



Case No. SCSL-2004-15-T  
THE PROSECUTOR OF  
THE SPECIAL COURT  
V.  
ISSA SESAY  
MORRIS KALLON  
AUGUSTINE GBAO

THURSDAY 6 DECEMBER 2007  
11.47 A.M.  
TRIAL

TRIAL CHAMBER I

Presiding

Before the Judges:

Benjamin Mutanga Itoe,

Pierre Boutet

For Chambers:

Ms Candice Welsch

Ms Erica Bussey

For the Registry:

Mr Thomas George

For the Prosecution:

Mr Stephen Rapp

Mr Charles Hardaway

Mr Reginald Fynn

For the accused Issa Sesay:

Mr Wayne Jordash

For the accused Morris Kallon:

Mr Lansana Dumbuya

For the accused Augustine Gbao:

Mr John Cammegh

Ms Prudence Acirokop

Mr Scott Martin

1 [RUF06DEC07A - JS]

2 Thursday, 6 December 2007

3 [The accused present]

4 [Open session]

11:53:01 5 [Upon commencing at 11.47 a.m.]

6 PRESIDING JUDGE: Good morning, learned counsel. We are  
7 assembling here today for just one purpose amongst other minor  
8 issues. It is to deliver our decision on the recusal motion  
that

9 has been filed against our colleague, Honourable Justice  
Bankole

11:54:46 10 Thompson, by the first, the second and the third accused  
persons.

11 And we thought that we should do everything to deliver it  
before

12 we proceed on the judicial break, so that we at least know how  
we

13 proceed in January when we do resume. We must apologise for  
this

14 delay. It has not been an easy decision to make and we had to  
do

11:55:26 15 some last minute consultations on certain issues, as you would  
16 imagine. We were to deliver the decision at 10, but  
17 Mr Prosecutor, learned counsel, we crave your indulgence for  
18 keeping you on hold for a few hours later than we had  
scheduled.

19 Well, this said, this will be -- this is our decision in

11:56:01 20 this case, and as you can see very consonant to the attitude  
we  
21 have adopted in this case we are again sitting as a Bench of  
two  
22 under the provisions of Article 16 of the Statute because our  
23 colleague who is the subject matter of these proceedings  
cannot  
24 sit, and because the law so [indiscernible] that in a motion  
like  
11:56:46 25 this we could dispose of it as a Bench of two Judges and it is  
26 what we are doing today in accordance with the provisions of  
Rule  
27 16 of the Rules of Procedure and Evidence of this Court.  
28 This is our judgment.  
29 On 22 August 2007, this Chamber rendered a majority

I  
CDF  
charged  
11:57:47 found  
opinion,  
point.  
11:58:17 necessity,  
the  
11:58:51 first  
joint  
by

1 decision from the judgment -- of the judgment of Trial Chamber  
2 in the case of the Prosecutor versus Fofana and Kondewa, the  
3 judgment, in which we found the two accused persons in the CDF  
4 case, Moinina Fofana and Allieu Kondewa, guilty of crimes  
5 in the eight count indictment and convicted them. We also  
6 them not guilty on others and acquitted them accordingly.  
7 In a separate concurring and partially dissenting  
8 Honourable Justice Bankole Thompson held a different view  
9 He found them not guilty on all the eight counts of the  
10 indictment and acquitted them accordingly. In his dissenting  
11 opinion, which he based principally on the defence of  
12 Honourable Justice Thompson made certain comments and findings  
13 which, according to the accused persons in the RUF case, were  
14 prejudicial to them and to their case. The two appellant --  
15 two applicants, Issa Hassan Sesay and Augustine Gbao, the  
16 and third accused persons respectively therefore filed this  
17 motion requesting him to recuse himself from continuing to sit  
18 making a voluntary withdrawal as a Judge from the RUF case --

19 from the RUF trial. When they learnt of his refusal to  
11:59:15 20 voluntarily withdraw under the provisions of Rule 15(C) of the  
21 Rules for the Chamber to disqualify him pursuant to the  
22 provisions of 15(B) of the Rules of Procedure and Evidence,  
23 Morris Kallon, the second accused, also applied personally in  
24 open Court to be allowed to file a memorandum to associate  
11:59:44 25 himself with the motion and his request was granted. He did  
26 thereafter file his requests for Justice Thompson's withdrawal  
or  
27 disqualification from the case.

28 The motion alleges that the factual and legal findings  
of  
29 the separate opinion to the judgment of Trial Chamber I, in  
the

1 earlier case of the Prosecutor versus Fofana and Kondewa,  
create  
2 an appearance of bias on the part of Honourable Justice  
Thompson  
3 with regard to the accused in the present and the second case  
of  
4 the Prosecutor versus Sesay, Kallon and Gbao. The motion was  
12:00:37 5 filed before this Chamber pursuant to Rule 15 of the Rules.  
It  
6 has now fallen to the remaining Judges, Honourable Justice  
Itoe,  
7 the Presiding Judge, and Honourable Justice Boutet of the  
Chamber  
8 to render the decision that now follows.

9 The submissions of the parties are this: The Defence  
12:01:05 10 submit that in a separate opinion to the CDF judgment  
Honourable  
11 Justice Thompson "reached conclusions of fact and law that  
give  
12 rise to reasonable doubts concerning his impartiality and/or  
the  
13 express conclusions -- the express conclusions that evince a  
14 strong commitment to the Prosecution's cause which gives rise  
to  
12:01:37 15 the appearance of bias."

16 The Defence contend that the conclusions implicitly and  
17 again it's in quotes "indict the RUF as a criminal  
organisation  
18 and create an appearance that the learned Judge has prejudged

19 many of the essential issues in the RUF case."

12:01:58 20 In support of this assertion, the Defence submit that  
21 Honourable Justice Thompson unilaterally invoked the defence  
of  
22 necessity on behalf of the CDF accused and that this  
demonstrates  
23 that he holds views on the overriding criminality of the  
24 AFRC/RUF.

12:02:22 25 Furthermore, it is argued that Honourable Justice  
26 Thompson's separate opinion characterises the CDF as fighting  
27 against imminent evil, "anarchy and tyranny" and that certain  
28 statements made and words used by Honourable Justice Thompson  
29 evince, "political and judicial support for any armed forces

1 engaged in combat with the RUF." The motion contrasts what is  
2 stated to the Honourable Justice Thompson's portrayal of the  
CDF  
3 as patriotic, altruistic and legitimate with the fact that the  
4 AFRC/RUF and inferentially its members, particularly its  
senior  
12:03:20 5 commanders, appear to be characterised as an evil, again, in  
6 quotes, "seven times" in his decision.

7 The Defence contend that Honourable Justice Thompson  
found  
8 in his separate opinion that the AFRC, again in quotes, "RUF  
9 members shared a criminal enterprise that was marked by  
anarchy,

12:03:50 10 tyranny and evil, but that he seems to be overlooking the  
human  
11 rights violations perpetrated against Sierra Leoneans by the  
12 CDF." The Defence further submit that Honourable Justice  
13 Thompson's purported use of strong and equivocal terms in  
14 relation to the AFRC/RUF is quantitatively and qualitatively  
no

12:04:20 15 different from the language which led to the disqualification  
of  
16 Honourable Justice Robertson. They argue that this language  
17 creates the perception not simply that the RUF accused have  
been  
18 deprived of their right pursuant to Article 17.3 of the  
Statute  
19 to be considered innocent until proven guilty, but also that a

12:04:47 20 substantial burden has been created against the accused. The  
21 Defence therefore conclude that, "As a consequence of the  
learned  
22 judge's views and the shifting burden for the RUF to prove its  
23 innocence, the RUF accused can expect to be convicted by the  
24 learned Judge irrespective of the law and the evidence. In  
12:05:13 25 summary the Defence argue that the separate opinion of  
Honourable  
26 Justice Thompson betrays his emotional and intellectual  
27 prejudgment of the RUF, its aims, objectives and members and  
28 that, "A reasonable fair-minded person properly informed,  
29 confronted by a Judge who has expressed such clear-cut,

purpose 1 wide-ranging and unequivocal findings about the object,  
2 and objectives [sic] of the AFRC/RUF would likely apprehend  
3 bias."  
4 As such, in circumstances where Honourable Justice  
Thompson 5 has elected not to withdraw voluntarily from continuing to  
12:05:57 hear 6 the case, the accused persons call on the Chamber to order his  
7 disqualification for the remainder -- for the remainder of the  
8 proceedings.  
9 As against the submissions the Prosecution filed a  
response 10 and in that response the Prosecution reminds the Chamber that  
12:06:20 11 there is -- that there exists a presumption of impartiality in  
12 relation to the functioning of any Judge and that this  
13 presumption can only be rebutted by a reasonable apprehension  
of 14 bias that has been firmly established. The Prosecution argues  
12:06:42 15 that the correct test for bias in the present case is not that  
16 used by the House of Lords in the Pinochet case but rather  
that 17 adopted by the Appeals Chamber of the ICTY in the case of the  
18 Prosecutor v Furundzija, which is whether the circumstances  
would 19 lead a reasonable observer, properly informed, to reasonably  
12:07:12 20 apprehend bias. The Prosecution emphasises the finding of the

an 21 ICTY Appeals Chamber in that case and that the person must be  
circumstances, 22 informed person with knowledge of all the relevant  
23 including the traditions of integrity and impartiality of the  
24 Bench and their expression in the judicial oath.  
12:07:40 25 The Prosecution also points to the jurisprudence of the  
26 ICTY which it claims suggests that a Judge ought not to be  
27 disqualified on the basis of a position taken in a preceding  
28 case. The Prosecution asserts that the motion  
mischaracterises 29 the findings of fact and law made by Honourable Justice  
Thompson

1 in his separate opinion and that the Defence have selectively  
2 cited passages or taken them out of context.

3 It is submitted further that the findings made by  
4 Honourable Justice Thompson are exclusively based upon the  
12:08:20 5 evidence heard in the course of the CDF trial but many of the  
6 phrases impugned by the Defence are supported by judicially  
7 noticed facts or facts accepted by the Defence, and that the  
8 separate opinion does not refer to the liability of the RUF,  
let  
9 alone of the accused Sesay, Kallon and Gbao.

12:08:56 10 The Prosecution also rejects the Defence contention that  
11 there was any finding by Honourable Justice Thompson that the  
12 AFRC/RUF members shared a criminal enterprise that was marked  
by  
13 anarchy, tyranny and evil and asserts that the separate  
opinion  
14 does not refer to crimes or criminal liability other than that  
of  
12:09:19 15 Fofana and Kondewa or contain any finding that there existed a  
16 joint criminal enterprise between the AFRC and the RUF.

17 In addition, the Prosecution argues that the Defence  
18 assertion that the views expressed by Honourable Justice  
Thompson  
19 are quantitatively and qualitatively no different from those  
12:09:41 20 which led to the disqualification of Honourable Justice  
Thompson

21 [sic] is without merit the language used by the latter being  
22 significantly more graphic. Furthermore, the Prosecution  
contend  
23 that any Judge appointed to the Special Court pursuant to  
24 Article 13 of the Statute would conclude that the harm done in  
12:10:09 25 Sierra Leone between 1991 and 2002 was reprehensible but that  
26 that is quite distinct from the judicial rule in considering  
and  
27 apportioning liability.  
28 In conclusion, it is a contention of the Prosecution  
that  
29 nothing in the separate opinion of Honourable Justice Thompson

merits  
partiality.  
bias  
accused.  
12:11:35  
context  
of  
such  
12:11:35  
and  
connote  
grave  
because  
AFRC  
12:11:40  
required

1 suggests that he is incapable of applying his mind to the  
2 of the case against the accused without prejudice or  
3 Accordingly, no reasonably informed observer would apprehend  
4 on the part of Honourable Justice Thompson against the  
5 For this reason the Prosecution requests that the motion be  
6 dismissed.  
7 In their reply the Defence reiterates that in the  
8 of a finding that the commission of criminal acts on the part  
9 the CDF was a necessary evil, the use of words and phrases  
10 as fear, utter chaos, widespread violence, alarm, despondency  
11 evil, as well as other expressions which are emotive and  
12 criminality would lead a reasonable person to conclude that  
13 crimes were attributable to the enemies of the CDF. And  
14 Honourable Justice Thompson did not distinguish between the  
15 and the RUF factions, it is argued that this implication of  
16 criminality entails an abandonment of the impartiality

the  
of  
17 of a Judge of the Special Court under Article 13 and implies  
18 degrees of prejudgment which creates an undeniable appearance  
19 bias against the RUF and the RUF accused persons.

12:12:12 20 The comments of Honourable Justice Thompson can be  
21 summarised as follows:

22 He raises three preliminary issues in his comments. He  
23 contends that the motion is repugnant to the notion of  
judicial  
24 immunity according to Article 12 of the agreement between the  
12:12:34 25 United Nations and the Government of Sierra Leone on the  
26 establishment of the Special Court for Sierra Leone which in  
his  
27 view flows from Article 13 of the Statute. Secondly, he  
asserts  
28 that Rule 15 ought properly to be construed as applying only  
to  
29 matters and issues of an extrinsic or extra judicial nature,  
and

1 thirdly, that Rule 15 should not be understood as providing a  
2 mechanism for circumventing the accused procedure provided for  
by  
3 part 7 of the Rules.

4 In relation to the substantive issues raised by the  
motion,

12:13:20 5 Honourable Justice Thompson states that in his separate  
6 opinion -- that his separate opinion does not attribute  
anarchy  
7 and rebellion to the AFRC or to the RUF and that his use of  
the  
8 term "evil" was intended to refer -- was not intended to refer  
to

9 either faction, but rather to the destabilisation and  
12:13:49 10 disintegration of the Sierra Leonean states. Likewise,  
11 Honourable Justice Thompson denies that in his separate  
opinion

12 he made any finding to the effect that the AFRC and RUF  
13 authorities were engaged in a joint criminal enterprise. It  
is  
14 his contention that the motion is founded on a complete  
12:14:16 15 misreading and misinterpretation of his words out of context.

16 Honourable Justice Thompson reminds the Chamber that nowhere  
in  
17 his separate opinion did he imply that it is settled law that  
the  
18 principle of necessity is a defence to violations of

view, 19 International Humanitarian Law. He reiterates that, in his  
12:14:37 20 the application of the principle depends on the facts of a  
given  
21 case; that the principle may, in certain circumstances, excuse  
22 but never justify criminal conduct, and that, in the peculiar  
23 circumstances of the CDF case, the criminal conduct of the  
24 accused was excusable in accordance with the principle. He  
12:15:02 25 argues that even if he is mistaken in this view, the proper  
26 allegation is that of error of law, not of bias or lack of  
27 impartiality.  
28 Honourable Justice Thompson also rejects the Defence's  
29 suggestion that by accepting the defence of necessity and

1 acquitting the CDF accused, he accepted the Prosecution's case  
in  
2 the RUF trial as founded on flawed logic. Honourable Justice  
3 Thompson concludes in his comments by stating that: "By no  
4 judicial calculus have I, in my separate concurring and  
partially  
12:15:45 5 dissenting opinion, determined in advance the guilt or  
innocence  
6 of the accused in the RUF case."

7 On the applicable law, Rule 15 of the Rules provides for  
8 the disqualification of a Judge in the following terms:

9 "A. A Judge may not sit at a trial or appeal in a case  
in  
12:16:10 10 which his impartiality might reasonably be doubted on  
any  
11 substantial ground.

12 "B. Any party may apply to the Chamber of which the  
Judge  
13 is a member for the disqualification of the said Judge  
on  
14 the above ground."

12:16:31 15 Article 13.1 of the Statute of the Special Court on the  
16 appointment and qualification of Judges provides:

17 "The Judges shall be persons of high moral character,  
18 impartiality and integrity who possess the  
qualifications  
19 required in their respective countries for appointment  
to

12:16:48 20  
independent

21  
accept

the highest judicial officers. They shall be

in the performance of their functions, and shall not

22 or seek instructions from any government or any other

23 source."

24 The relevant portions of Article 17 of the Statute state

12:17:05 25 that:

26 "2. The accused shall be entitled to a fair and public

27 hearing, subject to the measures ordered by the Special

28 Court for the protection of victims and witnesses.

29 "3. The accused shall be presumed innocent until proved

1 guilty according to the provisions of the present  
Statute."  
2 In our deliberations we would like to make observations  
on  
3 the preliminary comments of Honourable Justice Thompson and  
the  
4 first concerns judicial immunity which he claims to protect  
him  
12:17:49 5 from this proceeding. In his comments Honourable Justice  
6 Thompson suggests that his separate opinion cannot be  
challenged  
7 in this context due to the principle of judicial immunity for  
8 anything done in the performance of judicial functions. We  
find  
9 that Honourable Justice Thompson's reliance on the diplomatic  
12:19:04 10 privileges and immunities that are granted to Judges -- to the  
11 Judges, the Prosecutor, the Registrar and their families in  
12 accordance with Article 12 of the agreement between the United  
13 Nations and the Government of Sierra Leone on the  
establishment  
14 of the Special Court and his proffered understanding of what  
12:19:04 15 judicial immunity really means in the context of this case, is  
16 misplaced and misguided. The protections granted by this  
17 provision are clearly circumscribed by the Article and are  
18 completely irrelevant to the present motion.  
19 A Judge can never enjoy immunity from allegations of  
bias.

12:19:04 20 In both national systems and international tribunals it has  
21 always been accepted that a party has the right to challenge  
any  
22 alleged partiality on the part of a Judge. We consider that  
this  
23 is an essential component of the right of an accused to a fair  
24 trial and is a necessary ingredient to ensure that the public  
12:19:25 25 have confidence in the judicial system. To deny the right of  
an  
26 accused person to challenge the impartiality of a Judge would  
be  
27 inconsistent with the rules of natural justice.  
28 We are of the opinion and do so hold that the immunities  
29 referred to, not only under Article 12 of the agreement  
between

1 the United Nations and the Government of Sierra Leone of  
2 16 January 2002, but also provided for in Articles 3 and 14 of  
3 the headquarters agreement between the Government of Sierra  
Leone  
4 and the Special Court dated 21 October 2003, are not accorded  
to  
12:20:10 5 a Judge to protect him against proceedings based on actions  
such  
6 as those enunciated in this motion for which he does not, in  
our  
7 opinion, and like all of us Judges, enjoy any such immunity.  
8 In fact, the provisions of Article 13 are instead  
intended  
9 to protect the Judge against any criminal or civil suit  
brought  
12:20:42 10 against him in a municipal court in Sierra Leone where he  
enjoys  
11 the immunity, certainly as a Judge but more importantly, in  
his  
12 capacity as a Judge serving as a member of the Special Court  
and  
13 who in that capacity is afforded the privileges and protection  
of  
14 the diplomat in this international organisation functioning  
under  
12:22:07 15 a headquarters agreement signed with the host government which  
is  
16 what entitles him to take advantage of and enjoy the benefits  
of  
17 diplomatic immunities that are provided for in the Vienna

18 Conventions.

19           However, in the exercise of his profession within the  
12:22:07 20 context of judicial independence, like Honourable Justice  
the 21 Thompson did, the interests of justice are better served if  
22 hands of the Judge remain unfettered but only to the extent of  
23 his independence in taking certain initiatives and arriving at  
24 certain legal or factual conclusions and strictly within the  
12:22:07 25 context and confines of the law. This, we would like to  
observe,  
26 does not mean, nor does it necessarily lead to the conclusion  
the 27 that he must either have been right or wrong in having acted  
28 way he did, or in expressing his views on a particular issue  
the 29 within the confines -- within the context and the confines of

1 law.

2 It is an acknowledgement of this judicial attitude  
accorded

3 to Judges that the law, in order to insulate them from any  
4 extra -- any extra legal recriminations or civil or other  
suits

12:22:36 5 or motions taken against them and arising from the opinions  
6 expressed in the exercise of their judicial functions, has  
7 created appellate jurisdictions that are designed and intended

in  
8 those  
9 such circumstances to serve as legal avenues to readdress

have  
10 contentious or litigious legal and factual issues that may

12:23:00 10 been raised by the Judge to the detriment of any of the  
parties.

11 This is a subject matter that is different and must be clearly  
12 distinguished from the process that we are dealing with.

13 In taking this stand, however, we are of the view that  
the

14 responsibility imposed on the Judge that goes to the very root  
of

12:23:27 15 his designation or appointment to that position is, amongst  
16 others, the obligation not only to be reserved but also to be  
17 measured in his expression where it becomes necessary for him  
to

18 make known his opinion on issues that affect the party or the  
19 parties before him.

12:23:51 20  
Judge

21           In as much therefore as we accept and concede that a  
22           may, through the exercise of judicial independence, enjoy an  
23           unfettered latitude to express his judicial opinion, it is  
24           equally a primordial obligation that he does so in the upmost  
12:24:22 25           discretion without appearing, even if he does not intend doing  
26           so, to be manifesting a bias against a party and in so doing  
27           implicitly, again, even though he may not have intended it,  
to           taking sides with a particular cause, thereby exposing himself  
28           a violation in a broader sense of the doctrine enshrined in  
the           cardinal principle of nemo judex in sua causa which is  
29           intended

1 to cover classical situations of interestedness as was the  
case  
2 of Lord Hoffmann in the Pinochet case.  
3 It is our view therefore that Honourable Justice  
Thompson's  
4 dissenting opinion which acquitted the two accused persons on  
all  
12:25:13 5 the eight counts of the indictment was a judicial act that  
cannot  
6 subject or expose him to any questioning or to any civil or  
7 criminal action. The justification for this is because he  
wrote  
8 his opinion in the exercise of his judicial independence which  
he  
9 enjoys as a Judge and which in ordinary circumstances and if  
it  
12:25:39 10 were not a dissenting opinion which we also hold, taking the  
cue  
11 from our Appeals Chamber decision, cannot be appealed against,  
12 can only be contested through the appeals process and not  
through  
13 an action in any form against him.  
14 This doctrine of judicial immunity dates as far back as  
the  
12:26:06 15 1872 US Supreme Court decision of Bradley v Fisher, the  
rationale  
16 behind it being to protect Judges' independence by  
guaranteeing  
17 that litigants who they might have angered -- who they might

18 anger or disappoint while carrying out their duties cannot sue  
19 them for damages. It would indeed amount to a judicial  
misnomer  
12:26:34 20 and a glaring aberration if this fundamental right and  
privilege  
21 which Honourable Justice Thompson enjoys as a Judge were not  
22 upheld by our decision.  
23 In saying this, we are of the opinion that if one of the  
24 conditions to be fulfilled by a Judge under Article 13 of the  
12:26:55 25 Statute for an appointment to that position in this Court is  
that  
26 he should be endowed and imbued, inter alia, with the virtue  
of  
27 impartiality, it is implied, and indeed goes without saying,  
that  
28 if in the exercise of his judicial functions he is deemed to  
have  
29 or, indeed, violates any of the conditions of his appointment  
or

1 of his oath of office, he should voluntarily withdraw from the  
2 case, and if he does not, may be subjected to challenges if  
the  
3 aggrieved party so desires and requests on the propriety of  
his  
4 continuing to sit in a particular case.

12:27:47 5 We say this because the right to challenge the  
impartiality  
6 of a Judge and the possibility of recusing him or for him to  
7 voluntarily recuse himself and to withdraw from the  
proceedings  
8 is universally recognised. It is founded on the solid grounds  
9 that it is a crucial and fundamental norm and tool common to  
12:28:12 10 civilised judicial systems and practices intended to ensure  
the  
11 observance by Judges of professional values, ethics and  
standards  
12 and to protect the fundamental human rights of users of the  
13 judicial system and even the public generally from a possible  
14 judicial autocracy of Judges that could go against and  
contravene  
12:28:43 15 the very values that justice is supposed to serve in a  
democratic  
16 society.

17 The recusal procedure therefore, as a right and a tool  
that  
18 serves as a check and balancing mechanism over the judicial

all 19 action of Judges who are charged with dispensing justice to  
12:29:03 20 and sundry, cannot be inhibited, disregarded or sacrificed on  
the 21 alter of any claim whatsoever, albeit of judicial immunity of  
a 22 Judge from any process. In taking this position we recognise  
23 that a Judge enjoys absolute protection and immunity from any  
24 criminal or civil suits that may be instituted against him  
which 25 arises from or is founded on acts or decisions made or taken  
by 26 him in the lawful exercise of his judicial functions.  
27 However, we say from the following -- from the foregoing  
28 analysis that this does not include and cannot apply to any  
29 action in recusal that is founded on the provisions of Rule 15  
of

1 our Rules of Procedure and Evidence because it would, in this  
2 context, amount to a flagrant violation of the statutory  
rights  
3 of the accused who have brought this motion to a fair and  
public  
4 hearing as enshrined in the provisions of Article 17.2 of the  
12:30:23 5 Statute of this Court because we are, without any hesitation  
6 whatsoever, of the opinion that the fairness of the trial  
implies  
7 and includes the right to be tried by a Judge who is impartial  
8 and who has been appointed on the understanding -- on the  
9 understanding that he will continue to remain impartial. Our  
12:30:42 10 stand in this regard is further emphasised by the  
understanding  
11 that judicial independence in fact implies and connotes  
12 impartiality. In fact, a Judge cannot profess to be acting  
13 independently when he knows he is or may be perceived to be  
14 acting partially.

12:31:05 15 In this regard, we are of the opinion that independence  
is  
16 bestowed on Judges because it is not only intended to protect  
17 them from executive and legislative interferences or  
subjugation,  
18 but also to serve the public and not their personal or private  
19 interests, and that if a fundamental public interest, like a  
12:31:30 20 breach of the obligation for a Judge to be impartial were in

21 conflict with his claim to judicial independence, the former  
22 certainly does, will, and should invariably prevail.

Honourable 23 On the scope of Rule 15, the second argument of

24 Justice Thompson is that Rule 15 of the Rules applies only to  
12:31:55 25 acts or words outside the scope of the judicial process. The  
26 Chamber notes firstly that Rule 15 contains no such  
limitation.

27 It instead generally and very broadly states that a Judge must  
28 not sit on a matter in which his impartiality might reasonably  
be

29 doubted on a substantial ground. The jurisprudence of ad hoc

1 tribunals has elaborated a test for the appearance of bias  
that  
2 is seemingly broad in scope even though their corresponding  
rule  
3 is not as broad as Rule 15 is.  
4 The Chamber also observes that the impartiality of  
Judges  
12:32:46 5 has often been questioned on the basis of things that were  
done  
6 or said within the context of the judicial proceeding. As  
will  
7 be discussed below, there have been cases before the ICTY and  
the  
8 ICTR wherein there have been allegations that Judges are  
biased  
9 on the grounds of decisions rendered within the context of the  
12:33:11 10 proceeding itself. In all these cases an analysis was  
conducted  
11 either by the Court or by the Bureau to determine if the  
impugned  
12 decisions created an appearance of bias. Thus, even with the  
13 more restrictive wording of the corresponding disqualification  
14 provision in the ICTR -- in the ICTY and the ICTR rules, the  
12:33:36 15 courts have clearly conceded that decisions rendered within a  
16 judicial proceeding could be the subject of challenges on the  
17 basis of impartiality and may be found to create an appearance  
of  
18 bias.

Judge 19 It simply, we would observe, cannot be otherwise. A  
12:33:59 20 in the discharge of his duties as we have already said has the  
judicial 21 right to express his opinions in the fulfilment of his  
to, 22 functions, but we also say, again, as we have already alluded  
the 23 that where that opinion also creates an appearance of bias,  
24 party is entitled to challenge the impartiality of the Judge.  
12:34:27 25 On the right of appeal the fact that a decision or a  
may 26 judgment rendered within the context of a judicial proceeding  
from 27 be appealed does not alter nor does it preclude an accused  
An 28 raising such fundamental issues at any time during the trial.  
29 appeal may be brought by the parties to a case in order to

1 challenge a perceived procedural error, an error in law or an  
2 error of fact which has occasioned a miscarriage of justice in  
3 that particular trial which in this situation would be the CDF  
4 trial. It is our view that an application for  
disqualification

12:35:10 5 is based on entirely different grounds and relates only to  
6 determining whether or not an appearance of bias or actual  
bias  
7 has been established.

8 The present motion is an allegation by the accused in  
the  
9 RUF case that the opinions, statements and findings of  
Honourable

12:35:37 10 Justice Thompson in his separate opinion to the CDF judgment  
11 create an appearance of bias with regard to the RUF  
proceedings.

12 In view of the fact that the accused persons in the RUF trial  
are  
13 different and are involved in a different trial that is  
14 independent of the CDF trial, they have no locus standi in the

12:35:59 15 CDF proceedings. Moreover, we note that even the parties in  
the  
16 CDF cannot appeal against the findings of Honourable Justice  
17 Thompson in his separate opinion to the CDF judgment on the  
18 grounds that our Appeals Chamber, as I mentioned earlier, has  
19 held that a concurring or a dissenting opinion cannot be  
appealed

12:36:25 20 against.

Rules 21 On the test for bias, we say that Rule 15(A) of the

case 22 states that a Judge may not sit at a trial or appeal in any

23 in which his impartiality might reasonably be doubted on

24 substantial grounds. The wording we have noted is broader

than

12:36:51 25 the wording in the equivalent provisions that are applicable

in

I'm 26 the ICTY and in the ICTR whose provisions state that a Judge,

27 quoting, "that a Judge may not sit on a trial or appeal in any

28 case in which the Judge has a personal interest or concerning

29 which the Judge has or has had any association which might

affect

1 his or her impartiality."

2 The jurisprudence of international tribunals has been  
3 consistent in articulating the test for bias with respect to  
4 Judges sitting on a particular trial. The courts have held

that

12:37:35 5  
subjectively

a Judge will be held to be partial if he is either

6 biased or if the surrounding circumstances give rise to an  
7 objective appearance of bias. In the Furundzija case the

Appeals

8 Chamber of the ICTY held that:

bias

9 "A Judge is not impartial if it is shown that actual

12:38:07 10

exists.

appearance

11 "There is an unacceptable appearance of bias --

12 of bias if:

or

13 "i. A Judge is a party to the case and has a financial

14 propriety interest in the outcome of a case or if the

12:38:26 15  
in

judge's decision will lead to the promotion of a cause

16 which he or she is involved together with one of the

17 parties. Under these circumstances a judge's

18 disqualification from the case is automatic or;

19 "ii. The circumstances would lead a reasonable observer

12:38:47 20

properly informed to reasonably apprehend bias."

fact 21 The apprehension of bias tests is a reflection of the  
22 that justice should not only be done but should be seen to be  
23 done. The European Court of Human Rights has emphasised that  
24 what is at stake is the confidence which the Court, in a  
12:39:15 25 democratic society, must inspire in the public. The  
reasonable  
26 observer in these tests must be an informed person with  
knowledge  
27 of all the relevant circumstances, including the traditions of  
28 integrity and impartiality that form part of the background  
and  
29 appraised also of the fact that impartiality is one of the  
duties

1 that Judges swear to uphold.

2 The tests for reasonable apprehension of bias has been  
3 formulated by the Appeals Chamber of the Special Court  
4 essentially in similar terms and it is stated as follows:

12:40:01 independent

5 The crucial and decisive question is whether an

those

6 bystander, so to speak, or the reasonable man reading

7 passages will have a legitimate reason to fear that the

can

8 Judge lacks impartiality. In other words, whether one

9 apprehend bias.

12:40:25 Defence

10 On the allegations of appearance of bias, the

11 motion is premised on the argument that the separate

12 opinion of Honourable Justice Thompson in the CDF trial,

13 trial judgment, creates a reasonable appearance of bias

14 against the accused in the RUF case. The Chamber

12:40:46 different

15 emphasises that the fact that a Judge hears two

events

16 criminal trials that arise out of the same series of

17 is not enough to merit disqualification.

18 We are confronted in this opinion by the decision of the

19 Appeals Chamber of the ICTR that stated recently and was

12:41:13

20 delivered as recently as 28 November 2007 in which the learned

21 Lordships stated in the published French version of their  
22 decision.

23 With your permission I am aware that this is -- the  
24 official language of the Special Court is English, but since  
the  
12:41:36 25 published decision is in French I will read it in French but  
you  
26 will find the unofficial translation at the footnote of their  
27 decision.

28 [French spoken]

29 The translation here is that -- on the footnote is that  
the

1 Appeals Chamber would like to reiterate that all Judges of the  
2 Court and of the ICTY study several files which by their very  
3 nature relate to overlapping issues which are interrelated.  
One  
4 can presume in the absence of proof to the contrary that by  
12:43:01 5 reason of their training and experience the Judges decide in  
all  
6 fairness the issues which they are seized of by relying  
uniquely  
7 and exclusively on the evidence that has been adduced in the  
8 matter in question.

9 In the ICTR Appeals Chamber in the above decision, this  
12:43:26 10 decision also cited with approval the finding of the Bureau in  
11 the Kordic and Cerkez case and it is that, as shown by the  
12 jurisprudence on the subjects, it does not follow that a Judge  
is  
13 disqualified from hearing two or more criminal trials arising  
out  
14 of the same series of events where he is exposed to evidence  
12:43:52 15 relating to those events in both cases.

16 In Brdjanin and Talic the Court stated that the relevant  
17 question is whether the reaction of the hypothetical, fair-  
minded  
18 observer with sufficient knowledge of the actual circumstances  
to  
19 make a reasonable judgment would be that the Judge, having

12:44:17 20 participated in the Tadic conviction appeal judgment, might  
not  
21 bring an impartial and unprejudiced mind to the issues in the  
22 present case. It is not whether she should -- she would  
merely  
23 decide those issues in the same way as they were decided in  
that  
24 case. The distinction, the learned Judges in that case  
stated,  
12:44:45 25 is an important one.

26 The Chamber is also mindful of the following statement  
of  
27 Justice Mason from the case of re JRL ex parte CJL that was  
28 subsequently adopted by the High Court of Australia and I  
quote:  
29 "There are many situations in which previous decisions  
of a

1           judicial officer on issues of fact and law may generate  
an  
2           expectation that he is likely to decide matters in a  
3           particular case adversely to one of the parties. But  
this  
4           does not mean either that he will approach the issues in  
12:45:44 5           that case otherwise than with an impartial and  
unprejudiced  
6           mind in the sense in which that expression is used in  
the  
7           authorities or that his previous decisions provide an  
8           acceptable basis for interfering with" -- "for inferring  
9           that there is a reasonable apprehension that he will  
12:45:56 10          approach the issues in this way."  
11          The Chamber is therefore satisfied that the mere fact  
that  
12          Honourable Justice Thompson, like in other cases, like the  
other  
13          Judges of Trial Chamber I, has rendered a judgment in the CDF  
14          case and continues to sit in the RUF case which may relate in  
12:46:25 15          part to the same series of events does not disqualify him.  
The  
16          Defence have not suggested otherwise. This does not, however,  
17          dispose of the matter. In our opinion the issue before us is  
18          whether the language and opinions and findings contained in  
the  
19          separate opinion create an appearance of bias. The Chamber  
notes

12:46:53 20 that the allegations of bias brought before both the ICTY and  
the  
21 ICTR on the basis of decisions rendered by the Chamber within  
the  
22 same proceeding, in these cases bureaus have held that while  
23 Bureau would not rule, would not rule out entirely the  
24 possibility that decisions rendered by the Judge or Chamber by  
12:47:18 25 themselves could suffice to establish actual bias, it would be  
a  
26 truly extraordinary case in which they would.  
27 The ICTR Bureau later clarified the procedure to be  
adopted  
28 where decisions are alleged to constitute grounds for  
29 disqualification. Where such allegations are made, the Bureau

1 has a duty to examine the content of the judicial decisions  
cited  
2 as evidence of bias. The purpose of that review is not to  
detect  
3 error, but rather to determine whether such errors, if any,  
4 demonstrate the Judge or the Judges are actually biased or  
that  
12:48:04 5 there is an appearance of bias based on the objective test of  
the  
6 reasonable observer. Errors, if any, on a point of law is  
7 insufficient; what must be shown is that the rulings are and  
8 would reasonably be perceived as attributable to a  
predisposition  
9 against the applicant, and not genuinely related to the  
12:48:28 10 application of the law, on which there may be more than one  
11 possible interpretation, or to the assessment of the relevant  
12 facts.  
13 The Chamber accepts this to be an appropriate procedure  
to  
14 be adopted in our analysis of the allegations of bias. It  
will,  
12:48:49 15 therefore, now turn to an analysis of the separate opinion of  
16 Honourable Justice Thompson in the CDF judgment to determine,  
not  
17 if the findings he made that the Defence of necessity applied  
to  
18 the accused in the RUF case as is or could constitute an error  
in

19 law, but rather if a separate opinion could reasonably be  
12:49:17 20 perceived as creating an appearance of bias with regard to the  
21 RUF case. In so doing, the Chamber finds that it must  
consider  
22 the separate opinion of Honourable Justice Thompson in the  
light  
23 of a full context of the CDF judgment and also in the light of  
24 the context of the RUF trial that is currently before this  
12:49:40 25 Chamber, before the Trial Chamber. The Chamber is also guided  
by  
26 the views of Justice Buergenthal of the International Court of  
27 Justice in his dissenting opinion to the order of 30 January  
2004  
28 in the case of the Legal Consequences of the Construction of  
the  
29 Wall in the Occupied Palestinian Territory wherein he found  
that

1 it was important to examine the full context of any comments  
that  
2 are alleged to demonstrate bias. In that case the learned  
Judge  
3 stated:  
4 "That a court of law must be free and, in my opinion, is  
12:50:25 5 required to consider whether one of its Judges has  
6 expressed views or taken positions that create the  
7 impression that he will not be able to consider the  
issues  
8 raised in a case [...] in a fair and impartial manner,  
that  
9 is, that he may be deemed to have prejudged one or more  
of  
12:50:48 10 the issues bearing on the subject matter of the dispute  
11 before the Court. That is what is meant by the dictum  
that  
12 the fair and proper administration of justice requires  
that  
13 justice is not only be done, but that it also be seen to  
be  
14 done. In my view, all courts of law must be guided by  
this  
12:51:13 15 principle.  
16 "It is technically true, of course, that Judge Elaraby  
did  
17 not express an opinion on the specific question that he  
has

the  
equally  
12:51:34  
examining  
12:51:56  
established

18 submitted" -- "that has been submitted to the Court by  
19 General Assembly of the United Nations. But it is  
20 true that this question cannot be examined by the Court  
21 without taking account of the context of the  
22 Israeli/Palestinian conflict and the arguments that will  
23 have to be advanced by the interested parties in  
24 the case before the Court."  
25 As a preliminary matter, we note that Honourable Justice  
26 Thompson endorsed the entire findings of fact embodied in the  
27 main judgment with the exception of evidence related to  
28 cannibalism and the permissibility of initiations. Honourable  
29 Justice Thompson also found that the facts that were

1 by the Prosecution's evidence did not -- did prove the factual  
2 guilt of the accused in some of the counts in the indictment.  
3 Where he differed from the main judgment related primarily to  
his  
4 finding, raised proprio motu, that the accused were not guilty  
of  
12:52:44 5 the war crimes for which they were convicted in the main  
judgment  
6 on the grounds that their actions were justified by the  
defences  
7 of necessity and the doctrine of *salus civis suprema lex est*.  
8 The Defence teams contend and submit that Honourable  
9 Justice Thompson unilaterally invoked the defence of necessity  
on  
12:53:12 10 behalf of the accused and that this demonstrates that he holds  
11 views on the overriding criminality of the AFRC and the RUF.  
On  
12 this submission the Court observes that the majority judgment  
on  
13 the substantive case and the dissenting opinion were both  
14 published on 2 August 2007. However, the Chamber majority was  
12:53:38 15 not afforded the opportunity to and did not address the issue  
never  
16 relating to that defence of necessity solely because it was  
17 raised by the Defence, nor did its applicability to the  
18 circumstances of this case feature for determination at any  
stage  
19 before the delivery of a majority decision.

12:53:59 20           We, however, state here that whilst we accept that it is  
21 clear and established as the Defence contends that Honourable  
22 Justice Thompson, unilaterally and ex improviso, raised the  
23 defence of necessity without having given the parties a prior  
24 opportunity to present their arguments on it, we are not  
12:54:23 25 persuaded by the Defences' further arguments that he so raised  
26 this defence because he holds and to again quote them, "On the  
27 overriding" -- "the views he holds on the overriding  
criminality  
28 of the AFRC and the RUF."  
29           We observe that Honourable Justice Thompson does not

1 specifically refer to either the accused in the RUF case or  
the  
2 RUF itself in his opinion. Instead he speaks of the CDF  
fighting  
3 to restore the lawful and democratically elected government of  
4 President Kabbah to power after the coup by the AFRC on 25 May  
12:55:20 5 1997. When addressing the issue of greater evil that would  
6 justify the lesser evil of the actions by the CDF, Honourable  
7 Justice Thompson speaks of "tyranny, anarchy and rebellion,"  
"a  
8 rebellion against a legitimate government of the State" and an  
9 "intensely conflictual situation dominated by utter chaos,  
fear,  
12:55:45 10 alarm and despondency" and the "immediate threat of harm  
11 purportedly feared to wit fear, utter chaos, widespread  
violence  
12 of immense dimensions resulting from the coup and intense  
13 discomfiture, locally and nationally." These are all quotes.  
14 Having so opined, we are equally of the view that the  
12:56:18 15 expressions and terms used by Honourable Justice Thompson as  
16 outlined by the Defence in their submissions and which formed  
the  
17 basis for their introducing this motion, could be perceived or  
18 understood or understood as aggressive, offensive and  
injurious  
19 to the interests of the three aggrieved RUF defendants and  
12:56:44 20 created, even if the Learned Judge did not intend those

their 21 consequences, an appearance of bias against their cause and  
22 interests as the accused persons who have the right and are  
23 entitled, as we have already observed, to be tried by a Judge  
24 only if his impartiality did not have the potential of being  
12:57:11 25 considered on a first thought as having been compromised to  
their  
26 detriment and to those of their interests.

27 A review of the entirety of the CDF judgment however  
makes  
28 it clear that Honourable Justice Thompson is actually  
referring  
29 to actions of both the AFRC and the RUF. In the course of the

commonly  
in  
on  
with  
12:58:02  
organisation  
the  
12:58:32  
with  
12:58:57

1 CDF trial the Chamber took judicial notice that groups  
2 referred to as the RUF and the AFRC and the CDF were involved  
3 armed conflict in Sierra Leone and that the juntas lost power  
4 14 February 1998. The factual findings in the CDF judgment  
5 which Honourable Justice Thompson has expressed his total  
6 agreement state that the CDF began to operate as an  
7 in approximately September 1997. The findings of fact are  
8 replete with inferences to the CDF forces, fighting the RUF,  
9 rebels and the juntas. In the RUF case this Chamber has taken  
10 judicial notice of the fact that the RUF formed an alliance  
11 the AFRC shortly after the coup and that the leaders of both  
12 groups formed the governing body that exercised sole executive  
13 and legislative authority within Sierra Leone during the junta  
14 period. We also took judicial notice of the fact that the  
15 AFRC/RUF alliance continued after they were forced from power  
16 about 14 February 1998.

CDF  
judgment

17 It is therefore clear that the enemy or force that the  
18 is fighting in its finding -- in the findings in the CDF

in 19 includes the RUF, the three members of which are the accused  
12:59:35 20 the present case. As a result, while Justice Thompson may  
have 21 referred to the enemy of the CDF or the situation in Sierra  
Leone 22 only in the abstract, it is reasonable to conclude in the  
23 existing circumstances and having regard to the facts that  
were 24 found to have been established, that he is actually referring  
to 25 both the AFRC and the RUF when speaking of tyranny, anarchy  
13:00:01 26 rebellion. The intensely conflictual situation and the fear,  
and 27 utter chaos, widespread violence are dimensions that he has  
28 identified.  
29 The Chamber is of the view that Honourable Justice

1 Thompson's use of the term "evil" is made in reference to  
2 elaborating the test for necessity rather than in  
characterising  
3 the RUF as evil in the way that the Prosecution did in its  
4 opening statement or as advocated by the Defence.

13:00:49 5 A fair reading of his opinion leads us to the conclusion  
6 that he has not described the AFRC or the RUF as evil. The  
7 Chamber notes that the separate opinion of Honourable Justice  
8 Thompson does not implicitly or otherwise find that the AFRC  
and  
9 the RUF were involved in a joint criminal enterprise as  
alleged

13:01:16 10 by the Defence. Although Honourable Justice Thompson is using  
11 the terms that were previously described and challenged by  
this  
12 motion, we find that the language he is using does not  
13 necessarily imply criminality. We find that Honourable  
Justice  
14 Thompson did not make any findings with regard to the  
criminality

13:01:38 15 of the actions of the AFRC and the RUF. The Chamber further  
16 considers it relevant that the accused in the RUF case have  
17 considered that persons within the RUF and the AFRC -- and the  
18 AFRC committed terrible and horrible crimes during the  
conflict.  
19 Thus, if Honourable Justice Thompson had made findings that

13:02:08 20 criminal acts were committed by the RUF, this would not have  
been  
21 any different from the position already taken by the Defence.  
22 The CDF judgment found that the accused Fofana had  
23 committed the war crimes of murder, cruel treatment, pillage  
and  
24 collective punishment and that Kondewa had committed war  
crimes  
13:02:35 25 of murder, cruel treatment, pillage, collective punishments  
and  
26 enlisting children under the age of 15 into the armed groups  
27 and/or using them to participate actively in hostilities.  
These  
28 are extremely serious crimes. As we have noted, Honourable  
29 Justice Thompson stated that he has agreed with the findings  
that

1 the accused are factually guilty of these crimes.

2 Moreover, a review of the factual findings in the CDF

3 judgment makes it clear that the CDF forces often employed

4 extremely heinous means to commit these crimes. Despite the

13:03:16 5 extremely serious nature of the crimes, Honourable Justice

6 Thompson has accepted that these crimes were excusable in the

7 face of a larger evil due to the application of the defence of

8 necessity. For the reasons we outlined above, we find that in

9 the context of the judgment in which the opinion -- I will

take

13:03:45 10 that again. For the reasons we have outlined above, we find  
that

11 the context of the judgment in which the opinion is written

leads

12 to the conclusion that this larger evil that was to be avoided

by

13 the CDF actions can only be actions brought by the AFRC and

RUF

14 forces.

13:04:10 15 In his comments Justice Thompson states that he has no

16 crystal ball to discern defences that the accused in the RUF  
will

17 be relying on. Although it is true that the Chamber cannot

18 predict the exact nature of the defences that will be raised  
by

19 the Defence, it remains that there had been some indication of

13:04:36 20 their own nature on record. At the time that the CDF judgment

21 was delivered, the Chamber had been hearing the RUF case for  
22 three years. The Chamber had received the Defence pre-trial  
23 briefs, had listened to the open arguments, opening statements  
of  
24 the Defence for Kallon and Sesay and had heard the testimony  
of  
13:05:03 25 the accused Sesay.

26 The Defence for Sesay has always maintained its  
position.  
27 Its position is that the aim of Sesay was to fight justly and  
28 legitimately for the benefit of freedom and liberty for the  
29 people of Sierra Leone with a view to the creation of a  
society

1 based upon fairness and democracy. The Defence of Kallon  
stated  
2 in its opening statement that the Kallon -- that the accused  
3 Kallon remained committed to the idea of democracy. As a  
result,  
4 it is clear that the issue of which side was fighting the  
"just  
13:05:44 5 war" by fighting for democracy is an issue that has been  
raised  
6 in both the CDF and the RUF trials.  
7 The Chamber reiterates that all Judges, independent in  
the  
8 performance of their functions, without fear or favour,  
affection  
9 or ill-will, are entitled to express their own opinions on the  
13:06:06 10 law or otherwise. Indeed, the Appeals Chamber of the ICTY in  
the  
11 Furundzija case recognised that Judges have personal  
convictions  
12 and that absolute neutrality can hardly ever be achieved.  
This  
13 freedom to make findings of law and of fact is undeniably  
14 applicable to Honourable Justice Thompson's opinion that the  
13:06:37 15 defence of necessity was applicable to the CDF case no matter  
how  
16 novel or controversial that opinion might be. An expression  
of  
17 such an opinion in that context, however, may indeed have  
18 consequences and raise concerns relating to impartiality that

19 must be examined and considered.

13:06:57 20 The Chamber considers that the opinion of honourable --  
21 that Honourable Justice Thompson has expressed that the  
22 commission of serious war crimes was excusable because of the  
23 greater purpose of restoring democracy can be distinguished  
from  
24 the opinions that were the subject of cases before the ICTY  
and  
13:07:20 25 in the Furundzija appeal case the Appeals Chamber found that  
the  
26 view that rape is a crime is abhorrent and that those  
responsible  
27 for it should be prosecuted within the constraints of the law,  
28 cannot in itself constitute grounds for disqualification. In  
the  
29 Celebici Appeals Chamber -- the Appeals Chamber in the  
Celebici

1 case, the Appeals Chamber held that a reasonable and informed  
2 observer would expect Judges to hold the view that persons  
3 responsible for torture should be prosecuted. The Chamber  
4 considers that a reasonable and informed observer would not  
13:08:10 5 expect a Judge to find that the commission of serious war  
crimes  
6 was excusable because, considering the state of the law, it  
would  
7 amount to condoning the commission of very serious crimes.  
8 After a careful consideration, the Chamber finds that  
some  
9 indicia of an appearance of bias have been established having  
13:08:36 10 regard to all the circumstances by the language used in the  
context  
11 separate opinion when it is understood and viewed in the  
12 of the ongoing RUF proceedings.  
13 This finding, however, must also be appreciated in the  
14 larger context of the RUF trial and the Special Court for  
Sierra  
13:09:00 15 Leone in general in the light of the standard applicable to  
16 disqualification contained in Rule 15 and further defined and  
17 amplified by the jurisprudence that ad hoc tribunals have  
18 repeatedly stated that there is a presumption of impartiality  
19 which attaches to Judges who are professionally equipped by  
13:09:25 20 virtue of their training and experience for the task of fairly

the  
adduce  
not

21 determining the issues before them by applying their minds to  
22 evidence in a particular case. The Defence must therefore  
23 sufficient evidence to satisfy the Chamber that the Judge is  
24 impartial.

13:09:46  
be

25 In the Celebici case the ICTY Appeals Chamber held that  
26 there was a high threshold to reach in order to rebut this  
27 presumption and thus the reasonable apprehension of bias must  
28 firmly established.

29 This approach was recently confirmed again in the media

1 case whose decision has been published in French and I would  
read  
2 it:  
3 [French spoken]  
4 And unofficially translated it is that the Appeals  
Chamber,  
13:11:16 5 it is footnoted, that the Appeals Chamber reaffirms that all  
6 Judges benefit from the presumption of impartiality which  
cannot  
7 be easily negated. In the absence of any proof to the  
contrary,  
8 it is normal to presume that Judges are in a position to keep  
9 their spirits free from all convictions or personal  
inclinations  
13:11:33 10 which are not pertinent. It is, therefore, in this regard the  
11 responsibility of the appellant who seeks to question the  
12 impartiality of a Judge to produce before the Appeals Chamber  
13 solid and sufficient evidentiary proof in order to succeed to  
14 negate this presumption of impartiality.  
13:11:56 15 The reasons for this presumption of impartiality in the  
16 international context are many. The ICTY Appeals Chamber has  
17 emphasised the reason for this high threshold is that just as  
any  
18 real appearance of bias on the part of a Judge undermines  
19 confidence in the administration of justice, it would be as  
much

13:12:19 20 of a potential threat to the interests of the impartial,  
unfair  
21 administration of justice if Judges were to disqualify  
themselves  
22 on the basis of unfounded and unsupported allegations of  
apparent  
23 bias.  
24 Furthermore, the Judges of the international tribunals  
are  
13:12:41 25 required to be persons of high moral character, impartiality  
and  
26 integrity when they are appointed by Article 13 of the  
Statute.  
27 Before taking up their duties the Judges of the Special Court  
28 were required under Rule 14 to make a solemn declaration to  
act  
29 honestly, faithfully, impartially and conscientiously.

1           This Chamber has repeatedly observed that it is composed  
of  
2           professional Judges who are certainly capable of not drawing  
3           inferences without proper evidential basis or foundation.  
4           Similarly, the Appeals Chamber of the ICTY and the ICTR have  
13:13:27 5           found that it must be assumed that international Judges can  
6           disabuse their minds of any irrelevant personal beliefs or  
7           predispositions and are professionally equipped by virtue of  
8           their training and experience for the task of fairly  
determining  
9           the issues before them and applying their minds to the  
evidence  
13:13:48 10          in the particular case. The Chamber also considers it  
11          significant that the Judges of the Trial Chamber sit as a  
panel  
12          of three Judges.  
13           The Chamber further adopts the finding of the Supreme  
Court  
14          of South Africa in the case of the South African Rugby  
Football  
13:14:12 15          Union decision where the Judges said that:  
16                   "The reasonableness of apprehension of bias must be  
17                   assessed in the light of the oath of office taken by the  
18                   Judges to administer justice without fear or favour; and  
19                   their ability to carry out that oath by reason of their  
13:14:31 20          training and experience. It must be assumed that they  
can

and 21 disabuse their minds of any relevant personal beliefs  
22 predispositions. They must take account" -- "take into  
case 23 account the fact that they have a duty to sit in any  
24 in which they are not obliged to recuse themselves."  
13:14:56 25 The Chamber notes that Honourable Justice Thompson has  
obligation 26 clearly stated in his comments that he is bound by the  
27 to issue a judgment in the RUF case that is exclusively based  
on 28 whether or not the Prosecution has proven on the basis of the  
29 evidence adduced only in that proceeding the guilt of each of  
the

1 accused beyond reasonable doubt. We find that in his separate  
2 comments  
3 or expressed views on -- views or opinions with respect to the  
4 he  
13:15:53 5 has not made any findings about issues in the RUF trial.

6 As the jurisprudence makes it clear, the fact that a  
7 Judge  
8 has heard evidence and taken a position in different cases  
9 arising out of the same evidence is not a cause for  
10 the  
13:16:19 10 Judge can adjudicate on the new matter with an impartial mind  
11 and  
12 unprejudiced manner. We note in this regard that the evidence  
13 that  
14 presented in the CDF case was almost entirely different from  
15 in the RUF case.

16 In the light of all the foregoing, the Chamber concludes  
17 13:16:41 15 that even though it has found some indicia of apprehension of  
18 we  
19 are satisfied that this conclusion is not sufficient to  
20 overcome  
21 the high threshold standard that has been set and established  
22 by

recusal

13:17:08  
criminal

19 the jurisprudence of international criminal tribunals on  
20 or the disqualification of a Judge in an international  
21 tribunal and therefore does not rebut the presumption of  
22 impartiality, nor does it firmly establish a reasonable  
23 appearance of bias on the part of Honourable Justice Thompson.  
24 We so do find and hold.

13:17:36  
dismissed

25 Accordingly, and for these reasons, the motion is  
26 in its entirety and this judgment is done in Freetown, Sierra  
27 Leone, on the 6th day of December 2007.

to

coming

28 As we did indicate, we are predisposed to granting leave  
29 appeal because this is a very important matter and it is

1 before us for the first time and we have taken our time to  
look  
2 at the law and the jurisprudence on it and we do not want the  
3 matter to rest here. We want it to be tested further and we  
will  
4 grant, we stand by our word that we will grant leave to appeal  
13:18:25 5 from any other parties who would seek to appeal so that we can  
6 have a second opinion from the Appeals Chamber. But as far as  
we  
7 are concerned the matter rests here and when we resume in  
January  
8 Honourable Justice Thompson will join us on the Bench until a  
9 further order is made.

13:18:46 10 Yes, Mr Jordash, I think Mr Rapp is ceding the grounds  
to  
11 you.

12 MR JORDASH: Do I understand Your Honour correctly that  
we  
13 should make, if we want to seek an appeal, we should make the  
14 application now orally and Your Honours will --

13:19:07 15 PRESIDING JUDGE: No, no. You can make it today. You  
16 don't need to make it too long. I mean, it's not reopening  
the  
17 issues which we have determined. You will make it and just  
18 concentrate on the basics, you know, that are required.

19 MR JORDASH: So we have to make a written application?

13:19:29 20 PRESIDING JUDGE: A written application, yes.

21 MR JORDASH: For leave?

22 PRESIDING JUDGE: For leave, yes, and we shall respond  
to

23 it. We can respond to it at any time because we have the

24 procedure, you know, and there are rules to render decisions

13:19:40 25 electronically on the authority of the President of the Court  
and

26 we are taking steps for that leave to be granted at any time

that

27 the submissions would all be in.

28 MR JORDASH: The Prosecution and Defence met this  
morning

29 before the judgment and I think --

Did 1 PRESIDING JUDGE: Can Mr Rapp maybe update us in this?  
2 you meet with Mr Rapp?

3 MR JORDASH: Yes.

4 PRESIDING JUDGE: Good. Okay. All right, Mr Rapp,  
please.

13:20:06 5 MR RAPP: Your Honours, Mr President, may it please the  
6 Court. We did meet this morning. Obviously we knew that this  
7 was a very important issue and we very much appreciate the  
8 learned decision by Your Honours, but both the Prosecution and  
9 the Defence were of the view that whatever the decision,

13:20:27 10 particularly because there had been previously a  
disqualification  
11 decision by the Appeals Chamber, it was important that there  
be

12 an appeal and that every effort be made to expedite that  
appeal

13 and we discussed and agreed that we would jointly move for  
14 certification, whatever the decision was, and that we would  
ask

13:20:49 15 if possible for a decision on that orally by the Trial Chamber  
16 because we further anticipated approaching the Appeals Chamber  
17 and asking for an accelerated debriefing schedule that might  
18 permit all submissions to be made in the matter before the  
19 judicial recess, which obviously involves heavy lifting by the

13:21:11 20 various teams and by the Prosecution, but we think it  
important

the 21 to move this matter forward. We recognise, of course, that

22 issue of certification under 73(B) involves a showing of  
23 exceptional circumstances.

24 PRESIDING JUDGE: And irreparable prejudice.

13:21:32 25 MR RAPP: And irreparable injury to a party. We  
believe,

be 26 as Your Honours I think have opined, that that standard could

the 27 met in this case and that Your Honours are inclined, knowing

we 28 issues, to grant such a motion. Our simple concern is that if

29 file something jointly we then await for the ruling in writing

1 and then frankly it would be difficult to make even the first  
2 submission before the judicial recess and we will be briefing  
3 these matters in January. So with due respect we'd ask that  
our  
4 joint motion for certification be heard and granted here  
today,  
13:22:12 5 understanding that that's an exception to the general rule of  
6 73(A) which is that motions are filed in writing and heard and  
7 decided without [indiscernible].

8 PRESIDING JUDGE: So, in effect, the application you're  
9 making, you know, after consulting with the Defence, is that  
this  
13:22:34 10 time around, because of the urgency and the extraordinary  
11 situation, you want the certification to be made or rather the  
12 application to be made orally and the certification to be done  
13 orally today. Is that what you're suggesting?

14 MR RAPP: That's exactly correct, Your Honour,  
13:22:54 15 Mr President.

16 PRESIDING JUDGE: Thank you, Mr Rapp.

17 MR JORDASH: Could I buttress what my learned friend has  
18 just said? It may be the only way to keep the trial date of -  
-  
19 the next trial date of 10 January. Any slippage at this end  
may  
13:23:16 20 well affect that date. We're very concerned to keep that date

out 21 and the timetable we propose is as my learned friend has set  
22 with expedited pleadings with the application for appeal,  
23 response and reply in before the judicial break.

24 PRESIDING JUDGE: Right. Thank you, Mr Dumbuya, do you  
13:23:47 25 have any observations on this?

26 MR DUMBUYA: No, My Lord. I'm in agreement with what  
27 Mr Jordash has just said.

your 28 PRESIDING JUDGE: Yes, okay. Mr Cammegh, may we have  
29 comments on this please.

1 MR CAMMEGH: Mr Jordash has just said it. I can just  
2 re-emphasise the importance of what he just said.

3 PRESIDING JUDGE: Thank you.

4 JUDGE BOUTET: Mr Jordash, I would like to understand  
what

13:24:13 5 you mean by being able to proceed on 10 January given our  
6 decision, whether you appeal or not and whether your decision

7 rendered by the Court of Appeal. From my understanding the  
is way

8 we have proceeded up 'til now does not stand in the way to  
9 proceed ahead. The fact that you appeal does not suspend the

13:24:36 10 proceedings in this Court. How is this to delay the  
proceedings?

11 MR JORDASH: I suppose the answer to that is, it depends  
12 what view Your Honours took of the appeal and it depends what

13 view the Appeal Chamber took of the appeal. Once seized of  
it,

14 they may take the view that proceedings should be suspended.

13:25:02 15 JUDGE BOUTET: I can tell you that my view is very clear  
on

16 this, it does not suspend. [Indiscernible] But we have not  
17 discussed that but this is my view on it, I would imagine that  
18 this is shared in the Trial Chamber.

19 MR JORDASH: Absolutely.

13:25:20 20 JUDGE BOUTET: Just to make sure that you know where we

the  
Chamber  
will  
put  
13:25:38  
January.  
say  
Chamber

21 stand at the trial. I'm not sure we can speak on behalf of  
22 Appeals Chamber obviously. As I said, if they order this  
23 to seize of this while they are hearing the appeal, well, we  
24 have to comply with that. But for the time being, it is as I  
25 it, business as usual. We just come back and proceed in  
26 That's as clear as it can be from my perspective and I would  
27 not to speak on behalf of the Presiding Judge because -- but I  
28 think it is a view that is generally shared by the Trial  
29 and, as I say, it does not preclude any appeal to be

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1 [indiscernible].

2 PRESIDING JUDGE: And the fact that you have filed the  
3 appeal before the Appeals Chamber does not preclude us, you  
know,  
4 from going ahead as my colleague has said because we are  
deemed

13:26:18 5 to have put ourselves on course and we would proceed, unless,  
6 unless the Appeals Chamber issues an order saying that we  
should  
7 not proceed until they have made a determination in the appeal  
8 that you are going to take against our decision. As I said,  
we

9 are very prepared to accelerate other procedures which would  
13:26:44 10 enable you to move fast on this and we have never in the  
11 experience of this Court given our decision in advance on any  
12 interlocutory matter, but in this one we have said: Look, it  
is  
13 important and we have to inform the parties that because of  
the  
14 importance and the gravity of the decision that goes with this  
13:27:06 15 matter, we have to grant the parties leave to appeal and to  
16 certify the appeal accordingly.

17 MR JORDASH: And I suppose what we're asking is that,  
given  
18 Your Honours have arrived at that view and that decision, that  
we  
19 simply, I suppose, save some time, save some resources and  
move

13:27:31 20 straight into drafting our application for appeal. It seems a  
21 little -- it seems a little difficult to draft an application  
for  
22 leave in light of Your Honours' comments that Your Honours are  
23 going to grant leave. It seems a little difficult, especially  
24 since I'd rather be doing other work or no work. We would  
simply  
13:28:09 25 say it could save time, it could save the parties work. The  
26 accused are extremely concerned about the application, the  
first  
27 application, and will be concerned about Your Honours' ruling.  
28 We will need to discuss that with our respective clients, but  
29 certainly it would assist my client to move as swiftly as

1 possible to a final resolution of the issue. And I know  
2 certainly Mr Sesay will focus on the comments concerning some  
3 indicia of the appearance of bias and it may be that the  
swiftest  
4 way to get to the end of these issues is best for the Court  
and  
13:28:59 5 certainly, I would submit, best for my client.

6 PRESIDING JUDGE: Well, Mr Prosecutor, learned counsel,  
we  
7 would stand down this session for just a few minutes. We will  
8 resume and let you know what our position is on this matter.

And  
9 [indiscernible] stood down and --

13:30:19 10 JUDGE BOUTET: And please, we say a few minutes, it will  
be  
11 a few minutes. We're not asking of hours here.

12 PRESIDING JUDGE: A few minutes, please. Right. So we  
13 would rise and we will resume in a couple of minutes.

14 [Break taken at 1.28 p.m.]

13:53:56 15 [RUF06DEC07B - JS]

16 [Upon resuming at 1.50 p.m.]

17 PRESIDING JUDGE: Well, we are resuming the session  
again  
18 now. We thought it would be snappy, but it takes time to  
arrive  
19 at these decisions even with an amputated Bench of two Judges.

13:54:53 20 Mr Prosecutor, learned counsel for the Defence, we have

leave  
is  
13:55:22  
very,

21 decided to take the arguments orally on the application for  
22 under section 73. I know this has not been our tradition all  
23 along. We have always worked on written submissions and that  
24 why we were instead and before these proceedings making  
25 provisions for signing the decision and granting the leave  
26 electronically, but I think that we have been persuaded by the  
27 submissions you've made and we are prepared to take your  
28 arguments for leave to appeal orally. Will you please be  
29 very brief because we don't intend, you know, to stay here for

1 too long, but let me get it very clearly. The learned  
2 Prosecutor, do I understand you to be joining in the  
application  
3 for leave to appeal as well?

4 MR RAPP: That is correct, Your Honour.

13:56:05 5 PRESIDING JUDGE: That is correct.

6 MR RAPP: I understand the burden is on the party that's  
7 appealing, though we accept that the merit exists. We believe  
8 that were this matter to proceed with Justice Thompson and  
there  
9 to be no interlocutory appeal and then the Appeals Chamber  
took

13:56:26 10 the side that this decision to be made improperly or that it  
was  
11 incorrect, and the only remedy at that point would be a  
retrial  
12 and the period of detention would be so extended at that time  
13 that we really don't think that the injury would be reparable.

14 So under the circumstances we believe that this is -- that  
there  
13:56:45 15 is potential irreparable injury.

16 I do want to make one point in response to what Your  
17 Honours have said earlier. Certainly we do not believe that  
18 there should be a stay of this decision. The Trial Chamber  
has  
19 to determine whether there is a stay. A grant of leave to  
appeal

13:57:02 20 or a certification does not work as a stay. We would oppose a  
21 stay. We would oppose a stay of the appeals if the matter  
were  
22 then to be appealed to the Appeals Chamber. We believe that  
this  
23 case can go forward on 10 January with the three Justices and  
24 then even if there is no decision by the Appeals Chamber, a  
13:57:23 25 decision will come in due course.

26 We think, however, that there are advantages in  
27 accelerating the process so that the question is resolved in  
this  
28 case as soon as possible, and for that reason we have asked  
for  
29 this accelerated decision on certification and also we will be

1 asking the Appeals Chamber for an accelerated briefing  
schedule.

2 Thank you, very much.

3 PRESIDING JUDGE: Thank you. Certainly we are of the  
4 opinion that you have expressed, Mr Rapp, and we would go on.  
We

13:58:00 5 have already stated that we are going on come January 10 with  
the  
6 case and that the appeals process would not affect the  
calendar

7 of the proceedings which is already scheduled and we would be  
8 sitting as three Judges until our decision, if it would, is  
9 overturned by the Appeals Chamber. That is when the other  
issues

13:58:26 10 in the case will have to be considered, and we think that for  
now  
11 we are on the right track and we would hear that.

12 And I think we would also advise, you know, that I will  
13 tell you where we are coming from. We were under such  
pressure,  
14 and we can talk about it now, but we were under such pressure

13:58:51 15 preparing this decision, you know, that we were thinking that  
we  
16 were only coming here -- "Oh, why don't we come here and issue  
an

17 oral decision, you know, saying that we grant the motion, we  
18 don't grant it." But we felt that it was a matter of such  
19 importance that a decision should be pronounced on all the

13:59:12 20 ramifications of this case. I think within the context and in  
ask 21 the spirit of your accelerating spirit you would -- you might  
22 the Appeals Chamber to deliver, maybe if they cannot meet to  
decision 23 deliver a substantive decision, to issue a preliminary  
24 as to whether they agree with us or not and then to deliver a  
13:59:34 25 reasoned decision later. It is possible. I think it's  
possible  
26 and -- yes.  
27 JUDGE BOUTET: But we are not trying to bind their  
hands.  
28 PRESIDING JUDGE: No, we don't at all.  
29 JUDGE BOUTET: We recognise their authority in this

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1 respect.

2 MR RAPP: In that regard, Your Honours, the Prosecutor -

3 the Office of the Prosecutor very much appreciates the lengthy

4 decision today and the review of the jurisprudence including

13:59:56 5 cases that are not yet translated that are coming from the  
ICTR.

6 PRESIDING JUDGE: Mr Prosecutor, you know we were  
surprised

7 to receive it on 28 November. 28 November. That was when we

8 received it. So we were very -- we were updated. We were

9 looking for everything that would enrich our decision and we

14:00:17 10 couldn't miss out on that media case and the position taken by

11 the Appeals Chamber in the ICTY.

12 MR RAPP: And we submit that, having had your opinion  
and

13 having dealt with all of those precedents, that will make I  
think

14 it considerably easier the job of argument by the parties  
here.

14:00:36 15 So that's one of the reasons we want to move as quickly as  
16 possible. Thank you.

17 PRESIDING JUDGE: Thank you. Right, Mr Jordash? You  
18 certainly intend to appeal and so you're asking for leave?

19 MR JORDASH: Yes.

14:00:54 20 PRESIDING JUDGE: Yes.

submit

21 MR JORDASH: It's an application for leave to appeal the  
22 decision rendered today pursuant to Rule 73(B). We would  
23 that the circumstances are exceptional and leave should be  
24 granted to avoid irreparable prejudice to the Defence.

14:01:25 25 Dealing briefly with the exceptional circumstances, we  
26 would submit this is a novel situation. It may not be a novel  
27 issue insofar as there has been similar applications, but I am  
28 unaware of any similar -- any application which has involved a  
29 Judge at this stage of the proceedings --

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1           PRESIDING JUDGE: You're right, Mr Jordash, we did our  
2 research and we couldn't find a similar case, you know. It is  
3 novel and we knew that we were treading on very virgin grounds  
4 and that is why we don't pretend to have found a solution and  
we  
14:02:12 5 thought that it should move on ahead.

6           MR JORDASH: Yes, and it's particularly novel, I would  
7 submit, in light of Your Honours' findings that the learned  
Judge  
8 has evinced some indicia of the appearance of bias. So, in  
light  
9 of that finding, and yet Your Honours have applied a standard  
to  
14:02:34 10 that --

11           PRESIDING JUDGE: That's right.

12           MR JORDASH: -- that certainly, in our submission, makes  
it  
13 a point of importance to international criminal law.

14           PRESIDING JUDGE: Absolutely. We agree with you,  
14:02:47 15 because -- we agree with you entirely because your battle, I  
mean  
16 the battle on appeal would be between the finding of the  
indicia,  
17 you know, of bias, and the high threshold that has been fixed,  
18 you know, by international criminal tribunals.

19           MR JORDASH: Exactly.

14:03:06 20           PRESIDING JUDGE: That would be the crux of the matter.

21 MR JORDASH: The relationship. Exactly, and the  
22 relationship between the two I think is unique insofar as how  
the  
23 two relate to each other and whether Your Honours' decision is  
24 correct or otherwise. I will --

14:03:26 25 JUDGE BOUTET: We don't feel offended, Mr Jordash.

26 PRESIDING JUDGE: We don't feel offended at all. I  
mean,  
27 we have judicial minds. When you are a Judge you must be open  
to  
28 judicial challenges and you must take them very sportively and  
I  
29 think that has been our attitude all along.

1 MR JORDASH: I'm grateful.

2 PRESIDING JUDGE: Thank you.

3 MR JORDASH: And, secondly, we would submit a decision  
by  
4 the Appeal Chamber is important to avoid irreparable prejudice  
to  
14:03:54 5 the accused who, in the absence of a final resolution, will be  
6 faced with an ongoing trial, and we would submit any prejudice  
7 which accrues could not be cured by a final appeal. At that  
8 stage much time will have been lost. Evidence may well have  
been  
9 lost or downgraded or degraded, and we would submit that  
standard  
14:04:30 10 is also satisfied. Those are my submissions.

11 PRESIDING JUDGE: Thank you, Mr Jordash. Mr Dumbuya?  
Do  
12 you associate yourself with -- or do you have something to  
add?

13 MR DUMBUYA: My Lord, I do not have anything to add. I  
14 totally support the application of my learned colleague,  
14:04:51 15 Mr Jordash, in respect of my client, Mr Kallon.

16 JUDGE BOUTET: And do you apply for leave as well?

17 MR DUMBUYA: Yes, in that regard I apply for leave.

18 PRESIDING JUDGE: Mr Cammegh, it's your turn.

19 MR CAMMEGH: Very briefly.

14:05:06 20 PRESIDING JUDGE: Maybe you're not applying for leave to

21 appeal.

22 MR CAMMEGH: I, in fact, am. Your Honour, I too rely on  
23 Rule 73(B) and cite exceptional circumstances and the  
requirement  
24 in our submission of leave to remove any irreparable prejudice  
to  
14:05:31 25 the Defence. Can I reiterate what Mr Jordash said about the  
fact

26 that Your Honours have cited indicia of perceived bias or you  
27 have evinced as such, and it's apparent that --

28 PRESIDING JUDGE: And, Mr Cammegh, we did that very,  
very  
29 advisedly. Very advisedly.

1           MR CAMMEGH: I think the length and the breadth of the  
2 issues covered by Your Honours' judgment, I may say -- if I  
may  
3 say so, is testimony to the amount of work that Your Honours  
and,  
4 indeed, the legal officers have done over the last week or so.  
14:06:06 5 We are very grateful for that.

6           The second issue that I would like to refer to and cite  
as  
7 part and parcel of what I say are exceptional circumstances  
are  
8 Your Honours' factual finding, having analysed both the  
judgment  
9 in the CDF case and the dissenting opinion of Mr Justice  
14:06:35 10 Thompson. Your Honours I believe today stated that you found  
the  
11 enemy, as cited by Judge Thompson in his dissenting opinion  
did,  
12 as was averred by the Defence in our appeal, comprise both  
AFRC  
13 and RUF. That was -- it might be said that the most  
significant  
14 plank, certainly so far as the Gbao team are concerned and  
this  
14:07:04 15 was a joint application, a joint appeal, and the fact that  
Your  
16 Honours appear to have endorsed what we averred, ie, the enemy  
17 comprise AFRC and RUF, should, on its own, substantiate an  
18 exceptional circumstance which should demand that leave for

19 appeal be granted in this case. I don't think there's  
anything  
14:07:29 20 else I need add.  
21 PRESIDING JUDGE: Thank you. I mean, we just -- we just  
22 had to, you know, dissipate the cloud that surrounded, you  
know,  
23 the issue of identifying who the enemy was, who the evil was.  
We  
24 put that -- we put those comments as against the submissions  
of  
14:07:51 25 the Prosecution in that issue and we thought that there was no  
26 scintilla of doubt, you know, that that was it. I mean, we  
have  
27 made our findings and --  
28 MR CAMMEGH: Yes.  
29 PRESIDING JUDGE: -- and we leave the rest to the  
superior

1 jurisdiction.

2 MR CAMMEGH: I should add, of course, that I would not  
be  
3 confining my grounds for appeal on those two issues I've just  
4 flagged up. We've had very little notice, but those are the  
two  
14:08:22 5 most immediate ones that came to mind.

6 PRESIDING JUDGE: Absolutely.

7 JUDGE BOUTET: And as you know, we don't have to make  
8 pronouncement on grounds of appeal. We're not here on an  
appeal.

9 PRESIDING JUDGE: No, no, no. We don't even need to see  
14:08:30 10 your grounds of appeal. It's -- the certification is based on  
11 exceptional circumstances and irreparable damage. That's all.

12 MR CAMMEGH: Thank you very much, Your Honours.

13 PRESIDING JUDGE: Thank you. Does the learned  
Prosecutor,  
14 Mr Rapp, have something to add?

15 MR RAPP: Very little to add, Your Honours. Obviously I  
16 believe a good case has been made for the exceptional  
17 circumstances and the fact that there be irreparable harm if  
18 certification were not granted. I think it's important to  
note

19 that while we join in this application, that we believe that  
your

14:09:07 20 opinion was well reasoned and we will be supporting its

the

21 affirmance in this proceeding, but it is important that the  
22 matter reach the Appeals Chamber which previously dealt with

23 case of Justice Robertson and make a final decision on the --

24 PRESIDING JUDGE: And Justice Winter as well.

14:09:26 25 MR RAPP: Yes, exactly. So these issues need to be  
26 resolved and as expeditiously as possible. So thank you very  
27 much, Your Honours.

28 PRESIDING JUDGE: Thank you, learned Prosecutor, and we  
29 delayed because we were drafting our order, you know, in this

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1 regard and this is our order: Honourable Justice Benjamin  
2 Mutanga Itoe, Presiding Judge, and Honourable Justice Pierre  
3 Boutet of the Trial Chamber -- of Trial Chamber I of the  
Special  
4 Court, seized of the oral application made jointly by the  
14:10:14 5 Prosecution and the Defence for Issa Hassan Sesay, Morris  
Kallon  
6 and Augustine Gbao and the Prosecution, on 6 December 2007,  
7 seeking leave to appeal the decision on the Sesay and Gbao  
motion  
8 for voluntary withdrawal or disqualification of Honourable  
9 Justice Bankole Thompson from the RUF case, noting the  
14:10:53 10 submissions made in support of this application and that were  
11 satisfied  
12 that the interests of justice in these particular  
circumstances  
13 and the application for leave to appeal be made exceptionally  
by  
14 and  
means of an oral application, and pursuant to Rules 7, 73(A)  
14:11:24 15 73(B) of the Rules of Procedure and Evidence, and again,  
pursuant  
16 to the provisions of Rule 16 of the Rules of Procedure and  
17 Evidence, hereby issue the following decision: Rule 73(B) of  
the  
18 Rules establishes a standard which governs appeals and motions

Chamber 19 for interlocutory relief. According to Rule 73(B), the  
14:11:50 20 may give leave to appeal in exceptional circumstances and to  
21 avoid irreparable prejudice to a party. The standard is  
22 conjunctive as can be deduced from both the plain and literal  
23 interpretation of the Rule and this Chamber's settled  
24 jurisprudence on the subject.

14:12:10 25 The Chamber has defined exceptional circumstances for  
the  
26 purpose of Rule 73(B) in these terms: Exceptional  
circumstances  
27 may exist depending upon the particular facts and  
circumstances  
28 where, for instance, the question in relation to which leave  
to  
29 appeal is sought is one of general principle to be decided for

1 the first time or is a question of public international law  
2 importance in these -- upon which further argument or decision  
at  
3 the appellate level would be conclusive to the interests of  
4 justice -- interests of justice, or where the course of  
justice  
14:12:58 5 might be interfered with or is one that raises serious issues  
of  
6 fundamental legal importance to the Special Court for Sierra  
7 Leone in particular, or international criminal law in general,  
or  
8 some novel and substantial aspect of international criminal  
law  
9 for which no guidance can be derived from national criminal  
law  
14:13:21 10 systems.  
11 As regards the requirement of irreparable prejudice,  
this  
12 Chamber has previously held that the expression refers to the  
13 prejudice that may not be remediable by appropriate means  
within  
14 the final disposition of the trial.  
14:13:39 15 Given the joint oral submissions made by the parties on  
the  
16 seriousness, urgency and exceptional nature of the issues  
raised  
17 in this application, the Chamber is satisfied that both prongs  
of  
18 the tests have been met and satisfied.

19           The Chamber clearly raises an issue of fundamental legal  
14:14:01 20   importance to -- of the matter clearly raises an issue of  
21   fundamental legal importance to the Special Court of Sierra  
Leone  
22   and for international criminal law generally as it deals with  
the  
23   serious and fundamental issue of the standards to be applied  
in  
24   determining the disqualification of one of the Judges in the  
14:14:22 25   Chamber, a matter that has not previously been addressed by  
this  
26   Chamber -- by this Chamber.

27           Furthermore, the Chamber is of the view that the parties  
28   would suffer irreparable prejudice if this issue was not dealt  
29   with at an appellate level as expeditiously as possible.

1           For these reasons, the application for leave to appeal,  
2           which has been made by all the parties in this case, I mean  
the  
3           Prosecution and the three Defence teams, is granted. This is  
4           done in Freetown, Sierra Leone, this 6th day of December 2007  
and  
14:15:06 5           it is signed by Honourable Justice Benjamin Itoe, the  
Presiding  
6           Judge, and Honourable Justice Boutet. We wanted to make it an  
7           oral decision, but, with exception, we will file it for the  
8           record so that they can be available for the records of the  
Court  
9           of Appeal to see how we've come to arriving at this decision  
on  
14:15:29 10          the same day. Again, it has been dictated by the urgency and  
the  
11          extraordinary circumstances that surround this case and the  
12          importance of the legal issues that have to be considered on  
13          appeal.

14                    So this is our decision and I don't know if there are  
14:15:54 15          any -- Mr Learned Prosecutor have any -- right.

16                    The scheduling order for the Easter vacation, yes, would  
17          be -- will be published and you will know before you leave on  
18          Saturday. You said the Defence team said they were leaving on  
--  
19          was it on Saturday or so? Well, anyway, I'm sure they will be  
14:16:19 20          published any time. Tomorrow? No, I'm sure you will have the

21 orders before you do leave.

22 JUDGE BOUTET: It should be before the end of the day  
23 today.

24 PRESIDING JUDGE: Before the end of the day today, yes.

14:16:31 25 I would like to mention here the imminent departure of  
one

26 of our very dedicated staff, and this is Miss Erica Bussey,  
you

27 know, who has been a very important chain in our industry

28 producing judicial decisions. She has been wonderful and a  
very

29 responsible person who has given the very best of herself and  
of

1 her professional competence, you know, to -- and placed it at  
the  
2 service of the Chamber. We are very sad to miss her. In  
fact,  
3 we wanted her to stay, but I think she had some other options  
4 which she has to pursue and we cannot stand in the way of any  
14:17:22 5 staff who want to pursue their careers elsewhere.

6 I am sure that she knows we are very sincere about this  
and  
7 that we wish her all the best and want to thank her for her  
8 immense contribution in moving the process forward as a legal  
9 adviser in her Chamber. We wish her well in the pursuit of  
her  
14:17:47 10 career wherever she may be going to, and I have always said  
it,  
11 the world is a global village and some day you never know  
whether  
12 we would meet somewhere, somehow, and -- but the important  
thing  
13 is for her to keep in touch with us and exchange the  
experiences  
14 she's having over there to enrich us here as well. We still  
14:18:08 15 consider her as a member of our Chamber. So we thank her.

16 Right, this said -- yes, Mr Jordash?  
17 MR JORDASH: May I second Your Honour's remarks? I note  
18 that we are losing a second one in a short time and it is a  
loss.

19                   PRESIDING JUDGE: Thank you for your support. Thank  
you.

14:18:42 20           There is nothing else on the agenda and this is my  
observation.

21           I think that I would only have to thank the learned  
Prosecutor,

22           Mr Rapp, and the members of the Defence teams for making our  
23           session that is ending today very, very successful. We wish  
you  
24           all a very safe travel to your respective homes and above all  
we  
14:19:14 25           wish you a very happy Christmas and a merry New Year. We look  
26           forward and we hope that God wills it that way that we start  
our  
27           proceedings on the 10th with the status -- on 9 January with  
the  
28           status conference and on the 10th with the actual trial. So  
this  
29           is to put the Defence on notice that we intend -- we need to  
see

1 a witness on the stand on 10 January 2008. And as I again  
say,  
2 you know, that unless in between time we are asked not to, we  
3 would be sitting as a Bench of three until such a time that a  
4 contrary decision would be served on us.

14:20:02 5 So, this is it. Thank you very much. For the audience,  
we  
6 wish you a happy Christmas as well and a prosperous New Year.

We  
7 would resume here on 9 December -- of January, I'm sorry,  
2008,  
8 and we wish all of you success in all your preoccupations.

Thank  
9 you very much and have a wonderful day. The Chamber rises,  
14:20:27 10 please.

11 [Whereupon the hearing adjourned at 2.15  
p.m.,  
12 to be reconvened on Wednesday, the 9th day  
of  
13 January 2008 at 10.00 a.m.]

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SCSL - TRIAL CHAMBER I