931)

SCSL-04-15-T
(32571 — 32609)

32571

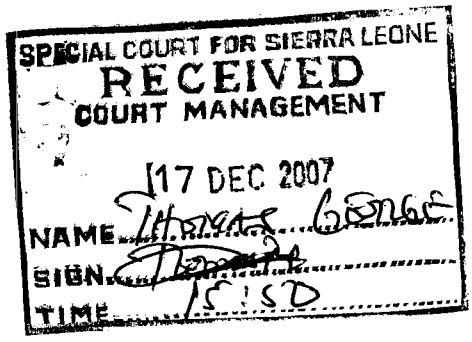
SPECIAL COURT FOR SIERRA LEONE
FREETOWN – SIERRA LEONE

APPEALS CHAMBER

Before: Hon. Justice George Gelaga King, Presiding
Hon. Justice Emmanuel Ayoola
Hon. Justice Renate Winter
Hon. Justice A. Raja N. Fernando
Hon. Justice Jon Kamanda

Registrar: Mr. Herman von Hebel

Date filed: 17 December 2007



The Prosecutor **v.** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

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

Office of the Prosecutor
Mr. Stephen Rapp
Mr. Charles Hardaway
Mr. Reginald Fynn

Defence Counsel for Issa Hassan Sesay
Mr. Wayne Jordash
Ms. Sareta Ashraph

Defence Counsel for Morris Kallon
Mr. Shekou Touray
Mr. Charles Taku
Mr. Kennedy Ogetto
Mr. Lansana Dumbuya

Defence Counsel for Augustine Gbao
Mr. John Cammegh
Ms. Prudence Acirokop

PROCEDURAL HISTORY[1]

1. On 12 December 2007 the Defence for the third Accused filed an appeal[2] of the Trial Chamber Decision not to disqualify Judge Thompson from the RUF Case.[3] On the same day the Defence for the First and Second Accused also filed separate appeals.[4]

2. On 13 December 2007 the Defence for the First Accused filed an addendum.[5] On the same day the Defence for the Second Accused filed a corrigendum.[6] On 14 December 2007, the Defence for the Third Accused filed an addendum and corrigendum.[7]

3. On 14 December 2007 the Prosecution filed its response.[8] It opposed the Appeal and argued that there was no error of law in the Decision, no misunderstanding or misapplication of the law or facts, and that the Appeals should be dismissed.

---

[1] For a more detailed procedural history see *Prosecutor v. Sesay et al,* SCSL-04-15-T-919, Gbao Notice of Appeal and Submissions Regarding the Decision by the Trial Chamber on the Motion For Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 12 December 2007, Notice of Appeal, paras. 2 to 23.

[2] *Prosecutor v. Sesay et al,* SCSL-04-15-T-919, Gbao Notice of Appeal and Submissions Regarding the Decision by the Trial Chamber on the Motion For Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 12 December 2007.

[3] *Prosecutor v. Sesay et al,* SCSL-04-15-T-909, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 6 December 2007. (Hereinafter 'Trial Chamber Decision')

[4] *Prosecutor v. Sesay et al,* SCSL-04-15-T-918, Kallon Notice of Appeal and Submissions on the Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 12 December 2007; SCSL-2004-15-T-920, Sesay Appeal Against the Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Judge Bankole Thompson from the RUF Case, 12 December 2007.

[5] *Prosecutor v. Sesay et al,* SCSL-04-15-T-922, Addendum to Sesay Appeal Against the Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Judge Bankole Thompson from the RUF Case, 13 December 2007.

[6] *Prosecutor v. Sesay et al,* SCSL-04-15-T-923, Corrigendum to Kallon Notice of Appeal and Submissions on the Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 13 December 2007.

[7] *Prosecutor v. Sesay et al,* SCSL-04-15-T-926, Addendum and Corrigendum to Gbao Notice of Appeal and Submissions Regarding the Decision by the Trial Chamber on the Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 14 December 2007.

[8] *Prosecutor v. Sesay et al,* SCSL-04-15-T-929, Prosecution Consolidated Response to the Sesay, Kallon and Gbao Appeal of the Decision on the Defence Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case , 14 December 2007. ('Prosecution Response').

4. More particularly, the Prosecution argued that:

   i. The Trial Chamber did not err in law, since the Defence has not shown that extraordinary circumstances existed that would derogate from the principle that Judges cannot be disqualified on the basis of judicial decisions.[9]

   ii. The Trial Chamber did not err in finding that Judge Thompson did not make any findings as to the criminality of the RUF. At no time did Judge Thompson mention the Accused or assign them any culpability for crimes committed that were detailed in the CDF trial.[10]

   iii. The Trial Chamber did not err in stating that the unilateral invocation of the defence of necessity by Judge Thompson was as result of Judge Thompson's views on the criminality of the RUF/AFRC.[11]

   iv. The Trial Chamber did not err in finding that the language used by Justice Thompson should be appreciated in the context of the RUF trial, and by reading in this context it did not show bias.[12]

5. Defence Counsel for the Third Accused hereby files its Reply.

SUBMISSIONS

6. For the reasons explained in its original appeal and this reply, Defence counsel for the Third Accused reasserts that the Trial Chamber erred in law by finding that the Separate Opinion of Justice Thompson gave rise to indicia of bias but that it was not sufficient to disqualify him from the remainder of the RUF proceedings. The Trial Chamber failed to correctly apply the law by setting an unreasonably high threshold before the appearance of bias can be found.

i. A Judge Sitting on Two Cases Arising from a Similar Series of Events can still be found to Provide an Appearance of Bias

7. In its Response to the Appellant's motion, the Prosecution notes that a judge should be permitted to rule on two or more criminal trials arising out of the same series of

[9] *Ibid.*, paras. 23 to 24.
[10] *Ibid.*, paras. 30 and 31.
[11] *Ibid.*, paras. 32 to 34.
[12] *Ibid.*, paras. 35 to 37.

events.[13] The Defence concurs and has not made this argument.[14] It has also argued that a judge cannot be disqualified on the sole basis of a position taken by that judge in a preceding case.[15] In fact, the Defence has not argued that he should be disqualified *solely* because he acquitted the CDF Defendants; rather, the concern is that, through the Separate Opinion in the CDF case, the Judge objectively creates the perception that his ability to rule upon the RUF impartially may be irreparably impaired. The focus of the Appellant's argument is related to whether there exists a pre-disposition against the RUF by Justice Thompson.

ii. No Arguments have been Advanced by Appellant Regarding Actual Bias

8. The Prosecution notes in paragraph 24 of its response that it would be a "truly extraordinary case" where a decision rendered by a judge would suffice to establish the reasonable appearance of bias. It references the Trial Chamber's decision which states that "decisions rendered by a Judge...by themselves [and whether it] could suffice to establish '*actual* bias'.[16] The Appellant has not alleged actual bias; the only allegations made are that the language, opinions and findings contained in the Separate Opinion create the appearance of bias against the RUF Accused.

iii. Cases Cited by the Prosecution Allow for Findings of Bias with Sufficient Evidence

9. The *Media* case is referenced in support of the Prosecution's position that there is a high threshold that must be met before finding a reasonable apprehension of bias. The *Media* case states, in relevant part, that "*absent evidence to the contrary*, a judge can be presumed by reason of their training and experience to make decisions based on the evidence adduced in the matter in question".[17] "Evidence to the contrary" in this case include the various reasons put forth by the Defence in these motions, further explaining why there is a reasonable apprehension of bias towards the RUF.

---

[13] *Ibid.*, paras. 19 to 22.
[14] Trial Chamber Decision, para. 59. This paragraph states that "The Defence have not suggested" that it is somehow improper to have a judge ruling on the same series of events in two different cases.
[15] Prosecution Response, para. 23.
[16] Trial Chamber Decision, para. 61 (other citations omitted).
[17] *Prosecutor v Barayagwiza,* Case No. ICTR-97-19-A, Judgement, Appeals Chamber, 28 November 2007, para. 78. ('Media case') (Unofficial translation with emphasis added).

iv. Criminality can be Implied by Reviewing the Emotive Language Used by Judge Thompson

10. Contrary to the Prosecution's position, the language used by Judge Thompson in his Separate Opinion does imply criminality. Evil is defined as "deeply immoral and malevolent"; tyranny as "cruel and oppressive government or rule"; anarchy as "a state of disorder due to lack of government or control"; chaos as "complete disorder and confusion"; grave as "giving cause for alarm or concern"; and despondent as "in low spirits from loss of hope or courage".[18] These words, commonly understood, demonstrate criminality. Even if Judge Thompson did not intend to criminalize the RUF by using these adjectives, the reality is that any reasonable observer, properly informed, would apprehend bias when reading them.

11. In addition, the defence of necessity was used to excuse the crimes committed by the CDF. Justice Thompson found that these actions were necessary to protect the democratically elected government of Sierra Leone against its enemies, including the AFRC and RUF. If these actions were justified under law, but otherwise criminal, one could surely assume that the "larger evil" against which they were defending were criminal as well.

v. The Defence of Necessity is not Being Challenged on the Merits

12. The Prosecution argues that Justice Thompson's use of the necessity defence cannot be challenged, as doing so challenges judicial independence and interferes with a judge's ability to issue judicial opinions.[19] The judicial use of the defence of necessity, however, is not challenged by the Defence.[20] However, in a position supported by the Trial Chamber, in the process of Justice Thompson expressing his Opinion, it may "have consequences…relating to impartiality that must be examined

---

[18] Compact Oxford English Dictionary of Current English, Third Edition (23 June 2005) Oxford University Press. Available online at http://www.askoxford.com/?view=uk.

[19] Prosecution Response, paras. 32 to 34.

[20] SCSL-04-15-T-880, Sesay and Gbao Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 14 November 2007, para. 11: "[w]hile not inherently problematic to support a novel argument in international criminal law (even one unilaterally made), it creates the impression that the inherent legitimacy of the CDF and the overriding criminality of the AFRC/RUF are firmly and powerfully rooted.'

and considered".[21] This is the full extent to which the Defence uses the necessity defence to establish the appearance of bias.

vi. Language used by Justice Thompson in his Dissenting Opinion Provides an Appearance of Bias

13. In its Response, the Prosecution argues that the Trial Chamber was correct in finding that the language used by Judge Thompson failed to 'impeach the presumption of [Justice Thompson's] neutrality as a judge'.[22] The Prosecution adds that the Trial Chamber correctly arrived at this finding by taking into account 'the context of the evidence and the findings in the CDF case' and 'the larger context of the RUF trial'.[23]

14. The Defence submits that this argument is without merit. Indeed, the Defence submits that the balancing test applied by the Trial Chamber, while correctly taking into account the broader context of the CDF and RUF cases, failed to give appropriate weight to the gravity of the language used by Justice Thompson.

15. The Defence agrees that the context of the Separate Opinion is of utmost importance. The context is that Justice Thompson, when rendering his Separate Opinion on the CDF Accused - which were fighting against the RUF during the war in Sierra Leone - found that they were excused from the crimes they committed (crimes that Judge Thompson recognised in adopting the findings of fact of the CDF Judgement)[24], since these crimes were committed in order to prevent the greater crimes that would have been committed by the RUF and AFRC.

16. The Trial Chamber correctly took into account the evidence and findings in the CDF case[25] and found that, indeed, Justice Thompson was referring to the RUF when using

---

[21] Trial Chamber Decision, para. 82.
[22] Prosecution Response, para. 35 (referring to Trial Chamber Decision, para. 72).
[23] *Ibid.*
[24] *Prosecutor v Fofana and Kondewa*, SCSL-04-14-T-785, Judgement, Trial Chamber I, 2 August 2007, Annex C: Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute, para. 56.
[25] Trial Chamber Decision, paras. 66, 67, 71, 72 and 73 to 75.

words such as 'chaos', 'anarchy', 'rebellion'.[26] The Trial Chamber also held that, 'when it is understood and viewed in the context of the ongoing RUF proceedings', the language of the Separate Opinion provided 'some indicia of appearance of bias'.[27]

17. Defence counsel agrees with the Prosecution that the Trial Chamber was correct in taking into account the context of both the CDF and the RUF cases. What defence counsel submits is that the Trial Chamber erred in law in, while finding that Judge Thompson's Separate Opinion provided an appearance of bias, holding that it was not sufficient to rebut the threshold standard for disqualification of a judge.[28]

18. In its Response, the Prosecution states that the cases of Judge Robertson and of Judge Thompson are distinct. It argued that, while Judge Robertson made his comments 'in a book before any facts had been presented in a judicial context',[29] Judge Thompson made his 'in the context of judicial process basing his comments on evidence which had been led before him as a judge and upon which he was now entitled to form an opinion and give a decision' and that it 'cannot be said to indicate any prejudgment of the [RUF] Accused.'[30]

19. Defence counsel disagrees. Judge Thompson cannot, before having heard the entirety of the evidence in the RUF case, make any finding as to the guilt of the RUF Accused, and that is what he appears to have done in his Separate Opinion.

20. The distinction drawn by the Prosecution is a superficial one. The time at which the appearance of bias arises does not matter. What matters is that both Justice Thompson and Judge Robertson gave the appearance of being biased against the RUF Accused.

21. Defence counsel would like to emphasise that Judge Robertson was not under the

---

[26] *Ibid.*, paras. 71, 73 and 75.
[27] *Ibid*, para. 84.
[28] *Ibid*, para.94.
[29] Prosecution Response, para.36.
[30] *Ibid.*

duty of impartiality at the time he wrote his book,[31] but was still disqualified from sitting on the RUF case. To the contrary, at the time he wrote his Separate Opinion, Judge Thompson, had been sitting on the RUF case for more than 2 years, and was duty bound to be impartial.

22. Any reasonable man properly informed of the CDF and RUF cases, of the conflict that took place in Sierra Leone and of the solemn declaration of judges as well as of their duty of impartiality, in reading Justice Thompson's separate opinion would apprehend bias. In reading words like 'chaos', 'evil', 'anarchy' and 'tyranny', within the context of the unilateral use of the defence of necessity to justify the crimes committed by the CDF, any reasonable person would fear that Justice Thompson will not bring an unprejudiced and impartial mind on the case and gives the impression of having already prejudged the three RUF Accused.

CONCLUSION

23. The defence agrees with the Prosecution's conclusion that '[f]acts for each trial must be determined on the evidence produced.'[32] However, Justice Thompson, in his Separate Opinion, gave the appearance that this would not be the case it the RUF trial, and that he has already prejudged the issue.

24. The Separate Opinion is quite clear: the crimes committed by the RUF were so terrible that the CDF, in fighting against them, was justified in committing war crimes. Contrary to what is alleged by the Prosecution, a judge can be disqualified from a position taken in another case, if that one gives the appearance of bias. It would be unacceptable not to allow the challenge of the impartiality of a judge for the simple reason that this was done in another case.

---

[31] The first edition Judge Robertson's book was published in 1999. *See* his biography on http://www.geoffreyrobertson.com/biography.htm. Judge Robertson was sworn in as a judge for the Special Court for Sierra Leone in December 2002. *See* the 2 December 2002 Press Release of the Special Court of Sierra Leone, available at http://scsl-server/sc-sl/new/Press/pressrelease-120202.html.

[32] Prosecution Response, para.38.

25. Judge Thompson qualified the RUF as creating tyranny, anarchy and chaos, and held that the crimes committed by the CDF were excusable since committed to prevent the greater harm that would be committed by the RUF. Taking into account the context of the CDF and RUF proceedings, the duty of impartiality of the judges and the functioning of the Special Court, any independent bystander, reasonably informed, in reading the Separate Opinion of Judge Thompson, will have a legitimate reason to fear that Justice Thompson lacks impartiality.

26. In failing to find so, the Trial chamber erred in the application of the law. In addition, the Trial Chamber exceeded its discretion in finding that the bias shown by the language of the Separate Opinion did not meet the requisite threshold for a judge to be disqualified.

27. A final assessment of this case requires one to compare the standards that have been used in international criminal tribunals in relation to the case at hand. There are various characterisations of the test of impartiality in the international courts: 'impartial mind to the case', 'reasons to fear that judge lacks impartiality 'reasonable impressions that not impartial'[33], 'legitimate reason that the judge lacks impartiality',[34] 'reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice',[35] 'circumstances would lead a reasonable observer to reasonably apprehend bias',[36] 'reasonable suspicion that he is not impartial',[37] and that the 'judge might not bring an impartial and unprejudiced mind to the issues of the present case'.[38]

---

[33] *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, Case No. IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para. 704. ('Celibici Appeals Judgement')

[34] *Prosecutor v. Sesay et al*, SCSL-2004-15-PT-58, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, Appeals Chamber, 13 March 2004, para. 15.

[35] *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36, Decision on Application by Momir Talic for the Disqualification and withdrawal of a judge, Trial Chamber II, 18 May 2000, para.18. ('Talic Decision of 18 May 2000').

[36] Celibici Appeals Judgement, para. 706. *See also Prosecutor v Furundjuza*, Case No. IT-95-17/1-A, Judgement, Appeals Chamber, 21 July 2000, para. 194.

[37] Celibici Appeals Judgment, para. 704.

[38] Talic Decision of 18 May 2000, para. 19.

28. When evaluating Justice Thompson's Separate Opinion it was "reasonable to conclude...that he is actually referring to the AFRC and the RUF when speaking of tyranny, anarchy and rebellion, the intensely conflictual situation and the fear, utter chaos, [and] widespread violence of immense dimensions".[39] And because these words could be interpreted as "aggressive, offensive and injurious to the interests of the three aggrieved RUF Defendants and could have created...an appearance of bias against their cause and interests as Accused persons" it is clear that a reasonable person would find an appearance of bias.[40]

RELIEF SOUGHT

29. A comprehensive review of the law leads one inexorably to the conclusion that Justice Thompson has reached the requisite level of bias sufficient to merit disqualification in the RUF case. The 6 December 2007 Decision of the Trial Chamber should be overturned, based upon an error of law in assessing whether Justice Thompson has demonstrated the requisite level of impartiality towards the RUF Accused. Thus, pursuant to RPE Rule 15,[41] Justice Thompson should be disqualified for the remainder of the proceedings.

30. In addition, Defence for the Third Accused requests the Appeals Chamber to order that, pending a decision on the present issue, Judge Thompson be prevented from sitting on the RUF case.

Filed in Freetown, 17 December 2007

For the Third Accused Augustine Gbao

John Cammegh.

[39] Trial Chamber Decision, para. 75.
[40] Trial Chamber Decision, para. 72.
[41] Rules of Procedure and Evidence of the Special Court for Sierra Leone as amended at the Tenth Plenary on 19 November 2007. Rule 15.

Table of Authorities

I. Special Court for Sierra Leone

A. Basic Documents

Rules of Procedure and Evidence of the Special Court for Sierra Leone as amended at the Tenth Plenary on 19 November 2007. Rule 15.

Press Release of the Special Court of Sierra Leone, 2 December 2002, available at http://scsl-server/sc-sl/new/Press/pressrelease-120202.html.

B. RUF Case (*Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao, Case No. SCSL -2004-15-T)*

SCSL-2004-15-PT-58, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, Appeals Chamber, 13 March 2004. Paragraph 15.

SCSL-04-15-T-880, Sesay and Gbao Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 14 November 2007. Paragraphs 11 and 12.

SCSL-04-15-T-887, Sesay and Gbao Joint Reply to Prosecution Response to the Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 21 November 2007. Paragraphs 8, 9 and 11.

SCSL-04-15-T-909, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 6 December 2007. Paragraphs 22, 59, 66, 67, 71, 72, 73 to 75, 79, 82, 84 and 94.

SCSL-04-15-T-918, Kallon Notice of Appeal and Submissions on the Decision n Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 12 December 2007.

SCSL-04-15-T-919, Gbao Notice of Appeal and Submissions Regarding the Decision by the Trial Chamber on the Motion For Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 12 December 2007. Paragraphs 2 to 23.

SCSL-2004-15-T-920, Sesay Appeal Against the Decision on Sesay and Gbao Motion for Voluntary Recusal or Disqualification of Judge Bankole Thompson from the RUF Case, 12 December 2007.

SCSL-04-15-T-922, Addendum to Sesay Appeal Against the Decision on Sesay and Gbao Motion for Voluntary Recusal or Disqualification of Judge Bankole Thompson from the RUF Case, 13 December 2007.

SCSL-04-15-T-923, Corrigendum to Kallon Notice of Appeal and Submissions on the Decision n Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 13 December 2007.

SCSL-04-15-T-926, Addendum and Corrigendum to Gbao Notice of Appeal and Submissions Regarding the Decision by the Trial Chamber on the Motion For Voluntary Withdrawal or

Disqualification of Justice Bankole Thompson from the RUF Case, 14 December 2007.

SCSL-04-15-T-929, Prosecution Consolidated Response to the Sesay, Kallon and Gbao Appeal of the Decision on the Defence Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case , 14 December 2007. Paragraphs 19 to 22, 23, 24, 30, 31, 32 to 34, 35 to 37, 38.

C. CDF case (*Prosecutor v Sam Hinga Norman, Moinana Fofana, Allieu Kondewa*, Case No. SCSL-04-14-T)

SCSL-04-14-T-785, Judgement, Trial Chamber I, 2 August 2007, Annex C: Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute. Paragraph 56.

II. International Criminal Tribunal for Rwanda

Prosecutor v Barayagwiza, Case No. ICTR-97-19-A, Judgement, Appeals Chamber, 28 November 2007. ('Media case'). Paragraph 78.

III. International Criminal Tribunal for the Former Yugoslavia

Prosecutor v. Brdjanin and Talic, Case No. IT-99-36, Decision on Application by Momir Talic for the Disqualification and withdrawal of a judge, Trial Chamber II, 18 May 2000.Paragraphs 18 and 19. Available at
http://www.un.org/icty/brdjanin/trialc/decision-e/00518DQ212937.htm

Prosecutor v Furundjuza, Case No. IT-95-17/1-A, Judgement, Appeals Chamber, 21 July 2000. Paragraph 194.
Available at
http://www.un.org/icty/furundzija/appeal/judgement/fur-aj000721e.pdf

Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo ('Celibici case'), Case No. IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001. Paragraphs 704 and 706.
Available at
http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf

IV. Other Documents

Compact Oxford English Dictionary of Current English, Third Edition (23 June 2005) Oxford University Press. Available online at http://www.askoxford.com/?view=uk.

Geoffrey Robertson's Website, biography. Available at
http://www.geoffreyrobertson.com/biography.htm.

32583

IN TRIAL CHAMBER II

Before: Judge David Hunt, Presiding

Registrar: Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of: 18 May 2000

PROSECUTOR

v

Radoslav BRDANIN & Momir TALIC

DECISION ON APPLICATION BY MOMIR TALIC FOR THE DISQUALIFICATION AND WITHDRAWAL OF A JUDGE

The Office of the Prosecutor:

Ms Joanna Korner
Mr Michael Keegan
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 Introduction

1. Pursuant to Rule 15(B) of the Tribunal's Rules of Procedures and Evidence, the accused Momir Talic ("Talic") has applied to me as the Presiding Judge of Trial Chamber II for the disqualification and withdrawal of Judge Mumba from both the trial and from the determination of a preliminary motion pursuant to Rule 72 pending before the Trial Chamber.[1] Talic asserts that Judge Mumba has "an association which might affect [...] her impartiality" and thus, in accordance with Rule 15(A), she may not participate in either the trial or the Rule 72 Motion.[2]

2 Background

2. The Rule 72 Motion alleges that the form of the current indictment is defective. One of the grounds taken is that, notwithstanding that Talic has been charged with grave breaches of the Geneva

32594

Conventions, the prosecution has not pleaded that the acts he is alleged to have committed took place in the course of an international armed conflict. That motion asserts that the *Tadic* Jurisdiction Appeal Decision requires such a fact to be proved in order to establish that the acts of the accused were (in the terms of Article 2 of the Tribunal's Statute) "against persons [...] protected under the provisions of the relevant Geneva Convention".[3]

3. The prosecution's response asserts that it has sufficiently pleaded what is required by the following allegation in the amended indictment:[4]

> At all times relevant to this indictment, a state of armed conflict and partial occupation existed in the Republic of Bosnia and Herzegovina. All acts or omissions herein set forth as Grave Breaches of the Geneva Conventions of 1949, recognised by Article 2 of the Statute of the Tribunal, occurred during that armed conflict and partial occupation.

In any event, the prosecution says, in *Prosecutor v Tadic*[5] – a case in which the time frame and area are said to have "echoed" those in the present case – the Appeals Chamber has held that the armed conflict in Bosnia and Herzegovina must be classified as an international armed conflict,[6] and that the Trial Chamber is bound by that decision.[7] In his reply to the Rule 72 Motion, Talic argues that the phrase "armed conflict and partial occupation" does not amount to an allegation of an *international* armed conflict, and that references to the *Tadic* indictment are irrelevant.[8]

3 The submissions of the parties

4. In the present Request, Talic asserts:[9]

> (1) The *Tadic* Conviction Appeal Judgment (in which Judge Mumba participated) came to its conclusion that the armed conflict in Bosnia and Herzegovina was an *international* one by accepting that:
>
> > (a) the Army of the Federal Republic of Yugoslavia ("FRY") and the Army of Republika Srpska possessed shared military objectives,[10]
> >
> > (b) the Army of the FRY exercised overall control over the Bosnian Serb forces,[11] and
> >
> > (c) for the period material to that case the armed forces of Republika Srpska were to be regarded as acting under the overall control of and on behalf of the FRY.[12]
>
> (2) This conclusion involved findings by the Appeals Chamber on a number of subsidiary facts relating to the organisation, structure, role and actions of the Army of Republika Srpska which the Defence in the present case contests.
>
> (3) The relevant period in *Tadic* was 23 May to 31 December 1992, and the relevant area was opština Prijedor.[13] The relevant period in the present case is between April and December 1992,[14] and the relevant area is the Autonomous Region of Krajina ("ARK"),

32585

which included the municipality of Prijedor.[15]

(4) The identical facts to those considered in *Tadic* will be submitted for Judge Mumba to review in this case. Talic concludes:[16]

> It is impossible to see how Judge Mumba could abandon the opinion she formulated and set out on identical facts – facts which are again submitted for her review.

5. In its Response, the prosecution says that its stance in relation to the Request is properly one of neutrality.[17] Talic has, without leave, filed a reply to that Response, and submits, actually in further reply to the Rule 72 Response,[18] that it is only the *ratio decidendi* of an Appeals Chamber decision – which relates solely to questions of law – which is binding upon the Trial Chambers, and that the international character of the armed conflict is for the Trial Chamber in each case to determine for itself upon the evidence given in that case.[19]

4 Analysis and findings

6. If the argument of the prosecution is correct, and the Trial Chamber *is* bound by the factual decision of the Appeals Chamber upon the facts before it in the *Tadic* case, then the Trial Chamber will not be permitted to determine the issue for itself, and the fact that Judge Mumba also participated in the Appeals Chamber is irrelevant. But, without making any final decision upon the matter at this stage, it seems to me that there are problems with this particular argument of the prosecution. Although the Trial Chamber will be bound to apply the *legal* tests relevant to the existence of an international armed conflict stated by the Appeals Chamber in the *Tadic* case as part of the *ratio decidendi* of its Judgment, it is perhaps a surprising submission that the Trial Chamber is also bound by the *factual* decision of the Appeals Chamber in that case when it applied that legal test to the facts of that particular case.[20]

7. For the purposes of this present decision, therefore, I accept the submission by Talic that I should proceed upon the basis that the Trial Chamber *will* have to determine whether, on the evidence before it in this case, any acts proved against Talic were committed by him in the course of an *international* armed conflict.

8. Rule 15(A) provides:

> 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. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

On one view, this Rule refers only to the existence of an *actual* bias on the part of the judge. I do not understand the Request as asserting an *actual* bias on the part of Judge Mumba. In my opinion, however, Rule 15(A) was intended to reflect the wider basis for disqualification uniformly recognised in both the common law and civil law systems and under the European Convention on Human Rights[21] where, as I shall demonstrate, a judge is disqualified not only if there is an actual bias but also if there is a reasonable apprehension by the parties that such bias exists.[22] This uniform approach in those jurisdictions is a valuable aid to the proper interpretation of Rule 15(A).

32586

9. At common law, although the House of Lords of the United Kingdom has identified the principle as being that a judge should not participate in a case wherever there is a "real danger" that he or she was biased,[23] this test has been criticised in Australia, Canada and New Zealand as impinging upon the requirement laid down in the famous dictum of Lord Hewart CJ: that it is –

> [...] of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[24]

However, a recent examination in the United Kingdom of the various tests laid down there and in Australia – made in the *Pinochet* case[25] – led to the conclusion that, although these tests are stated differently, their application was likely in practice to lead to results which are so similar as to be indistinguishable.[26]

10. In Australia, the test laid down by the appellate courts is that a judge should withdraw not only if he or she is actually biased but also if, in all the circumstances, the parties or the public might entertain a reasonable apprehension that he or she might not bring an impartial and unprejudiced mind to the resolution of the question involved in that case.[27] What is to be considered is not the actual reaction of the particular complainant but the hypothetical reaction of the fair-minded observer with sufficient knowledge of the actual circumstances to make a reasonable judgment.[28]

11. The test is expressed slightly differently in the United States. For a judge to be disqualified there, it must be shown there that the reasonable person, knowing all the circumstances, would expect the judge to be biased.[29] The test has been codified in these terms:[30]

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

In my view, there is no significant difference in substance between that and the Australian and United Kingdom formulations.

12. In the civil law systems, the issue of disqualification is governed largely by statutory provisions which appear, generally, to include as grounds for disqualification both actual bias and an objectively justified fear of bias. In Germany, for example, a judge is disqualified from participating in a case either where he has already been associated with it in various capacities,[31] or where there is otherwise a fear of bias, but only if there is reason to distrust his impartiality.[32] In Sweden, there are also references (in the alternative) to similar associations with the case and to circumstances which create a legitimate doubt as to the judge's impartiality.[33] In France, there are again references to disqualification by reason of a judge's association in various capacities with the particular case or the parties where that association is grave enough to put his impartiality in question.[34] In Italy, a judge will be disqualified in circumstances which would lead a reasonable person to doubt his impartiality due to personal interest or other reasons.[35]

13. The European Convention on Human Rights provides, by Article 6, that everyone is entitled to a hearing by "an independent and impartial tribunal established by law". This provision has been interpreted by the European Court of Human Rights ("ECHR") as requiring disqualification where there is either a lack of subjective impartiality (the existence of actual bias) or a lack of objective impartiality (the existence of a fear of bias). In the latter case, it is said, the determinant is whether the fear of bias can be held to be objectively justified, or whether the judge has offered guarantees sufficient to exclude

32587

any legitimate doubt in the matter.[36] Article 6 and the Court's decisions in relation to it appear to have widely affected the attitude of the domestic courts in Europe. For example, until the Court had found against it in a number of cases, Belgium had not accepted objective partiality as a test.[37] The courts of Denmark,[38]The Netherlands[39] and Portugal[40] have also regarded the terms of the Convention and the decisions of the ECHR as being applicable in their countries in relation to judicial impartiality.

14. In my view, there is therefore no difference in substance between the various legal systems as to the tests to be applied concerning the disqualification of judges. I accept that an apprehended bias such as described in all these authorities is sufficient to warrant disqualification in both the common law and civil law systems and under the European Convention. In my view, the basis for disqualification stated in Rule 15(A) should be interpreted as also including such an apprehended bias. That is the interpretation of Rule 15(A) which I have adopted.

15. The question raised by the Request is, then, whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgment) would be that Judge Mumba, having participated in the *Tadic* Conviction Appeal Judgment, might not bring an impartial and unprejudiced mind to the issue of whether the armed conflict in Bosnia and Herzegovina at the time and place relevant to this case was an international one.

16. As part of the knowledge which such an observer would have of the actual circumstances of this case, the observer would know of the received jurisprudence of the Tribunal, that the issue as to whether an international armed conflict existed at a particular time or place is a matter for each

Trial Chamber to determine based upon the evidence before it in the particular case.[41] Such observer would also know that, although the periods relevant to the two cases are much the same, the places do not cover the same geographical area – in that opština Prijedor (the area with which *Tadic* was concerned) is but one of more than fifteen municipalities within the ARK (which is the area with which this case is concerned). But that observer would also realise that what have been described earlier as the findings on the subsidiary facts – as to the organisation, structure, role and actions of the Army of Republika Srpska[42] – would be relevant anywhere in the ARK in which the Army of Republika Srpska was involved in an armed conflict with non-Serb persons. Accordingly, and for the purposes of this case, I accept the submission by Talic that these issues *will* arise for determination in this case.

17. This observer would nevertheless query the assertion by Talic that the facts to be submitted to the Trial Chamber in the present case will be "identical" with those before the Appeals Chamber in the *Tadic* case.[43] Those facts must be determined by reference to the evidence produced in the particular case. This observer would assume that, in disputing that the armed conflict was international in character, the two accused in the present case – Talic (who is alleged to have been the Chief of Staff/Deputy Commander of the 5th Corps of the Yugoslav People's Army, and then in command of that Corps,[44] and ultimately the Chief of the General Staff in the Army of Republika Srpska)[45] and his co-accused, Radoslav Brdanin (who is alleged to have been the President of the ARK Crisis Staff, and then the acting Vice-President of Republika Srpska)[46] – would be in a more advantageous position than was Tadic (a café proprietor and a minor local politician) to produce evidence upon these so-called subsidiary issues, and that, realistically, the evidence will be somewhat different to that which the Appeals Chamber had to consider in *Tadic*. Finally, this observer would know that the judges of this Tribunal are professional judges, who are called upon to try a number of cases arising out of the same events, and that they may be relied upon to apply their mind to the evidence in the particular case before them.

18. Of course, the question is *not* whether there is a reasonable apprehension that Judge Mumba will decide these issues in the same way as they were decided in *Tadic*. As Mason J (later Mason CJ) of the High Court of Australia said:[47]

> It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established" [...]. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

19. To state the issue once more, it is whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgment) would be that Judge Mumba, having participated in the *Tadic* Conviction Appeal Judgment, might not bring an impartial and unprejudiced mind to the issues in the present case identified in pars 4 and 15, *supra*. 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.

20. Having given the Request made by Talic careful consideration, I have *not* been satisfied by him that the reaction of the fair-minded observer would be that Judge Mumba might not bring an impartial and unprejudiced mind to any of the issues in this case. I have conferred with Judge Mumba, as Rule 15(B) requires. She has agreed with me that her participation in the *Tadic* Conviction Appeal Judgment provides no basis for her disqualification in the present case. Neither of us see any need to refer the matter to the Bureau for its determination.

5 Disposition

21. The Request is refused.

Done in English and French, the English text being authoritative.

Dated this 18th day of May 2000,
At The Hague,
The Netherlands.

_____
Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

32589

1. Request for Disqualification of a Trial Judge, 4 May 2000 ("Request").
2. *Ibid,* par 3.
3. Motion for Dismissal of the Indictment, 8 Feb 2000 ("Rule 72 Motion"), pp 14-15 (English version), referring to *Prosecutor v Tadic* (1995) I JR ICTY 353 at 447 (par 81) ("*Tadic* Jurisdiction Appeal Decision"). Because the Rule 72 Motion raises other (and substantial) issues to be determined, no decision has yet been given upon it.
4. Prosecution's Response to "Motion for Dismissal of the Indictment" filed by Counsel for the Accused Momir Talic, 28 Feb 2000 ("Rule 72 Response"), par 20. The quoted passage is from par 24 of the amended indictment.
5. Case IT-94-1-A, Judgment, 15 July 1999 ("*Tadic* Conviction Appeal Judgment").
6. *Ibid,* at par 167.
7. Rule 72 Response, par 21.
8. Application for Leave to Reply and Reply to the Response of the Prosecutor of 28 February 2000, 20 Mar 2000, p 5 (English version).
9. Request, pars 2-3.
10. *Tadic* Conviction Appeal Judgment, par 153.
11. *Ibid*, par 156.
12. *Ibid*, par 162.
13. *Tadic* Indictment, par 1.
14. Amended Indictment, par 16.
15. *Ibid*, par 5.
16. Request, par 3.
17. Prosecution's Response to "Request for Disqualification of a Trial Judge" Filed by Counsel for Momir Talic, 15 May 2000 ("Response"), par 1.
18. Memorandum Relating to Prosecutor's Response of 15 May 2000, 16 May 2000.
19. *Ibid*, par 3.
20. In a recent *obiter dictum*, in *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgment, 24 Mar 2000, par 113, the Appeals Chamber stated that Trial Chambers are bound by the *ratio decidendi* of any decision of the Appeals Chamber, but the discussion of that proposition makes it clear, in par 113(iii), that it is restricted to issues of law. The reference in par 113(i) to the decisions of the Appeals Chamber on questions of both law and fact being final may perhaps be equivocal, but I did not (as a member of the Appeals Chamber in that case), and do not now, understand that Judgment as asserting that Trial Chambers *in one case* are bound by decisions of fact made by the Appeals Chamber *in another case*. The prosecution has also referred to this judgment in its Response (par 2(b)), but it does not suggest that its submissions in the Rule 72 Response are withdrawn.
21. Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.
22. I have understood the Request by Talic as implicitly proceeding upon this wider basis for disqualification.
23. *R v Gough* S1993C AC 646 at 661.
24. *R v Sussex Justices; Ex parte McCarthy* S1924C 1 KB 256 at 259.
25. *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)* S1999C 2 WLR 272. Although the *Pinochet* case is the most recent examination of the issue of disqualification, it is otherwise of no particular significance to the present case. First, it was described (at 284) as an exceptional case. Secondly, it was an application of the principle *nemo debet esse judex in propria causa* (no-one should be judge in his own cause), and not a case of apprehended bias. One of the members of the House of Lords hearing the original appeal, Lord Hoffman, had been closely associated with Amnesty International, an organisation which had become an intervener in the appeal and which had in the past urged the punishment of those guilty in Chile for past breaches of human rights. The suspicion that a judge may not be impartial for reasons other than having a relevant interest in its subject matter – which is the substance of the allegation here – was clearly identified as a different category of case (at 281) or as being based upon a different principle (at 289).
26. *Ibid*, at 289-290.
27. *Livesey v NSW Bar Association* (1983) 151 CLR 228 at 293-294; *Re Polites; Ex Parte Hoyts Corporation Pty Ltd* (1991) 65 ALJR 445 at 448.
28. *S & M Motor Repairs Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1988) 12 NSWLR 358 at 380-381; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 87, 95; *Webb v The Queen* (1994) 181 CLR 41 at 73-74.
29. *Liljeberg v Health Services Corp* 486 US 847 at 859-860 (1988).
30. 28 USCS (1999), at 455.
31. German Code of Criminal Procedure (*Strafprozeß ordnung)*, Sections 22, 23.
32. *Ibid*, Section 24.
33. Swedish Code of Procedure *(Rättegångsbalken)*, Section 14:13.
34. Code of Criminal Procedure *(Code de Procedure Penal)*, Article 668.
35. Code of Criminal Procedure (*Codice di Procedura Penale)*, Article 36.
36. *Piersac v Belgium*, ECHR, judgment of 1 Oct 1982, Series A No 53, par 30; *Hauschildt v Denmark*, (1990) 12 EHRR 266, par 48; *Bulut v Austria*, ECHR, judgment of 22 Feb 1996, Reports of Judgments and Decisions 1996-II 347, at 356

32590

(pars 31-33).
37. Criminal Procedure Systems in the European Community (ed Van Den Wyngaert), Butterworths, London, p 13.
38. *Ibid*, p 58.
39. *Ibid*, pp 282, 289.
40. *Ibid*, p 318.
41. See, for example, *Prosecutor v Delalic*, Case IT-96-21-T, Judgment, 16 Nov 1998, pars 228-229; *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999, par 43; *Prosecutor v Simic*, Case IT-95-9-PT, Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, 25 Mar 1999, p 4.
42. See par 4, *supra*.
43. This assertion appears in the passage quoted in par 4(4), *supra*.
44. According to the indictment, the 5th Corps was later re-named the 1st Krajina Corps.
45. Amended Indictment, par 18.
46. *Ibid*, par 17.
47. *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352. This statement was subsequently adopted in a unanimous judgment of the High Court of Australia in *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 65 ALJR 444 at 448. See also the decision of the NSW Court of Appeal in *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* (1986) 6 NSWLR 272 at 275-276.

The present authority exceeds 30 p. In accordance with the Practice Direction on Filing Documents before the Special Court for Sierra Leone, article 7 (E), a copy of the first page of the authority as well as a copy of the relevant section are filed.

32592

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-95-17/1-A

Date: 21 July 2000

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Patrick Lipton Robinson
Judge Fausto Pocar

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **21 July 2000**

PROSECUTOR

v.

ANTO FURUND@IJA

JUDGEMENT

Counsel for the Prosecutor:

Mr. UpawansaYapa
Mr. Christopher Staker
Mr. Norman Farrell

Counsel for the Accused:

Mr. Luka S. Miseti}
Mr. Sheldon Davidson

VI. FOURTH GROUND OF APPEAL

164. The issue which has been raised as the fourth ground of appeal is that of recusal, namely, whether or not Judge Mumba, the Presiding Judge in the Appellant's trial was impartial or gave the appearance of bias. The allegations turn on her former involvement with the United Nations Commission on the Status of Women ("the UNCSW"). It is the nature of her involvement with this organisation and its implications on the Appellant's trial which have led the Appellant to assert that she should have been disqualified pursuant to Rule 15 of the Rules.

165. The Appeals Chamber finds it useful to set out initially the factual basis for the allegations made by the Appellant.

166. Judge Mumba has served as a Judge of the International Tribunal since her election on 20 May 1997. For a period of time prior to her election, she was a representative of the Zambian Government on the UNCSW.[216] At no stage was she a member of the UNCSW whilst at the same time serving as a Judge with the International Tribunal. The UNCSW is an organisation whose primary function is to act for social change which promotes and protects the human rights of women.[217] One of its concerns during Judge Mumba's membership of it was the war in the former Yugoslavia and specifically the allegations of mass and systematic rape. This concern was exhibited by its resolutions which condemned these practices and urged the International Tribunal to give them priority by prosecuting those allegedly responsible.[218]

167. The UNCSW was involved in the preparations for the UN Fourth World Conference on Women held in Beijing, China, 4-15 September 1995, and specifically participated in the drafting of the "Platform for Action," a document identifying twelve "critical areas of concern" in the area of women's rights and which contained a five-year action plan for the future, the aim being to achieve gender equality by the year 2000. Three of the critical areas of concern were particularly relevant to issues in the former Yugoslavia.[219] There was an Expert Group Meeting following the Beijing conference, whose purpose was to work towards achieving certain of the goals drawn from the

---

[216] The Appellant states that Judge Mumba's term with the UNCSW was from 1992-1995 and this is not disputed by the Prosecutor (Appellant's Amended Brief, p. 122 and Prosecutor's Response, para. 6.28).

[217] Established by the United Nations Economic and Social Council ("ECOSOC") Resolution 11 (II) on 21 June 1946, Section 1 provides that "[t]he functions of the Commission shall be to prepare recommendations and reports to the Economic and Social Council on promoting women's rights in political, economic, social and educational fields. The Commission shall also make recommendations to the Council on urgent problems requiring immediate attention in the field of women's rights." The Commission was subsequently enlarged by ECOSOC Resolutions 1987/22, 1987/23, and 1989/45.

[218] Both the Appellant and Respondent refer to several of these resolutions including, ECOSOC Resolution 38/9, ECOSOC Resolution 37/3 and ECOSOC Resolution 39/4.

[219] Critical Area D (Violence against Women), Critical Area E (Women and armed conflict) and Critical Area I (Human Rights of Women). United Nations Economic and Social Council, Commission on the Status of Women; *Report of the Commission on the Status of Women on its Fortieth Session*, U.N. Doc. E/199/27 (1996).

Beijing Conference and set out in the Platform for Action, including the reaffirmation of rape as a war crime, by the end of 1998. Three authors of one of the *amicus curiae* briefs later filed in the instant case[220] and one of the Prosecutors in the instant case, Patricia Viseur-Sellers ("the Prosecution lawyer"), attended this meeting.[221] This Expert Group proposed a definition of rape under international law.[222]

168. The Appeals Chamber notes that it is not so much that the parties dispute the factual basis of the Appellant's allegations, but rather that they differ in their interpretation of it and the relevance of it to the ground of appeal. For example, the parties do not dispute that Judge Mumba was involved in the UNCSW in the past, but they do dispute the nature of her involvement and the exact role which she played. The parties do not dispute that the Prosecution lawyer and the three authors of one of the *amicus curiae* briefs may also have been involved in either the activities of the UNCSW on some level or the Expert Group Meeting, but they do dispute the extent of the contact they may have had with Judge Mumba and its impact on, or relevance to, the Appellant's trial.

A. Submissions of the Parties

1. The Appellant

169. The Appellant submits that because of Judge Mumba's personal interest in, and association with the UNCSW, the ongoing agenda or campaign of the Platform for Action, the three authors of one of the *amicus curiae* briefs, and the Prosecution lawyer, she should have been disqualified under Rule 15 of the Rules.[223] He argues that the test which should be applied by the Appeals Chamber in ascertaining if disqualification is appropriate is whether "a reasonable member of the public, knowing all of the facts [would] come to the conclusion that Judge Mumba has *or had* any associations, which *might* affect her impartiality."[224] Based on this test, he submits that Judge Mumba should have been disqualified as an appearance was created that she had sat in judgement

[220] By orders of 10 and 11 November 1998, the Trial Chamber granted leave for two *amicus curiae* briefs to be filed, pursuant to Rule 74 of the Rules, which provides that, "[a] Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organisation or person to appear before it and make submissions on any issue specified by the Chamber." (Judgement, paras. 35 and 107).
[221] Prosecutor's Response, para. 6.29.
[222] United Nations Division for the Advancement of Women, *Report of the Expert Group Meeting, Toronto, Canada (9 – 12 November 1997)*, EGM/GBP/1997/Report.
[223] Appellant's Amended Brief, p. 121 and Appellant's Reply, pp. 46-47. Rule 15(A) provides: "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. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case."
[224] Appellant's Reply, p. 46.

in a case that could advance and in fact did advance a legal and political agenda which she helped to create whilst a member of the UNCSW.[225]

170. The Appellant alleges that Judge Mumba continued to promote the goals and interests of the UNCSW and Platform for Action after her membership concluded, and contends that this was reflected directly in his trial. He does not allege that Judge Mumba was actually biased.[226] Rather, the issue was whether a reasonable person could have an apprehension as to her impartiality.[227] In this regard, he argues that a tribunal should not only be unbiased but should avoid the appearance of bias.[228] Hence the submission that there could be no other conclusion based on the above test than that Judge Mumba has or had associations which might affect her impartiality.[229]

2. The Respondent

171. The Respondent submits that the Appellant has failed to establish the existence of either a personal interest by Judge Mumba in the instant case, or the existence of an association or working relationship between Judge Mumba, the three authors of one of the *amicus curiae* briefs and the Prosecution lawyer, such that she should have been disqualified. In addition, the Appellant has submitted no evidence to support an allegation that Judge Mumba exhibited actual bias or partiality.[230] The Prosecutor contends that the standard for a finding of bias should be high and that Judges should not be disqualified purely on the basis of their personal beliefs or legal expertise.[231] In the view of the Prosecutor, the Appellant has failed to meet the "reasonable apprehension" of bias standard.[232] The prior involvement of a Judge in a United Nations body such as the UNCSW cannot give rise to any reasonable apprehension that the Judge has an agenda which would cause him or her to be biased against an accused appearing before him or her. [233]

---

[225] *Ibid.*, p. 48 and Appellant's Amended Brief, p. 121.
[226] Appellant's Reply, p. 48.
[227] *Ibid.*, p. 49.
[228] Appellant's Amended Brief, p. 136.
[229] *Ibid.*, p.138.
[230] Prosecutor's Response, para. 6.33.
[231] *Ibid.*, paras. 6.50-6.54.
[232] *Ibid.*, para. 6.55.
[233] *Ibid.*, paras. 6.54–6.55.

B. Discussion

172. Before proceeding to consider this matter further, the Appeals Chamber makes two observations.

173. First, the Appellant states that he first discovered Judge Mumba's associations and personal interest in the case after judgement was rendered, and for this reason, only then raised the matter before the Bureau.[234] Although the Appeals Chamber has decided to consider this matter further, given its general importance,[235] it would point out that information was available to the Appellant at trial level, which should have enabled him to discover Judge Mumba's past activities and involvement with the UNCSW. The Appeals Chamber notes, in this context, public documentation issued by the International Tribunal, including, for example, its published yearbooks which contain sections devoted to biographies of the Judges elected to serve at the International Tribunal.[236] In addition, Public Information Service of the Tribunal, which is responsible for ensuring public awareness of the International Tribunal's activities, regularly publishes Bulletins and releases information on the International Tribunal's web-site. Both the Yearbook and the Public Information Service of the Tribunal provide official information to the public regarding such issues as the election of new Judges to the International Tribunal and details of a Judge's legal background. The information was freely available for the Appellant to discover.

174. The Appeals Chamber considers that it would not be unduly burdensome for the Appellant to find out the qualifications of the Presiding Judge of his trial. He could have raised the matter, if he considered it relevant, before the Trial Chamber, either pre-trial or during trial. On this basis, the Appeals Chamber could find that the Appellant has waived his right to raise the matter now and could dismiss this ground of appeal.

175. These observations however, should not be construed as relieving an individual Judge of his or her duty to withdraw from a particular case if he or she believes that his or her impartiality is in question. This is in fact what Rule 15(A) of the Rules calls for when it says that the Judge shall in any such circumstance withdraw. The Appeals Chamber finds that Judge Mumba had no such duty for the reason that she had no potentially disqualifying personal interest or associations.

---

[234] Appellant's Amended Brief, p. 121. The Appellant raised the matter before the Bureau by filing on 3 February 1999 the "Defendant's Post Trial Application to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to Vacate Conviction and Sentence, and Motion for a New Trial."
[235] *Tadi}* Appeals Judgment, paras. 247 and 281.
[236] *E.g.*, Yearbook of the International Tribunal (1997) stated that Judge Mumba was a member of the UNCSW from 1992-1995 (pp. 26-27).

176. The second observation is concerned with the additional material annexed to the Appellant's Amended Brief. It is to be recalled that, in an order dated 2 September 1999, the Appeals Chamber granted leave to the Appellant to amend his Appellate Brief, although not specifically admitting the material referred to in the "Defendant's Motion to Supplement Record on Appeal".[237] The Appeals Chamber confirms that, by granting leave to file an amended Appellate Brief, it granted leave to file the annexed documents, which the Appeals Chamber will take into account in considering the Appellant's submissions.

1. Statutory Requirement of Impartiality

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. Article 13(1) of the Statute reflects this, by expressly providing that Judges of the International Tribunal "shall be persons of high moral character, *impartiality* and integrity".[238] This fundamental human right is similarly reflected in Article 21 of the Statute, dealing generally with the rights of the accused and the right to a fair trial.[239] As a result, the Appeals Chamber need look no further than Article 13(1) of the Statute for the source of that requirement.

---

[237] Filed on 28 June 1999.

[238] (Emphasis added). Article 13(1) 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. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law." See also Arts. 2 and 11 of Statute of the International Tribunal for the Law of the Sea (Annex VI of United Nations Convention on the Law of the Sea of 10 December 1982); Art. 19 of Statute of the Inter-American Court of Human Rights (adopted by Resolution 448 by the General Assembly of the Organisation of American States at its ninth regular session held in La Paz, Bolivia, October 1979); Arts. 36(3)(a), 40 and 41 of the Rome Statute.

[239] Under Article 21(2) of the Statute, the accused is entitled to "a fair and public hearing" in the determination of the charges against him. Paragraph 106 of the Report of the Secretary General provides that "[i]t is axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognised standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights." (Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808(1993)). Article 14(1) of the ICCPR provides in relevant part: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The fundamental human right of an accused to be tried before an independent and impartial tribunal is also recognised in other major human rights treaties. The Universal Declaration of Human Rights provides in Art. 10 that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the full determination of his rights and obligations of any criminal charge against him". Art. 6(1) of the European Convention on Human Rights protects the right to a fair trial and provides *inter alia* that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Art. 8(1) of the American Convention provides that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law". Art. 7(1)(d) of the African Charter on Human and Peoples' Rights provides that every person shall have the right to have his case tried "within a reasonable time by an impartial court or tribunal."

178. However, it is still the task of the Appeals Chamber to determine how this requirement of impartiality should be interpreted and applied to the circumstances of this case. In doing so, the Appeals Chamber notes that, although the issue of impartiality of a Judge has arisen in several cases to date, before both the Bureau and a Presiding Judge of a Trial Chamber,[240] this is the first time that the Appeals Chamber has been seized of the matter.

2. Interpretation of the Statutory Requirement for Impartiality

179. Interpretation of the fundamental human right of an accused person to be tried by an impartial tribunal is carried out by considering situations in which it is alleged that a Judge is not or cannot be impartial and therefore should be disqualified from sitting on a particular case. A two-pronged approach appears to have developed. Although interpretation on a national or regional level is not uniform, as a general rule, courts will find that a Judge "might not bring an impartial and unprejudiced mind"[241] to a case if there is proof of actual bias or of an appearance of bias.

180. The Appellant acknowledges that he "makes no claim that Judge Mumba was actually biased".[242] The Appeals Chamber will proceed on this basis.

181. The European Convention on Human Rights has generated a large amount of jurisprudence on the interpretation of Article 6 of that Convention which provides, *inter alia,* that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." In the view of the European Court of Human Rights:

> Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6§1 (art.6-1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given Judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.[243]

---

[240] In each case, application has been made under Rule 15(B) of the Rules and considered by either the Presiding Judge of the Chamber in question who confers with the Judge in question, or if necessary, the matter is determined by the Bureau. See for example, *Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-T, Decision of the Bureau on Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, 1 Oct. 1999; *Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-T, Decision of the Bureau on Motion on Judicial Independence, 4 Sept. 1998; *Prosecutor v. Dario Kordic et al.*, Case No. IT-95-14/2-PT, Decision of the Bureau, 4 May 1998; *Prosecutor v. Radoslav Br|anin and Momir Talic*, Case No. IT-99-36-PT, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, 18 May 2000 ("*Talic* Decision").

[241] *Talic* Decision, para. 15.

[242] Appellant's Reply, p. 48.

[243] *Piersack v. Belgium*, Judgment of 21 September 1982, Eur. Ct. H. R., Series A, No. 53 ("*Piersack*"), para. 30. This test has been confirmed and applied in *De Cubber v. Belgium*, Judgment of 26 October 1984, Eur. Ct. H. R., Series A, No.86 ("*De Cubber*"), para. 24; *Hauschildt v. Denmark*, Judgment of 24 May 1989, Eur. Ct. H. R., Series A, No. 154 ("*Hauschildt*"), para. 46; *Bulut v. Austria*, Judgment of 22 February 1996 Eur. Ct. H. R, Series A, No.5 ("*Bulut*"), para

182. 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.[244] 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.[245] The Court considers that it must determine whether or not there are "ascertainable facts which may raise doubts as to...impartiality."[246] In doing so, it has found that 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.*"[247] Thus, one must ascertain, apart from whether a judge has shown actual bias, whether one can apprehend an appearance of bias.

183. The interpretation by national legal systems of the requirement of impartiality and in particular the application of an appearance of bias test, generally corresponds to the interpretation under the European Convention.

184. Nevertheless, the rule in common law systems varies. In the United Kingdom, the court looks to see if there is a "real danger of bias rather than a real likelihood",[248] finding that it is "unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time."[249] However, other common law jurisdictions have rejected this test as being too strict, and cases such as *Webb*, *R.D.S.*, and the *South African Rugby Football Union* case use the reasonable person as the arbiter of bias, investing him with the requisite knowledge of the circumstances before an assessment as to impartiality can be made.

31; *Castillo Algar v. Spain*, Judgment of 28 October 1998, Eur. Ct. H. R., Series A, No.95 ("*Algar*"), para. 43; *Incal v. Turkey*, Judgment of 9 June 1998, Eur. Ct. H. R , Series A, No.78 ("*Incal*"), para. 65.

[244] See *Le Compte, Van Leuven and de Meyere*, Judgment of 27 May 1981, Eur. Ct. H. R., Series A, No. 43, para. 58 ("*Le Compte*"); *Piersack*, para. 30; *De Cubber*, para. 25. In fact, there has yet to be a case in which a violation of Article 6 has been found under this element of the test.

[245] See *Sramek v. Austria*, Judgment of 22 October 1984, Eur. Ct. H. R., Series A, No.84, para.42; *Campbell and Fell v. United Kingdom*, Judgment of 28 June 1984, Eur. Ct. H. R., Series A, No.80, para. 85.

[246] *Hauschildt*, para. 48.

[247] *Ibid.* (emphasis added). See also *Algar*, para. 45; *Incal*, para. 71 and *Bulut*, para. 33.

[248] *R v. Gough*, [1993] A.C. 646 at 661.

[249] *Ibid.*

185. In the case of *Webb*, the High Court of Australia found that, in determining whether or not there are grounds to find that a particular Judge is partial, the court must consider whether the circumstances would give a fair-minded and informed observer a "reasonable apprehension of bias".[250] Similarly, the Supreme Court of Canada identified the applicable test for determining bias to be whether words or actions of the Judge give rise to a reasonable apprehension of bias to the informed and reasonable observer: "This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself 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".[251]

186. A recent case to confirm the above formula is the *South African Rugby Football Union Case,*[252] where the Supreme Court of South Africa stated that "[t]he 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."[253]

187. In the United States a federal Judge is disqualified for lack of impartiality where "a reasonable man, cognisant of the relevant circumstances surrounding a Judge's failure to recuse himself, would harbour legitimate doubts about the Judge's impartiality."[254]

188. This is also the trend in civil law jurisdictions, where it is required that a Judge should not only be actually impartial, but that the Judge should also appear to be impartial.[255] For example, under the German Code of Criminal Procedure, although Articles 22 and 23 are the provisions setting down mandatory grounds for disqualification, Article 24 provides that a Judge may be challenged for "fear of bias" and that such "[c]hallenge for fear of bias is proper if there is reason to distrust the impartiality of a Judge". Thus, one can challenge a Judge's partiality based on an

---

[250] *Webb v. The Queen* (1994) 181 CLR 41, 30 June 1994. The court reasoned that "public confidence in the administration of justice is more likely to be maintained if the Court adopts a test that reflects the reaction of the ordinary reasonable member of the public to the irregularity in question."

[251] *R.D.S. v. The Queen* (1997) Can. Sup. Ct, delivered 27 September 1997.

[252] *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others, Judgement on Recusal Application,* 1999 (7) BCLR 725 (CC), 3 June 1999 ("*South African Rugby Football Union*").

[253] *Ibid.*, para. 48.

[254] *U.S. v. Bremers et al.,* 195 F. 3d 221, 226 (5th Cir. 1999). Disqualification is governed by 28 USCS, Section 455 (2000), which provides that a Judge shall disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The Supreme Court has stated that "[t]he goal of section 455(a) is to avoid even the appearance of impartiality." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988) (citing *Hall v. Small Administration*, 695 F.2d 175, 179 (5th Cir. 1983).

[255] *See e.g.*, Arts. 22-24, German Code of Criminal Procedure (Strafprozeßordnung), Art 668 of the French Code de Procédure Pénale, Arts. 34-36, Italian *Codice de Procedura Penale*, and Arts. 512-519 of the Dutch Code of Criminal Procedure (Wetboek van Strafvordering). It should also be noted that as a general rule, these civil law systems also consider actual bias as being grounds for disqualification.

objective fear of bias as opposed to having to assert actual bias. Similarly in Sweden, a Judge may be disqualified if any circumstances arise which create a legitimate doubt as to the Judge's impartiality.[256]

3. A standard to be applied by the Appeals Chamber

189. Having consulted this jurisprudence, the Appeals Chamber finds that there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:

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.[257]

190. In terms of the second branch of the second principle, the Appeals Chamber adopts the approach that the "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."[258]

191. The Appeals Chamber notes that Rule 15(A) of the Rules provides:

> 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

[256] Sections 13 and 14 of the Swedish Code of Judicial Procedure (1998).
[257] In the *Talic* Decision, it was found that the test on this prong is "whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgement) would be that [the Judge in question]... might not bring an impartial and unprejudiced mind" (para. 15).
[258] *R.D.S. v. The Queen* (1997) Can. Sup. Ct., delivered 27 September 1997.

> impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.[259]

The Appeals Chamber is of the view that Rule 15(A) of the Rules falls to be interpreted in accordance with the preceding principles.

4. Application of the statutory requirement of impartiality to the instant case

(a) Actual Bias

192. As mentioned above,[260] the Appellant does not allege actual bias on the part of Judge Mumba. Accordingly, the Appeals Chamber sees no need to consider this aspect further in the instant case.

(b) Whether Judge Mumba was a party to the cause or had a disqualifying interest therein

193. With regard to the first branch of the second principle, the Appellant highlights the similarities in the circumstances of this case and that of *Pinochet*.[261] However, the *Pinochet* case is distinguishable from the instant case on at least two grounds.

194. First, whereas Lord Hoffmann was at the time of the hearing of that case a Director of Amnesty International Charity Limited, Judge Mumba's membership of the UNCSW was not contemporaneous with the period of her tenure as a Judge in the instant case.[262] Secondly, the close link between Lord Hoffmann and Amnesty International in the *Pinochet* case is absent here. As Lord Browne-Wilkinson said, "[o]nly in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties."[263] While Judge Mumba may have been involved in the same organisation, there is no evidence that she was closely allied to and acting with the Prosecution lawyer and the three authors of one of the *amicus curiae* briefs in the present case. The link here is tenuous, and does not compare to that existing between Amnesty International and Lord Hoffmann in the *Pinochet* case. Nor may this link be established simply by asserting that Judge Mumba and the Prosecution lawyer and the three *amici*

---

[259] Rule 14 also provides that a Judge must make a solemn declaration before taking up duties, in the following terms: "I solemnly declare that I will perform my duties and exercise my powers as a Judge of the International Tribunal...honourably, faithfully, impartially and conscientiously."
[260] *Supra*, para. 180.
[261] *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2)* [1999] 1 All ER 577 ("*Pinochet*").
[262] Judge Mumba served on the UNCSW between 1992 and 1995.
[263] *Pinochet*, p. 589.

authors shared the goals of the UNCSW in general. There is, therefore, no basis for a finding in this case of partiality based on the appearance of bias test established in the *Pinochet* case.

(c) Whether the circumstances of Judge Mumba's membership of the UNCSW would lead a reasonable and informed observer to apprehend bias

195. The Appeals Chamber, in applying the second branch of the second principle, considers it useful to recall the well known maxim of Lord Hewart CJ that it is of "fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[264] The Appellant, relying on the findings in the *Pinochet* case, alleges that there was an appearance of bias, because of Judge Mumba's prior membership of the UNCSW and her alleged associations with the Prosecution lawyer and the three authors of one of the *amicus curiae* briefs.[265]

196. In the view of the Appeals Chamber, there is a presumption of impartiality which attaches to a Judge. This presumption has been recognised in the jurisprudence of the International Tribunal,[266] and has also been recognised in municipal law. For example, the Supreme Court of South Africa in the *South African Rugby Football Union* case found:

> The reasonableness of the apprehension[of bias] must be assessed in the 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.[267]

197. The Appeals Chamber endorses this view, and considers that, in the absence of evidence to the contrary, it must be assumed that the Judges of the International Tribunal "can disabuse their minds of any irrelevant personal beliefs or predispositions." It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that Judge Mumba was not impartial in his case. There is a high threshold to reach in order to rebut the presumption of impartiality . As has been stated, "disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be 'firmly established.'"[268]

198. The Appellant suggests that, during her time with the UNCSW, Judge Mumba acted in a personal capacity and was "personally involved" in promoting the cause of the UNCSW and the Platform for Action. Consequently, she had a personal interest in the Appellant's case and, as this

---

[264] *R v. Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at p. 259.
[265] Appellant's Amended Brief, p. 127.
[266] See e.g., *Prosecutor v. Dario Kordic et al.*, Case No. IT-95-14/2-PT, Decision of the Bureau, 4 May 1998, p. 2.
[267] *South African Rugby Football Union*, para. 48.
[268] Mason J, in *Re JRL; Ex parte CJL* (1986) CLR 343 at 352. Adopted in the subsequent Australian High Court decision in *Re Polities; Ex parte Hoyts Corporation Pty Ltd* (1991) 65 ALJR 444 at 448.

created an appearance of bias, she should have been disqualified.[269] The Prosecutor argues that Judge Mumba acted solely as a representative of her country and, as such, was not putting forward her personal views, but those of her country.[270]

199. The Appeals Chamber finds that the argument of the Appellant has no basis. First, it is the Appeals Chamber's view that Judge Mumba acted as a representative of her country and therefore served in an official capacity. This is borne out by the fact that Resolution 11(II) of the UN Economic and Social Council that established the UNCSW provides that this body shall consist of "one representative from each of the fifteen Members of the United Nations selected by the Council."[271] Representatives of the UNCSW are selected and nominated by governments.[272] Although the Appeals Chamber recognises that individuals acting as experts in many UN human rights bodies do serve in a personal capacity, [273] the founding Resolution of the UNCSW does not provide for its members to act in such capacity. Therefore, a member of the UNCSW is subject to the instructions and control of the government of his or her country. When such a person speaks, he or she speaks on behalf of his or her country. There may be circumstances which show that, in a given case, a representative personally identified with the views of his or her government, but there is no evidence to suggest that this was the case here. In any event, Judge Mumba's view presented before the UNCSW would be treated as the view of her government.

200. Secondly, even if it were established that Judge Mumba expressly shared the goals and objectives of the UNCSW and the Platform for Action, in promoting and protecting the human rights of women, that inclination, being of a general nature, is distinguishable from an inclination to implement those goals and objectives as a Judge in a particular case. It follows that she could still sit on a case and impartially decide upon issues affecting women.

---

[269] Appellant's Amended Brief, pp. 122 and 135.
[270] Prosecutor's Response, paras. 6.13-6.15.
[271] Resolution adopted 21 June 1946, section 2(a).
[272] *Ibid.* Section 2(b) provides that "[W]ith a view to securing a balanced representation in the various fields covered by the Commission, the Secretary-General shall consult with the governments so selected before the representatives are finally nominated by these governments and confirmed by the Council."
[273] *E.g.*, Art. 17 of the Convention on the Elimination of Discrimination against Women (entering into force on 3 September 1981) which calls for the establishment of the Committee on the Elimination of Discrimination against Women to monitor the above, states that the "experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity..." Similarly, such language which expressly provides that members of committees shall act in their personal capacity is found in Art. 43(2) of the Convention on the Rights of the Child establishing the Committee on the Rights of the Child; Art. 8(1) of the International Convention on the Elimination of All Forms of Racial Discrimination establishing the Committee on the Elimination of all forms of Racial Discrimination; Art. 17(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment establishing the Committee against Torture; and Art. 28(3) of the International Covenant on Civil and Political Rights, establishing the Human Rights Committee.

201. Indeed, even if Judge Mumba sought to implement the relevant objectives of the UNCSW, those goals merely reflected the objectives of the United Nations,[274] and were contemplated by the Security Council resolutions leading to the establishment of the Tribunal. These resolutions condemned the systematic rape and detention of women in the former Yugoslavia and expressed a determination "to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them."[275] In establishing the Tribunal, the Security Council took account "with grave concern" of the "report of the European Community investigative mission into the treatment of Muslim women in the former Yugoslavia" and relied on the reports provided by, *inter alia*, the Commission of Experts and the Special Rapporteur for the former Yugoslavia, in deciding that the perpetrators of these crimes should be brought to justice.[276] The general question of bringing to justice the perpetrators of these crimes was, therefore, one of the reasons that the Security Council established the Tribunal.

202. Consequently, the Appeals Chamber can see no reason why the fact that Judge Mumba may have shared these objectives should constitute a circumstance which would lead a reasonable and informed observer to reasonably apprehend bias. The Appeals Chamber agrees with the Prosecutor's submission that "[c]oncern for the achievement of equality for women, which is one of the principles reflected in the United Nations Charter, cannot be taken to suggest any form of pre-judgement in any future trial for rape."[277] To endorse 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.

203. The Appeals Chamber recognises that Judges have personal convictions. "Absolute neutrality on the part of a judicial officer can hardly if ever be achieved."[278] In this context, the Appeals Chamber notes that the European Commission considered that "political sympathies, at least insofar as they are of different shades, do not in themselves imply a lack of impartiality towards the parties before the court".[279]

204. The Appeals Chamber considers that the allegations of bias against Judge Mumba based

---

[274] Article 1(3) of the UN Charter includes as a purpose of the United Nations: "To achieve international co-operation in solving international problems of an economic, social cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion..." Article 55(c) provides that based on respect for the principle of equal rights and self-determination of peoples, the United Nations will promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

[275] UN Security Council Resolution 827(1993) (S/RES/827 (1993)). S/RES/798 (1992) directly addressed to crimes against women in Bosnia and Herzegovina and being appalled by the "massive, organised and systematic detention and rape of women" in Bosnia and Herzegovina, condemned it as "acts of unspeakable brutality."

[276] S/RES/808 (1993).

[277] Prosecutor's Response, para.6.23.

[278] *South African Rugby Football Union Case*, para. 42.

upon her prior membership of the UNCSW should be viewed in light of the provisions of Article 13(1) of the Statute, which provide that "[i]n the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."

205. The Appeals Chamber does not consider that a Judge should be disqualified because of qualifications he or she possesses which, by their very nature, play an integral role in satisfying the eligibility requirements. Judge Mumba's membership of the UNCSW and, in general, her previous experience in this area would be relevant to the requirement under Article 13(1) of the Statute for experience in international law, including human rights law. The possession of this experience is a statutory requirement for Judges to be elected to this Tribunal. It would be an odd result if the operation of an eligibility requirement were to lead to an inference of bias. Therefore, Article 13(1) should be read to exclude from the category of matters or activities which could indicate bias, experience in the specific areas identified. In other words, the possession of experience in any of those areas by a Judge cannot, in the absence of the clearest contrary evidence, constitute evidence of bias or partiality.[280]

206. The Appellant has alleged that "Judge Mumba's decision [the Judgement] in fact promoted specific interests and goals of the Commission."[281] He states that she advocated the position that rape was a war crime and encouraged the vigorous prosecution of persons charged with rape as a war crime.[282] He erroneously states that this was the first case in which either the International Tribunal or the ICTR was offered the opportunity to reaffirm that rape is a war crime,[283] and that through this case the Trial Chamber expanded the definition of rape.[284] The Appellant alleges that this expanded definition of rape which emerged in the Judgement reflected that which had been adopted by the Expert Group Meeting, at which the three authors of one of the *amicus curiae* briefs and the Prosecution lawyer were present.[285] In his submissions, these circumstances could cause a reasonable person to reasonably apprehend bias.

---

[279] *Crociani et al. v. Italy*, Decisions and Reports, European Commission of Human Rights, vol. 22 (1981) 147, 222.
[280] Such a statutory requirement for experience of this general nature is by no means novel to this Tribunal. *See e.g.*, Art. 36 of the Rome Statute; Art. 34 of the American Convention; Art. 39(3) of the European Convention; Art. 2 of the Statute of the International Court of Justice.
[281] Appellant's Amended Brief, p. 135.
[282] *Ibid.*, p. 122.
[283] Appellant's Reply, p. 47. Cf. *^elebi}i* Judgement, paras. 478 - 479.
[284] Appellant's Amended Brief, p. 116.
[285] *Ibid.*

207. On the other hand, the Prosecutor argues that, in terms of the definition of rape, there is no evidence that Judge Mumba acted under the influence of the Expert Group Meeting or that she was even aware of it or its report. The Prosecutor states that the three authors of one of the *amicus curiae* briefs did not advance a definition of rape in their submissions (the Appellant does not dispute this statement[286]), and that in any event, the Appellant took no issue with the submissions made by the Prosecutor on the elements of rape during trial.[287]

208. The Appeals Chamber notes that there was no dispute at trial as to whether rape can, or should, be categorised as a war crime. The Prosecutor addressed the definition of rape in both her pre-trial brief and during the trial,[288] and, as found by the Trial Chamber, these submissions went unchallenged by the Appellant.[289] In addition, the Appellant confirmed during the oral hearing on the appeal that there was no issue raised at trial as to whether rape could be categorised as a war crime;[290] in fact, at the same hearing, he made no oral submission on the question of recusal.[291] For these reasons, the Appeals Chamber finds that the circumstances could not lead a reasonable observer, properly informed, to reasonably apprehend bias.

209. Moreover, the Appeals Chamber notes that both the International Tribunal and the ICTR have had the opportunity, prior to the Judgement, to define the crime of rape.[292]

210. With regard to the issue of the reaffirmation by the International Tribunal of rape as a war crime, the Appeals Chamber finds that the international community has long recognised rape as a war crime.[293] In the *^elebi}i* Judgement, one of the accused was convicted of torture by means of rape, as a violation of the laws or customs of war.[294] This recognition by the international community of rape as a war crime is also reflected in the Rome Statute where it is designated as a war crime.[295]

---

[286] Appellant's Amended Brief, footnote 29.
[287] Prosecutor's Response, para. 6.30.
[288] Prosecutor's pre-trial Brief, pp. 14-15; transcript of trial proceedings in *Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-T, p. 658 (this reference is from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public).
[289] Judgement, para. 174.
[290] T. 98 (2 March 2000).
[291] T. 93 (2 March 2000).
[292] *^elebi}i* Judgement, paras. 478 – 479; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, para. 598.
[293] *^elebi}i* Judgement, para. 476. The Lieber Code of 1863 considered rape by a belligerent to be punishable as a war crime (Instructions for the Government of the United States in the Field by Order of the Secretary of War, Washington D.C., 24 April 1863). Rape was prosecuted as a war crime under Control Council Law No. 10. Rape was also prosecuted as a war crime before the International Military Tribunal in Tokyo, with officials held criminally responsible for war crimes including rape committed by officers under their command.
[294] *^elebi}i* Judgement, paras. 943 and 965.
[295] Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) of the Rome Statute.

211. The Appeals Chamber also finds without merit the allegation that Judge Mumba is shown to have been biased by the fact that the Judgement expanded the definition of rape in a manner which reflected the definition put forward by the Expert Group Meeting. There is no evidence that Judge Mumba was influenced by the latter definition. On the other hand, there was jurisprudence which led the Trial Chamber to take the direction which it took. In the case of *The Prosecutor v. Jean-Paul Akayesu* before the ICTR, the Trial Chamber, while acknowledging that there was no generally accepted definition of rape in international law and that there were also variations at the national level,[296] defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[297] This definition was subsequently adopted in the *^elebi}i case.*[298]

212. In the instant case, there was no issue on this point at trial.[299] The Trial Chamber stated that it sought to arrive at an "accurate definition of rape based on the criminal law principle of specificity".[300] The Appeals Chamber recognises that the Trial Chamber was entitled to interpret the law as it stood.

213. Finally, the Appellant alleges that the association Judge Mumba had with the three authors of an *amicus curiae* brief created an apprehension of bias. He contends that, in filing the briefs before the Trial Chamber, the "amici actively assisted the prosecution in its effort to convict Mr. Furundžija by seeking to prevent the reopening of the trial after the Defence discovered that relevant documents had been withheld by the prosecution....the amici advanced legal arguments that assisted the prosecution in order to advance an agenda they shared with Judge Mumba."[301] The Appellant quotes sections of the briefs to illustrate the attitude which Judge Mumba shared; those sections, he says, reminded "the Tribunal that its ruling 'profoundly affects (a) women's equal rights to access to justice and (b) the goal of bringing perpetrators of sexual violence in armed conflict before the two International Criminal Tribunals."[302]

214. The Judgement notes that the *amicus curiae* briefs "dealt at great length with issues pertaining to the re-opening of the...proceedings" and the suggested scope of the reopening.[303] They did not address the question of rape or the Appellant's personal responsibility for the rapes in

---

[296] *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 Sept. 1998, para. 596.
[297] *Ibid.*, para. 598.
[298] *^elebi}i* Judgement, para. 479.
[299] Judgement, para. 174.
[300] *Ibid.*, para. 177.
[301] Appellant's Amended Brief, p. 118.
[302] *Ibid.*, p. 119.
[303] Judgement, para. 107.

question.[304] In any event, by the time the briefs were filed on 9 and 11 November 1998, the Trial Chamber had already decided to reopen the proceedings which commenced on 9 November 1998.[305]

215. The Appeals Chamber finds that there is no substance in the Appellant's allegations as contained in this ground of appeal. This ground therefore fails.

[304] The Appellant concedes that the *amicus curiae* briefs did not address the issue of the definition of rape (Appellant's Amended Brief, footnote 29).
[305] Judgement, para. 107.