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Under what Conditions Would the Involvement of a Judge in the Adoption of a Piece of Legislation Warrant his Recusal (or Removal) From the Bench on Grounds of Lack of Impartiality or Appearance Thereof?

Brandon J. Wheeler

MEMORANDUM FOR THE OFFICE OF THE DEFENCE FOR THE SPECIAL TRIBUNAL FOR LEBANON

ISSUE: UNDER WHAT CONDITIONS WOULD THE INVOLVEMENT OF A JUDGE IN THE ADOPTION OF A PIECE OF LEGISLATION WARRANT HIS RECUSAL (OR REMOVAL) FROM THE BENCH ON GROUNDS OF LACK OF IMPARTIALITY OR APPEARANCE THEREOF?

Prepared by Brandon J. Wheeler
J.D. Candidate, May 2011
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INDEX OF AUTHORITIES

STATUTES

1. Disqualification of Justice, Judge, or Magistrate [magistrate judge] Act, 28 U.S.C. §455 (2010).

2. Bias or Prejudice of Judge Act, 28 U.S.C. §144 (2010).

3. Statute of the Special Tribunal for Lebanon, S.C. Res. 1757 UN Doc S/RES/1757 (2007), available at: http://www.stltsl.org/x/file/TheRegistry/Library/BackgroundDocuments/Statutes/Resolution%201757-Agreement-Statue-EN.pdf

4. Special Tribunal for Lebanon Rules of Procedure and Evidence, Adopted June 10, 2009, Amended June 05, 2009, available at: http://www.stl-tsl.org/sid/51.

5. Statute of the International Court of Justice, available at: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0

6. International Court of Justice, Rules of the Court, available at: http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0

7. Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious violations of International Humanitarian law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704 (1993), available at: http://www1.umn.edu/humanrts/icty/statute.html

8. International Criminal Tribunal for the Prosecution of Persons Responsible for Serious violations of International Humanitarian law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, IT/32/Rev. 44, 10 December 2009, available at: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf

9. Statute for the International Criminal Tribunal for Rwanda, S.C. Res. 955, UN Doc. S/RES/955, available at: http://69.94.11.53/ENGLISH/basicdocs/statute.html.

10. Statute of the Special Court for Sierra Leone, UN Doc. S/2000/915 (2002).

11. Special Court for Sierra Leone, Rules of Procedure and Evidence, amended 7 March 2003, available at: http://www.scsl.org/LinkClick.aspx?fileticket=zXPrwoukovM%3D&tabid=176

12. Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNT.S. 90.

REPORTS BY THE UN INTERNATIONAL INDEPENDENT INVESTIGATION COMMISSION

13. Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005), available at http://www.un.org/apps/news/docs.asp?Topic=Lebanon&Type=UNIIIC+Report.

14. Second Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005) and 1636 (2005), available at http://www.un.org/apps/news/docs.asp?Topic=Lebanon&Type=UNIIIC+Report.

15. Third Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005), 1636 (2005) and 1644 (2005), available at http://www.un.org/apps/news/docs.asp?Topic=Lebanon&Type=UNIIIC+Report

16. Fourth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005), 1636 (2005) and 1644 (2005), available at http://www.un.org/apps/news/docs.asp?Topic=Lebanon&Type=UNIIIC+Report

17. Fifth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005), 1636 (2005) and 1644 (2005), available at http://www.un.org/apps/news/docs.asp?Topic=Lebanon&Type=UNIIIC+Report

18. Sixth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005), 1636 (2005) and 1644 (2005), available at http://www.un.org/apps/news/docs.asp?Topic=Lebanon&Type=UNIIIC+Report

19. Seventh Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005), 1636 (2005), 1644 (2005) and 1686 (2006), available at http://www.un.org/apps/news/docs.asp?Topic=Lebanon&Type=UNIIIC+Report

20. Eighth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007), available at http://www.un.org/apps/news/docs.asp?Topic=Lebanon&Type=UNIIIC+Report

21. Ninth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007), available at http://www.un.org/apps/news/docs.asp?Topic=Lebanon&Type=UNIIIC+Report

22. Tenth Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007), available at http://www.un.org/apps/news/docs.asp?Topic=Lebanon&Type=UNIIIC+Report

CASES

23. Samuel v. University of Pittsburgh 395 F. Supp. 1275 (W.D. PA 1975), *vacated on other grounds*, 538 F.2d 991 (PA 1976).

24. Mavis v. Commercial Carriers, Inc. 408 F. Supp. 55 (C.D. Cal 1975).

25. *Woodmen of the World v. Alford*, 206 Ala. 684, 685 (1926); *Cf. People v. Houston*, 446 N.W.2d 543, 545 (1989).

26. *Little Rock Sch. Dist. V. Ark. Bd. Of Educ.*, 902 F.2d 1289 *quoting* 28 U.S.C. §455 (1970 ed.).

27. Tyler v. Purkett, 413 F.3d 696 2005 (8th Cir. 2005).

28. Higganbotham v. Okla. Transp. Common, 328 F.3d 638 (10th Cir. 2003).

29. State v. Gardner, 789 P.2d 273, 278 (Utah 1989), *cert. denied*, 110 S. Ct. 18.

30. U.S. v. Butcher, 56 M.J. 87, 90 (U.S.C.A.A.F. 2001).

31. U.S. v. Cooley et. al., 1 F.3d 985 (10th Cir. 1993).

32. In re Antar, 71 F.3d 97, 101 (3d Cir. 1995).

33. Health Servs. Acq'n Corp. v. Liljeberg, 796 F.2d 796 (5th Cir. 1986).

34. Church of Scientology of California v. Cooper, 495 F. Supp. §455, 460 (C.D. Calif. 1980).

35. In re Turner 69 BR 95 (S.D. Ohio 1987).

36. Price Bros. Co. v. Philadelphia Gear Corp., 629 F.2d 444 (Ohio 1980).

37. U.S. v. Van Griffin, 874 F.2d 634 (Nev. 1989).

38. In re School Asbestos Litigation 977 F.2d 764 (PA 1992).

39. U.S. v. Gipson, 835 F.2d 1323 (10th Cir. 1988).

40. Mangum v. Hargett, 67 F.3d 80 (5th Cir. 1995).

41. U.S. v. Ruzzano, 247 F.3d 688 (7th Cir. 2001).

42. Baker & Hostetler LLP v. U.S. Dept. of Commerce, 471 F.3d 1355, (D.C. Cir. 2006).

43. U.S. v. O'Keefe, 128 F.3d 885 (5th Cir. 1997).

44. Brown v. State, 885 So. 2d 391, 2004 Fla. App. LEXIS 14444, *4 (Fla. App. 2004).

45. Moody v. Simmons, 858 F.2d 137, 138 (3d Cir. 1988).

46. McCain v. Texas Power & Light Co. 714 F.2d 1255 (Tex. 1983).

47. United States v. Murphy, 768 F.2d 151 (7th Cir. 1985).

48. In re Larson, 43 F.3d 410, 413 (8th Cir. 1994).

49. Schreiber v. Kellogg, 838 F. Supp. 998, 1003 (E.D. Pa. 1993).

50. Doering v. Fader, 558 A.2d 733, 735 (1989).

51. U.S. v. Greenspan, 26 F.3d 1001 (10th Cir. 1994).

52. Litkey v. U.S., 114 S. Ct. 1147, 1155 (1994).

53. State v. D'Antonio, 274 Conn. 658 (2005).

54. In re IBM Corp., 45 F.3d 641 (2d Cir. 1995).

55. U.S. v. Berger, 375 F.3d 1223 (11th Cir. 2004).

56. Roberts v. Bailar, 625 F.2d 125 (Tenn. 1980).

57. In re Heather L., 274 Conn. 174, 874 A.2d 796, 2005 LEXIS 215, *5-6 (Conn. 2005).

58. U.S. v. York, 888 F.2d 1050 (5th Cir. 1989).

59. Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgment, P189 (July 21, 2000).

BOOKS, LAW REVIEW ARTICLES & PUBLICATIONS

60. Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges.*

61. Aharon Barak, *The Judge In A Democracy.*

62. 2008 Model Code of Judicial Conduct.

63. Grant Hammond, *Judicial Recusal: Principles, Process and Problems.*

64. Philip M. Langbroek and Marco Fabri, *The Right Judge for Each Case: A study of case assignment and impartiality in six European judiciaries.*

65. Jeffrey M. Shaman and Jona Goldschmidt, *Studies of the Justice System: Judicial Disqualification: an empirical study of judicial practices and attitudes*.

66. Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 Berkeley J. Int'l L. 111, 2008.

67. UN News Agency, *Special Tribunal for Lebanon*, available at: http://www.un.org/apps/news/infocus/lebanon/tribunal.

68. International Judicial Monitor, *Special Tribunal for Lebanon*, available at: http://www.judicialmonitor.org/current/spotlight.html.

69. UN Security Council Report, *Lebanon*, available at: http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.4916575/k.111/February_2009brLebanon.htm.

I. Introduction & Summary of Conclusions

There is a requirement in United States statutory law and customary international law that any party to a proceeding is to receive the benefit of a neutral and detached adjudicator who is impartial and free from bias. An increasing problem in the international criminal tribunals is that the judges who adjudicate cases for these tribunals may play roles in drafting the court's statute and rules of procedure and evidence.* This is problematic because the judge in a proceeding needs to approach the case with complete neutrality and impartiality. A judge drafting the court's statute may not destroy his impartiality when the court has general jurisdiction over wide array of criminal acts because his increased role in the court is not likely to result in a bias against a defendant. However, in the case of the Special Tribunal for Lebanon ("STL"), which only has jurisdiction over events relating to a single criminal act,[1] a judge drafting the Court's Statute has increased exposure to facts that are likely to be disputed at trial. This exposure to disputed facts creates, at the very least, a set of circumstances which that creates a question about the Judge's impartiality, which is enough to disqualify a judge under the law of the United States and many of the international criminal tribunals.

This memorandum will address the possible disqualification of the President and Vice-President of the Special Tribunal for Lebanon due to their roles in drafting the Court's Statute and previous government service in relation to the cases they are meant to adjudicate for the STL. While the information available at the time of this writing only establishes a basis for the disqualification of the President and Vice-President of the Court, the reasons for disqualification

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[1] *See*, Statute of the Special Tribunal for Lebanon, S.C. Res. 1757 UN Doc S/RES/1757, art. 1, (2007). [Reproduced in accompanying Notebook at Tab 1].

spelled out herein would apply equally to any judge of the STL who participated in drafting the Court's Statute. Part I of this memorandum will address the President and Vice-President's disqualification under the application of United States law, specifically 28 U.S.C. §455.[2] Part II will examine the judges' disqualification based on the STL rules for disqualification and other international criminal tribunal statutes.

A) The disqualification of the President and Vice-President of the STL is mandated by 28 U.S.C. §455 because the circumstances are such that a disinterested observer could reasonably question the judges' impartiality and because of the judges' prior government service in this matter substantially related to the cases they adjudicate.

In U.S. law there are two bases for judicial disqualifications under 28 U.S.C. §455 that are applicable to the President and Vice-President of the STL. 28 U.S.C. §455(a) requires the recusal of a judge whenever his impartiality might reasonably be questioned, and §455(b) requires recusal when the judge formerly worked in government service, and in that capacity did work relating to the matter he is adjudicating. Because the President and Vice-President helped to draft the STL Statute and were heavily exposed to evidentiary facts that likely will be disputed at trial, their recusal is mandated by 28 U.S.C. §455(a). Similarly, because the judges were working for the United Nations and the Lebanese Government in helping to draft the STL statute, their recusal is mandated by 28 U.S.C. §455(b).

B) While international criminal tribunals often shy away from disqualifying judges, the STL Judges' disqualification would be mandated under each court's statute.

[2] The Special Tribunal for Lebanon does not apply United States law, but rather Lebanese domestic law. *See, Id*. at art. 2. The question presented by the Office of the Defence asked for the application of United States law.

The STL Statute, as well as the statutes of all other international criminal tribunals, has provisions governing the disqualification or recusal of a judge based on bias, the appearance of bias, or prior government service regarding the matter in controversy. The President and Vice-President of the STL should be disqualified based on the STL statute, and their recusal would be required under the application of many of the other international tribunal's statutes. International courts have generally been very hesitant to require the disqualification of a judge outside of the showing of clear and extreme cases of judicial bias. However, the STL Judges' roles in drafting the STL Statute, their exposure to evidence likely to be disputed at trial, and their former government service regarding the matter in controversy meet the statutory requirements for disqualification under the provisions of the STL and other international tribunals as well.

II. Factual Background

The Statute of the STL was drafted upon the recommendation of the United Nations International Independent Investigation Commission ("UNIIIC").[3] Using the UNIIIC Report, which contained a great deal of evidentiary findings related to the assassination of Rafiq Hariri, the United Nations and Lebanese Republic drafted the STL Statute pursuant to Security Council Resolution 1664 of 20 March 2006.[4] Among the drafters of the STL Statute were the future President of the Court, Antonio Cassese, and the future Vice-President of the Court, Ralph

[3] Report of the United Nations International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005), available at http://www.un.org/apps/news/docs.asp?Topic=Lebanon&Type=UNIIIC+Report [Reproduced in accompanying Notebook at Tab 2].

[4] United Nations Security Council Resolution 1664, S.C. Res. 1664 UN Doc S/RES/1664 (2006). [Reproduced in accompanying Notebook at Tab 3].

Riachy. Additionally, the President and Vice-President have provided advice to those intent on creating the STL and participated in writing the STL Rules of Procedure and Evidence.[5]

The President and Vice-President's employment in government service, for the UN and Lebanese Government, respectively, their pre-trial exposure to evidentiary facts likely to be disputed at trial provides the bases for disqualification that this paper addresses.

LEGAL ANALYSIS

III. 28 U.S.C. §455 requires the recusal of the President and Vice-President of the STL because their roles in drafting the STL Statute create the appearance of judicial bias and their prior government service in this matter substantially relates to the cases they adjudicate

In 1974, the United States Congress amended 28 U.S.C.S. §455,[6] which governs the recusal and disqualification of judges. The amendments to 28 U.S.C.S. §455 liberalized the previous recusal requirements in favor of the party moving for recusal,[7] and eliminated the "duty to sit" doctrine, which called for judges to have a strong preference against recusal.[8] The relevant portions of 28 U.S.C.S. §455 states:

[5]Special Tribunal for Lebanon Rules of Procedure and Evidence, Adopted June 10, 2009, Amended June 05, 2009, available at: http://www.stl-tsl.org/sid/51 [Reproduced in accompanying Notebook at Tab 4].; Email from Geoffrey Roberts, STL Office of the Defence, February 26, 2010, on file with author

[6] Disqualification of Justice, Judge, or Magistrate [magistrate judge] Act, 28 U.S.C. §455 (2010). [Reproduced in accompanying Notebook at Tab 5].

[7] Samuel v. University of Pittsburgh 395 F. Supp. 1275 (W.D. PA 1975), *vacated on other grounds*, 538 F.2d 991 (PA 1976). [Reproduced in accompanying Notebook at Tab 6].

[8] Mavis v. Commercial Carriers, Inc. 408 F. Supp. 55 (C.D. Cal 1975). [Reproduced in accompanying Notebook at Tab 7].

> (a) Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy[9]

Thus, a judge should be disqualified when his impartiality can be reasonably questioned, or when his previous relationship with a party caused him to express an opinion concerning the merits of the case in controversy. In the present matter, where judges for the Special Tribunal for Lebanon were employed by the UN and the Lebanese Government to negotiate and draft the statute for the Court and possibly the Rules of Procedure and Evidence they themselves use to adjudicate the case, the judges' recusal might be required were this a U.S. case based on the appearance of bias under 28 U.S.C. §455(a), and because of previous governmental service regarding the matter in controversy under 28 U.S.C. §455(b).

A. 28 U.S.C. §455(a) Recusals Based on Appearance of Bias or Lack of Impartiality

Previous to the 1974 amendments to 28 U.S.C.S. §455, a party moving for recusal was required to show that an actual bias existed on the part of the judge.[10] Additionally, the standard for determining whether the judge had some bias was a subjective test; "a judge had to withdraw

[9] 28 U.S.C. §455, *supra* note 6.

[10] *People v. Houston*, 446 N.W.2d 543, 545 (1989). [Reproduced in accompanying Notebook at Tab 8].

from a case [only] when 'in his opinion' it would be improper to sit."[11] The 1974 amendments replaced the subjective test with an objective one,[12] and instead of requiring the moving party to prove a bias exists, the amendments require only a showing that a disinterested observer may reasonably question the judge's impartiality.[13]

The switch from showing a judge's actual bias to showing only an appearance of bias "stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence."[14] Proving an actual bias on the part of the judge is deemed unnecessary because "[n]othing is more damaging to the public confidence in the legal system than the appearance of judicial bias."[15] Moreover, proving that the judge has an actual bias is prohibitively difficult and "in matters of bias, the line between appearance and reality is often barely discernible."[16]

Having judges in the STL who participated in the drafting of the STL statute, and who may have participated in drafting the Court's Rules of Procedures and Evidence, creates *at least*

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[11] *Little Rock Sch. Dist. V. Ark. Bd. Of Educ.*, 902 F.2d 1289 *quoting* 28 U.S.C. §§455 (1970 ed.). [Reproduced in accompanying Notebook at Tab 9].

[12] Tyler v. Purkett, 413 F.3d 696 2005 (8th Cir. 2005) [Reproduced in accompanying Notebook at Tab 10]; Higganbotham v. Okla. Transp. Common, 328 F.3d 638 (10th Cir. 2003). [Reproduced in accompanying Notebook at Tab 11].

[13] U.S. v. Berger, 375 F.3d 1223 (11th Cir. 2004) ("we determine whether an objective…observer fully informed of the facts underlying the grounds [for recusal] would entertain a significant doubt about the judge's impartiality"). [Reproduced in accompanying Notebook at Tab 12].

[14] Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges*, p. 108 (2d. ed. 2007). [Reproduced in accompanying Notebook at Tab 13].

[15] State v. Gardner, 789 P.2d 273, 278 (Utah 1989), *cert. denied*, 110 S. Ct. 1837. [Reproduced in accompanying Notebook at Tab 14].

[16] U.S. v. Butcher, 56 M.J. 87, 90 (U.S.C.A.A.F. 2001). [Reproduced in accompanying Notebook at Tab 15].

the appearance of bias. This is because their role in shaping the Court has closely exposed them to the case in controversy, has necessitated their doing an in-depth analysis of a matter that they are required to approach with unobstructed neutrality, and will require them to interpret a statute that they wrote.

1. The Special Tribunal for Lebanon is functioning as a Crime-Specific Court

The STL was formed "to prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Prime Minister Rafiq Hariri."[17] With few exceptions,[18] the Court's purpose is to try individuals for crimes relating to one specific criminal act. This makes the scope of the STL much narrower than other international courts, such as the International Criminal Tribunal for Rwanda (hereinafter "ICTR") or the International Criminal Tribunal for the Former Yugoslavia (hereinafter "ICTY"), whose jurisdiction includes multiple defendants accused of unrelated criminal acts committed during an extended period of violence and civil unrest. This is significant because any work that an STL judge did in drafting the STL's statute or Rules of Procedure and Evidence would have required them to make a pre-trial extrajudicial analysis of the specific crime to be tried. By helping to form the Court a judge has taken an active role in *bringing* justice for a criminal act rather than remaining a fair and neutral *adjudicator* of justice. When a judge becomes an "active participant in bringing law and order to

[17] Statute of the Special Tribunal for Lebanon, *supra* note 1, art. 1

[18] *Id*. (the Court also has jurisdiction over criminal acts made after 12 December 2005 as long as they are "connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005").

bear on [defendants], rather than remaining as [a] detached adjudicator,"[19] then his or her recusal is required based on the appearance of bias.

2. The Appearance of Bias Standard only requires that an objective person would question the judge's impartiality and makes no determination about whether the judge is actually biased

A disqualification or recusal based upon the appearance of bias does not establish a determination about whether a judge is actually biased[20] or whether a party moving for recusal has suffered any bias due to the judge's involvement.[21] Rather, "[g]enerally speaking, where an appearance of bias can be shown, such that a judge's impartiality might reasonably be questioned . . . disqualification will be warranted."[22] Additionally, the affidavit that states the circumstances calling for a recusal pursuant to 28 U.S.C. §455(a) need not even be true. As the Court in *Church of Scientology v. Cooper* noted, "the factual allegations contained in the Affidavit must be taken as true and the Court has no power or authority to contest in any way whatsoever the

[19] U.S. v. Cooley et. al., 1 F.3d 985 (10th Cir. 1993). [Reproduced in accompanying Notebook at Tab 16].

[20] In re Antar, 71 F.3d 97, 101 (3d Cir. 1995) ("[b]ecause we seek to protect [public] confidence in the judiciary, our inquiry focuses not on whether the judge actually harbored subjective bias, but rather on whether the record, viewed objectively, reasonably supports the appearance of…bias"). [Reproduced in accompanying Notebook at Tab 17].

[21] *See, e.g.*, Health Servs. Acq'n Corp. v. Liljeberg, 796 F.2d 796 (5th Cir. 1986) (because an appearance of bias or impropriety is not lessened by the fact that the litigation would have come out the same way anyway, it makes no difference how much practical effect a trial judge's disqualification would have had on the actual outcome of the litigation), *aff'd* 486 U.S. 847; *c.f.* In re Turner 69 BR 95 (S.D. Ohio 1987). [Reproduced in accompanying Notebook at Tab 18].

[22] Flamm, *supra* note 14, at 116; In re Heather L., 274 Conn. 174, 874 A.2d 796, 2005 Conn. LEXIS 215, *5-6 (Conn. 2005) ("Even in the absence of actual bias, a judge must [recuse] in any proceeding in which [her] impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential"). [Reproduced in accompanying Notebook at Tab 19].

necessary acceptance of truthfulness of the facts alleged, even though the Court may be aware of facts which would indicate clearly the falsity of any such allegations."[23]

While recusals based on 28 U.S.C. §455(a)'s appearance of bias lean heavily in the moving party's favor,[24] it "does not amount to [a] grant of automatic veto power in order that counsel might choose [a] judge who meets with their approval."[25] Moreover, "the standard of disqualification is still one of reasonableness and should not be interpreted to include spurious or loosely based charges of partiality."[26]

Recusals due to the appearance of bias have been required in a wide-ranging set of circumstances. While there is no case directly on point with the situation of STL Judges drafting the Court's Statute and possibly the Rules of Procedure and Evidence, many have required recusal based on the judge's overexposure to the facts of the case or evidence not admissible to the proceedings. The Court in *Price Bros. Co. v. Philadelphia Gear Corp.* held that it is impermissible for [a] judge to deliberately set about gathering facts outside record of trial and the judge has a duty to avoid off-the-record contacts which might influence the outcome of

[23] Church of Scientology of California v. Cooper, 495 F. Supp. §455, 460 (C.D. Calif. 1980) (granting disqualification of a judge based on 28 U.S.C. §455 based on an affidavit which stated facts the Court knew to be exaggerated, if not untrue) [Reproduced in accompanying Notebook at Tab 19]; *See,* In re Turner 69 BR 95 (S.D. Ohio 1987). [Reproduced in accompanying Notebook at Tab 20].

[24] Roberts v. Bailar 625 F.2d 125 (Tenn. 1980) ("a judge's introspective estimate of his own ability to hear [a] case impartially is no longer relevant, and even where [the] question is close, judge must recuse himself from trial."). [Reproduced in accompanying Notebook at Tab 21].

[25] *See*, Samuel v. University of Pittsburgh, *supra* note 7.

[26] Mavis v. Commercial Carriers, *supra* note 8.

litigation.[27] In *United States v. Van Griffin*, the Court held that the magistrate should have recused himself from a criminal trial because he had a copy of the arresting patrol ranger's report of the incident, which was not admitted into evidence, with him on bench. This created the appearance of impropriety despite the magistrate's declaration that he had not read it.[28] Even attending a scientific convention where a judge hears a party's witness speak can be enough to create enough of a question of the judge's impartiality.[29] *In re School Asbestos Litigation* involved a judge hearing a products liability case that involved asbestos-containing products who attended a scientific convention on the hazards of asbestos in the workplace.[30] Because at the convention the party's witness expressed views similar to those they intended to express at trial, recusal was required due to the judge's 'off-the-record' exposure to evidence; even though what he was exposed to was substantially the same thing he would have been exposed to at trial.

Thus, an appearance of bias is created in most situations where a judge is exposed to evidence outside the normal procedures for admitting evidence. If the judge is exposed to evidence not admitted at trial, then he is disqualified based on improper exposure to facts not in evidence and fact-finding regarding the proceedings. If the judge is exposed to evidence that will be admitted at trial, then he is disqualified on the basis of off-the-record contacts similar to the judge in *In re School Asbestos Litigation*.

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[27] Price Bros. Co. v. Philadelphia Gear Corp., 629 F.2d 444 (Ohio 1980). [Reproduced in accompanying Notebook at Tab 22].

[28] U.S. V. Van Griffin, 874 F.2d 634 (Nev. 1989) (cited in Mathew Bender & Company United States Code Service, pg. 30). [Reproduced in accompanying Notebook at Tab 23].

[29] In re School Asbestos Litigation 977 F.2d 764 (PA 1992) (cited in Mathew Bender & Company United States Code Service, pg. 87). [Reproduced in accompanying Notebook at Tab 24].

[30] *Id.*

3. The recusal of the President and Vice-President of the STL would be required under 28 U.S.C. §455(a) because an objective person might reasonably question their impartiality

If the 28 U.S.C. §455(a) 'appearance of bias' standard were applied to the STL Judges, their recusal would seemingly be required due to exposure to the case in controversy. Following the holding in *Price Bros.*, the STL Judges' recusal would be mandated by their having gathered facts over the case and their 'off-the-record' contacts. While the STL Judges' roles in drafting the statute and other rules of procedure is not entirely clear, unquestionably any effort to draft a statute to give a newly-formed court jurisdiction over a single criminal act would require at least some fact finding about the incident. In drafting the Statute for the Court the judges would have been apprised of the particular facts of Mr. Hariri's murder, much more so than the casual observer reading the newspaper, and their recusal would be required under 28 U.S.C. §455(a).

Moreover, the basis for drafting the Statute for the STL was the report by the UN International Independent Investigation Commission, which suggested the formation of the STL. The head UNIIIC Commissioner, who headed the investigation and urged for an international prosecution, Daniel Bellemare, now serves as the lead prosecutor for the Office of the Prosecutor (hereinafter "OTP") of the STL.[31] Mr. Bellemare's investigation with the UNIIIC gathered evidence for prosecuting Hariri's murderers and its report included substantial evidence of the crime. The judges for the STL who helped draft the Court's Statute were exposed to the UNIIIC Report and used it in drafting the statute. This creates two problems, both of which would require recusal under 28 U.S.C. §455(a).

[31] UN Security Council Report, *Lebanon*, available at: http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.4916575/k.111/February_2009brLebanon.htm. [Reproduced in accompanying Notebook at Tab 25].

First, the UNIIIC Report, which was the basis for the formation of the STL, exposed President Cassese and Vice-President Riachy to evidence that they should have been secluded from until the trials begin. The original UNIIIC report formed a large part of the OTP's overall investigation, and contains a nearly exhaustive examination of all aspects of Hariri's assassination. The first UNIIIC report[32] contained "244 witness statements, 293 investigators' notes, 22 suspect statements … 453 crime scene exhibits [with] a total of 16,7111 pages of documents."[33] Additionally, the Report focused on the key aspects of the crime such as "reconstruction of actions and whereabouts of Mr. Hariri prior to the blast, findings and results from activities of the Lebanese authorities undertaken at the crime scene and adjacent areas, the Abu Adass track, the Mitsubishi Canter van, collection and analysis of telephone lists, collection and analysis of closed-circuit television (CCTV) material, videos and photos collected from a diverse set of possessors depicting the scene prior to and after the blast."[34]

Much of this evidence will be critical to any case heard at the STL and at least some of it will be contested at trial, and while much of the UNIIIC evidence will be admitted into evidence at trial, not all of it will. Following the holdings in *Price Bros.*, *Van Griffith* and *School Asbestos Litigation*, the STL Judges' disqualification is required by their off-the-record contact with evidence that he should be seeing for the first time during litigation. Furthermore, their

[32] For the purposes of establishing the appearance of bias for the judges who drafted the Court's Statute, only the first UNIIIC (20 Oct. 2005) report will be used. While the subsequent UNIIIC reports contain a great deal of additional evidence and examples of why Cassese and Riachy on the bench creates an appearance of bias, only the first UNIIIC report was available during the preliminary formation of the Court.

[33] Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595 (2005), *supra* note 3, at ¶ 87.

[34] *Id*. at ¶ 89

disqualification is mandated by their exposure to evidence that will not be admitted into evidence that unfairly affects the judges' neutrality.

More striking, however, is evidence presented in the UNIIIC Report about individual suspects and assertions by 'witnesses' that could not be corroborated. This 'evidence,' unfiltered by the normal procedures of a court, relates to critical aspects of the assassination and individuals who are likely to be either future defendants or witnesses. For example, the UNIIIC contains detailed information about Zuhir Ibn Mohamed Said Saddik, "a witness who later became a suspect."[35] Saddik gave the UNIIIC a great deal of information including that one of the planners of the assassination was Nasser Kandil,[36] and that the decision to assassinate Hariri had been taken in the Syrian Arab Republic followed by clandestine meetings in Lebanon between senior Lebanese and Syrian officers.[37] After spelling out Saddik's assertions the UNIIIC Report mentions that "[a]t the present stage of investigation, a certain amount of information given by Sadik cannot be confirmed through other evidence."[38]

The Judges' exposure to Mr. Saddik's uncorroborated allegations creates the appearance of bias and are prejudicial to future proceedings. If any of the people that Mr. Saddik alleges were part of the assassination plot become a defendant at the STL, then the judges' exposure to Saddik's claims in the UNIIIC Report are prejudicial. If Mr. Saddik's claims are not entered into evidence then the judges are exposed to off-the-record evidence that would likely bias them against the defendants. Even if Mr. Saddik's UNIIIC testimony is admitted into evidence and

[35] *Id*. at ¶ 104.

[36] *Id*. at ¶ 105.

[37] *Id.* at ¶ 106.

[38] *Id*. at ¶114.

independently corroborated, the judges would be exposed to extrajudicial witness testimony similar to the judge in *School Asbestos Litigation*, and they would have to be disqualified, even if Mr. Saddik's testimony was substantially the same has his statements in the UNIIIC report.

President Cassese's own statement in the STL's Annual Report[39] provides the reason why he and Mr. Riachy should be disqualified. Mr. Cassese stated "[t]errorist cases are often built on circumstantial evidence, which is often more powerful than direct evidence. The individual rings of metal used in producing chain mail armour are not, in and of themselves, strong. But when hundreds of such rings are linked together, the armour can be impenetrable. Circumstantial cases are the same. By linking the various evidentiary threads together, the Prosecution can put forwards a case that is much stronger than one based solely on direct evidence."[40]

While President Cassese is certainly correct, the problem with the present matter is that he and Vice-President Riachy's unfiltered exposure to the UNIIIC investigation causes them to consider many individual rings of circumstantial evidence that have not been officially entered into evidence by the OTP. Many of the individual rings of evidence they were exposed to will likely be entered into consideration through the proper regulations of the Court, but the judges should not have been exposed to them extra-judicially and off-the-record. Likewise, much of the evidence they were exposed to will not be officially entered into evidence, and causes the prosecution's case to be artificially strengthened by irrelevant and uncorroborated individual rings of evidence that should not have been considered

The second problem is that a drafting judge's exposure to Mr. Bellemare's UNIIIC report is similar to the judge's interaction with witnesses in *School Asbestos Litigation*. In that case the

[39] Special Tribunal for Lebanon, Annual Report (2009-2010). [Reproduced in accompanying Notebook at Tab 26].

[40] *Id*. at ¶ 76.

judge was disqualified based on his hearing a party to the case's witness present similar views as those she intended to express at trial. The judges who drafted the STL statute in response to Mr. Bellemare's UNIIIC report were similarly exposed to Mr. Bellemare's views that, now that he is the lead prosecutor for the OTP, they will hear in court. While a witness at trial and the prosecutor have drastically different roles in the proceeding, the appearance of bias still exists because the judges are exposed to the prosecution's argument ex parte, and have seemingly lost their impartiality.

Allowing individuals who helped draft the STL Statute and possibly the Rules of Evidence and Procedure to adjudicate STL cases creates the appearance of bias, if not actual bias, because of the judges' pre-trial exposure to evidence on and off the record and the hearing of ex parte arguments from the lead prosecutor in an extrajudicial setting

B. §455(b) Recusals Based on Prior Government Service

In addition to disqualification based on an appearance of bias under 28 U.S.C. §455(a), the disqualification of the STL Judges is mandated by 28 U.S.C. §455(b)(3). §455(b)(3) states that a judge is required to disqualify himself or herself where he or she has served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.[41] §455(b)(3) is applicable to the STL Judges' disqualification because two judges, the President and Vice-President, served in government employment and participated as advisers to the particular case in controversy.

While the 1974 amendments to 28 U.S.C. §455 expanded the bases for recusal claims in favor of the moving party under §455(a) and the appearance of bias, the amendments to

[41] 28 U.S.C. §455(b)(3), *supra* note 6.

§455(b)(3) restricted recusal motions by requiring the judge to have previously served the government as counsel, adviser, or material witness concerning the matter in controversy. Before the amendments, all that was required for a judge to be disqualified based on previous government service was for the judge to have been "of counsel."[42] "This change is significant because, while one need not do anything to be 'of counsel,' the word 'participated' would appear to connote some sort of activity."[43] Even though courts require the judge to have participated in the matter in controversy, this participation does not necessarily need to be the product of a formal employer-employee relationship. Because the STL President and Vice-President previously served in government, and in that capacity participated as advisors regarding the matter in controversy, §455(b)(3) mandates their disqualification.

1. The President and Vice-President's prior government service regarding the Special Tribunal for Lebanon requires their recusal under 28 U.S.C. §455(b)

The President and Vice-President of the STL worked for the UN and the Lebanese government, respectively, to draft the STL Statute and the Rules of Procedure and Evidence.[44] President Cassese, a notable Italian jurist and former President of the ICTY, worked for the UN in drafting the STL statute after the UNIIIC report, and Ralph Riachy was a Lebanese judge who was chosen by the Lebanese Government to assist in drafting the Statute. Both are also assumed to have helped write the Rules of Procedure and Evidence.[45] The creation of the STL was a

[42] 28 U.S.C. §455(b) (1970 ed.).

[43] Flemm, *supra* note 14, at 704.

[44] Email from Geoffrey Roberts, STL Office of the Defence, February 26, 2010, on file with author.

[45] *Id*.

collaboration between the UN and the Lebanese Government, and the two judges' assistance to those governments in drafting the Statute made the Judges advisors.

The extent of Riachy's government service is more established than Cassese's. This is not because there is a deeper and more illustrative record of Hariri's service to the Lebanese Government, but because there can be no question that the Lebanese Government is in fact a government as contemplated by §455(b)(3). Cassese's service on the other hand was to the UN, which is not a formal government or world governing body, but rather a worldwide collaboration that performs a limited government function. Whether Cassese's service to the UN is government service as contemplated by §455(b)(3) is not clear. While the UN does not seem to be a 'government' as required §455(b)(3), it seems that the government service referred to is public, rather than private practice.

2. 28 U.S.C. §455(b) only requires that the judge participate in some manner for the government in the matter in controversy

The requirement in §455(b)(3)'s that the judge participate as counsel, adviser or witness to the proceeding *or* express an opinion regarding the matter in controversy has been construed liberally.[46] While §455(b)(3) use of the phrase 'government employment' suggests that a formal employer-employee relationship must exist for a disqualification to apply, courts have allowed for a range of relationships more tenuous than that to merit disqualification. This is because §455(b)(3) also calls for disqualification when the judge was an adviser to the government or when he expressed an opinion regarding the matter in controversy.

[46] Flamm, *supra* note 14.

Most courts have required that a judge have some participation to require his disqualification.[47] The Courts in *U.S. v. Gipson,*[48] *Mangum v. Hargett,*[49] *U.S. v. Ruzzano*[50] and *Baker & Hostetler LLP v. U.S. Dept. of Commerce*[51] have all articulated that a judge is required to have some participation in order to require his recusal. Before the 1974 amendments to 28 U.S.C. §455, a judge need only be 'of counsel' for the government and no participation in the case was needed for his disqualification.[52] The 1974 amendments changed 'of counsel' to 'participated as counsel,' and "implies a higher degree of activity than 'of counsel.'"[53] In *Gipson*, the judge had previously worked as the United States Attorney, at a time when the defendant was convicted of an offense similar to the one he was then standing before the judge.[54] While the judge was not disqualified because he had no participation whatsoever in the defendant's previous case, the *Gipson* court noted that even a small amount of participation "in the investigation, preparation, or prosecution of a case"[55] is enough to warrant disqualification.

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[47] *Id.*

[48] *See*, U.S. v. Gipson, 835 F.2d 1323 (10th Cir. 1988). [Reproduced in accompanying Notebook at Tab 27].

[49] *See*, Mangum v. Hargett, 67 F.3d 80 (5th Cir. 1995). [Reproduced in accompanying Notebook at Tab 28].

[50] *See*, U.S. v. Ruzzano, 247 F.3d 688 (7th Cir. 2001). [Reproduced in accompanying Notebook at Tab 29].

[51] *See*, Baker & Hostetler LLP v. U.S. Dept. of Commerce, 471 F.3d 1355, (D.C. Cir. 2006). [Reproduced in accompanying Notebook at Tab 30].

[52] U.S. v. Gipson, *supra* note 48, at 1326.

[53] *Id.*

[54] *Id.*

[55] *Id.*

The 5th Circuit, in *Mangum v. Hargett*, echoed the *Gipson* Court by not disqualifying a judge who had previously worked in the prosecutor's office, at the same time the defendant was prosecuted, because the judge had not participated in the previous prosecution of the defendant.[56]

Obviously, if a judge were retained to work on a case or draft a memorandum his participation would be clear, and his disqualification required. However, some courts allow for a more tenuous relationship to require disqualification, and consider professional contact with a judge in regards to a particular matter a sufficient level of participation that calls for his disqualification. In fact, a judge who is professionally consulted on a matter may be disqualified even if he was not retained.[57]

If the President and Vice-President of the STL were formally employed by the UN and Lebanese Government in assisting with drafting the Statute, there would be no question if their participation as government advisors, satisfies §455(b)(3). However, even if the judges were contacted, but not formally retained or compensated for their work in drafting the Statute, they would have participated as advisors and/or expressed an opinion about the matter in question.

It seems that the President and Vice-President should be disqualified under 28 U.S.C. §455(b)(3) because they both engaged in governmental employment and participated as counsel or adviser, or expressed opinions concerning the merits of the particular case in controversy. President Cassese's employment in the United Nations and Vice-President Riachy's employment in the Lebanese Government to draft the Court's Statute would mandate their recusal. While President Cassese and Vice-President Riachy's roles in drafting the STL Statute is not entirely

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[56] Mangum v. Hargett, *supra* note 49.

[57] *See*, Prior representation or Activity as Attorney or Counsel as Disqualifying Judge, 72 A.L.R.2d 443, pg. 4. [Reproduced in accompanying Notebook at Tab 31].

clear, to be disqualified they only need to participate in some small way in the investigation or preparation of the case.

C. Once Disqualified, the Judge May Not Participate in the Proceedings in Any Way

A judge's disqualification under 28 U.S.C. §455 requires the judge take no further part in the proceedings. "Once a judge has recused [or] has been disqualified … she immediately loses all jurisdiction in the matter;[58] except to grant the motion, vacate her prior orders,[59] and in some circumstances, to make those orders necessary to effectuate the change.[60],[61] Thus, a judge who has been disqualified has no jurisdiction over any subsequent proceedings.[62] The prohibition on a disqualified judge taking any part in the proceedings also extends to any administrative matters that a judge, chief judge or president of the court may take. In *McCain v. Texas Power & Light Co.* the Chief Judge, who was disqualified under 28 U.S.C. §455, was also disqualified from selecting the judge who would then handle the case.[63]

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[58] U.S. v. O'Keefe, 128 F.3d 885 (5th Cir. 1997). [Reproduced in accompanying Notebook at Tab 32].

[59] Brown v. State, 885 So. 2d 391, 2004 Fla. App. LEXIS 14444, *4 (Fla. App. 2004) ("once the judge concluded that he should voluntarily recuse himself from the case, vacating his earlier order, while perhaps not required, was certainly within his discretion"). [Reproduced in accompanying Notebook at Tab 33].

[60] U.S. v. O'Keefe, 169 F. 3d 281, 289 (7th Cir. 1999) Dennis, C.J., dissenting ("in a proper case, the judge may be obliged to disqualify himself retroactively and to vacate any orders entered during the time that a reasonable person would harbor doubts about [his] impartiality").

[61] Flamm, *supra* note 14, at 646-47.

[62] Moody v. Simmons, 858 F.2d 137, 138 (3d Cir. 1988) (once a judge has or should have recused, he may perform no judicial actions), *cert. denied*, 109 S. Ct. 1529. [Reproduced in accompanying Notebook at Tab 34].

[63] McCain v. Texas Power & Light Co. 714 F.2d 1255 (Tex. 1983). [Reproduced in accompanying Notebook at Tab 35].

The wide scope of a §455 disqualification has a substantial impact on the STL Judges because at least two of the judges in question, Cassese and Riachy, are, respectively, President and Vice-President of the Court. Assuming that the President and Vice-President were disqualified by a provision of 28 U.S.C. §455, they would then seemingly be barred from taking any further role in the proceedings. As mentioned previously, the Special Tribunal for Lebanon has a crime-specific jurisdiction, and all cases to be heard by the STL will relate to the assassination of Rafiq Hariri. If the President Cassese and Vice-President Riachy were disqualified due to their impartiality being reasonably questioned under 28 U.S.C. §455(a) or because of their prior government service under 28 U.S.C. §455(b), they should be disqualified from taking any further role in any of the proceedings.

For President Cassese, this would mean he would not only be disqualified from being the presiding judge of the Appeals chamber,[64] but also under *Texas Power & Light Co.* he would be unable to take part in the selection of judges for other cases. Judge Riachy would be similarly disqualified from his role as Vice-President and as a pre-trial judge. This would mean that President Cassese and Vice-President Riachy would have to step down from any judicial role in the STL and could not participate in any future cases.

D. Procedural Issues

While appearance of judicial bias or the judges' previous government service can taint the fairness of the proceedings and require the judges' recusal, there are several procedural issues that govern judicial disqualification. First, depending on what the grounds are for disqualification, §455(a) or §455(b), the party moving for recusal must file within certain time restraints. Second, the grounds for disqualification must be based on an extrajudicial source.

[64] Statute of the Special Tribunal for Lebanon, *supra* note 1, art. 8(2).

1. 28 U.S.C. §455(a) recusal motions must be filed in a timely manner, while §455(b) recusal motions can be filed at any time, even after judgment has been rendered

A party moving for recusal is required to file a motion to have the judge disqualified in a timely manner.[65] Because of the difference between 28 U.S.C. §455(a) and (b) claims there are different time restraints on the judge's disqualification. 28 U.S.C. §455(a) claims are based on a set of circumstances in which a disinterested observer would reasonably question the judge's impartiality, so the parties should be completely apprised of any appearance of bias. Because all parties to the proceedings are presumed to be aware of what constitutes the appearance of bias, the party moving for recusal must file within a timely manner. U.S. federal circuits are free to decide whether to adopt explicit deadline requirements or an undefined 'within a timely manner' standard. The main thrust of the timeliness condition is that the parties do not use it strictly as a strategic move to get their way on a particular motion or the case overall.[66]

Essentially, any party moving for recusal based on the appearance of bias must move for recusal within a reasonable time after the appearance of bias is known, and not wait until after they receive an unfavorable judgment. As the Seventh Circuit stated in *United States v. Murphy*, " [a] criminal trial is too serious and costly to permit defendant to sit on possible errors, hoping to have crack at acquittal and then second trial."[67] If a reasonable person could question the

[65] Reilly v. S.E. Pa Transp. Auth., 507 Pa. 204, 489 A.2d 1291, 300 (1985). [Reproduced in accompanying Notebook at Tab 36].

[66] In re IBM Corp., 45 F.3d 641, 643 (2d Cir. 1995) ("a prompt application avoids the risk that a party is holding back a recusal application as a fall-back position"); U.S. v. York, 888 F. 2d 1050, 1055 (5th Cir. 1989) (a timeliness requirement inhibits the knowing concealment of ethical issues for strategic purposes). [Reproduced in accompanying Notebook at Tab 37].

[67] United States v Murphy, 768 F2d 151 (7th Cir. 1985). [Reproduced in accompanying Notebook at Tab 38].

judge's impartiality from the beginning of the proceedings, any party who wishes to move for disqualification must do so at the onset of trial. However, if questions of impartiality develop at some point later in the proceedings, a party must move for disqualification shortly after discovering what gave rise to the appearance of bias.

28 U.S.C. §455(b) claims have no strict timeliness requirement. While the party is expected to file a disqualification motion in a timely manner after being apprised of a bias, §455(b) claims are not based on an appearance of bias, and the situation or relationship that causes the judge's bias may remain unknown to the parties for any length of time, even after a judgment has been rendered. In many situations, the parties would not know the judge's previous government service until the judge discloses it to them. Parties are not penalized by strict timeliness requirements when the judge fails to disclose to the parties the previous relationship. Therefore, a motion for disqualification based on §455(b) can be filed at any time, even after the trial has concluded. However, similar to §455(a) motions, the parties may not wait to challenge the judge until after receiving an unfavorable judgment. As soon as the previous impermissible relationship is established, a party wishing to disqualify must move in a timely manner.

Should a party wishing to disqualify a judge fail to meet the timeliness requirement, they risk waiving their right to challenge the judge. "Failure to timely seek a judge's disqualification may be deemed to constitute an implied waiver of a party's right to seek judicial disqualification,[68] which is the functional equivalent to express consent to allow the judge to

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[68] *See*, Murray v. Timberlake, 564 So. 2d 885, 891 (Ala. 1990). [Reproduced in accompanying Notebook at Tab 39].

preside.[69],[70] If a party does not move for recusal under §455(a) during the proceedings, they likewise lose the ability to appeal the judgment on the basis of the appearance of judicial bias.[71] However, if a party fails to move for recusal under §455(b) because the judge fails to disclose the previous government service, the ability to appeal the judgment because of judicial bias is preserved.[72]

In the present matter, the Office of the Defence should move for Judge Cassese and Judge Riachy's recusal early in the proceedings. Because the Office of the Defence is presently aware of the circumstances that cause the judges' impartiality to be questioned, a failure to move for recusal in a timely manner may result in an implied waiver. While it may be possible to delay moving for recusal based on the judges' prior government service if the judges have not disclosed this matter to the parties. The judges' prior government service is known to the Office of the Defence, and failure to move for recusal may result in an implied waiver.

2. The extrajudicial source rule would not save the judges from disqualification

[69] State v. D'Antonio, 274 Conn. 658, 671 (2005) ("It is well settled that, in both civil and criminal cases, the failure 'to raise the issue of the referee's disqualification either before or during the trial, can be construed as the functional equivalent of 'consent in open court"). [Reproduced in accompanying Notebook at Tab 40].

[70] Flamm, *supra* note 14, p. 512.

[71] *See*, U.S. v. Gipson, *supra* note 48, at 1325.

[72] *Id*.; U.S. v. Ruzzano, *supra* note 50, at 695 ("we require the parties to petition for a writ of mandamus for §455(a) claims because the injury we are seeking to prevent is not an injury to an individual party, but rather to the judicial system as a whole. In the case of a meritorious §455(b) claim, where the judge actually did participate in the earlier proceeding in some manner, it is more likely that the substantial rights of the individual party have actually been implicated. Therefore, although mandamus is the preferred route, we will review §455(b)(3) claims notwithstanding the failure to petition for a writ of mandamus").

In order for a 28 U.S.C. §455 disqualification to be successful, the source of the bias normally must stem from an "extrajudicial source."[73] "Thus, to be disqualifying, the alleged bias must not have arisen from judicial knowledge, opinions, conduct, or comments that derived from the evidence adduced in a pending or a prior proceeding; but by virtue of some factor that arose outside of the incidents that have taken place in the courtroom itself."[74]

In determining whether a bias stems from an extrajudicial source courts typically look at whether the source of the alleged bias came from "the four corners of the courtroom."[75] If during the course of any proceeding the judge develops a bias towards a party due to behavior that takes place in the courtroom, that bias will be considered to have a judicial source, and not be grounds for disqualification. If however, the impartiality of the judge is tainted by something that happens outside of the courtroom, the bias is developed from an extrajudicial source, and may be used to disqualify the judge.

A drastic example of a bias developed from an extrajudicial source occurred in *U.S. V. Greenspan*.[76] The judge in *Greenspan* received a death threat that was not "delivered in court," so the source of the judge's bias was considered to be extrajudicial and applicable towards his disqualification.[77] However, the Supreme Court, in *Litkey v. United States*, has refined the

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[73] In re Larson, 43 F.3d 410, 413 (8th Cir. 1994)[Reproduced in accompanying Notebook at Tab 41]; Schreiber v. Kellogg, 838 F. Supp. 998, 1003 (E.D. Pa. 1993). [Reproduced in accompanying Notebook at Tab 41].

[74] Flamm, *supra* note 14, at 81-82.

[75] Doering v. Fader, 558 A.2d 733, 735 (1989). [Reproduced in accompanying Notebook at Tab 42].

[76] U.S. v. Greenspan, 26 F.3d 1001 (10th Cir. 1994). [Reproduced in accompanying Notebook at Tab 43].

[77] *Id*. at 1006.

concept to allow for a bias stemming from a judicial source because although an extrajudicial source requirement for disqualification is "the only common basis, it is not the exclusive one, since it is not the exclusive reason a predisposition can be wrongful or inappropriate."[78]

The bias giving rise to disqualification for the STL Judges stems from an extrajudicial source. The two bases for disqualification, an appearance of bias from 28 U.S.C. §455(a) and a bias stemming from previous government service under 28 U.S.C. §455(b)(3), both are extrajudicial. The appearance of bias that comes from the judge's pre-trial exposure to evidence and parties to the case all occurred outside of the courtroom in a legislative, not a judicial setting. While the purpose of the judges' involvement in drafting the statute was based upon their judicial knowledge and experience, the role they were filling was as aides to legislators, not as adjudicators. Similarly, the judges' employment by the UN and the Lebanese Government was not a judicial source of their bias, but rather arose in extrajudicial settings where the judges were acting as lawyers/advisors in the matter.

IV. International Courts Approach to Disqualification for Bias And Previous Government Service

The United States statutory scheme providing for the disqualification of a judge is only one example of how a court resolves issues of bias, or the appearance thereof, and previous relationships that may taint the judge's impartiality. The STL and all the other international criminal tribunals have rules regarding judicial disqualification. It is important to note that the international criminal tribunals have a history and tendency to have their rules of procedure comport with each other's so that there is not a drastic shift in how justice is administered from court to court. While this does allow for international law to enjoy somewhat of a consensus of

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[78] Litkey v. U.S., 114 S. Ct. 1147, 1155 (1994). [Reproduced in accompanying Notebook at Tab 44].

opinions on certain issues and crystallize legal practices into a unified scheme, there remains the problem that if a court implements a dangerous or unfair provision others will likely follow that provision out of a sense of conformity. This can and does result in the proliferation of a bad policy into customary international law. As a result, many courts may allow for the lack of impartiality exhibited by the President and Vice-President of the STL and do not consider it to be grounds for disqualification. However, this does not necessarily mean that the STL Judges' role in drafting the STL Statute would not be grounds for disqualification based on the reading of any court's statute or the need to comport with the notion of impartiality and neutral adjudication.

A. The International Court of Justice

The International Court of Justice (hereinafter "ICJ") seeks to remedy the same judicial impartiality issues as the U.S. system. The ICJ attempts to "prevent actual bias, the appearance of bias from extrajudicial activities, and the appearance of bias that may result from an adjudicator's prior experience as an advocate."[79]

Several aspects of the ICJ Statute provide impartiality standards. Article 2 requires "independent judges."[80] Article 24 calls for judges to recuse themselves, or for the President of the Court to remove a judge if "some special reason" is present.[81] The ICJ provision that deals most directly with impartiality is Article 17(2) of the ICJ Statute, which forbids a Court member from participating in "any case in which he has previously taken part as agent, counsel, or

[79] Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 Berkeley J. Int'l L. 111, 2008. [Reproduced in accompanying Notebook at Tab 45].

[80] Statute of the International Court of Justice, art. 2, available at: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0. [Reproduced in accompanying Notebook at Tab 46].

[81] *Id.* at art. 24.

advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity."[82] While these provisions are in some ways analogous to 28 U.S.C. §455 in that they disqualify a judge based on an explicit list of previous relationships, the Court handles issues of the appearance of bias with a different safeguard.

While the ICJ Statute makes no mention of an appearance of bias or whether the judge's impartiality might reasonably be questioned, Article 16(1) forbids any member of the Court from exercising "any political or administrative function . . . [or engaging] in any other occupation of a professional nature."[83] It is this safeguard that protects against the kind of behavior engaged in by the STL Judges who, by drafting the STL Statute, engaged in a political/administrative function, which was also another occupation of a professional nature.

However, it is unclear whether the STL Judges would be disqualified under an Article 16(1) analysis. While it could be said that the President and Vice-President's employment in the United Nations and Lebanese Government constituted 'political or administrative function,' this political or administrative function was, in some respects, completely confined to the Court they were serving on. Article 16(1) does not preclude judges from serving a political or administrative function in the ICJ, it only precludes them from employment outside of the Court. Since the President and Vice-President were employed solely to serve an administrative (drafting the STL Statute) and political (help form the Court itself) function within the confines of the STL, 16(1) may not be applicable. Furthermore, Article 16(1) only applies to ICJ Judges after they have been sworn in as judges, at the time the STL Judges were helping to draft the Court's Statute, they were not yet sworn in as judges and 16(1) would be inapplicable to them.

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[82] *Id.* at art. 17(2).

[83] *Id*. at art.16(1).

While Article 16(1) is likely inapplicable, Article 17(2) would most likely require the STL Judges' disqualification because of their prior government service. The President and Vice-President's employment with the UN and Lebanese Government shows they previously served as advisor or as counsel in relation to the matter they are meant to adjudicate.

B. The International Tribunal for the Former Yugoslavia

The ICTY recognizes essentially the same forms of bias as the U.S. and the ICJ. Article 13(1) of the ICTY Statute requires judges to be "persons of high moral character, impartiality and integrity,"[84] and Rule 15(A) of the Rules of Procedure and Evidence states "[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."[85] Additionally, ICTY Judges are required to abide by the ICJ conditions of service, including Articles 16(1) and 17(2).[86]

The ICTY Appeals Chamber has interpreted these provisions to show an appearance of bias exists when the judge is a party to the case, has a personal or pecuniary interest in the case

[84] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious violations of International Humanitarian law Committed in the Territory of the Former Yugoslavia since 1991, art. 13(1), UN Doc. S/25704 (1993), available at: http://www1.umn.edu/humanrts/icty/statute.html. [Reproduced in accompanying Notebook at Tab 47].

[85] International Criminal Tribunal for the Prosecution of Persons Responsible for Serious violations of International Humanitarian law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, art. 15(A), IT/32/Rev. 44, 10 December 2009, available at: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf. [Reproduced in accompanying Notebook at Tab 48].

[86] Brubaker, *supra* note 79, at 120-21.

or when a reasonable observer, properly informed, apprehends bias.[87] The ICTY Appeals Chamber further recognized the need for the appearance of bias stating, "that it is of 'fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'"[88] However, the STL Judges would not likely be disqualified under the ICTY's interpretation of these statutory provisions.

A case somewhat similar to the situation of the STL Judges drafting the Court's Statute occurred in the ICTY Appeals Chamber. Anto Furundzija appealed his conviction in the ICTY because he alleged, *inter alia*, that "a reasonable member of the public, knowing all of the facts [would] come to the conclusion that Judge Florence Ndepele Mwachande Mumba has or had any association, which *might* affect her impartiality."[89] Furundzija never alleged that Judge Mumba was actually biased, only that a reasonable person may question her impartiality.[90] The question of Judge Mumba's impartiality was about her service in the United Nations Commission on the Status of Women (hereinafter "UNCSW"), which 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.'"[91] Judge Mumba was active in the UNCSW for three years and called for individuals to be brought to justice for their roles in the hostilities in the former Yugoslavia, before becoming an ICTY

[87] Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgment, P189 (July 21, 2000); Brubaker, *supra* note 79, at 120. [Reproduced in accompanying Notebook at Tab 49].

[88] *Id*. at ¶ 195 (citing Lord Hewart CJ, R v. Sussex Justices ex parte McCarthy [1924] 1 KB 256 at p. 259).

[89] *Id*. at ¶ 169.

[90] *Id*. at ¶170.

[91] *Id*. at ¶ 201 (citing UN Security Council Resolution 827(1993) (S/RES/827 (1993)).

Judge. The ICTY Appeals Chamber held that disqualification was unnecessary because Judge Mumba was appointed to the UNCSW by her government to represent them. Judge Mumba's role in the UNCSW is strikingly similar to the STL Judges because she was working for the government, Zambia and the United Nations, to bring to justice the perpetrators of international crimes in the former Yugoslavia, and later was appointed as a judge at the Yugoslavia Tribunal.

Under this analysis, Judge Riachy would not be disqualified, while there is still a chance that Judge Cassese would. The ICTY Appeals Chamber based their analysis of Judge Mumba's service in the UNCSW on the fact that the Zambian Government appointed her to that position. Because "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. Representatives of the UNCSW are selected and nominated by governments. 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."[92] The appointment of Judge Riachy was under similar circumstances. Article 8 of the STL Statute calls for a Lebanese judge to be nominated by the Lebanese Government. Because Judge Riachy was nominated by the Lebanese Government to help draft the Statute of the Court, and later nominated to be a judge, the ICTY Appeals Chamber would not disqualify him.

However, the Lebanese Government did not nominate Judge Cassese to his position as a drafter of the Statute. Judge Cassese was a personal appointment by the United Nations, meaning that his role in drafting the Statute is not necessarily protected from disqualification. The ICTY Appeals Chamber goes to great length to reason that Judge Mumba should not be

[92] *Id*. at 199.

disqualified because the Zambian Government appointed her to her position in the UNCSW. Because Judge Cassese was not appointed to his position of drafting the Statute to represent a government he still may be disqualified under the *Furundzija* holding.

Regardless of whether Judge Cassese or Riachy could be disqualified under the *Furundzija* holding, the ICTY Appeals Chamber seems to ignore the point that regardless of how Judge Mumba ended up on the UNCSW, and how her position there created the appearance of impropriety in the proceedings. Even if she was not actually biased, her position of seeking to punish the perpetrators of the atrocities in the former Yugoslavia creates a reasonable question about her impartiality in adjudicating those same matters. The judges in the STL need not follow this same flaw in logic and recognize that because President Cassese and Vice-President Riachy worked for the government in bringing certain perpetrators to justice and were heavily informed of all aspects of the investigation in an extrajudicial setting they need to be disqualified.

C. The Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) substantially used the ICTY's Statute and Rules of Procedure and Evidence, and applying the same interpretation the ICTY used, disqualified a judge based on his extrajudicial writings against the Revolutionary United Front. The statutory provisions and interpretations the SCSL used in disqualifying the judge were nearly identical to the *Furundzija* analysis. However, the SCSL decided that Justice Robertson did need to be disqualified because his public and unfavorable opinion of the RUF caused for the appearance of bias.[93] Justice Robertson "had published opinions regarding this group's

[93] Prosecutor v. Issa Hassan Sesay, Case No. SCSL-2004-14-AR 15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber (Mar. 13,

barbarism in a book, alleging its pillage, rape and diamond-heisting as well as its more devilish tortures of mutilation."[94]

While the case of Justice Robertson is an extreme example of judicial bias, or the appearance thereof, it seems likely that the STL Judges' would be disqualified under a SCSL analysis. The Special Court for Sierra Leone appears more open to the notion that whenever there is good reason to question the impartiality of the judge, regardless of whether there is an actual bias, the judge must recuse himself or herself.

D. The Special Tribunal for Lebanon

The STL also heavily modeled its rules for disqualification and Rules of Procedure and Evidence on the ICTY model.[95] There are several provisions of the STL Statute and Rules of Procedure and Evidence that relate to the appearance of bias and a judge's previous government service. Article 9(1) of the STL Statute states "[t]he judges shall be persons of high moral character, impartiality and integrity, with extensive judicial experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source."[96] Rule 25(A) of the STL Rules of Procedure and Evidence states "[a] Judge may not sit on a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association that might affect or appear to

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2004), available at http://www.sc-sl.org/Documents/SCSL-04-15-PT-058.pdf. [Reproduced in accompanying Notebook at Tab 50].

[94] Brubaker, *supra* note 79, at 123.

[95] Possibly due to President Cassese's previous role as President of the ICTY.

[96] Statute of the Special Tribunal for Lebanon, *supra* note 1, art. 9(1).

affect his impartiality. The Judge shall, in any such circumstance, withdraw."[97] Additionally, Rule 25(E) foresees the possibility of the President of the Court being disqualified. "If the Judge who is the subject of the motion for disqualification is the President, the responsibility of the President in accordance with this paragraph shall be assumed by the Vice-President or, if he is not able to act in the application, by the Judge most senior in precedent."[98]

While there is obviously no case law as of yet from the STL on judicial disqualifications, it seems that the statutory provisions may require recusals in situations where the judges' impartiality might reasonably be questioned and previous government service. The phrasing in 25(A) that says 'in any circumstance where the judge's association might affect or appear to affect his impartiality,' suggests that the STL will apply an appearance of bias standard similar to §455(a) and the Statutes of the ICJ and ICTY. Article 9(1) envisions a separation of the STL judges from the government, whether that is the United Nations or Lebanese Republic. Even though the judges may be presently separate from the government they were employed by, their previous relationship calls into question their impartiality.

V. CONCLUSION

The President and Vice-President of the Special Tribunal for Lebanon would be disqualified under the application of 28 U.S.C. §455(a) or (b). Because of the Judges' extrajudicial exposure to critical evidence, their roles in drafting the STL Statute and previous government service, they would be disqualified and prohibited from taking any further part in the proceedings. §455(a) would require the Judges' recusal not because any actual bias exists, but

[97] Special Tribunal for Lebanon Rules of Procedure and Evidence, Rule 25(A), Adopted June 10, 2009, Amended June 05, 2009, available at: http://www.stl-tsl.org/sid/51. [Reproduced in accompanying Notebook at Tab 51].

[98] *Id*. at 25(E).

because a reasonable observer might question the Judges' impartiality. §455(b) would require their recusal based on their prior government service in the matter before them at the STL.

While many of the provisions of the STL Statute and the Statutes of other international criminal tribunals may cause for the Judges' disqualification, international courts are traditionally very hesitant to disqualify a judge without an extreme showing of bias or clear proof of previous government service that casts doubt on the Judges' impartiality.

In filing for the Judges' disqualification, the Office of the Defence should move shortly after the beginning of the proceedings to ensure to meet any timeliness requirements and preserve the ability to appeal the judgment on the grounds of judicial bias.