920)

SCSL-04-15-T
(32265 — 32278)

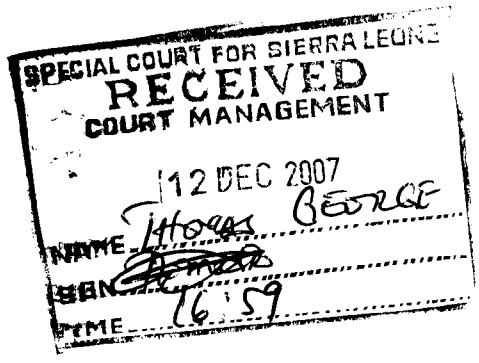
SPECIAL COURT FOR SIERRA LEONE
APPEAL CHAMBER

32265

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

Registrar: **Mr. Herman Von Hebel**

Date filed: **12th December 2007**



THE PROSECUTOR

v.

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

SESAY APPEAL AGAINST THE DECSION ON SESAY AND GBAO MOTION FOR VOLUNTARY RECUSAL OR DISQUALIFICATION OF JUDGE BANKOLE THOMPSON FROM THE RUF CASE

Office of the Prosecutor:
Mr. Peter Harrison
Mr. Reginald Fynn

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

Defense Counsel for Morris Kallon
Mr. Shekou Touray
Mr. Charles Taku
Mr. Ogetto Kennedy

Court-Appointed Counsel for Augustine Gbao
Mr. John Cammegh
Ms. Prudence Acirokop

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. On the 21st November 2007 the Defence filed its Reply (the "Reply").[4]

5. On the 28th November 2007 Hon. Justice Thompson filed his "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" ("Hon Justice Thompson's Comments").[5]

6. In their Decision of 6th December 2007 (the "Decision"),[6] Hon. Justice Itoe and Hon. Justice Boutet (Trial Chamber I) dismissed the Motion concluding that "even though it has found some *indicia* of apprehension of bias in the challenged opinion of Hon. Justice Thompson, we are satisfied that this conclusion is not sufficient to overcome the high threshold standard that has been set and established by the jurisprudence of International Criminal Tribunals on the recusal or the disqualification of a Judge in an International Criminal Tribunal and therefore,

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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.

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.

4 *Prosecutor v. Sesay et al,* SCSL-04-15-T-887, "Defence Reply to Prosecution Response to Sesay and Gbao Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case", 21 November 2007..

5 *Prosecutor v. Sesay et al,* SCSL-04-15-T-900, "Hon. 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 filed pursuant to Rule 15 of the Rules of Procedure and Evidence", 28 November 2007. ('Hon. Justice Thompson's Comments).

6 *Prosecutor v. Sesay et al,* SCSL-04-15-T-909, Decision on Sesay and Gbao Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 6 December 2007 (the "Decision").

does not rebut the presumption of impartiality and nor does it firmly establish a reasonable appearance of bias on the part of Hon. Justice Thompson."[7] On the same date, following an oral application made jointly by the Prosecution and the Defence seeking leave to appeal the Decision, Trial Chamber I granted leave to appeal the Decision.[8]

7. Herewith Counsel for Sesay files its Appeal against the Decision.

THE GROUNDS OF APPEAL

Ground one

8. The Trial Chamber erred in its Decision by concluding that only "some indicia of an appearance of bias have been established having regard to the circumstances by the language used in the Separate Opinion when it is understood and viewed in the context of the ongoing RUF proceedings "[9] It is submitted that on a plain reading of the Separate Opinion, within the context of the RUF case, there was an abundance of ascertainable facts which gave rise to a substantial appearance of bias, sufficient to provide a legitimate reason to fear that Hon. Justice Thompson lacks impartiality and this fear can be "held objectively justified".[10]

Ground two

9. It is submitted that upon a proper application of the *Furundzija* test – wherein it is stated *inter alia* "There is an unacceptable appearance of bias if ... the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias"[11] – the Trial Chamber would have concluded that the presumption of impartiality which attaches to judges has been firmly rebutted. Trial Chamber I erred in its application of the law by failing to give *proper* weight to all the relevant circumstances. In particular, the Trial Chamber (i) failed to acknowledge or give any weight to Hon. Justice Thompson's significant departure from the judicial neutrality which dictates that judges at International Tribunals should hold the view that persons responsible for violations of international humanitarian law should not go unpunished; and (ii) gave undue weight to contextual factors, such as the "oath of office taken by the Judges to administer justice without fear or favour", the corresponding assumed

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[7] *Id.* at para. 94.
[8] *Prosecutor v. Sesay et al,* SCSL-04-15-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", 6th December 2007.
[9] The *Decision*, para. 84.
[10] *Prosecutor v Furundzija*, IT-95-17/1-A, "Judgement (AC)", 21 July 2000, para. 182.
[11] *Id.* at Para. 189

"ability to carry out that oath by reason of ... training and experience",[12] and the fact that "Judges sit as a panel of three Judges".[13]

10. The effect of these errors was to raise the evidentiary threshold for rebuttal of the presumption of impartiality to an extent which misapplies the objective requirement that justice should be seen to be done, as well as actually done. The test employed by the Trial Chamber failed to demand that a "tribunal is not only genuinely impartial, *but also appears to be impartial*".[14] The Trial Chamber failed to appreciate that the safeguards implicit in the judicial oath and the constitution of three judges within a panel may well provide some reassurance concerning the essential requirement that a Judge should be subjectively free from bias but given the discernible appearance of bias in the Separate Opinion the damage to public confidence in the integrity of the process is incalculable.

11. As noted by Judge Shahbuddeen in a separate but concurring opinion in the *Furundzija* case,

> The litmus test of what is acceptable and what is not is the need to maintain public confidence in the integrity of the system under which justice is administered. Public confidence need not be disturbed by the reactions of the hypersensitive and the uninformed, but there are cases in which it can be shaken by an appearance of bias even though, from the point of view of a court considering the matter, it may not be thought that there was a real danger of that disposition.[15]

12. In light of the facts disclosed by Hon. Justice Thompson and/or those reached in the Decision, it is indisputable that the Learned Judge has, *at a minimum*, concluded that the RUF accused were members of a group who were "enemies"[16] of the state of Sierra Leone, the activities of which would have led to the "destabilisation and disintegration of the State of Sierra Leone"[17] and whose ongoing existence was characterised by "tyranny, anarchy and rebellion, ... fear, utter chaos [and] widespread violence of immense dimensions".[18] It is submitted that these ascertained facts, without more, would lead a reasonable observer, properly informed, to reasonably apprehend bias".[19] In light of the wider circumstances, namely the detail of the RUF Prosecution and Defence cases and Hon. Justice Thompson's

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[12] The *Decision*, paras. 91, 92, and 93, quoting with approval the finding of the Supreme Court of South Africa in *President of the Republic of South Africa and Others v. South African Rugby Union and Others, Judgement on Recusal Application,* 1999 (7) BCLR 725 (CC), 3 June 1999.
[13] The *Decision*, para. 90.
[14] *Prosecutor v Furundzija*, IT-95-17/1-A, "Judgement (AC)", 21 July 2000, para. 182; emphasis added.
[15] *Prosecutor v Furundzija*, IT-95-17/1-A, "Judgement (AC)", 21 July 2000, para. 268.
[16] The *Decision*, para. 75.
[17] Hon. Justice Thompson's Comments, para. 19.
[18] The *Decision*, para. 75.
[19] The *Decision*, para. 51 quoting with approval *Prosecutor v Furundzija*, IT-95-17/1-A, "Judgement (AC)", 21 July 2000, para. 189.

unilateral invocation of a hugely controversial defence of necessity to "excuse"[20] the crimes of the CDF accused, there can be no doubt that "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*"[21] would conclude that there was a reasonable apprehension of bias and that it had been "firmly established".[22]

***Ground One* – Ascertainable facts that gave rise to an appearance of bias, sufficient to provide a legitimate reason to fear that Hon. Justice Thompson lacks impartiality and this fear can be "held objectively justified"[23]**

i. Error in finding that Hon. Justice Thompson did not make any findings with regard to the criminality of the actions of the AFRC and RUF[24]

13. This was a finding which was not reasonably open to Trial Chamber I. The expressions and words used by Hon. Justice Thompson, in the context of the invocation of the necessity defence to excuse war crimes, could only connote crimes or criminal conduct relevant and probative of the RUF indictment.

14. On a plain and literal reading, the terminology employed by the Learned Judge, within the invocation of the necessity defence, impliedly suggested, without qualification, that the AFRC/RUF were engaged in activities which were not limited to the usurpation of a purportedly democratically elected government but were those steeped in lawlessness and criminal conduct. This conduct was the "larger evil that was to be avoided by the CDF's actions" and was "actions brought by the AFRC and the RUF forces".[25]

15. The terms were employed within the context of "the destabilising and disintegration of the State of Sierra Leone as a result of hostilities"[26] but nevertheless the Separate Opinion was not limited to the notion of quashing "rebellion" or the restoration of a democratically elected government. The terms employed – namely "tyranny", "anarchy", "utter chaos", "continuing breakdown of law and order", and "widespread violence" – are not the hallmarks of all

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[20] Hon. Justice Thompson Comments, Para. 16.
[21] The *Decision*, para. 51 quoting with approval *Prosecutor v Furundzija*, IT-95-17/1-A, "Judgement (AC)", 21 July 2000, para. 189; emphasis added.
[22] The standard reiterated in the *Decision* at para. 86 quoting, e.g.: *Prosecutor v. Brdjanin and Talic*, "Decision on Joint Motion to Disqualify the Trial Chamber Hearing the Brdjanin-Talic (Presiding Judge)", 3 May 2002, para. 18.
[23] *Prosecutor v Furundzija*, IT-95-17/1-A, "Judgement (AC)", 21 July 2000, para. 182.
[24] The *Decision*, para. 77.
[25] The *Decision*, para. 79.
[26] Hon. Justice Thompson Comments, para. 19, and the *Decision*. para. 83.

democratic overthrows but rather the attribution of further and extensive criminal conduct to the AFRC and the RUF. As noted by Hon. Justice Thompson this conduct "gravely imperilled" not just the State as an entity but also the "essential interests, *individually* and collectively"[27] of the citizenry of Sierra Leone.

16. Moreover a reasonable observer, when judging the meaning and import of the terms and expressions, would need to be properly informed of the balancing exercise conducted by Hon. Justice Thompson: with the evils of the CDF war crimes weighed on one side of the scale and the evil of the activities of the AFRC/RUF on the other. The Learned Judge concluded that the grotesque acts of criminality committed by the CDF accused against innocent civilians were preferable to the ongoing acts and conduct of the AFRC/RUF. In other words the acts and conduct of the AFRC/RUF must have been greater and more egregiously grotesque than the criminal acts of the CDF.

17. A reasonable observer, cognisant of the Prosecution case – which alleges that the AFRC and the RUF together were a joint military organisation and that the RUF accused were engaged in wanton "criminal acts of unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilians structures" and these were "actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise"[28] – would therefore reasonably conclude that the unqualified use of these emotive and apocalyptic terms and expressions gave the appearance that there had been a substantial prejudgment of the *central* issues in the case; namely whether there was an agreement amongst the AFRC and RUF to overthrow the democratically elected government and commit crimes under the statute and/or were the crimes a foreseeable consequence of the criminal enterprise to take over the territory of Sierra Leone.

ii. Further error in the approach to the ascertainable facts

18. The Trial Chamber appeared not to approach the assessment of the appearance of bias as an issue intimately related to an assessment of the *degree* of prejudgment of the RUF and the RUF accused. Thus, the Trial Chamber erred in suggesting that "even if Hon. Justice Thompson had made findings that criminal acts were committed by the RUF, this would not

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[27] *Prosecutor v. Moinina Fofana and Allieu Kondewa*, SCSL-04-14-T-785, "The Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson", para. 100, emphasis added.

[28] *Prosecutor v. Sesay et al.*, SCSL-04-15-PT-619, "Corrected Amended Consolidated Indictment", 2nd August 2006, para. 37.

have been any different from the position already taken by the Defence".[29] This is plainly wrong. The Trial Chamber's task was to consider whether the Separate Opinion evinced an unacceptable appearance of bias. This required an assessment of the *degree* of prejudgment apparent from the Separate Opinion. The fact that *one* of the accused (Sesay) admitted in the defence opening that "some" of the RUF accused committed crimes does not provide *carte blanche* to the Hon. Justice Thompson to attribute crimes or other wrong doing to the RUF without further explanation or qualification.

19. The Sesay Defence remarks were made with specific reference to a specific case, which may or may not be accepted by the other Accused. Moreover the opening remarks were intended and did attribute responsibility for crimes to a very limited group of the RUF and within a limited temporal framework. These limitations convey the substance of the Sesay case which denies that the majority of the RUF or Sesay as an individual had anything to do with any chaos or lawlessness which was caused principally by groups comprised of Kamajors, CDF, ex-Sierra Leonean Army personnel (or AFRC), or specific individual RUF commanders acting independently (e.g. the killing of the alleged Kamajors by Sam Bockarie in Kailahun in February 1998).

20. Thus the Sesay Defence (and/or the other RUF accused) have always challenged the very existence of either the *crime bases alleged within the indictment (*notably those alleged in the Bo, Kenema, and Kailahun districts) or any RUF involvement in the crime bases (notably Koinadugu, Port Loko, Bombali, and Freetown and the Western Area). Moreover the Sesay Defence, which commenced in May 2007, has called to testify 17 independent witnesses whose testimony was largely adduced to demonstrate that from 1993 until 2000 the civilians of Kailahun lived in peace and harmony with the RUF fighters, and conversely were harassed and brutalised by pro-government forces, especially the Kamajors and the CDF. In other words, whereas the Hon. Justice Thompson characterises without qualification the CDF as the liberators of Sierra Leone in all locations and at all times and the RUF as being responsible for "tyranny", "anarchy", "utter chaos", and the "continuing breakdown of law and order" the Sesay Defence case asserts that in large part and in most areas and at most times within the indictment period these characterisations are not only untrue but often the reverse of the true picture.[30]

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[29] The *Decision*, para. 77.

[30] For example, DIS-301 (28th June 2007) at page 48, lines 19-28: "Q. Are you able to say anything about how you felt about the administration then with the junior commandos and the administration today?.....A. The

iii. Error in failing to give due weight to other ascertainable factors

21. The question of whether a reasonable observer would reasonably apprehend bias is not reducible to whether Hon. Justice Thompson appeared to have attributed crimes under the Statute to the RUF or the RUF accused. Clearly the issue concerns the larger question of the apparent *degree* of prejudgement or hostility to the issues or the accused in the case. The appearance of prejudgment can thus arise in a variety of ways and is not limited to whether the words used imply criminality. It is submitted that the Trial Chamber failed to either conduct an assessment into these other factors and/or failed to give the factors due weight when concluding that there was only "some indicia of an appearance of bias".[31] In particular it is submitted that insufficient weight was given to the following.

a. Ascertainable Fact One

22. The Trial Chamber found that the expressions and terms used "could be perceived or understood as aggressive, offensive and injurious to the interests of the three aggrieved RUF Defendants and could have created, even if the Learned Judge did not intend those consequences, an appearance of bias against their cause".[32]

b. Ascertainable Fact Two

23. The overwhelming judicial endorsement of any activity of the CDF accused (including the commission of heinous crimes against civilians) to combat the RUF. This, even without the imputation of crimes, suggests that the Hon. Justice Thompson regarded the eradication of

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junior commandos, we all lived together. They did not do anything wrong to us. They didn't do anything to us except when we were going in search of food they led us, so we go together. We were living together as brothers and sisters. We did everything in common"; DIS-187 (26th November 2007) at page 48, line 11-18: "when I was at Mende Buima, I had no problem with the fighters, nobody raped me, nobody forced me to work, no one beat me up and nobody did anything bad to me, except when they were giving me respect ... the same way they were treating me was the same way they were treating the civilians ..."; and DIS-128 (27th November 2007) at page 58, lines 19-25: "Q. Were you able to observe, in Giema and the environs, the reasons why civilians remained within RUF territory in 1997 and 1998 and 1999? A. They were now accustomed -- they become used to them because all the Gios had left, they were our siblings, so, we are now living together because we are now used to them. They became our siblings." For evidence on treatment of women by the RUF: DIS-187, (26th November 2007) page 37, line 27 to page 38, line 16 as well as page 74, line 19 to page 76, line 1; DIS-302 (27th June 2007) page 34, line 20 to page 35, line 19; and DIS-301 (28th June 2007) page 28, line 27 to page 29, line 28. For provision of free medical care to civilians: DIS-187 (26th November 2007) page 37, lines 1-26; DIS-128 (27th Nov 2007) page 5, line 15 to page 8, line 17; DIS-301 (28th June 07) page 22, line 2 to page 23, line 18. For evidence on provision of free schooling to civilian children: DIS-187, (26th November 2007) page 47, lines 17 -23; DIS-128 (27th Nov 07) page 8, line 18 to page 9, line 2; DIS-302 (27th June 07) page 9, line 11 to page 10, line 20. For evidence on RUF laws and punishment of crimes committed in the RUF zones: DIS-187, (26th November 2007) page 40, line 28 to page 47, line 16; DIS-301 (28th June 07) page 40, line 16 to page 46, line 26. See DIS 187 (26th November 2007) at page 7, lines 16-24: "People said the Kamajors were chasing people ... The Kamajors were doing something wrong to them ... People were running away from Kenema ... they said the Kamajors were capturing people ... ill-treating people".

[31] The *Decision*, Para. 84

[32] The *Decision*, para. 72.

the RUF as nothing less than essential for the survival of the State of Sierra Leone. In light of the Defence case that the aim of Sesay was to "fight justly and legitimately for the benefit of freedom and liberty for the people of Sierra Leone"[33] this could not be considered an irrelevant personal belief or disposition which the Learned Judge can be relied upon to discard.[34]

c. Ascertainable Fact Three

24. This concerns Hon. Justice Thompson's unqualified thesis that *any* crime committed by the CDF was excusable in light of the activities of the RUF and AFRC. As noted above at Paragraph 20, this thesis, attributing wanton chaos and anarchy to the RUF, is in large part the reverse of the Sesay Defence case. The Trial Chamber's finding that the Learned Judge "has not made any findings about the issues in the RUF trial"[35] is therefore not correct.

d. Ascertainable Fact Four

25. This concerns Hon. Justice Thompson's unilateral invocation of the defence of necessity. The Defence did not suggest that the circumstances of this invocation (that is without the Majority being afforded the opportunity to address the issue "solely because it was never raised by the Defence nor did its applicability to the circumstances of this case, feature for a determination at any stage before the delivery of the" Majority Decision[36]) indicated that the Learned Judge held views on "the overriding criminality of the AFRC/RUF".[37] It was submitted that the fact that the defence was invoked unilaterally (and an opportunity not provided to the Majority for discussion prior to delivery) demonstrated the depth of conviction and the degree of emotional and intellectual commitment to the proposition that the CDF were fighting a noble cause against an anarchic and illegal RUF. This fact appears to have been ignored by the Trial Chamber when considering the Motion. It is submitted that this conduct ought to have been given some, if not substantial weight when considering the issue of whether the Learned Judge could disabuse his mind of any irrelevant personal beliefs or predispositions.[38]

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[33] The *Decision*, para. 81.
[34] *Prosecutor v Furundzija*, IT-95-17/1-A, "Judgement (AC)", 21 July 2000, para. 197, "The Appeal Chamber ... considers that, in the absence of evidence to the contrary, it must be assumed that the Judges of the International Tribunal "can disabuse their minds of any irrelevant belief of predisposition".
[35] The *Decision*, para. 92
[36] The *Decision*, para. 62.
[37] The *Decision*, para. 69.
[38] *Case of Wettstein v. Switzerland* (Application no. 33958/96), European Court of Human Rights, 21 December 2000, para. 42 which states, "According to the Court's constant case-law, when the impartiality of a tribunal for the purposes of Article 6(1) is being determined, regard must be had to the personal conviction and behaviour of a particular judge in a given case – the subjective approach – as well as to whether it afforded sufficient guarantees to exclude any legitimate doubt in this respect – the objective approach".

***Ground Two* – The Trial Chamber I erred in its application of the law by failing to give *proper* weight to all the relevant circumstances. In particular the Trial Chamber (i) failed to acknowledge or give any weight to Hon. Justice Thompson's significant departure from the judicial neutrality which dictates that judges at International Tribunals should hold the view that persons responsible for violations of international humanitarian law should not go unpunished and (ii) gave undue weight to contextual factors, such as the "oath of office taken by the Judges to administer justice without fear or favour" and the corresponding assumed "ability to carry out that oath by reason of ... training and experience"[39] and the fact that "Judges sit as a panel of three Judges".[40]**

26. It is submitted that the Decision failed to give any or any sufficient weight to Hon. Justice Thompson's significant departure from the anticipated judicial neutrality. In particular, the Trial Chamber appears to have accepted the Prosecution and Defence submissions 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" harming Sierra Leonean civilians and appear to have accepted that Hon. Justice Thompson's excusing of the CDF crimes was a significant departure from Article 13 of the Statute.[41] This finding is highly relevant since this departure would appear to crucially undermine the presumption of impartiality which ordinarily attaches to judges.

27. In these circumstances it was contradictory to place any, or any due reliance on (i) the requirement that Judges of international tribunals are required to be "persons of high moral character, impartiality and integrity" when they are appointed by Article 13 of the Statute;[42] (ii) the solemn declaration pursuant to "Rule 14 ... to act honestly, faithfully, impartially and conscientiously";[43] and (iii) the fact that the "Judges of the Trial Chamber sit as a panel of the three Judges".[44]

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[39] The *Decision*, paras. 91, 92, and 93, quoting with approval the finding of the Supreme Court of South Africa in *President of the Republic of South Africa and Others v. South African Rugby Union and Others, Judgement on Recusal Application,* 1999 (7) BCLR 725 (CC), 3 June 1999.

[40] The *Decision*, Para. 90.

[41] The *Decision*, Para. 83 with reference to submissions: *Prosecutor v. Sesay et al,* SCSL-04-15-T-887, "Defence Reply to Prosecution Response to Sesay and Gbao Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case", 21 November 2007, para. 15 quoting from the Celebici Appeals Judgement, para. 699 wherein in its stated that "[I]t is stated 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".

[42] The *Decision*, para. 89.

[43] The *Decision,* para. 89.

[44] The *Decision*, Para. 90

28. These presumptions had been displaced or significantly weakened by a highly unusual departure from judicial norms. The reasonable person was no "longer the informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form part of the background and apprised of the fact that impartiality is one of the duties that Judges swear to uphold"[45] but was the reasonable person *with the knowledge that there had been a significant departure from the judicial norm and this departure had occurred notwithstanding the "Judges of the Trial Chamber sit as a panel of three Judges".*

29. In other words the Trial Chamber erred when concluding that these presumptions had not been displaced. First, as submitted above there was ample evidence above and beyond "some indicia of an appearance of bias". Second, even if the Trial Chamber was correct in its assessment; that there were only some "indicia of bias", there was nothing in the surrounding circumstances, neither the comments issued by Hon. Justice Thompson's on the 28th November 2007 nor any other document or finding which explained, ameliorated or weakened this appearance.

30. Equally, the fact that the Learned Judge asserted that he is "bound by the obligation to issue a judgment in the RUF case that is exclusively based on whether or not the Prosecution has proven, on the basis of evidence adduced only in that proceeding, the guilt of each of the Accused beyond a reasonable doubt",[46] or that the "evidence presented in the CDF case was almost entirely different from that in the RUF case",[47] or that "the Trial Chamber sits as a panel of three Judges"[48] is only minimally relevant. These reassurances provide comfort that the Learned Judge may not exercise any subjective bias but they touch only tangentially upon the clear and firmly established circumstances which objectively gives rise to the *appearance of bias.*

REQUEST

31. For the reasons aforementioned the Defence submits that the Trial Chamber erred when concluding that the Defence had failed to firmly establish a reasonable appearance of bias on the part of Justice Thompson.

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[45] *Prosecutor v Furundzija*, IT-95-17/1-A, "Judgement (AC)", 21 July 2000, para. 190.
[46] The *Decision*, para. 92.
[47] The *Decision*, para. 93.
[48] The *Decision*, para. 90.

32. The Defence respectfully requests that the Appeal Chamber, pursuant to Rule 15(B) disqualify Hon. Justice Thompson from the RUF proceedings.

33. In light of the finding that there is some evidence indicating the appearance of bias, the Defence respectfully requests that the Learned Judge be excused from the proceedings until the Appeal Chamber has deliberated. Mr. Sesay consents to continue with only two judges.

34. The Defence respectfully requests that the page limit for appeals be extended in light of the paramount importance of the issues herein.

Dated 12th December 2007

Wayne Jordash
Sareta Ashraph

LIST OF AUTHORITIES

Judgements and Decisions

Case of Wettstein v. Switzerland (Application no. 33958/96), European Court of Human Rights, 21 December 2000.

President of the Republic of South Africa and Others v. South African Rugby Union and Others, "Judgement on Recusal Application", 1999 (7) BCLR 725 (CC), 3 June 1999.

Prosecutor v. Brdjanin and Talic, "Decision on Joint Motion to Disqualify the Trial Chamber Hearing the Brdjanin-Talic (Presiding Judge)", 3 May 2002.

Prosecutor v Furundzija, IT-95-17/1-A, "Judgement (AC)", 21 July 2000.

Prosecutor v. Sesay et al, SCSL-04-15-T-909, "Decision on Sesay and Gbao Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case", 6 December 2007.

Prosecutor v. Sesay et al, SCSL-04-15-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.

Prosecutor v. Moinina Fofana and Allieu Kondewa, SCSL-04-14-T-785, "The Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson".

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.

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