المحكمة الخاصة بلبنان
SPECIAL TRIBUNAL FOR LEBANON
TRIBUNAL SPÉCIAL POUR LE LIBAN

Received
05 NOV 2010
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Special Tribunal for Lebanon

THE PRESIDENT OF THE TRIBUNAL

Case no.:	**CH/PRES/2010/08**
Before:	**Judge Antonio Cassese**
Acting Registrar:	**Mr Herman von Hebel**
Date:	**5 November 2010**
Original language:	**English**
Type of document:	**Public**

DECISION ON MR EL SAYED'S MOTION FOR THE DISQUALIFICACTION OF JUDGE RIACHY FROM THE APPEALS CHAMBER PURSUANT TO RULE 25

Counsel:
Mr Akram Azoury

Office of the Prosecutor:
Mr Daniel Bellemare, MSM, QC

Defence Office:
Mr François Roux

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I, **Antonio Cassese**, President of the Special Tribunal for Lebanon (the "Tribunal") am seized of the "*Demande de récusation et de dessaisissement de Monsieur le Vice-Président Ralph Riachi*" ("Motion"), filed publicly on 20 October 2010. Acting pursuant to Rule 25 of the Tribunal's Rules of Procedure and Evidence ("Rules"), I hereby render the following decision.

BACKGROUND

1. On 30 August 2005, Mr El Sayed (the "Applicant") was detained in connection with the attack against Prime Minister Rafiq Hariri (the "*Hariri* case") by Lebanese authorities under domestic criminal procedures. A Lebanese Investigating Judge issued an arrest warrant on 3 September 2005, under which the Applicant remained in detention.

2. On 27 March 2009, the Pre-Trial Judge, upon the request of the Tribunal's Prosecutor (the "Prosecutor"), issued an order directing the Lebanese judicial authorities seized of the *Hariri* case to defer to the Tribunal's competence.[1]

3. On 8 April 2009, the Lebanese judicial authorities referred a list of persons detained by them in connection with the *Hariri* case. The Applicant was among those listed. On 10 April 2010, the investigative results and the case records were transferred to the Tribunal. From that date, the Applicant came under the formal authority of the Tribunal.

4. On 27 April 2009, the Prosecutor determined that the information in his possession did not warrant filing an indictment against any of those held by the Tribunal.[2] On 29 April 2009, the Pre-Trial Judge issued an order directing *inter alia* the Lebanese authorities to release the Applicant and three others.[3] This order was complied with on the same day.

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1 Order Directing the Lebanese Judicial Authorities Seized with the Case of the Attack against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, Case No. CH/PTJ/2009/01, 27 March 2009.

2 Submission of the Prosecutor to the Pre-Trial Judge Under Rule 17 of the Rules of Procedure and Evidence, Case No. CH/PTJ/2009/004, 27 April 2009.

3 Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, 29 April 2009.

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5. On 17 March 2010, an application was filed by the Applicant through his Counsel, Mr Akram Azoury, seeking the "release of evidentiary material related to the crimes of libellous denunciations and arbitrary detention". On 15 April 2010, I issued an order assigning the matter to the Pre-Trial Judge for determination.[4]

6. After duly considering the written submissions of the Applicant and the Office of the Prosecutor ("Prosecution") and after conducting a public hearing on 13 July 2010, the Pre-Trial Judge issued his decision on 17 September 2010.[5] He held that the Tribunal had jurisdiction to rule on the substance of the application, that the applicant had standing to seize the Tribunal of issues relating to his prior detention, and ordered the parties to submit responses to a number of questions outlined in the decision.[6]

7. On 29 September 2010, the Prosecution appealed the Pre-Trial Judge's decision.[7] On 1 October 2010, I issued a scheduling order inviting the Applicant to file a response brief, the Prosecution to file a brief in reply and calling on the United Nations ("UN") to file an *amicus curiae* brief.[8] On 12 October 2010, I issued a further order announcing the composition of the Appeals Chamber.[9]

8. On 20 October 2010, the Applicant filed the Motion pursuant to Rule 25 of the Rules for the disqualification of Judge Riachy from the Appeals Chamber.[10]

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4 Order Assigning Matter to Pre-Trial Judge, Case No. CH/PRES/2010/01, 15 April 2010.

5 Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed dated 17 March 2010 and whether Mr El Sayed has Standing before the Tribunal, Case No. CH/PTJ/2010/005, 17 September 2010 ("Pre-Trial Chamber Decision").

6 Pre-Trial Chamber Decision, paras 36, 42, 57.

7 Appeal of the "Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed dated 17 March 2010 and whether Mr El Sayed has Standing before the Tribunal" and Urgent Request for Suspensive Effect, No. OTP/AC/2010/01, 28 September 2010.

8 Scheduling Order, Case No. CH/PRES/2010/02, 1 October 2010.

9 Order on Composition of the Appeals Chamber, Case No. CH/PRES/2010/03, 12 October 2010.

10 Demande de récusation et de dessaisissement de Monsieur le Vice-Président Ralph Riachi, Case No. OTP/AC/2010/01, 20 October 2010 ("Motion").

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9. In my scheduling order of 21 October 2010, I called on Judge Riachy to comment on the Applicant's disqualification motion and requested the Applicant to submit documents which were referred to in his motion.[11] On 26 October 2010 Judge Riachy submitted his comments in a memorandum which is now being made public, as an Annex to this decision.[12] On the same day, the Applicant filed the additional requested documents. I have consulted this material with the assistance of Arabic-speaking staff.

APPLICABLE LAW

I. Rule 25 (A) and the Relevant Case Law

10. Rule 25(A) of the Rules provides that:

> 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 affect his impartiality. The Judge shall, in any such circumstance, withdraw, and the President shall assign another Judge to the case.

11. Rule 25(A) is practically identical in substance to its equivalent rule in the Rules of the International Criminal Tribunal for the former Yugoslavia ("ICTY")[13] and the International Criminal Tribunal for Rwanda ("ICTR").[14] In light of these important textual similarities, it is

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11 Scheduling Order on Judge Riachy Disqualification Motion, Case No. CH/PRES/2010/06, 21 October 2010, p. 3.

12 Mémoire du Juge Ralph Riachi en réponse à la demande de récusation et de dessaisissement présentée par M. El Sayed, 26 October 2010 ("Annex").

13 ICTY Rules of Procedure and Evidence, IT/32/Rev. 44, 10 December 2009, Rule 15(A) reads:

> 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, and the President shall assign another Judge to the case.

14 ICTR Rules of Procedure and Evidence, 9 February 2010, Rule 15(A) reads:

> A Judge may not sit in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw from that case. Where the Judge withdraws from the Trial Chamber, the President shall assign another Trial Chamber Judge to sit in his place. Where a Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber shall assign another Judge to sit in his place.

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useful and relevant to consider the jurisprudence of these tribunals in interpreting their equivalent of Rule 25(A).

12. I would note, however, the tendency of the tribunals to analyze their relevant disqualification rules as a whole, rather than deconstructing them into their constitutive elements for the purposes of legal analysis. On this occasion I propose to take the latter approach, so as to provide better clarity in the aid of its future application.

A. "Personal interest" or "any association"

13. The first requirement of Rule 25(A) is that of a "personal interest" or "any association" between the Judge and the relevant case. This requirement is expressed in a disjunctive fashion, separated by the word "or". The ICTY, in considering the term "any association" has opined that not all associations, however remote, are caught by their Rule 15(A). In their view:

> [f]or there to exist a relevant association in terms of this Rule [15(A)], [...] the party challenging the Judge's impartiality must demonstrate that the Judge entertains a personal interest in or a particular concern for any of the Parties, the witnesses or the facts of the case.[15]

14. In other words, "any association" as used in the ICTY Rule 15(A) includes only those associations that raise a personal interest or concern for the relevant case. This would seem to make the separate inclusion of "personal interest" in Rule 25(A) (and indeed the ICTY's own Rule 15(A)) somewhat artificial. As noted above, this parameter is drafted in a disjunctive, not an inclusive, manner. Further, the inclusion of the word "any" suggests that, in fact, *all* associations are caught by Rule 25(A), not just those that raise a personal interest or concern for the relevant case.

15. In my view, "personal interest" and "any association" are to be read as complementing one another to create a catch-all rule that is "co-terminous with the statutory requirement of

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[15] ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-PT, Decision on the Defence Application for Withdrawal of a Judge from the Trial, 22 January 2003 ("*Krajišnik* Decision"), para. 8.

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impartiality and thus as including within its scope all possible bases of disqualification."[16] Thus, as the ICTR rightly stated, such a rule "must be read broadly to permit any ground of impartiality to be raised [...] as a basis for disqualification."[17]

B. "[T]hat might affect or appear to affect his[/her] impartiality"

16. The mere existence of an association with or personal interest in a case is generally insufficient, in and of itself, to disqualify a Judge. An additional element is required: it must be demonstrated that such an association or interest has an effect on the Judge's impartiality or the appearance of his impartiality.

17. It should be stressed that the Judges of the Tribunal enjoy a *presumption of impartiality* by virtue of their solemn oath.[18] However I would point out that in the case of this Tribunal, the presumption is complemented by the manner in which its Judges are appointed. The Judges of the ICTR and the ICTY, for instance, are nominated by their respective governments and then elected by the UN General Assembly.[19] The Judges of this Tribunal, by contrast, are appointed differently. International Judges are nominated by States and "competent persons"[20] whilst Lebanese Judges are nominated by the Lebanese Government upon the proposal of the Lebanese Higher Council of the Judiciary.[21] The UN Secretary-

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16 ICTY, *Prosecutor v. Blagojević et al.*, Case No. IT-02-60, Decision on Blagojević's Application pursuant to Rule 15(B), 19 March 2003, para. 10.

17 ICTY, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion by Nzirorera for Disqualification of Trial Judges, 17 May 2004 ("*Karemera* Decision"), para. 8.

18 ICTR, *Karemera* Decision, para. 11. See also ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-05/18-PT, Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15(B)(ii), 22 July 2009 ("*Karadžić* Decision"), para. 17; ICTY, *Prosecutor v. Blagojević*, Case No. IT-02-60-R, Decision on Motion for Disqualification, 2 July 2008, para. 3; ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification, 16 February 2007 ("*Šešelj* Decision of 16 February 2007"), para. 5; ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeals Judgement"), para. 196; ICTY, Appeals Chamber, *Galić*, judgment of 30 November 2006, para. 41.

19 See Article 13*bis*(1), Statute of the International Criminal Tribunal for the former Yugoslavia; Article 12(3), Statute of the International Criminal Tribunal for Rwanda.

20 United Nations Security Council Resolution 1757 (2007), Annex, Agreement between the United Nations and Lebanon, article 5(b).

21 *Ibid.*, article 5(a).

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General then appoints Judges only upon the recommendation of a selection panel.[22] Such a mechanism creates an additional layer of protection against appointments for reasons other than competence, independence and integrity.

18. The moving party bears the heavy burden of displacing the aforementioned presumption, a high threshold that can only be overcome through firm evidence; mere speculation is not enough.[23] Thus, for instance, the nationalities of Judges and the policies of their governments are irrelevant for the purposes of determining impartiality.[24] The ICTY has succinctly explained the rationale:

> The reason for this high threshold is that, just as any real appearance of bias of the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias.[25]

19. After a review of international and national impartiality definitions,[26] the ICTY Appeals Chamber made the following observations concerning their Rule 15:

> A. A Judge is not impartial if it is shown that actual bias exists.
>
> B. There is an unacceptable appearance of bias if:
>
> i. a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification is automatic; or
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> ii. the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[27]

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22 *Ibid.*, article 5(d).

23 ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67-R77.3, Decision on Motion by Professor Vojislav Šešelj for the Disqualification of Judges O-Gon Kwon and Kevin Parker, 22 June 2010 ("*Šešelj* Decision of 22 June 2010"), para. 27; ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Order on the Prosecution Motion for the Disqualification of Judge Frederik Harhoff, 14 January 2008 ("*Šešelj* Harhoff Decision"), para. 11.

24 ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-A, Order on Defence Motion to Disqualify Judge Wolfgang Schomburg from Sitting on Appeal, 23 October 2007 ("*Martić* Decision"), Annex, p. 3.

25 ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 707.

26 *Furundžija* Appeals Judgement, paras. 181-188. See also ICTY, *Prosecutor v. Brđanin & Talić*, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000 ("*Talić* Decision"), paras 9-14.

27 *Furundžija* Appeals Judgement, para. 189.

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This formulation has been accepted and applied in numerous ICTR and ICTY disqualification decisions. For the purposes of Rule 25(A) of the Tribunal, I consider that it is warranted to uphold it.

20. It thus follows that impartiality denotes lack of bias. Under Rule 25(A), bias can be split into (i) actual bias and (ii) unacceptable appearance of bias.

i. Actual bias

21. Actual bias refers to a lack of impartiality in the subjective sense. This can take many forms. In the context of litigation, the ICTY did "[...] not rule out entirely the possibility that decisions rendered by a Judge or Chamber by themselves could suffice to establish actual bias, [but] it would be truly an extraordinary case in which they would."[28] Where such an allegation is made, it is the duty of the court to:

> [...] examine the content of the judicial decisions cited as evidence of bias. The purpose of that review is not to detect error, but rather to determine whether such errors, if any, demonstrate that the judge or judges are actually biased, or that there is an appearance of bias [...] Error, if any, on a point of law is insufficient: what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law (on which there may be more than one possible interpretation) or to the assessment of the relevant facts.[29]

22. Claims of actual bias as a result of other judicial acts have been subject to similar scrutiny. For example, the confirmation of an indictment that overlapped with the crimes alleged in a related case did not by itself establish actual bias.[30] Similarly, the mere fact that the same

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28 *Blagojević* Decision, para. 14. But see ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67-R77.2-A, Decision on Motion for Disqualification of Judges Fausto Pocar and Theodor Meron from the Appeals Proceedings, 2 December 2009, para. 13.

29 ICTR, *Prosecutor v. Ntahobali*, Case No. ICTR-97-21-T, Decision on Motion for Disqualification of Judges, 7 March 2006, para. 12; ICTR, *Prosecutor v. Seromba*, Case No. ICTR-2001-66-T, Decision on Motion for Disqualification of Judges, 25 April 2006, para. 12; *Karemera* Decision, para. 13.

30 ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on Galić's Application Pursuant to Rule 15(B), 28 March 2003 ("*Galić* Decision"), paras 13-14; see also ICTR, *Kabiligi v. The Prosecutor*, Case No. ICTR-97-34-I, Decision on the Defence's Extremely Urgent Motion for Disqualification and Objection based on Lack of Jurisdiction, 4 November 1999 ("*Kabiligi* Decision"), paras 49-50 (where a judge that

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two judges presided over a prior contempt case "is insufficient to rebut the presumption of impartiality attaching to both Judges for the purposes of [another] contempt case".[31] The fluctuations in the importance of temporal considerations and judicial economy in the conduct of proceedings are also not enough to find actual bias.[32]

23. Non-judicial acts that raise allegations of bias are subject to the same stringent review process. Thus, a Judge was not disqualified from sitting on a Trial Chamber on the basis that he had previously been the co-counsel for a former accused, because nothing suggested that the Judge was biased by a personal interest in the outcome of the case or that he would otherwise not bring an impartial and unprejudiced mind to the issues arising in the trial.[33] In the same vein, a Judge's previous employment with a foreign government did not rebut the presumption of impartiality[34] and a Judge's prior comments on the implementation of her previous decisions did not demonstrate any personal bias against the accused or his country.[35]

24. In light of the above, to demonstrate actual bias, a party must provide convincing evidence that a Judge's mind is, or would be, tainted by a predisposition to resolve matters that come before him or her in a prejudiced manner.

ii. Unacceptable appearance of bias

25. In addition to being impartial in the subjective sense, a Judge must also be perceived as being *objectively* impartial, according to the well-known maxim that "justice should not only be done, but should manifestly and undoubtedly be seen to be done."[36] This encompasses two limbs.

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had previously dismissed a Defence motion for separate trials was not disqualified from considering a subsequent joinder motion).

31 *Šešelj* Decision of 22 June 2010, para. 32.

32 ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Disqualification of Judge Byron and Stay of Proceedings, 20 February 2009, para. 14.

33 *Krajišnik* Decision, para. 12.

34 *Martić* Decision, Annex, p. 4.

35 *Karadžić* Decision, para. 27.

36 *R v. Sussex Justices ex parte McCarthy* [1924] 1 KB 256, 259.

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a. Nemo debet esse judex in proprio causa

26. This first limb reflects the *nemo debet esse judex in propria causa* maxim, "[t]he well-known rule that no one can be judge in his[/her] own suit".[37] In the United Kingdom, it has been discussed as follows:

> First it [the maxim] may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party.[38]

27. In that case, the rationale of the maxim was applied to a circumstance where a judge did not have a pecuniary interest in the outcome of the litigation, but an association with an organization that promoted a cause that was at issue, namely, establishing that a former Head of State was not entitled to immunity for alleged torture.[39]

28. The High Court of Australia has similarly explained that automatic disqualification can occur where a direct or indirect pecuniary or other interest arises or "where the apprehension of pre-judgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings."[40]

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37 *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, Advisory Opinion of 21 February 1925, Permanent Court of International Justice, Series B12, No. 12, p. 32. This maxim can be traced back almost 400 years: *Earl of Derby's Case* 12 Co. Rep. 114; 77 E.R. 1390 (1613). See also *Matthew v. Ollerton* 4 Mod. 226; 87 E.R. 362 (1693); *Anonymous* 1 Salk. 396; 91 E.R. 343 (1700); *Between the Parishes of Great Charte v. Kennington* 2 Str. 1173; 93 E.R. 1107 (1742).

38 *R v. Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No. 2)* [2000] 1 AC 119 ("*Pinochet (No. 2)*"), 132-133 (House of Lords); *see also R v. Altrincham Justices,* Ex parte *Pennington*, [1975] Q.B. 549, 552 (Divisional Court, United Kingdom).

39 *Pinochet (No. 2)*, 135.

40 *Webb v. The Queen* (1994) 181 CLR 41, 74-75 (per Deane J.) (High Court of Australia) (the Court classified this situation as "disqualification by association" although it acknowledged that it often overlaps with cases where there is a direct or indirect interest in the outcome of litigation, based in turn on the maxim that nobody may be judge in his own cause).

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29. At the ICTY, although the existence of the *nemo debet esse judex in propria causa* maxim has been judicially recognised,[41] it has yet to be pleaded successfully in order to disqualify a judge. Neither has it been successful at the ICTR. This can perhaps be explained by its thorough incorporation into the judicial consciousness. The professionalism and training of Judges instinctively alert them to such instances, so that voluntary recusals are the normal procedure. As such, few (genuine) cases ever reach the merits. Those that do, usually touch the very contours of the maxim.

30. Thus, for the purposes of Rule 25(A), a Judge is automatically disqualified if he or she harbours a direct or indirect pecuniary interest in the outcome of a case or if the Judge is associated with one of the parties in a cause that will be advanced or promoted by his or her decision.

b. Apprehension of bias

31. The test commonly employed in this second limb involves viewing the facts presented through a "hypothetical fair-minded observer with sufficient knowledge of the actual circumstances to make a reasonable judgement".[42] That is, a person uninvolved in the litigation who has sufficient knowledge and understanding of the traditions of impartiality and integrity inherent in judicial institutions to be able to identify when the public's sense of justice would be undermined or challenged by a particular set of facts.[43] Thus, when analyzing an unacceptable appearance of bias, much depends, like in cases of actual bias, on the strength of the totality of the facts.

32. A judge would not be disqualified, for example, on the sole basis that he or she had previously been involved in the gathering of information surrounding a conflict during which the

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41 *Šešelj* Harhoff Decision, paras 15-18. See also *Talić* Decision, fn. 25.

42 *Krajišnik* Decision, para. 14. See also *Kabiligi* Decision, para. 33 (citing the High Court of Australia); *Karemera* Decision, para. 10; *Furundžija* Appeals Judgement, para. 185 (citing the Supreme Court of Canada); *Galić* Decision, para. 12; *Karadžić* Decision, para. 16; *Šešelj* Harhoff Decision, para. 15.

43 See generally *Krajišnik* Decision, para. 14; *Karadžić* Decision, para. 16; *Furundžija* Appeals Judgement, para. 185.

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alleged crimes took place.[44] Neither is it enough to claim that a judge's prior exposure to evidence to be presented at trial would constitute an unacceptable appearance of bias.[45] Fair-minded observers would be aware that a Judge is trained to put out of their minds evidence other than that presented at trial.[46] Therefore, a Judge's prior judicial contact with the facts of a case (or indeed with the accused) alone would generally not be sufficient to find an unacceptable appearance of bias. A fair-minded observer would know that a Judge's role can differ from one judicial context to another.[47]

33. On the other hand, prior extra-judicial writings of a Judge of the Appeals Chamber of the Special Court for Sierra Leone ("SCSL") was sufficient to disqualify him from sitting on a case because its content criticized and denounced the accused's rebel group and appeared to pre-judge the crimes at issue.[48]

34. It is also worth mentioning the decision of the European Court of Human Rights ("ECHR") in *Thorgeirson* v. *Iceland*:[49]

> What is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, *the standpoint of the accused is important but not decisive. What is determinant is whether this fear can be held to be objectively justified.*

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44 *Šešelj* Harhoff Decision, para. 22 (where a Judge had previously assisted in interviewing an individual who was to be a witness at trial).

45 *Ibid.* para. 24 ("exposure to some of the evidence that will be adduced in another context is not a basis for disqualification"). Similarly, "judges are not disqualified from hearing a case by virtue of having dealt with witnesses or evidence related to the same facts in other cases" *Karadžić* Decision, para. 24. See also *Prosecutor v. Kordić*, Case No. IT-95-14-T, Bureau Decision on Participation of Trial Chamber Judges in the Hearing of the Case of the Prosecutor v. D. Kordić and M. Čerkez, 4 May 1998, p. 2; *Šešelj* Decision of 16 February 2007, para. 25; *Krajišnik* Decision, para. 19.

46 *Ibid.* para. 25. See also *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para. 44.

47 *Karadžić* Decision, para. 19 (where the court recognized that a Judge's previous role in a human rights court was fundamentally distinct to that of a criminal court); *Šešelj* Decision of 22 June 2010, para. 32 (where the court recognized that the Judge's role in an earlier contempt case bore no bearing in a subsequent contempt case that involved entirely separate and unrelated events).

48 SCSL, *Prosecutor v. Sesay*, Case No. SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004, paras 2, 15.

49 ECHR, *Thorgeir Thorgeirson* v. *Iceland*, Judgment of 25 June 1992, Series A no. 239, para. 51 (emphasis added); see also *Fey* v. *Austria*, Judgment of 3 February 1993, para. 30, Series A no. 255-A.

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II. The Need for an Extensive Application of Rule 25 (A)

A. General

35. Before I discuss the arguments presented by the Applicant, I should note that, strictly speaking, Rule 25(A) cited above and the relevant case law refer to "a case", namely proceedings where an accused is confronted by the Prosecution and the Tribunal exercises its "primary" jurisdiction (that is, the jurisdiction conferred upon it by Article 1 of the Statute). Since what is at stake in "a case" is the guilt or innocence of a person, it is crucial that the Bench not include any Judge whose independence or impartiality may appear to be tainted. The question of guilt or innocence is so paramount that even the slightest doubt about the ability of a Judge to pass judgment with full equanimity must be taken into account and be given the proper weight. In the present issue, we are dealing instead with a motion by a person who is not an accused, a suspect or a victim, but nevertheless has been regarded by the Pre-Trial Judge as falling under the inherent jurisdiction of the Tribunal. Since we are not faced with a "case" proper, and the demands of justice are less exacting, in theory I could simply note that Rule 25(A) as such does not apply and dismiss the motion out of hand. Alternatively I could apply less demanding standards than those laid down in Rule 25(A) and the relevant case law.

36. However, I strongly feel that the fair trial principle must apply across the board. The interests of justice require that in any proceeding all the persons involved should have a right to challenge the impartiality or independence of a Judge, and the court must grant satisfaction to such challenges by relying upon the strict legal standards enshrined in Rule 25(A) and the relevant case law. I will therefore apply Rule 25(A) extensively, as also covering instances where what is being argued before the Tribunal is not a "case" proper, falling under the primary jurisdiction of the Tribunal.

B. International Case Law More Relevant to the Instant Proceedings

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37. I will now briefly recall a few cases where international tribunals pronounced on facts that are akin to those under discussion. This I will do always bearing in mind what I have just stated about the difference between the cases dealt with by international tribunals and the unique features of the instant proceedings. The cases I will presently refer to can therefore be relied upon *mutatis mutandis*.

38. One challenge to judicial impartiality somewhat similar to the one at stake here is that raised in *Krajišnik*. The accused asserted that one of the Judges sitting on the case, namely Judge Alphons Orie, should withdraw from the case, for he had previously acted as co-counsel of a person convicted by the Tribunal, Duško Tadić, who would be called to testify for the defence in his case. In the accused's view, there was an association between Judge Orie and the case, and that that association affected Judge Orie's impartiality. The Presiding Judge rejected the motion. He held that:

> [i]t would be erroneous to assume from the outset that every possible association, however remote, between the Judge and the Accused or for that matter a witness or the facts relating to another case against a witness automatically qualifies as "an association" within the meaning of Rule 15. For there to exist a relevant association in terms of this Rule, in my view, the party challenging the Judge's impartiality must demonstrate that the Judge entertains a personal interest in or a particular concern for any of the Parties, the witnesses or the facts of the case.[50]

The Court added: "Such personal interest or particular concern is certainly different from any lawyer's professional interest in the subject-matter of the case."[51]

39. Another case that is germane to some extent to the instant proceeding is that of *Šešelj*. The Prosecution had requested the disqualification of one of the Judges in the *Šešelj* case, for he had interviewed one of the prospective prosecution witnesses while performing *pro bono* work for a human rights organization, the Helsinki Committee. According to the Prosecution, Judge Harhoff would be in the invidious position of having to judge the results of his own work because there were inconsistencies between the Helsinki Report and the anticipated testimony of the prosecution witness. The Prosecution therefore claimed that there was an appearance of bias. The Panel called upon to pronounce on the question dismissed the motion. It noted that "[n]either Judge Harhoff nor the Helsinki Committee is a party to the present case, in contrast to the

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50 *Krajišnik*, Decision, para 8. However see *supra* paras. 13-15.

51 *Ibid.*

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Pinochet case in which a judge was closely associated with an organization that was an intervener."[52] It went on to say that "Judge Harhoff's volunteer work was not aimed at establishing or assessing the criminal responsibility of Šešelj [...] The fact that Judge Harhoff was involved in interviewing an individual who will now be a witness at trial is not by itself sufficient to objectively warrant apprehension of bias."[53]

40. A third case that may be relevant to the instant proceedings is *Karadžić*. The accused Radovan Karadžić requested the disqualification of one of the Judges sitting in his case, Judge Picard, claiming that her decisions and public statements while she was President of the Human Rights Chamber of Bosnia and Herzegovina ("HRC") reflected an unacceptable appearance of bias, such that a reasonable observer, properly informed, would reasonably apprehend bias. The ICTY Chamber convened by the order of the President dismissed the motion. It held that the jurisdiction of the two courts was different:

> the nature and subject-matter of proceedings before the two bodies are separate and distinct: the HRC, as a human rights court, being concerned with the responsibility of the State for failure to abide by its human rights obligations; the Tribunal, as a criminal court, dealing with the criminal responsibility of individuals accused of serious violations of international humanitarian law. A fair-minded informed observer would therefore know that the determination of specific facts and the application of legal tests by the Tribunal to ascertain the individual criminal responsibility of Radovan Karadžić would be materially and fundamentally different from the necessary findings and determinations of State responsibility for human rights violations by the Human Rights Chamber.[54]

41. What conclusion can one infer from this consistent case law? The three cases have in common that one of the Judges had somehow been associated with the case at bar, either because he had been defence counsel of one of the prospective witnesses, or because he had previously interviewed one of the prospective witnesses, or because she had pronounced, as a member of another court, on some of the facts subsequently brought before the international tribunal. In all three cases the relevant panel or judge held that the presumption of impartiality had not been rebutted. Indeed, the panel or judge adjudicating the motion for disqualification were satisfied that the Judge being challenged had not previously passed judgment or made any factual or legal

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52 *Šešelj* Harhoff Decision, para. 18.

53 *Ibid.*, paras 21-22.

54 *Karadžić* Decision, para 19.

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findings on the guilt or innocence of the accused. His or her association with the case was therefore not such as to involve a prejudgment of the guilt or innocence of the accused or to prevent him or her from assessing the evidence presented at trial with an open mind.

SUBMISSIONS

I. The Applicant's Submissions

42. The Applicant submits that Judge Riachy may not be impartial, or appear to be impartial, on any question relating to his arbitrary detention.[55] This conclusion the Applicant draws from the combined force of the following facts:

(1) Judge Riachy has previously passed judgment on a question directly linked to the prolongation of the Applicant's arbitrary detention, by making two decisions, that of 17 July 2007, on the suspension of the investigating Judge Elias Eid, and that of 6 September 2007, on the disqualification of Judge Eid;[56]

(2) the extension in time of such detention was in keeping with the publicly expressed wishes of the Lebanese Government;[57]

(3) the Applicant had requested the Lebanese Court of Cassation to disqualify Judge Riachy;[58]

(4) before Judge Riachy's appointment as a Judge of this Tribunal, the Applicant had sent a letter to the UN Secretary-General challenging Judge Riachy's impartiality;[59] and

(5) the nomination of Judge Riachy was made by the Lebanese Government, which had been assailed and publicly condemned by the UN Working Group on Arbitrary Detention.[60]

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55 Motion, para. 4

56 Motion, para. 1, p. 8.

57 Motion, para. 7, p. 8.

58 Motion, para. 13, p. 8.

59 Motion, para. 2, p. 8.

60 Motion, para. 3, p. 8.

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II. Judge Riachy's Memorandum

43. In his Memorandum addressed to me pursuant to my Scheduling Order of 21 October 2010, Judge Riachy first points out that the Lebanese Court of Cassation had not been seized with a motion for disqualification (*demande de récusation*) provided for in Article 120 of the Lebanese Code of Civil Procedure, but with a motion for the referral of a case from a judge to another judge on account of a reasonable suspicion of bias (*demande de renvoi d'une jurisdiction à l'autre pour suspicion légitime*), on the strength of Article 340 of the Lebanese Code of Criminal Procedure. Indeed, the applicant, Mr Ahmad Zahabi, had requested that the Court of Cassation refer the case to an investigating Judge other than Judge Eid. While other civil litigants (*parties civiles*) had lodged with the Beirut Court of Appeals a motion for the disqualification of Judge Eid, based on Article 120 of the Code of Civil Procedure, this motion was rejected by the Court of Appeals on account of its lack of jurisdiction over motions for the disqualification of investigating Judges of the Judicial Council (*Cour de Justice*).[61]

44. Judge Riachy then notes that the decision of the Court of Cassation was not taken by him, but by the whole bench, consisting of three Judges deciding unanimously. None of the Judges appended a dissenting opinion, as allowed under Lebanese law. The lack of any difference of view proves, according to Judge Riachy, that the decision was in keeping with the law "without any ground of bias being raised with regard to the decision or the judges who had taken it."[62] Furthermore, the Court of Cassation had explicitly disregarded all allegations relating to media reports concerning the investigating Judge, holding that such reports could in no way warrant a deferral based on a reasonable suspicion of bias.[63]

45. Judge Riachy further notes that a lack of impartiality or the appearance of such a lack of impartiality, may result, as confirmed by international case law, from (i) kinship or a close

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61 Annex, para. 6

62 Annex, paras. 16-17.

63 Annex, para. 27.

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bond between a judge and a party; (ii) community or conflict of interests between a judge and a party; (iii) a prior involvement in the case, if the judge has been involved in the trial as a judge, referee, counsel or witness; or (iv) any act likely to arouse suspicions of impartiality of a judge.[64] The party requesting the disqualification of a judge has the burden of proof.[65] The Applicant in this case has not produced any evidence to corroborate his allegations.

46. As for the decision by the Court of Cassation in particular, Judge Riachy continues, this was based on two elements, which, in their combination established the bias of Judge Eid: (i) he had received, while Mr El Sayed was the director of the Department of Security, free petrol coupons from such Department, without any justification being provided for this privilege;[66] (ii) his brother, a medical doctor, had been receiving a lump-sum monthly salary from that same Department, regardless of whether or not he treated the patients.[67] This special bond between Mr El Sayed and Judge Eid was grounds for a reasonable suspicion of bias (*suspicion légitime*) even if the bond existed prior to Judge Eid being involved in the case concerning Mr El Sayed, given that prior grounds for a reasonable suspicion of bias remain operative even if they are established only after a Judge is seized with a particular case.[68]

47. Judge Riachy then notes that the motion for his disqualification submitted to the Court of Cassation by Mr El Sayed had been withdrawn by Mr El Sayed himself[69] and that, contrary to what the Applicant alleges, he had not received any letter following the decision of 6 September 2007 from Mr El Sayed, although the Applicant did send him three handwritten letters before a final decision was taken by the Court of Cassation.[70]

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64 Annex, para. 18.

65 Annex, para. 19.

66 Annex, para. 23(i).

67 Annex, paras. 11, 23(ii).

68 Annex, para. 24.

69 Annex, para. 29.

70 Annex, para. 30.

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48. Finally, after pointing out that his appointment as a Judge of the Tribunal was made by the UN Secretary-General[71], Judge Riachy requests that the Applicant's motion be rejected.

DISCUSSION

49. The requirements of international criminal justice and the Rules impose upon me the duty to pronounce on the Applicant's motion for the disqualification of Judge Riachy. In discharging this duty I will attempt to be free from any preconceived beliefs and even the slightest psychological slant. Indeed, I am aware that both the Lebanese people and the international community at large require that our Tribunal administer justice with the utmost impartiality and transparency. I shall therefore be guided solely by our rules, the exacting demands of the general principles of justice as evidenced by international and national case law, and the need for our Tribunal to act in the fairest manner and as limpidly as a glass house.

50. The Applicant claims that Judge Riachy has had such a direct link with the proceedings relating to his detention that it compromises his impartiality or his appearance of impartiality.[72] In his view this conclusion follows from five distinct facts:

(1) Judge Riachy's decision on the disqualification of the Lebanese Judge Elias Eid;
(2) the fact that the prolongation of Mr El Sayed's detention was in keeping with the wishes of the Lebanese Government;
(3) Mr El Sayed's request for Judge Riachy's disqualification from sitting on the Court of Cassation;
(4) Mr El Sayed's challenge of Judge Riachy's candidature as a Judge of the Tribunal;
(5) the selection of Judge Riachy as a candidate for Judgeship on the Tribunal by the Government of Lebanon, a Government "condemned" by the UN Working Group on Arbitrary Detention.

51. I will note at the outset that item 2 is manifestly devoid of any substance. Clearly, the fact that a judicial decision by a court of law may be consonant with the policy or the political

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71 Annex, para. 31.

72 Motion, p. 8.

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desiderata of a government does not necessarily mean that the court of law has acted under pressure by the government or has made its *findings* according to the requests or demands of the government. To make the case that a government has interfered in such a gross and blatant manner, the Applicant would have to provide convincing evidence. In reality, Mr El Sayed does not even claim that such a gross interference did occur. He simply asserts that there was a concordance of the Lebanese Government's wishes with the decision made by the Court of Cassation. This concordance, even if true, patently does not have any relevance to the question under discussion.

52. Nor do items 3 and 4 of the Applicant's allegations have any relevance to the question of disqualification. The fact that the Applicant had already challenged Judge Riachy, by itself, does not prove in any way whatsoever that his challenges were well-founded when put forward, nor that the present one has merit. Rather, the Applicant's past challenges of Judge Riachy evince a strong prejudice and even deep-felt animosity of the Applicant vis-à-vis Judge Riachy. The Applicant's attitude might remind somebody of Francis Bacon's dictum "*audacter calumniare, semper aliquid haeret*" (slander boldly, something always sticks).[73] However, this attitude is not evidence of bias *by Judge Riachy* against the Applicant. The implication that a Judge accused of partiality would, in retaliation, act unfairly towards the accuser betrays a serious misunderstanding of judicial ethics and would require much more than simple innuendo.

53. Likewise item 5, namely the objection that Judge Riachy had been nominated as one of the possible Judges of this Tribunal by a government criticized by a UN body, does not hold water. Whether or not the Lebanese Government acted in conformity with international standards, the fact remains that its conduct does not have any relation with the selection of Judge Riachy as one of the candidates put forward by the Lebanese Government upon the proposal of the Lebanese Higher Council of the Judiciary. Ultimately it was the UN Secretary-General, after careful scrutiny by a Selection Committee consisting of two distinguished international Judges and chaired by the UN Legal Counsel, who chose from among the various candidates those most suitable to meet the requirements laid down in Article 9 of the Tribunal's Statute and were therefore not only "persons with extensive judicial experience," but also "persons of high moral

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[73] F. Bacon, *De dignitate et augmentis scientiarum* (1623), 8, 2, 34.

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character, impartiality and integrity." As pointed out above,[74] international Judges benefit from a presumption of impartiality and integrity, on account of the careful and painstaking process for their appointment. To rebut this presumption, compelling evidence should be produced to the effect that a Judge lacks impartiality or integrity. No such evidence has been produced in this respect.

54. The only objection by the Applicant which deserves extensive attention is the first item referred to above, in which the Applicant claims that Judge Riachy, by pronouncing on the request for the removal of Judge Elias Eid from his case on account of a reasonable suspicion of bias, contributed to the prolongation of the Applicant's detention. Such contribution resulted – in the Applicant's opinion – from the reputed notoriety of Judge Eid's willingness to order the release of the Applicant from prison. To have decided that Judge Eid was to be removed from the case for lack of impartiality meant, according to the Applicant, that he remained in prison.

55. It is true, as noted by the Applicant, that one of the requests for the disqualification of Judge Eid lodged with the Beirut Court of Appeals mentioned that Judge Eid reportedly intended to release Mr El Sayed and another officer from prison.[75] This fact lends itself to two considerations.

56. First of all, the circumstance that Judge Eid had made it known that he would take a certain position on the matter of the detention of Mr El Sayed and others shows that it was indeed necessary to remove him from the case, since a Judge should never disclose his orientation or his intentions prior to taking a judicial decision.

57. Secondly, the mere fact that the motion for the removal of Judge Eid from the case on account of a reasonable suspicion of bias referred to those rumours (reported in the motions for disqualification lodged with the Beirut Court of Appeals) put the judges of the Court of Cassation in an awkward position. Indeed, they perforce became exposed to accusations of bias. Were they to decide that Judge Eid was not to be disqualified, they would be accused of siding

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74 *Supra*, para. 17.

75 Motion, para. 12.

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with Mr El Sayed and wishing that he be released from prison. If instead the judges ruled that Judge Eid was to be disqualified, they would be accused of siding with all those who wished Mr El Sayed to remain in prison. Plainly, the reference to the aforementioned rumours by the civil litigants challenging Judge Eid does not have any value for the purpose of deciding whether Judge Riachy showed any bias in his decision – or a bias that would have a bearing on the narrow issue under discussion before this Tribunal.

58. Furthermore, close scrutiny of the decision of the Criminal Section of the Court of Cassation presided over by Judge Riachy shows that the Court rightly disregarded these rumours and explicitly stated that such rumours had no value whatsoever for the purpose of deciding on whether or not to refer the case to a different judge. To reach its decision, the Court only applied the strict standards laid down in Lebanese law (Article 340 of the Code of Criminal Procedure and Articles 116 para. 3 and 119 of the Code of Civil Procedure). Thus, the Court emphasised two sets of facts: (i) that between February 2003 and May 2005 Judge Eid had received on a monthly basis free petrol coupons from the General Department for Security led by Mr El Sayed; and (ii) on 21 March 2003, the brother of Judge Eid, a medical doctor, had entered into an agreement with the same General Department for Security whereby he would provide medical services to the Department in return for a monthly salary. To appraise the significance of these facts, the Court pointed out that although each of them would not *per se* give rise to a suspicion of bias, their common attributes and the circumstance of their simultaneous beginning raised problems. The Court also dwelt upon the objection that the case of Judge Eid was not unique, for many judges benefited from the provision by the Security Department of free petrol coupons. In this regard, the Court noted that in fact only eleven judges had so benefited between 1999 and 2007. Furthermore, the Court pointed out that no justification had been provided for the provision of free petrol coupons to Judge Eid. The Court also took into account the fact that the free provision of petrol coupons went on until May 2005 (when Mr El Sayed left his office), namely after the Hariri assassination but before the issuance by Judge Eid of an arrest warrant against Mr El Sayed and others. The Court pointed out that facts and elements arousing doubts as to the impartiality of a judge need not be contemporaneous with the judge's activity at stake, but may precede it: "it suffices for the earlier facts to give rise to doubts about the impartiality of the judge seized with the principal case" to require the transfer of a case to a new judge.

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59. The Court concluded that all these facts showed that "there existed between the giver and the beneficiary close links, grounded either in mutual interests or in bonds of friendship, and that these links objectively justified doubts as to the impartiality of Judge Eid."

60. On the face of it, the Court's findings and its legal reasoning seem correct. True, the Court did not take into account the circumstance that (i) it was Judge Eid who had ordered the arrest and detention of Mr El Sayed and others in 2005 and that (ii) reportedly he had rejected Mr El Sayed's motions for release on a few occasions. It is not clear why the Court refrained from considering these facts. On the other hand, it is for national courts to apply domestic law and place on them the interpretation they consider the most appropriate. It also was for the Lebanese court to weigh up the various elements brought before it and to assess their probative value. An international tribunal in this and similar cases can only ascertain whether domestic criminal and procedural law has been applied by a national court in such a blatantly erroneous manner so as to amount to a miscarriage of justice. This legal proposition is consonant with a string of international decisions that in my view may not be disregarded, although they emanate from inter-state international courts and not from international criminal tribunals.[76] Generally speaking, international courts should apply domestic law, either *principaliter* (namely in the exercise of their primary jurisdiction, when this application is required by the relevant rules, such as Article 2 of the Tribunal's Statute) or *incidenter tantum* (namely to settle an incidental issue), as interpreted by national courts[77] unless such interpretation is conspicuously inconsistent with

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[76] In *Ida Robinson Smith Putnam v. Mexico*, one of the questions brought before the General US-Mexico Claims Commission was the question of whether a denial of justice had been committed in the application of a penalty disproportionate to a criminal offence. The Commission stated that:

> A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, *must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunals of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law.*

(United Nations, *Reports of International Arbitral Awards,* vol. IV, p. 153; emphasis added).

In *Jane Joynt Davies and Thomas W. Davies v. Mexico*, the General US-Mexico Claims Commission held that there is a denial of justice when, "there existing a failure or omission punishable by law, the authorities of a country refuse to comply with their own legal provisions as interpreted by the courts." (United Nations, *Reports of International Arbitral Awards,* vol. IV, p. 652).

[77] Back in 1895, a Great Britain-Republic of South Africa Tribunal in *Affaire des protégés britanniques au Transvaal* held that a national law "was subject to the sole and exclusive interpretation in the ordinary course by the tribunals of the country" (text in La Fontaine (ed.), *Pasicrisie internationale. Histoire*

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international legal standards. When required by the need to do justice, international courts should also rely upon domestic judicial determinations of fact,[78] unless they amount to a miscarriage of justice.

61. In the instant case the Court of Cassation's evaluation was neither grossly fallacious nor blatantly tainted by errors of law or fact.

62. Thus, I believe I have established two firm points: first, the Court of Cassation's decision cannot be faulted for any serious error of law or fact and, second, the view that the Court's decision contributed to the extension of the Applicant's detention is simply based on the undemonstrated assumption that Judge Eid would have released Mr El Sayed.

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documentaire des arbitrages internationaux 1794-1900, Berne 1902, p. 460), thus implying that an international tribunal was obliged to comply with such interpretation. The same principle had already been set out in *Fernando Dominguez* (USA v. Spain) in 1879 ("The Tribunals of the United States are the sole interpreters of the laws of the country, and it is not the privilege of the umpire to review their adjudications as to the requirements of these laws." (in Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party,* Washington 1998, vol. III, pp. 2596-97).

The principle was specified in greater detail by the Permanent Court of International Justice ("PCIJ") in 1929 in *Serbian Loans*. The Court stated that:

> The Court, having in these circumstances to decide as to the meaning and scope of a municipal law, makes the following observations: For the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal and which, in its results, seems to the Court reasonable, would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members. It would be a most delicate matter to do so, especially in cases concerning public policy—a conception the definition of which in any particular country is largely dependent on the opinion prevailing at any given time in such country itself—and in cases where no relevant provisions directly relate to the question at issue. *It is French legislation, as applied in France, which really constitutes French law,* and if that law does not prevent the fulfilment of the obligations in France in accordance with the stipulations made in the contract, the fact that the terms of legislative provisions are capable of a different construction is irrelevant.

Judgment of 12 July 1929, Series A, No. 20, pp. 46-47 (emphasis added).

The PCIJ referred to the same question in *Brazilian Loans*, where it also offered a persuasive explanation of the rationale behind the application, by international tribunals, of national law as construed and applied by domestic courts. Judgment of 12 July 1929, Ser. A, No. 21, p. 124.

78 In *Kononov v. Latvia*, the European Court of Human Rights (Judgment of 24 July 2008) stated that "in accordance with the principle of subsidiarity that is inherent in the system of individual rights protection set up by the Convention, *it is in principle solely for the domestic courts to establish the facts of the case and to interpret domestic law.* The Court cannot question the domestic authorities' assessment *unless it is flagrantly and manifestly arbitrary* (*García Ruiz v. Spain* [GC], no. 30544/96, §§ 28-29, ECHR 1999-I)." (para. 108, emphasis added).

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63. The question, however, remains whether the fact that Judge Riachy presided over the Criminal Section of the Court of Cassation pronouncing on the removal of Judge Eid from the case entails that he *may be, or may appear to be, biased in the application brought before this Tribunal* by Mr El Sayed and with which the Tribunal's Appeals Chamber is currently seized.

64. Let me first of all emphasize that the Criminal Section of the Court of Cassation, composed of three Judges, adopted the decision under discussion unanimously. The collegiate nature of the decision further weakens the charge of bias the Applicant has proffered against Judge Riachy.

65. Moreover, I do not see the "direct link" asserted by the Applicant between the question of Mr El Sayed remaining in prison and the Court of Cassation's decision on the disqualification of Judge Eid. The Court of Cassation was *not* called upon to decide on El Sayed's detention or on his alleged crimes. Had the Court done so, one of its members might have been exposed to, or be suspected of, bias in any subsequent decision on the same matter by another court or tribunal. The Court of Cassation was instead seized with the motion for the transfer of the case from Judge Eid. Given the rumours which circulated about that Judge's possible future stance on the matter repeated in the motion itself, the Court was bound to issue a decision that *might and would impact*, in one sense or another, on the legal position of the detainee. If Judge Eid was not disqualified, he might have, or might have not, released Mr El Sayed. If replaced, the new investigating Judge might have, or might have not, released Mr El Sayed.

66. The Court, however, did not take those various possible consequences into consideration. It confined itself to scrutinizing the position of Judge Eid in light of the relevant Lebanese legislation. In addition, the Court neither decided nor had any say in the replacement of Judge Eid, since under Article 360 of the Lebanese Code of Criminal Procedure it is for the Minister of Justice to appoint the investigating judge with the approval of the Higher Council of the Judiciary.

67. Hence, as I have stated above, I do not see how it can be alleged that there is a "direct link" between Judge Riachy and "the proceedings relating to the detention" of Mr El Sayed. Furthermore, the prolongation of Mr El Sayed's imprisonment was due to the decisions of the

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investigating judge who replaced Judge Eid. It is not attributable to the decision of the Court of Cassation.

68. However, even assuming that indeed there was such "direct link", the evidence brought before me *does not show* that this link was such as to affect Judge Riachy's impartiality or his appearance of impartiality in any future proceedings such as that pending before the Tribunal's Appeals Chamber. Any "association" of Judge Riachy with the past proceedings before Lebanese courts is not such as to undermine or even slightly affect his impartiality.

69. Judge Riachy was not involved in any case concerning the *detention* of Mr El Sayed. In short, *he did not pronounce on a case concerning Mr El Sayed.* Let me refer again, in this connection, to some ICTY cases that can be relied upon *mutatis mutandis*. I will first of all recall the Report submitted by a Panel of Judges to the ICTY President concerning the disqualification of Judge Harhoff in the *Šešelj* case. The Panel stressed that Judge Harhoff had interviewed a prospective prosecution witness while engaging in volunteer work for the Helsinki Committee; this work, the Panel emphasized, "was not aimed at establishing the criminal responsibility of Šešelj".[79] Similarly, in the *Karadžić* case referred to above,[80] the Panel of Judges passing judgment on the motion for disqualification of Judge Picard held that, in presiding over the Human Rights Court for Bosnia and Herzegovina, although Judge Picard might have dealt with facts subsequently brought before the ICTY, she did not determine the guilt or innocence of the accused.[81] The same holds true for the situation posed in *Krajišnik.*[82] In other words, whether or not a Judge has been "closely" associated with a case, what matters is that he or she has not *taken any stand or expressed any view that may prejudge his or her position on the guilt or innocence of the accused in the proceedings at bar*. The issue before the Appeals Chamber (and before Judge Riachy as member of the Appeals Chamber), moreover, is only remotely related to the legitimacy of Mr El Sayed's detention, much less to his ultimate guilt or innocence. The Appeal Judges in this case will be making a determination related to a question that is largely procedural,

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79 *Šešelj* Harhoff Decision, para. 21.

80 *Supra*, para. 40.

81 *Karadžić* Decision, para. 24.

82 *Supra*, para. 38.

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i.e., whether the Pre-Trial Judge has erred in his determination of jurisdiction and standing for the purpose of the "release of evidentiary material related to the crimes of libellous denunciations and arbitrary detention". I fail to see how the decision on Judge Eid taken, *inter alia*, by Judge Riachy has any significant connection – from a legal perspective – to the matter under consideration here.

70. Applying extensively Rule 25(A) of the Tribunal's Rules and the aforementioned case law on the notion of *bias*, I am satisfied that the Applicant has not provided convincing evidence that Judge Riachy's mind is, or would be, tainted by a predisposition to resolve the matter at bar in a prejudiced manner. Nothing conclusively shows that Judge Riachy had or has a personal interest in the proceedings at issue or has or has had any association with the past or current proceedings which might affect his impartiality.

71. As for the *appearance of bias*, applying the aforementioned test commonly employed for ascertaining such appearance (namely the "reasonable observer standard", which is based on "an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form part of the background" and "who is apprised also of the fact that impartiality is one of the duties that Judges swear to uphold"[83]), I am satisfied that Judge Riachy's participation in the decision of the Lebanese Court of Cassation does not create any appearance of bias.

72. I firmly believe that, while Judges must be absolutely free and appear to be free from any preconceived beliefs, it is also necessary for them to be sheltered from mere innuendoes as to their professional past or their current attitude. If they were not so safeguarded, they would be unable to discharge their difficult mission with equanimity. Charges of bias unsupported by compelling evidence can only sow confusion and uncertainty in the mind of all those who watch the unfolding of international justice, as well as trouble the conscience of Judges, thereby affecting their serenity. The Tribunal will firmly reject any attempt at guesswork or speculation intended to project onto the Tribunal political motivations that instead are, and shall always remain, extraneous to it, as is fitting and appropriate for any proper court of law.

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[83] *Furundžija* Appeals Judgement, para 189. See also *supra*, para. 31.

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DISPOSITION

FOR THESE REASONS,

IN ACCORDANCE with Articles 9(1), 10(1) and 21 of the Statute and Rule 25,

I DETERMINE that the motion of Mr El Sayed for the disqualification of Judge Riachy is rejected.

Done in English, Arabic, and French, the English text being authoritative.
Dated this fifth day of November 2010,
Leidschendam, The Netherlands.

Judge Antonio Cassese
President

المحكمة الخاصة بلبنان
SPECIAL TRIBUNAL FOR LEBANON
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MEMORANDUM

Date: **26 October 2010**

To: **Judge Antonio Cassese, President of the Special Tribunal for Lebanon**

From: **Judge Ralph Riachy, Vice-President of the Special Tribunal for Lebanon**

Subject: **Memorandum from Judge Ralph Riachy in response to the Motion [Application] for disqualification and withdrawal submitted by Mr El Sayed**

I- Introduction:

1. On 20 October 2010, Mr Jamil El Sayed (hereinafter "the Applicant") filed a Motion with the Registry of the Special Tribunal for Lebanon (hereinafter "the Tribunal") addressed to the President whereby he sought the disqualification and withdrawal of Judge Ralph Riachy (hereinafter "Judge Riachy") from his duties with the Appeals Chamber of the Tribunal, without actually stating to which case the Motion applied.

2. On 21 October 2010, President Antonio Cassese (hereinafter "the President") notified me of the Motion so that I might submit my observations.

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II- Reconstruction of events and the context thereof:

3. From August 2005 until 29 April 2009, the Applicant was provisionally detained in the case involving the assassination of Mr Rafiq Hariri pursuant to a warrant of arrest issued against him by the Investigating Judge, Mr Elias Eid, who was investigating the case prior to jurisdiction being transferred from the Lebanese judicial authorities to the Tribunal in accordance with resolution 1757, adopted on 30 May 2007 by the United Nations Security Council.

4. Prior to this period of arrest, and even prior to the assassination of Mr Hariri, Judge Riachy presided over the Sixth Chamber of the Court of Cassation in Lebanon, ruling on criminal cases. The Chamber consisted of three judges and its jurisdiction also included applications for referral from one court to another on the grounds of reasonable suspicion of bias involving judges as set out in Article 340 of the Lebanese Code of Criminal Procedure[1] (hereinafter "Lebanese CCP"). It is worth mentioning that the referral procedure under Article 340 of the Lebanese CCP is very different from the disqualification procedure provided for in Article 120 of the Lebanese Code of Civil Procedure (hereinafter: "Lebanese CPC")[2], regarding the cases and the proceedings and the fact that it does not necessarily fall within the jurisdiction of the Court of

[1] Article 340 of the Lebanese CCP: "*A Criminal Division [Chamber] of the Court of Cassation shall rule on applications for the transfer of a case from one judicial authority to another. It shall relieve one authority of the case, at the investigative or trial stage, and refer it to another authority at the same level to continue the proceedings, because it proved impossible to constitute the authority with original jurisdiction or because the investigation or trial was suspended, or in order to maintain public safety, to ensure the proper administration of justice or on the ground of legitimate suspicion.*
Only the Public Prosecutor at the Court of Cassation may request that a case be transferred on the ground of maintenance of public safety.
Where the judicial authority in respect of which an application for transfer is filed is a Criminal Division [Chamber] of the Court of Cassation, the full bench of the Court of Cassation shall rule on the application.
The Public Prosecutor at the Court of Cassation may apply to transfer a case for one of the reasons set out in the first paragraph, of his own motion or pursuant to an application from the Appeal Court Prosecutor, the Financial Prosecutor, the civil party, the defendant or the Minister of Justice on the grounds set forth in the first paragraph.
The application for a transfer shall be served on all parties to the case, who may respond to it within ten days of the date of service.
The filing of the application shall not be suspensive unless the Court of Cassation decides otherwise."

[2] The provisions of Articles 120 and 123 of the Lebanese CPC on withdrawal at Annex No.1.

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Cassation, as in the case of referrals on the grounds of reasonable suspicion of bias.

5. On 12 July 2007, Mr Ahmed Zahabi, in his capacity as a civil party in the *Hariri* case, filed an application for referral under Article 340 of the Lebanese CCP before the Criminal Chamber of the Court of Cassation to have Judge Elias Eid removed from the *Hariri* case and to refer the file to another investigating judge. The motives of Mr Zahabi in support of his application for referral were set out in the grounds of the final decision rendered by the Court of Cassation on 6 September 2007.[3] In his application for referral, Mr Zahabi sought the following:
   (i) A stay in the proceedings in progress before Judge Elias Eid in the *Hariri* case until the Court of Cassation renders its decision in relation to the suspicion of bias, pursuant to Articles 116(3) and 119 of the Lebanese CCP;
   (ii) The referral of the *Hariri* case to an investigating judge other than Judge Elias Eid on the grounds of reasonable suspicion of bias pursuant to Article 340 of the Lebanese CCP.[4]

6. Prior to this application for referral submitted by Mr Ahmad Zahabi, other civil parties lodged an "application for disqualification" before the Court of Appeal in Beirut against Judge Eid, on the basis of Article 120 of the Lebanese CPC rather than on Article 340 of the Lebanese CCP.[5] The reasons set out in the application for disqualification were completely different from the reasons set out in the application for referral on the grounds of reasonable suspicion of bias. The application for disqualification was dismissed on the grounds that the Court of Appeal in Beirut did not have jurisdiction to rule on the disqualification of an Investigating Judge sitting at the Court of Justice.

7. It should be noted that the facts set out in paragraph 6 above correct paragraph 13 of the Applicant's Motion for disqualification, in which he claims that three

[3] See, for these motives, the Decision of 6 September 2007 appended to Mr El Sayed's Application.
[4] Pages 1 and 11 of the Application for referral, Annex No. 2.
[5] See pages 1 and 11 of the Application for disqualification submitted by the applicants, Annex No. 3.

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applications for disqualification were submitted against Judge Eid, including the one submitted to the Court of Cassation, whereas the latter was not an application for disqualification on the basis of Article 120 of the Lebanese CPC, but an application for referral on the grounds of reasonable suspicion of bias based on Article 340 of the Lebanese CCP and hence completely different from the application for disqualification, both as far as the filing parties were concerned and with regard to its reasons and legal basis.

8. Given that the Court of Cassation was to take steps to complete the interlocutory proceedings which involved establishing the names and addresses of the various persons on whom the application for referral was to be served pursuant to Article 340(5) of the Lebanese CCP, and also asking the authorities, in particular the General Security directorate, to clarify the documents submitted in support of the application for referral, and given that this involves a relatively lengthy process and that the Court's decision on the suspicion of bias would be devoid of purpose if the claims of the applicant were to be proven in light of the explanations sought from the authorities by the Court, it was therefore decided on 17 July 2007 to stay the proceedings before Judge Eid pending enforcement of the provisional decision by the afore-mentioned Court.[6] The stay in the proceedings was wellfounded and justified on the grounds of the final paragraph of Article 340 of the Lebanese CCP.

9. Prior to the final decision of 6 September 2007, Mr El Sayed, via his counsel Mr Akram Azoury, filed an application for the disqualification of Judge Riachy from the case referred on the basis of Article 123 of the Lebanese CPC but Mr El Sayed was to withdraw the application for disqualification a short time later, as confirmed by the judgment of the Fifth Chamber of the Court of Cassation of 26 July 2007.[7]

[6] Copy of the provisional decision of 17 July 2007 appended to the Applicant's Motion.
[7] See the decision of 26 July 2007, Annex No. 4.

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10. On 6 September 2007, the Chamber over which Judge Riachy presided with two other judges, having been able to serve the application for referral on all the parties and having received from the General Security directorate documents confirming the veracity of the evidence submitted by Mr Zahabi in support of his application for referral, ordered in a reasoned decision and approved the referral of the *Hariri* case to a different investigating judge, who was to be appointed in accordance with Article 360, final paragraph, of the Lebanese CCP.

11. It should be noted that, contrary to what is stated by the Applicant, the acceptance of the application for Judge Eid's referral was not only based on gifts of fuel vouchers determined on a monthly basis to his benefit by Mr El Sayed but also on the grounds that during the same period, the brother of Judge Eid was appointed as a physician with General Security, also upon Mr El Sayed's authorisation, for a fixed monthly salary, whether or not he examined patients from the General Security directorate.

III- The grounds raised by the Applicant in his Motion for disqualification

12. The Applicant has raised the following grounds:

(i) Judge Riachy, in his capacity as President of a Chamber of the Court of Cassation of Lebanon, by his decision of 17 July 2007, stayed the proceedings before Investigating Judge Mr Elias Eid then "disqualified" him with the decision taken by the Chamber over which he presided on 6 September 2007, which was a contributory factor in prolonging the arbitrary detention of the Applicant, something which was sought and stated by the Lebanese government at the time.

(ii) The application for disqualification submitted by the Applicant against Judge Riachy in his capacity as President of a Chamber of the Court of Cassation is wellfounded, in the view of the Applicant, by the fact that he was closely connected to the executive and could not be impartial in ruling on a case where the real issue at stake was the extension of arbitrary detention.

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(iii) In a letter dated 7 July 2007, the Applicant informed the United Nations of his objection to Judge Riachy being shortlisted by the Lebanese government as a candidate for the Tribunal because of the connection he had with his "arbitrary detention", which was likely to compromise his impartiality or apparent impartiality.

(iv) The extension of the Applicant's arbitrary detention for almost four years on the basis of what the Applicant describes as "false witnesses" was carried out at the request of the Lebanese government, which itself shortlisted a number of Lebanese judges at the time as candidates for appointment as judges to the Tribunal. According to the Applicant, such circumstances give rise to reasonable suspicion of bias regarding the impartiality or the appearance of impartiality of all the Lebanese judges appointed to rule at the Tribunal on all the issues in connection with his arbitrary detention between 30 August 2005 and 29 April 2009.

IV- Non-compliance of the Application with the legal provisions or the case law on disqualification

A. Preliminary observations

13. It is useful first and foremost to note that, in the interests of compliance with legal notions, the Applicant described the application submitted by Mr Zahabi to the Chamber of the Court of Cassation in Lebanon, over which Judge Riachy presided at the time, against the Investigating Judge, not as an application for disqualification on the basis of Article 120 of the Lebanese CPC, but as an application for referral on the grounds of reasonable suspicion of bias based on Article 340 of the Lebanese CCP. The difference between the two procedures is quite clear in this respect,[8] as set out in the foregoing.[9] The confusion of these two concepts by the Applicant does not appear to have been in good faith; it amounts to saying that Judge Riachy was the only one of

[8] See in this regard: *JurisClasseur Procédure Pénale*, Fasc. 20, *Récusation*, No. 36-37, on www.lexisnexis.com/fr/droit.
[9] See paragraph (4) supra.

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several judges to agree to this application against Judge Eid, contrary to other appeals courts, which is not what happened in reality since the Court of Appeal had received an application for "disqualification" against Judge Eid submitted by other parties, not an application for referral on the grounds of reasonable suspicion of bias.

14. Rule 25 of the Rules of Procedure and Evidence (hereinafter "the Rules") sets out the conditions for disqualification before the Tribunal. In accordance with this Rule, there are three conditions:
    (i) Where a Judge has a personal interest in a case or;
    (ii) Any association with the case;
    (iii) The Judge's interest and association must be of a nature to affect or appear to affect his impartiality.

15. It is clear that the grounds raised by the Applicant do not comply with the aforementioned conditions and the Motion for disqualification must be dismissed for one of the primary or subsidiary grounds set out below.

Indeed,

B. <u>Regarding the grounds raised by the Applicant in relation to the two decisions rendered on 17 July and 6 September 2007 by the Court of Cassation of Lebanon</u>

16. It is worth noting that the two aforementioned decisions were not taken by Judge Riachy alone, but also by all the Judges of the Chamber over which he presided, without any dissenting opinion on their part.[10] It should be deduced therefrom that the two decisions mentioned by the Applicant cannot be described as biased given that they were taken by all the Judges of the Chamber, who were not the subject of [any application for] disqualification on the part of the Applicant at the time. It should be noted that court decisions in

[10] See in this regard the text of the two decisions appended to the application submitted by the Applicant.

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Lebanese law can be taken by a majority; a judge who rejects the decision has the option of submitting a written dissenting opinion.

17. The fact that none of the Judges who made up the Chamber dissented implies that the decisions were in accordance with the law and that there was no question of bias in connection with these decisions or the Judges who adopted them.

18. The absence of bias or an appearance of bias raised as a ground for disqualification can only be based on factual elements where the subject thereof is clearly proven. These elements may ideally be reduced to four categories:
    (i) Kinship or a relationship by marriage between a judge and a party;
    (ii) Common interest or conflict of interest between a judge and a party;
    (iii) Prior knowledge of the case if the judge took cognizance of the proceedings as a judge, arbitrator or counsel or if he gave testimony as a witness regarding the facts of the trial ;
    (iv) An event which is likely to call into question the impartiality of the judge.[11]

19. The burden of proof for these four categories is incumbent upon the Applicant, who must establish that there is a risk of bias on the part of the Judge, which is likely to affect the future decision.[12] International case law concurs: the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter "the ICTY") states in the *Furundzija* judgment:[13]

> "It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that Judge Mumba was not impartial in his case [...]. "disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be 'firmly established'"".

[11] See in this regard: *Jurisclasseur Procédure Pénale*, Fasc. 20, *Récusation* No. 101, www.lexisnexis.com/fr/droit.
[12] Ibid, No. 134.
[13] *The Prosecutor v. Anto Furundzija*, Judgment on appeal, ICTY Case No. IT-95-17/1-A, 21 July 2000, para. 166.

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20. The grounds raised by the Applicant cannot be considered to fall within the first three categories set out in the foregoing;[14] they are even less likely to fall within the fourth category given that no event was proven by the Applicant which might call into question the impartiality or apparent impartiality of Judge Riachy.

21. Indeed, firstly the provisional decision of 17 July 2007 staying the proceedings before the Investigating Judge, Judge Eid: in addition to the fact that it was taken by all the judges who made up the Chamber without dissent, it is justified in fact and in law since Article 340 of the Lebanese CCP gives the Chamber powers to stay the proceedings before the judge who is the subject of the referral order.

22. Secondly, the final decision of 6 September 2007, which accepted the referral order, was also taken without dissent by any of the judges who made up the Chamber; it was also justified in fact and in law. In this decision the Chamber, as in any appropriate legal reasoning, first and foremost had to establish the criterion to define the notion of reasonable suspicion of bias as this is not defined by Article 340 of the Lebanese CCP. This is why, based on national and comparative doctrine and case law, the decision of 6 September 2007 states in this regard:

> [TRANSLATION] "Considering that even though the law does not specify the substance of reasonable suspicion of bias, leaving it to the sole discretion of the Tribunal seized of the application for referral, bias is only established when genuine grounds exist, based on specific and proven facts, which are likely objectively to raise doubts among the parties to the case or one of them regarding the impartiality of the court seized of the case, whether the facts preceded or were concomitant with the moment when the judge took over the case."[15]

[14] The hypothesis of prior knowledge of the case is not met, especially given that the application for the disqualification of Judge Eid differs in terms of the case, subject and parties to the present case submitted by Mr El Sayed before the Tribunal.
[15] See the text of the decision of 6 September 2007.

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23. Having stated this criterion, the Chamber, still made up of the three judges, including Judge Riachy, examined the grounds raised by the applicant, Mr Zahabi, to assess the compliance thereof with the criterion laid down. In this regard, the Chamber was to dismiss the ineffective grounds regarding media pressure, press articles and interviews which accompanied the submission of the application for disqualification before the Appeals Court, holding that this could not constitute the requisite reasonable suspicion of bias. In addition, the Chamber accepted two grounds, which, in combination, made the application for referral admissible and which were as follows:

(i) **The first ground**: the Investigating Judge, Judge Eid, following a decision by the Director-General of the General Security at the time, Mr El Sayed, received free fuel vouchers for 300 litres of fuel per month on an ongoing basis from February 2003 and for the duration of Mr El Sayed's term of office as Director. A gift of this nature was dependent on the personal initiative of Mr El Sayed and was at his discretion alone. In addition, it was neither occasional nor circumstantial since the arrangement continued for a period of two years and five months, as confirmed by the letter sent to the Chamber by the current Director-General of the General Security. The Judge involved has provided no justification to explain the reasons for this gift, especially since no more than eleven judges benefited from the same gift out of a total of five hundred judges.

(ii) **The second ground**: although reasonable suspicion of bias cannot be based on the conduct of a third party, such conduct remains effective if it is able to confirm the facts which constitute the reasonable suspicion of bias ascribed to the Judge involved. In this regard, the brother of the Judge in question was appointed shortly after the first fact occurred, upon Mr El Sayed's authorisation, to work as a physician for General Security in return for a fixed monthly salary, with the associated contract being renewed tacitly on an annual basis.

24. In its decision the Chamber had to consider, in light of the allegations, whether the facts as proven in the two grounds set out in the foregoing implied the

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existence of a special connection between the Judge and Mr El Sayed. This link is evidenced by the special services provided by the Applicant within a short space of time (one month). The Chamber concluded in its decision that these special links could only be based on mutual interest or an established and serious friendship which was likely to justify the doubts expressed by the applicant, Mr Zahabi, as to the impartiality of the Judge, in accordance with Article 340 of the Lebanese CCP. The Chamber was also to contend, in support of its decision, that although the constituting reasonable suspicion of bias occurred on a date prior to the referral of the *Hariri* case by Judge Eid, this did not call into question the occurrence thereof, given that the grounds for reasonable suspicion of bias remained effective, even though they were observed prior to the referral in question.[16] It should be noted that demonstrations of hostility or friendship towards one of the parties could lead a Judge to rule *in defavorem* or *in favorem* depending on the party in question.[17]

25. In light of the foregoing, the process followed by the Chamber in its decision of 6 September 2007 was a legal process by necessity as far as the reasoning adopted and the result achieved were concerned. It was bound to result in the application for referral on grounds of reasonable suspicion of bias of the Investigating Judge involved being declared admissible. This process, as set out, does not reveal any evidence on the part of Judge Riachy and the other Judges involved in the decision, which could call into question their impartiality. Thus the claims to the contrary made by the Applicant are unfounded since they are not backed up by evidence and have no legal basis.

[16] See *Jurisclasseur Procédure pénale*, Fasc. 20, *Récusation*, Nos 105 and 115, www. lexisnexis.com/fr/droit.: "[TRANSLATION] ***105. Maintaining disqualification**: The judge may still be withdrawn following divorce from his or her spouse or in the event of the death of the spouse, if said spouse was related by marriage to one of the parties [...]. The Judge may equally still be withdrawn if the couple separates [...]. **115.** Once again there is a conflict of interest where there has been a trial involving the judge [...] and one of the parties [...]. Indeed the judge could harbour enmity for a former adversary which might affect his or her neutrality [...]".*
It can be deduced from this that enmity for a former adversary prior to the trial is analogous for the purposes of suspicion of bias to friendship or to reciprocal interests, which may take place even before a trial involving a judge and one of the parties.

[17] See *Jurisclasseur Procédure pénale*, Fasc. 20, *Récusation*, *ibid*, No. 129, www. lexisnexis.com/fr/droit.

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C. Regarding the point made in paragraph 12 of the Motion for disqualification, that Judge Eid was withdrawn because he intended to release the Applicant, Mr El Sayed.

26. The Applicant indicates in paragraph 12 of his Motion that the civil party submitted three applications in turn for withdrawal on the grounds that the investigating judge was intending to release him. It is useful in this regard to point out that the matter raised by the Applicant in this regard is not in the application for reasonable suspicion of bias submitted by Mr Zahabi to the Court of Cassation against Judge Eid, but only in the application for disqualification submitted by other parties to the Court of Appeal.

27. Whatever the case may be in this regard, in its decision of 6 September 2007 the Court of Cassation refuted all the claims regarding media pressure, press articles and interviews, holding expressly that this could not justify the application for referral on the grounds of reasonable suspicion of bias to the Investigating Judge.[18] Nor was the decision to refer the case on the grounds of reasonable suspicion of bias ever based on this claim.

D. Regarding the ground raised by the Applicant based on his claim that Judge Riachy could not be impartial given that he had close links with the executive

28. It is worth recalling in this regard the rule mentioned in the foregoing in paragraph 19 (*Furundzija* judgment), which states that the burden of proof is incumbent upon the Applicant to prove that the Judge was not impartial. The Applicant has failed to produce any serious and effective evidence in this regard. Such claims, which are totally unfounded, have no evidence to back them up and the ground must fail.

[18] See in this regard the Decision of 6 September 2007.

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E. Regarding the ground raised by the Applicant based on his Application for disqualification of Judge Riachy as submitted to the Court of Cassation on 17 July 2007

29. It is true that the Applicant requested the disqualification of Judge Riachy during the proceedings in relation to the application for referral, but he withdrew this immediately, being forced to do so given that no serious grounds existed.

30. Contrary to what the Applicant claims in paragraph 12 (ii) of his Motion, Judge Riachy received no letter from him following the decision of 6 September 2007,[19] even though the Applicant was able to pass on three handwritten letters to Judge Riachy via a person close to him whilst the referral proceedings were in progress and before the decision. The content of these letters does not match his claims as set out in his Motion for disqualification.[20]

F. Regarding the ground raised by the Applicant involving his complaint to the United Nations in connection with the candidature of Judge Riachy for the Tribunal

31. The ground raised in this regard does not challenge the impartiality of Judge Riachy in any way and therefore cannot constitute a ground for disqualification. It should also be pointed out that in spite of this complaint, Judge Riachy was appointed to the Tribunal on a decision by the United Nations Secretary-General, which shows the lack of interest afforded to this complaint given that it is ill-founded.

[19] It should be mentioned that the letter in question presented as Annex No 5 to the Applicant's Motion is printed. One wonders whether the Applicant had access to the necessary resources to send a printed letter during his detention, especially given that this is not a handwritten letter, unlike the other three letters mentioned in footnote no. 20, which are handwritten.

[20] Judge Riachy reserves the right to produce these letters in due course.

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G. **Regarding the ground raised in relation to the shortlisting of judges by the Lebanese government**

32. It should be pointed out that the Lebanese Judges at the Tribunal are appointed by the United Nations Secretary-General on the basis of a list submitted by the Supreme Council of the Judiciary, and that the Lebanese government has no involvement in shortlisting or appointing them.

33. Whatever the case may be, the shortlisting or appointing of the Lebanese Judges cannot constitute a ground for the impartiality of Judge Riachy and therefore cannot be used as a reason for disqualification.

34. **In conclusion**, for all these reasons and arguments, all the provisions and grounds which constitute the Motion for disqualification submitted by the Applicant must be dismissed.

Respectfully submitted.

Done at Leidschendam, on 26 October 2010.

Judge Ralph Riachy.

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LIST OF ANNEXES

Number	Document
1	Articles 120 and 123 of the Code of Civil Procedure
2	Application for referral submitted by Mr Zahabi to the Court of Cassation
3	Application for disqualification submitted by the civil parties to the Court of Appeal
4	Decision by the Fifth Chamber of the Court of Cassation of 26 July 2007

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