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RSCSL-03-01-ES  
(12802 - 12825)

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RESIDUAL SPECIAL COURT FOR SIERRA LEONE

**Before:** Justice Renate Winter, Presiding  
Justice Isaac Lenaola  
Justice Miatta Samba

**Registrar:** Ms. Binta Mansaray

**Date:** 24 August 2020

**In the Matter of**

**THE APPLICATION OF CHARLES GHANKAY TAYLOR**

Case No. RSCSL-03-01-ES

**PUBLIC**

**DECISION ON PRINCIPAL DEFENDER'S REQUEST FOR THE  
WITHDRAWAL AND/OR RECUSAL OF HON. JUSTICE TERESA DOHERTY  
OF THE UNITED KINGDOM (UK) AS THE DUTY JUDGE ON THE  
APPLICATION OF CHARLES G. TAYLOR TO BE TEMPORARILY  
TRANSFERRED TO A SAFE THIRD COUNTRY TO CONTINUE HIS  
IMPRISONMENT DUE TO THE MASSIVE OUTBREAK OF  
COVID 19 IN THE UK**

**Office of the Prosecutor:**

Mr. James C Johnson

**Defence Office:**

Mr. Ibrahim Yillah

**Counsel for Charles G. Taylor:**

Mr. Essa M. Faal

RESIDUAL SPECIAL COURT FOR SIERRA LEONE	
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**The Chamber of the Residual Special Court for Sierra Leone** (“Residual Special Court”) designated for a Decision on the recusal of Judge Doherty, composed of Justice Renate Winter, Presiding Judge, Justice Isaac Lenaola and Justice Miatta Samba;

**RECALLING** the Public Motion “Prosecutor Against Charles Ghankay Taylor - Taylor’s Request for Temporary Transfer to a Safe Third Country to Continue His Imprisonment Due to Massive Outbreak of COVID-19 in the UK” filed on 15 June 2020 (“Motion”), wherein counsel for Mr. Taylor requested a temporary transfer from HM Franklands Prison in the United Kingdom (UK) where Mr. Taylor is currently serving his sentence, on grounds related to the Covid-19 pandemic;<sup>1</sup>

**RECALLING** Prosecutor’s Public “Motion for Leave to Respond to Taylor Request for Temporary Transfer to a Safe Third Country to Continue His Imprisonment Due to Massive Outbreak of Covid-19 in the UK”;<sup>2</sup>

**RECALLING** President’s Public “Order Designating a Duty Judge” of 29 June 2020, wherein the President appointed Justice Teresa Doherty as the Duty Judge to hear and determine all matters arising from the Motion;<sup>3</sup>

**RECALLING** Public Directions issued by Justice Doherty on 30 June 2020 requesting, *inter alia*, certain particulars from the Applicant in relation to the Motion and granting leave to the Prosecutor to file his response;<sup>4</sup>

**RECALLING** Re-Filed Public “Prosecutor’s Response to Taylor’s Request for Temporary Transfer to a Safe Third Country To Continue His Imprisonment Due to Massive Outbreak of Covid-19 in the UK”;<sup>5</sup>

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<sup>1</sup> RSCSL-03-01-ES-1442, 15 June 2020, (“Motion”).

<sup>2</sup> RSCSL-03-01-ES-1443, 24 June 2020.

<sup>3</sup> RSCSL-03-01-ES-1446, 29 June 2020.

<sup>4</sup> RSCSL-03-01-ES-1448, 30 June 2020.

<sup>5</sup> RSCSL-03-01-ES-1450, 1 July 2020.

**RECALLING** Re-Filed Public with Confidential Annex “Submission of the Registrar Pursuant to Rule 33(B) in the Application of Charles Ghankay Taylor for Transfer to a Safe Third Country Due to Massive Outbreak of Covid-19 in the UK”;<sup>6</sup>

**SEIZED OF** Public “Principal Defender’s Request for the Withdrawal and/or Recusal of Hon. Justice Teresa Doherty of the United Kingdom (UK) as The Duty Judge on The Application of Charles G. Taylor to be Temporarily Transferred to a Safe Third Country to Continue His Imprisonment Due to Massive Outbreak of Covid-19 in the UK”, filed on 1 July 2020 (“Recusal Application”);<sup>7</sup>

**NOTING** Prosecutor’s Motion for Leave to respond to the Recusal Application, filed on 8 July 2020 and the Decision of Justice Doherty granting said leave;<sup>8</sup>

**CONSIDERING** Public “Prosecutor’s Response to Principal Defender’s Request for the Withdrawal and/or Recusal of Hon. Justice Teresa Doherty of the United Kingdom (UK) as the Duty Judge on the Application of Charles G. Taylor to be Temporarily Transferred To a Safe Third Country to Continue His Imprisonment Due to Massive Outbreak of Covid-19 in the UK”, filed on 8 July 2020 (“Prosecutor’s Response to Recusal Application”);<sup>9</sup>

**CONSIDERING** Public “Principal Defender’s Reply to the Prosecution’s Response to “The Principal Defender’s Request for the Withdrawal and/or Recusal of Hon. Justice Teresa Doherty of the United Kingdom (UK) as Duty Judge on the Application of Charles G. Taylor to be Temporarily Transferred To a Safe Third Country to Continue His Imprisonment Due to Massive Outbreak of Covid-19 in the UK”, filed on 14 July 2020 (“Applicant’s Reply”);<sup>10</sup>

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<sup>6</sup> *RSCSL-03-01-ES-1451*, 1 July 2020.

<sup>7</sup> *RSCSL-03-01-ES-1449*, 1 July 2020.

<sup>8</sup> Prosecutor’s Motion for Leave to Respond to Principal Defender’s Request for the Withdrawal and/or Recusal of Hon. Justice Teresa Doherty of the United Kingdom (UK) as Designated Duty Judge, *RSCSL-03-01-ES-1453*, 08 July 2020; Decision - Prosecutor’s Motion for Leave to Respond to Principal Defender’s Request for the Withdrawal and/or Recusal of Hon. Justice Teresa Doherty of the United Kingdom (UK) as Designated Duty Judge, *RSCSL-03-01-ES-1454*, 08 July 2020.

<sup>9</sup> *RSCSL-03-01-ES-1455*, 08 July 2020.

<sup>10</sup> *RSCSL-03-01-ES-1456*, 14 July 2020.

**CONSIDERING** Public “Statement and Decision on Principal Defender’s Request for Recusal of Justice T. Doherty”, filed on 24 July 2020 (“Comments of Hon. Justice Doherty”);<sup>11</sup>

**FURTHER CONSIDERING** that Justice Doherty has indicated that she will not withdraw voluntarily from the adjudication of the Motion;<sup>12</sup>

**RECALLING** President’s Public “Order Convening Chamber Pursuant to Article 13(1) of the Statute”, of 4 August 2020, wherein the present Chamber was appointed to hear and determine all matters arising from the Recusal Application;<sup>13</sup>

**COGNISANT** of Articles 11 and 17 of the Statute of the Residual Special Court for Sierra Leone (“Statute”);

**IN CONSIDERATION OF** the provisions of Rule 15 of the Rules of Procedure and Evidence of the Residual Special Court for Sierra Leone (“Rules”);

**HEREBY DECIDE AS FOLLOWS:**

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<sup>11</sup> *RCSL-03-01-ES-1457*, 24 July 2020.

<sup>12</sup> *RCSL-03-01-ES-1457*, 24 July 2020, para. 47.

<sup>13</sup> *RCSL-03-01-ES-1458*, 4 August 2020.

## I. SUBMISSIONS

### A. Recusal Application

1. The Principal Defender (hereinafter, the “Applicant”) seeks the withdrawal or recusal of Justice Teresa Doherty as Duty Judge on the Motion pursuant to Rules 15 and 54 of the Rules. He acknowledges that Rule 15 refers to trial and appeal proceedings but submits that the same principles apply to the Motion.<sup>14</sup> As relief, the Applicant requests the designation of a Judge from a different jurisdiction.<sup>15</sup>
2. The Applicant emphasizes that he impugns neither the integrity nor the impartiality of Justice Doherty.<sup>16</sup> Rather, he premises his request on the existence of an appearance of bias.<sup>17</sup>
3. The Applicant argues that two circumstances raise an appearance of bias:
  - i. Justice Doherty is “from the UK”,<sup>18</sup> and the Motion necessarily places her in the position of “passing some form of judgment/assessment of her country’s response to covid 19 especially within that country’s prison system”.<sup>19</sup> As an example, the Applicant describes the need for the Duty Judge to obtain submissions from UK officials responsible for the implementation of health measures at the prison in question;<sup>20</sup> and
  - ii. Justice Doherty is a UK National who has “served as a judge in that country” and was “nominated by that country to serve as a Judge in the RSCSL.”<sup>21</sup> He argues that, “this scenario by itself without more creates an appearance of ‘bias’ akin to a person being a judge in his/her own cause.”<sup>22</sup>

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<sup>14</sup> Recusal Application, para. 14.

<sup>15</sup> Recusal Application, para. 11.

<sup>16</sup> Recusal Application, para. 7.

<sup>17</sup> Recusal Application, para. 9.

<sup>18</sup> Recusal Application, para. 5.

<sup>19</sup> Recusal Application, para. 5.

<sup>20</sup> Recusal Application, para. 7.

<sup>21</sup> Recusal Application, para. 8.

<sup>22</sup> Recusal Application, para. 8.

4. In support of his argument that a judge may be disqualified for appearance of bias alone, “before any [related] matter on that case had come up”,<sup>23</sup> the Applicant cites the Appeals Chamber decision disqualifying Justice Geoffrey Robertson from the Appeals Chamber in the *Sesay* case,<sup>24</sup> and two UK cases for related principles regarding the appearance of bias: *R v Sussex Justices, Ex parte McCarthy*,<sup>25</sup> and *R v Bow Street Metropolitan Stipendiary Magistrates and others, Ex parte Pinochet Ugarte*.<sup>26</sup>

### **B. Prosecutor’s Response to Recusal Application**

5. The Prosecutor sought leave from the President or Justice Doherty to respond to the Recusal Application,<sup>27</sup> stating that the Recusal Application raised a “novel issue relating to the disqualification of a judge from a matter for apparent bias based on his/her nationality”,<sup>28</sup> and that a favourable decision would “impact on settled principles on this subject”.<sup>29</sup> Justice Doherty granted the requested leave, considering that “the Prosecutor’s proposed Response raise[d] relevant issues of jurisprudence and law.”<sup>30</sup>
6. The Prosecutor argues that the Recusal Application is based exclusively on the incorrect assertion that Justice Doherty is a UK national, and should be dismissed as frivolous.<sup>31</sup> He asserts that Justice Doherty is Irish and not a UK National.<sup>32</sup> In support of this assertion, the Prosecutor refers to the Belfast Agreement,<sup>33</sup> records of

<sup>23</sup> *RSCSL-03-01-ES-1449*, 1 July 2020, para. 15.

<sup>24</sup> *Prosecutor v. Issa Hassan Sesay, SCSL-04-15-AR-15*, Appeals Chamber, “Decision on Defence Motion Seeking the Disqualification of Geoffrey Robertson from the Appeals Chamber”, 13 March 2004.

<sup>25</sup> [1924] 1 KB 256 at 259, Recusal Application, para. 10.

<sup>26</sup> [2000] 1 AC 119 (HL) (“UK *Pinochet* case”), Recusal Application, para. 12.

<sup>27</sup> *RSCSL-03-01-ES-1453*, 8 July 2020, cover page, *but see* para. 29, where the Prosecutor directs his request to the President.

<sup>28</sup> *RSCSL-03-01-ES-1453*, 8 July 2020, para. 3.

<sup>29</sup> *RSCSL-03-01-ES-1453*, 8 July 2020, para. 3.

<sup>30</sup> *RSCSL-03-01-ES-1454*, 8 July 2020.

<sup>31</sup> Prosecutor’s Response to Recusal Application, paras 2 and 9.

<sup>32</sup> Prosecutor’s Response to Recusal Application, para. 5.

<sup>33</sup> Prosecutor’s Response to Recusal Application, para. 5 (internal reference omitted).

the SCSL and RSCSL,<sup>34</sup> and Justice Doherty's role as an appointee to the Irish Department of Foreign Affairs Election Monitoring Register.<sup>35</sup>

7. He further argues that the Recusal Application fails to meet any of the accepted tests for the removal of a judge for impartiality as well as the conditions set out under Rule 15(A) and so should be rejected.<sup>36</sup> Referring to principles enunciated in the *Furundzija Appeal Judgment* and the *Celebici Appeal Judgment* from the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY),<sup>37</sup> the Prosecutor submits that there is a presumption of judicial impartiality, and that the moving party has the onus to adduce sufficient evidence to demonstrate a lack of impartiality or a reasonable apprehension of bias.<sup>38</sup>
8. The Prosecutor also refers to a decision of the Appeals Chamber of the Special Court of Sierra Leone (Special Court) in *Prosecutor v. Norman*, in which the Appeals Chamber sets out the principles to be followed in interpreting and applying the impartiality requirement of the Statute of the Special Court, which encompasses bias in both its subjective and objective forms.<sup>39</sup>
9. The Prosecutor submits that the Recusal Application focuses primarily on the appearance of bias, given that it makes no mention of any display of actual bias on the part of Judge Doherty;<sup>40</sup> neither does it allege that Judge Doherty has any conflicting personal interests.<sup>41</sup> The Prosecutor submits that jurisprudence requires a "legitimate reason to fear that a particular judge lacks impartiality", supported by

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<sup>34</sup> Prosecutor's Response to Recusal Application, para. 6 (internal reference omitted).

<sup>35</sup> Prosecutor's Response to Recusal Application, para. 6.

<sup>36</sup> Prosecutor's Response to Recusal Application, paras 3-4, 11-22.

<sup>37</sup> Prosecutor's Response to Recusal Application, paras 11,15 and 19-20, referring to *Prosecutor v. Furundzija*, IT-95-17/1-A, ICTY, Appeals Chamber, Judgment, 21 July 2000, and *Prosecutor v. Delalic et al.*, IT-96-21-A, ICTY, Appeals Chamber, Judgment, 20 February 2001.

<sup>38</sup> Prosecutor's Response to Recusal Application, paras 11-12 and 14.

<sup>39</sup> Prosecutor's Response to Recusal Application, para. 13, referring to *Prosecutor v. Sam Hinga Norman, SCSL-2004-14-112-A*, Appeals Chamber, Decision on Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004.

<sup>40</sup> Prosecutor's Response to Recusal Application, paras 16-17.

<sup>41</sup> Prosecutor's Response to Recusal Application, paras 16-17.

ascertainable, reasonable facts and that the Recusal Application must therefore fail as no facts beyond Judge Doherty's nationality have been provided for consideration.<sup>42</sup>

10. Finally, the Prosecutor submits that nationality as a basis for recusal is flawed,<sup>43</sup> and has been previously rejected as such before the ICTY,<sup>44</sup> and the ICC.<sup>45</sup> The Prosecutor also refers to the President's designation of Justice Vivian Margarette Solomon in the matter of Moinina Fofana's violation of a term of his conditional early release (*Fofana Matter*).<sup>46</sup> The Prosecutor argues that the designation of Justice Solomon took place notwithstanding her Sierra Leonean nationality, and required her to carry out an assessment of agents of the Government of Sierra Leone, her principal employer. He submits that Justice Solomon carried out the required duty, ultimately delivering "a fair and just decision which not only found the allegations to be proven, but [which] was highly critical" of the relevant Sierra Leonean authority.<sup>47</sup>

### C. Applicant's Reply

11. As a preliminary matter, the Applicant disputes Justice Doherty's authority to grant leave to the Prosecutor to respond to the Recusal Application, stating that the procedure amounts to Justice Doherty acting "as a judge in her own cause",<sup>48</sup> and that the matter should have been dealt with by the President or another judge appointed by the President.<sup>49</sup> The Applicant advises he will be appealing the decision

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<sup>42</sup> Prosecutor's Response to Recusal Application, paras 21-22 (internal references omitted).

<sup>43</sup> Prosecutor's Response to Recusal Application, paras 18 and 23.

<sup>44</sup> Prosecutor's Response to Recusal Application, paras 24-25, referring to *Prosecutor v. Seselj*, IT-03-67-PT, ICTY, "Decision on Motion for Disqualification", 10 June 2003, and *Prosecutor v. Mladic*, IT-09-92-PT, ICTY, "Order Denying Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphons Orié and a Stay of Proceedings", 15 May 2012.

<sup>45</sup> Prosecutor's Response to Recusal Application, para. 26, referring to *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohamed Jerbo Jamus*, ICC-02/05-03/09-344-Anx, 33, "Decision of the Plenary on the Defence Request for Disqualification of a Judge of 2 April 2012," 5 June 2012.

<sup>46</sup> *Prosecutor v. Moinina Fofana*, RSCSL-04-14-ES-839, "Public Order for Detention and for Hearing Pursuant to Article 12(F) of the Practice Direction on Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone" 9 March 2015.

<sup>47</sup> Prosecutor's Response to Recusal Application, para. 28, referring to *Prosecutor v. Moinina Fofana*, RSCSL-04-14-ES-847, "Public Disposition on the Matter of Moinina Fofana's Violations of the terms of his Conditional Early Release", 24 April 2016.

<sup>48</sup> Applicant's Reply, paras 3-5.

<sup>49</sup> Applicant's Reply, para. 5.



of Justice Doherty granting said leave, and that the Applicant's Reply is directed to the President.<sup>50</sup>

12. The Applicant contests the propriety of the Prosecutor's inclusion of factual representations regarding Justice Doherty's nationality in his Response, arguing that Justice Doherty herself has not issued a statement or an affidavit,<sup>51</sup> that the representations go beyond the scope of the leave granted by Justice Doherty,<sup>52</sup> and amount to second-hand hearsay evidence.<sup>53</sup> The Applicant submits that regardless of the Prosecutor's submissions on Justice Doherty's Irish nationality, Justice Doherty is from Northern Ireland, which is part of the UK, which the Applicant submits is the state that nominated Justice Doherty to the Residual Special Court.<sup>54</sup>
13. The Applicant further argues that Judge Doherty "has consistently sat on almost all applications filed by Mr. Taylor",<sup>55</sup> including on the Trial Chamber that convicted him and the panel that rejected his application to be transferred from prison in the UK to continue his sentence in Rwanda, an issue the Applicant characterizes as "central to the determination of" the Recusal Application.<sup>56</sup>
14. The Applicant submits that the main contention of the Recusal Application is not Justice Doherty's nationality alone, but is as follows: "the process and procedure which this Court may undertake to resolve the expert/scientific/global issues raised in Mr. Taylor's application on covid-19 may necessitate some judgment/assessment to be passed on the UK and it may not bode well for such to emanate from a judicial officer nominated by that country especially given the fact that the Impugned Designated Judge was nominated by the UK to sit on this fact, a fact that has not been challenged in the Prosecutor's response."<sup>57</sup>

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<sup>50</sup> Applicant's Reply, para. 10.

<sup>51</sup> Applicant's Reply, paras 5 and 7.

<sup>52</sup> Applicant's Reply, para. 7.

<sup>53</sup> Applicant's Reply, para. 8.

<sup>54</sup> Applicant's Reply, para. 13 (internal reference omitted).

<sup>55</sup> Applicant's Reply, para. 9.

<sup>56</sup> Applicant's Reply, paras 9 and 15 (internal reference omitted).

<sup>57</sup> Applicant's Reply, para. 11.

15. The Applicant seeks the removal of Justice Doherty “to pre-emptively avoid matters of conflicts of interests that may possibly arise from the perspective of a reasonable observer”,<sup>58</sup> including in the scenario of an assessment of “the Government’s response to covid-19 generally and within its prison systems in particular,”<sup>59</sup> a scenario the Applicant argues would be better addressed by a Judge “detached from the country”.<sup>60</sup>
16. The Applicant distinguishes the *Mladic* case involving Judge Orié<sup>61</sup> and the *Fofana* Matter, cited by the Prosecutor, on the basis that in the present case, international organizations may be asked to file submissions on the UK’s Covid-19 response within its prisons and specifically the prison where Mr. Taylor is serving his sentence, which may in turn generate responses from UK national authorities. The Applicant argues there is thus “every possibility of tension arising from the different submissions as the UK Government may seek to protect its response purely as a matter of political expediency.”<sup>62</sup> The Applicant further distinguishes the *Fofana* Matter on the basis that those proceedings were uncontested, and moreover did not involve a recusal application.<sup>63</sup>
17. The Applicant concludes by requesting that the Decision of Justice Doherty granting leave to the Prosecutor to respond to the Recusal Application be disregarded and that the Prosecutor’s Response be similarly disregarded.<sup>64</sup>

## II. SUMMARY OF THE COMMENTS OF HON. JUSTICE DOHERTY

18. Justice Doherty considers that the Applicant’s objections to her designation are based on bias or perception of bias predicated on her status as a UK national and that she

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<sup>58</sup> Applicant’s Reply, para. 12.

<sup>59</sup> Applicant’s Reply, para. 12.

<sup>60</sup> Applicant’s Reply, para. 16.

<sup>61</sup> *Prosecutor v. Mladic*, IT-09-92-PT, ICTY, “Order Denying Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphons Orié and a Stay of Proceedings”, 15 May 2012.

<sup>62</sup> Applicant’s Reply, paras 14-15.

<sup>63</sup> Applicant’s Reply, para. 14 (internal reference omitted).

<sup>64</sup> Applicant’s Reply, para. 18.

holds or has held positions in the UK. She notes that the Applicant’s Reply raises further issues, specifically: (i) that she has sat on almost all applications filed by Mr. Taylor, and (ii) that the procedure which the Court may take to resolve the Motion may require the Duty Judge to assess the UK, which “may not bode well for such to emanate” from a judge nominated by the UK.<sup>65</sup>

19. Justice Doherty considers that issue (ii) implies that “any national of any country or jurisdiction will be biased and/or perceived to be biased by virtue of being appointed to judicial office by that country or jurisdiction”, and that this contention has not been borne out by any facts submitted by the Applicant.<sup>66</sup>

20. Justice Doherty provides the following biographical details:

- i. Justice Doherty comes from Northern Ireland and common with all citizens of that province of the UK has dual citizenship: Irish and British.<sup>67</sup>
- ii. Justice Doherty is an Irish citizen by birth and has travelled on an Irish passport for decades before and after the 1998 Belfast Agreement.<sup>68</sup>
- iii. Justice Doherty has never served as a judge in the UK.<sup>69</sup>
- iv. Justice Doherty was nominated as a judge of the Residual Special Court by the Republic of Ireland and in 2004 was nominated by the UK to the United Nations (UN) in relation to the Special Court; in both cases, the UN made the appointments.<sup>70</sup>

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<sup>65</sup> Comments of Hon. Justice Doherty, para. 34 (internal references omitted).

<sup>66</sup> Comments of Hon. Justice Doherty, para. 35 (internal reference omitted).

<sup>67</sup> Comments of Hon. Justice Doherty, para. 36 (internal references omitted). Justice Doherty further notes that she has neither changed her nationality to Irish nor elected Irish citizenship as a result of the Belfast Agreement, and there is no Northern Irish nationality: para. 36.

<sup>68</sup> Comments of Hon. Justice Doherty, para. 37.

<sup>69</sup> Comments of Hon. Justice Doherty, para. 38. Justice Doherty further notes that she has served as a Principal Magistrate and as a Judge of the National and Supreme Courts of Papua New Guinea, and of the High Court and Court of Appeal of Sierra Leone, and as a Parole Commissioner in Northern Ireland, as appointed by the Minister of Justice of Northern Ireland: para. 38.

<sup>70</sup> Comments of Hon. Justice Doherty, para. 39 (internal reference omitted).

- v. Records of the Special Court and the Residual Special Court list Justice Doherty as a member of the court from Ireland; she is registered in international bodies as Irish, and is on the Irish Department of Foreign Affairs Election Monitoring Register.<sup>71</sup>
21. Justice Doherty refutes the suggestion that her nationality or her being beholden to the United Kingdom government for any previous or current position would render her “biased in favour of any actions a department of that country may take.”<sup>72</sup>
22. In relation to the Applicant’s submission that Justice Doherty would have to seek information on the implementation of public health measures in UK prisons, including the prison where Mr. Taylor is currently serving his sentence, Justice Doherty notes that the Registrar has already sought and provided said information, which is generally in the public arena.<sup>73</sup> She further notes that the Enforcement Agreement provides that conditions of imprisonment are governed by the law of the United Kingdom subject to the supervision of this Court.<sup>74</sup>
23. Justice Doherty considers it unclear whether the Applicant advances her frequent presence on Mr. Taylor’s previous applications as a grounds for disqualification, or whether it is simply an observation, but considers that the jurisprudence of the Special Court clearly holds that what matters is “that he or she has not taken any stand or expressed any view that may reasonably be perceived as prejudging his or her position”.<sup>75</sup> She notes that the present proceedings are distinct from the previous litigation she has been involved with respect to Mr. Taylor’s case and distinguishes the case involving Justice Robertson on the basis that he had published a public document in which he made statements on his views on the RUF prior to the hearing.<sup>76</sup>

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<sup>71</sup> Comments of Hon. Justice Doherty, para. 39 (internal reference omitted).

<sup>72</sup> Comments of Hon. Justice Doherty, para. 40.

<sup>73</sup> Comments of Hon. Justice Doherty, para. 42

<sup>74</sup> Comments of Hon. Justice Doherty, para. 43 (internal reference omitted).

<sup>75</sup> Comments of Hon. Justice Doherty, para. 44, referring to *Prosecutor v. Charles G. Taylor*, SCSL-03-01-A-1323, Appeals Chamber, Decision on Charles Ghankay Taylor’s Motion for partial voluntary withdrawal or disqualification of Appeals Chamber Judges, 13 September 2012, para. 18 (internal references omitted).

<sup>76</sup> Comments of Hon. Justice Doherty, paras 45-46 (internal reference omitted).

### III. APPLICABLE LAW

24. Articles 11(2) and (3) of the Statute on the appointment and qualification of judges provide, in relevant part:

2. 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.
3. Ten judges shall be appointed to the roster by the Secretary-General and six judges shall be appointed to the roster by the Government of Sierra Leone... In the appointment of judges, particular account shall be taken of the experience of former judges of the Special Court, the International Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Extraordinary Chambers in the Courts of Cambodia, the International Criminal Court, and the Special Tribunal for Lebanon.

25. Rule 15 of the Rules addresses the Disqualification of Judges. The relevant provisions of the rule are as follows:

- (A) A Judge may not sit at a trial or appeal in any case in which his or her impartiality might reasonably be doubted on any substantial ground.
- (B) Any party may apply to the Chamber of which the Judge is a member for the disqualification of the said Judge on the above ground.
- (C) If an application is made under Sub-Rule (B), the challenged Judge shall be entitled to present his or her comments on the matter.
- ...
- (F) The Judge who approves an indictment or who is involved with any pre-trial or interlocutory matter against a suspect or accused, shall not for that reason be disqualified from sitting as a member of a Chamber for the trial or appeal of that accused.

26. The relevant provision of Article 17 of the Statute, addressing the rights of the accused, provides:
2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court and/or the Residual Special Court, including for the protection of victims and witnesses.
27. The Recusal Application is based on Rule 15 of the Rules, which provides the mechanism for the disqualification of judges in the context of trial or appeal. The Motion to which the Recusal Application relates is neither a trial nor an appeal proceeding. However, the Chamber considers that the Accused's right to a fair trial, as enshrined in Article 17 of the Statute, read in conjunction with Article 11 of the Statute, requiring the impartiality of judges of the Residual Special Court, reflects the right to an impartial judge,<sup>77</sup> and requires the applicability of Rule 15 in the present case.
28. In the *Prosecutor v. Charles Ghankay Taylor*, the Appeals Chamber of the Special Court held that to determine whether the surrounding circumstances objectively give rise to an appearance of bias, the applicable test 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. The standpoint of the accused is not decisive. Rather, it must be demonstrated that there is a legitimate reason to fear that the Judge in question lacks impartiality which can be objectively justified. Where some indicia of bias is found, the logical and reasonable conclusion must be that a Judge is disqualified.<sup>78</sup>
29. In the same decision, the Appeals Chamber further clarified that “the reasonable man is an informed person, with knowledge of all the relevant circumstances, including

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<sup>77</sup> *Prosecutor v. Charles G. Taylor*, SCSL-03-01-A-1323, Appeals Chamber, Decision on Charles Ghankay Taylor's Motion for partial voluntary withdrawal or disqualification of Appeals Chamber Judges, 13 September 2012, para. 23 (internal references omitted).

<sup>78</sup> *Prosecutor v. Charles G. Taylor*, SCSL-03-01-A-1323, Appeals Chamber, Decision on Charles Ghankay Taylor's Motion for partial voluntary withdrawal or disqualification of Appeals Chamber Judges, 13 September 2012, para. 16 (internal references and quotations omitted). See also *Prosecutor v. Issa Hassan Sesay*, SCSL-04-15-AR-15, Appeals Chamber, “Decision on Defence Motion Seeking the Disqualification of Geoffrey Robertson from the Appeals Chamber”, 13 March 2004, para.15, and *Prosecutor v. Sam Hinga Norman*, SCSL-2004-14, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004, para 22.

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.’’<sup>79</sup>

#### IV. DELIBERATIONS

##### A. Prosecutor’s Leave Request

30. The Chamber notes that the Prosecutor addressed his 8 July 2020 request for leave to respond to the Recusal Application to both President and Justice Doherty.<sup>80</sup> This Chamber was convened by order of the President on 4 August 2020 to hear all matter arising from the Recusal Application.<sup>81</sup> The Chamber has reviewed the Prosecutor’s leave request as well as the decision of Justice Doherty of 8 July 2020 granting leave,<sup>82</sup> and agrees that leave should be granted for the relevant issues of jurisprudence and law raised by the Prosecutor in his request. The Chamber therefore takes into consideration the elements of the Prosecutor’s Response that fall within the scope of the leave granted.

##### B. The principal issues and their determination

31. The principal issues to be determined are first, whether or not there is evidence of actual bias concerning Judge Doherty, and second, whether or not there is an unacceptable appearance of bias. The threshold for an appearance of bias does not require proof of actual bias.<sup>83</sup>

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<sup>79</sup> *Prosecutor v. Charles G. Taylor*, SCSL-03-01-A-1323, Appeals Chamber, Decision on Charles Ghankay Taylor’s Motion for partial voluntary withdrawal or disqualification of Appeals Chamber Judges, 13 September 2012, para. 17 (internal references omitted).

<sup>80</sup> *RSCSL-03-01-ES-1453*, Prosecutor’s Motion for Leave to Respond to Principal Defender’s Request for the Withdrawal and/or Recusal of Hon. Justice Teresa Doherty of the United Kingdom (UK) as Designated Duty Judge, 8 July 2020.

<sup>81</sup> *RSCSL-03-01-ES-1458*, President, Order Convening Chamber Pursuant to Article 13(1) of the Statute, 4 August 2020.

<sup>82</sup> *RSCSL-03-01-ES-1454*, Decision - Prosecutor’s Motion for Leave to Respond to Principal Defender’s Request for the Withdrawal and/or Recusal of Hon. Justice Teresa Doherty of the United Kingdom (UK) as Designated Duty Judge, 08 July 2020.

<sup>83</sup> *SCSL-04-15-T-956*, Decision on Sesay, Kallon and Gbao Appeal against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 24 January 2008, para. 9.

32. The Chamber notes that the Applicant states that he does not allege actual personal bias on the part of Justice Doherty.<sup>84</sup> As the Applicant has put forth no evidence of judicial bias in relation to Justice Doherty, this case can be distinguished from the matter in the *Sesay* case involving Justice Robertson, wherein the recusal application was predicated on published material written by the impugned judge.<sup>85</sup>
33. Concerning another issue, the Chamber notes that in his Reply, the Applicant raised the issue of Justice Doherty's presence on the Trial Chamber convicting Mr. Taylor and on the panel rejecting Mr. Taylor's application to be transferred from prison in the UK to Rwanda.<sup>86</sup> This is the first time Mr. Taylor has filed an application alleging an appearance of bias on Justice Doherty's part, notwithstanding that he has appeared before her more than once. The Chamber is aware that in these previous circumstances the UK was not involved, and further notes that Judge Doherty served as a member of a Chamber and not as a single judge in both matters named in the Applicant's Reply. Notwithstanding that this vaguely worded matter was raised for the first time in the Applicant's Reply, the Chamber considers that it could be viewed as an additional ground for recusal advanced by the Applicant and will therefore deal with the matter.
34. The Chamber recalls that, in the *Prosecutor v. Charles Ghankay Taylor* case, the Appeals Chamber of the Special Court held that "a judge's prior judicial contact with the facts of a case (or indeed with the accused) alone would generally not be sufficient to find an unacceptable appearance of bias. A fair-minded observer would know that a Judge's role can differ from one judicial context to another",<sup>87</sup> and "is aware that a Judge is trained to put out of their minds evidence other than that presented at trial."<sup>88</sup> The Appeals Chamber further clarified that "in determining

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<sup>84</sup> Recusal Application, paras 7, 9.

<sup>85</sup> *Prosecutor v. Issa Hassan Sesay*, SCSL-04-15-AR-15, Appeals Chamber, "Decision on Defence Motion Seeking the Disqualification of Geoffrey Robertson from the Appeals Chamber", 13 March 2004, paras 2 and 14-15.

<sup>86</sup> Applicant's Reply, para. 9.

<sup>87</sup> *Prosecutor v. Charles G. Taylor*, SCSL-03-01-A-1323, Appeals Chamber, Decision on Charles Ghankay Taylor's Motion for partial voluntary withdrawal or disqualification of Appeals Chamber Judges, 13 September 2012, para. 17 (internal references omitted). See also *Prosecutor v. Delalic et al. (Celebici case)*, IT-96-21-A, Appeals Chamber, Appeals Judgment, para. 700.

<sup>88</sup> *Prosecutor v. Charles G. Taylor*, SCSL-03-01-A-1323, Appeals Chamber, Decision on Charles Ghankay Taylor's Motion for partial voluntary withdrawal or disqualification of Appeals Chamber Judges, 13 September 2012, para. 17 (internal references omitted).



whether ‘one can apprehend bias’, what matters is that the Judge has not taken any position or expressed any view that may be reasonably perceived as prejudging his or her position on the guilt or innocence of the Accused [in the proceedings at bar].”<sup>89</sup>

35. In the *Sesay* case, the Trial Chamber seized with an application for the disqualification of Justice Bankole Thompson adopted the following instruction from the Bureau of the ICTR:<sup>90</sup>

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

...

Where such allegations are made, the Bureau has a duty to examine the content of the judicial decisions cited as evidence of bias. The purpose of that review is not to detect error, but rather to determine whether such errors, if any, demonstrate the judge or judges are actually biased, or that there is an appearance of bias based on the objective test ... Error, if any, on a point of law is insufficient; what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law, on which there may be more than one possible interpretation, or to the assessment of the relevant facts.<sup>91</sup>

36. In the present case, the Applicant advanced no evidence relating to Justice Doherty’s participation in previous matters involving Mr. Taylor, and specifically no evidence that Judge Doherty has taken any position or expressed any view that may be reasonably perceived as prejudging her position regarding the adjudication of the Motion. Further, a reading of Rule 15(F) of the Rules supports the proposition that a Judge’s prior involvement in an accused’s case cannot in and of itself serve as a basis for disqualification. In the circumstances, the Chamber is unable to find that a

<sup>89</sup> *Prosecutor v. Charles G. Taylor*, SCSL-03-01-A-1323, Appeals Chamber, Decision on Charles Ghankay Taylor’s Motion for partial voluntary withdrawal or disqualification of Appeals Chamber Judges, 13 September 2012, paras 18 and 29 (internal references omitted).

<sup>90</sup> *Prosecutor v. Sesay, Kallon and Gbao*, 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.

<sup>91</sup> *Prosecutor v. Sesay, Kallon and Gbao*, 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, paras 61-63, referring to *Prosecutor v. Blagojevic, Obrenovic, Jokic and Nikolic*, ICTY, IT-02-60, Bureau, Decision on Blagojevic’s Application Pursuant to Rule 15(b), 19 March 2003, para. 14; *Prosecutor v. Karemera, Rwamakuba, Ngirumpatse and Nzirorera*, ICTR, ICTR-98-44-T, Bureau, Decision on Motion by Karemera for Disqualification of Judges, 17 May 2004, paras 12-13.

reasonable apprehension of bias has been raised by Justice Doherty’s prior judicial contact with Mr. Taylor.

37. The sole remaining issue to be resolved by the Chamber therefore is whether a reasonable observer would apprehend bias with respect to Justice Doherty for the grounds raised by the Applicant, specifically her alleged UK nationality, or matters related to her alleged UK nationality and her employment, including her nomination to the Special Court and the Residual Special Court.
38. The Chamber recalls the solemn declaration taken by Justice Doherty as a judge of the Residual Special Court,<sup>92</sup> the qualifications for appointment to the office of Judge as set out in Article 11 of the Statute including moral character, impartiality and integrity, as well as the requirement that she neither seek nor accept instruction from any government. These matters are at the root of the presumption of impartiality that attaches to a judge, and why “[a] party seeking disqualification of a Judge at the Special Court bears the heavy burden of displacing the presumption of judicial impartiality.”<sup>93</sup>
39. The Appeals Chamber of the Special Court in the *Prosecutor v. Charles Ghankay Taylor* case made clear that “[a] party seeking disqualification must also support any application with “ascertainable facts” and firm evidence of judicial bias. Evidence that is remote, irrelevant, capable of being disabused in the mind of Judges or speculative is not sufficient.”<sup>94</sup>
40. Challenges to the impartiality of International Judges based on nationality have previously been made before the ICTY in the *Seselj* case, and the ICC in the matter of the *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*.

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<sup>92</sup> Rules, Rule 14.

<sup>93</sup> *Prosecutor v. Charles G. Taylor*, SCSL-03-01-A-1323, Appeals Chamber, Decision on Charles Ghankay Taylor’s Motion for partial voluntary withdrawal or disqualification of Appeals Chamber Judges, 13 September 2012, para. 19 (internal reference omitted).

<sup>94</sup> *Prosecutor v. Charles G. Taylor*, SCSL-03-01-A-1323, Appeals Chamber, Decision on Charles Ghankay Taylor’s Motion for partial voluntary withdrawal or disqualification of Appeals Chamber Judges, 13 September 2012, para. 19 (internal references omitted).

41. In the *Seselj* case before the ICTY, the Accused sought the disqualification of three judges. In respect of Judge Schomburg, the Accused alleged actual bias on the grounds of the Judge's German nationality and the long history of conflict between Germans and Serbs, as well as the fact that Germany is a part of the North Atlantic Treaty Organization.<sup>95</sup>
42. Notwithstanding that the application before the ICTY Bureau alleged actual bias rather than an appearance of bias, the Chamber considers instructive the following reasoning: "[t]he policies of the governments of the countries from which Judges of this International Tribunal come are, and must be, irrelevant to the carrying out of their judicial responsibilities. Judges of this International Tribunal serve only the international community. In taking their solemn declaration to perform their duties "honourably, faithfully, impartially and conscientiously," they necessarily disavow any influence by the policies of any government, including the government of their home country."<sup>96</sup>
43. A plenary of judges of the ICC considered the request of defence counsel to disqualify Judge Chile Eboe-Osuji in *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* matter, alleging an appearance of bias on three bases, including: (i) his Nigerian nationality, being the nationality of certain victims in the case at issue and not the nationality of the Accused; and (ii) the endorsement of his candidacy as a judge by the African Union and Nigeria.<sup>97</sup>
44. The plenary of judges denied the motion. While issue (i) involves different facts and is therefore not directly relevant to the present case, the Chamber notes that the plenary conceded that the nationality of a judge may be potentially relevant in

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<sup>95</sup> *Prosecutor v. Seselj*, IT-03-67-PT, ICTY (Bureau), Decision on Motion for Disqualification, 10 June 2003.

<sup>96</sup> *Prosecutor v. Seselj*, IT-03-67-PT, ICTY (Bureau), Decision on Motion for Disqualification, 10 June 2003, para. 4; see also *Prosecutor v. Mladic*, Case No. IT-09-92-PT, ICTY (President), Order Denying Defence Motion Pursuant to Rule 15(B) seeking Disqualification of Presiding Judge Alphons Orié and a Stay of Proceedings, 15 May 2012, where the President rejected, without providing specific reasons, the defence argument that Judge Orié's Dutch nationality created a reasonable apprehension of bias in light of the particular facts of that case.

<sup>97</sup> *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC, ICC-02/05-03/09-Anx, "Decision of the plenary of the judges on the "Defence Request for the Disqualification of a Judge," 2 April 2012", 5 June 2012.

considering a recusal application under different circumstances.<sup>98</sup> In respect of ground (ii), the plenary held that “the exercise of a procedure for the nomination of judges was, in itself, insufficient to provide a basis to reasonably doubt the impartiality of the respondent.”<sup>99</sup> The plenary noted that “[n]o evidence had been presented to demonstrate that the degree of support for the respondent’s candidacy offered by either the AU or Nigeria was in any way extraordinary, thus there was no basis to depart from the ordinary position that election formalities do not suffice to doubt the impartiality of a judge.”<sup>100</sup>

45. In the present case, Justice Doherty has dual Irish and British citizenship. She is not dependent on the UK government for her employment and has never served as a UK judge,<sup>101</sup> nor is there any evidence that Justice Doherty is subject to any administrative supervision by the UK government in the carrying out of her professional duties, or that she deals with or has previously dealt with UK matters in the scope of her work as a judge.
46. The Chamber is unable to find, looking at all the relevant circumstances and in consideration of the requisite burden of proof, that an independent bystander or reasonable person would have a legitimate reason to fear that Justice Doherty lacks impartiality for the nationality-related grounds advanced by the Applicant.
47. Notwithstanding that Justice Doherty is of dual British and Irish nationality, the Applicant has not demonstrated how Justice Doherty’s nationality raises a reasonable apprehension of bias in the circumstances of this particular case. The Applicant’s allegation that an appearance of bias arises because Justice Doherty may be placed in a position requiring her to criticize her alleged home State or its agents is unsupported by any specific evidence or ascertainable facts that would give a

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<sup>98</sup> *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC, ICC-02/05-03/09-Anx, “Decision of the plenary of the judges on the “Defence Request for the Disqualification of a Judge,” 2 April 2012”, 5 June 2012, para 15.

<sup>99</sup> *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC, ICC-02/05-03/09-Anx, “Decision of the plenary of the judges on the “Defence Request for the Disqualification of a Judge,” 2 April 2012”, 5 June 2012, para. 16

<sup>100</sup> *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC, ICC-02/05-03/09-Anx, “Decision of the plenary of the judges on the “Defence Request for the Disqualification of a Judge,” 2 April 2012”, 5 June 2012, para. 16.

<sup>101</sup> Comments of Hon. Justice Doherty, paras 36-40.

reasonable person a legitimate reason to fear that Judge Doherty lacks the impartiality necessary to carry out such a function.

48. The Chamber considers that every judge has both the right and the duty to criticize his or her own government if it is necessary in the circumstances, and that this duty is inherent to the principle of judicial independence and a cornerstone of judicial function. The Chamber recalls that the “fair-minded” observer at the heart of the inquiry into appearance of bias knows that “impartiality is one of the duties judges swear to uphold,” that “a Judge’s role can differ from one judicial context to another” and that a Judge “is trained to put out of their minds evidence other than that presented at trial” or during the hearing of a motion.<sup>102</sup>
49. The Chamber considers the President’s designation of Justice Vivian Margarete Solomon, a Sierra Leonean judge, and Justice Solomon’s execution of her function in the *Fofana* Matter instructive on this point.<sup>103</sup> In that case, Justice Solomon’s designation required her to assess the performance of the Sierra Leonean Monitoring Authority, which was to supervise the conditional early release of Mr. Fofana. She not only admonished the Monitoring Authority in the strongest terms but further found that it had been complicit in Mr. Fofana’s violation of his conditional early release.<sup>104</sup>
50. The Chamber further notes that the Statute of the Residual Special Court is silent on the matter of nationality in relation to the appointment or selection of judges. In contrast, the Statute of the African Court of Justice and Human Rights prohibits a judge of the nationality of a State Party to a case before the Court from sitting on that case.<sup>105</sup>

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<sup>102</sup> *Prosecutor v. Charles G. Taylor*, SCSL-03-01-A-1323, Appeals Chamber, Decision on Charles Ghankay Taylor’s Motion for partial voluntary withdrawal or disqualification of Appeals Chamber Judges, 13 September 2012, para. 17 (internal reference omitted).

<sup>103</sup> *Prosecutor v. Moinina Fofana*, RSCSL-04-14-ES-839, “Public Order for Detention and for Hearing Pursuant to Article 12(F) of the Practice Direction on Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone”, 9 March 2015, and *Prosecutor v. Moinina Fofana*, RSCSL-04-14-ES-847, “Public Disposition on the Matter of Moinina Fofana’s Violations of the terms of his Conditional Early Release”, 24 April 2016.

<sup>104</sup> *Prosecutor v. Moinina Fofana*, RSCSL-04-14-ES-847, “Public Disposition on the Matter of Moinina Fofana’s Violations of the terms of his Conditional Early Release”, 24 April 2016, paras 72, 75 and 80.

<sup>105</sup> Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008, Annex, *Statute of the African Court of Justice and Human Rights*, Article 14(3).

51. In relation to Justice Doherty’s previous nomination by the UK to the Special Court, the Chamber notes that Justice Doherty was appointed by the United Nations, and her subsequent and current nomination to the Residual Special Court was made by Ireland.<sup>106</sup> The Chamber further notes the Applicant has furnished no evidence suggesting that Judge Doherty’s nomination by the UK to the Special Court departed in any way from the regular nomination procedure.
52. The Chamber notes the decision of a single judge in the *Krajisnik* case at the ICTY, regarding a recusal application based on the impugned judge’s former professional history. The court noted that, a party challenging the judge’s impartiality must demonstrate that the judge entertains “a personal interest in, or a particular concern for any of the Parties, the witnesses or the facts of the case,” or where an appearance of bias is alleged, that “the public sense of Justice would be challenged by the presence of a particular Judge on the Bench in the case at end.”<sup>107</sup> In the present circumstances, the Chamber is unable to find that the public’s sense of justice would be challenged by Judge Doherty’s presence as the Duty Judge on the Motion as a result of her past nomination to the Special Court by the UK.
53. The ICC in the *Ntaganda* case and the ICTY in the *Furundzija* case have also addressed challenges alleging bias focussed on judges’ proximity to their national governments, as demonstrated through official appointments or activities.
54. A plenary of ICC judges dismissed a defence motion seeking the disqualification of Judge Kuniko Ozaki from the *Ntaganda* case on the basis of her appointment as the Japanese ambassador to Estonia, a post she filled for a month prior to resigning.<sup>108</sup> In finding that there was no appearance of bias, the plenary emphasized that it has “consistently conducted a detailed and case-specific assessment of the circumstances

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<sup>106</sup> Comments of Hon. Justice Doherty, para. 39.

<sup>107</sup> *Prosecutor v Momcilo Krajisnik*, IT-00-39-PT, “Decision by a single Judge on the Defence Application for Withdrawal of a Judge from the Trial”, 22 January 2003. *See also Prosecutor v. Delalic et al. (Celebici case)*, IT-96-21-A, Appeals Chamber, Appeals Judgment, para. 700.

<sup>108</sup> *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06/2355-AnxI-Red, ICC, (plenary), Decision of the Plenary of Judges on the Defence Request for the Disqualification of Judge Kuniko Ozaki From the case of The Prosecutor v. Bosco Ntaganda”, 20 June 2019.

and has not relied on general categories or assumptions as themselves supporting disqualification or excusal requests.”<sup>109</sup>

55. The ICTY Appeals Chamber used similar reasoning in the Furundzija Appeal Judgment<sup>110</sup> to reject the appellant’s request to disqualify Judge Mumba based on her past membership with the UN Commission on the Status of Women (UNCSW), as lawyers who had been involved in the activities of the UNCSW had filed an *amicus curiae* brief in the proceedings. The Appeals Chamber held that there was no basis for finding an appearance of bias, distinguishing the UK *Pinochet* case cited by the appellant, also referred to by the Applicant, as authority on two grounds:<sup>111</sup> (i) Judge Mumba’s UNCSW membership was not contemporaneous with her tenure as a Judge in the case at issue; and (ii) there was an absence of evidence that Judge Mumba was closely allied to and acting with the Prosecutor or authors of the *amicus curiae* briefs.<sup>112</sup>
56. The UK *Pinochet* case can similarly be distinguished from the present case as Justice Doherty’s tenure as a Special Court judge is not contemporaneous with her tenure as Duty Judge. Moreover, there is no evidence before the Chamber demonstrating a link between Justice Doherty and the UK government or any agents thereof that the Applicant alleges Justice Doherty must assess in her role as Duty Judge.
57. The Applicant further relies on the principle enunciated by Lord Hewart C.J. in the *R v. Sussex Ex parte McCarthy* that justice should not only be done, but should manifestly and undoubtedly be seen to be done.<sup>113</sup> While the Chamber concurs with that principle, the case is distinguishable on its facts, as it involved a judicial clerk with a specific conflict of interest that raised an appearance of bias.
58. The Chamber considers that the cases reviewed demonstrate the high evidentiary threshold to be met by parties seeking to displace the presumption of impartiality

<sup>109</sup> *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06/2355-AnxI-Red, ICC, (plenary), Decision of the Plenary of Judges on the Defence Request for the Disqualification of Judge Kuniko Ozaki From the case of The Prosecutor v. Bosco Ntaganda”, 20 June 2019, para. 36 (internal references omitted).

<sup>110</sup> *Prosecutor v. Furundzija*, IT-95-17/1-A, ICTY, Appeals Chamber, Judgment, 21 July 2000.

<sup>111</sup> *R v Bow Street Metropolitan Stipendiary Magistrates and others, Ex parte Ugarte*, [2000] 1 AC 119 (HL).

<sup>112</sup> *Prosecutor v. Furundzija*, IT-95-17/1-A, ICTY, Appeals Chamber, Judgment, 21 July 2000, paras 193-194.

<sup>113</sup> *R v Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 256.

accorded to judges, as well as the threshold concerning a showing of appearance of bias from the perspective of a reasonable observer. In the present case, the Applicant has not provided detailed, case-specific evidence capable of meeting either threshold. The Chamber is unable to find any indicia of apparent bias on the grounds related to nationality raised by the Applicant that justify the recusal of Justice Doherty.

#### V. DISPOSITION

59. For the foregoing reasons, the Chamber **DISMISSES** the Recusal Application in its entirety.

Done remotely.

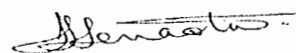
Decision filed at The Hague

This 24th day of August 2020

Justice Renate Winter,  
Presiding Judge



Justice Isaac Lenaola



Justice Miatta Samba



[Seal of the Residual Recusal Chamber for Sierra Leone]

