

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
learned 21 Defence therefore conclude that, "As a consequence of the
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,

1 wide-ranging and unequivocal findings about the object,
purpose 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
Thompson 29 the findings of fact and law made by Honourable Justice

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

in 1 acquitting the CDF accused, he accepted the Prosecution's case
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 5 dissenting opinion, determined in advance the guilt or
12:15:45 6 of the accused in the RUF case."
innocence 7

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

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

13 "B. Any party may apply to the Chamber of which the
14 Judge 15 is a member for the disqualification of the said Judge
on 16 the above ground."

17 Article 13.1 of the Statute of the Special Court on the
18 appointment and qualification of Judges provides:
19 "The Judges shall be persons of high moral character,
qualifications 20 impartiality and integrity who possess the
to 21 required in their respective countries for appointment

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 such circumstances to serve as legal avenues to readdress
those
9 contentious or litigious legal and factual issues that may
have
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
15 the very values that justice is supposed to serve in a
12:28:43 16 democratic
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 12:29:30 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
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
2 as evidence of bias. The purpose of that review is not to
3 error, but rather to determine whether such errors, if any,
4 demonstrate the Judge or the Judges are actually biased or
5 there is an appearance of bias based on the objective test of
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
9 against the applicant, and not genuinely related to the
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
14 be adopted in our analysis of the allegations of bias. It
15 therefore, now turn to an analysis of the separate opinion of
16 Honourable Justice Thompson in the CDF judgment to determine,
17 if the findings he made that the Defence of necessity applied
18 the accused in the RUF case as is or could constitute an error

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 concurring and partially dissenting opinion he made no
3 or expressed views on -- views or opinions with respect to the
4 he accused themselves or their alleged criminality. In addition,
13:15:53 5 has not made any findings about issues in the RUF trial.

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

14 In the light of all the foregoing, the Chamber concludes
13:16:41 15 that even though it has found some indicia of apprehension of
16 we bias in the challenged opinion of Honourable Justice Thompson,
17 overcome are satisfied that this conclusion is not sufficient to
18 by the high threshold standard that has been set and established

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

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
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

SCSL - TRIAL CHAMBER I

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 --

SCSL - TRIAL CHAMBER I

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?

14:08:50 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

SCSL - TRIAL CHAMBER I

Special
14:10:14 Kallon
motion
14:10:53
satisfied
circumstances
by
and
14:11:24 pursuant
the

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
4 Court, seized of the oral application made jointly by the
5 Prosecution and the Defence for Issa Hassan Sesay, Morris
6 and Augustine Gbao and the Prosecution, on 6 December 2007,
7 seeking leave to appeal the decision on the Sesay and Gbao
8 for voluntary withdrawal or disqualification of Honourable
9 Justice Bankole Thompson from the RUF case, noting the
10 submissions made in support of this application and that were
11 advanced by the parties in their oral submissions, I'm
12 that the interests of justice in these particular
13 and the application for leave to appeal be made exceptionally
14 means of an oral application, and pursuant to Rules 7, 73(A)
15 73(B) of the Rules of Procedure and Evidence, and again,
16 to the provisions of Rule 16 of the Rules of Procedure and
17 Evidence, hereby issue the following decision: Rule 73(B) of
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