SCSL-04-15-T
(31998 – 32005)

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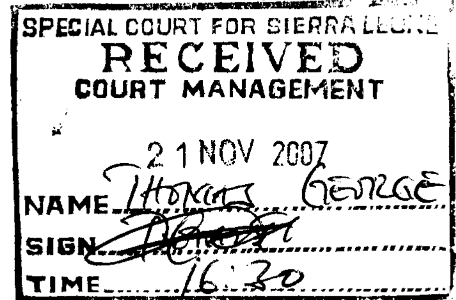
SPECIAL COURT FOR SIERRA LEONE
FREETOWN – SIERRA LEONE

TRIAL CHAMBER I

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

Registrar: Mr. Herman von Hebel

Date filed: 21st November 2007



THE PROSECUTOR
v.
Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

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

Office of the Prosecutor
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Introduction

1. On the 14th November 2007 the first and third accused (the "Defence") filed a motion requesting the voluntary withdrawal or the disqualification of Judge Thompson from the RUF proceedings (the "Motion").[1]

2. On the 20th November 2007 the second accused in person and in open court informed the Court of his support for the Defence motion and thereafter filed a statement in support of the Motion.[2]

3. On the 20th November 2007 the Prosecution filed its Response, arguing that the defence motion should be dismissed (the "Response").[3]

4. The Defence for the First and Third Accused herewith files its reply.

Merits

5. The substance of the Response appears to distil to the observation that "[t]he Dissenting Opinion *goes no further* than to use words such as 'rebellion, anarchy and tyranny', 'immediate threat of harm purportedly feared', 'fear, utter chaos, widespread violence', 'alarm and despondency' or 'evil' [emphasis added][4] and since there were no direct references to the liability of the RUF, or the RUF Accused[5] or to specific crimes,[6] no reasonable informed observer would conclude that Judge Thompson is either biased, or that there is a reasonable apprehension of bias.

6. It is submitted that the Response fails to deal with the substance of the Motion; the merits of which rest upon the appearance created by Judge Thompson's specific use of these specific adjectives and their attribution to the enemies of the CDF *within* the context of a finding that the commission of criminal acts was a necessary evil. The

[1] *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').
[2] *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.
[3] *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').
[4] The Response, para. 25 (emphasis added).
[5] Para. 15 of the Response.
[6] Para. 25 of the Response.

Prosecution err by (i) attempting to downplay the significance of the particular words used; and (ii) by choosing to read the words without reference to the specific context. In 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.

The literal interpretation

7. A literal interpretation of the words is instructive. The words are emotive and undeniably connote criminality.[7] The words imply that the AFRC and anyone allied with its aims and objectives were engaged in acts and conduct which were against both the safety of the state and its civilians. In short they imply that the AFRC and its allies were deeply immoral, malevolent, cruel and oppressive. No reasonable person, let alone the Accused, would reasonably conclude that the Learned Judge had not concluded that the AFRC and its allies were criminals.

The contextual interpretation

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". In this context the Learned Judge *must* have considered that the 'rebellion, anarchy and tyranny', 'immediate threat of harm purportedly feared', 'fear, utter chaos, widespread violence', 'alarm and despondency' and 'evil', which characterised the acts and conduct of the AFRC, were not only crimes but crimes of an even greater magnitude. This is the only logical conclusion.

9. The Prosecution's suggestion that the Learned Judge was *not* making references to crimes and criminality is unsustainable when considering the lesser evil of the CDF, namely grotesque acts of criminality against innocent civilians.[8] What else could the

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[7] Evil is defined as "deeply immoral and malevolent"; tyranny as "cruel and oppressive government or rule"; anarchy as "a state of disorder due to lack of government or control"; chaos as "complete disorder and confusion"; grave as "giving cause for alarm or concern"; and despondent as "in low spirits from loss of hope or courage". Compact Oxford English Dictionary of Current English, Third Edition (23 June 2005) Oxford University Press. Available online at http://www.askoxford.com/?view=uk.

[8] *See* paras. 423 and 424 which describe the killing of three women who were the wives of Junta Soldiers. Two of the women were killed by having sticks inserted through their genitals until they came out of their mouths, and the third woman was killed with a cutlass. The Kamajors disembowelled them and put their guts in the checkpoints so that others could see; para. 368, which described the how the Kamajors slit open the stomach of a victim they killed and displayed the entrails to civilians, before killing 150 people with cutlasses based upon their ethnic affiliation; para. 474, where the Kamajors cut out a captured woman's heart as a means to threaten other captured civilians; para. 522, where a boy was killed with a cutlass, then the Kamajors celebrated by

Learned Judge have meant?

10. In the context of the Motion it is clear that a reasonable person, properly informed of this balancing act, and the circumstances (in which the AFRC and the RUF were the enemies of both the government of Sierra Leone and the CDF) could only conclude that the words appear to connote grave crimes that were directly attributable to the RUF. The fact that the Learned Judge chose advisedly not to qualify or explain these adjectives/ remarks, whether by excluding criminal conduct or by making clear that the adjectives did not apply to the RUF[9], or merely implied to a "minority" or even just "some" of the AFRC (as the Sesay Defence did in their opening[10]) only adds to the appearance of overwhelming prejudgment and thus the appearance of bias.

11. While 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.

12. If it were to be argued that the perceived "enemy" (against whom Judge Thompson found the defence of necessity was justified) did not-in view of his adopted findings of fact in the majority's decision[11]- implicitly include the RUF, then it is hard to imagine, upon those facts, how such a distinction could reasonably be drawn between

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cutting the boy from the throat to the penis and removing his internal organs, including his heart; para. 480 Kamajors chopped at TF2-156 with machete cutting his foot, stomach, chest and face; then chopping TF2-156's brothers with machetes, killing them; para. 499, where TF2-058 witnessed 15 Kamajors armed with knives, cutlasses, and guns and beat and stab her husband to death. When TF2-058 returned to Bo two months later she discovered his body had been take to Gbetema and eaten by Kamajors.

[9] The notion that the reasonable informed observer would conclude that the Learned Judge's labelling of the AFRC was not applicable to the RUF is clearly fanciful. Moreover it is clear from an examination of the majority findings of facts in the CDF case that the CDF were engaged in criminal acts in pursuance of their war against the joint forces of the AFRC/RUF *See for eg.* para. 332 which found that Norman ordered 'that gravels mined by the AFRC/RUF should be washed by the Kamajors'; para. 335 where the Trial Chamber finds that the house of Mike Lamin was burnt because he was a RUF; para. 375 also mentions the RUF being in Tongo between 1997 and 1998 and the Kamajors being driven out of Tongo Town; para. 416 the court finds that the Kamajors wanted to 'flush out the AFRC and RUF rebels from Koribondo' and that they arranged for the capture of the AFRC/RUF military in Koribondo; para. 637 where the judges find that the RUF was fighting against the SLA in 1995 in Moyaba District. A reasonable informed observer, properly informed of the nature of the conflict (and the Prosecution case) with the CDF on one side and the AFRC/RUF on the other would be driven irrevocably to the conclusion that any attribution of evil, chaos etc to the AFRC would have the appearance of being automatically applicable to the RUF.

[10] Response Para. 24 quoting from 3rd May transcript and the Sesay opening.

[11] Subject to two findings that are not relevant to the situation at hand. Judge Thompson's Separate Opinion para. 56.

the two rebel factions. Had the judge intended to distinguish between each faction, it would surely have been incumbent upon him (especially considering the specific references to the AFRC and RUF in the findings of fact)[12] to have done so within his separate opinion in order to eradicate any perception of bias which may have logically flowed from his conclusions. This he omitted to do. The Defence submits that the logical implication from the cited passages, with necessary consideration of the context provided by the finding of facts, is the conclusion that Justice Thompson was referring jointly to AFRC and RUF in his opinion.

Article 13(1) of the Statute

13. In paragraph 27 of the Prosecution's response, it states that "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".[13] Prosecution and Defence agree that the exercise of this neutrality is the bare minimum required of a judge in the Special Court. The fact that the Learned Judge has abandoned this approach and implied that extensive harm committed by the CDF was not reprehensible-and attributed that description, without qualification, to others involved in the conflict, is what lies at the heart of the Motion. It is this which underpins the deeply rooted and reasonable concerns of the accused and this which is the cause of the appearance of bias.

14. This complaint is not about whether "a Judge cannot be disqualified on the sole basis of a position taken by that Judge in a preceding case"[14] nor whether "[a] Judge is... disqualified from hearing two or more criminal trials arising out of the same series of events".[15] Similarly the notion that the instant case is comparable to *Talic*, where the complaint raised by the defence was that the issue of the categorisation of the conflict

[12] *See for eg.* para. 332 which found that Norman ordered 'that gravels mined by the AFRC/RUF should be washed by the Kamajors'; para. 335 where the Trial Chamber finds that the house of Mike Lamin was burnt because he was a RUF; para. 375 also mentions the RUF being in Tongo between 1997 and 1998 and the Kamajors being driven out of Tongo Town; para. 416 the court finds that the Kamajors wanted to 'flush out the AFRC and RUF rebels from Koribondo' and that they arranged for the capture of the AFRC/RUF military in Koribondo; para. 637 where the judges find that the RUF was fighting against the SLA in 1995 in Moyaba District.

[13] Para. 27 (other citations omitted).

[14] Prosecution Response, para 13.

[15] Prosecution Response, para 11.

as "an international armed conflict in Bosnia and Herzegovina"[16] is wide of the mark and largely irrelevant. The complaint made is only tangentially concerned with these basic precepts and is primarily concerned with findings expressed by the Learned Judge in the CDF case – which evinces a level of prejudgement - which a reasonable person would discern as bias. In short findings of fact which deal with a discrete part of a case against an accused would be unproblematic whereas judicial findings in one case which criminalise one party (and therefore the accused)-whilst providing a novel defence to exculpate the other-creates profound difficulty.

15. Finally it is noteworthy that both Prosecution and Defence cite the *Celebici* case in support of their respective positions.[17] The Prosecution and the Defence rely upon the proposition that "[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".[18] It appears to be common ground that a judge at the International Tribunal must possess this minimum neutrality. In its motion, the Defence argued that "[i]t is reasonable to assume, similarly to torture, that a judge would not be morally neutral about harming innocent Sierra Leonean civilians",[19] and that the finding that the human rights violations committed by the CDF were forgivable and in fact necessary demonstrated both the depth of the emotional and intellectual prejudgement of the RUF Defendant's guilt, not to mention the loss of this requisite perspective. This submission remains unaddressed in the Prosecution's response. There is nothing to counter this submission.

Request

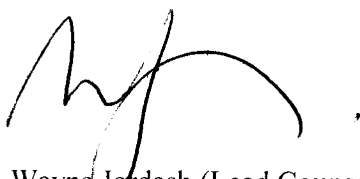
16. It is respectfully submitted that a reasonable person, properly informed of this court and the conflict would readily conclude that the continued presence of Justice Thompson in the RUF case was gravely troubling, owing to a reasonable perception of bias, given the thrust and tenor of the factual and legal findings in the CDF case. A reasonable observer, much less the Accused, would be likely to fear that the role of the RUF may have been predetermined by a judge seized of the trial of former CDF members, importing unassailable prejudice into its proceedings. The issues at stake in the present Motion go beyond the appearance of the fairness of the RUF trial but go to

[16] Response Para 13 (other quotations omitted).
[17] Defence Motion, para.17; Prosecution's Response paras. 6, 9, 26 and 27.
[18] Defence Motion, para. 17; Prosecution's Response, para. 6.
[19] *Id.*

the heart of the reputation and integrity of the whole court and the hoped for fulfilment of its mandate, its legitimacy and its legacy.

17. Therefore, Counsel for Sesay and Counsel for Gbao respectfully request that Justice Thompson voluntarily withdraw from any further involvement in the RUF proceedings. In the alternative, if Justice Thompson is unwilling to withdraw, the Defence requests that, pursuant to Rule 15(B), he be disqualified for the remainder of the proceedings and appropriate action is taken according to Article 12(4) of the Statute[20] and Rule 16.[21]

Dated: 21 November 2007



Wayne Jordash (Lead Counsel for Sesay)
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[20] Statute of the Special Court for Sierra Leone.

[21] Rules of Procedure and Evidence of the Special Court for Sierra Leone as amended at the ninth Plenary on 14 May 2007.

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LIST OF AUTHORITIES

Motions

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.

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.

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.

Dictionaries

Compact Oxford English Dictionary of Current English, Third Edition (23 June 2005) Oxford University Press. Available online at http://www.askoxford.com/?view=uk.