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SCSL-04-16-A

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(028033)

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

IN THE APPEALS CHAMBER

Before: Hon. Justice Justice George Gelaga King, President  
Hon. Justice Emmanuel Ayoola  
Hon. Justice A. Raja N. Fernando  
Hon. Justice Renate Winter  
Hon. Justice Geoffrey Robertson, QC

Registrar: Mr Herman Von Hebel

Date filed: 2 August 2007

**THE PROSECUTOR**

**Against**

**Alex Tamba Brima**  
**Brima Bassy Kamara**  
**Santigie Borbor Kanu**

Case No. SCSL-04-16-A

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**PUBLIC**

**PROSECUTION MOTION FOR VOLUNTARY RECUSAL  
OR DISQUALIFICATION OF JUSTICE ROBERTSON**

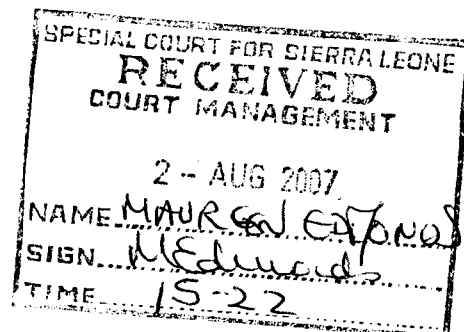
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Office of the Prosecutor:  
Mr. Stephen Rapp  
Mr. Chile Eboe-Osuji

Defence Counsel for Alex Tamba Brima  
Mr. Kojo Graham

Defence Counsel for Brima Bassy Kamara  
Mr. Andrew Daniels

Defence Counsel for Santigie Borbor Kanu  
Mr. Abibola E. Manly-Spain



## INTRODUCTION

1. In the *Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber*, rendered on 13 March 2004, the Appeals Chamber held as follows in paragraph 18:

‘Justice Robertson ought to be disqualified from adjudicating on the following matters:

- (i) those motions involving alleged members of the RUF for which decisions are pending, in this Chamber; and
- (ii) Cases involving the RUF if and when they come before the Appeals Chamber.’<sup>1</sup>

2. In *Sesay – Decision on Defence Motion Seeking Clarification of the Decision on the Disqualification of Justice Robertson from the Appeals Chamber*, rendered on 25 May 2004, the Appeals Chamber further held as follows:

CONSIDERING that the Disqualification Decision was clear, explicit and unambiguous in disqualifying Justice Robertson from adjudicating on the following matters:

1. Those Motions involving alleged members of the RUF for which decision are pending, in this chamber; and
2. Cases involving the RUF if and when they come before the Appeals Chamber.’<sup>2</sup>

## AFRC Appeal

3. The Prosecution now brings the present motion requesting Justice Robertson recuse himself from hearing the appeal of the Judgement of the Trial Chamber in the AFRC Case.<sup>3</sup> In the alternative, in the event Justice Robertson does not recuse himself, the Prosecution requests that the remaining members of the Appeals Chamber disqualify Justice Robertson from hearing the appeal of the Judgement of the Trial Chamber in the AFRC Case.

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<sup>1</sup> *Prosecutor v. Sesay et al*, SCSL-2004-15-PT-AR15-58, “Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber”, 13 March 2004 (Appeals Chamber) para 18.

<sup>2</sup> *Prosecutor v. Sesay et al*, SCSL-2004-15-PT-140, “Sesay – Decision on Defence Motion Seeking Clarification of the Decision on the Disqualification of Justice Robertson From the Appeals Chamber”, 25 May 2004, (Appeals Chamber).

<sup>3</sup> *Prosecutor v Brima, Kamara and Kanu (Judgement)* 20 June 2007.

4. The case for the Prosecution in the AFRC Case was partly conducted with the view to establishing that the accused in the AFRC Case had committed the crimes alleged against them by virtue of a joint criminal enterprise between them and the RUF. The pleading in this regard appears particularly at paragraphs 33 and 34 of the Indictment in which the following is alleged:

33. The AFRC, including **ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU**, and the RUF, including ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO, shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.

34. The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise. [Emphasis added.]

5. In their Judgment at the end of the AFRC Case, the Trial Chamber held that the joint criminal enterprise mode of liability had been defectively pleaded in the Indictment and that the Trial Chamber would therefore not consider joint criminal enterprise liability in its Judgment. Consequently, the Chamber refused to consider any evidence regarding joint criminal enterprise.
6. One of the Prosecution's points of appeal in the AFRC Judgment is that the Trial Chamber erred as regards their findings on the issue of joint criminal enterprise between the AFRC and the RUF. To correct the error, the Prosecution urges the Appeals Chamber to:
- (i) reverse this finding of the Trial Chamber;


- (ii) (a) revise the Trial Chamber's Judgment by adding findings that Brima, Kamara and Kanu are each individually responsible under Article 6(1) of the Statute, by virtue of joint criminal enterprise liability, for all of the crimes which the Trial Chamber found in its Judgment to have been committed, and for all of the crimes that are encompassed within the Prosecution's other Grounds of Appeal to the extent that the other Grounds of Appeal are upheld,
    - (b) make any resulting amendments to the Disposition of the Trial Chamber's Judgment, and
    - (c) increase the sentences imposed on the Accused to reflect the additional criminal liability; and additionally or alternatively,
  - (iii) to the extent that the Appeals Chamber is unable to determine the matter without further findings of fact by the Trial Chamber, to remit the case to the Trial Chamber for further findings on whether the three Accused are individually responsible for these crimes under Article 6(1) of the Statute on the basis of joint criminal enterprise liability.
7. For purposes of paragraph 18(ii) of the Appeals Chamber's Decision of 13 March 2004, the appeal of the AFRC Judgment is a 'Case involving the RUF' since it involves an appeal relating to the issue of joint criminal enterprise. This is because consideration of the Prosecution's appeal on that issue will engage the following questions:
- (a) whether or not joint criminal enterprise between the AFRC and the RUF was correctly pleaded in the Indictment;
  - (b) whether or not joint criminal enterprise was, as a matter of fact, proved to exist between the AFRC and the RUF;
  - (c) whether acts alleged to have been committed by RUF members in furtherance of the joint criminal enterprise with the accused members of the AFRC have been proven; and
  - (d) whether or not acts committed in furtherance of such joint criminal enterprise ought to be taken into account for purposes of sentencing.
8. Of course, a determination of the matters in subparagraphs 7(b), 7(c), and 7(d) would not be necessary if a decision was made as to subparagraph 7(a) that the

Trial Chamber was correct in concluding that Prosecution had not properly pleaded joint criminal enterprise. This would avoid the direct examination of RUF conduct by Justice Robertson, which examination would create a clear appearance of bias in light of his published comments. However, a determination by Justice Robertson against the Prosecution appeal on procedural grounds, which would avoid a very visible examination of the proof against the RUF, could itself lead a reasonable observer, properly informed, to apprehend bias.

## CONCLUSION

9. Given that the AFRC Judgment is a 'Case involving the RUF' to the extent of the appeal on the question of joint criminal enterprise, it follows that the disqualification order contained in the 13 March 2004 Decision of the Appeals Chamber is applicable to the AFRC Appeal. The Prosecution requests Justice Robertson recuse himself from hearing the appeal of the Judgment of the Trial Chamber in the AFRC Case.<sup>4</sup> In the alternative, in the event Justice Robertson does not recuse himself, the Prosecution requests that the remaining members of the Appeals Chamber disqualify Justice Robertson from hearing the appeal of the Judgment of the Trial Chamber in the AFRC Case.

Filed in Freetown,  
2 August 2007  
For the Prosecution,

  
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Stephen Rapp  
Prosecutor

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<sup>4</sup> *Prosecutor v Brima, Kamara and Kanu (Judgement)* 20 June 2007.

**Index of Authorities**

1. *Prosecutor v. Sesay et al*, SCSL-2004-15-PT-AR15-58, “Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber”, 13 March 2004.
2. *Prosecutor v. Sesay et al*, SCSL-2004-15-PT-140, “Sesay – Decision on Defence Motion Seeking Clarification of the Decision on the Disqualification of Justice Robertson From the Appeals Chamber”, 25 May 2004.
3. *Prosecutor v Brima, Kamara and Kanu (Judgment)* 20 June 2007.