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SPECIAL COURT FOR SIERRA LEONE
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THE APPEALS CHAMBER

Before: Justice Renate Winter, Presiding
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Raja Fernando

Registrar: Robin Vincent

Date: 13 March 2004

PROSECUTOR **Against** ISSA HASSAN SESAY
(Case No.SCSL-2004-15-AR15)

DECISION ON DEFENCE MOTION SEEKING THE DISQUALIFICATION OF JUSTICE ROBERTSON FROM THE APPEALS CHAMBER

Office of the Prosecutor:

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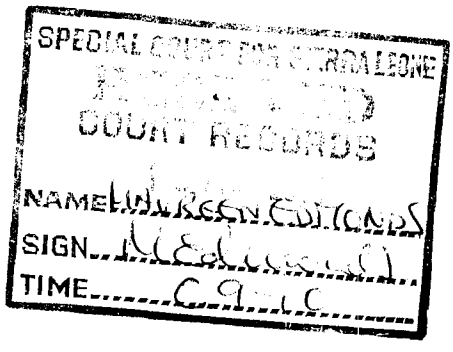
Rupert Skilbeck
Haddijatou Kah-Jallow

for *Augustine Gbao*
Girish Thanki
Professor Andreas O'Shea
Kenneth Carr
Glenna Thompson



THE APPEALS CHAMBER of the Special Court for Sierra Leone ("the Special Court");

HAVING CONSIDERED THE ORAL AND WRITTEN SUBMISSIONS OF THE PARTIES;

I, JUSTICE GEORGE GELAGA KING, HEREBY DECIDE AS FOLLOWS:

1. On 27 February 2004 counsel for Issa Hassan Sesay ("Defence") filed a Motion in the Special Court seeking the disqualification of Justice Robertson from the Appeals Chamber on the grounds that the Judge "has expressed the clearest bias against both the Revolutionary United Front (RUF) and the Armed Forces Revolutionary United Front (AFRC) and thereby has displayed lack of impartiality to the accused indicted as members of these groups and their respective defences."[1]

2. The Defence submits that the matters which constitute the core of the Motion for disqualification are contained within a book entitled *Crimes Against Humanity – The Struggle for Global Justice* that he published in 2002.[2] The Defence contention is that Justice Robertson's opinions, comments and statements are expressed in terms that demonstrate the clearest and most grave bias, or in the alternative, the same objectively give rise to the appearance of bias. The Defence submits that the Judge pursuant to Rule 15(A) of the Rules of Procedure and Evidence of the Special Court ("the Rules") must withdraw from the Appeals Chamber forthwith and permanently. If Justice Robertson does not withdraw, then pursuant to Rule 15(B) of the Rules the remaining members of the Appeals Chamber must submit, disqualify him from the Appeals Chamber. The Motion quotes the following extracts from the book:

"(i) Chapter – "An End to Impunity"

> "Those who order atrocities believe at the time that their power will always enable them to bargain with any new government to let bygones be bygones, and history since Nuremburg has tended to prove them correct – *most bizarrely in Sierra Leone, when by the Lome agreement in July 1999 the UN not only amnestied Foday Sankoh,, the nation's butcher, but rewarded his pathological brutality by making him deputy leader of the government and giving him control of the diamond mines*".[3]

(ii) Chapter – "Slouching Towards Nemesis"

> "*...so amnesties given to perpetrators of such deeds (genocide and torture by frightened or blackmailed government) cannot be upheld by international law, even when agreed by international diplomats. For this reason, the UN was justified in reinterpreting the amnesty*

[1] Motion, para 2.
[2] Geoffrey Robertson, *Crimes Against Humanity – the Struggle for Global Justice* (The New Press, 2002) ("*Crimes Against Humanity*").
[3] *Crimes Against Humanity* , page 220.

given to the despicable Foday Sankoh: it pardoned him only for crimes committed under Sierra Leone law, not international law".[4]

(iii) Chapter - "Lessons from Sierra Leone"

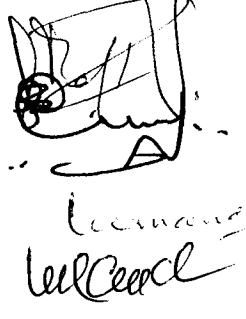
"The Lome Peace Agreement, brokered by the UN, with UK and US support, purchased peace at a most extraordinary price. The democratically elected government was forced to share power with rebels who were pardoned for the most grotesque crimes against humanity, and their leader, liberated from prison, was made Deputy Prime Minister in charge of the nation's diamond resources, the very object of his ruthless campaign. As it happened, not even his capitulation could satisfy Foday Sankoh: his renewed attacks on a ragtag army of UN peacekeepers obliged the former colonial power, Great Britain to return in force, much to the relief of the populace. The case of Sierra Leone provides object lessons in (inter alia)... The impossibility of UN peacekeepers maintaining neutrality in a civil war where one side is given to committing such crimes..."[5]

"Styled the Revolutionary United Front (RUF) it recruited gangs of violent, dispossessed youths and armed them with AK47s for their missions of pillage, rape and diamond - heisting. The RUF had no political agenda: its sponsor was Charles Taylor, Liberia's vicious warlord. But when, in 1995, the RUF threatened to attack Sierra Leone's capital Freetown, the military government paid a South African mercenary force, Executive Outcomes, to protect the city and re-train the government army. They did well enough for elections to be held again in 1996, which returned Ahmed Kabbah, a former UN official. By this time, the RUF had perfected its special contribution to the chambers of horrors: the practice of 'chopping' the limbs of inccoent civilians. It was a means of spreading terror, especially slogan, "Don't vote or don't write", came true for thousands of citizens, forced to lay their right hand on RUF chopping - blocks after they had chosen to vote. Mutilation worked, as a means of terrifying the population, and so the RUF devised more devilish tortures, such as lopping off a leg as well as an arm, sewing up vaginas with fishing lines, and padlocking mouths. Given their level of barbarism, how could Sankoh and the RUF leadership ever have been invited by Western diplomats to share power"[6]

"Jackson chummed up with Charles Taylor and expressed admiration for the imprisoned Foday Sankoh, likening him to Nelson Mandela (who was not a psychopath given to mutilating civilians). Jackson's ignorance and moral blindness does not excuse the Western and UN diplomats who agreed to release Sankoh from prison, bestow upon him an apparently valid amnesty, and hand him the only prize in Sierra Leone worth having - control of the diamond mines.[7]

"The RUF, programmed to kill and pillage and mutilate, continue, continued to do so after Lome, so the UN sent in another 'peacekeeping' mission..."[8]

"So much for hindsight: a warring faction... [referring to the RUF] *...guilty of atrocities on a scale that amounts to a crime against humanity must never again be forgiven sufficiently to be accorded a slice of power: on the contrary, its leaders deserve to be captured and put on trial".*[9]



[4] *Ibid*, page 277.
[5] *Ibid*, pages 465 -466
[6] *Ibid*, page 466.
[7] *Ibid*, page 467.
[8] *Ibid*, pages 467-468.
[9] *Ibid*, page 469.

3. In support of its contention the Defence refers to Rule 15 of the Rules, entitled "Disqualification of Judges". Rule 15(A) states, inter alia:

> "A Judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has a personal interest or concerning which he has or has had any personal association which might affect his impartiality..."

Rule 15(B) states:

> "Any party may apply to the Chamber which the Judge is a member for his disqualification on the above grounds. If the Judge does not withdraw, the issue of disqualification will be determined by the other Judges of that Chamber."

4. The Defence calls in aid some cases in support. At this juncture I shall refer to two of them[10]. The first is *Prosecutor v Anto Furundzija* from the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), which states as follows:[11]

> Para. 177. "The fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognised as being an integral component of the requirement that an accused should have a fair trial".
>
> Para. 179. "as a general rule, courts will find a Judge 'might not bring an impartial and prejudiced mind' to a case if there is proof of actual bias or of an appearance of bias".
>
> Para. 182. (Referring to the jurisprudence of the European Court of Human Rights) "In considering subjective impartiality, the Court has repeatedly declared that the personal impartiality of a Judge must be presumed until there is proof to the contrary. In relation to the objective test, the Court has found that this requires that a tribunal is not only genuinely impartial, but also appears to be impartial. Even if there is no suggestion of actual bias, where appearances may give rise to doubts about impartiality, the Court has found that this alone may amount to an inadmissible jeopardy of the confidence which the court must inspire in a democratic society. The Court considers that it must determine whether or not there are ascertainable facts which may raise doubts as to impartiality'. In doing so, it has found in deciding 'whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality. The standpoint of the accused is important but not decisive... *What is decisive is whether this fear can be held objectively justified.* Thus, one must ascertain, apart from whether a judge has shown actual bias, whether one can apprehend an appearance of bias".
>
> Para. 189 - "On this basis the Appeal Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the statute:
>
> A. A Judge is not impartial if it is shown that actual bias exists
> B. There is an unacceptable appearance of bias if: (i) a judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a judge's disqualification from the case is automatic: or (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

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[10] Motion, para 9-10.

[11] *Prosecutor v Anto Furundzija* ICTY Appeals Chamber: 21 July 2000: Case No. IT - 95 - 17/1 - A, as cited in para 9 of the Motion.

5. The second authority relied upon is *Regina v Bow Street Metropolitan Stipendary Magistrates and others, Ex parte Pinochet Ugarte*, which states that:[12]

> pp 1/2 - "...the fundamental principle that a man may not be a judge in his own cause was not limited to the automatic disqualification of a judge who had a pecuniary interest in the outcome of a case but was equally applicable if the judge's decision would lead to the promotion of a cause in which he was involved together with one of the parties... that in order to maintain the absolute impartiality of the judiciary there had to be a rule which automatically disqualified a judge who was involved... in promoting the same causes... as was a party to the suit".
>
> pp 2/3 - "The court cannot rely on its knowledge of the integrity of the judge concerned to outweigh the appearance of bias to the eye of the bystander. The reference point must remain the reasonable observer. This is consistent with the test laid down under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms".
>
> pp 21 - Lord Hutton - "...I am of the opinion that there could be cases where the interests of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation".

6. The Defence stressed that Justice Robertson "immediately withdraws permanently and forthwith from the Appeal Chamber pursuant to Rule 15(A). Alternatively, in the event that the President does not so withdraw, the Defence requests that the remaining members of the Chamber disqualify the President pursuant to Rule 15(B)."

7. On 1 March 2004, the Prosecution filed its Response and made the following unequivocal and, in my judgement, vital and emphatic concession:

> "...having carefully reviewed the facts as alleged by the Defence and elsewhere, to include a careful reading of the book in question, the Prosecution concedes that there could be a valid argument that there is an appearance of bias on the part of Judge Robertson. The material could lead a reasonable observer, properly informed, to apprehend bias."[13]

8. The Prosecution then goes on to point out "that this motion and whatever resulting decision by the President and/or the Appellate Chamber will ultimately reflect upon the credibility of the Special Court for Sierra Leone and the integrity of its proceedings."[14]

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[12] *Regina v Bow Street Metropolitan Stipendary Magistrates and others, Ex parte Pinochet Ugarte* (No. 2) (House of Lords) (2000) 1 AC 119, as cited in para 10 of the Motion.
[13] Prosecution Response, para 2.
[14] Prosecution Response, para 4.

9. The Prosecution finally urged Justice Robertson and this Chamber to act on the Motion immediately and expeditiously and submitted that prior to the delivery of any appellate rulings pending before this Chamber this Motion be dealt with first and foremost.

10. The Defence seems to have welcomed the Prosecution's Response with alacrity, for a day after receiving that Response it indicated in writing that it would not be filing a Reply. The matter did not end there. On 5 March 2004, Professor Andreas O'Shea and Mrs. Haddijatou Kah-Jallow on behalf of Augustine Gbao and Morris Kallon respectively, with what I can only describe as exuberance, added their clients' names to Issa Sesay's as co-applicants on the face of a document which they chose to call "Joint Response". They apparently thought time was of the essence (and rightly so) and consequently could not, and did not, wait for an Order to that effect (wrongly so).

11. The matter came up for hearing on 9 March 2004 but as we had then not received a statement from Justice Robertson we adjourned to 12 March 2004 by which time the statement should have been issued, as indeed it was. The crux of the learned Justice's statement seems to me to be this passage in which he maintains as follows:

> "...that the Rules provide only for a challenge to a judge from hearing a particular case on appeal, and not for a motion of this kind which seeks to remove a judge from all hearings in relation to all defendants, irrespective of their wishes or contentions. To permit such a challenge would be contrary to the principle of judicial independence, under which a judge must be secure in the office itself, notwithstanding the right of parties to seek his removal from the bench in a particular case, a judge would most sensibly resign his office, but that decision must, if judicial independence is to be maintained, be his decision alone. There are a number of provisions in the Special Court Agreement and the Statute which secure judicial independence. Even when a judge refuses to resign although palpably unfit – e.g. through ill health or criminal conviction, his colleagues may not force his resignation, but have only the power to 'make a recommendation' to the appointing body (Rule 15 (E)). It must follow logically that no motion by a party can, in effect, secure a judge's resignation from the bench, or from any other office – such as President, Presiding Judge or Vice President, to which he has been appointed by his colleagues through an internal Chambers decision.
>
> For the above reasons, I do not think it right to respond to a request to "withdraw" under 15 (B), which Rule envisages "withdrawal" from a particular case on appeal, and not "permanent withdrawal" by which the applicant can only mean "resignation". It would be a precedent for undermining judicial independence, a value without which no court can function."

12. My evaluation of that statement is that Justice Robertson has declined to "withdraw", in the language of 15(B), for the reasons he has given. The question arose during argument whether this Motion was properly before the Appeals Chamber as Issa Sesay did not have any matter

pending in this Chamber. Professor O'Shea submitted that on grounds of "diligence" the moment that an indictee becomes aware, the moment it becomes clear to the indictee that there is evidence which may lead one to believe that a judge is impartial then the motion for disqualification could be brought under 15(A). Further, he relied on Article 13 of the Special Court Statute to the effect that the judges must be independent and impartial and submitted that an application to disqualify could properly be brought on direct reliance on that Statute.

13. The factual position is that Rulings are pending in this Chamber of which the learned Justice is a member of the panel. Those Rulings stem from applications brought by indictees, some of whom are said to be Revolutionary United Front (RUF) members. In my judgement, any RUF indictee who may be affected one way or the other by the decisions, is entitled to bring a motion under Rule 15(A) and 15(B) if he has credible evidence that a member of that panel may be biased or prejudiced, even if that applicant is not a party to the motions for which the Rulings are pending. The present Motion is, therefore, properly before this Chamber.

14. Since Justice Robertson has not withdrawn, the next step is for the other Judges of this Chamber to determine the issue of disqualification as provided for under Rule 15(B). I have referred to passages in Justices Robertson's book cited by the applicant. Those passages speak graphically for themselves and there is no need for me to elaborate on them.

15. It is irrelevant for the purposes of this Ruling whether or not the passages hereinbefore referred to are true or not. The learned Justice is certainly entitled to his opinion. That is one of his fundamental human rights. The crucial and decisive question is whether an independent bystander so to speak, or the reasonable man, reading those passages will have a legitimate reason to fear that Justice Robertson lacks impartiality. In other words, whether one can apprehend bias. I have no doubt that a reasonable man will apprehend bias, let alone an accused person and I so hold.

16. As Lord Hewart C.J. said in *R v. Sussex Justices, Ex parte McCarthy*: "Justice must not only be done, but should manifestly and undoubtedly be seen to be done".[15] On this sacred and overriding principle I accept the submission that Judges must be above suspicion of bias and the presumption of innocence must be respected at all times until guilt is proved.

[15] *Rev v. Sussex Justices, Ex parte McCarthy (1923)* 1 K.B. 256 at page 259.

17. It only now remains for me to deal with Rule 15(E) and I say without hesitation that it does not apply in this case. In this context I agree with Justice Robertson when he says in effect that Rule 15(E) applies only to those cases where a judge is "palpably unfit – e.g. through ill health or criminal conviction". In that circumstance the other Judges of the Chamber may not force his resignation, but may only refer the matter to the Council of Judges which in the words of the Rule "will consider the matter and make a recommendation to the body which appointed the Judge, if required".

18. It follows from all I have said that I find some merit in the application to this extent: that Justice Robertson ought to be disqualified from adjudicating on the following matters:

(i) those motions involving alleged members of the RUF for which decisions are pending, in this Chamber; and

(ii) Cases involving the RUF if and when they come before the Appeals Chamber.

AND SO I ORDER.

JUSTICE WINTER

I agree.

JUSTICE AYOOLA

I agree.

JUSTICE FERNANDO

I agree.

Done at Freetown this 13th Day of March 2004

Justice Winter Presiding | Justice Ayoola | Justice King | Justice Fernando

[Seal of the Special Court for Sierra Leone]