

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE THE APPEALS CHAMBER:

**Judge Winter, President
Judge King, Vice President
Judge Robertson QC
Judge Ayoola
Judge Fernando**

Registrar: Mr. Robin Vincent

Date filed: 5th of April 2004

THE PROSECUTOR

v

CHIEF SAMUEL HINGA NORMAN

And

MOININA FOFANA|

CASE NO. SCSL - 2004 - 14 - PT

**DEFENCE REPLY
TO PROSECUTION RESPONSE TO
MOTION TO RECUSE JUDGE WINTER FROM
DELIBERATING IN THE PRELIMINARY MOTION
ON THE RECRUITMENT OF CHILD SOLDIERS**

Office of the Prosecutor

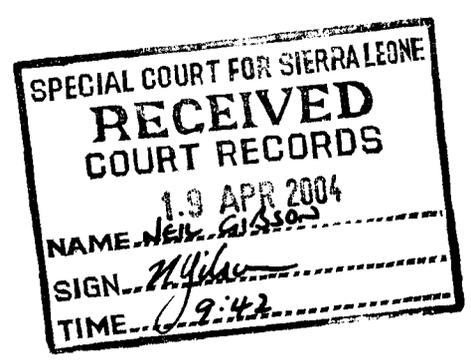
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1. This is the Defence Reply to the Response of the Prosecution to the Motion filed on behalf of Chief Hinga Norman and Moinina Fofana seeking the recusal of Judge Winter from deliberating in the Preliminary Motion on the recruitment of child soldiers.
2. With respect to Question 1 **“Whether actual bias has been shown to exist”** posed by the Prosecution at paragraph 7 of their Response, the Defence re-affirms the basis of the Motion, namely that the failure of Judge Winter to respond to the proper and legitimate enquiries of the Defence as to the extent of her contacts with UNICEF and involvement in the drafting of the September 2002 publication means no proper examination of the extent of any actual bias is possible. There is however clear *prima facie* evidence of bias in the form of her “generously reviewing and supporting the drafting process” of a publication that pronounces on the very issue she was called upon to decide.
3. The Prosecution suggest erroneously that page 45 of the September 2002 publication “does not suggest that the crime [of recruitment and use of child soldiers] existed under international law even before the Rome Statute. It is submitted that the phrase cited in paragraph 5 of the Defence Motion does indeed

suggest that the recruitment of child soldiers was a crime under international customary law prior to the commencement of the Rome statute, hence the use of the phrase “confirm”. If the recruitment of child soldiers was considered to become an international crime once it was incorporated into the Rome statute (as is contended by the Defence) then the use of “confirm” in this context would not make sense. In any event, it is clear from the “amicus” brief filed by UNICEF that they are of the view that the recruitment of child soldiers was a crime under international law from at least 1996.

4. It is submitted that it would have been entirely possible to dispel this *prima facie* demonstration of bias on this issue if Judge Winter had responded to the Defence’s enquiry by informing them of the role she in fact played in the drafting of the report. It may be the case, as suggested by the prosecution at paragraph 8, that Judge Winter had no editorial or other responsibility for the final product but her failure to explain her role does not enable the Defence to assure the accused that she is not biased on this issue.
5. Similarly with regard to Question 2, posed at paragraph 11 of the Prosecution Response, namely **whether there is an appearance of bias due to an association with UNICEF** the Defence is simply unable to ascertain the level of Judge Winter’s involvement with UNICEF due to her failure to respond to proper enquiry by the Defence on this issue. The Defence received information that Judge Winter has accepted a formal position with UNICEF subsequent to her appointment as a judge. The Defence have been unable to confirm or dismiss this information due to the response of Judge Winter. Thus the Defence have no way of knowing whether Judge Winter plays an “active role” in UNICEF and have been disappointed to find that the Judge herself is not anxious to detail precisely her involvement so as to dispel any suggestion of bias.
6. It is submitted that the Prosecution have misunderstood the substantive contention of the Defence Motion. The matters cited by the Defence are the matters that show this is a proper area for them to make a formal enquiry of Judge Winter as they raise a *prima facie* case of bias. If Judge Winter had responded to the Defence enquiries then the Defence would have been able to make a proper assessment of whether the

criteria for recusal had been met. The Defence contends that the Judge's refusal to respond to what is clearly a legitimate enquiry creates an appearance of bias on the part of the reasonable observer. The matters raised by the prosecution are premature as it is impossible to determine them until Judge Winter responds fully to the matters raised in the letter of the 3rd of February 2004.

Dated this 5th day of April 2004

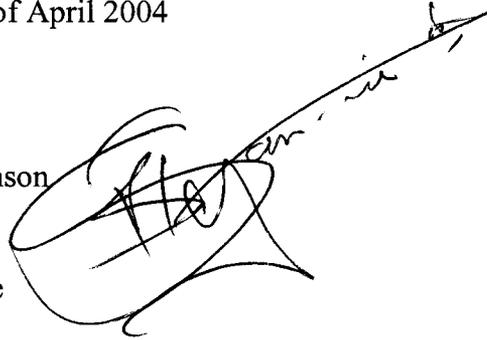
James Jenkins-Johnson

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A handwritten signature in black ink, appearing to be 'James Jenkins-Johnson', written over a large, stylized circular scribble.