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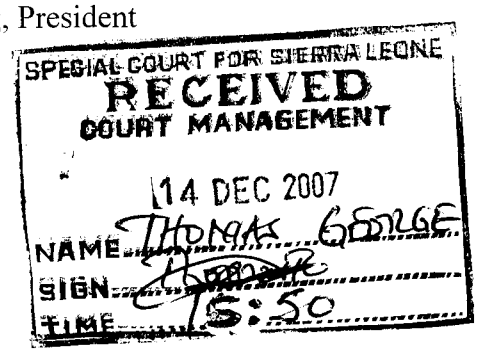
SCSL-04-15-T
(32551 — 32566)

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

32557

APPEALS CHAMBER

Before:	Hon. Justice George Gelaga King, President Hon. Justice Emmanuel Ayoola Hon. Justice Raja Fernando Hon. Justice Renate Winter Hon. Justice Jon Kamanda
Registrar:	Mr. Herman Von Hebel
Date filed:	14 December 2007



THE PROSECUTOR **Against** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

PROSECUTION CONSOLIDATED RESPONSE TO THE SESAY, KALLON AND GBAO APPEAL OF THE DECISION ON THE DEFENCE MOTION FOR VOLUNTARY WITHDRAWAL OR DISQUALIFICATION OF JUSTICE BANKOLE THOMPSON FROM THE RUF CASE

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I. INTRODUCTION

1. The Prosecution files this Consolidated Response to the Notices of Appeal and Submissions of Sesay,[1] Kallon[2] and Gbao,[3] which appeal Trial Chamber I's "Decision on Sesay and Gbao Motion For Voluntary Withdrawal or Disqualification of Justice Bankole Thompson From the RUF Case" ("**Decision**"), dated 6 December 2007.[4]

2. The appeal seeks to overturn the Decision, which dismissed the Accuseds' motion that Mr. Justice Thompson voluntarily withdraw from sitting on the RUF case or that Mr. Justice Thompson be disqualified from continuing to sit on the RUF case. The motion filed[5] with Trial Chamber I asserted an alleged appearance of bias based on the "Separate Concurring and Partially Dissenting Opinion of Justice Bankole Thompson" in *Prosecutor v. Fofana and Kondewa* ("**Dissenting Opinion**").[6] There is no error of law in the Decision, no misunderstanding or misapplication of the law or of the facts, and the appeals should be dismissed.

II. APPLICABLE LAW

A. STANDARD OF REVIEW

3. The Appellants must show that the Trial Chamber "misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or ... (gave) weight to extraneous or irrelvant considerations, or ... made an error as to the facts upon which it has exercised its discretion."[7] The Appellants have not discharged

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[1] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-920, "Sesay Appeal Against the Decision on Sesay and Gboa Motion for Voluntary Recusal or Disqualification of Judge Bankole Thompson From the RUF Case", 12 December 2007.

[2] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-918, "Kallon Notice of Appeal and Submissions on the Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson From the RUF Case", 12 December 2007.

[3] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-919, "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", 12 December 2007.

[4] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-909, "Decision on Sesay and Gbao Motion For Voluntary Withdrawal or Disqualification of Justice Bankole Thompson From the RUF Case", 6 December 2007.

[5] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-880, "Sesay and Gbao Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson From the RUF Case, (***Motion***), 14 November 2007.

[6] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T-785, "Judgement", Annex C, 2 August 2007.

[7] *Prosecutor v. Norman et al*, SCSL-04-14-688, "Decision on Interlocutory Appeals on Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone," 11 September 2006, para. 6; *Prosecutor v. Milosević*, IT-99-37-AR73, "Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder," Appeals Chamber, 18 April 2002, para. 5. See also *Prosecutor v. Milosević*, Case No IT-02-54-AR73.6, "Decision on the Interlocutory Appeal by the Amici Curiae Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case," Appeals Chamber, 20 January 2004, para. 7; *Prosecutor v.Bizimungu*, ICTR-99-

this burden.

4. The Decision was one that was "reasonably open" to the Trial Chamber,[8] and there is no support for the proposition that the Trial Chamber "abused its discretion,"[9] or "erred and exceeded its discretion."[10] The Decision canvassed the law thoroughly, applied the law to the facts, and there is no basis upon which the Decision should be overturned on appeal.

B. THE RULES

5. The test established by Rule 15 (A) of the Rules of Procedures and Evidence (the "**Rules**") provides that "[a] Judge may not sit at a trial or appeal in any case in which his impartiality might reasonably be doubted on any substantial ground."

6. Rule 15(A) was amended on 29 May 2004 and 24 November 2004. In its original (pre-29 May 2004 version), Rule 15(A) stated, "A Judge may not sit at trial or appeal in any case in which he has a personal interest or concerning which he has a personal interest or concerning which he has or has had any personal association which might affect his impartiality."[11]

7. The effect of the original version of Rule 15(A) was considered in the Justice Robertson Decision. In that decision, disqualification was sought, not on the basis of any personal interest or personal association that Justice Robertson had, but on the basis of comments made by Justice Robertson in a book he had published. Nevertheless, the Appeals Chamber decided that Justice Robertson was disqualified under the original version of Rule 15(A), indicating that under that Rule, the test was "whether an independent bystander, so to speak, or the reasonable man, reading those passages will have a legitimate reason to fear that Justice Robertson lacks impartiality. In other words,

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50-AR50, "Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment," Appeals Chamber, 12 February 2004, para. 11.

[8] *Prosecutor v. Delalić et al,* IT-96-21-A, Appeals Chamber, "Judgement", ("***Čelebići Appeal Judgement***"), 20 February 2001, paras. 274-275 (see also para. 292, finding that the decision of the Trial Chamber not to exercise its discretion to grant an application was "open" to the Trial Chamber).

[9] *Ibid,* para. 533, "...the Appeals Chamber recalls that it also has the authority to intervene to exclude evidence, in circumstances where it finds that the Trial Chamber abused its discretion in admitting it...." See also para. 564, where the Appeals Chamber found that there was no abuse of discretion by the Trial Chamber in refusing to admit certain evidence, and in refusing to issue a subpoena that had been requested by a party at trial.

[10] *Ibid,* para. 533.

[11] See *Prosecutor v Sesay et al,* SCSL-2004-15-AR15, "Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber", Appeals Chamber, 13 March 2004 (the "***Justice Robertson Decision***"), para 3.

whether one can apprehend bias".[12]

8. The wording of Rule 15(A) was subsequently changed in order to make it more consistent with the actual test applied by the Appeals Chamber in the Justice Robertson decision. The subsequent amendments to Rule 15(A) did not change the test, but rather amended the wording of Rule 15(A) so that it more accurately reflected the test applied in the Justice Robertson Decision and to be consistent with the tests applied in other tribunals. The test that must be applied now is the same as it was at the time when the Justice Robertson Decision was decided by the Appeals Chamber.
9. In the Justice Robertson Decision, the Appeals Chamber referred to and relied on the decision of the ICTY Appeals Chamber in the *Furundžija* case,[13] and the decision of the United Kingdom House of Lords in the Pinochet case.[14]
10. In its later decision involving Justice Winter,[15] the Appeals Chamber again was required to apply Rule 15(A), and in doing so it relied on the decisions of the ICTY Appeals Chamber in *Furundžija,*[16] *Čelebići,*[17] *Krajišnik*[18] and *Šešelj,*[19] and the decision of the ICTR Bureau in *Karemera.*[20] The Appeals Chamber indicated that the test under Rule 15(A) was the same as in *Furundžija,* which is (in cases other than where a judge is a party to the case or has a financial or proprietary interest in the outcome of the case), whether "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias" (ibid., para 23).
11. The Defence are incorrect when they claim that the test under Rule 15(A) is different from the test under the ICTR and ICTY Rules. The test under the present text of Rule

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[12] *Ibid,* para. 15.
[13] *Prosecutor v. Furundžija*, IT-95-17/1-A, "Judgement," ("***Furundžija Appeal Judgement***"), 21 July 2000, para. 189.
[14] *Regina v. Bow Street Metropolitan Stipendary Magistrates and others, Ex Parte Pinochet Ugarte (No 2,)* ("***Pinochet Decision***"), [1999] 2 WLR 272, p. 284.
[15] *Prosecutor v Norman et al*, SCSL-04-14-PT-112,"Decision on Motion to Recuse Judge Winter from Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers", Appeals Chamber, 28 May 2004.
[16] Ibid at note 13.
[17] *Prosecutor v. Zejnul Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, (IT-96-21) "Decision on Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative That Certain Judges Recuse Themselves", 17 September 1999.
[18] *Prosecutor v. Momcilo Krajišnik,* Case No. IT-00-39-PT, Decision by a Single Judge on the Defence Application for Withdrawal of a Judhe from the Trial, 22 January 2003.
[19] *Prosecutor v. Vojislav Šešelj*, Decision on Motion for Disqualification, IT-03-67-PT, 10 June 2003 (***Šešelj Decision***).
[20] *The Prosecutor v Karemera,Rwamajuba, Ngirumpatse, Nzirorera*, Case No. ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Trial Judges, 17 May 2004.

15(A) of the Special Court Rules is, and always has been the same as that at the ICTY and ICTR, and the case law of the ICTY and ICTR is relevant to the interpretation and application of Rule 15(A) of the Special Court Rules.

C. TEST FOR DISQUALIFICATION

12. The law of the International Tribunals has established a presumption of impartiality in relation to the functioning of any Judge of the Tribunal.[21] To rebut the presumption of impartiality, the reasonable apprehension of bias must be "firmly established".[22] The standard is high because the withdrawal or disqualification of judges for unfounded allegations is as much of a threat to the interests of the impartial administration of justice as is the appearance of bias itself.[23]

13. It is also the case that an absolute neutrality for a judicial officer cannot be achieved, and personal convictions and opinions of judges are not in themselves a basis for inferring a lack of impartiality.[24] By way of illustration, the ICTY Appeals Chamber considered views on torture and held 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", as required by Article 13 of the Tribunal's Statute – 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.[25]

14. Disqualification can only occur where there is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice:[26]

> There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable

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[21] *Prosecutor v. Brđanin*, IT-99-36-R 77, "Decision on Application for Disqualification," 11 June 2004, para. 8.
[22] *Ibid.*
[23] *Ibid.*
[24] *Prosecutor v. Delalić, Mucić, Delić, Landzo,* IT-96-21-A, "Judgement," ("***Čelebići Appeal Judgement***"), 20 February 2001, para. 699.
[25] *Čelebići* Appeal Judgement, para. 699.
[26] *Prosecutor v. Brdanin and Talić,* IT-99-36/1-T, "Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge," ("***Talić Decision***"), 18 May 2000, para. 18 quoting Mason CJ of the High Court of Australia.

basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established'.[27]

15. The Appeals Chamber of the ICTY defined the test of impartiality as follows:

> ...a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:
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> A. A Judge is not impartial if shown that actual bias exists.
>
> B. There is an unacceptable appearance of bias if:
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> i) a Judge is a party to the case, or has a financial or propriety interests in the outcome of the case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
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> ii) the circumstances would lead to a reasonable observer, ***properly informed***, to reasonably apprehend bias.[28] [emphasis added]

16. The *Pinochet* decision was held to be of limited assistance by the Appeals Chamber in *Čelebići*[29] because the House of Lords disqualified Lord Hoffman on the ground that he "...was disqualified as a matter of law automatically by reason of his directorship of AICL, a company controlled by a party, AI [Amnesty International]."[30] Two categories of cases were identified in *Pinochet*, Lord Hoffman fell within the first, and the categories were later described the Appeals Chamber in *Čelebići*:

> The first is that, where a judge is party to a litigation or has a relevant interest in its outcome, he is automatically disqualified from hearing the case. The second category is that a judge who is not party to the litigation, but whose conduct or behaviour in some other way gives rise to a reasonable suspicion that he is not impartial, is obliged to disqualify himself.[31]

17. Unlike in *Pinochet*, where Lord Hoffman fell within the first category, Mr. Justice Thompson clearly does not. In *Furundžija* the ICTY Appeals Chamber stated the test for

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[27] *Ibid.*

[28] *Prosecutor v. Furundžija*, IT-95-17/1-A, "Judgement," ("***Furundžija Appeal Judgement***"), 21 July 2000, para. 189.

[29] *Čelebići* Appeal Judgement, para. 706. The same finding was made by the ICTY Appeals Chamber in the *Furundžija* Appeal Judgement, para. 194.

[30] *Regina v. Bow Street Metropolitan Stipendary Magistrates and others, Ex Parte Pinochet Ugarte (No 2,)* ("***Pinochet Decision***"), [1999] 2 WLR 272, p. 284.

[31] *Čelebići* Appeal Judgement, para. 704.

the second category of cases as follows:

> In terms of the second branch of the second principle, the Appeals Chamber adopts the approach that the "reasonable person must be 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.[32] [emphasis added]

18. As was stated by Trial Chamber I in the Decision, the Appeals Chamber of the Special Court stated the test for reasonable apprehension of bias in similar terms:

> The crucial and decisive question is whether an independent bystander so to speak, or the reasonable man, reading those passages will have a legitimate reason to fear that (the Judge) lacks impartiality. In other words, whether one can apprehend bias.[33]

19. ICTY cases are clear in holding that a Judge is not disqualified from hearing two or more criminal trials arising out of the same series of events:[34]

> ...it does not follow that a judge is disqualified from hearing two or more criminal trials arising out of the same series of events, where he is exposed to evidence relating to these events in both cases. This applies also to the situation where an accused in the latter case was previously named as a co-accused in the first indictment. A judge is presumed to be impartial.[35]

20. Trial Chamber I in its Decision further relied on the 28 November 2007, judgement of the ICTR in the Media Case, where the Court held as follows:

> La Chambre d'appel tient a rappeler que les juges du Tribunal et du TPIY traitent souvent plusieurs dossiers qui, de par leur nature même, portent sur des questions qui se recoupent. On présumera, en l'absence de preuve du contraire, qu'en raison de leur formation et de leur experience, les juges tranchent en toute équité les questions dont ils sont saisis, en se fondant uniquement et exclusivement sur les moyens de preuve admis dans l'affaire en question.[36]

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[32] *Furundžija*, Appeal Judgement, para. 190 (emphasis added); *Talić* Decision, para. 15: the test is "...whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgement) would be that [the Judge]... might not bring an impartial and unprejudiced mind." See also *Talić* Decision, para. 8. The preceeding principles were applied by the Appeals Chamber of the Special Court in *Prosecutor v. Sesay*, SCSL-2004-15-58, "Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber", **("Sesay Appeal Decision")**, 13 March 2004, para. 4.

[33] Robertson Disqualification Decision, para. 15.

[34] *Prosecutor v. Kordić and Čerkez*, "Decision on the Application of the Accused for Disqualification of Judges Jorda and Riad", 21 May 1998, pp. 2-3: see also Bureau Decision of 4 May 1998, quoted in John R.W.D. Jones and Steven Powles, *International Criminal Practice*, Oxford University Press, 2003, para. 2.1.64.

[35] Bureau Decision of 4 May 1998, quoted in John R.W.D. Jones and Steven Powles, *International Criminal Practice*, Oxford University Press, 2003, para. 2.1.65.

[36] Media Case Appeal Judgement, para. 78, quoted at para. 55 of the Decision. An unoffical translation of the above as reproduced at footnote 51 of the Decision is as follows: "The Appeals Chamber would like to reiterate that all

21. Only two persons testified for the Prosecution in both the CDF and the RUF trials. The evidence in the two trials is different. The Special Court was created to efficiently and fairly try persons involved in the conflict that took place in Sierra Leone. The limited time span of the Special Court and the small number of groups that took part in the conflict, no doubt created the possiblility of overlapping issues between cases. Trial Chamber I's Decision acknowledged this issue and observed:

> ... that the mere fact that Hon. Justice Thompson, like the other Judges of Trial Chamber I, has rendered his judgement in the CDF case and continues to sit in the RUF case which may relate in part to the same series of events does not disqualify him.[37]

22. In *Talić* the point was expressly made that "the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgment)...",[38] "would know that the judges of this Tribunal are professional judges, who are called upon to try a number of cases arising out of the same events, and that they may be relied upon to apply their mind to the evidence in the particular case before them."[39]

23. Moreover, a Judge cannot be disqualified on the sole basis of a position taken by that Judge in a preceding case.[40] In *Talić* a Defence application was dismissed where the Defence sought to disqualify Judge Mumba because she had been a member of the Appeals Chamber on the *Tadić* appeal. The Appeals Chamber held that there was an international armed conflict in Bosnia and Herzegovina, an issue that would also arise in the *Talić* trial.[41] The statement of law applied by the *Talić* Trial Chamber was:

> ...whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgement) would be that [the Judge], having participated in the *Tadić* Conviction Appeal Judgement, might not bring an impartial and unprejudiced mind to the issues in the present case [...] It is *not* whether she would merely decide these issues in the same way as they were decided in that case. The

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Judges of the Tribunal and of the ICTY often deal with several cases which, by their very nature, relate to overlapping issues. Absent evidence to the contrary, it can be presumed that by reason of their training and experience, the Judges decide, in all fairness, the issues of which they are seized by relying uniquely on the evidence that has been adduced in the matter in question."

[37] Decision, para. 59.

[38] *Talić* Decision, para. 15.

[39] *Talić* Decision, para. 17.

[40] Jones and Steven Powles, *International Criminal Practice*, Oxford University Press, 2003, para. 2.1.69, quoting *Talić* Decision, paras 19, 20.

[41] *Talić* Decision, paras 19, 20.

distinction is an important one.[42] [emphasis in original]

24. Trial Chamber I correctly considered the law and then went on to consider "whether the language, the opinions and the findings contained in the Separate Opinion create an appearance of bias."[43] It further noted that allegations of bias have been brought before the ICTR and the ICTY on the basis of decisions rendered by the Chamber within the same proceeding, and observed that in those cases the Bureaus held that:

> While the Bureau would not rule out entirely the possibility that decisions rendered by a Judge or Chamber by themselves could suffice to establish actual bias, it would be a **truly extraordinary case** in which they would.[44] [emphasis added]

25. The Decision having correctly stated the law, then applied the law to the facts and properly concluded that the Accused did not meet its burden and was unable to show that a reasonable apprehension of bias existed such that Mr. Justice Thompson should be disqualified. This is not the truly extraordinary case referred to in the authorities. As observed by Trial Chamber I, Mr. Justice Thompson endorsed "the entire findings of fact embodied in the Main Judgement"[45] save for two narrow areas of evidence that are not relevant to this appeal. That fact is important in weighing the information used to form the allegations of bias and the way in which the information is edited from certain passages and added to unrelated passages so as to create misleading impressions.

III. ARGUMENT

A. CRIMINALITY OF THE AFRC/RUF AND JOINT CRIMINAL ENTERPRISE

26. A major point of the Appellants' argument, among others is that Mr. Justice Thompson has found that the AFRC/RUF shared a criminal enterprise that was marked by tyranny, anarchy and evil and that they acted within a joint criminal enterprise.[46] However, as the Trial Chamber correctly observed, the Separate Opinion of Mr. Justice Thompson did not implicitly or otherwise find that the AFRC or RUF were involved in a joint criminal

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[42] *Talić* Decision, para. 19.
[43] Decision, para. 60.
[44] Decision, para. 61,quoting from *Prosecutor v. Blagojevic, Obrenovic, Jokic and Nikolic*, IT-02-60, "Decision on Blagojevic's Application Pursuant to Rule 15(b)", (Bureau), 19 March 2003, para. 14; Karemera Decision, para. 12.
[45] Decision, para. 66.
[46] Motion, para. 15.

enterprise. The Trial Chamber also correctly observed that the language used did not necessarily imply criminality.[47]

27. Had it been the intention of Mr. Justice Thompson to find that a joint criminal enterprise between the AFRC and RUF existed, a reasonable observer, properly informed would expect Mr. Justice Thompson to discuss the elements of a joint criminal enterprise and how it relates to the AFRC and RUF.

28. The Appellants advance the proposition that a plain and literal reading of the Dissenting Opinion suggests that the AFRC and RUF were engaged in activities which were not limited to the usurpation of a democratically elected government but were steeped in lawlessness and criminal conduct.[48]

29. In the RUF trial, Judicial Notice was taken of several facts, including:[49]

(i) "The conflict in Sierra Leone occurred from March 1991 until January 2002" (fact A);

(ii) "Groups commonly referred to as the RUF, AFRC and CDF were involved in the armed conflict in Sierra Leone" (fact H);

(iii) "The RUF, under the leadership of FODAY SAYBANA SANKOH, began organized armed operations in Sierra Leone in March 1991" (fact J);

(iv) "During the ensuing armed conflict, the RUF forces were also commonly referred to as "RUF", "rebels", and "People's Army" by the population of Sierra Leone (fact K);

(v) "On 30 November 1996, in Abidjan, Ivory Coast, FODAY SAYBANA SANKOH and Ahmed Tejan Kabbah, President of the republic of Sierra Leone, signed a peace agreement which brought a temporary cessation to active hostilities" (fact M);

(vi) "However, the active hostilities thereafter recommenced" (fact N);

(vii) "The AFRC was founded by members of the Armed Forces of Sierra Leone who seized power from the elected government of the Republic of Sierra Leone via a coup d'etat on 25 May 1997. Soldiers of the Sierra Leone Army (SLA) comprised the majority of the AFRC membership" (fact O).

(viii) "Shortly after the AFRC seized power, at the invitation of Johnny Paul Koroma, and upon the order of FODAY SAYBANA SANKOH, leader of the RUF, the RUF

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[47] Decision, para. 77.
[48] Sesay Appeal, para. 14 quoting the Decision, para. 79.
[49] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-PT-174, "Decision on Prosecution's Motion For Judicial Notice And Admission of Evidence", 24 June 2004, and *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-392, Consequential Order Regarding Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence," 24 May 2005. No leave to appeal was sought of this decision.

formed an alliance with the AFRC" (fact R).

(ix) "The governing body [created by the AFRC/RUF Junta forces] included leaders of both the AFRC and the RUF" (fact U).

(x) "The Junta was forced from power by forces acting on behalf of the ousted government of President Kabbah about 14 February 1998. President Kabbah's government returned in March 1998" (fact V); and

(xi) "After the Junta was removed from power, the AFRC/RUF alliance continued" (fact W).[50]

29. The Trial Chamber concluded that the force the CDF was fighting included the RUF. A group to which the three accused belong to.[51]

30. The Trial Chamber went on to correctly adduce that while Mr. Justice Thompson did not make any finding as to the criminality of the AFRC and the RUF that had he done so, his position would have been consistent with that of the Defence, who stated that terrible crimes were committed by some claiming to represent the RUF and that members of the RUF committed horrific crimes.[52]

31. At no time in Mr. Justice Thompson's Dissenting Opinion did he mention the Accused or assign them any culpability for any crimes committed that were detailed in the CDF trial.

B. RAISING THE DEFENCE OF NECESSITY

32. It is a defence submission that an appearance of bias is exhibited by the fact that the learned Judge invoked the defence of necessity on his own volition where the Accused had not themselves raised it.[53] Surely, this position would restrain a judge's independence and ability to "form opinions and enjoy unfettered latitude to express his judicial opinions"[54] free from external pressure.

33. The Prosecution submits that this position is untenable and would further submit that Mr. Justice Thompson is entitled to invoke any principle of law which he feels is applicable to the case before him.

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[50] See Annex I to the *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-392, "Consequential Order Regarding Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence," 24 May 2005.
[51] Decision, para. 75.
[52] Decision, para. 77 and *Prosecutor v. Sesay*, Trial Transcript 3 May 2007, pp. 7-8, lines 28-29 and 1-2.
[53] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-920, "Sesay Appeal Against the Decision on Sesay and Gboa Motion for Voluntary Recusal or Disqualification of Judge Bankole Thompson From the RUF Case", 12 December 2007, para. 25.
[54] Decision, para 34.

34. The Prosecution adopts the view of the Trial Chamber, when it stated in The Opinion, that while Mr. Justice Thompson did raise the defence of Necessity without giving the parties a chance to present arguments on it, the defence was not raised because Mr. Justice Thompson holds views on the "overriding criminality of the AFRC/RUF".[55]

C. THE LANGUAGE USED BY MR. JUSTICE THOMPSON IN HIS DISSENTING OPINION

35. The language used by the learned Judge in his Separate Opinion "could be perceived or understood as aggressive, offensive and injurious"[56] but it becomes less so when read within the context of the evidence and the findings in the CDF case on which the learned Judge bases his opinion. The Prosecution accepts that the Trial Chamber was correct to find and hold that the indicia of an appearance of bias established must be "appreciated within the larger context of the RUF trial"[57]. When read within this larger context, "the indicia" becomes clear and fails to support a finding that the learned Judge had used words and language that impeach the presumption of his neutrality as a judge.

36. The Appellants have sought to compare the instant case to that of Mr. Justice Robertson. The Prosecution submits that a significant distinction could be found between the circumstances in which Mr. Justice Robertson made his comments which were later found to have created an appearance of bias and those in which Mr. Justice Thompson made his comments. The former did so in a book before any facts had been presented in a judicial context. The latter made his comments in the context of judicial process basing his comments on evidence which had been led before him as a judge and upon which he was now entitled to form an opinion and give a decision. The words used in the Dissenting opinion are based on evidence heard at trial and cannot be said to indicate any prejudgement of the Accused in that case or any other case.

37. The prosecution submits that the reasonable man properly informed of the facts and findings in the CDF case in which the learned Judge used the words and language complained of, and appreciating fully the larger context of the RUF case, will apprehend no bias when reading the words and language used by the learned Judge.

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[55] Decision, para. 69.
[56] Decision, para. 72
[57] Decision, para. 85

IV. CONCLUSION

38. The evidence in the CDF trial was different and the facts of each trial must be determined on the evidence produced.[58] There is nothing in the Dissenting Opinion to suggest that Judge Thompson is not capable of applying his mind to the merits of this case in an unprejudiced and impartial manner.[59] It is settled law that a Judge cannot be disqualified based on a position taken in parallel case on an issue in dispute in the case now before him or her.[60] The reasonable informed observer would conclude that Judge Thompson is neither biased, nor is there a reasonable apprehension of bias. The Appeals should be dismissed.

Filed in Freetown, 14 December 2007
For the Prosecution,

Stephen Rapp
Prosecutor

[58] *Talić* Decision, para. 17.
[59] *The Prosecutor v. Momčilo Krajišnik*, IT-00-39-PT, "Decision on the Defence Application for Withdrawal of Judge from the Trial", 22 January 2003, para. 18.
[60] Jones and Steven Powles, *International Criminal Practice*, Oxford University Press, 2003, para. 2.1.69, quoting Talić Decision, paras 19, 20.

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