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SCSL-04-15-T
(32237 — 32264)

32237

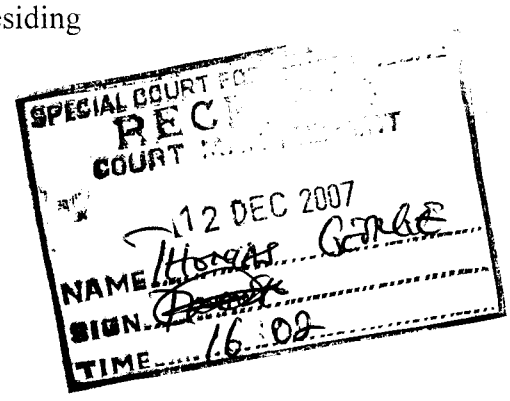
SPECIAL COURT FOR SIERRA LEONE
FREETOWN – SIERRA LEONE

APPEALS CHAMBER

Before: Hon. Justice George Gelaga King, Presiding
Hon. Justice Emmanuel Ayoola
Hon. Justice Renate Winter
Hon. Justice A. Raja N. Fernando
Hon. Justice Jon Kamanda

Registrar: Mr. Herman von Hebel

Date filed: 12 December 2007



THE PROSECUTOR v. **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

GBAO NOTICE OF APPEAL AND SUBMISSIONS REGARDING THE DECISION BY THE TRIAL CHAMBER ON THE MOTION FOR VOLUNTARY WITHDRAWAL OR DISQUALIFICATION OF JUSTICE BANKOLE THOMPSON FROM THE RUF CASE

Office of the Prosecutor
Mr. Peter Harrison
Mr. Vincent Wagona

Defence Counsel for Issa Hassan Sesay
Mr. Wayne Jordash
Ms. Sareta Ashraph

Defence Counsel for Morris Kallon
Mr. Shekou Touray
Mr. Charles Taku
Mr. Kennedy Ogetto
Mr. Lansana Dumbuya

Defence Counsel for Augustine Gbao
Mr. John Cammegh

NOTICE OF APPEAL

I. Title and Date of Filing of Appealed Decision

1. The Defence for the Third Accused files this notice of appeal pursuant to Rules 73(B) and 108(C), as well as the Practice Direction of 30 September 2004.[1] The Defence files an appeal to the Trial Chamber's 6th December 2007 "Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case".[2] The decision was issued orally in open court[3] and subsequently filed on 6th December 2007.

II. Summary of Proceedings Relating to the Appealed Decision

2. On 2 August 2007, Trial Chamber I rendered its judgement in the case against Moinina Fofana and Allieu Kondewa ('The CDF Accused').[4] They were found guilty of violence to life, health and physical or mental well-being of persons, in particular cruel treatment (count 2 and count 4), pillage (count 5) and collective punishment (count 7). Allieu Kondewa was also found guilty of using child soldiers (count 8).[5]

3. On the same day, Honourable Justice Thompson issued a separate and dissenting opinion ('Separate Opinion') in which the two CDF Accused were found not guilty and acquitted on all counts.[6] In his opinion, Judge Thompson adopted the findings of fact of the Majority.[7] He reached his decision by applying, *inter alia*, the defence of necessity to the case, finding that the actions of the CDF were necessary in order to protect the state

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1 Practice Direction for Certain Appeals Before the Special Court, 30 September 2004, paragraph 10.

2 *Prosecutor v. Sesay et al*, SCSL-04-15-T-909, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 6 December 2007. ('The Trial Chamber's Decision').

3 RUF Transcripts of 6 December 2007.

4 *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Doc. No. SCSL-04-14-T-785, Judgement, Trial Chamber I, 2 August 2007. ('CDF Judgement').

5 Ibid, Dispositions.

6 *Ibid.*,, Annex C: Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute. ('Separate Opinion'). Paragraph 104.

7 Except a small segment of findings of fact on the issue of ritual killings and the initiation process of the CDF and the Kamajors. See Separate Opinion, para.56.

of Sierra Leone from various forces threatening it,[8] and that therefore the crimes in respect of which the Accused have been found guilty were excusable.[9]

4. On 14 November 2007 the First and Third Accused filed a motion requesting the voluntary withdrawal or the disqualification of Judge Thompson from the RUF Case.[10] Defence for the First and Third Accused submitted that, in reaching his decision, Judge Thompson made findings which gave rise to an appearance of bias.[11] More specifically, the Defence noted that the language used by Justice Thompson[12] as well as other findings and conclusions in the Separate Opinion would lead any reasonable and informed observer would legitimately express doubts as to Justice Thompson's ability to impartially rule on the case of the RUF Accused. It was submitted by the Defence that Judge Thompson gave the impression of having already prejudged the guilt of the RUF Accused[13] and therefore that the Accused's right to be presumed innocent was affected.[14]

5. On 16 November 2007 the Trial Chamber decided to sit in the absence of Judge Thompson pursuant to rule 16(A) of the Rules of Procedure and Evidence ('RPE')[15] and ordered the Prosecution to file any response by 20 November 2007, and the Defence to file any reply by 23 November 2007.[16]

6. On 20 November 2007 the Second Accused informed the Court of his support for the Defence motion and thereafter filed a statement in support of the Motion.[17]

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8 *Ibid.*, paras. 91 and 101.
9 *Ibid.*, para.103.
10 Prosecutor v. Sesay et al, 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. ('Defence Motion').
11 *Ibid.*, paras. 3, 10 and 20.
12 *Ibid.*, para.12
13 *Ibid.*, para.6.
14 *Ibid.*, para. 19.
15 Rules of Procedure and Evidence of the Special Court for Sierra Leone as amended at the Tenth Plenary on 19 November 2007.
16 *Prosecutor v. Sesay et al*, SCSL-04-15-T-881, Order for Expedited Filing, 16 November 2007. Orders No.1 and 2.
17 *Prosecutor v. Sesay et al*, SCSL-04-15-T-885, Kallon Defence Statement in Support of the Sesay and Gbao Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case Filed on the 14th Day of November 2007, 20 November 2007. RUF Transcripts of 20

7. On 20 November 2007 the Prosecution filed its Response, arguing that the Defence motion should be dismissed.[18] The Prosecution stated that the words of Judge Thompson had been taken out of context,[19] and that he had made his findings with regards to the evidence presented in the CDF case only.[20] It further stated that the Separate Opinion could not be understood as referring to the criminal responsibility of the RUF Accused.[21] The Prosecution therefore concluded that there was nothing in the separate opinion showing actual bias or appearance of bias.[22]

8. On 21 November 2007 the Defence filed its reply.[23] It re-emphasised that Judge Thompson created the legitimate appearance of bias in his separate opinion by using emotive words and attributing them to the enemies of the CDF,[24] within the context of a legal finding that the defence of necessity exculpated the CDF Accused from criminal responsibility.[25] It further submitted that, if Judge Thompson did not intend to include the RUF in his separate opinion, he would have done so unequivocally.[26] It concluded that a reasonable appearance of bias against the RUF Accused had been created, which could only be cured by the permanent withdrawal of Judge Thompson.[27]

9. On 22 November 2007 the Prosecution filed its response to the statement of the Second Accused,[28] explaining that it now considered the Second Accused to be a party to the Defence motion and therefore relied on the arguments made in its Response on the

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November 2007, p.3.

18 *Prosecutor v. Sesay et al*, SCSL-04-15-T-886, Prosecution Response to Sesay and Gbao Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 20 November 2007. ('Prosecution's Response').

19 *Ibid.*, para. 14.

20 *Ibid.*, para.15.

21 *Ibid.*

22 *Ibid.*, paras. 20, 28.

23 *Prosecutor v. Sesay et al*, SCSL-04-15-T-887, Sesay and Gbao Joint Reply to Prosecution Response to the Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 21 November 2007. ('Defence Reply').

24 *Ibid.*, paras. 6 and 7.

25 *Ibid.*, paras. 6 and 8.

26 *Ibid.*, para. 12.

27 *Ibid.*, paras. 16 and 17.

28 *Prosecutor v. Sesay et al*, Doc. No. SCSL-2004-15-T-889, Prosecution Response to Kallon Defence Statement in Support of the Sesay and Gbao Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case and Corrigendum, 22 November 2007.

initial motion.[29]

10. On 22 November 2007 Defence counsel for the first Accused sought leave from the Court to make submissions on the application of RPE 16[30] in order to expedite the proceedings.[31] Preliminary comments were made by the parties on the issue. Defence counsel for the Second and Third Accused made clear that they had no objection to the Trial Chamber sitting for more than 5 days with two judges.[32] Defence counsel for the Third Accused added that he had no objection to having the two judges sitting until the conclusion of the case.[33] The Second Accused told the court that he had no objection to the two judges sitting until the end of the session.[34] The Prosecution considered it premature to look into the possibility of having two judges sitting for more than 5 days.[35] The Trial Chamber ordered the parties to file written submissions concerning the application of RPE 16 and the possibility of sitting with two judges.[36] Following the request by the Third Accused,[37] the Trial Chamber scheduled oral submissions for the 23 November 2007.[38]

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29 *Ibid.*, paras. 2 and 3.

30 Rule 16 'absence and resignation' reads as follow: (A) If a Judge is unable to continue sitting in a proceeding, trial or appeal which has partly been heard for a short duration and the remaining Judges are satisfied that it is in the interests of justice to do so, those remaining Judges may order that the proceeding, trial or appeal continue in the absence of that Judge for a period of not more than five working days.

(B) If a Judge is, for any reason, unable to continue sitting in a proceeding, trial or appeal which has partly been heard for a period which is or is likely to be longer than five days, the President may designate an alternate Judge as provided in Article 12(4) of the Statute.

(i) If an alternate Judge is not available as provided in Article 12(4) of the Statute, and the remaining Judges are satisfied that it would not affect the decision either way, the remaining Judges may continue in the absence of that Judge.

(ii) Where a trial or appeal chamber proceeds in the absence of one Judge, in the event that the decision is split evenly a new proceeding, trial or appeal shall be ordered.

(C) If a Judge is, for any reason, unable to sit in a proceeding, trial or appeal which has not yet been heard but has been scheduled, the President may designate an alternate Judge provided in Article 12 (4) of the Statute.

(D) A Judge who decides to resign shall give notice of his resignation in writing to the President, who shall transmit it to the Secretary-General of the United Nations and the Government of Sierra Leone.

31 RUF Transcripts of 22 November 2007, pp. 4, 6.

32 *Ibid.*, pp. 9, 10.

33 *Ibid.*, para.12.

34 *Ibid.*,

35 *Ibid.*, p. 14.

36 *Ibid.*, p. 15.

37 *Ibid.*, p. 15.

38 *Ibid.*, p. 16.

11. On 22 November 2007 Defence for the Third Accused filed its submission on RPE 16.[39] stating that in view of the particular circumstances of the case and if Judge Thompson was to be removed, the proceedings should continue with two judges, in accordance with rule 16(B)(i) of the Rules. It made clear that having a new judge coming in the case at such an advanced stage of the trial would affect the expediency of the trial.[40]

12. On 23 November 2007 the Prosecution filed its submissions on Rule 16's application.[41] After a thorough analysis of analogous rules in the ICTR and ICTY, the Prosecution submitted that the test to be applied by the Trial Chamber should be whether the absence of a third judge would affect the fairness of their decision.[42] It also submitted that, should the Trial Chamber decide to proceed in the absence of Judge Thompson, it should seek the consent of the Accused.[43]

13. The Defence for the Second Accused filed its submissions soon thereafter.[44] It expressed its support for continuing the proceedings in accordance with rule 16(B)(ii),[45] and emphasises that this should not cause any prejudice to the fair conduct of the trial and to the rights of the Accused.[46] It also submits that, should the trial continue with two judges only, Rule 16(B)(ii) should be clarified, if necessary by amendment to the rules.[47]

14. On the same day the Defence for the First Accused filed its submissions on the application of rule 16.[48] It adopted the Prosecution's submissions.[49] It added that, if rule

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39 *Prosecutor v. Sesay et al,* SCSL-04-15-T-890, Gbao Submission on the Application of Rule 16, 22 November 2007.
40 *Ibid.*, paras 8 and 10.
41 *Prosecutor v. Sesay et al,* SCSL-04-15-T-891, Prosecution Submission on Rule 16 of the Rules of Procedure and Evidence, 23 November 2007.
42 *Ibid.*, para. 9.
43 *Ibid.*, para.17 (g).
44 *Prosecutor v. Sesay et al,* SCSL-04-15-T-892, Kallon Submissions in Compliance with Court Order in Relation to Rule 16, 23 November 2007.
45 *Ibid.*, para. 2.
46 *Ibid.*, para.6
47 *Ibid.*, para.8.
48 *Prosecutor v. Sesay et al,* SCSL-04-15-T-893, Sesay Defence Submissions on the Interpretation of Rule 16, 23 November 2007.

16 was to be applied, the delay caused by the appointment of a new judge should be balanced with the risk of having to order new proceedings in case the two judges come to a split decision.[50] It further submitted that, should the Trial Chamber decide to proceed with two judges, a system of interlocutory appeals should be put in place in order to deal with split decisions.[51]

16. On 23 November 2007 the parties to the proceedings made oral submissions on the application of Rule 16.[52] None of the parties opposed having the court continuing with two judges,[53] but discussions were held about what would happen in the event of a split decision, and how to address such issue. It was submitted by all the Defence teams that rule 16(B) should be amended in order to put into place a procedure of interlocutory appeal in case of split decision.[54] They all agreed that having a new judge coming into the case would endanger the expediency of the trial.[55]

17. On 28 November 2007 Honourable Judge Thompson filed his comments on the issue of his disqualification, and thereby signalling his unwillingness to voluntarily withdraw.[56] After raising some preliminary issues,[57] Judge Thompson held that his Separate Opinion did not attribute anarchy and rebellion to the AFRC or the RUF[58] and that it did not imply any joint criminal enterprise.[59] According to Judge Thompson, his words had been taken out of context by the Defence.[60] He further argues that if the

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49 *Ibid.*, para. 2.
50 *Ibid.*, paras. 5 and 6.
51 *Ibid.*, para. 7.
52 RUF Transcripts of 23 November 2007, starting from p.51.
53 Sesay Submissions p.53, Kallon's submissions p. 62, Gbao's submissions p.64, Prosecution's Submission p.76,
54 Sesay's Submission, p.54, 61, Kallon's submissions p.63, Gbao's submissions p. 69 and 70
55 Sesay's Submission, p.54, 59, 60, Gbao's submissions p. 66-68, 71.
56 *Prosecutor v. Sesay et al.* SCSL-04-15-T-900, Honourable Justice Bankole Thompson's Comments on Sesay, Kallon and Gbao Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case Pursuant to Rule 15 of the Rules of Procedure and Evidence, 28 November 2007. ('Judge Thompson's Comments').
57 Inter alia his alleged judicial immunity (para.7), the application of rule 15 RPE to only extra judicial proceedings (para. 9) and that the appropriate way to critic a Judge's decision was through the appeal procedure (para.10). Judge Thompson's Comments.
58 *Ibid.*, paras.11 and 19.
59 *Ibid.*, para.21.
60 *Ibid.*, para.11.

defence was of the opinion that his use of the defence of necessity was mistaken, the remedy was not a request for disqualification but an alleged error of law through the appeals procedure.[61] He concluded by stating that in no event did he determine in advance the guilt or innocence of the RUF Accused.[62]

18. On 6 December 2007 the Trial Chamber rendered an oral decision, dismissing the Defence motion.[63] The written decision was rendered on the same day.[64] In its decision, the Trial Chamber found the indicia of appearance of bias in Judge Thompson's separate opinion were not sufficient to overcome the 'high threshold standard' that has been established by case law.[65]

19. The Trial Chamber first made observations on the comments on Judge Thompson pertaining to judicial immunity[66], the scope of rule 15[67] and on the right to appeal.[68] It found that Judge Thompson was referring to the RUF/AFRC when using the words 'tyranny, anarchy and rebellion', 'utter chaos, fear, alarm and despondency'.[69] Taking into account the context of both the CDF and RUF proceedings, it found that the language used by Judge Thompson provided some 'indicia of an appearance of bias'.[70] It also held, with respect of the use of the defence of necessity by judge Thompson to excuse the crimes committed by the CDF, that a reasonable observer would not expect a judge to find that the commission of serious crimes was excusable.[71]

20. The Trial Chamber then stated that, due to the presumption of impartiality that the Judges benefit from, the defence must adduce sufficient evidence of bias, and that a high

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61 *Ibid.*, para.23.
62 *Ibid.*, paras.25-26.
63 RUF Transcripts of 6 December 2007.
64 *Prosecutor v. Sesay et al*, SCSL-04-15-T-909, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 6 December 2007. ('Trial Chamber's Decision').
65 *Ibid.*, para. 94.
66 *Ibid.*, paras. 26 to 44.
67 *Ibid.*, paras. 45 to 47.
68 *Ibid.*, paras. 48 to 49.
69 *Ibid.*, paras. 73 and 75.
70 *Ibid.*, para. 84.
71 *Ibid.*, para. 83.

threshold needs to be reached in order to disqualify a judge.[72] After finding that judge Thompson, in his separate opinion, did not make comments nor expressed views on the Accused themselves or on their alleged criminality,[73] the trial Chamber held that even though it had found some indicia of appearance of bias, this was not sufficient to overcome the high threshold standard that has been set.[74]

21. Following oral arguments by all the parties[75] the Trial Chamber granted leave to appeal its decision on Judge Thompson.[76]

22. On 7 December 2007, the Prosecution and the Defence filed a request for an order of expedited filing, based upon the urgency and extraordinary circumstances of the issue.[77] They requested the Appeals Chamber to order the Appeal to be filed on 12 December 2007, with any response to be filed on 14 December 2007, and any reply to be filed on 17 December 2007.[78]

23. On 7 December 2007 the President of the Special Court took note of the Joint Prosecution and Defence motion for expedited filing and ordered the Registry to allow filings on the 17 December.[79]

III. Grounds for Appeal

24. The Trial Chamber erred in ruling that, upon review of the Separate Opinion written by Justice Thompson, a reasonable observer would not objectively apprehend bias

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72 *Ibid.*, para. 86.
73 *Ibid.*, para.92.
74 *Ibid.*, para. 94.
75 RUF Transcripts of 6 December 2007, pp. 43-45 (Sesay Submissions), p. 45 (Kallon Submissions), pp.45-47 (Gbao Submissions) and p. 47.
76 *Prosecutor v. Sesay et al*, RUF Transcripts of 6 December 2007, pp. 48-50. See also SCSL-2004-15-T-910, Decision on Leave to Appeal Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 6 December 2007.
77 *Prosecutor v. Sesay et al*, SCSL-2004-15-T-916, Joint Prosecution and Defence Request for an Order for Expedited Filing, 7 December 2007.
78 *Ibid.*, para.4.
79 *Prosecutor v. Sesay et al*, SCSL-2004-15-T-917, Order to Allow a Judicial Filing During Judicial Recess, President, 7 December 2007.

towards the RUF Accused sufficient for his disqualification.

IV. Relief Sought

25. The Trial Chamber's decision should be reversed and Justice Bankole Thompson should be disqualified from sitting in the RUF case.

26. The Appeals Chamber should order Judge Thompson not to sit on the RUF case pending its decision, and that, in order to protect the expediency of the proceedings, that Judge Itoe and Judge Boutet to be allowed to sit in accordance with rule 16.

SUBMISSIONS ON GROUNDS FOR APPEAL

I. Introduction

1. The Defence for the Third Accused files its submissions pursuant to the Practice Direction of 30 September 2004.[80]

II. Standard of Review

2. Article 20 of the Special Court for Sierra Leone and RPE 106 state that the Appeals Chamber shall hear appeals on a question of law regarding a particular decision. In this case, the Trial Chamber erred as a matter of law insofar as it agreed with the Defence that Judge Thompson evidenced some indicia of a reasonable appearance of bias, but did not rule that he should be disqualified from continued service in the RUF Case.

3. Rule 106 states that the Appeals Chamber shall hear appeals on the following grounds: i) A procedural error; ii) an error on a question on law invalidating the decision; or iii) an error of fact which has occasioned a miscarriage of justice.

4. As previously stated by the Appeals Chamber, the issue on appeal is whether the Trial Chamber correctly exercised its discretion in reaching the decision in refusing the Defence motion to disqualify Justice Thompson.[81] The appellant must demonstrate that the Trial Chamber made a discernible error in the exercise of its discretion.[82] In order to demonstrate that a discernible error has been made, the appellant must show that the Trial Chamber misdirected itself as to the legal principle or law to be applied, took irrelevant

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80 Practice Direction for Certain Appeals Before the Special Court, 30 September 2004, paragraph 11.

81 *Prosecutor v. Norman, Fofana and Kondewa*, Doc. No. SCSL-2004-14-T-688, Decision on Interlocutory Appeals against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, Appeals Chamber, 11 February 2006, para. 5.

82 *Prosecutor v Milosevic*, Cases No. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, Appeals Chamber, 18 April 2002, para.5.

factors into consideration, failed to consider relevant factors, failed to give relevant factors sufficient weight, or made an error as to the facts upon which it has exercised its discretion.[83]

5. The Appeals Chamber of the ICTY also provides more details. It stated that the exercise of the discretion must not be one reasonably open to the Trial Chamber.[84] The appellant must show that the Trial Chamber abused or erred and exceeded its discretion[85] and that it committed a discernible error in the exercise of its discretion, which resulted into a prejudice for the appellant.[86] In other words, the appellant has to establish that the Trial Chamber decision was so unreasonable and plainly unjust that the Appeals Chamber has to infer that the Trial Chamber has failed to exercise its discretion properly.[87]

6. In order to show that the Trial Chamber decision was based on an error of law, an appellant must give details of the alleged error and must state precisely how the legal error invalidates the decision. In this case, it is submitted that the Trial Chamber erred as a matter of law insofar as it agreed with the Defence that Judge Thompson evidenced some indicia of a reasonable appearance of bias, but did not rule that he should be disqualified from further service in the RUF Case.

III. Preliminary Comments

A. Trial Chamber Findings in Support of Appellant

7. The Trial Chamber made several findings and conclusions in its decision that generally support the basic argument made by Appellants in this matter. Specifically, there was general concordance (at least in substance, if not always in degree) in the

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83 *Ibid.*, para. 6.
84 See for eg. *Prosecutor v Delalic et al*, Case No. IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, paras. 275 and 275.
85 *Ibid.*, para. 533.
86 *Prosecutor v Martinovic et al*, Case No. IT-98-34-A, Judgement, Appeals Chamber, 3 May 2006, para. 257.
87 *Prosecutor v Seselj*, Case No. ICTY-03-67-AR73.4, Decision on Appeal against the Trial Chamber's Decision (NO.2) on Assignment of Counsel, Appeals Chamber, 8 December 2006, para.16.

following findings and conclusions:

i. Some appearance of bias [has] been established having regard to all the circumstances against the RUF Accused.[88]

ii. While Justice Thompson may have only referred to the enemy of the CDF in the abstract, it is "reasonable to conclude...that he is actually referring to the AFRC and the RUF when speaking of tyranny, anarchy and rebellion, the intensely conflictual situation and the fear, utter chaos, [and] widespread violence of immense dimensions".[89]

iii. The terms in the directly preceding paragraph could be understood as "aggressive, offensive and injurious to the interests of the three aggrieved RUF Defendants and could have created...an appearance of bias against their cause and interests as Accused persons".[90]

iv. The context of the Judgement in which the opinion is written leads to the conclusion that [the] "larger evil" to be avoided by the CDF's actions can only be actions brought by the AFRC and RUF forces.[91]

v. While legitimate to invoke the defence of necessity for the CDF Defendants, in expressing his Opinion, it may "have consequences relating to impartiality that must be examined".[92]

vi. RPE 15 supports the right of the Accused to challenge a judge's

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88 Trial Chamber's Decision, paras. 84 and 94. Defence Motion para. 20 ("[a] reasonable fair minded person, properly informed, confronted by a judge, who has expressed such clear-cut, wide-ranging and unequivocally damning findings about the object, purpose, and activities of the AFRC/RUF would likely apprehend bias; also see Defence Reply para. 6 states "[i]n this regard and in this context the adjectives employed, their direct attribution to the enemy of the CDF and the degree of prejudgment implied creates an undeniable appearance of bias against the RUF and the RUF Accused").

89 Trial Chamber's Decision, para. 75; Defence Reply, para. 11 ("[w]hile true that the RUF is not explicitly referenced in the cited passages, there is repeated reference to a mostly unnamed 'enemy' found by Justice Thompson to be engaged in, inter alia, acts of 'evil'. It is submitted that the 'enemy', in its rightful context, upon reasonable examination of the findings of facts, implicitly included the RUF".)

90 Trial Chamber's Decision, para. 72. This is argued implicitly throughout the text of the Defence motion.

91 Trial Chamber's Decision, para. 79; Defence Motion para. 12 ("The AFRC, and inferentially its members (particularly its senior commanders), appear to be characterised as 'evil' seven times. Of note, the Learned Judge posits the question 'Was what the [CDF] Accused did actually necessary to avoid the evil in question?' There can be no doubt that the evil the Learned Judge had in mind was any member of the AFRC and any motive or objective therein"); Defence Reply, para. 8 ("The Learned Judge has found that the war crimes committed by the CDF accused were preferable, less blameworthy and necessary to prevent the greater AFRC 'evil'.)

92 Trial Chamber's Decision, para. 82; Defence Motion, para. 11 ("While not inherently problematic to support a novel argument in international criminal law (even one unilaterally made), it creates the impression that the inherent legitimacy of the CDF and the overriding criminality of the AFRC/RUF are firmly and powerfully rooted.')

impartiality in the context of rendering a decision in a judicial proceeding.[93]

vii. Two cases arising out of the same series of events is not enough to merit disqualification, but it does not mean that the language of the Separate Opinion, the findings and conclusions are not subject to challenge for bias.[94]

B. *Unclear Nature of Certain Trial Chamber Findings*

i. The "Evil" Nature of the RUF

8. There is some confusion as to whether the Court agreed with the Defence assertion that Judge Thompson was implicitly referring to the RUF as "evil" in his Separate Opinion. While just one of many adjectives that the Defence suggests is demonstrative of an appearance of bias against the RUF Accused, it is particularly important one.

9. The confusion relates to two paragraphs in the Trial Chamber's Decision. In paragraph 76, the Trial Chamber states that "[a] fair reading of [Judge Thompson's] Opinion leads us to the conclusion that he has not described the AFRC or RUF as evil". However, just three paragraphs later it states that "the Opinion leads to the conclusion that this *larger evil* was to be avoided...can only be actions brought by the AFRC and RUF forces".[95] These two paragraphs seem to directly conflict. However, this confusion may have been clarified at the hearing on 6 December 2007, where Judges Itoe and Boutet orally considered whether to grant leave to appeal the Trial Chamber's decision in this matter. In responding to a comment made by Counsel for the Third Accused, the Honourable Justice Itoe stated that the Trial Chamber in its Decision was working on "the issue of identifying who the enemy was, *who the evil was*...and we thought there was no

93 Trial Chamber's Decision, paras. 25 and 47. This formed the basis of the Defence motion.
94 Trial Chamber's Decision, paras. 55 and 59. In paragraph 59, after reviewing the standard and governing principles of this contention, the Trial Chamber states that "The Defence have not suggested" that it is somehow improper to have a judge ruling on the same series of events in two distinct cases.
95 Emphasis added.

scintilla of doubt" that it was the AFRC and RUF.[96]

ii. Preference for Continuing the RUF Trial with Three Judges

10. In discussing the inherent independence and professionalism of judges in the Special Court, the Trial Chamber notes that judges only draw inferences with a proper evidentiary basis or foundation. This helps justify the finding that Justice Thompson's Separate Opinion did not show the requisite appearance of bias to merit disqualification. It then follows with a statement that "the Chamber also considers it significant that the Judges of the Trial Chamber sit as a panel of three judges".[97]

11. Under normal circumstances, Appellant for the Third Accused would likewise prefer three judges ruling in the RUF case. What is disconcerting is the inclusion of this comment coupled with a decision that refuses to dismiss a Justice that the Bench agrees has evinced certain bias against the Defendants. Preference for three judges cannot be a factor in assessing whether to disqualify Justice Thompson. The Defence for the third Accused suggests that, as in the Prosecution's case against Charles Taylor,[98] if the Trial Chamber had a preference for three judges, there should have been an alternate judge appointed that could be prepared in case of situations such as the one faced by the RUF case today.[99]

iii. Different Standards of Actual Bias and the Appearance of Bias

12. In paragraph 61, the Trial Chamber cites the *Blagojevic* and *Karemera* decision in support of the high standard in assessing allegations of judicial bias. It discusses whether "decisions rendered by a Judge...by themselves could suffice to establish "*actual* bias".

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96 RUF Transcripts of 6 December 2007, pp. 46.
97 Trial Chamber's Decision, para. 90.
98 See Office of Press and Public Affairs, Information and Background on the Prosecution of Charles Ghankay Taylor, p.2, http://www.sc-sl.org/taylor-timeline.pdf, last accessed 11 December 2007.
99 It may not have been possible to appoint an alternate judge at the inception of the RUF Trial, as there was no provision for appointing these judges in the RPE. However, on 19 May 2007, provision for appointing an alternate was added to the RPE.

Defence counsel notes that these courts are discussing allegations of actual, and not perceived bias. It is unclear, in discussing the high threshold that the Trial Chamber asserts must be satisfied to substantiate claims of perceived bias, whether quotations and standards such as those in paragraph 61 were used in making this determination.

13. The Appellant has not alleged actual bias; the only allegations made are that the language, opinions and findings contained in the Separate Opinion create the appearance of bias.

IV. Ground of Appeal : While Finding that Some Indicia of a Reasonable Apprehension of Bias Existed in Justice Thompson's Opinion, the Trial Court erred in Concluding that it did not Merit Disqualification From the RUF Trial

i. Misreading the High Threshold Standard for Apprehending Bias

14. As stated by the Trial Chamber, some appearance of bias has been established having regard to all the circumstances against the RUF Accused.[100] Also, the terms used by Justice Thompson could be understood as "aggressive, offensive and injurious to the interests of the three aggrieved RUF Defendants and could have created...an appearance of bias against their cause and interests as Accused persons".[101] However, it ultimately concludes that, due to the high threshold set by international tribunals in assessing bias, as well as Justice Thompson's stated obligation to issue a judgement in the RUF Case that is based upon whether the Prosecution has proven guilt beyond a reasonable doubt, the reasonable appearance of bias was not firmly established enough to merit disqualification.[102]

15. It is difficult to understand how high the standard must be set before a reasonable

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100 Trial Chamber's Decision, para. 93.
101 *Ibid.*, para. 75.
102 *Ibid.*, para. 94.

appearance of bias manifests to a level sufficient for disqualification. In Justice Thompson's Separate Opinion, the Trial Chamber agreed that the RUF, considering the context of the CDF Trial, were enemies of the CDF—enemies that were evil,[103] tyrannical, anarchic, provoking a rebellion dominated by fear, utter chaos, [and] widespread violence of immense dimensions. In Justice Thompson's Separate Opinion, the CDF were characterised as patriotic and altruistic.[104]

16. In many respects, therefore, the conflict was presented as a battle of "good" versus "evil". If Justice Thompson has first acquitted the patriotic and altruistic (or 'good'), and will soon rule on the 'evil', there seems few cases (other than extreme actions, such as a preliminary finding of guilt or candid statement that the RUF will be found guilty for war crimes) where this ` of bias is more manifest. It is for these reasons that the Defence for the Third Accused submits that the standard was misapplied in the Trial Court's Decision.

a) International Case law Clarifies the High Threshold Standard

17. An examination of the case law in the international tribunals shows that the standard, while properly based upon a presumption of impartiality and with a high threshold that must be met before ruling that the reasonable appearance of bias exists, cannot be read to be as high as set by the Trial Chamber in this case.[105]

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103 Subject to the potential ambiguity, as explained in paragraphs 3 and 4 above.

104 Justice Thompson's Separate Opinion, para. 90.

105 While it is clear from the case law of the other international tribunals, it is interesting to note that, in its jurisprudence, the European Court for Human Rights uses a two part test in assessing the impartiality of judges: subjective (personal bias) and objective (appearance of bias). When using this test, it refers to the presumption of impartiality only with regards with the first test, i.e. the personal impartiality of the judge. See for eg. *De Cubber v Belgium*, Application no. 9186/80, Judgement, European Court of Human Rights, 26 October 1984, para. 25: ' The personal impartiality of a judge is to be presumed until there is proof to the contrary.' *Hauschildt v Denmark*, Application no. 10486/83, Judgement, European Court of Human Rights, 24 May 1989, para. 47: 'As to the subjective test, the applicant has not alleged, either before the Commission or before the Court that the judges concerned acted with personal bias. In any event, the personal impartiality of a judge must be presumed until there is proof to the contrary [...].'; *Bulut v Austria*, case number 59/1994/506/588, Judgment, European Court of Human Rights, 22 February 1996, para.32: 'There has been no suggestion in the present case of any prejudice or bias on the part of Judge Schaumburger. It follows that the Court cannot but presume his personal impartiality.'; *Morel v. France*, Application no. 34130/96, Judgement, European Court of Human Rights, 6 June 2000,

18. In the Special Court for Sierra Leone, there have been two cases discussing the appropriate standard in assessing whether a judge demonstrates an appearance of bias that merits dismissal.[106] Both cases support the Decision in our case, stating that the starting point is a presumption of impartiality and that there is a burden on the party seeking disqualification to displace that presumption. In one of these cases, the Appeals Chamber decided that this standard was met when a judge made comments on the criminality of the RUF accused in a previous book.[107]

19. This general standard benefits from further illustration in the ICTR and ICTY case law which can serve to offer greater detail as to the parameters of what qualifies as perceived bias and what does not. In general, where arguments are "too general and abstract" or "not substantiated in the details", the allegations will not rebut the presumption of impartiality.[108] The *Celebici* case stated that unfounded and unsupported allegations of bias would not be sufficient to create any real appearance of bias.[109] Challenges cannot be futile, such as in the *Seselj* case, where the Defence sought the disqualification of the whole trial chamber because of their nationality and religion. He feared that these qualities could prejudge them against him, as he has a different nationality and religion.[110] There can be no "sweeping or abstract allegations that are neither substantiated nor detailed to rebut the presumption of impartiality", as stated by the Appeals Chamber in the *Rutaganda* case.[111]

20. Other cases have noted what qualifies as creating the reasonable appearance of

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para.41: 'As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary'.

106 *Prosecutor v. Sesay et al.*, Doc No. SCSL-05-15-PT-058, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004, Appeals Chamber; CDF Case, SCSL-2004-14-PT-112, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004, Appeals Chamber.

107 Appeals Chamber Decision on Judge Robertson, para.15.

108 *Prosecutor v Akayesu*, Case No. ICTR-96-4-A, Judgement, Appeals Chamber, 1 June 2001.Para. 92. See also paras. 95, 100 and 101.

109 Celebici case, para. 707.

110 *Prosecutor v Seselj*, Case No. IT-03-67-PT, Bureau Decision of 10 June 2003, para. 2.

111 *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgement, Appeals Chamber, 26 May 2003, para. 43.

bias. In the *Bagosora* case, it was stated that a predisposition against the Accused would assist the Chamber in assessing whether the appearance of bias exists.[112] The *Seromba* case also supported this point.[113] Additionally, the appellant "must set forth the arguments in support of his allegations of bias in a precise manner".[114]

21. In providing further clarity to what constitutes a reasonable apprehension of bias in international tribunals, it becomes clear that the standard has been misapplied by the Trial Chamber. The argument made in the original Defence motion (and its reply brief) that a reasonable observer would apprehend bias was based upon distinct and specific allegations, founded and supported by many references to Justice Thompson's Separate Opinion. There are no sweeping allegations made against Justice Thompson; instead, there are specific paragraphs referenced in the Opinion that the Defence alleges demonstrate the perception of bias. Regarding whether a pre-disposition against the RUF exists in the Judge's Separate Opinion, Defence for the First and Third Accused note seven times in their motion and reply that Justice Thompson had a predisposition against—or had "prejudged"—the RUF.[115]

b) Other Jurisdictions support a finding of perceived bias

22. Considering the specific allegation made in this case—that Justice Thompson's Separate Opinion merits his disqualification for creating the reasonable appearance of bias—there is little directly related case precedent in international criminal tribunals. However, in other jurisdictions, there are cases more relevant to the case at hand. The United States Supreme Court discussed judicial rulings forming the basis of bias allegations in the *Liteky* case. Generally speaking, these types of cases do not often merit a finding of bias and resulting disqualification. However, this is "apart from surrounding

112 *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Decision on Motion for Disqualification of Judges, Bureau, 28 May 2007, para. 31.
113 *Prosecutor v Seromba*, Case No. ICTR-2001-66-T, Decision on Motion for Disqualification of Judges, Bureau, 25 April 2006, para. 12.
114 *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgement, Appeals Chamber, 26 May 2003, para. 43.
115 Defence Motion, paras 6,18,20; Defence Reply, paras. 7,10,14,15.

comments or *[the] accompanying opinion*",[116] where it is implicitly easier to establish bias. In our case, the fundamental concern the Defence had with Justice Thompson's continued service in the RUF Case was the language used in his Separate Opinion, the 'accompanying opinion' to his judicial ruling.

23. There have also been cases discussing judicial impartiality in the European Court of Human Rights. In the *Roja Morales* case, judges who were trying the applicant had previously rendered a judgement that made reference to the applicant within a criminal organisation. Consequently, the fear of the applicant with regards to the impartiality of the tribunal was found to be objectively justified and the Court found that the right to an impartial trial was violated.[117]

ii. Justice Cannot be "Seen" to be Done if a Reasonable Observer Would Apprehend Bias

24. The Trial Chamber noted twice in its Decision the axiom of law that "[j]ustice must be done and seen to be done" and that this was an important consideration in ruling upon whether Justice Thompson should be disqualified.[118] Justice being 'seen' to be done is an especially relevant principle in international tribunals, where there are special concerns about the Court's legitimacy as compared to domestic courts. As a result, special sensitivity should be paid to this principle, arguably even more so than in domestic courts.

25. Independent of whether Justice Thompson would actually endanger the right to fair and impartial justice for the RUF Accused, his continued service would threaten the perceived legitimacy of this right guaranteed to them. After judicial findings which concluded that a reasonable observer could perceive that Justice Thompson exhibited

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116 *Liteky v. U.S.*, 510 U.S. 540 (1994), p. 555 (emphasis added).
117 *Rojas Morales v. Italy*, Application No. 39676/98, Judgement, 16 November 2000. Paragraphs 34 and 35.
118 Trial Chamber's Decision, paras. 52, 65 (referring to the Dissenting Opinion of Judge Buergenthal in the Advisory Opinion Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, International Court of Justice, Order of 30 January 2004.)

bias, the overall legitimacy of the Bench and, more broadly, the Special Court itself would be at risk due to the inevitable perception that the RUF Case is not fair to the Accused. While understanding the Trial Chamber's conclusion that a threshold level must be passed before bias or partiality can be found, it is hard to see exactly how its position comports with larger theories of perceived justice. How can the Trial Chamber ensure that justice be 'seen' to be done when it simultaneously concluded that Justice Thompson exhibited bias, but just not enough?

26. By deciding not to disqualify Judge Thompson while still finding that he gave the appearance of bias, the Trial Chamber erred in law by failing to give the appropriate weight to the fact that the Justice needed to be seen as impartial.

iii. The Judicial Oath to Rule Impartially Was Not Adequately Questioned by the Trial Chamber

27. As stated in the previous paragraph, even though some indicia of bias were found in Justice Thompson's Separate Opinion, significant trust was placed in the Judge's ability to rule impartially because he made a solemn declaration to do so.[119] The question of Justice Thompson's solemn declaration was noted in the Defence's original motion. In it, the Defence cited the *Celebici* case, which stated 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'*... would not be opposed to acts of torture. A reasonable and informed observer, knowing that torture is a 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."[120]

28. It is notable that article 13 of the Special Court statute is substantively similar to the declaration at the ICTY. Both require judges to be persons of high moral character, impartiality and integrity. If the Appeals Chamber accords persuasive value to the

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119 Trial Court's Decision, paras. 88-90.

120 *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* ('Celibici case'), Case No. IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para. 699. ('Celibici Appeals Judgement') (emphasis added).

Celebici case, then it would be proper to suggest that the declaration taken by the Judge be legitimately questioned. After all, as stated in the original motion, if a judge seems to be acting morally neutral about the commissioning of serious war crimes, there could be an overall concern with the declaration taken. It seems hard to avoid the conclusion that there may be some concern with Justice Thompson's continued service in the RUF trial.

29. In its decision, the Trial Chamber addresses the *Celebici* case only briefly. Unfortunately, no reasoning is apparent in their review of the case. Instead, the Trial Chamber concludes that it was distinguishable to the case at hand.[121] This vague explanation requires greater clarity; specifically, whether there is an overall concern with the judicial oath if the Honourable judge has ruled that the commission of war crimes is excusable for the CDF Defendants. It seems that the Trial Chamber did not adequately examine what seems facially problematic with Justice Thompson's Separate Opinion and solemn declaration taken under article 13 of the Statute, especially in light of the *Celibici* decision.

30. Defence Counsel submits that the Trial Chamber erred in law in failing to give appropriate weight to the findings of the ICTY Appeals Chamber in the *Celibici* case.

iv. The Defence of Necessity is Not Questioned on the Merits

31. It must be emphasised again that the Defence did not challenge the legal reasoning of Justice Thompson's use of the necessity defence, and fully agree that any substantive objection is reserved for the appeals process (if the RUF Accused were able to appeal in the CDF case). However, unilateral invocation of a defence normally used outside of international criminal law and used to excuse the commissioning of serious war crimes-crimes one would not anticipate a judge could exhibit moral neutrality towards-does cause one to question whether Justice Thompson's findings and conclusions evince a perception of bias.

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121 Trial Chamber's Decision, para. 83.

V. Relief Sought

32. The Trial Chamber made a discernible error in the exercise of its discretion, the result of which is prejudicial for the Accused as well as for the entire Court, by letting a judge found to have shown appearance of bias, sitting on the present case.

33. The Trial Chamber's ruling that, while certain indicia of bias against the RUF Accused can reasonably be found, it is not sufficient to disqualify from Justice Thompson continuing to serve in the RUF Case. There must be an objective appearance of impartiality in the Special Court, one where justice is "seen" to be done.

VI. Conclusion

34. The 6 December 2007 decision of the Trial Chamber in the RUF Case should be overturned, based upon an error of law in assessing whether Justice Thompson has demonstrated the requisite level of impartiality towards the RUF Accused. Thus, pursuant to RPE Rule 15, Justice Thompson should be disqualified for the remainder of the proceedings.

35. In addition, Defence for the Third Accused requests the Appeals Chamber to order that, pending a decision on the present issue, Judge Thompson be prevented from sitting on the RUF case.

Filed in Freetown, 12 December 2007

For the Third Accused Augustine Gbao

John Cammegh

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