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TRIAL CHAMBER I

Before: Hon. Justice Benjamin Mutanga Itoe, Presiding Judge
Hon. Justice Pierre Boutet

Registrar: Mr. Herman von Hebel

Date: 28th of November 2007

PROSECUTOR Against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

Public Document

HON. JUSTICE BANKOLE THOMPSON'S COMMENTS ON SESAY, KALLON AND GBAO JOINT MOTION FOR VOLUNTARY WITHDRAWAL OR DISQUALIFICATION FROM THE RUF CASE FILED PURSUANT TO RULE 15 OF THE RULES OF PROCEDURE AND EVIDENCE

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I. Introduction

1. On the 14th of November 2007, Counsel for Issa Hassan Sesay (First Accused) and Augustine Gbao (Third Accused) in the RUF case filed a Motion for the voluntary withdrawal or disqualification of Hon. Justice Bankole Thompson, a member of Trial Chamber I, from the RUF case.

2. On the 20th of November, 2007, Counsel for the Second Accused, Morris Kallon, filed a Statement in support of the aforesaid Motion. On the same date, the Prosecution filed a Response to the said Motion submitting that it is without merit and should accordingly be dismissed. On the 19th of November, 2007, Defence Counsel for the First and Second Accused file a Reply to the Prosecution's Motion. On the 22nd of November, 2007, the Prosecution filed a Response to the Statement of the Second Accused.

3. In the Introduction to the said Motion, Counsel stated that in the CDF case, Hon. Justice Bankole Thompson issued a Separate Concurring and Partially Dissenting judgement in which Accused Fofana and Kondewa were found not guilty and acquitted on all counts.

4. Counsel aver that the learned Judge, *inter alia*:

> "(i) holds that, on a reasonable interpretation of the evidence, as a whole, [the CDF Accused's] legal guilt in respect of grounds on which they have been convicted is excusable in the eyes of the law on the grounds of necessity; and
>
> (ii) entertain[s] 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."

5. It is on those grounds that Counsel for the three Accused are seeking the voluntary withdrawal permanently or disqualification of Justice Thompson from the case in that he has reached

conclusions of fact and law that give rise to reasonable doubts concerning his impartiality and/or that the conclusions evince a strong commitment to the Prosecution's cause/case which gives rise to an appearance of bias.

6. With that introduction, and consistent with my earlier indication in writing not to withdraw voluntarily from the RUF Trial, I will now proceed to comment on the matter of this Motion.

II. Preliminary Comments

7. My first preliminary comment, is that the Motion is repugnant to the notion of judicial immunity from suit, action, or litigation for any matter or thing done or said by judges in the performance of their judicial functions. ***It is abundantly clear that the Motion, though not directly making the Hon. Justice Bankole Thompson a party to the proceeding, does effectively seek to litigate his Separate Concurring and Partially Dissenting Opinion followed by remedy in the form of a penalty or sanction, to wit, disqualification from the RUF trial, for a matter or thing said or done by him in the course of his judicial functions.*** According to Article 12(1) of the *Agreement Between the United Nations and The Government of Sierra Leone On the Establishment of a Special Court for Sierra Leone*, the Judges of the Special Court enjoy functional immunities. Such immunities flow logically from Article 13(1) of the Statute providing for judicial independence. The instant Motion, therefore, breaches such an immunity to the extent to which it seeks to litigate in the context of Rule 15 an Opinion given in the course of my judicial functions.

8. As regards such functional immunities, there is no authority limiting them only to municipal legal processes. They apply with equal force to international judicial processes by the very reason of their being functional in nature.

9. My second preliminary comment is that the rationale and purport of Rule 15 of the Court's Rules of Procedure and Evidence does not extend to situations intrinsic to the judicial process, that is, cases relating to matters, issues, acts or things done by a Judge in the performance of his judicial functions. It relates to matters and issues of an extrinsic or extra-judicial nature, for example, where it is alleged that a judge has shown bias in a public lecture, a book or newspaper interview on a matter or issue in a pending case or that the judge is a member of a group with interest in the matter before the court. If the scope of Rule 15 were intended to cover judgements, decisions and opinions of

judges, the immunity granted to judges for things said or done in the performance of their functions would be rendered nugatory and inefficacious by the said Rule, a subsidiary legislation. A subsidiary legislation cannot take precedence over the enabling or parent Act nor can it prevail where it is not consistent with the parent Statute.

10. My third preliminary comment is that the immunity granted to judges does not mean that their Opinions or Decisions are not open to attack or criticism. They are quite properly so, but only within the limited framework of the appeal procedure. This is evidently the legislative wisdom behind the statutory instruments of the Court, to wit, Statute, Agreement and Rules. Rule 15 is not intended or designed to be an alternative remedy to the appeals procedure embodied in Part VII of the Court's Rules of Procedure and Evidence. It does not provide a mechanism for circumventing the latter procedure. It is also my considered view that if the legislative intent behind Rule 15 was to make it a basis for a review by a Trial Chamber of either its own Judgement or the separate concurring or dissenting opinions of individual judges, the effect of the Rule would be to confer concurrent jurisdiction, additional to the existing review jurisdiction of the Trial Chamber and the appellate jurisdiction of the Appeals Chamber. Its effect would clearly be to negate the doctrine of *functus officio* whereby once a court or judge has delivered a judgement, except for clerical errors, it is impermissible for that court or an individual judge to be called upon to affirm, defend, explain, or review the said judgement in some further litigation, whether interlocutory or otherwise, before the same adjudicatory forum which, regrettably, this exercise seems to amount to. Hence, the word "matter" in Rule 15*bis* (C) can only meaningfully be interpreted to mean any issue or question other than a judgement, decision, or opinion of a Court.

III. Substantive Comments

11. Without derogating from the force of my preliminary comments, I set out in this Part my Substantive Comments. I begin by noting that the general purport and tenor of the complaint and supporting grounds of Counsel as to the allegation of lack of impartiality on my part derives mainly from their disagreement with my judicial views, analyses, reasoning, and application of the principle of necessity as a defence to criminal conduct, which are all issues that could form the substrata of appellate litigation at the appellate level of international criminal adjudication. They also take issue with my view as to the applicability of the principle of necessity as a defence to violations of international humanitarian law. They, likewise, contend that throughout my Opinion I drew

inferences of fact and law specifically attributing the state of anarchy and rebellion to the RUF and/or AFRC groups and the Accused Persons. Nowhere in my Opinion did I make any attribution of anarchy and rebellion specifically to the AFRC and/or RUF or even to any of the Accused Persons. It is a complete misreading and misinterpretation of the paragraphs cited in support, especially paragraphs 101, 87(b) and 68 which, by the familiar technique of 'scissors, paper, paste' extrapolation technique, jumble together, ***out of context***, ideas and thoughts based on my application of the law to the facts having regard to the totality of the evidence.

12. Differences between judges and lawyers as to a judge's intellectual appreciation of the law on criminal law concepts, doctrines, principles, and the various crimes constituting the branch of law designated the criminal law, his interpretation and application of the law to the facts of a case before him cannot reasonably amount to bias or lack of impartiality on his part. As a judge, I find it difficult to understand what it means to assert that a judge or a lawyer has a biased view of the law. The conventional wisdom here is that there are different perspectives of the law, and not biased or partial perspectives. Admittedly, there may be erroneous or mistaken perspectives of the law.

13. Disagreements between judges and lawyers on (i) what the law is on a particular subject; (ii) how that law is to be interpreted; (iii) how the law is to be applied to the particular facts and circumstances have never, in the discipline and practice of the law, been held by any reasonable tribunal as *indicia* of bias or lack of impartiality on the part of judges. If this were the case, then every time there is a disagreement on these matters between judges and lawyers, the disagreement would ground an application for recusal, withdrawal or disqualification of the judge on grounds of bias or lack of impartiality.

14. For the sake of emphasis, I reiterate that disagreements between judges and lawyers on the matters stated in paragraphs 12 and 13 above, have always, in the context of the judicial process, been regarded and treated as proper and legitimate grounds of appeal, either as errors of law or errors of fact, to be resolved by an appellate body.

15. Whether the principle of necessity is a defence to criminal conduct remains an acutely controversial matter in law, in respect of which there is not single school of thought. It depends on what lines of textual or case-law authorities, nationally or internationally, one relies upon. The extensive body of legal research on the subject supports this view. It is not accurate, from the existing

state of the law, to say that necessity cannot or can never be a defence to violations of international humanitarian law. There is as yet no settled body of case-law that can be cited in support of this proposition. Indeed, no line of settled case-law authorities have been cited by Counsel to that effect. It is one of two opposing schools of legal thinking. Where a judge and a lawyer find themselves on the opposite side of this legal spectrum, this does not reflect a bias as to the law. It becomes a matter of perspective to be resolved at an appellate level, and which perhaps, given the evolutionary character of the law, may be settled in the future.

16. Nowhere in my Opinion did I hold expressly or impliedly that it is settled law that the principle of necessity is a defence to violations of international humanitarian law. My position is, and remains threefold, that (i) whether the principle of necessity is a defence to criminal conduct depends upon the particular facts and circumstances of each case, (ii) that the principle of necessity may, exceptionally ***excuse (not justify)*** criminal conduct, depending upon the particular facts and circumstances of each case, and (iii) that given the uniquely peculiar circumstances of the CDF case, the legal guilt (which I stated was proven) of the accused is excusable on grounds of necessity. It is elementary law that there is a fundamental distinction, for the purposes of defences in criminal law, between "excuses" and "justifications".

17. As a professional judge, sworn to dispense justice impartially, objectively and dispassionately, the principle of legality makes it obligatory on me to determine the ultimate question of guilt or innocence of an accused person in the trial based upon the evidence adduced in that trial (and not on the evidence adduced in another trial), factual or legal similarities notwithstanding, and the application of the law to the particular facts and circumstances of that case. It is sheer speculation to assert that inferences drawn in one case will primarily influence a judge's determination of guilt or innocence in another case. Such a view does not make for the possibility of the existence of other compelling and competing inferences deducible from the facts of the case being tried. It is untenable to argue that by some judicial calculus, the findings of not guilty in respect of the Accused in the CDF case entered by Hon. Justice Bankole Thompson will automatically translate into findings of guilty in respect of the Accused in the RUF trial. There is absolutely no basis for this inference from my reasoning in the Separate Concurring and Partially Dissenting Opinion.

18. It is flawed logic to suggest that by finding the Accused in the CDF trial not guilty, the Dissenting Judge was thereby accepting in advance the Prosecution's case in the RUF trial especially

having regard to the fact that the Prosecution's case in the RUF trial can only be gathered from the evidence adduced in the RUF trial.

19. It is a complete misreading and misunderstanding as alleged in paragraph 12 of the Motion that my articulation of the competing evils which, for the purposes of the analytical reasoning in my Opinion grounding the principle of necessity as a possible defence, was with reference to the RUF and AFRC warring factions. My analysis of the competing evils was in respect of two phenomena: (i) the destabilisation and disintegration of the State of Sierra Leone as a result of the hostilities and (ii) non-compliance with the law by the CDF, the former being characterised as the greater evil and the latter as the lesser evil. It is curious to suggest that the "evil in question" being characterised by the Judge was either the AFRC or the RUF. It is disingenuous to cite paragraph 71 of my Opinion in support of this allegation. Paragraph 71 is a citation of the law from my Book, *The Criminal Law of Sierra Leone*. Paragraph 78 (also cited in support) is a statement of the law from *Archbold*. Paragraph 80 (also cited in support) is a statement of the American law as to the defence of necessity. Paragraph 87(2) is a postulation put forward by the Judge based on his understanding of the law; likewise paragraph 87(3) and paragraph 87(4). These are all rationalisations or propositions as to the applicable principles governing necessity as a defence, completely taken out of context.

20. Further, all I stated in paragraphs 69, 87(6), 97 and 101 were propositions and inferences of law based on my appreciation of the defence of necessity and how it could apply to the CDF case.

21. It is extremely disingenuous to contend that in paragraph 32 of my Opinion, I found that the AFRC/RUF authorities did share a "common plan, purpose or design (joint criminal enterprise)....." At paragraph 37 this is what I wrote:

> "The Chamber took cognisance of the fact that a criminal trial involves the ultimate adjudication or resolution of two key issues. The first is that the crimes charged in the Indictment were indeed committed, as alleged. The second is the attribution of criminal responsibility to the accused for the commission of those crimes. In effect, there must be a nexus between the said crimes and the conduct of the accused. Where there is no such nexus, the crime has not been proven."

22. It is also alleged at paragraph 12 of the Motion that in paragraph 89 of my Opinion, I argued that the AFRC/RUF were acting with "lesser values". This is grossly misleading. All I said at paragraph 89 is this:

> "Admittedly, cases of such bizarre factual dimensions and legal complexity do present judges with the agonising dilemma of reconciling two conflicting interests, to wit, the need for "the law to promote achievement of higher values at the expense of lesser values", realising that "sometimes the greater good for society will be accomplished by violating the literal language of the criminal law, 'of which the judges are themselves the assigned custodians."

23. One aspect of the attack on my Opinion is that I am wrong in finding the Accused in the CDF trial not guilty by reason of necessity and that by reason of my findings and verdicts, I have already predetermined the guilt of the Accused in the RUF trial.. This is certainly a *non sequitur*. Even if I am wrong in my findings and verdict, this is a ground for appeal not for recusal. The proper allegation here is that of errors of law, not a manifestation of bias or lack of impartiality.

24. It is trite law that each Indictment is a separate accusatory instrument to be proved on the basis of the Prosecution's evidence adduced in support thereof and not on the basis of evidence adduced in another trial, especially where there are no common witnesses. There is absolutely no legal warrant to deduce from my Opinion any inference that proof of the charges in the RUF Indictment will depend on evidence adduced in the CDF case. As a Judge, I consider myself strictly bound by the above principle, and must emphasize that it was precisely consistent with the said principle that the Trial Chamber, in its wisdom, decided to order a separate trial on each indictment, rather than a joint trial, so to afford each Accused the judicial safeguards and guarantees to which he is entitled. I am pre-eminently aware that the charges laid in each Indictment have to be proved beyond reasonable doubt on the basis of the evidence adduced in support of the individual Indictment.

25. I have no judicial crystal ball to discern, at this stage, precisely what defences the Accused in the RUF trial will be relying on or are open to them, on a reasonable interpretation of the totality of the evidence. Nothing in my Separate Concurring and Partially Dissenting Opinion suggests

otherwise. Hence, I could not then in that Opinion have presaged their guilt or innocence in any legal reasoning or finding therein.

III. Concluding Comments

26. Predicated upon my Preliminary Comments, the Motion is a calculated attempt to stifle judicial independence and to discourage judges from exercising their authority and right to dissent, or write separate concurring opinions thereby undermining, in the judicial context, one of the matrix rights and freedoms guaranteed every individual, the right to free speech and expression and their functional immunity from suit for exercising that right in the course of their judicial functions. From a related perspective, the Motion calls upon Hon. Justice Bankole Thompson, through the mechanism of Rule 15, to justify the verdicts of not guilty entered in favour of the Accused in the CDF trial. Rule 15 is not intended for that purpose. By no judicial calculus have I, in my Separate Concurring and Partially Dissenting Opinion determined in advance the guilt or innocence of the Accused in the RUF case; that will be determined at the end of the trial exclusively on the basis of the evidence adduced in Court during that trial and the application of the law to such evidence. Consistent with my oath, my understanding of the judicial function is not to yield to any pressure, direct, indirect, subtle or overt, from whatever source in the discharge of such function. I reaffirm that commitment.

Done at Freetown, Sierra Leone, this 28th day of November 2007

Hon. Justice Bankole Thompson

[Seal of the Special Court]