissenting Opinion, and at times passages are taken out of context. The context of the impugned words and the evidence heard in the CDF trial are important. With regard to the latter point only two persons testified for the Prosecution in the CDF trial and the trial of the Accused Sesay, Kallon and Gbao.[22]

15. The words used in the Dissenting Opinion are based on the evidence heard at trial. Paragraph 2 of the Motion seeks to make a point concerning the words preventing "anarchy and tyranny from taking a firm hold in their society,"[23] found in para. 101 of the Dissenting Opinion. However, para. 101 states that the inferences drawn are done so "in

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[17] *Talić* Decision, para. 15
[18] *Talić* Decision, para. 17.
[19] Jones and Steven Powles, *International Criminal Practice*, Oxford University Press, 2003, para. 2.1.69, quoting *Talić* Decision, paras 19, 20.
[20] *Talić* Decision, paras 19, 20.
[21] *Talić* Decision, para. 19.
[22] TF1-035 who testified in the RUF trial on 5 and 7 July 2005, and TF-296, an expert witness, who testified in the RUF trial on 11-14 July 2006.
[23] Motion, para. 2.

the context of the uniquely peculiar facts and circumstances of this case.."[24] Two comments follow from this: 1) the Dissenting Opinion does not refer to liability of the RUF, let alone of the Accused Sesay, Kallon and Gbao; and 2) the findings in the Dissenting Opinion are based upon the evidence heard in the CDF trial, which is almost entirely different from the evidence called in the RUF trial.

a) Facts Judicially Noticed

16. Judicial notice was taken of a number of facts in the RUF trial, including:[25]

(i) "The conflict in Sierra Leone occurred from March 1991 until January 2002" (fact A);

(ii) "Groups commonly referred to as the RUF, AFRC and CDF were involved in the armed conflict in Sierra Leone" (fact H);

(iii) "The RUF, under the leadership of FODAY SAYBANA SANKOH, began organized armed operations in Sierra Leone in March 1991" (fact J);

(iv) "During the ensuing armed conflict, the RUF forces were also commonly referred to as "RUF", "rebels", and "People's Army" by the population of Sierra Leone (fact K);

(v) "On 30 November 1996, in Abidjan, Ivory Coast, FODAY SAYBANA SANKOH and Ahmed Tejan Kabbah, President of the republic of Sierra Leone, signed a peace agreement which brought a temporary cessation to active hostilities" (fact M);

(vi) "However, the active hostilities thereafter recommenced" (fact N);

(vii) "The AFRC was founded by members of the Armed Forces of Sierra Leone who seized power from the elected government of the Republic of Sierra Leone via a coup d'etat on 25 May 1997. Soldiers of the Sierra Leone Army (SLA) comprised the majority of the AFRC membership" (fact O).

(viii) "Shortly after the AFRC seized power, at the invitation of Johnny Paul Koroma, and upon the order of FODAY SAYBANA SANKOH, leader of the RUF, the RUF formed an alliance with the AFRC" (fact R).

(ix) "The governing body [created by the AFRC/RUF Junta forces] included leaders of both the AFRC and the RUF" (fact U).

(x) "The Junta was forced from power by forces acting on behalf of the ousted government of President Kabbah about 14 February 1998. President Kabbah's government returned in March 1998" (fact V); and

(xi) "After the Junta was removed from power, the AFRC/RUF alliance continued" (fact W).[26]

17. These judicially noticed facts provide further context to the impugned passages relied upon in the Motion. For example, para. 4 (i) of the Motion cuts and edits a sentence from paragraph 87(6) of the Dissenting Opinion and attaches it to a phrase from paragraph 68. Paragraph 68 read in full leads to a more complete understanding, it states:

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[24] Dissenting Opinion, para. 101.

[25] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-PT-174, "Decision on Prosecution's Motion For Judicial Notice And Admission of Evidence", 24 June 2004, and *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-392, "Consequential Order Regarding Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence," 24 May 2005. No leave to appeal was sought of this decision.

[26] See Annex I to the *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-392, "Consequential Order Regarding Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence," 24 May 2005.

> 68. An examination of the totality of the evidence adduced before the Trial Chamber amply reveals, in my considered judgement, a claim by the Accused that the CDF and the Kamajors were fighting to restore the lawful and democratically elected Government of President Kabbah to power after the May 25, 1997 coup by the Armed Forces Revolutionary Council (AFRC). The records indicate that the Prosecution admitted that the Kamajors were fighting for the restoration of democracy.[27]

18. The first phrase is confirmation that inferences were drawn from the specific evidence heard in the trial, while the final sentence records a Prosecution admission during the course of the trial. It is a judicially noticed fact that the Kabbah government was the elected government of Sierra Leone (Fact O), that there was an AFRC coup (Fact O), and that the AFRC junta was forced from power by forces acting on behalf of the government of President Kabbah (Fact V).

19. Paragraph 4(ii) of the Motion, states: "The CDF were acting with 'patriotism and altruism' against the forces of 'rebellion, anarchy and tyranny'", and it cites para. 90 of the Dissenting Opinion. However, that paragraph reads as follows:

> 90. Predicated upon these premises, there can be little doubt that in the context of the intensely conflictual situation prevailing at the material time in Sierra Leone dominated by utter chaos, fear, alarm and despondency, fighting for the restoration of democracy and constitutional legitimacy could be rightly perceived as an act of both patriotism and altruism, overwhelmingly compelling disobedience to a supranational regime of proscriptive norms.[28]

20. In no way can that paragraph be interpreted to demonstrate that the writer is bringing a partial and prejudiced mind to a trial involving members of the RUF, or to the three particular Accused, Sesay, Kallon and Gbao. It was a finding of fact open to the adjudicator on the evidence before him that there was chaos and fear, that attempts were being made to reinstate an elected government, and that such an attempt could be perceived as an act of patriotism.

21. A review of the remaining allegations contained in para. 4 of the Motion shows a similar failure to acknowledge the context of the statement, and they obscure the meaning of the Dissenting Opinion by cutting words from one paragraph and adding them to another. The allegation at para. 4(iii) of the Motion, states: "That members of the Armed Forces

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[27] Dissenting Opinion, para. 68.
[28] Dissenting Opinion, para. 90.

Revolutionary Counsel (AFRC) constituted the forces of rebellion, anarchy and tyranny," and the footnote attributes this allegation to paras. 87(6), 97 and 101 of the Dissenting Opinion. However, para. 87(6) is irrelevant to the allegation,[29] and paras. 97 and 101 are findings based on the evidence in that particular trial.[30]

22. None of the impugned passages relied on in the Motion refer to the RUF.[31] The Dissenting Opinion refers to the overthrow of the government of Sierra Leone on May 25, 1997 by the AFRC,[32] a judicially noticed fact, and the First Accused's opening statement accepted that the SLA seized power from the Kabbah government.[33]

23. Contrary to what is suggested at paragraph 4 of the Motion, all the references to "evil" in Dissenting Opinion are made in very general and abstract terms, and never refer to any particular organization.[34] Nor does the Dissenting Opinion refer to crimes committed, but rather to actions and concepts such as "rebellion, anarchy and tyranny".[35]

b) Sesay Defence Opening Statement

24. The Sesay Defence conceded in its opening statement that "the evidence you have heard in this courtroom concerning the conduct, some in the RUF, cannot be disputed"[36] and referred to "...the wrongs committed on them by members of the RUF."[37] The Defence further stated: "Were terrible crimes committed by some claiming to represent the RUF?

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[29] Paragraph 87(6) of the Dissenting Opinion states: "The preservation of democratic rule in the contemporary world setting with its emphasis on a global culture that espouses freedom and human dignity as key values of modern civilization is a vital interest of individual states and the international community in general worthy to be defended at all costs in the face of rebellion and anarchy."

[30] Paragraphs 97 and 101 of the Dissenting Opinion state:

> 97. Based on the foregoi ng legal analysis, I find that the evidence, in its totality, points irresistibly to the conclusion that the CDF and Kamajor resistance efforts were directed at the preservation of the safety of the State of Sierra Leone which, at the material time, was threatened by the forces of rebellion and anarchy.
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> 98. The evidence also reasonabl y shows that the safety of the State of Sierra Leone, as the supreme law, became for the CDF and the Kamajors the categorical imperative and paramount obligation in their military efforts to restore democracy to the country. I entertain more than serious doubts whether in the context of the uniquely peculiar facts and circumstances of this case a tribunal should hold liable persons who volunteered to take up arms and risk their lives and those of their families to prevent anarchy and tyranny from taking a firm hold in their society, their transgressions of the law notwithstanding.

[31] Dissenting Opinion, paras 71, 75, 79, 80, 87, 90, 92, 97, 100(i) 101; compare with Motion para. 12 which aggregates RUF and AFRC.

[32] Dissenting Opinion, paras 69 and 80.

[33] *Prosecutor v. Sesay*, Trial Transcript 3 May 2007, p. 14, lines 17-18: "the SLA who seized power from the hapless Kabbah government."

[34] Dissenting Opinion, paras. 71, 73, 78, 80, 87(2) & (3).

[35] Dissenting Opinion, para. 69.

[36] *Prosecutor v. Sesay*, Trial Transcript 3 May 2007, p. 4, lines 18-21.

[37] *Prosecutor v. Sesay*, Trial Transcript 3 May 2007, p. 5, lines 20-21; See also Trial Transcript 3 May 2007, p. 5, lines 28-29: "...a huge number of suspect insiders willing to say anything to salvage their own disreputable lives";

Again, no doubt";[38] that "[m]embers of the RUF committed horrific crimes";[39] and that "some of the rank and file [of the RUF] were opportunistic criminals, and these people have caused the innocent in Sierra Leone a huge amount of pain and suffering. We do not deny that pain and suffering."[40]

c) Allegation of a joint criminal enterprise

25. Contrary to the allegation at paragraph 15 of the Motion, the Dissenting Opinion does not refer to crimes and criminal liability (other than the Accused Fofana and Kondewa), nor is there a finding of a shared criminal enterprise between the AFRC and RUF. The Dissenting Opinion goes no further than to use words such as "rebellion, anarchy and tyranny"[41], "immediate threat of harm purportedly feared"[42], "fear, utter chaos, widespread violence",[43] "alarm and despondency", [44] or "evil".[45] Judge Robertson's book,[46] on the other hand, made references to crimes and criminality.[47] In addition, the language used by Judge Robertson was significantly more graphic, and he made specific reference to Foday Sankoh. There is no merit in the Defence assertion that "the views expressed by Justice Thompson are quantitatively and qualitatively no different to those made by Justice Robertson...."[48]

26. The proper test must be applied. A citizen may think that persons responsible for crimes should be punished, "...but this is fundamentally different to bias against any person accused of [specific crimes]. This is particularly so in the case of judges who ... are

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[38] *Prosecutor v. Sesay*, Trial Transcript 3 May 2007, pp. 7-8, lines 28-29 and 1-2.
[39] *Prosecutor v. Sesay*, Trial Transcript 3 May 2007, p. 8, line 6. See also lines 19-20 "It is these types of cases where there are overwhelming feelings of repugnance..."; See also p. 9, lines 20-23: " How do we reconcile the man who civilians insiders and others will describe as doing so much good with a man who rose to the top of such an *infamous organization*?" (emphasis added); See also, in the same vein, p. 10, lines 23-24: " I pause here to say we do not dispute that crimes were committed in Kailahun during the indictment period."; See also p. 11, lines 10-11: "...this so-called criminal organization, revolutionary United Front..."; See also p. 16, lines 2-3: "as Superman brutalized his way from Koinadugu to Makeni in late 1998, looting and burning as he went along..."; See also p. 16, lines 25-26: " As the West Side boys rampaged around Okra Hill, and Superman, Gibril Massaquoi launched attacks on the innocents in Port Loko..."; See also p. 27, lines 10-12: " ...Gibril Massaquoi was held up as a man who did not have Sierra Leone's best interests at heart".
[40] *Prosecutor v. Sesay*, Trial Transcript 3 May 2007, p. 8, lines 8-11.
[41] Dissenting Opinion, para. 69.
[42] Dissenting Opinion, para. 91 (ii).
[43] Dissenting Opinion, para. 91(ii).
[44] Dissenting Opinion, para. 90.
[45] Dissenting Opinion, para. 71.
[46] Geoffrey Robertson, *Crimes Against Humanity-the Struggle for Global Justice* (The NewPress, 2002) ("Crimes Against Humanity).
[47] *Ibid*, pp. 220, 277, 465-469.
[48] Motion, para. 16.

presumed to be impartial, and are professionally equipped, by virtue of their training and experience, for the task of fairly determining the issues before them by applying their minds to the evidence in the particular case."[49]

27. Any judge eligible for appointment to the Special Court – and thus a person of "high moral character, impartiality and integrity", as required by Article 13 (1) of the Statute – would consider that the extensive harm that took place in Sierra Leone from 1991 to 2002 was reprehensible.[50] That is wholly different from considering or identifying liability. Determining liability involves weighing evidence and assessing judicially noticed facts, and nowhere do the words of the Dissenting Opinion suggest that Mr. Justice Thompson has made determinations that bring into question the presumption of impartiality owed to all judges.

IV. CONCLUSION

28. The evidence in the CDF trial was different and the facts of each trial must be determined on the evidence produced.[51] There is nothing in the Dissenting Opinion to suggest that Judge Thompson is not capable of applying his mind to the merits of this case in an unprejudiced and impartial manner.[52] It is settled law that a Judge cannot be disqualified based on a position taken in parallel case on an issue in dispute in the case now before him or her.[53] The reasonable informed observer would conclude that Judge Thompson is neither biased, nor is there a reasonable apprehension of bias. The Motion should be dismissed.

Filed in Freetown, 20 November 2007

For the Prosecution,

Stephen Rapp
Prosecutor

[49] See *Čelebići* Appeal Judgement, para. 700, which applies the same reasoning to torture, i.e. it can be expected that a Judge will be against torture as such (emphasis added).
[50] *Čelebići* Appeal Judgement, para. 699.
[51] *Talić* Decision, para. 17.
[52] *The Prosecutor v. Momcilo Krajisnik*, IT-00-39-PT, "Decision on the Defence Application for Withdrawal of Judge from the Trial", 22 January 2003, para. 18.
[53] Jones and Steven Powles, *International Criminal Practice*, Oxford University Press, 2003, para. 2.1.69, quoting Talić Decision, paras 19, 20.

INDEX OF AUTHORITIES

I. ORDERS, DECISIONS AND JUDGEMENTS

A. Special Court for Sierra Leone

1. *Prosecutor v. Sesay*, SCSL-2004-15-58, "Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber", 13 March 2004.

2. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-PT-174, "Decision on Prosecution's Motion for Judicial Notice And Admission of Evidence", 24 June 2004.

3. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-392, "Consequential Order Regarding Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence," 24 May 2005.

4. *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T-785, "Judgement", Annex C, 2 August 2007.

5. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-880, "Sesay and Gbao Joint Motion For Voluntary Withdrawal or Disqualification of Justice Bankole Thompson From the RUF Case", 14 November 2007.

B. International Criminal Tribunal for the Former Yugoslavia

1. *Prosecutor v. Kordić and Čerkez*, "Decision on the Application of the Accused for Disqualification of Judges Jorda and Riad", 21 May 1998.
http://www.un.org/icty/kordic/trialc/decision-e/80521DQ113621.htm

2. *Prosecutor v. Radoslav Br|anin and Momir Talic,* ("*Talić* Decision") IT-99-36-PT, "Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge", 18 May 2000.
http://www.un.org/icty/brdjanin/trialc/decision-e/00518DQ212937.htm

3. *Prosecutor v. Furundžija,* IT-95-17/1, "Judgement", Appeals Chamber, 21 July 2000
http://www.un.org/icty/furundzija/appeal/judgement/index.htm

4. *Prosecutor v. Zejnul Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* ("*Čelebići* decision"), IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001
http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf

5. *The Prosecutor v. Momcilo Krajisnik*, IT-00-39-PT, "Decision on the Defence Application for Withdrawal of Judge from the Trial", 22 January 2003.
http://www.un.org/icty/cases-e/index-e.htm

6. *Prosecutor v. Brđanin*, IT-99-36-R 77, Decision on Application for Disqualification, 11 June 2004.
http://www.un.org/icty/brdjanin/trialc/decision-e/040611.htm

II TRIAL TRANSCRIPTS

1. *Prosecutor v. Sesay, Kallon, Gbao,* Trial Transcript 5-7 July 2005

2. *Prosecutor v. Sesay, Kallon, Gbao,* Trial Transcripts 11-14 July 2006

3. *Prosecutor v. Sesay*, Trial Transcript 3 May 2007

III OTHER AUTHORITIES

1. *Regina v. Bow Street Metropolitan Stipendary Magistrates and others, Ex Parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272, p. 284, ("Pinochet Decision").
-decision is attached to the Motion filed by the First and Third Accused.

2. John R.W.D. Jones and Steven Powles, International Criminal Practice, Oxford University Press, 2003.

3. Geoffrey Robertson, *Crimes Against Humanity-the Struggle for Global Justice*, The NewPress, 2002.

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Reluctant Judas
Obscenity
People Against the Press
Geoffrey Robertson's Hypotheticals
Does Dracula Have Aids?
Freedom, the Individual and the Law
Media Law (with A. Nicol)

Geoffrey Robertson

THE JUSTICE GAME

VINTAGE

73,000 people – fewer than the maniacal Marxist of Ethiopia, Colonel Mengistu, who lives happily ever after his monstrous crimes against humanity under the personal protection of Robert Mugabe in Zimbabwe. The late Pol Pot went into hospital in Thailand periodically for haemorrhoid treatment, protected by the UN's need to keep the Khmer Rouge from upsetting its peace plans in Cambodia, while its former Secretary-General, Boutros Boutros-Ghali, warmly embraced the bloodiest Khmer leaders when they emerged from hiding in 1998. In 1994, the Haitian generals provided a copybook example of how to ransom their crimes against humanity: they were prepared to stop committing them in the future in return for being allowed to keep the profits from those they had committed in the past.

This was all the doing of international diplomacy, which until the Bosnian crisis simply pretended that Nuremberg had never happened. The diplomats who represented national leaders were instructed not to countenance the prosecution of other national leaders: tyranny was a matter for negotiated climbdowns, never for justice. This approach has been reflected at a national level by the choice of amnesties and 'Truth Commissions' over trials for the crimes committed by former regimes. Thus, the middle-ranking military officers of the Argentinian junta who waged the 'dirty war' against dissidents by torturing and then causing them to disappear – often by having them pushed out of aeroplanes over the Atlantic – received a blanket amnesty in 1987. Leaders of the death squads in El Salvador received an amnesty in 1994, which embraced those responsible for killing over a hundred children in the El Mozote massacre. Go to South Africa today, and for the price of a few drinks you can listen to loquacious ex-majors tell how they tortured and killed the opponents of apartheid: the Truth and Reconciliation Commission forced them to talk, but did not reconcile them with many relatives of their victims. Those who order atrocities believe at the time that their power will always enable them to bargain with any new government to let bygones be bygones, and history since Nuremberg has tended to prove them correct – most bizarrely in Sierra Leone, when by the Lomé agreement in July 1999 the UN not only amnestied Foday Sankoh, the nation's butcher, but rewarded his pathological brutality by making him deputy leader of the government and giving him control of the diamond mines. The

main resolve to punish crimes against humanity has been to prosecute in national courts a handful of very old Nazis suspected of war crimes. Some of these trials (hinging on identification evidence, hopelessly unreliable after fifty years) have collapsed: with war crimes, as with other crimes, justice long delayed can be justice denied.

This is why it has been the great achievement of international law, by the dawn of the twenty-first century, to lift the veil of sovereign statehood far enough to make individuals responsible for the crimes against humanity committed by the states they formerly commanded, while at the same time developing a rule that those states have a continuing duty to prosecute and punish them, failing which another state or the international community may bring them to justice. This chapter places that achievement in historical perspective, focusing on the epochal judgment at Nuremberg. Chapter 7 examines the duty to prosecute and the temptations of amnesties and Truth Commissions, while chapters 8–10 will explain how the world community is working, with difficulty, towards a universal jurisdiction to try crimes against humanity, and with even greater difficulty (see chapter 11) towards a system which will stop them being perpetrated in the first place.

Nuremberg was a precedent that the United Nations ignored until the ethnic cleansing policy of the Bosnian Serbs turned its New World Order into a joke. The International Criminal Tribunal for the Former Yugoslavia was established by the Security Council on 27 May 1993 as if to stop the world laughing at its impotence, as a substitute for effective military action to stop the war. After catching one criminal in two years (and a footsoldier at that) the Tribunal finally lifted a formal finger against the Bosnian Serb leadership on 15 May 1995, by taking over the investigation into their culpability from the courts of Bosnia and Hercegovina. This step seemed insignificant at the time (the Bosnian Serb leaders were not under arrest, but on the contrary were in a position to authorize the arrest of UN peacekeepers, which they did a few weeks later). It marked, nevertheless, the first time since Nuremberg that an international court had assumed jurisdiction over the masters of war crimes, towards the close of a century in which 160 million human beings were slaughtered in war.

At this level, it was a deeply symbolic occasion. Richard Goldstone,

army to revolt unless its officers are given amnesties for crimes against humanity. Clearly, no pardon signed under threat of direct physical violence – a gun at the head of the president – can be valid: it is not the deliberate act of a head of state.[27] But pressure, even to the point of threatening calamitous loss of life, cannot invalidate through duress the presidential act of granting an amnesty if the president is physically free and makes a deliberate decision that amnesty is in the public interest as the lesser of two evils. Thus, in the Trinidad case, the Privy Council declined to invalidate the amnesty on the ground that it was extracted from the president by threats to kill the prime minister and cabinet ministers who were all being held as hostages. The court invalidated it, instead, because the Muslims did not immediately accept its condition – that they surrender their hostages unharmed – but continued to hold them for several days while negotiating an eventual surrender. With Solomonic wisdom, the court thus denied murderous fanatics any damages for wrongful arrest, but at the same time stopped the State from proceeding to hang them by ruling that it would be an abuse of process to continue prosecution because they had surrendered in the belief (induced by the government) that they were entitled to a pardon once they did eventually comply with the condition. The repugnant prospect that terrorists who killed and caused vast damage to the country might actually be awarded millions of dollars of compensation for false imprisonment (they had been detained for two years while the validity of the amnesty was considered by the courts) was a Gilbertian conclusion to be avoided at all costs, and the Privy Council avoided it by ruling that the insurgents had not surrendered quickly enough. This useful precedent was applied by the Fiji courts in 2001 to invalidate the amnesty given to George Speight by the army: it could not obliterate his continuing acts of treason. But governments which do deals with terrorists and common criminals may be legally obliged to keep them, and in such situations 'amnesty' is really no more than a formal means of promising immunity from prosecution in return for surrender.

For this reason, domestic rules upholding the validity of amnesties do not answer the question of whether in international law it is ever possible to grant a valid pre-conviction pardon in respect of a crime against humanity. There may be no objection to a state remitting the

sentence, in whole or in part, on persons convicted of such crimes, as an act of humanity or even of politics (e.g. where it is believed that insufficient weight was given to obedience to superior orders as a mitigating factor). What cannot be countenanced is either the ludicrous spectacle of the State forgiving itself its own wrongs, or the increasing phenomenon of new governments giving amnesties at the insistence of one continuing branch of the old – usually the military or the police. The State, in other words, is entitled to grant amnesty to individuals who break its laws, but not when they do so on behalf of the State itself. The State as victim may forgive, but when complicit with the perpetrator, it cannot be forgiven.

It is well established that new governments inherit the legal responsibilities of their predecessors. The principle of the continuity of the State in international law means that state responsibility exists independently of change of government and continuously from the time of the act for which the State is responsible to the time when the act is declared illegal. The State cannot therefore obliterate its own crimes, or those of its agents, committed against its subjects. This is the case whether the government granting the amnesty is the government at fault or the successor to that government. Just as genocide and torture are repugnant to international law to such an extent that no circumstances can justify them (hence these convention obligations are non-derogable), so amnesties given to perpetrators of such deeds by frightened or blackmailed governments cannot be upheld by international law, even when agreed by international diplomats. For this reason, the UN was justified in reinterpreting the amnesty given to the despicable Foday Sankoh: it pardoned him only for crimes committed under Sierra Leone law, not international law.

In other words, states which pardon torturers before trials have taken place are in breach of their international obligations to bring perpetrators of crimes against humanity to justice. The amnesty may be valid under domestic law, and the action justified in international law either under Article 4 of the Civil Covenant (a derogation taken in time of public emergency which threatens the life of the nation') or under the accepted customary law notion of necessity: obligations may be ignored to save a state from grave and imminent peril. Governments which fail in their duty to prosecute the military sometimes do

as in other parts of Indonesia. Parliament established a civilian human rights commission which soon uncovered evidence of massacres in East Timor and of how bodies of victims were transported across the border for secret disposal in West Timor. It called in and cross-examined senior generals and uncovered the conspiracy to form and arm the militias, and to fund them from the budget of East Timor's civil administration. Its report, in January 2000, accused thirty-three leaders of crimes against humanity and demanded their prosecution: command responsibility was fixed on the former military chief, General Wiranto, five other generals and a number of senior officers, together with the militia commanders and the former civilian governor of East Timor, Abilio Soares.[35] The UN Human Rights Commission inquiry reported at the same time with broadly similar conclusions, except that it recommended an extension of the Hague Tribunal, including judges from Indonesia, to try the accused.

The Indonesian government rejected this affront to its sovereignty, but renewed its promise to bring the suspects to justice – although the approval for trials of Soares and some junior officers was not given until late 2001 by President Megawati, under strong international pressure, and amid serious doubts about the capacity of local judges to manage them. The first trial, that of Soares and his chief of police, began in Jakarta in March 2002 before a special human rights tribunal: they were accused of a crime against humanity by permitting widespread and systematic militia attacks on civilians, 117 of whom lost their lives.[36] They are challenging the Tribunal's jurisdiction, but their defence on the merits is an absurd and in any event irrelevant claim that the attacks were provoked by anger at the bias of the UN mission that supervised the referendum. It is to be hoped that the new human rights court handles these cases effectively, although the worst criminals will not appear before it. General Wiranto, the overall commander, was allowed to resign from cabinet in return for an agreement not to prosecute, and the Attorney General at this point lacks the courage to indict Zacky Anwar and the other senior army officers implicated in the killings. In East Timor in the meantime, international judges at a UN Court in Dili have begun to convict remaining militia members for their part in the September 1999 atrocities.

The battle – thus far successful – by Indonesian generals to avoid

international justice has been illuminating. They have made no secret of their fears of suffering the fate of Pinochet, or of the indignity that would attend their appearance in uniform in the Hague dock.[37] What appears to have exercised them most was the humiliation of being tried in another country, under the world's gaze, rather than in their own courts. If this fear of suffering the *indignity* of international criminal justice is widely shared in military circles, and if it infects political leaders as well, then the prospect of trial at The Hague can have a real deterrent effect. The army and the militias behaved like nervous murderers, transporting the corpses, at great inconvenience, long distances to bury them across the West Timor border. The advent of international criminal law, for all the pot luck of its enforcement, had at least made them afraid of retribution for their crimes against humanity.

LESSONS FROM SIERRA LEONE

Pinochet, Kosovo, East Timor and Lockerbie occupied the world's attention in 1999, that *annus mirabilis* for international human rights law. But these steps forward were accompanied by one barely noticed backslide in the treacherous minefield of a small and turbulent African state. The Lomé Peace Agreement, brokered by the UN, with UK and US support, purchased peace at a most extraordinary price. The democratically elected government was forced to share power with rebels who were pardoned for the most grotesque crimes against humanity, and their leader, liberated from prison, was made Deputy Prime Minister in charge of the nation's diamond resources, the very object of his ruthless campaign. As it happened, not even this capitulation could satisfy Foday Sankoh: his renewed attacks on a ragtag army of UN peacekeepers obliged the former colonial power, Great Britain, to return in force, much to the relief of the populace. The case of Sierra Leone provides object lessons in:

i) the counter-productivity of amnesties for crimes against humanity;
ii) the impossibility of UN peacekeepers maintaining neutrality in a civil war where one side is given to committing such crimes;

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iii) the need for a standing UN 'rapid reaction' force;
iv) the potential for legitimate use of mercenaries; and
v) the prospects for 'hybrid' war crimes courts, comprising both local and international judges and prosecutors.

When Sierra Leone, a West African coastal state, was granted independence from Great Britain in 1961, its population of 4.5 million had enjoyed comparative peace and prosperity, largely thanks to its diamond mines. Corruption soon took its toll of elected politicians and a series of army coups were interspersed with raids on the diamond mines by a breakaway Sierra Leone army faction led by Corporal Foday Sankoh, operating from neighbouring Liberia. Styled the Revolutionary United Front (RUF), it recruited gangs of violent, dispossessed youths and armed them with AK47s for their missions of pillage, rape and diamond-heisting. The RUF had no political agenda: its sponsor was Charles Taylor, Liberia's vicious warlord. But when, in 1995, the RUF threatened to attack Sierra Leone's capital Freetown, the military government paid a South African mercenary force, Executive Outcomes, to protect the city and 're-train' the government army. They did well enough for elections to be held again in 1996, which returned Ahmed Kabbah, a former UN official. By this time, the RUF had perfected its special contribution to the chamber of war horrors: the practice of 'chopping' the limbs of innocent civilians. It was a means of spreading terror, especially to deter voters in the elections which the RUF opposed: their anti-election slogan, 'Don't vote or don't write', came true for thousands of citizens, forced to lay their right hand on RUF chopping-blocks after they had chosen to vote. Mutilation worked, as a means of terrifying the population, and so the RUF devised more devilish tortures, such as lopping off a leg as well as an arm, sewing up vaginas with fishing lines, and padlocking mouths.[38] Given their level of barbarism, how could Sankoh and the RUF leadership ever have been invited by Western diplomats to share power?

The UN and the Western countries which had supervised the 1996 elections did not stay around to help President Kabbah, and in 1998 some RUF-inclined army officers staged another coup. Kabbah retained a new mercenary company, Sandline, to help his return to

power although this was in fact achieved by Nigerian forces acting through a regional OAU grouping (ECOMOG). It is ironic that Sani Abacha, the villainous Nigerian dictator who killed Ken Sara Wiwa looted $5 billion and denied his own country democracy should restore it in Sierra Leone, but that he did, with grudging support (there being no alternative) from the UN. He arrested Foday Sankoh, who was tried by a jury in Freetown and sentenced to death for treason. In June 1998 the UN passed resolution 1181 pursuant to which it sent in a token force of 'blue berets' to stabilize the situation, but they were wholly inadequate to stop the renewed fighting between the RUF and the governmental armies (whose members often swapped sides at night). Discredit for the Lomé Peace Agreement belongs principally to the Reverend Jesse Jackson, whose role as 'comforter and confessor' to President Clinton over the Lewinsky affair had in some bizarre way led to his appointment as Presidential envoy to stop the wars of West Africa. Jackson chummed up with Charles Taylor and expressed admiration for the imprisoned Foday Sankoh, likening him to Nelson Mandela (who was not a psychopath given to mutilating civilians). Jackson's ignorance and moral blindness does not excuse the Western and UN diplomats who agreed to release Sankoh from prison, bestow upon him an apparently valid amnesty, and hand him the only prize in Sierra Leone worth having – control of the diamond mines. Kabbah signed the Lomé Agreement in July 1999 under intense pressure, his protest symbolized by the companion he brought to the signing ceremony, a child whose arm had been chopped by the RUF. Kofi Annan, feeling queasy about the amnesty, instructed his representative to make one reservation, to the effect that it would not cover 'grave breaches' of the Geneva Conventions.

The amnesty certainly covers crimes Sankoh and the RUF have committed under Sierra Leone law, like murder and grievous bodily harm (i.e. mutilation). Whether it covers the same offences when characterized – through their widespread and systematic nature – as crimes against humanity, will be a matter for the court at Sankoh's eventual trial. At least it cannot extend to forgiveness of crimes committed after July 1999 (on the Privy Council authority of *AG Trinidad* v. *Lennox Phillip* – see p. 275). The RUF, programmed to kill and pillage and mutilate, continued to do so after Lomé, so the

UN sent in another 'peacekeeping' mission, a ragtag army of ragbag Zambians (they arrived without kit), insubordinate Jordanians and disorganized Kenyans, and put them all under the command of an unpopular Indian Major General, whose orders they routinely disobeyed. After Sankoh's forces had taken 500 Zambian hostages and were about to overrun Freetown, it was Britain that saved the day. It did not, sensibly enough, rely on any UN mandate, but intervened at the invitation of the elected government and for the initial purpose of safely evacuating British nationals from Freetown.[39] The continuing presence of British forces proved necessary to provide some stability and to frighten the RUF (when one of its gangs kidnapped British soldiers, the ensuing SAS rescue wiped out twenty-four gang members). The British Prime Minister, in a notable speech at his party's conference, in October 2001, boasted of British action in Sierra Leone as a precedent for the defeat of terrorism in Afghanistan. The latter has proved a much more difficult prospect, but the British/UN occupation of Sierra Leone has at least ended a ten-year civil war which lost 50,000 lives and hundreds of thousands of limbs.

Although British intervention did not solve the country's intractable problems, it produced sufficient peace for plans to proceed for the trial of the re-imprisoned Foday Sankoh and some captured RUF leaders, while the more reasonable elements of that group are actually to contest an election in 2002 in a country which now has a large (and finally, effective) force of UN peacekeepers. A special court has been established pursuant to Security Council Resolution 1315, which records an agreement between the UN and Sierra Leone to try 'those who bear the greatest responsibility' for crimes against humanity and for disrupting the peace process. It will have jurisdiction to deal with crimes committed after 1996, subject to rulings on the scope of the Lomé Agreement, which in any event cannot protect Sankoh from punishment for any crimes he committed after July 1999. The court is a hybrid, staffed by local and international UN personnel. Its trial chamber has 2 judges (and 3 appeal judges) appointed by the UN Secretary General and one judge (2 appeal judges) appointed by the government. There is an international prosecutor, working mainly with local lawyers, and the rules of evidence and procedure will be those of the Rwandan Tribunal. The most difficult ethical question

was how to deal with atrocities committed by boy soldiers: many of the worst mutilations were committed by brutal and aggressive 16- and 17-year-olds, and the populace demanded that they be punished. Kofi Annan took the forgiving line of most NGOs, that these youths were in fact 'victims of psychological and physical abuse' and pursuant to the Convention on the Rights of the Child they should not be made accountable for their criminal acts. The treaty between the UN and Sierra Leone which establishes the court reaches an uneasy compromise: soldiers under the age of fifteen at the time of their crime will not be prosecuted, whilst those who were sixteen or seventeen will not go to jail if convicted. The deliberate use of child soldiers for terrorist atrocities in Africa (pioneered by CIA-backed Holden Roberto – see p. 217) and the ethical objections to punishing them makes it crucial for customary international law to recognize their recruitment as a war crime entailing individual responsibility – a development which has been helped by the inclusion of the recruitment of child soldiers as a crime in Article 8 of the ICC statute.

Sierra Leone is a small state that loomed large in the UN's latest department, which is optimistically called its 'Lessons Learned Unit'. The primary lesson was spelled out in the report produced for the millennium summit by a panel of experts chaired by Lakhdar Brahimi: it concluded that the UN's fundamental peacekeeping failure had been its 'reluctance to distinguish victim from aggressor': adherence to the traditional principles of impartiality and use of force only in self-defence had resulted in the UN's 'complicity with evil'. This referred to the Lomé Agreement, which set free the RUF leader and gave him a half share in the nation's political power and resource wealth. Henceforth, said Brahimi, Security Council mandates must permit military action by bigger and better forces, directed against 'spoilers' – parties like the RUF which break peace agreements – and include as targets their accomplice arms suppliers, drug and gem traders and parasitic crime syndicates.

So much for hindsight: a warring faction guilty of atrocities on a scale that amounts to a crime against humanity must never again be forgiven sufficiently to be accorded a slice of power: on the contrary, its leaders deserve to be captured and put on trial. Foday Sankoh embodies that proposition, and the hybrid special court devised to try