SCSL-2004-14-PT

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SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

IN THE APPEALS CHAMBER

Before:	Justice Emmanuel Ayoola, Presiding Justice George Gelaga King Justice Raja Fernando
Registrar:	Robin Vincent
Date:	28 May 2004

PROSECUTOR **Against** SAM HINGA NORMAN
(Case No. SCSL-2004-14)

DECISION ON THE MOTION TO RECUSE JUDGE WINTER FROM THE DELIBERATION IN THE PRELIMINARY MOTION ON THE RECRUITMENT OF CHILD SOLDIERS

Office of the Prosecutor:

Desmond de Silva QC
Luc Côté
James C. Johnson

Defence Counsel:

James B Jenkins-Johnston
Sulaiman B. Tejan-Sie
Tim Owen QC
Quincy Whitaker

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

SEIZED of the Defence Motion to Recuse Justice Winter from Deliberating in the Preliminary Motion on the Recruitment of Child Soldiers filed on 24 March 2004("Motion") pursuant to Rule 15 of the Rules of Procedure and Evidence ("Rules");

NOTING the Prosecution Response to the Motion of Sam Hinga Norman to Recuse Justice Winter ("Response"), filed on 31 March 2004 and the Reply thereto ("Reply") on 19 April 2004;

NOTING the Motion for Production of Documents and Adjournment of Proceedings, filed on 24 May 2004 on behalf of Moinina Fofana and the Order[1] dismissing it on 26 May 2004;

NOTING that an oral hearing was held in the Motion on 26 May 2004;

NOTING the documents filed on a confidential basis in this Motion, including a statement by Justice Winter pursuant to Rule 15(B);

HAVING CONSIDERED THE SUBMISSIONS OF THE PARTIES;

A. Defence Motion

1. It is submitted on behalf of the Accused Samuel Hinga Norman that Justice Renate Winter, pursuant to Rule 15(A) of the Rules, ought to withdraw from any further deliberation in the Preliminary Motion challenging whether the recruitment of child soldiers amounted to a crime under international customary law at the time of the indictment that he faces ("Motion on Child Soldiers")[2], and that any past contribution be struck from the remaining judges' consideration.[3]

2. According to the Defence, The United Nations Children Fund ("UNICEF") applied to the Appeals Chamber to submit an "amicus curiae" brief which was granted by an Order.[4] According to the Defence, there is an apparent close connection between

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[1] *Prosecutor v Moinina Fofana*, SCSL-04-14-PT, Order, 26 May 2004.
[2] *Prosecutor v Norman* SCSL-03-08-PT, Motion on lack of Jurisdiction: Child Recruitment, filed 26 June 2003, referred to the Appeals Chamber by an Order of the Trial Chamber of 17 September 2003 pursuant to Rule 72(E) of the Rules.
[3] Motion, para.1.
[4] Motion, para. 4.

Justice Winter and UNICEF, notably her involvement in a report published in September 2002 by UNICEF entitled *International Criminal Justice and Children* ("September 2002 Publication").[5] The report deals with the Special Court for Sierra Leone ("Special Court") and its power to prosecute for conscripting or enlisting children.[6]

3. The Defence also notes that in a UNICEF report dated February 2002 entitled "Working for and with Adolescents" ("February 2002 Publication"), UNICEF asserted that they "benefited immensely from the technical assistance provided by Austrian Judge Renate Winter and would like to recommend her to other country offices".[7]

4. According to further research conducted by the Defence, Justice Winter is listed with a number of senior UNICEF personnel as forming part of an expert panel for a Masters Degree in Children's Rights run by the University of Freiburg.[8]

5. It is submitted that immediately upon discovery of these matters Defence counsel wrote to Justice Winter seeking clarification of her involvement with UNICEF, but the Defence claims it never received an actual response from Justice Winter.[9]

6. The Defence asserts that a proper application of the principles set out in the established jurisprudence inevitably leads to the conclusion that Justice Winter must withdraw from any further deliberation or determination of the Motion on Child Soldiers.[10]

7. According to the Defence, Justice Winter has displayed actual bias by pre-judging the very issue she was called upon to determine in the Motion on Child Soldiers. The Defence submits that it was clear from Justice Winter's interventions in the Appeal hearing in November that she remained firmly committed to the view expressed in the report.[11]

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[5] Motion, para. 5.
[6] Motion, para. 6.
[7] Motion, para. 7.
[8] Motion, para. 7.
[9] Motion, paras 8-10.
[10] Motion, paras 13-19.
[11] Motion, paras 12 and 20.

8. Further or alternatively the Defence claims that Justice Winter has a "personal interest" and/or "a personal association" by her relationship with UNICEF.[12] According to the Defence, Justice Winter's refusal to detail the extent of this relationship has left the Defence "with no other rational inference but that the relationship is very extensive indeed".[13]

9. In support of its submissions, the Defence relies on national and international jurisprudence to submit that the applicable test is whether a reasonable bystander would have an apprehension of bias by such failure to disclose prior to the grant of leave to UNICEF to intervene and/or by the continuing failure to disclose the extent of Justice Winter's association with UNICEF.[14] In particular, the Defence cites the decision of the UK House of Lords in *Pinochet (No 2)*[15] and of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in *Furundzija*,[16] as well as the recent decision of this Chamber in the case of *Sesay*.[17]

10. According to the Defence, in the event that Justice Winter declines to withdraw from deliberating in the Motion on Child Soldiers, the remaining members of the Appeals Chamber must disqualify Justice Winter pursuant to Rule 15(B) of the Rules.[18]

B. Prosecution Response

11. The Prosecution claims that there is a presumption of impartiality which attaches to a Justice and that it is for the party seeking disqualification of a Justice to adduce sufficient evidence to satisfy the Chamber that the Justice is not impartial or that there is a reasonable apprehension of bias[19]. According to the Prosecution, there is a high threshold to reach in order to rebut this presumption and a reasonable apprehension of

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[12] Motion, para. 21.
[13] Motion, paras 15-18, 22.
[14] Motion, para. 22.
[15] *Regina v Bow Street Metropolitan Stipendiary Magistrates and others, ex parte Pinochet Ugarte* (No 2), House of Lords, (2000) 1 AC 119 ("*Pinochet No 2*").
[16] *Prosecutor v Anto Furundzija*, Case No IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundzija*").
[17] *Prosecutor v Sesay* Case Number SCSL-2004-15-PT, Decision on the Defence Motion Seeking Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004 ("*Sesay* decision").
[18] Motion, paras 23-24.
[19] Prosecution Response, paras 3 and 4.

bias must be "firmly established".[20] The Prosecution submits that in accordance with the test established by the ICTY in its *Furundzija* Decision, the relevant questions to be addressed are as follows: [21]

(a) whether actual bias on the part of Justice Winter in relation to the Motion on Child Soldiers has been shown to exist;

(b) whether there is an unacceptable appearance of bias on the ground that Justice Winter is a party to the Motion on Child Soldiers, or if the Justice's decision will lead to the promotion of a cause in which she is involved, together with one of the parties; and

(c) whether there is an unacceptable appearance of bias on the ground that the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

12. According to the Prosecution in relation to (a), there is no indication in the September 2002 Publication that Justice Winter was one of its authors or had any editorial or other responsibility for the final product.[22] The Prosecution claims that contrary to what the Defence Motion suggests, the September 2002 Publication simply contains no detailed analysis or conclusions with respect to the issue in dispute in the Motion on Child Soldiers[23].

13. In relation to (b), the Prosecution rejects the Defence suggestion that this gives rise to a situation analogous to that which was the subject of the *Pinochet* case[24] in the United Kingdom. The Prosecution submits that there is no suggestion in the Defence Motion, and certainly no evidence, that Justice Winter holds any senior position in UNICEF, or any other organization that exists to support the work of UNICEF, or has any executive or managerial responsibility in UNICEF or related organisation.[25]

14. The Prosecution submits that as to the February 2002 publication, the Motion on Child Soldiers relies on a section of the publication dealing with one particular project

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[20] Prosecution Response, para. 4.
[21] Prosecution Response, para. 6.
[22] Prosecution Response, para. 8.
[23] Prosecution Response, para. 10.
[24] *Pinochet No. 2*, above note 15.
[25] Prosecution Response, para. 13.

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undertaken by the Iran Country Office of UNICEF which included a study tour to Austria. The Prosecution claims that there is no suggestion in the publication that Justice Winter had any managerial or organisational responsibility for the project, or even that she was a participant in the project as such, which can hardly be regarded as a "close connection" or "relationship" with UNICEF.[26]

15. As to the Executive Masters programme in Children's Rights run by the University of Freiburg, the Prosecution submits that the pamphlet appears to indicate that Justice Winter and the named UNICEF officials had agreed to speak or lecture to participants in this Masters programme, but that there is no suggestion that either Justice Winter or the UNICEF officials had any involvement in the management or organisation of this programme or even that Justice Winter and the UNICEF officials had any contact with each other in connection with it.[27]

16. In relation to (c), the Prosecution submits that the Defence Motion does not suggest that there were otherwise any circumstances that would lead a reasonable observer, properly informed, to reasonably apprehend bias. The Prosecution notes that any past experience and involvement that Justice Winter may have had in issues concerning the legal position of children cannot be a basis for a reasonable person to apprehend bias in proceedings involving such issues. In this respect, the Prosecution relies on the findings of the Appeals Chamber of the ICTY in the cases of *Furundzija* and *Celebici*.[28]

C. Defence Reply

17. The Defence submits with respect to (a) that the failure of Justice Winter to respond to the proper and legitimate enquiries of the Defence means no proper examination of the extent of any actual bias is possible. According to Defence, there is a clear *prima facie* evidence of bias and that Justice Winter should dispel this *prima facie* demonstration of bias.[29] The Defence submits that the wording of the September 2002

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[26] Prosecution Response, para. 15.
[27] Prosecution Response, para. 16.
[28] Prosecution Response, para.17, referring to *Furundzija* above note 16, and *Prosecutor v Delalic (Celebici case)* Case No IT-96-21-A, Judgement, 20 February 2001.
[29] Defence Reply, paras 2 and 4.

Publication indeed suggests that the recruitment of child soldiers was a crime under international customary law prior to the commencement of the Rome statute.[30]

18. With regard to (b), the Defence submits that it is simply unable to ascertain the level of Justice Winter's involvement with UNICEF due to her failure to respond to the enquiry by the Defence on this issue. The Defence claims that it received information that Justice Winter has accepted a formal position with UNICEF subsequent to her appointment as a judge.[31]

19. The Defence contends that Justice Winter's refusal to respond creates an appearance of bias on the part of the reasonable observer.[32]

D. Applicable Law and Jurisprudence

20. Article 13 of the Statute of the Special Court provides that:

> 1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.
>
> 2. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.
>
> 3. The judges shall be appointed for a three-year period and shall be eligible for reappointment.

21. Rule 15 of the Rules deals with the Disqualification of Judges and is useful to set out the relevant provisions of the rule:

> (A) A Judge may not sit at a trial or appeal *in any case in which he has a personal interest or concerning which he has or has had any personal association which might affect his impartiality*. Where the Judge withdraws from the Trial Chamber, the President may assign the alternate judge, in accordance with Article 12(4) of the Statute, or another Trial Chamber Judge to sit in his place. Where a Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber may assign another Judge to sit in his place. (Emphasis added).

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[30] Defence Reply, para. 3.
[31] Defence Reply, para. 5.
[32] Defence Reply, para. 6.

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

22. The meaning of "personal interest" and "impartiality" are not elaborated further in the Rules, but have been the subject of considerable jurisprudential debate. In its Decision on the Disqualification of Justice Robertson in the case of *Sesay*,[33] this Chamber held that the applicable test for determining applications made under Rule 15(B) is whether an independent bystander or reasonable person will have a legitimate reason to fear that the judge in question lacks impartiality, "in other words, whether one can apprehend bias".[34]

23. This is consistent with the ICTY jurisprudence, in particular the test derived from the Judgement in the case of *Furundzija* as set out as follows:

> [t]he 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:
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> A. A Judge is not impartial if it is shown that actual bias exists.
>
> B. There is an unacceptable appearance of bias if:
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> 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
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> ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias." [35]

The focus is therefore on "an unacceptable appearance of bias". While the first category leads to automatic disqualification, the more difficult area is where the Judge is

[33] *Sesay* decision, above note 17.
[34] Ibid. para. 15.
[35] *Furundzija*, above note 16, at para. 189.

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neither a party to the case nor has an improper interest in the outcome of the decision. In this case, we come back to the objective test of whether there is a reasonable apprehension of bias. This test has since been widely applied, in such cases as *Celebici*[36], *Krajisnik*[37]and *Seselj.*[38] Most recently, the Bureau of the ICTR confirmed this Chamber's characterization of this standard in its decision in the case of *Karemera.*[39]

E. The Principal Issues and their determination

24. The issues that arise in the Motion are the following:

(a) Does the reviewing of the draft and supporting our drafting process of the report formally published by UNICEF and "No Peace Without Justice" in September 2002 demonstrate bias on the part of Judge Winter?

(b) Does the technical assistance provided by Judge Winter to this project undertaken by their Iranian country office of UNICEF show bias on the part of Judge Winter?

(c) Does the participation of Judge Winter in a Masters Programme in children's rights run by the University of Freiburg as an expert indicate bias?

25. As discussed in the previous section, there is a general rule that judges should not only be subjectively free from bias but that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. However, it should be emphasised that the starting point for any determination of such claim - as noted by the Prosecution – is that "there is a presumption of impartiality which attaches to a Judge."[40] This presumption derives from their oath of office and the qualifications for

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[36] *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo (Celebici case)* Appeals Chamber Judgement, 20 February 2001.
[37] *Prosecutor v Momcilo Krajisnik* - Case No. IT-00-39-PT, Decision by a single Judge on the Defence Application for Withdrawal of a Judge from the Trial, 22 January 2003.
[38] *Prosecutor v Vojislav Seselj*, Decision on Motion for Disqualification, IT-03-67-PT, 10 June 2003 ("*Seselj* decision").
[39] *The Prosecutor v Karemera, Rwamajuba, Ngirumpatse, Nzirorera*, Case No ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Trial Judges, 17 May 2004 at para. 9.
[40] *Furundzija*, above note 16 at para. 196.

their appointment in Article 13 of the Statute, and places a high burden on the party moving for the disqualification to displace that presumption.[41]

26. As observed by the Prosecution, while it is not uncommon for authors of publications to submit their drafts for experts for their comments and suggestions and to acknowledge their assistance, the views expressed in the publication remains those of the author and cannot be attributed to the person who reviewed the draft. There is no material to suggest that Judge Winter *approved* the draft. She was one of over 50 persons who reviewed the draft and who supported the drafting process.

27. The "hypothetical fair-minded observer", as articulated in the *Krajisnik* decision, is by implication someone from the outside, who, as an *observer* (and not a party) recognises and understands the circumstances well enough to tell whether or not the public sense of Justice would be challenged by the presence of a particular Judge on the bench in the case.[42] Applying this standard, in relation to (a), I am therefore unable to agree with the Defence suggestion that on the above facts a reasonable observer properly informed of the professional practice of reviewing publications would reasonably apprehend bias.

28. In relation to (b), as the Prosecution points out, the February 2002 publication relates to a project undertaken by the Iran Country Office of UNICEF that involved a study tour to Austria where Justice Winter is a Judge. A party challenging the judge's impartiality must demonstrate that the judge entertains a personal interest in, or a particular concern for, any other parties. While it is not necessary that such an interest be of a financial or pecuniary nature, it must be that the judge in question "is so closely associated [...] that he can properly be said to have an interest in the outcome of the proceedings".[43] Such a personal interest or particular concern is different from a professional interest in the subject matter of the case.[44] The fact that there may be some history of professional association, however limited, is not alone sufficient to meet the required threshold.

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[41] *Prosecutor v Karemera, Rwamajuba, Ngirumpatse, Nzirorera*, Case No ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Trial Judges, 17 May 2004 at para. 10.
[42] *Krajisnik*, above note 37.
[43] *Pinochet No 2*, above note 15, per Lord Goff.
[44] *Krajisnik*, above note 37.

29. Similarly, in relation to (c), teaching in an international Masters programme - as with reviewing a report - does not in and of itself show or even suggest an appearance of bias. On the material before the Chamber, there are no details provided of the nature of Justice Winter's involvement in the Freiburg Masters Programme, and to consider this point further would be purely speculative.

30. On the contrary, we find that each of the grounds relied upon by the Defence Motion, rather than proving any actual or perceived bias on the part of Justice Winter with regard to the question of if and when the recruitment of child soldiers became a crime under international law, are evidence of the internationally recognised qualifications of Justice Winter in the general field of juvenile justice. The ICTY Appeals Chamber has pointed out that "it would be an odd result if the fulfilment of the qualification requirements of Article 13 were to operate as a disqualifying factor on the basis that it gives rise to an inference of bias."[45] As required by Article 13(2) of the Statute of the Special Court, taking account of such expertise in juvenile justice in the composition of the Chambers is entirely appropriate and a distinction must be drawn between the requirements for a person to serve as a Judge of the Tribunal and the issues relating to the grounds of disqualification of a Judge from sitting in a particular case.[46]

31. As a final matter, we note that the Defence claims that it was clear from Justice Winter's interventions in the Appeal hearing that she remained firmly committed to the view expressed in the report. First, whether or not Justice Winter expressed a view similar to the one in the publications does not create the link between Justice Winter and the publications the Defence is trying to establish. Furthermore, the fact that Justice Winter may have expressed an opinion which is unfavourable to the Defence is not a sufficient ground for bias.

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[45] *Celebici* Appeals Chamber Judgment, above note 36 at para. 702 (citing *Furundzija).*

[46] *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo (Celebici case),* Decision Of The Bureau On Motion To Disqualify Judges Pursuant To Rule 15 Or In The Alternative That Certain Judges Recuse Themselves, 25 October 1999.

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HEREBY DECIDES:

32. For the above-mentioned reasons the Motion is dismissed

Done at Freetown this 28th day of May 2004,

Justice Ayoola
Presiding

Justice King

Justice Fernando

[Seal of the Special Court for Sierra Leone]