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SCSL-04-15-T
(32148 — 32176)

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SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER I

Before: Hon. Justice Benjamin Mutanga Itoe, Presiding Judge
Hon. Justice Pierre Boutet

Registrar: Mr. Herman von Hebel

Date: 6th of December 2007

PROSECUTOR Against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

Public Document

DECISION ON SESAY AND GBAO MOTION FOR VOLUNTARY WITHDRAWAL OR DISQUALIFICATION OF HON. JUSTICE BANKOLE THOMPSON FROM THE RUF CASE

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HON. JUSTICE BENJAMIN MUTANGA ITOE, PRESIDING JUDGE AND HON. JUSTICE PIERRE BOUTET of Trial Chamber I ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

SEIZED of the Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, filed jointly by Counsel for the First Accused, Issa Hassan Sesay, and Court Appointed Counsel for the Third Accused, Augustine Gbao ("Defence"), on the 14th of November 2007 ("Motion");

NOTING the Statement in Support of the Sesay and Gbao Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case filed by Counsel for the Second Accused, Morris Kallon on the 20th of November 2007;

HAVING RECEIVED the Response to the Motion filed by the Office of the Prosecutor ("Prosecution") on the 20th of November 2007 ("Response"), the Reply thereto, filed jointly by the Defence on the 21st of November 2007 ("Reply"), the Response of the Prosecution to the Kallon Statement in Support and Corrigendum filed on the 22nd of November 2007 and the Addendum filed by the Defence on the 23rd of November 2007;

HAVING RECEIVED the Hon. Justice Bankole Thompson's Comments on Sesay, Kallon and Gbao Joint Motion for Voluntary Withdrawal or Disqualification from the RUF Case Filed Pursuant to Rule 15 of the Rules of Procedure and Evidence ("Comments of Hon. Justice Thompson"), filed on the 28th of November 2007 and the Corrigendum thereto;

CONSIDERING that Justice Thompson has indicated that he will not withdraw voluntarily from the RUF proceedings;

PURSUANT to Articles 17 of the Statute of the Special Court ("Statute") and Rule 15 of the Rules of Procedure and Evidence ("Rules");

PURSUANT to the provisions of Rule 16 of the Rules of Procedure and Evidence;

HEREBY ISSUE THE FOLLOWING DECISION:

I. INTRODUCTION

1. On the 2nd of August 2007, this Chamber rendered a Majority Decision of the Judgement of Trial Chamber I in the case of *Prosecutor v. Fofana and Kondewa* ("CDF Judgement")[1] in which we found the two Accused Persons in the CDF case, Moinina Fofana and Allieu Kondewa, Guilty of crimes charged in the eight-count Indictment and convicted them. We also found them Not Guilty on others, and acquitted them accordingly.[2]

2. In a Separate Concurring and Partially Dissenting Opinion ("Separate Opinion"),[3] Hon. Justice Bankole Thompson held a different view point. He found them Not Guilty on all the eight Counts of the Indictment and acquitted them accordingly.

3. In his Dissenting Opinion which he based principally on the defence of Necessity, Hon. Justice Thompson made certain comments and findings which, according to the Accused persons in the RUF case, were prejudicial to them and to their case.

4. The two Applicants, Issa Hassan Sesay and Augustine Gbao, the First and Third Accused respectively therefore, filed this joint Motion requesting him to recuse himself from continuing to sit by making a voluntary withdrawal as a Judge from their RUF trial, or in the event of his refusal to voluntarily withdraw under the provision of Rule 15(C) of the Rules, for the Chamber to disqualify him pursuant to the provisions of Rule 15(B) of the Rules of Procedure and Evidence.

5. Morris Kallon, the Second Accused, also applied personally in open Court to be allowed to file a memorandum to associate himself with the Motion and his request was granted. He did thereafter file his request for Hon. Justice Thompson's withdrawal or disqualification from the case.

6. This Motion alleges that the factual and legal findings of the Separate Opinion to the Judgement of Trial Chamber I in the earlier case of *Prosecutor v. Fofana and Kondewa*, create an

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[1] *Prosecutor v. Fofana and Kondewa*, SCSL-04-16-T, Judgement (TC), 2 August 2007.
[2] Moinina Fofana was convicted of Counts 2, 4, 5 and 7 and acquitted on Counts 1, 3, 6, and 8. Allieu Kondewa was convicted of Counts 2, 4, 5, 7 and 8 and acquitted on Counts 1, 3 and 6.
[3] *Prosecutor v. Fofana and Kondewa*, SCSL-04-16-T, Judgement (TC), 2 August 2007, Annex C, "Separate Concurring and Partially Separate Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute [Separate Opinion].

appearance of bias on the part of Hon. Justice Thompson with regard to the Accused in the present and second case of *Prosecutor v. Sesay, Kallon and Gbao* ("RUF trial").

7. The Motion was filed before the Chamber pursuant to Rule 15 of the Rules. It has now fallen to the remaining Judges, Hon. Justice Itoe, the Presiding Judge, and Hon. Justice Boutet of the Chamber to render the Decision that now follows.

II. SUBMISSIONS OF THE PARTIES

1. The Motion

8. The Defence submit that in his Separate Opinion to the CDF Judgement, Hon. Justice Thompson "reached conclusions of fact and law that give rise to reasonable doubts concerning his impartiality and/or the express conclusions that evince a strong commitment to the Prosecution's cause/case which gives rise to the appearance of bias."[4]

9. The Defence contend that these conclusions "implicitly indict the RUF as a criminal organisation" and create "an appearance that the Learned Judge has prejudged many of the essential issues in the RUF case."[5] In support of this assertion, the Defence submit that Hon. Justice Thompson unilaterally invoked the defence of necessity on behalf of the CDF Accused and that this demonstrates that he holds views on the "overriding criminality of the AFRC/RUF."[6]

10. Furthermore, it is argued that Hon. Justice Thompson's Separate Opinion characterises the CDF as fighting against "imminent evil, anarchy, and tyranny" and that certain statements made and words used by Hon. Justice Thompson, evince "political and judicial support for any armed forces engaged in combat with the RUF."[7] The Motion contrasts what is stated to be Hon. Justice Thompson's portrayal of the CDF as patriotic, altruistic and legitimate with the fact that "[t]he AFRC/RUF and inferentially its members (particularly its senior commanders), appear to be characterised as an 'evil' seven times".[8]

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[4] Motion, para 3.
[5] *Ibid.*, para 6.
[6] *Ibid.*, para 11.
[7] *Ibid.*, para 5.
[8] *Ibid.*, para 12.

11. The Defence contend that Hon. Justice Thompson found in his Separate Opinion that "the AFRC/RUF members shared a criminal enterprise that was marked by anarchy, tyranny and evil,"[9] but that he "seems to be overlooking the human rights violations perpetrated against Sierra Leonean civilians" by the CDF.[10]

12. The Defence further submit that Hon. Justice Thompson's purported use of strong and equivocal terms in relation to "the AFRC/RUF" is quantitatively and qualitatively no different from the language which led to the disqualification of Hon. Justice Robertson.[11] They argue that this language creates the perception, not simply that the RUF Accused have been deprived of their right pursuant to Article 17(3) of the Statute to be considered innocent until proven guilty, but also that a substantial burden has been created against the Accused.[12] The Defence therefore conclude that "as a consequence of the Learned Judge's views and the shifting burden for the RUF to 'prove' its innocence, the RUF Accused can expect to be convicted by the Learned Judge, irrespective of the law or the evidence."[13]

13. In summary, the Defence argue that the Separate Opinion of Hon. Justice Thompson betrays his emotional and intellectual prejudgement of the RUF, its aims, objectives and members,[14] and that "a reasonable fair minded person, properly informed, confronted by a judge who has expressed such clear-cut, wide-ranging and unequivocal findings about the object, purpose and activities of the AFRC/RUF would likely apprehend bias."[15] As such, in circumstances where Hon. Justice Thompson has elected not to withdraw voluntarily from continuing to hear the Case, the Accused Persons call the Chamber to order his disqualification for the remainder of the proceedings.[16]

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[9] *Ibid.*, para 15.
[10] *Ibid.*, para 14.
[11] *Ibid.*, para 16.
[12] *Ibid.*, para 19.
[13] *Ibid.*, para 19.
[14] *Ibid.*, para 18.
[15] *Ibid.*, para 20. See also para 8 in which the Defence refer to the test for apparent bias as it was expressed by the Appeals Chamber of the Special Court in *Prosecutor v. Sesay*, SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004, para 15 [Robertson Disqualification Decision]. See also para 3, note 6, wherein the Defence quotes from the headnote to the Judgement of the United Kingdom's House of Lords in *R v. Bow Street Stipendiary Magistrates and others, ex parte Pinochet Ugarte* (No 2) [2000] 1 AC 119 [*Pinochet No 2*].
[16] Motion para 22.

2. The Response

14. The Prosecution reminds the Chamber that there exists a presumption of impartiality in relation to the functioning of any Judge, and that this presumption can only be rebutted by a reasonable apprehension of bias that has been firmly established.[17] The Prosecution argues that the correct test for bias in the present case is not that used by the House of Lords in *Pinochet (No 2)* but rather, that adopted by the Appeals Chamber of the ICTY in *Prosecutor v. Furundzija* which is: whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[18] The Prosecution emphasises the finding of the ICTY Appeals Chamber in that case that the "reasonable person" must be an informed person with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality of the Bench and their expression in the judicial oath.[19] The Prosecution also points to jurisprudence of the ICTY which, it claims, suggests that a Judge ought not to be disqualified on the basis of a position taken in a preceding case.[20]

15. The Prosecution asserts that the Motion mischaracterises the findings of fact and law made by Hon. Justice Thompson in his Separate Opinion and that the Defence have selectively cited passages or taken them out of context.[21] It is submitted further, that the findings made by Hon. Justice Thompson are based exclusively upon the evidence heard in the course of the CDF trial, that many of the phrases impugned by the Defence are supported by judicially noticed facts or facts accepted by the Defence, and that the Separate Opinion "does not refer to the liability of the RUF, let alone of the Accused Sesay, Kallon and Gbao."[22]

16. The Prosecution also rejects the Defence contention that there was any finding by Hon. Justice Thompson that "the AFRC/RUF members shared a criminal enterprise that was marked by anarchy, tyranny and evil,"[23] and asserts that the Separate Opinion does not refer to crimes or criminal liability other than that of Fofana and Kondewa or contain any finding that there existed

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[17] Response, paras 5-7.
[18] *Ibid.*, paras 8. See also *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgement (AC), 21 July 2000, paras 189-190 [*Furundzija* Appeal Judgement].
[19] Response, para 10.
[20] *Ibid.*, para 13.
[21] *Ibid.*, paras 14, 19-23.
[22] *Ibid.*, paras 14-24.
[23] *Ibid.*, para 15.

a joint criminal enterprise between the AFRC and the RUF.[24] In addition, the Prosecution argues that the Defence assertion that the views expressed by Hon. Justice Thompson are quantitatively and qualitatively no different from those which led to the disqualification of Hon. Justice Robertson, is without merit, the language used by the latter having been "significantly more graphic."[25] Furthermore, the Prosecution contend that any Judge appointed to the Special Court pursuant to Article 13 of the Statute would conclude that the harm done in Sierra Leone between 1991 and 2002 was reprehensible, but that is quite distinct from the judicial role in considering and apportioning liability.[26]

17. In conclusion, it is the contention of the Prosecution that nothing in the Separate Opinion of Hon. Justice Thompson suggests that he is incapable of applying his mind to the merits of the case against the Accused without prejudice or partiality. Accordingly, no reasonably informed observer would apprehend bias on the part of Hon. Justice Thompson against the Accused.[27] For this reason, the Prosecution requests that the Motion be dismissed.

3. The Reply

18. In their Reply the Defence reiterates that, in the context of a finding that the commission of criminal acts on the part of the CDF was a necessary evil, the use of words and phrases such as "fear, utter chaos, widespread violence," "alarm and despondency" and "evil" as well as other expressions which are "emotive" and "connote criminality" would lead a reasonable person to conclude that grave crimes were attributable to the enemies of the CDF[28] and because Hon. Justice Thompson did not distinguish between the AFRC and RUF factions, it is argued that this implication of criminality entails an abandonment of the impartiality required of a Judge of the Special Court under Article 13 and implies a degree of prejudgement which creates "an undeniable appearance of bias against the RUF and the RUF accused."[29]

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[24] *Ibid.*, para 25.
[25] *Ibid.*, para 25.
[26] *Ibid.*, para 27.
[27] *Ibid.*, para 28.
[28] Reply, paras 5-11.
[29] *Ibid.*, para 12-15.

III. SUMMARY OF THE COMMENTS OF HON. JUSTICE THOMPSON

19. Hon. Justice Thompson raises three preliminary issues his Comments. He contends that the Motion is repugnant to the notion of judicial immunity according to Article 12(1) of the *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*[30] which in his view flows from Article 13(1) of the Statute. Secondly, he asserts that Rule 15 ought properly to be construed as applying only to matters and issues of an extrinsic or extrajudicial nature, and thirdly, that Rule 15 should not be understood as providing a mechanism for circumventing the appeals procedure provided for by Part VII of the Rules.[31]

20. In relation to the substantive issues raised by the Motion, Hon. Justice Thompson states that his Separate Opinion does not attribute anarchy and rebellion to the AFRC or the RUF and that his use of the term "evil" was not intended to refer to either faction, but rather to the destabilisation and disintegration of the Sierra Leonean State.[32] Likewise, Hon. Justice Thompson denies that in his Separate Opinion he made any finding to the effect that the AFRC and RUF authorities were engaged in a joint criminal enterprise.[33] It is his contention that the Motion is founded on "a complete misreading and misinterpretation" of his words out of context.[34]

21. Hon. Justice Thompson reminds the Chamber that nowhere in his Separate Opinion did he imply that it is settled law that the principle of necessity is a defence to violations of International Humanitarian Law. He reiterates that, in his view, the application of the principle depends on the facts of a given case; that the principle may, in certain circumstances, excuse (but never justify) criminal conduct, and that, in the peculiar circumstances of the CDF case, the criminal conduct of the Accused was excusable in accordance with the principle.[35]

22. He argues that even if he is mistaken in this view, the proper allegation is that of error of law, not of bias or of lack of impartiality.[36] Hon. Justice Thompson also rejects the Defence's suggestion that by accepting the defence of Necessity and acquitting the CDF Accused, he accepted

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[30] Comments of Hon. Justice Thompson, para 7.
[31] *Ibid.*, paras 9-10.
[32] *Ibid.*, paras 11, 19.
[33] *Ibid.*, para 21.
[34] *Ibid.*, para 11.
[35] *Ibid.*, para 16.
[36] *Ibid.*, para 23.

the Prosecution's case in the RUF trial as founded on flawed logic.[37] Hon. Justice Thompson concludes his Comments by stating that "[b]y no judicial calculus have I, in my Separate Concurring and Partially Dissenting Opinion, determined in advance, the guilt or innocence of the Accused in the RUF case."[38]

IV. APPLICABLE LAW

23. Rule 15 of the Rules provides for the disqualification of a Judge in the following terms:

> (A) A Judge may not sit at a trial or appeal in any case in which his impartiality might reasonably be doubted on any substantial ground.
>
> (B) Any party may apply to the Chamber of which the Judge is a member for the disqualification of the said Judge on the above ground.

24. Article 13(1) of the Statute of the Special Court on the appointment and qualification of Judges provides:

> The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

25. The relevant portions of Article 17 of the Statute state that:

> 2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.
>
> 3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

[37] *Ibid.*, paras 18, 23.
[38] *Ibid.*, para 26.

V. DELIBERATIONS

1. The Chamber's Observations on the Preliminary Comments of Hon. Justice Thompson

1.1. Judicial Immunity

26. In his Comments, Hon. Justice Thompson suggests that his Separate Opinion cannot be challenged in this context due to the principle of judicial immunity for anything done in the performance of judicial functions.

27. We find that Hon. Justice Thompson's reliance on the diplomatic privileges and immunities that are granted to the Judges, the Prosecutor, the Registrar and their families in accordance with Article 12 of the *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone* and his proffered understanding of what judicial immunity really means in the context of this case, is misplaced and misguided. The protections granted by this provision are clearly circumscribed by the Article and are completely irrelevant to the present Motion.

28. A Judge can never enjoy immunity from allegations of bias. In both national systems and in International Tribunals, it has always been accepted that a Party has the right to challenge any alleged partiality on the part of a Judge. We consider that this is an essential component of the right of an accused to a fair trial and is a necessary ingredient to ensure that the public have confidence in the judicial system. To deny the right of an accused person to challenge the impartiality of a Judge would be inconsistent with the rules of natural justice.

29. We are of the opinion, and do so hold, that the Immunities referred to, not only under Article 12 of the *Agreement Between the United Nations and the Government of Sierra Leone* of the 16th of January 2002, but also as provided for in Articles 3 and 14 of the *Headquarters Agreement Between the Government of Sierra Leone and the Special Court* dated the 21st of October 2003, are not accorded to a Judge to protect him against proceedings based on actions such as those enunciated in this

Motion for which he does not, in our opinion, and like all of us Judges, enjoy any such immunity.[39]

30. In fact, the provisions of Article 13 are instead intended to protect the Judge only against any criminal or civil suit brought against him in a municipal court in Sierra Leone where he enjoys the immunity, certainly as a Judge but more importantly, in his capacity as a Judge serving as a member of the Special Court and who in that capacity is afforded the privileges and protection of a Diplomat in this International Organisation functioning under a Headquarters Agreement signed with the host Government which is what entitles him to take advantage of and enjoy the benefits of Diplomatic Immunities that are provided for in the Vienna Conventions.

31. However, in the exercise of his profession within the context of judicial independence, like Hon. Justice Thompson did, the interests of justice are better served if the hands of the Judge, remain unfettered but only to the extent of his independence in taking certain initiatives and arriving at certain legal or factual conclusions, and strictly within the context and confines of the Law. This, we would like to observe, does not mean, nor does it necessarily lead to the conclusion that he must have been right or wrong in having acted the way he did or in expressing his views on a particular issue within the context and confines of the Law.

32. It is in acknowledgement of this judicial latitude accorded to Judges that the law, in order to insulate them from any extra legal recriminations or civil or other suits or actions taken against them and arising from opinions expressed in the exercise of their judicial functions, has created appellate jurisdictions that are designed, and intended in such circumstances, to serve as legal avenues to readdress those contentious or litigious legal and factual issues that may have been raised by the Judge to the detriment of any of the Parties. This is a subject matter that is different and must be clearly distinguished from the process that we are dealing with.

33. In taking this stand however, we are of the view that the responsibility imposed on the Judge that goes to the very root of his designation or appointment to that position is, amongst others, the obligation, not only to be reserved, but also to be measured in his expression where it

[39] See, for example, Robertson Disqualification Decision and *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004 [Winter Disqualification Decision].

becomes necessary for him to make known his opinion on issues that affect the Party or the Parties before him.

34. In as much therefore as we accept and concede, that a Judge may, through the exercise of judicial independence, enjoy an unfettered latitude to express his judicial opinions, it is equally a primordial obligation that he does so in the utmost discretion and without appearing, even if he does not intend doing so, to be manifesting a bias against any Party and in so doing, implicitly, again, even though he may not have intended it, taking sides with a particular cause thereby exposing himself to a violation, in a broader sense of the doctrine, enshrined in the cardinal principle of *nemo judex in sua causa* which is intended to cover classical situations of interestedness as was the case of Lord Hoffmann in the *Pinochet* Case.[40]

35. It is our view therefore, that Hon. Justice Thompson's Dissenting Opinion which acquitted the 2 Accused Persons on all the eight Counts of the Indictment, was a judicial act that cannot subject or expose him to any questioning or to any civil or criminal action.

36. The justification for this is because he wrote his Opinion in the exercise of his judicial independence which he enjoys as a Judge, and which, in ordinary circumstances and if it were not a Dissenting Opinion which we also hold, taking the cue from our Appeals Chamber Decision, cannot be appealed against, can only be contested through the appeals process and not through an action in any form against him.

37. This doctrine of judicial immunity dates as far back as the 1872 U.S. Supreme Court Decision of *Bradley v. Fisher*,[41] the rationale behind it being to protect Judges' independence by guaranteeing that litigants whom they might anger or disappoint while carrying out their duties, cannot then sue them for damages.

38. It would indeed amount to a judicial misnomer and a glaring aberration if this fundamental right and privilege which Hon. Justice Thompson enjoys as a Judge, were not upheld by our Decision.

39. In saying this we are of the opinion that if one of the conditions to be fulfilled by a Judge under Article 13(1) of the Statute for an appointment to that position in this Court, is that he

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[40] *Pinochet No 2.*

[41] *Bradley v. Fisher*, [1872] 80 US 335 (U.S.S.C.).

should be endowed and imbued, *inter alia*, with the virtue of impartiality, it is implied, and indeed goes without saying, that if in the exercise of his judicial functions, he is deemed to have, or indeed, violates any of the conditions of his appointment or of his oath of office, he should, voluntarily withdraw from the case, and if he does not, may be subjected to challenges if the aggrieved Party so desires and requests, on the propriety of his continuing to sit in a particular case.

40. We say this because the right to challenge the impartiality of a Judge and the possibility of recusing him, or for him to voluntarily recuse himself and to withdraw from the proceedings, is universally recognised. It is founded on the solid grounds that it is a crucial and fundamental norm and tool common to civilised judicial systems and practices intended to ensure the observation by Judges, of professional values, ethics and standards and to protect the fundamental human rights of users of the judicial system and even the public generally, from a possible judicial autocracy of the Judges that could go against and contravene the very values that justice is supposed to serve in a democratic society.

41. The recusal procedure therefore, as a right and a tool that serves as a check and balancing mechanism over the judicial action of Judges who are charged with dispensing justice to all and sundry, cannot be inhibited, disregarded or sacrificed on the alter of any claim whatsoever, albeit of the judicial immunity of a Judge from any process.

42. In taking this position, we recognise that a Judge enjoys absolute protection and immunity from any criminal or civil suit that may be instituted against him which arises from or is founded on acts or decisions made or taken by him in the lawful exercise of his judicial functions.

43. However, we say, from the foregoing analysis, that this does not include and cannot apply to any action in recusal that is founded on the provisions of Rule 15 of our Rules of Procedure and Evidence because it would, in this context, amount to a flagrant violation of the Statutory rights of the Accused who have brought this motion, to a fair and public hearing as enshrined in the provisions of Article 17(2) of the Statute of this Court because we are, without any hesitation whatsoever, of the opinion that the fairness of the trial implies and includes the right to be tried by a Judge who is impartial and who has been appointed on the understanding he will continue to remain impartial.

44. Our stand in this regard is further emphasised by the understanding that judicial independence in fact implies and connotes impartiality. In fact, a Judge cannot profess to be acting independently when he knows that he is or may be perceived to be acting partially. In this regard, we are of the opinion that independence is bestowed on Judges because it is not only intended to protect them from Executive and legislative interferences or subjugation, but also to serve the public and not their personal or private interests and that if a fundamental public interest, like a breach of the obligation for a Judge to be impartial were in conflict with his claim to judicial independence, the former certainly does, will, and should invariably prevail.

1.2. Scope of Rule 15

45. The second argument of Hon. Justice Thompson is that Rule 15 of the Rules applies only to acts or words outside the scope of the judicial process. The Chamber notes, firstly, that Rule 15 contains no such limitation. It instead states generally and very broadly, that a Judge may not sit on a matter in which his impartiality "might reasonably be doubted on a substantial ground". The jurisprudence of the *ad hoc* tribunals has elaborated a test for the appearance of bias that is similarly broad in scope even though their corresponding Rule is not as broad as our Rule 15.

46. The Chamber also observes that the impartiality of Judges has often been questioned on the basis of things that were done or said within the context of the judicial proceedings. As will be discussed below, there have been cases before the ICTY and the ICTR wherein there have been allegations that Judges are biased on the grounds of decisions rendered within the context of the proceeding itself. In all of these cases, an analysis was conducted by either the Court or the Bureau to determine if the impugned decisions created an appearance of bias. Thus, even with the more restrictive wording of the corresponding disqualification provision in the ICTY and ICTR Rules, the Courts have clearly considered that decisions rendered within a judicial proceeding could be the subject of challenges on the basis of impartiality and may be found to create an appearance of bias.[42]

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[42] See, for example, *Prosecutor v. Blagojevic, Obrenovic, Jokic and Nikolic*, IT-02-60, Decision on Blagojevic's Application Pursuant to Rule 15(b) (Bureau), 19 March 2003, para 14 [*Blagojevic* Decision]; *Prosecutor v. Karemera, Rwamakuba, Ngirumpatse and Nzirorera*, ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para 12 [*Karemera* Decision].

47. It simply cannot be otherwise. A Judge in the discharge of his duties, as we have already said, has the right to express his opinions in the fulfilment of his judicial functions but we also say, again as we have already alluded to, that where that opinion also creates an appearance of bias, the Party is entitled to challenge the impartiality of the Judge.

1.3. Effect of the Right to Appeal

48. The fact that a decision or a judgement rendered within the context of a judicial proceeding may be appealed does not alter nor does it preclude an Accused from raising such fundamental issues at any time during the trial. An appeal may be brought by the Parties to a case in order to challenge a perceived procedural error, an error of law or an error of fact which has occasioned a miscarriage of justice in that particular trial – which, in this situation, would be the CDF trial.[43] It is our view that an application for disqualification is based on entirely different grounds and relates only to determining whether or not an appearance of bias or actual bias has been established.

49. The present Motion is an allegation by the Accused in the RUF case, that the opinions, statements and findings of Hon. Justice Thompson in his Separate Opinion to the CDF Judgement, create an appearance of bias with regard to the RUF proceedings. In view of the fact that the Accused in the RUF trial are different and are involved in a different trial that is independent of that of the CDF, they have no *locus standi* in the CDF proceedings. Moreover, we note that even the parties to the CDF cannot appeal against the findings of Hon. Justice Thompson in his Separate Opinion to the CDF Judgement on the grounds that our Appeals Chamber has held that a concurring or dissenting opinion cannot be appealed.[44]

2. Test for Bias

50. Rule 15(A) of the Rules states that "a Judge may not sit at a trial or appeal in any case in which his impartiality might reasonably be doubted on a substantial ground". This wording as we have noted, is broader than the wording in the equivalent provision that are applicable in the

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[43] Rule 106 of the Rules.

[44] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone (AC), 11 September 2006, para 41: "It must be emphasised, however, that the operative portion of a judgement or decision is that of the majority. No appeal may arise from a concurring or dissenting opinion."

ICTY and in the ICTR whose provisions state that "a Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality".[45]

51. The jurisprudence of the International Tribunals has been consistent in articulating the test for bias with respect to Judges sitting on a particular trial. The Courts have held that a Judge will be held to be partial if he is either subjectively biased or if the surrounding circumstances give rise to an objective appearance of bias. In *Furundzija,* the Appeals Chamber of the ICTY held that:

> A Judge is not impartial if it is shown that actual bias exists
>
> 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, of if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
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> ii) The circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[46]

52. The apprehension of bias test is a reflection of the fact that "justice should not only be done, but should be seen to be done".[47] The European Court of Human Rights has emphasised

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[45] Rule 15(A) of the ICTR Rules of Procedure and Evidence and Rule 15(A) of the ICTY Rules of Procedure and Evidence.

[46] *Furundzija* Appeal Judgement, para 189. This formulation has been adopted in subsequent jurisprudence of the ICTY and the ICTR and approved of by the Appeals Chamber of the Special Court: see Winter Disqualification Decision, para 23.

[47] *R v. Sussex Justices* [1924] 1 KB 256, 259, cited in *Furundzija* Appeal Judgement, para 195; *Prosecutor v. Seromba*, ICTR-01-66-T, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para 9 [*Seromba* Disqualification Decision]. This is similar to the test for bias applied in many national jurisdictions. In *Webb*, the High Court of Australia found that in determining bias, the court must consider whether the circumstances "would give a fair-minded and informed observer 'a reasonable apprehension of bias'" (*Webb v. The Queen*, (1994) CLR 41, 30 June 1994). In Canada, the test "contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias must be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances" (*R v. RDS*, [1997] 3 SCR 484, para 111 [*RDS*]). In South African Rugby Football Union, the Supreme Court of South African held that "the question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel", (*President of the Republic of South Africa and Others v. South African Rugby Union and Others*, Judgement on Recusal Application, 1999 (7) BCLR 725 (CC), 3 June 1999) [*South Africa Rugby Football Union* Decision].

that "[w]hat is at stake is the confidence which the Courts in a democratic society must inspire in the public."[48]

53. The reasonable observer in this test must be "an informed person, with knowledge of all of the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties that Judges swear to uphold".[49]

54. The test for the reasonable apprehension of bias that has been formulated by the Appeals Chamber of the Special Court, essentially in similar terms, is as follows:

> The crucial and decisive question is whether an independent bystander so to speak, or the reasonable man, reading those passages will have a legitimate reason to fear that [the Judge] lacks impartiality. In other words, whether one can apprehend bias.[50]

3. Analysis of the Allegations of Appearance of Bias

55. The Defence Motion is premised on the argument that the Separate Opinion of Hon. Justice Thompson in the CDF Trial Judgement creates a reasonable appearance of bias against the Accused in the RUF case. This Chamber emphasises that the fact that a Judge hears two different criminal trials that arise out of the same series of events is not enough to merit disqualification. We are comforted in this opinion by the Decision of the Appeals Chamber of the ICTR that was delivered as recently as the 28th of November 2007, in which their Learned Lordships stated in the published French version of their Decision:

> La Chambre d'appel tient à rappeler que les juges du Tribunal et du TPIY traitent souvent plusieurs dossiers qui, de par leur nature même, portent sur des questions qui se recoupent. On présumera, en l'absence de preuve du contraire, qu'en raison de leur formation et de leur expérience, les juges tranchent en toute équité les questions dont ils sont saisis, en se fondant uniquement et exclusivement sur les moyens de preuve admis dans l'affaire en question.[51]

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[48] *Ferrantelli and Santangelo v. Italy*, 26 June 1996, 23 EHRR 288, para 58.

[49] *Furundzija* Appeal Judgement, para 190, quoting *RDS*, para 111. See also *Prosecutor v. Brdjanin and Talic*, Decision on Joint Motion to Disqualify the Trial Chamber Hearing the Brdjanin-Talic Trial (Presiding Judge), 3 May 2002, para 17 [*Brdjanin and Talic* Decision].

[50] Robertson Disqualification Decision, para 15.

[51] *Media Case* Appeal Judgement, para 78 (original footnotes omitted). While an official English translation is not yet available, an unofficial translation is as follows: "The Appeals Chamber would like to reiterate that all Judges of the

56. The ICTR Appeals Chamber in the above decision also cited with approval the finding of the Bureau in *Kordic and Cerkez* that:

> [A]s is shown by the jurisprudence on the subject, it does not follow that a judge is disqualified from hearing two or more criminal trials arising out of the same series of events, where he is exposed to evidence relating to those events in both cases.[52]

57. In *Brdjanin and Talic*, the Court stated that the relevant question is:

> [W]hether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgement) would be that [the Judge], having participated in the Tadic Conviction Appeal Judgement, might not bring an impartial and unprejudiced mind to the issues in the present case [. . .] It is not whether she would merely decide these issues in the same way as they were decided in that case. The distinction is an important one.[53]

58. The Chamber is also mindful of the following statement of Justice Mason from the case of *Re JRL, ex parte CJL* that was subsequently adopted by the High Court of Australia:

> [T]here may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way.[54]

59. The Chamber is, therefore, satisfied that the mere fact that Hon. Justice Thompson, like the other Judges of Trial Chamber I, has rendered his judgement in the CDF case and continues

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

[52] *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-PT, Decision on Application Requesting Disqualification of Judges Jorda and Riad (Bureau), 4 May 1998.

[53] *Prosecutor v. Brdjanin and Talic*, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge (TC), 18 May 2000, para 19. In this case, the Court considered an allegation that because Judge Mumba had determined in the Appeals Chamber decision in *Tadic* that the conflict was international, she was biased since she had to determine the nature of the conflict in the *Brdjanin* case, where the facts were identical. The court held that there was no reasonable apprehension of bias in that case (para 20).

[54] *Re JRL, ex parte CJL* (1986) 161 CLR 342, p. 352 (Australia). This statement was subsequently adopted in a unanimous judgement of the High Court of Australia in *Re Polites, ex parte Hoyts Corporation Pty Ltd* (1991) 65 ALJR 444, p. 448.

to sit in the RUF case which may relate in part to the same series of events does not disqualify him. The Defence have not suggested otherwise.

60. This does not, however, dispose of the matter. In our opinion, the issue before us is whether the language, the opinions and the findings contained in the Separate Opinion create an appearance of bias.

61. The Chamber notes that allegations of bias have been brought before both the ICTY and the ICTR on the basis of decisions rendered by the Chamber within the same proceeding. In these cases, the Bureaus have held that:

> While the Bureau would not rule out entirely the possibility that decisions rendered by a Judge or Chamber by themselves could suffice to establish actual bias, it would be a truly extraordinary case in which they would.[55]

62. The ICTR Bureau later clarified the procedure to be adopted where decisions are alleged to constitute grounds for disqualification:

> Where such allegations are made, the Bureau has a duty to examine the content of the judicial decisions cited as evidence of bias. The purpose of that review is not to detect error, but rather to determine whether such errors, if any, demonstrate the judge or judges are actually biased, or that there is an appearance of bias based on the objective test [of the reasonable observer]. Error, if any, on a point of law is insufficient; what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law, on which there may be more than one possible interpretation, or to the assessment of the relevant facts.[56]

63. The Chamber accepts this to be an appropriate procedure to be adopted in our analysis of the allegations of bias. It will, therefore, now turn to an analysis of the Separate Opinion of Hon. Justice Thompson in the CDF Judgement to determine, not if the findings he made that the defence of necessity applied to the Accused in the CDF case is or could constitute an error of law, but rather if the Separate Opinion could reasonably be perceived as creating an appearance of bias with regard to the RUF Accused.

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[55] *Blagojevic* Decision, para 14; *Karemera* Decision, para 12.

[56] *Karemera* Decision, para 13. See also, *Prosecutor v. Ntahobali*, ICTR-97-21-T, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para 12; *Seromba* Disqualification Decision, para 12; and *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-T, Decision on Motion for Disqualification of Judges (Bureau), 28 May 2007, para 10.

64. In doing so, the Chamber finds that it must consider the Separate Opinion of Hon. Justice Thompson in light of the full context of the CDF Judgement and also in light of the context of the RUF trial that is currently before the Trial Chamber.

65. The Chamber is also guided by the view of Justice Buergenthal of the International Court of Justice in his Dissenting Opinion to the Order of 30 January 2004 in the case of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* wherein he found that it was important to examine the full context of any comments that are alleged to demonstrate bias. He stated:

> A court of law must be free and, in my opinion, is required to consider whether one of its judges has expressed views or taken positions that create the impression that he will not be able to consider the issues raised in a case [...] in a fair and impartial manner, that is, that he may be deemed to have prejudged one or more of the issues bearing on the subject-matter of the dispute before the Court. That is what is meant by the dictum that the fair and proper administration of justice requires that justice not only be done, but that it also be seen to be done. In my view, all courts of law must be guided by this principle [...]
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> It is technically true, of course, that Judge Elaraby did not express an opinion on the specific question that has been submitted to the Court by the General Assembly of the United Nations. But it is equally true that this question cannot be examined by the Court without taking account of the context of the Israeli/Palestinian conflict and the arguments that will have to be advanced by the interested parties in examining [the case before the Court].[57]

66. As a preliminary matter, we note that Hon. Justice Thompson endorsed "the entire findings of fact embodied in the Main Judgement" with the exception of evidence related to cannibalism and the permissibility of initiations.[58] Hon. Justice Thompson also found that the facts that were established by the Prosecution's evidence did prove the factual guilt of the Accused on some of the counts in the Indictment.[59] Where he differed from the Main Judgement related primarily to his finding, raised *proprio motu*, that the Accused were not guilty of the war crimes for

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[57] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, ICJ Reports 2004, p. 3, Dissenting Opinion of Judge Buergenthal, paras 11, 13.
[58] Separate Opinion, paras 56 and 3.
[59] *Ibid.*, para 57.

which they were convicted in the Main Judgement on the grounds that their actions were justified by the defences of necessity and the doctrine of *salus civis suprema lex est.*[60]

67. The Defence Teams contend and submit, that Hon. Justice Thompson unilaterally invoked the defence of Necessity on behalf of the CDF Accused and that this demonstrates that he holds the views on the "overriding criminality of the AFRC/RUF".

68. On this submission, the Chamber observes that the Majority Judgement on the substantive case and the Dissenting Opinion were both published on the 2nd of August 2007. However, the Chamber Majority was not afforded the opportunity to and did not address the issue relating to that defence of Necessity solely because it was never raised by the Defence nor did its applicability to the circumstances of this case, feature for a determination at any stage before the delivery of Our Majority Decision.

69. We however state here, that whilst we accept that it is clear and established, as the Defence contends, that Hon. Justice Thompson, unilaterally and *ex improviso*, raised the defence of Necessity without having given the Parties the prior opportunity to present their arguments on it, we are not persuaded by the Defence's further arguments that he so raised this defence because he holds views, and to quote them, on the "overriding criminality of the AFRC/RUF".

70. We observe that Hon. Justice Thompson does not specifically refer to either the Accused in the RUF case or to the RUF itself in his Opinion. Instead, he speaks of the CDF fighting to restore the lawful and democratically elected Government of President Kabbah to power after the coup by the AFRC on the 25th of May 1997.[61]

71. When addressing the issue of the greater evil that would justify the lesser evil of the actions by the CDF, Hon. Justice Thompson speaks of "tyranny, anarchy and rebellion",[62] "a rebellion against the legitimate government of a State",[63] an "intensely conflictual situation... dominated by utter chaos, fear, alarm and despondency",[64] and the "immediate threat of harm purportedly

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[60] *Ibid.*, paras 63 and 65.
[61] *Ibid.*, paras 68-69 and 91.
[62] *Ibid.*, para 69.
[63] *Ibid.*, para 88.
[64] *Ibid.*, para 90.

feared, to wit, fear, utter chaos, widespread violence of immense dimensions resulting from the *coup*, and intense discomfiture, locally and nationally".[65]

72. Having so opined, we are equally of the view however, that the expressions and terms used by Hon. Justice Thomspon as outlined by the Defence Teams in their submissions and which form the basis for their introducing this Motion, could be perceived or understood as aggressive, offensive and injurious to the interests of the three aggrieved RUF Defendents and could have created, even if the Learned Judge did not intend those consequences, an appearance of bias against their cause and their interests as Accused Persons who have the right and are entitled, as we have already observed, to be tried by a Judge only if his impartiality did not have the potential of being considered, on a first thought, as having been compromised, to their detriment and to those of their interests.

73. A review of the context of the entirety of the CDF Judgement, however, makes it clear that Hon. Justice Thompson is actually referring to the actions of both the AFRC and the RUF. In the course of the CDF trial, the Trial Chamber took judicial notice of the fact that groups "commonly referred to as the RUF, AFRC, and CDF were involved in armed conflict in Sierra Leone" and that the juntas lost power around the 14th of February 1998.[66] The factual findings in the CDF Judgement, with which Hon. Justice Thompson has expressed his total agreement, state that the CDF began to operate as an organization in approximately September 1997.[67] The findings of fact are replete with references to the CDF forces fighting the RUF,[68] the "rebels"[69] and the "juntas".[70]

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[65] *Ibid.*, para 91(ii).

[66] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, Decision on Prosecution Motion for Judicial Notice and Admission of Evidence (TC), 2 June 2004, Annex I and II, as modified by *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-AR73, Fofana - Decision on Appeal against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence" (AC), 16 May 2005, p. 20.

[67] CDF Judgement, paras 302-303.

[68] CDF Judgement, paras 375, 416, 622, 637, 667 and 716.

[69] CDF Judgement, paras 62, 293, 294, 303, 321, 332, 334, 354, 375, 377, 379, 380, 383, 391-394, 398-399, 404, 406, 409, 416, 469-470, 518, 563, 566, 569, 573, 582, 595-599, 610, 621, 622, 654, 674, 676, 680, 683-685 and 686. The Chamber took judicial notice in the RUF trial of the fact that the Sierra Leonean population referred to the RUF and the AFRC/RUF forces as "rebels". *See Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Consequential Order Regarding Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence, Facts K and S, 24 May 2005 [Judicial Notice Consequential Order].

[70] CDF Judgement, paras 321-325, 331, 335-336, 360, 421, 423, 425, 439-440, 442, 449, 461-462, 463, 464, 473, 483, 495, 497, 499, 502, 548, 552, 569-570, 585, 595, 598, 602-603, 608, 615 and 652. The Chamber took judicial notice in the RUF trial of the fact that the Sierra Leonean population referred to the AFRC/RUF forces as "Juntas". *See* Judicial Notice Consequential Order, Fact S.

74. In the RUF case, this Chamber has taken judicial notice of the fact that the RUF formed an alliance with the AFRC shortly after the coup and that leaders of both groups formed the governing body that exercised sole executive and legislative authority within Sierra Leone during the Junta period. We also took judicial notice of the fact that the AFRC/RUF alliance continued after they were forced from power about the 14th of February 1998.[71]

75. It is therefore clear that the enemy or force that the CDF is fighting in the findings in the CDF Judgement includes the RUF - three members of which are the Accused in the present case. As a result, while Hon. Justice Thompson may have referred to the enemy of the CDF or the situation in Sierra Leone only in the abstract, it is reasonable to conclude in the existing circumstances, and having regard to the facts that were found to have been established, that he is actually referring to both the AFRC and the RUF when speaking of tyranny, anarchy and rebellion, the intensely conflictual situation and the fear, utter chaos, widespread violence of immense dimensions that he has identified.

76. The Chamber is of the view that Hon. Justice Thompson's use of the term "evil" is made in reference to elaborating the test for necessity,[72] rather than in characterizing the RUF as "evil" in the way that the Prosecution did in its opening statement or as advocated by the Defence. A fair reading of his Opinion leads us to the conclusion that he has not described the AFRC or the RUF as evil.

77. The Chamber notes that the Separate Opinion of Hon. Justice Thompson does not implicitly or otherwise find that the AFRC and the RUF were involved in a joint criminal enterprise as alleged by the Defence. Although Hon. Justice Thompson is using the terms that were previously described and challenged by this Motion, we find that the language he is using does not necessarily imply criminality. We find that Hon. Justice Thompson did not make any findings with regard to the criminality of the actions of the AFRC and the RUF. The Chamber further considers it relevant that the Accused in the RUF case have conceded that persons within

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[71] *See* Judicial Notice Consequential Order, Facts R-W.

[72] Separate Opinion, paras 87, 78 and 80, citing PJ Richardson et al., *Archbold, Criminal Pleading, Evidence and Practice* (London: Sweet and Maxwell, 1997), US Model Penal Code, s. 3.02. Other sources cited by Hon. Justice Thompson use the term "harm" rather than "evil".

the RUF and the AFRC committed "terrible crimes" and "horrible crimes" during the conflict.[73] Thus, even if Hon. Justice Thompson had made findings that criminal acts were committed by the RUF, this would not have been any different from the position already taken by the Defence.

78. The CDF Judgement found that the Accused Fofana had committed the war crimes of murder, cruel treatment, pillage and collective punishments and that the Accused Kondewa had committed war crimes of murder, cruel treatment, pillage, collective punishments and enlisting children under the age of 15 years into an armed groups and/or using them to participate actively in hostilities. These are extremely serious crimes. As we have noted, Hon. Justice Thompson stated that he has agreed with the findings that the Accused are factually guilty of these crimes.

79. Moreover, a review of the factual findings in the CDF Judgement makes it clear that the CDF forces often employed extremely heinous means to commit these crimes.[74] Despite the extremely serious nature of the crimes, Hon. Justice Thompson has accepted that these crimes were excusable in the face of a larger evil due to the application of the defence of necessity. For the reasons we have outlined above, we find that the context of the Judgement in which the Opinion is written leads to the conclusion that this larger evil that was to be avoided by the CDF's actions can only be actions brought by the AFRC and the RUF forces.

80. In his Comments, Hon. Justice Thompson states that he has no "judicial crystal ball" to discern the defences that the Accused in the RUF trial will be relying on.[75] Although it is true that the Chamber cannot predict the exact nature of the defences that will be raised by the Defence, it remains that there had been some indication of their nature on record. At the time that the CDF Judgement was delivered, the Chamber had been hearing the RUF case for three years. The Chamber had received the Defence pre-trial briefs, had listened to the opening statements of the Defence for Kallon and Sesay and had heard the testimony of the Accused Sesay.

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[73] Transcript, Opening Statement of Sesay Defence, 3 May 2006, pp. 7-8: "The evidence will show that Mr. Sesay lived up to the spirit and rules which underpin the true heart of the RUF. Was this spirit corrupted in some places by some people? No doubt. Were terrible crimes committed by some claiming to represent the RUF? Again, no doubt. But we say Mr. Sesay ought not to be held responsible for these crimes.... Members of the RUF committed horrific crimes. Commanders such as Denis Mingo, Gibril Massaquoi, Komba Gbundema and Sam Bockarie acted completely against the ideology. Some of the rank and file were opportunistic criminals, and these people have caused the innocent in Sierra Leone a huge amount of pain and suffering. We do not deny that pain and suffering."

[74] The CDF, for example, were found to have removed organs from people they had killed (see para 474) or people who were not yet dead (see paras 606-607). The CDF also burned civilians to death (see paras 607 and 627) and shot and killed civilians, including young children (see paras 472, 541 and 658-659).

[75] Comments of Hon. Justice Thompson, para 25.

81. The Defence for Sesay has always maintained that its position is that the aim of Sesay was to "fight justly and legitimately for the benefit of freedom and liberty for the people of Sierra Leone... with a view to the creation of a society based upon fairness and democracy."[76] The Defence for Kallon stated in its opening statement that the Accused "Kallon remained committed to this idea of democracy".[77] As a result, it is clear that the issue of which side was fighting the "just war" by fighting for democracy is an issue that has been raised in both the CDF and the RUF trials.

82. The Chamber reiterates that all Judges "independent in the performance of their functions"[78] "without fear or favour, affection or ill-will"[79] are entitled to express their own opinions, on the law or otherwise. Indeed, the Appeals Chamber of the ICTY in the *Furundzija* case recognised that "Judges have personal convictions" and that absolute neutrality can hardly ever be achieved.[80] This freedom to make findings of law and of fact is undeniably applicable to Hon. Justice Thompson's opinion that the defence of necessity was applicable in the CDF case, no matter how novel or controversial that opinion might be. An expression of such an opinion in that context, however, may indeed have consequences and raise concerns relating to impartiality that must be examined and considered.

83. The Chamber considers that the opinion that Hon. Justice Thompson has expressed, that the commission of serious war crimes was excusable because of the greater purpose of restoring democracy, can be distinguished from the opinions that were the subject of cases before the ICTY Appeals Chamber. In *Furundzija*, the Appeals Chamber found that "the view that rape as a crime is abhorrent and that those responsible for it should be prosecuted within the constraints of the law cannot in itself constitute grounds for disqualification."[81] In the *Celebici* case, the Appeals Chamber held that a "reasonable and informed observer... would expect judges to hold the view

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[76] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-PT, Issa Sesay Pre-Trial Brief, 18 June 2004, para 4. See also Transcript of 3 May 2007, Opening Statement of Defence for Sesay, pp. 8-11.
[77] Transcript of 5 July 2004, Opening Statement of Defence for Kallon, p. 74, lines 16-21. See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-PT, Morris Kallon - Defence Pre-Trial Brief, 18 June 2004, para 14.
[78] Article 13(1) of the Statute.
[79] Rule 14(A) of the Rules.
[80] *Furundzija* Appeal Judgement, para 203.
[81] *Furundzija* Appeal Judgement, para 202.

that persons responsible for torture should be prosecuted."[82] The Chamber considers that a reasonable and informed observer would not expect a Judge to find that the commission of serious war crimes was excusable because considering the state of the law, it could amount to condoning the commission of very serious crimes.

84. After careful consideration, the Chamber finds that some indicia of an appearance of bias have been established having regard to all the circumstances by the language used in the Separate Opinion when it is understood and viewed in the context of the ongoing RUF proceedings.

85. This finding, however, must also be appreciated in the larger context of the RUF trial and the Special Court for Sierra Leone in general in light of the standard applicable to disqualification contained in Rule 15 and further defined and amplified by the jurisprudence.

86. The *Ad Hoc* Tribunals have repeatedly stated that there is a presumption of impartiality which attaches to Judges, who are "professionally equipped, by virtue of their training and experience, for the task of fairly determining the issues before them by applying their minds to the evidence in a particular case".[83] The Defence must therefore adduce sufficient evidence to satisfy the Chamber that the Judge is not impartial. In the *Celebici* case, the ICTY Appeals Chamber held that there was a high threshold to reach in order to rebut this presumption, and thus the reasonable apprehension of bias must be "firmly established".[84]

87. This approach was recently confirmed by the ICTR Appeals Chamber in the *Media Case*, which stated:

> La Chambre d'appel réaffirme que tout juge du Tribunal bénéficie d'une présomption d'impartialité qui ne peut être renversée facilement. En l'absence de preuve du contraire, il convient de présumer que les juges « sont en mesure de maintenir leur esprit libre de toute conviction ou inclination personnelle non pertinente ». Il appartient dès lors à l'appelant qui met en doute l'impartialité d'un juge de soumettre à la Chambre d'appel des éléments de preuve solides et suffisants pour renverser cette présomption d'impartialité.[85]

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[82] *Prosecutor v. Delalic, Mucic, Delic and Landzo*, IT-96-21-A, Judgement (AC), 20 February 2001, para 699 [*Celebici* Appeal Judgement].
[83] *Celebici* Appeal Judgement, para 700.
[84] *Celebici* Appeal Judgement, para 697; *Brdjanin and Talic* Decision, para 18.
[85] *Media Case* Appeal Judgement, para 48 (original footnotes omitted). While an official English translation of the Judgement is not yet available, an unofficial translation is as follows: "The Appeals Chamber reaffirms that all Judges

88. The reasons for this presumption of impartiality in the international context are many. The ICTY Appeals Chamber has emphasised:

> The reason for this high threshold is that, just as any real appearance of bias on the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias.[86]

89. Furthermore, the Judges of the international tribunals are required to be "persons of high moral character, impartiality and integrity" when they are appointed by Article 13 of the Statute. Before taking up their duties, the Judges of the Special Court were required under Rule 14 to make a solemn declaration to act "honestly faithfully, impartially and conscientiously."

90. This Chamber has repeatedly observed that it is composed of professional judges who are certainly capable of not drawing inferences without proper evidentiary basis or foundation.[87] Similarly, the Appeals Chamber of the ICTY and the ICTR have found that it must be assumed that international Judges "can disabuse their minds of any irrelevant personal beliefs or predispositions"[88] and are "professionally equipped, by virtue of their training and experience, for the task of fairly determining the issues before them by applying their minds to the evidence in a particular case".[89] The Chamber also considers it significant that the Judges of the Trial Chamber sit as a panel of three Judges.

91. The Chamber further adopts the finding of the Supreme Court of South Africa in the *South African Rugby Football Union* Decision that:

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benefit from the presumption of impartiality which cannot be easily rebutted. In the absence of any proof to the contrary, it will be presumed that Judges 'can disabuse their minds of any irrelevant personal beliefs or predispositions'. It is therefore in this regard, the responsibility of the appellant who seeks to question the impartiality of a Judge to produce before the Appeals Chamber, solid and sufficient evidentiary proof in order to rebut this presumption of impartiality."

[86] *Celebici* Appeal Judgement, para 707. See also *Furundzija* Appeal Judgement, para 197.

[87] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, 23 May 2005, para 11, citing *Prosecutor v. Gbao*, SCSL -2003-09-I, *Order on the Urgent Request for Direction on the Time to Respond to and/or an Extension on Time for the Filing of a Response to the Prosecution Motions And The Suspension of any Ruling on the Issue of Protective Measures that may be Pending before other Proceedings before the Special court as a Result of Similar Motions Filed to those that have been Filed by the Prosecution in this Case*, 16 May 2003, p. 2. See also Judge Richard May and Marieke Wierda, *International Criminal Evidence* (New York: Transnational Publishers, 2002), para 4.09.

[88] *Furundzija* Appeal Judgement, para 197; *Media Case* Appeal Judgement, para 48.

[89] *Celebici* Appeal Judgement, para 700.

> The reasonableness of the apprehension [of bias] must be assessed in light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves.[90]

92. The Chamber notes that Hon. Justice Thompson has stated clearly in his Comments that he is bound by the obligation to issue a judgement in the RUF case that is exclusively based on whether or not the Prosecution has proven, on the basis of evidence adduced only in that proceeding, the guilt of each of the Accused beyond a reasonable doubt.[91] We find that in his Separate Concurring and Partially Dissenting Opinion, he made no comments nor expressed views or opinions with respect to the Accused themselves or their alleged criminality. In addition, he has not made any findings about issues in the RUF trial.

93. As the jurisprudence makes clear, the fact that a Judge has heard evidence and taken a position in different cases arising out of the same evidence is not a cause for disqualification. The important question instead is whether the Judge can adjudicate on the new matter with an impartial mind and an unprejudiced manner. We note in this regard that the evidence presented in the CDF case was almost entirely different from that in the RUF case.[92]

94. In light of all of the foregoing, the Chamber concludes that even though it has found some *indicia* of apprehension of bias in the challenged opinion of Hon. Justice Thompson, we are satisfied that this conclusion is not sufficient to overcome the high threshold standard that has been set and established by the jurisprudence of International Criminal Tribunals on the recusal or the disqualification of a Judge in an International Criminal Tribunal and therefore, does not rebut the presumption of impartiality and nor does it firmly establish a reasonable appearance of bias on the part of Hon. Justice Thompson. We so do find and hold.

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[90] *South African Rugby Football Union* Decision, para 48.
[91] Comments of Hon. Justice Thompson, paras 24 and 26.
[92] The evidence in the two trials relates almost entirely to different geographic regions of Sierra Leone. As the Prosecution noted in its Response, only two witnesses, TF1-035 and TF1-296, testified in both the CDF and RUF trials.

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VI. DISPOSITION

ACCORDINGLY AND FOR THESE REASONS the Motion is dismissed in its entirety.

Done at Freetown, Sierra Leone, this 6th day of December, 2007.

Hon. Justice Benjamin Mutanga Itoe
Presiding Judge
Trial Chamber I

Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]