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At the trial of an accused person, whether the fact that a judge has written critically about that accused before he came to be appointed as judge impugns the competence, independence and impartiality of the tribunal of which that judge forms a part

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE SPECIAL COURT FOR SIERRA LEONE

ISSUE: AT THE TRIAL OF AN ACCUSED PERSON, WHETHER THE FACT THAT A JUDGE HAS WRITTEN CRITICALLY ABOUT THAT ACCUSED BEFORE HE CAME TO BE APPOINTED AS JUDGE IMPUGNS THE COMPETENCE, INDEPENDENCE AND IMPARTIALITY OF THE TRIBUNAL OF WHICH THAT JUDGE FORMS A PART

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52. Press Release (2003), available at http://www.un.org/icty/pressreal/2003/p803-e.htm

53. Revolutionary United Front, available at http://www.globalsecurity.org/military/world/para/ruf.htm

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I. INTRODUCTION

In a ruling on March 13, 2004, Justice Geoffrey Robertson of the Special Court for Sierra Leone was disqualified from hearing any cases involving the Revolutionary United Front.[1] The decision was based on opinions expressed by Robertson in his 2002 book, *Crimes Against Humanity: The Struggle for Global Justice*.[2] Although the Office of the Prosecutor supported the disqualification of Justice Robertson under these circumstances, it is now concerned that the decision will be over-generalized to apply to other members of the Special Court's bench for their academic writings published before their appointment to the Special Court.

The judiciary aspires to preserve both the reality and the appearance of neutrality.[3] However, judges are academic members of the legal community, and should therefore be expected to write scholarly articles and treatises on issues within their expertise. Except in the most extreme cases, a judge's independence and impartiality should not be deemed as compromised by any such academic writings when they are made before the judge is appointed to his or her position on the court. As an active member of the legal field, a judge cannot reasonably be expected to be void of any cognizance of the issues which may come before his or her bench, especially in the confined universe of the international judiciary. Thus, past scholarly writings should

[1] Prosecutor v. Issa Hassan Sesay, Decision on Defense Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, Case No. SCSL-2004-15-AR15 (March 13, 2004) ("Prosecutor v. Issa Hassan Sesay"). [Reproduced in the accompanying notebook II at Tab 27].

[2] *Id*.

[3] Kiley Marie Corcoran, *Mandamus and Recusal: Promoting Public Confidence in the Judicial Process*, 9 SUFFOLK J. TRIAL & APP. ADV. 13 (2004) ("*Mandamus and Recusal*"). [Reproduced in the accompanying notebook II at Tab 45].

generally not be seen as having any effect on the detached, neutral and impartial character that the judge has sworn to uphold.

Part II of this memorandum provides the factual background concerning the disqualification of Justice Geoffrey Robertson from the Appeals Chamber of the Special Court. Part III of this memorandum details the ICTY case, *Prosecutor v. Anto Furundzija*, relied upon by the Appeals Chamber in disqualifying Justice Robertson. The section goes on to suggest that the test from the ICTY case was misapplied by the Appeals Chamber in disqualifying Justice Robertson, with potential negative consequences for future cases. Part IV of this memorandum details the standards for judicial conduct in the United States, as well as surveys similar standards in several nations across the globe. Part V of this memorandum then highlights international standards of judicial impartiality in tribunal statutes, various rules of procedure and proposed basic principles and minimum standards. Finally, Part VI of this memorandum seeks to formulate a standard for international judicial conduct based on the foregoing to come to the conclusion that the academic writings of a judge, especially those written outside the capacity as judge, are not an indicator of partiality or bias while on the court.

II. FACTUAL BACKGROUND

Before analyzing the issue of judicial impartiality, it is first necessary to discuss the series of events that brought this issue to the floor of the Appeals Chamber of the Special Court for Sierra Leone. Many of the prosecutions that make up the caseload of the Special Court are those involving the Revolutionary United Front, or RUF. The RUF, with its brutal and unorthodox guerilla tactics, emerged in the second half of the 1980s,

and was a prominent military presence during Sierra Leone's civil war.[4] A humanitarian crisis quickly resulted from the RUF's tactics, which involved brutal attacks on unarmed civilians and children.[5] The RUF has also been known to target journalists, lawyers and ethnic groups specifically, as well as use women and children as human shields.[6]

RUF head Foday Sankoh was indicted for war crimes, crimes against humanity and violations of international humanitarian law by the Special Court, along with several other RUF leaders, in March 2003.[7] The prior year, prominent human rights advocate and barrister Geoffrey Robertson published a book entitled, *Crimes Against Humanity: The Struggle for Global Justice*.[8] In the book, Robertson made several references to Sankoh, referring to him as a despicable psychopath given to mutilating citizens.[9] The book also details the killings, rapes, mutilations and pillages carried out by the RUF during the civil war, all the while renouncing Sankoh and other RUF sympathizers.[10] Given this publicized view by Robertson of the atrocities committed by the RUF, it is easy to see why defense teams for RUF members would call into question Robertson's

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[4] Revolutionary United Front, available at http://www.globalsecurity.org/military/world/para/ruf.htm. [Reproduced in the accompanying notebook II at Tab 53].

[5] *Id*.

[6] *Id*.

[7] Indictments at the Special Court, 10 March 2003, available at http://www.specialcourt.org/documents/WhatHappening/PressReleaseOTP.htm. [Reproduced in the accompanying notebook II at Tab 51].

[8] The Head Heeb: Recusal, available at http://headheeb.blogmosis.com/archives/023374.html. [Reproduced in the accompanying notebook II at Tab 55].

[9] GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE (The New Press, 2002) at 467. [Reproduced in the accompanying notebook II at Tab 37].

[10] *Id*.

impartiality when he subsequently became President Judge of the Special Court for Sierra Leone.

One such challenge was made by the defense team for Issa Hassan Sesay, another RUF member indicted along with Sankoh in March 2003.[11] A motion was filed on February 27, 2004 seeking the disqualification of Justice Robertson from the Appeals Chamber on the grounds that the Judge "has expressed the clearest bias against both the Revolutionary United Front and the Armed Forces Revolutionary United Front and thereby has displayed lack of impartiality to the accused indicted as members of these groups and their respective defenses."[12] The Prosecution conceded due to a concern that the integrity and credibility of the Court would be called into question by the public if Justice Robertson remained on the bench of the Appeals Chamber in such cases.[13] After Justice Robertson refused to withdraw, the Special Court on March 13, 2004, pursuant to Rule 15 of the Court, ruled to disqualify Justice Robertson from adjudicating on those motions involving alleged members of the RUF for which decisions are pending, in the Appeals Chamber, and cases involving the RUF if and when they come before the Appeals Chamber.[14]

The importance of this decision by the Appeals Chamber lies in the issue concerning the impartiality of the judiciary that arises from it. More precisely, it becomes prudential to inquire whether a judge can remain an impartial arbiter of justice

[11] Prosecutor v. Issa Hassan Sesay, *supra* at note 1, at para. 1. [Reproduced in the accompanying notebook II at Tab 27].

[12] *Id*., citing Motion by Defense, at para. 2.

[13] *Id*. at para. 8.

[14] *Id*. at para. 18.

when he has previously expressed a written opinion on a named defendant prior to becoming a judge on the bench for that defendant's trial. Little exists regarding how a judge chooses to express his opinion before he has taken the oath to become a judge, especially in the limited and confined universe of international law. However, rules and customs regarding a judge's behavior and conduct while presiding, as well various domestic provisions for recusal and disqualification of judges, can provide some insight into differentiating between those expressions of opinion or bias that clearly encroach on a judge's impartiality, and those that do not.

III. THE ICTY DECISION CITED BY THE APPEALS CHAMBER

A. The Ruling in *Prosecutor v. Anto Furundzija*

In making its ruling on the disqualification of Justice Robertson, the Appeals Chamber of the Special Court relied heavily upon the July 2000 decision by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Anto Furundzija*. The case involved a challenge by the appellant similar to the one asserted by Sesay. Specifically, one of the grounds submitted for appeal was that presiding Judge Mumba should have been disqualified from trying the case.[15] Judge Mumba had been the Zambian representative to the United Nations Commission on the Status of Women (UNCSW) prior to her election to the International Tribunal, and the two duties never coincided or were carried out simultaneously.[16] During Judge Mumba's membership with the UNCSW, the organization drafted the "Platform for Action," a

[15] Prosecutor v. Anto Furundzija, Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/1-A, A. Ch., 21 July 2000 ("Prosecutor v. Furundzija") at para. 25. [Reproduced in the accompanying notebook II at Tab 26].

[16] Press Release (2003), available at http://www.un.org/icty/pressreal/2003/p803-e.htm. [Reproduced in the accompanying notebook II at Tab 52].

document which identified twelve major problem areas concerning women's rights, three of which were relevant to issues in the former Yugoslavia.[17] Also during Judge Mumba's membership in the UNCSW, the organization passed several resolutions condemning the systematic mass rape that was taking place in Yugoslavia at the time, and urged the International Tribunal to prosecute those responsible. In light of these facts, the appellant alleged a personal interest on the part of Judge Mumba in the ongoing agenda of the UNCSW, which had a detrimental effect on the impartiality of his trial.[18]

The test for judicial disqualification proposed by the appellant was whether "a reasonable member of the public, knowing all of the facts, would come to the conclusion that Judge Mumba has or *had* any association, which *might* affect her impartiality."[19] The appellant did not allege that Judge Mumba was actually biased, rather only that a reasonable person could apprehend bias. This emphasizes the importance of the idea that a tribunal must have the appearance of impartiality.[20]

Conversely, the prosecution asserted that the appellant submitted no evidence of actual bias or partiality, and proposed that the standard for a finding of bias should be high and that judges should not be disqualified purely on the basis of their personal beliefs or legal expertise.[21]

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[17] Prosecutor v. Anto Furundzija, *supra* at note 15, at para.167. [Reproduced in the accompanying notebook II at Tab 26].

[18] *Id*., at para. 169.

[19] *Id*. (emphasis in original).

[20] *See*, *e.g*., Webb v. The Queen, 181 C.L.R. 41 (1994) [Reproduced in the accompanying notebook II at Tab 34]; *see also* President of the Republic of South Africa and Others v. South African Rugby Football Union and Others, Judgment on Recusal Application (1999). [Reproduced in the accompanying notebook II at Tab 25].

[21] Prosecutor v. Anto Furundzija, *supra* at note 15, at para. 171. [Reproduced in the accompanying notebook II at Tab 26].

In devising the proper test and coming to a decision, the Appeals Chamber first noted the statutory requirement of impartiality found in the Statute of the International Tribunal. Article 13 states that all judges shall be persons of high moral character, impartiality and integrity.[22] Additionally, Article 21 states generally the rights of an accused to a fair and impartial trial.[23] The majority considered that these two articles reflected the fundamental human right to be tried before and independent and impartial tribunal.[24] In interpreting these basic statutory requirements, the Appeals Chamber first surveyed the interpretations of various national legal systems on the subject of impartiality, which this memorandum does in great detail below.

After consulting the statutory requirement, as well as national jurisprudence, the Appeals Chamber devised a two-prong test for judicial disqualification. First, a judge is not impartial if it is shown that actual bias exists.[25] Second, there is an unacceptable appearance of bias if a judge is a party to the case, or has financial or proprietary interest in the outcome of the case, or if the judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties, or the circumstances would lead a reasonable observer, properly informed to reasonably apprehend bias.[26]

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[22] Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended 19 May 2003 by Resolution 1481) at art. 13. [Reproduced in the accompanying notebook I at Tab 6].

[23] *Id.*, at art. 21.

[24] Greg Lombardi and Michael Scharf, *Commentary to Prosecutor v. Furundzija, Judgment,* in ANDRE KLIP & GORAN SLUITER eds., ANNOTATED LEADING CASES OF INTERNATIONAL TRIBUNALS, VOL. 5 (Intersentia, 2003) ("ANNOTATED LEADING CASES OF INTERNATIONAL TRIBUNALS") at 358. [Reproduced in the accompanying notebook II at Tab 35].

[25] Prosecutor v. Anto Furundzija, *supra* at note 15, at para. 189. [Reproduced in the accompanying notebook II at Tab 26].

[26] *Id.* (It should be noted that the "reasonable observer" referred to in the second prong of the test is to be imparted with knowledge of all of the surrounding circumstances, including a knowledge of the traditions

The Appeals Chamber then applied the test to the case at hand. Emphasizing that Judge Mumba's membership in the UNCSW was not contemporaneous with the period of her tenure as judge, reaffirming the presumption of impartiality that attaches to a judge, and recognizing that judges naturally have personal convictions from which they can detach themselves in their duties as judge, the Appeals Chamber held that the appellant's argument had no basis.[27]

B. The Test from *Prosecutor v. Anto Furundzija* was Misapplied by the Appeals Chamber for the Special Court in *Prosecutor v. Issa Hassan Sesay*.

The Appeals Chamber for the Special Court for Sierra Leone misapplied the test for impartiality from *Prosecutor v. Anto Furundzija* in two fundamental ways. First, it seems to have ignored the three major justifications for the International Tribunal's ruling that Judge Mumba should not have been disqualified. Namely, the ruling does not adequately address the fact that Justice Robertson expressed his opinions before and not after he took the judicial oath, the presumption of judicial impartiality, or the ability of judges to detach themselves from personal opinion in carrying out their duties. Second, the Appeals Chamber, in its rationale, incorrectly characterized the "reasonable man" or knowledgeable observer referred to in the *Furundzija* test. Each of these misapplications shall be analyzed in turn.

Turning first to the SCSL Appeals Chamber's failure to recognize the important reasons for the *Furundzija* decision, it is foremost noteworthy that Justice Robertson published *Crimes Against Humanity: The Struggle for Global Justice* in 2002, well

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of integrity and impartiality of the judiciary, as well as the fact that judges swear to uphold the duty of impartiality).

[27] *Id*., at paras. 194-199.

before being sworn in on the Special Court.[28] The ICTY Appeals Chamber in *Furundzija* went to great lengths to emphasize the fact that Judge Mumba's membership in the UNCSW occurred before she was elected to the International Tribunal.[29] The Appeals Chamber of the Special Court only mentions that the book was published in 2002, and makes no mention of the fact that this occurred before Justice Robertson held a position on the court. This is a crucial omission, for it seems to discount or devalue the fact that a judicial oath is taken between the time when a judge may have expressed his or her written opinion, and the time when he or she presides on a court. In Justice Robertson's case, his well-informed, professional opinion was written before he was elected to the Special Court. The duty of impartiality he swore to uphold trumps any academic editorial he may have penned prior to the taking of the oath.

Additionally, the ruling by the SCSL Appeals Chamber disqualifying Justice Robertson does not lend sufficient deference to the presumption of judicial impartiality reaffirmed in the *Furundzija* ruling. In *Furundzija*, the Appeals Chamber recognized that a presumption of impartiality and neutrality is prevalent in their own jurisprudence.[30] The ruling also noted that this presumption is recognized in other national jurisdictions as well.[31] Conversely, the ruling by the Appeals Chamber of the Special Court in *Sesay*

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[28] The Appeals Chamber, Website of the Special Court for Sierra Leone, available at http://www.sc-sl.org/chambers.html. [Reproduced in the accompanying notebook II at Tab 54].

[29] *See* Prosecutor v. Anto Furundzija, *supra* at note 15, at para. 194 (citing and distinguishing Lord Hoffman's contemporaneous involvement with Amnesty International during his involvement with the Pinochet case). [Reproduced in the accompanying notebook II at Tab 26].

[30] *Id*., at para. 196 (citing Prosecutor v. Dario Kordic et al. (1998)).

[31] *See* President of the Republic of South Africa and Others v. South African Rugby Football Union and Others, Judgment on Recusal Application, *supra* at note 20 ("The reasonableness of the apprehension [of bias] must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favor; and their ability to carry out that oath by reason of their training and experience"). [Reproduced in the accompanying notebook II at Tab 25].

only briefly posits the general principle that judges must be above suspicion of bias.[32] Nowhere does the ruling state the opposite conclusion, specifically that judges are to be presumed impartial until proof is made otherwise. Again, this omission has the effect of undermining the oath taken by judges, as well as the overall integrity of the office of the judiciary.

On a related point, the SCSL Appeals Chamber also did not adequately take into account a judge's professional ability and duty to disabuse his or her mind of any personal beliefs or predispositions. The ruling in *Furundzija* recognized this ability by conceding that judges will have personal convictions, and that absolute neutrality on the part of a judicial officer can hardly, if ever be achieved.[33] In disqualifying Justice Robertson, the Appeals Chamber of the Special Court did grant that the Justice is certainly entitled to his opinion, and that this is one of his fundamental human rights.[34] However, the ruling did not state that a judge may hold these opinions and at the same time be a neutral and impartial arbiter of justice, as the *Furundzija* ruling and several national legal systems suggest. To doubt a judge's ability to detach his or her mind from personal conviction or predispositions in the course of judicial duty is to weaken the idea of judicial independence and professionalism. In all but the most extreme cases, the

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[32] Prosecutor v. Issa Hassan Sesay, *supra* at note 1, at para. 16. [Reproduced in the accompanying notebook II at Tab 27].

[33]Prosecutor v. Anto Furundzija, *supra* at note 15, at para. 203 (citing President of the Republic of South Africa and Others v. South African Rugby Football Union and Others). [Reproduced in the accompanying notebook II at Tab 26].

[34] Prosecutor v. Issa Hassan Sesay, *supra* at note 1, at para. 15. [Reproduced in the accompanying notebook II at Tab 27].

decision to resign from hearing a case must be the judge's decision alone if judicial independence is to be maintained.[35]

Finally, it would seem that the Appeals Chamber of the Special Court in *Sesay* incorrectly characterized the "reasonable observer" in the second prong of the test cited from *Furundzija*. The ruling in *Furundzija* made it clear that the observer is to be presumed as having knowledge of all relevant circumstances, *including* the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is on of the duties that judges swear to uphold.[36] The Appeals Chamber of the Special Court in *Sesay* said that the crucial and decisive question was whether an independent bystander, or reasonable man, reading the relevant passages in Justice Robertson's book will have a legitimate reason to fear that Justice Robertson lacks impartiality.[37] Without describing the knowledge of the reasonable man any further, the SCSL Appeals Chamber comes to the conclusion that the reasonable man would apprehend bias. However, to impart the reasonable man only with the knowledge of the passages in Justice Robertson's book is to clearly place him on unequal footing. To properly apply the test devised in *Furundzija*, and to accurately detect an appearance of bias, the SCSL Appeals Chamber would have to characterize the reasonable observer as also having knowledge of the presumption of judicial impartiality.

In making its ruling, the SCSL Appeals Chamber in *Sesay* never suggested that the ruling in *Furundzija* disposed of the matter. However, if *Furundzija* is to be

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[35] *Id*., at para. 11 (citing Justice Robertson's statement in response to the motion by defense).

[36] Prosecutor v. Anto Furundzija, *supra* at note 15, at para. 190 (emphasis added). [Reproduced in the accompanying notebook II at Tab 26].

[37] Prosecutor v. Issa Hassan Sesay, *supra* at note 1, at para. 15. [Reproduced in the accompanying notebook II at Tab 27].

considered persuasive (and it would certainly seem so given that it was relied upon by the defense and cited in great length by the SCSL Appeals Chamber in its opinion), then the test for judicial impartiality must be properly applied. In misapplying the test with respect to Justice Robertson, the SCSL Appeals Chamber has unjustifiably lowered the threshold for disqualification of judges.

IV. NATIONAL STANDARDS OF JUDICIAL IMPARTIALITY

When undertaking the task of formulating a universal standard or set of standards for judicial independence and impartiality, it can be helpful to explore the standards for judicial conduct of various nations. Although the following is not an exhaustive survey, it is a representative one. The common theme of the importance of impartiality is prominent; however, subtle differences between the several systems can be seen as well.

A. The United States

Beginning with the American judicial system, it is first important to note that the United States Constitution unconditionally guarantees all criminal litigants the right to a fair and impartial trial.[38] Apart from the constitutional requirement, the judiciary considers neutrality so fundamental to the integrity of the judicial process that the judicial code of ethics mandates impartiality.[39] Canon 3 of the Model Code of Judicial Conduct states generally that a judge shall perform the duties of judicial office impartially and diligently.[40]

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[38] The United States Constitution, at amendment VI (1791). [Reproduced in the accompanying notebook I at Tab 15].

[39] *Mandamus and Recusal*, *supra* at note 3, at 14 (citing Model Rules of Judicial Conduct, Canon 3(b)(5) (1999). [Reproduced in the accompanying notebook II at Tab 45].

[40]Model Code of Judicial Conduct, at canon 3 (1990). [Reproduced in the accompanying notebook I at Tab 17].

The legislation dealing with disqualification of an American judge is found in Section 455 of Title 28 of the United States Code. Most notably, Section 455(a) states that a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.[41] This 1974 amendment to the statute is significant in that it is a "catch-all" standard that asks what a reasonable person knowing all the relevant facts would think about the impartiality of the judge.[42] Section 455(a) is waivable by the defense, but Section 455(b) provides non-waivable circumstances in which a judge shall also be disqualified. The circumstances provided in this section are substantially similar to that of other nations, and they include relatedness, personal bias toward a party, financial interest and a potentially affected personal interest.[43]

It is important to note that while Section 455(a) was implemented as a more objective standard for the evaluation of judicial bias and prejudice, recent jurisprudence has limited its impact primarily to situations where the source of bias is extra-judicial, as opposed to originating in the course of judicial proceedings.[44] In other words, Section 455(a) applies more to an appearance of bias based on the judge's past associations, and Section 455(b) applies more to the judge's associations and convictions concerning the parties in any given case. At least one commentator believes this to be an incorrect interpretation that sacrifices the appearance of judicial impartiality in the name of judicial

[41] 28 U.S.C. § 455(a) (2004). [Reproduced in the accompanying notebook I at Tab 18].

[42]Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification*, 72 NEB. L. REV. 1046 at 1048 (1993). [Reproduced in the accompanying notebook II at Tab 46].

[43] 28 U.S.C. § 455(b) (2004). [Reproduced in the accompanying notebook I at Tab 18].

[44]Shawn P. Flaherty, *Litekey v. United States: The Enrichment of an Extrajudicial Source Factor in the Recusal of Federal Judges Under 28 U.S.C. §455(a)*, 15 N. ILL. U. L. REV. 411 (1995)at 416 (discussing how the United States Court of Appeals for the Eleventh Circuit mistakenly held an extrajudicial source of bias to be a requirement, rather than a mere factor in the federal disqualification legislation). [Reproduced in the accompanying notebook II at Tab 48].

economy.[45] Historically however, the American judicial system has tended to favor the side of the former rather than the latter. Although most American judges could probably be fair in many questionable circumstances, the legal system has decided collectively that even the appearance of partiality can undermine the justice system.[46]

The United States has quite frequently and publicly called into question the impartiality of its federal judges. The most recent example of this is the public debate that emerged over Supreme Court Justice Antonin Sclalia's hunting trip with Vice President Dick Cheney, in light of the fact that the Supreme Court was to review a case involving the National Energy Policy Development Group, a committee chaired by Cheney.[47] The environmental organization known as Sierra Club filed a motion requesting that Justice Scalia recuse himself from hearing the case, in light of his recent hunting trip with the vice president, a named party in the case. In response, Justice Scalia denied the motion in a scathing 21-page memorandum. Scalia was quick to point out that he never spent any time alone with the vice president and not a word was spoken regarding the case at issue.[48] He went on to state that a judge's "recusal is required if, by

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[45] *Id*. at 432.

[46]Steven Lubet, *Disqualification of Supreme Court Justices*, 80 MINN. L. REV. 657 (1996) at 661 (It is important to note that the United States legal system, perhaps more than any other, holds to the idea that a trial cannot be impartial if there is an appearance of bias. Thus, even if there is a slight chance that the process will be undermined in the public eye due to the personal convictions of a judge, that judge's competence will almost surely be challenged). [Reproduced in the accompanying notebook II at Tab 49].

[47] *Mandamus and Recusal*, *supra* note 3, at 14 [Reproduced in the accompanying notebook II at Tab 45]; *See also* Richard B. Cheney v. United States District Court, 124 S. Ct. 958 (2003) (granting review of appellate court decision denying government's petition for writ of mandamus vacating district court's discovery order). [Reproduced in the accompanying notebook II at Tab 29].

[48] Richard B. Cheney, Vice President of the United States, et al. v. United States District Court for the Northern District of Columbia, et al., Memorandum of Justice Scalia, 124 S. Ct. 1391 (2004) at 1394. [Reproduced in the accompanying notebook II at Tab 30].

reason of [his] actions, his impartiality might reasonably be questioned."[49] To support his position, Scalia cited several examples of Supreme Court Justices who had often fraternized with members of the executive and parties in cases before the Court, including a skiing trip taken by Justice Byron White with Attorney General Robert Kennedy and a weekend retreat attended by Justice Robert Jackson and President Franklin Roosevelt.[50] Scalia's principle point was that a no-friends rule requiring automatic recusal on the basis of friendship would harm the justice system. He flatly denied the motion, adding "[i]f it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined."[51]

More notorious is the public stir over the nomination of Judge Robert Bork to the Supreme Court by President Ronald Reagan in 1987. Bork was regarded by Reagan and others as a premiere constitutional authority with outstanding intellect and unrivaled scholarly credentials.[52] It soon became clear through opposition, however, that Bork had possibly been too public with his views on key issues. For example, Bork had been highly critical of federal civil rights legislation in 1964, and also spoke against Supreme Court decisions regarding the establishment of religion.[53] Several individuals and organizations opposed the nomination, but the most vehement opposition came from Senator Ted Kennedy, who called Judge Bork the enemy of the individual in

[49] *Id*. (citing 28 U.S.C. § 455(a)).

[50] *Id*. at 1400-1401.

[51] *Id*. at 1403.

[52] MARY E. STUCKEY, STRATEGIC FAILURES IN THE MODERN PRESIDENCY, (Hampton Press, 1997) at 71. [Reproduced in the accompanying notebook II at Tab 40].

[53] NORMA VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS (Southern Illinois University Press, 1998) at 15 and 93. [Reproduced in the accompanying notebook II at Tab 42].

confrontations with the Government, and the enemy of Congress in confrontations with the President.[54] As a consequence of Judge Bork's well-publicized ultra-conservative leanings, the nomination was defeated in the Senate by a vote of 58-42.[55] This should be seen as distinguishable from the case of Justice Scalia's denial of a motion for recusal in two fundamental ways. First, the opposition to Judge Bork came in the context of a Supreme Court nomination. In contrast, Justice Scalia already sat on the Court, and the controversy involved his associations with a party in one particular case. Second, Bork's nomination failed due to his extreme conservative worldview, while Scalia's denial of a recusal motion involved the application of the statutory requirements for judicial impartiality to a specific activity he engaged in. Taking these two important differences into consideration, it becomes apparent that appointing a potentially inherently biased judge to the highest court in the land may be significantly more harmful than the repercussions of how the statutory provisions for impartiality are applied to an activity engaged in by a sitting judge.

Several lower court decisions in the United States have addressed the issue of judicial impartiality as well. For example, in *United States v. Evans*, defense counsel moved for recusal on the grounds that he had opposed the trial judge's nomination one year before the case was heard based on political attitudes and academic writings, and that this was a source of judicial bias against the defense counsel.[56] The District Court

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[54]LANE CROTHERS & NANCY S. LIND, PRESIDENTS FROM REAGAN THROUGH CLINTON, 1981-2001: DEBATING THE ISSUES IN PRO AND CON PRIMARY DOCUMENTS (Greenwood Press, 2002) at 60. [Reproduced in the accompanying notebook II at Tab 39].

[55] *Id*. at 56.

[56]United States v. Evans, 262 F. Supp. 2d 1292 (2003) at 1294. [Reproduced in the accompanying notebook II at Tab 32].

for the Central Division of Utah denied the recusal motion, stating that defense counsel raises only an allegation of prior interaction and partiality pursuant to Section 455(a) against him, not his client, and that this is insufficient to require recusal.[57] Furthermore, the motion to recuse referred to academic writings by the trial judge published 5 years before the case at hand.[58] In response, the court held that at some point, even a genuine appearance of impartiality will begin to fade away, and that defense counsel's allegations are disappearing into the past.[59]

Similarly, the United States Court of Appeals for the Second Circuit denied a recusal motion that was grounded in the fact that the trial judge owned stock in an insurance company that was among the victims of the defendant's fraud offense.[60] Recognizing that, at least in some circumstances, a judge should recuse if the judge or the judge's spouse owns stock in a crime victim, the court declined to adopt a per se rule requiring recusal in every instance where a judge has an interest in a victim of a crime.[61] Rather, the court held that recusal is required only where the extent of the judge's interest in the crime victim is so substantial, or the amount that the victim might recover as restitution is so substantial, that an objective observer would have a reasonable basis to doubt a judge's impartiality.[62]

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[57]*Id*. at 1295; *see also* In re Beard, 811 F. 2d. 818 (4th Cir. 1987) (where fact that judge referred to counsel as a "son-of-a-bitch" and a "wise-ass lawyer" did not require recusal). [Reproduced in the accompanying notebook I at Tab 21].

[58]*Id*. at 1297.

[59]*Id*.

[60]United States v. Lauresen, 348 F. 3d 329 (2003) at 331. [Reproduced in the accompanying notebook II at Tab 33].

[61] *Id*. at 336.

[62]*Id.* at 337.

Also, the United States District Court for the Northern District of Illinois denied a plaintiff's motion for recusal that was based on the grounds of friendship with the defendant.[63] The court held that the mere fact that a judge knows or knows of an attorney, witness or litigant is insufficient to warrant recual.[64] Similarly, the mere fact that a judge is a member of a bar association and socializes at such functions with attorneys or judges who may at some point in time appear before him is also insufficient to warrant recusal.[65]

B. A Brief Survey of Other Nations

1. The United Kingdom

In the case of the United Kingdom, an important difference from other systems is apparent in that the courts look for a real danger of bias, rather than a likelihood.[66] In other words, it is unnecessary that the court look through the eyes of a reasonable man, because the court first has to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.[67]

In the United Kingdom, the general rule considered part of the common law and regarded as a rule of natural justice is that a judge should disqualify himself if he has any pecuniary interest in the matter, however small, and however unlikely it is to affect his

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[63]Hass v. The RICO Enterprise, 2004 U.S. Dist. LEXIS 6133 (2004) at 9. [Reproduced in the accompanying notebook I at Tab 19].

[64]*Id*.

[65]*Id*.

[66] R v. Gough, [1993] A.C. 646 (2003) at 661. [Reproduced in the accompanying notebook II at Tab 28].

[67] *Id*.

judgment.[68] A judge should also disqualify himself in there are any circumstances of whatever nature which would give rise to a reasonable suspicion by one party that the judge might be biased.[69]

An example of a case in the United Kingdom in which a judge's impartiality was at issue is *In Re Pinochet*. The decision was issued by the House of Lords on January 15, 1999. The case arose as a petition to set aside an earlier decision by the Appellate Committee concerning a judgment rendered against Augusto Pinochet. Pinochet was the head of state in Chile from 1973 to 1990. During this time, various crimes against humanity including torture, hostage taking and murder took place.[70] Specifically, Pinochet's defense raised the issue that Lord Hoffman, one of the judges who heard the original appeal, was so closely connected with the human rights group Amnesty International as to create an appearance of bias against Pinochet.[71] Pinochet did not allege that Lord Hoffman was actually biased, but rather that there was a real danger or reasonable apprehension or suspicion that he may have been biased.[72] The House of Lords set aside the earlier judgment and ordered a re-hearing. The opinion stated that a man may not be a judge in his own cause, and that the mere fact of Amnesty International's interest (the trial and possible conviction of Pinochet) is sufficient to

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[68] Prof. D.B. Casson and Prof. I.R. Scott, "Great Britain", in JULES DESCHENES & SHIMON SHETREET eds., JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE (Martinus Nijhoff Publishers, 1985) ("JUDICIAL INDEPENDENCE") at 150 (citing Dimes v. Grand Junction Canal Co., 3 H.L.Cas. 759 (1852)). [Reproduced in the accompanying notebook II at Tab 38].

[69] *Id*.

[70]Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet, (No. 2) (House of Lords) (2000) 1 AC 119. [Reproduced in the accompanying notebook I at Tab 22].

[71]*Id*.

[72] *Id*.

disqualify Lord Hoffman.[73] This decision to disqualify speaks to the importance of the "danger of bias" test applied by courts in the United Kingdom.

2. Australia

In Australia, much like in Great Britain, the common law and generally perceived obligations of judicial independence restrain judges from taking part in cases in which they may have an interest.[74] Attitudes differ on the issue of writing books, but the general consensus is that judges ought not write or publish books of a legal nature once they are appointed.[75]

The High Court of Australia has held that when testing for bias, a court must consider whether the circumstances would give a fair-minded and informed observer a "reasonable apprehension of bias."[76] This is where the Australian system differs from the British system, namely in the inclusion of a reasonable observer standard in its test for impartiality. It is also important to note that the knowledge of the observer in this test encompasses all circumstances, including the presumption of impartiality, much like the test in *Furundzija*.

3. Belgium

[73] *Id*.

[74] Hon. Mr. Justice M.D. Kirby, "Australia", in JUDICIAL INDEPENDENCE, *supra* at note 68, at 22. [Reproduced in the accompanying notebook II at Tab 38].

[75] *Id*. at 23.

[76] Webb v. The Queen, *supra* at note 20, at 45. [Reproduced in the accompanying notebook II at Tab 34].

The Judicial Code provides numerous grounds for recusal by Belgian judges.[77] A judge will voluntarily withdraw if he is informed that such a ground exists, and may also disqualify himself on personal grounds.

The Belgian rules for extra-judicial practice are rather strict as compared to many others. A judge may not be involved in legal practice or paid arbitration.[78] Likewise, judges cannot be involved in public or business activities.[79] In spite of all of these regulations, judges are still not restricted from writing books.

4. France

The Code of Judicial Organization and the Code of Civil Procedure provide the rules of self-disqualification for French judges. The main tests are family ties between the judge and one of the parties, either directly or by marriage.[80] Business relations with a party may also be cause for disqualification.[81] In addition, well-known antagonism or friendship between a judge and a party may be sufficient.[82]

The rules prohibiting extra-judicial activity are strict, but judges are still permitted to write books, provided they remain subject to the limitation of obligation de réserve.[83]

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[77] Professor Marcel Storme, "Belgium", in JUDICIAL Independence, supra at note 68, at 48 (citing Judicial Code of Belgium at art. 828). [Reproduced in the accompanying notebook I at Tab 38].

[78] *Id*. (citing Judicial Code of Belgium at arts. 297 and 298).

[79] *Id*. (citing Judicial Code of Belgium at arts. 293 and 299).

[80] Code of Civil Procedure of France (2003) at Title X, art. 341. [Reproduced in the accompanying notebook I at Tab 12].

[81] *Id*.

[82] *Id.*

[83] F. Grivart de Kerstrat, "France", in JUDICIAL INDEPENDENCE, *supra* at note 68, at 71 (describing obligation de réserve as a general obligation imposed on all persons having the status of public servant). [Reproduced in the accompanying notebook II at Tab 38].

5. Germany

Section 22 of the German Criminal Procedure Code (*Strafprozeßordnung*) provides the basic grounds for the disqualification of a judge in a criminal case. The main test is kinship to the accused or aggrieved party.[84] Section 23 of the same code provides that a judge shall be disqualified from hearing a case on appeal when he has participated in the same case in a lower instance.[85] Germany also serves as one of the archetypal examples of a system that places emphasis on the appearance of bias. Section 24 provides that a judge's impartiality may be challenged for fear of bias and that such a challenge is proper if there is reason to distrust the impartiality of a judge.[86]Therefore, a German judge's impartiality can be challenged based on an objective apprehension of bias without alleging actual bias, similar to the challenge in *Furundzija*.

6. Japan

The rules for judicial exclusion and challenge in Japan are provided by the Codes of Civil and Criminal Procedure. A Japanese judge's self-disqualification is automatic in a criminal case if the judge is the victim, is a relative or guardian of the accused or the victim, is a witness, becomes an attorney for the case, previously prosecuted the case, or participated in the previous instance of the same case.[87] The provisions for challenging a

[84] German Criminal Procedure Code, § 22 (1987). [Reproduced in the accompanying notebook I at Tab 16].

[85] *Id*., § 23.

[86] *Id*., § 24.

[87] Code of Criminal Procedure of Japan, at art.20 (2002). [Reproduced in the accompanying notebook I at Tab 14].

judge are intended to supplement the provisions that automatically exclude a judge.[88] The Criminal Code provides that a judge may be challenged if there is an apprehension that he will render a partial verdict.[89] In this respect, Japan is similar to the other nations that require only an apprehension of bias rather than actual bias.

The Code of Civil Procedure provides a similar standard for exclusion, forbidding the judge to preside if he or his spouse is a party, or if there is a degree of relatedness between the judge and one of the parties.[90] However, the provision for challenging a judge's impartiality makes no mention of an apprehension of bias, but merely provides for a challenge if there are such circumstances that may prejudice partiality.[91]

The standards relating to extra-judicial activities are very strict in Japan, but judges can and do frequently write academic books and articles.[92]

C. Conclusions

This brief survey of the standards for judicial independence and impartiality in various nations is a useful consideration in the task of devising a universal standard. The idea of a fair trial, as it pertains to the tribunal, should not differ substantially from traditional notions of a fair, impartial trial in the domestic sense. Therefore, a survey of these national standards should be at least partially indicative of what the international

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[88] SHIGEMITSU DANDO, JAPANESE CRIMINAL PROCEDURE (Fred B. Rothman & Co., 1965) at 59. [Reproduced in the accompanying notebook II at Tab 43].

[89]Code of Criminal Procedure of Japan, *supra* note 87, at art. 21. [Reproduced in the accompanying notebook I at Tab 14].

[90]Code of Civil Procedure of Japan, at art. 23 (2000). [Reproduced in the accompanying notebook I at Tab 13].

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

[92] Prof, Yasuhei Taniguchi, "Japan", in JUDICIAL INDEPENDENCE, *supra* at note 68, at 213. [Reproduced in the accompanying notebook II at Tab 38].

legal community believes to be the rules that outline acceptable and unacceptable conduct for judges.

In general, most national legal systems agree that a judge has a duty to withdraw from a case where a close personal relationship with one of the parties exists, or a personal interest is at stake. Where the personal interest provision is not mentioned, as in the case of Japan, it is assumed to be encompassed by the general "catch-all" challenge provisions. Differences appear regarding whether the apprehension of bias by the hypothetical well-informed observer is sufficient to require disqualification. Also, in all of the standards of conduct that mention the subject, the writing and publishing of academic books by judges seems to be viewed as not affecting their impartiality.

It should be stressed at this juncture that these national standards of conduct apply to judges once they are sworn in. It is impossible for a standard of judicial conduct to apply retroactively. Therefore, it seems safe to assume that proscribed conduct for a judge has no bearing on that person's involvements before he or she became a judge. In other words, if it is generally accepted that the publishing of an academic book or treatises by a judge does not affect that judge's neutrality, then it stands to reason that any such publication before taking the judicial oath has even less effect.

V. INTERNATIONAL STANDARDS OF JUDICIAL IMPARTIALITY

Relatively little has been written on the subject of the independence of the international judiciary.[93] However, the judicial impartiality standards of international legal bodies can also be helpful in devising a universal test for neutrality. These

[93] Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L. J. 271 (2003) at 276. [Reproduced in the accompanying notebook II at Tab 47].

standards can be found in the rules of procedure for the hybrid court in Sierra Leone and the International Tribunals in Rwanda and Yugoslavia, as well as the International Court of Justice, the International Criminal Court, and the European Court of Human Rights. Additionally, much work has been done by independent organizations, like the International Law Association's Project on International Courts and Tribunals, on the subject of impartiality in the international judiciary. All of these sources can be helpful in discerning exactly how the international legal community views the issues involved with impartiality, especially when examined together with the domestic standards outlined above.

A. The ad hoc Tribunals

The primary focus of attention regarding the independence of international tribunals has been on the methods of selecting judges and their qualifications.[94] The International Criminal Tribunal for Rwanda agreed to adopt the Rules of Procedure for the International Criminal Tribunal for the Former Yugoslavia.[95] Subsequently, the Special Court for Sierra Leone agreed to adopt the Rules of Procedure for the International Criminal Tribunal for Rwanda.[96] Therefore, all three of the tribunals are governed by the same set of rules with minor variations. The pertinent provision is found in Rule 15 of the Rules of Procedure. A tribunal judge may not sit in any case in which

[94]Dinah Shelton, *The Independence of International Tribunals*, in ANTONIO A. CANCADO TRINIDADE ed., THE MODERN WORLD OF HUMAN RIGHTS: ESSAYS IN HONOR OF THOMAS BUERGENTHAL ("THE MODERN WORLD OF HUMAN RIGHTS") (Inter-American Institute of Human Rights, 1996) at 317. [Reproduced in the accompanying notebook II at Tab 36].

[95] Statute of the International Criminal Tribunal for Rwanda, at art. 14 (1995). [Reproduced in the accompanying notebook I at Tab 10].

[96] Statute of the Special Court for Sierra Leone, at art. 14 (2000). [Reproduced in the accompanying notebook I at Tab 11].

he or she has a personal interest or concerning which the judge has or has had any association which might affect his or her impartiality.[97] As both *Sesay* and *Furundzija* demonstrate, any party may raise the issue of disqualification of a tribunal judge.[98] The phrase "any association which might affect his or her impartiality," is rather broad, and could be subject to interpretation when applied to activities of judges before being elected to the tribunal. However, based on the test adopted in *Furundzija*, it can at least be assumed that Rule 15 encompasses bias that would be ascertained by the "reasonable observer."

B. The International Court of Justice

The Statute of the International Court of Justice contains several provisions that speak to the independence and impartiality of its judges. First, Article 16 provides that no member of the court may exercise any political or administrative function, or engage in any other occupation of a professional nature.[99] Also, no member of the court may act as agent, counsel, or advocate in any case, or may participate in the decision of any case in which he or she has previously acted as any of these things.[100] These restrictions on judicial activity are of the most basic in nature, and some equivalency in one form or another can usually be found in the statutes of other international judiciary bodies.[101] A

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[97] Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, at rule 15(A) (1994). [Reproduced in the accompanying notebook I at Tab 7].

[98] *Id*., at rule 15(B).

[99] Statute of the International Court of Justice, at art. 16 (1945). [Reproduced in the accompanying notebook I at Tab 8].

[100] *Id*., at art. 17.

[101] *See*, *e.g*., Rome Statute of the International Criminal Court, at art. 40 (1998) [Reproduced in the accompanying notebook I at Tab 4]; *see also*, Rules of Court for the European Court of Human Rights, at rule 4 (2003). [Reproduced in the accompanying notebook I at Tab 5].

judge can only be dismissed for failing to abide by the above restrictions by a unanimous opinion of the other members of the court.[102] The rule enforcing this provision is found in Article 6 of the Rules of Procedure for the court.[103]

One unique feature of the International Court of Justice arises in the context of the nationality of judges. If a judge is a national of a state that is a party to a case before the court, rather than requiring that judge to recuse, an ad hoc judge from the other state party will be appointed to balance the scales.[104]

Above all, every member of the International Court of Justice is required to make a solemn declaration in open court that his or her powers will be exercised impartially and conscientiously.[105] This once again speaks to the importance and consideration courts rightly attribute to the judicial oath of impartiality.[106] This provision is enforced further by the Rules of Procedure for the court.[107]

C. The International Criminal Court

The Rome Statute of the International Criminal Court is rather brief in its treatment of judicial impartiality, relative to its entire length. The relevant articles

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[102]Statute of the International Court of Justice, *supra* at note 99, at art. 18. [Reproduced in the accompanying notebook I at Tab 8].

[103]Rules of Court for the International Court of Justice, at art. 6. [Reproduced in the accompanying notebook I at Tab 6].

[104]Statute of the International Court of Justice, *supra* at note 99, at art. 31. [Reproduced in the accompanying notebook I at Tab 8].

[105] *Id*., at art. 20.

[106] *See*, *e.g*., Prosecutor v. Anto Furundzija, *supra* at note 15. [Reproduced in the accompanying notebook II at Tab 26].

[107] Rules of Court for the International Court of Justice, *supra* at note 103, at art. 4. [Reproduced in the accompanying notebook I at Tab 6].

provide that judges shall not engage in any activity that is likely to interfere with their judicial functions or to affect confidence in their independence.[108]

Regarding challenge and disqualification, a judge on the International Criminal Court shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground, or if the judge was involved with the case at the national level.[109] Additionally, any decision regarding a challenge to independence or impartiality must be made by an absolute majority of judges.[110]

Based on the language of the above provisions, it appears as though the International Criminal Court will operate on the "reasonable observer" standard discussed above. Although no mention is made of a reasonable or well-informed observer in the statute of the court, the language, "affect confidence in" and "might reasonably doubted" would suggest that an outsider's apprehension of bias is the true arbiter of impartiality for the court.

D. The European Court of Human Rights

Article 6 of the European Convention on Human Rights states that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[111] Pursuant to this provision, the European Court of Human Rights has formulated a two prong test that has a subjective part dealing with a judge's personal convictions, and an objective part determining whether there are

[108] Rome Statute of the International Criminal Court, *supra* at note 101, at art. 40(2). [Reproduced in the accompanying notebook I at Tab 4].

[109] *Id*., at art. 41(2)(a).

[110] *Id*., at arts. 40(4) and 41(2)(c).

[111] European Convention on Human Rights (1950) at art. 6(1). [Reproduced in the accompanying notebook I at Tab 1].

sufficient guarantees to exclude any legitimate doubt in the judge's impartiality.[112] The court has stressed, in regards to the subjective part of the test, that the impartiality of a judge must be presumed until there is proof to the contrary.[113] However, in interpreting the objective part of the test, the court has held that it is required that a tribunal is not only genuinely impartial, but also that it appears to be impartial.[114] What is decisive, according to the court, is whether the fear that a particular judge lacks impartiality can be held objectively justified.[115]

E. The Work of the Project on International Courts and Tribunals

In examining international standards of judicial independence, it is also helpful to consider the guidelines and sets of standards proposed by the International Law Association's Project on International Courts and Tribunals. The Project on International Courts and Tribunals is an internationally based effort to facilitate the work of international courts and tribunals through academic research and concrete action.[116] The Project realized in 2001 that the International Law Association could play an important role in identifying principles and developing guidelines which might enhance the

[112] Piersack v. Belgium, Eur. Ct. H. R., Series A, No. 53 (1982) at para. 30. [Reproduced in the accompanying notebook II at Tab 24].

[113]LeCompte, Van Leuven and de Meyere, Eur. Ct. H. R., Series A, No. 43 (1981) at para. 58. [Reproduced in the accompanying notebook II at Tab 23].

[114] Sramek v. Austria, Eur. Ct. H. R., Series A, No. 84 (1984) at para. 42. [Reproduced in the accompanying notebook II at Tab 31].

[115]Hauschildt v. Denmark, Eur. Ct. H. R., Series A, No. 154 (1989) at para. 48. [Reproduced in the accompanying notebook I at Tab 20].

[116]Homepage of Project on International Courts and Tribunals, available at http://www. pict-pcti.org. [Reproduced in the accompanying notebook II at Tab 50].

operation of existing tribunals and provide useful models for future bodies.[117] The result was the formation of the Study Group on the Practice and Procedure of International Courts and Tribunals, and the subsequent Burgh House Principles on the Independence of the International Judiciary, which reflect the discussions of the Study Group at its five meetings to date.[118]

Of particular importance in the International Law Association Burgh House Principles is the principle regarding extra-judicial activity, which states that judges should not engage in any extra-judicial activity that is incompatible with their judicial function or that may affect their independence or impartiality.[119] Equally important are the principles dealing with a judge's past links. First, judges shall not serve in a case in which they have previously served in any capacity or a case with the subject matter of which they have had any other form of association, not including prior academic publications, that may affect or may reasonably be considered to affect their independence or impartiality.[120] Second, judges shall not sit in a case involving a party for whom they have served in any capacity, or with whom they have had any other significant professional or personal link within the previous three years or such other period as the court may establish within its rules.[121] Finally, a judge shall not sit in any

[117] International Law Association/Project on International Courts and Tribunals, Study Group on the Practice and Procedure of International Courts and Tribunals (2002). [Reproduced in the accompanying notebook I at Tab 3].

[118] *Id*.

[119]The International Law Association Burgh House Principles on the Independence of the International Judiciary, at principle 8 (2004). [Reproduced in the accompanying notebook I at Tab 2].

[120] *Id*., at principle 9 (It is important to take note that the language "may affect or may reasonably be considered to affect" encompasses both actual partiality and the appearance of partiality to a reasonable observer).

[121] *Id*., at principle 10.

case in the outcome of which they hold any material personal, professional or financial interest.[122]

VI. ANALYSIS BASED ON THE FOREGOING

In light of all of the above observations, it is possible to infer some basic universal standard that address which practices by international judges will or will not be seen to affect their impartiality. After all, there is some commonality in the requirements to be an international judge in the first place.[123]

To begin with, the test for judicial impartiality and disqualification formulated in *Prosecutor v. Anto Furundzija* is likely to serve as some kind of template for all of the others. Not only was it the first appellate decision in the ICTY to address if and when a judge can be disqualified for bias, it also provides a clear test for doing so where the Statutes and Rules of the tribunals are silent on the matter.[124] It is extremely detailed, yet uncomplicated, and it emphasizes both the importance of the appearance of impartiality and the knowledge of the "reasonable observer". It also raises the bar fairly high and makes it unlikely that a judge in the ICTY will voluntarily disqualify him or herself in any but the most obvious circumstances.[125]

It is important to comprehend the circumstances surrounding the decision of the Appeals Chamber in *Furundzija*. Judge Mumba had indisputably spoken out, in an

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[122] *Id*., at principle 11.

[123] Dinah Shelton, *The Independence of International Tribunals*, in THE MODERN WORLD OF HUMAN RIGHTS, *supra* at note 94, at 317. [Reproduced in the accompanying notebook II at Tab 36].

[124]Greg Lombardi and Michael Scharf, *Commentary to Prosecutor v. Furundzija, Judgment,* in ANNOTATED LEADING CASES OF INTERNATIONAL TRIBUNALS, *supra* at note 24, at 357. [Reproduced in the accompanying notebook II at Tab 35].

[125]*Id*.

official capacity, against offenses by certain people in the former Yugoslavia who were now defendants before the court.[126] The only argument that can be made to diminish the possible effect this previous involvement could have on Judge Mumba's impartiality would be to assert that she was acting as a representative working in the best interest of the Government of Zambia. Otherwise, one must conclude that if the presumption of impartiality is strong enough to overcome convictions expressed while serving on the United Nations Commission on the Status of Women, then it must be strong enough to counter personal convictions expressed in an academic setting before even taking an oath to uphold impartiality.

It is true that the test in *Furundzija* is more concerned with the appearance of bias than with actual bias.[127] However, if the apprehension of bias must come from a well-informed observer, as the test calls for, then it is important to recognize that this observer would not only know that a judge expressed his opinions in an academic writing before becoming a judge, but also that there is an oath taken by judges and that there is a high threshold to reach in order to rebut the presumption of impartiality.[128]

Applying the *Furundzija* test as a starting point, it is now possible to add the slant provided by the various national standards for impartiality. The United States looks at the issues of judicial impartiality and disqualification with a discerning eye, as evidenced by the case of Justice Scalia and the nomination debate surrounding Judge Bork. It

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[126] Prosecutor v. Furundzija, *supra* at note 15, at para. 166. [Reproduced in the accompanying notebook II at Tab 26].

[127] *Id*., at para. 189.

[128] *Id*., at para. 197 (discussing the assumption that international judges can disabuse their minds of any irrelevant personal beliefs or predispositions, and a challenge must adduce sufficient evidence to prove otherwise).

certainly seems possible that, especially in light of the failed Bork nomination, that a judge's academic past could have a detrimental affect on the appearance of impartiality. After all, it was precisely Bork's academic credentials and expertise that caused the rejection of his nomination.[129] However, Senate confirmation hearings are a very different situation from a criminal trial. In the case of a nominated Supreme Court Justice, the nominee is not yet on the bench. Therefore, there is not yet a presumption of impartiality in place to rebut any doubts regarding bias. This is only to suggest that it is possible that the academic history of a judge is not viewed in the United States the same in the context of Supreme Court nominations as it is in the context of a trial judge's impartiality.

As for the standards of other national judicial systems, some variations can be seen, especially in the inclusion or exclusion of a "reasonable observer" test. The various national systems are in general agreement on the principle that judges should not write books on legal subjects while on the bench. Also, all of the surveyed national standards are silent as to what types of academic activities before taking the oath will be seen as adversely affecting impartiality.

It is also unanimous that a judge has a duty to withdraw from a case in which he or she has a personal interest. In this respect, it remains unanswered whether books written before being sworn in will be indicative of such an interest. It would seem that such academic writings would not be dispositive of the personal interest issue, but could feasibly be used to support a showing of an interest. Again, it is important to view this issue through the lens of the presumption of impartiality once sworn in.

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[129] MARY E. STUCKEY, STRATEGIC FAILURES IN THE MODERN PRESIDENCY, *supra* at note 52, at 71. [Reproduced in the accompanying notebook II at Tab 40].

In the international judicial arena, the rules of procedure for the ad hoc tribunals provide minimal insight into formulating a clear standard for impartiality. One possible reason for this could be the assumption that the process of selection of judges for the tribunals will take care of the problems of conflict of interest since the selectors will be acquainted with the issues to be decided and the candidates' qualifications.[130] For example, in the selection process of judges for the International Criminal Tribunal for the Former Yugoslavia, the Russian Judge Valentin G. Kisilez was defeated to avoid any appearance of a pro-Serb bias.[131] Nevertheless, the general personal interest restrictions clearly apply.[132] Apart from this, the restriction on sitting in a case that may affect impartiality is broad and open to interpretation regarding activities engaged in before being elected to the tribunal. However, tests like the one in *Furundzija* help to clarify the standard.

The standards of other international judicial bodies are slightly clearer. The Statute of the International Court of Justice, for example, goes to great pains to elaborate what is expected of judges.[133] Also, the language of the Rome Statute of the International Criminal Court used in the restriction on sitting in cases where impartiality might be doubted is indicative of an "apprehension of bias" test, much like the one in

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[130] Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 A.J.I.L. 250 (1996) at 252. [Reproduced in the accompanying notebook II at Tab 44].

[131] MICHAEL P. SCHARF, BALKAN JUSTICE (Carolina Academic Press, 1997) at 64-65. [Reproduced in the accompanying notebook II at Tab 41].

[132] *See* Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, *supra* at note 97, at rule 15. [Reproduced in the accompanying notebook I at Tab 7].

[133] Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, *supra* at note 130, at 251. [Reproduced in the accompanying notebook II at Tab 44].

Furundzija.[134] Likewise, the two-part test of the European Court of Human Rights emphasizes the importance of the appearance of bias to an observer, as well as the presumption of impartiality.[135] This means that any challenge based on activities by a judge before sitting on the bench can be evaluated by these international judicial bodies using standards similar to those in *Furundzija*.

Finally, the International Law Association Burgh House Principles on the Independence of the International Judiciary provide gloss to the above standards. Under the International Law Association Principles, the fact that a judge may not engage in activity that could affect his or her impartiality applies only to activities engaged in while sitting on the bench. Regarding the provisions dealing with past links, it is unlikely that opinions expressed in a book before being sworn in would be found to amount to the type of former association with a party referred to in the principles. In this same respect, and unique to the International Law Association Principles, a set period of time (three years) is proposed, which could quite possibly eliminate a great deal of a judge's academic writings before he or she sat on the bench.[136]

VII. CONCLUSION

[134] Rome Statute of the International Criminal Court, *supra* at note 101, at art. 41. [Reproduced in the accompanying notebook I at Tab 4].

[135] Piersack v. Belgium, *supra* at note 112, at para. 30. [Reproduced in the accompanying notebook II at Tab 24].

[136] The International Law Association Burgh House Principles on the Independence of the International Judiciary, *supra* at note 119, at principle 10 (calling for disqualification of any judge who has had any significant professional or personal link with a party in the previous three years or such other period as the court may establish within its rules). [Reproduced in the accompanying notebook I at Tab 2].

Given the qualifications one must have to be chosen or elected as an international judge, absolute neutrality assumes the character of a legal fiction. This is implicit in the Rome Statute of the International Criminal Court. Article 36 provides the required qualifications for potential judges, and mandates that every candidate shall have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity in criminal proceedings.[137] Certainly, with such experience come personal convictions. Political sympathies do not in themselves imply a lack of impartiality towards the parties before the court.[138] This examination of numerous standards for judicial impartiality and independence demonstrates that it is far to presumptuous to boldly declare that because a person, prior to becoming a judge, has written critically about war crimes attributed to a defendant now before his court, he is unable to render a fair and impartial judgment based on the facts adduced at trial. Assuming that the test elaborated in *Furundzija* is the proper test, and is the cumulative representative of several national and international standards, many other factors must be considered in making a finding of bias. Keeping in mind that the appearance of impartiality and independence is of the utmost importance to public confidence in the judiciary, great deference must nevertheless be given to the over-arching presumption of the inherent impartiality of the judicial office, as well as the assumption that a judge is able to detach his or her personal convictions and predispositions from the judicial duties. Finally, as stressed in *Furundzija*, it is of the

[137] Rome Statute of the International Criminal Court, *supra* at note 101, at art. 36(3)(b)(i). [Reproduced in the accompanying notebook I at Tab 4].

[138]Prosecutor v. Furundzija, *supra* at note 15, at para. 203 (citing Crociani et al v. Italy, Decisions and Reports, European Commission of Human Rights, vol. 22, at 147 (1981)). [Reproduced in the accompanying notebook II at Tab 26].

utmost importance if whatever the judge has done to cast doubt upon his or her impartiality was done or engaged in before the judge sat on the bench.