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UNITED NATIONS COMMISSION OF INQUIRY ON THE GAZA CONFLICT ESTABLISHED PURSUANT TO UNHRC RESOLUTION S-21/1

Before: WILLIAM SCHABAS, *Chair of Commission*

Secretariat: Sarah Hamood
Team Leader, Middle East
Middle East and North Africa Section
Office of the UN High Commissioner for Human Rights

Date: 4 September 2014

REQUEST FOR WILLIAM SCHABAS TO RECUSE HIMSELF FOR BIAS OR THE APPEARANCE THEREOF

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SUMMARY

On the basis of highly unusual facts, UN Watch requests that Prof. William Schabas recuse himself from the Commission of Inquiry established under resolution S-21/1 on the grounds that his numerous, recent, public and prejudicial statements—adverse to relevant parties, and pronouncing on the merits of the very question to be decided by the Mission—give rise to actual bias or the appearance thereof.

This request has been submitted in summary form as an official written statement to the 27th session of the UN Human Rights Council, and will be placed on the agenda of the Council at its 22 September 2014 debate concerning Israel, and circulated to delegates as an official document. We respectfully request that Prof. Schabas respond to this motion prior to that date.

The relevant prejudicial statements by Prof. Schabas include:

- "[P]rima facie, there is evidence of disproportionality in the response that Israel is undertaking in order to protect itself." *(Schabas speaking about the very operation that is now before him, BBC, 17 July 2014)*

- "Actually, my favorite would be Netanyahu within the dock of the International Criminal Court," Schabas declared before an advocacy group's mock trial of Israel in 2012.

- In a law journal article, Schabas wrote that Netanyahu could be considered "the single individual most likely to threaten the survival of Israel."

- Schabas called for "going after" Nobel Peace Prize laureate Shimon Peres in the ICC, saying, "Why are we going after the president of Sudan for Darfur and not the president of Israel for Gaza?"

The impartiality requirement under international law is unequivocal. Scholars of international law list impartiality as the first principle of fact-finding. Impartiality as a

requirement is further set forth in Articles 3 and 25 of the UN Declaration on Fact-Finding.

Finally, precedents from analogous international tribunals are equally clear. In the 2004 case of *Sesay*, the Special Court for Sierra Leone disqualified a judge who had published statements on the culpability of an organization connected to the defendants. This precedent applies a fortiori to the case of Prof. Schabas, whose prior determination of guilt directly concerned one of the parties under examination.

The remedy applied in Sesay should apply here. Never in the history of international tribunals and fact-finding panels has there been a more overt case of actual bias in the form of a fact-finder's prior statements concerning one of the parties under investigation, and in presumptive determination of the merits of a particular case in controversy.

Because of Prof. Schabas' highly unusual and prejudicial statements, the reasonable person would consider him to be partial.

"I was appointed to this commission not because of my past views," said Schabas in one of his recent interviews. Yet one suspects that the very opposite may be true. As McGill law professor Frédéric Mégret wrote about similar UN incidents, "the politicized nature of designation processes means that judges/experts are in fact sometimes chosen not *despite* their previous declarations, but on the very basis of having made them."

Therefore, if justice is to be done—and to be seen to be done—the only remedy is Prof. Schabas' recusal.

INTEREST OF PETITIONER AND LOCUS STANDI

1. UN Watch ("Petitioner") is a non-governmental human rights organization accredited with the United Nations as a NGO in Special Consultative status with ECOSOC, pursuant to Article 71 of the United Nations Charter. In this capacity Petitioner is a recognized stakeholder at the UN Human Rights Council ("the Council"), and a regular participant in its proceedings, intervening on a wide range of thematic human rights issues and country situations. UN Watch reports, briefings and analyses on the Council are widely read by diplomats, academics and journalists, and its speeches in defense of the principles of universal human rights, democracy, and accountability, have been seen on the Internet by millions of concerned citizens around the world.[1]

2. Petitioner actively participated in the 23 July 2014 special session that adopted Resolution S-21/1, which created the mandate under which this Commission of Inquiry ("the COI") was created. Petitioner has since been actively involved in reporting on and analyzing the work of the COI, and intends to make submissions before it on matters of procedure, fact and law.

3. Consequently, Petitioner has an interest in a COI conducted according to the principle of impartiality, and has standing to bring this petition. In addition, Petitioner has public interest standing because our request concerns serious public international issues, including the Mission's credibility to impartially decide matters of international human rights and humanitarian law. Finally, this petition is the only reasonable and effective means for the material defect in Prof. Schabas' impartiality to be challenged and remedied.

[1] *See generally* UN Watch reports, articles and speeches at www.unwatch.org, and the UN Watch blog on latest U.N. and human rights developments at blog.unwatch.org/.

STATEMENT OF FACTS

Schabas Says His "Favorite" to see in Dock of the International Criminal Court is the Prime Minister of Israel

4. On 7 October 2012, Schabas appeared before the Russell Tribunal, a mock trial of Israel that was ridiculed in a *New York Times* op-ed by Judge Richard Goldstone as a kangaroo court composed of "critics whose harsh views of Israel are well known."[2] Schabas declared: "Actually, my favorite would be Netanyahu within the dock of the International Criminal Court."[3]

5. Similarly, speaking in a university symposium on 10 September 2010, Schabas declared: "Frankly, if I had to think of an individual who would be the biggest threat to the survival of Israel, I'd probably choose Netanyahu." He then chuckled, prompting further guffaws from the audience.[4]

6. And again, in a subsequent law journal article, Schabas wrote that Netanyahu could be considered "the single individual most likely to threaten the survival of Israel." [5]

Schabas Called for "Going After" Israeli President Shimon Peres for War Crimes

7. Interviewed in 2009, Schabas called for "going after" Israel's president—then Shimon Peres—for war crimes. Schabas asked: "Why are we going after

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[2] Richard Goldstone, "Israel and the Apartheid Slander," *New York Times*, 4 September 2012.

[3] William Schabas, testimony before the "Russell Tribunal on Palestine," 7 October 2012, at https://www.youtube.com/watch?v=0EgykgqpgQY.

[4] William Schabas, 10 September 2010, "Lawfare and the Israeli-Palestine Predicament," War Crimes Research Symposium, Frederick K. Cox International Law Center, at https://www.youtube.com/watch?v=jFwUmNXZm14.

[5] William Schabas, "Gaza, Goldstone, and Lawfare," 43 Case Western Reserve Journal of International Law (2011) at 308.

the president of Sudan for Darfur and not the president of Israel for Gaza?"[6] In the same interview, Schabas complained that the UN Security Council had created a tribunal for Yugoslavia— "but it did not create a Tribunal for Israel, for example."[7] He cited no other examples.

Schabas Statements Over Three Decades Evince Pattern and Practice of Seeking to Indict Israel for War Crimes

8. Over three decades, Schabas has made numerous additional statements that, taken together, evince a pattern and practice of seeking to accuse and indeed indict Israel for war crimes:

- As far back as 1991, Schabas was a regular participant in the UN's notoriously one-sided "Committee on the Exercise of the Inalienable Rights of the Palestinian People," a body controlled by the world's worst dictatorships.[8] At its NGO symposium that year, Schabas, speaking after the message from PLO Chairman Yasser Arafat, "articulated Israel's rationales for the inapplicability of the Convention, *and then made a legal rebuttal of all Israeli facile arguments.*"[9] (emphasis added)

- In 1999, before the ICC was even in operation, Schabas was an early activist calling for the indictment of Israeli leaders. At a Cairo meeting of the same problematic UN committee, Schabas embraced an extraordinary session on Israel to be held by the High Contracting Parties to the Fourth Geneva Convention, which he called an "exciting opportunity." Schabas said that member states were "under an obligation to prosecute those suspected of committing grave breaches in the occupied territories. Exercising jurisdiction may be difficult to the extent the suspects remain within Israel, although arguably *States Parties are required by the Convention to seek extradition of those whom Israel refuses to try. If the*

[6] Victor Tsilonis, "International Protection of Human Rights and Politics: an Inescapable Reality, Interview with Professor William Schabas," published on 2 December 2010, at http://www.intellectum.org/articles/issues/intellectum7/en/Int%27l%20Protection%20of%20Human%20Rights%20and%20Politics_English%20co-edited%20WS%20&%20VT3.pdf.

[7] *Ibid.*

[8] Current members and observers of this committee include Syria, Belarus, Cuba, Pakistan, Turkey, Venezuela, Algeria, Bangladesh, Bulgaria, China, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Qatar, Saudi Arabia, Sri Lanka, UAE, Viet Nam, Yemen, the State of Palestine, African Union, the League of Arab States, and the Organization of Islamic Cooperation.

[9] http://unispal.un.org/UNISPAL.NSF/0/03BB61BF3F26A1FF8525610A00712C7B

result of threats of prosecution under article 146 is only to restrain the travel plans of Israeli civilian and military officials, this may still constitute a useful means of pressure." (Emphasis added)

- In 2012, Schabas accused Israel of perpetrating "crimes against humanity, war crimes and the crime of aggression" at various times during its history.[10]

- In the same talk, Schabas acknowledged that much of his current efforts are devoted to trying to indict Israel: "A strong and arguable case could be made that the court can already exercise jurisdiction over crimes against humanity and war crimes perpetrated in Palestine, and that the obstacle… is simply a decision by the prosecutor of the international criminal court. *And so much of my effort these times is addressed to trying to get that decision rethought and reversed, and pointing out the legal fallacy and the policy error of the court in failing to take up this burning, important issue*.[11]

There are numerous other such statements by Schabas that are publicly available.

Schabas Has Repeatedly Defended Hamas and its Iranian Sponsor

9. Speaking in 2012, Schabas accused Israel of engaging in "punitive action" in 2009 that was not motivated by self-defense but rather "aimed to punish the people of Gaza." He went on to legitimize Hamas: "If we look at the poor people of Gaza… all they want is a state—and they get punished for insisting upon this, and for supporting *a political party in their own determination and their own assessment that seems to be representing that aspiration.*"[12]

10. In addition, Schabas has a troubling record of seeking to defend or explain away some of the most dangerous positions or practices of Hamas' sponsor, the Islamic Republic of Iran and its leaders. For example, Schabas has written that Iran "very

[10] William Schabas, testimony before the "Russell Tribunal on Palestine," 7 October 2012, at http://youtu.be/Vm_WhxIGytk?t=1m58s.

[11] *Ibid.*

[12] https://www.youtube.com/watch?v=7wM_SBlo6JM

arguably has a claim to require [nuclear weapons] for defensive purposes."[13] Schabas equated Iranian calls to destroy the Jewish state with "Cold Warriors" who "wanted to destroy the Soviet Union."[14] Writing about the UN's controversial Durban II conference on racism, Schabas said that former president Mahmoud Ahmadinejad was merely "provocative," suggesting that his statements (which included denying the Holocaust) were made "in desperation" and "deserve to be ignored rather than exaggerated."[15] By contrast, those responsible for the conference's troubles, according to Schabas, were "Israel and its friends."[16] Schabas has also gone to Iran to co-sponsor conferences organized by a regime-backed "human rights" institute designed to promote anti-Western propaganda.[17]

Schabas Repeatedly Participated in One-Sided Mandates Investigating Israel Only

11. Although Schabas has insisted that he will now conduct an impartial inquiry, his record shows that he has consistently sought out or participated with mandates that exclusively examine Israel, including the Committee on the Exercise of the Inalienable Rights of the Palestinian People, the non-governmental Russell Tribunal and the post of UN Special Rapporteur on Palestine.

UNHRC Rejected Schabas' Application to Replace Richard Falk, Citing Prior Statements

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[13] http://humanrightsdoctorate.blogspot.co.il/2012/12/dancing-around-genocide.html

[14] *Ibid.*

[15] http://humanrightsdoctorate.blogspot.co.il/2009/09/naomi-klein-on-durban-ii-conference.html

[16] *Ibid.*

[17] Hillel Neuer, "An Iranian 'human rights' wrong," *New York Daily News*, 21 November 2011, at http://www.nydailynews.com/opinion/iranian-human-rights-wrong-board-north-korea-cuba-article-1.979942.

12. In March of this year, a vetting panel of the UNHRC, consisting of five ambassadors acting in their personal capacities—the majority of whom in this exceptional case were from democracies—rejected Schabas' application to replace Richard Falk in one of the most biased UN positions—that of the Human Rights Council's special rapporteur charged with investigating "Israel's violations of the principles and bases of international law." Schabas actively sought out this one-sided post even though Amnesty International has said the mandate's "limitation to Israeli violations of international human rights and humanitarian law in the Occupied Palestinian Territories undercuts both the effectiveness and the credibility of the mandate."[18] Amnesty noted that the mandate "fails to take account of the human rights of victims of violations of international human rights and humanitarian law committed by parties other than the State of Israel."[19] Even Falk himself, a supporter of Hamas and 9/11 conspiracy theories, acknowledged the one-sided nature of the mandate, saying it was open to challenge regarding "the bias and one-sidedness of the approach taken."[20] Yet Schabas sought out this post of investigating only Israel—and not Hamas, the PA, Islamic Jihad or anyone else.

13. It is telling that the 5-member panel, which strove to appoint a balanced person despite the imbalanced mandate, rejected Schabas' application, instead choosing someone who was deemed "the most likely to be able to objectively engage the key

[18] See: http://www.amnesty.org/en/library/asset/MDE15/028/2008/en/789c2afd-4f63-11dd-a20f-af4976c1087c/mde150282008eng.html.

[19] *Ibid.*

[20] See UN summary at http://www.unhchr.ch/huricane/huricane.nsf/0/2B6ED3462A1CE0BEC125746A00487111?opendocument.

interested parties *having not previously taken public positions on issues relevant to the mandate."* (Emphasis added)

BBC Interview of 17 July 2014: Schabas Makes Prejudicial Statements on the Very Question Before the Commission

14. In a 17 July 2014 interview with the BBC, Schabas effectively pronounced Israel presumptively guilty on the very question that his commission is now called to investigate. Asked about war crimes and self-defense in the summer's Gaza conflict, Schabas declared that "prima facie, there is evidence of disproportionality in the response that Israel is undertaking in order to protect itself."[21]

UNHRC Session Condemns Israel 18 Times Over Gaza, Ignores Hamas; Chair Appoints Schabas

15. Since the UN Human Rights Council was established in June 2006, the 47-nation body—dominated by a controlling majority that includes China, Cuba and Saudi Arabia—has convened more emergency sessions on Israel than on any other country in the world. Of the sessions that specifically criticized countries, there have been 7 on Israel, 4 on Syria, and 1 on Central African Republic, Libya, Cote d'Ivoire, DR Congo, Myanmar, and Sudan.[22] The rest of the world has gone ignored.

16. The sessions on Israel, each initiated by the Arab and Islamic blocs, consistently condemned Israel for responding to cross-border attacks by Hamas and Hezbollah, yet said nothing about the attacks by both Iranian-sponsored terrorist groups, thereby legitimizing their actions and granting them effective immunity and impunity.

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[21] BBC World Service, *Newshour*, 17 July 2014, http://youtu.be/yHc7RqYBI64.

BBC: "Well, Israel has maintained that it is doing its best to minimize civilian causalities and that Hamas is using civilians as human shields. Israel also says that Hamas' rockets are illegally targeting residential areas. So, are any crimes being committed here? William Schabas is professor of international law at Middlesex University in London and at Leiden University in the Netherlands. First of all on the Israeli airstrikes, are they justified as self-defense protecting Israelis?"

SCHABAS: "Well, self-defense will always be a justification, but it's only to the extent that it's proportionate to the threat that's being posed… [T]here are huge numbers of civilian casualties on one side and virtually no civilian causalities on the other, and so **prima facie, there is evidence of disproportionality in the response that Israel is undertaking** in order to protect itself." (emphasis added)

[22] http://blog.unwatch.org/index.php/2014/07/23/special-sessions-of-the-un-human-rights-council/

The sessions routinely declare Israel guilty from the start. The European Union, Canada and other democracies typically refuse to support these measures on account of their being one-sided.

17. Thomas M. Franck, the late NYU scholar and former president of the American Society of International Law, lamented the emergence of this UN pattern in his authoritative article on procedural due process in human rights fact-finding by international agencies.[23] Referring to a 1968 General Assembly resolution that had taken it for granted "that Israel was in breach of its international obligations," Prof. Franck criticized the creation of a fact-finding mission whose mandate included "conclusory language that palpably interfered with the integrity of the fact-finding process by violating the essential line between political assumptions and issues to be impartially determined." Prof. Franck's evaluation of such resolutions neatly summarizes the worth of the S-21/1 mandate: "A fact-finding group created by terms of reference that seek to direct its conclusions is essentially a waste of time. Its findings, at most, will reassure those whose minds are already made up."[24]

18. In total, from its regular and special sessions, the Council has devoted more than half of all its country censures to one country, Israel. By focusing the international spotlight on Israel, the collective strategy of Council members like China, Russia, Egypt, Pakistan, Cuba, and Saudi Arabia—supported by observer states like Iran, Syria, and Zimbabwe—is to shield their own crimes from scrutiny. Because they hold an

[23] T.M. Franck & H.S. Fairley, "Procedural Due Process in Human Rights Fact-Finding by International Agencies" (1980) 74 *American Journal of International Law* 308 at 316.

[24] *Id.* at 316.

automatic majority of approximately 30 out of 47 member states, the strategy is successful.

19. Following this pattern and practice, on 23 July 2014—at the initiative of the Arab, Islamic, African and Non-Aligned groups, the Council met in special session on the situation in Gaza. It adopted Resolution S-21/1, condemning Israel 18 times for violations, while never mentioning Hamas once. The resolution created a commission of inquiry to investigate war crimes in Gaza "in the context of the military operations conducted since 13 June 2014," which the preamble defined as being those by Israel, and which it condemned as "grave violations." The context not chosen was the Hamas aggression against Israel. The EU refused to support the one-sided text, saying it was "unbalanced, inaccurate and prejudges the outcome of the investigation by making legal statements."

LEGAL DISCUSSION

Applicable Law

20. International fact-finding in the field of human rights is considered a quasi-judicial process that should be guided by the relevant substantive and procedural rules of international law.[25] These are not rigid but should be consistent with the principles of natural justice and due process—a necessity for the fact-finding to be a credible procedure.[26] It is generally recognized that the credibility of fact-finding depends on the observance of fair rules of procedure.

Due Process Requires Impartiality in Human Rights Fact-Finding

[25] *See* Bertrand Ramcharan, "Substantive Law Applicable," in B.G. Ramcharan, ed., *International Law and Fact-Finding in the Field of Human Rights* (Boston and London, 1982), at 26.

[26] *Id.* at 26.

21. The minimal rules of due process require that fact-finders in the human rights field be impartial.[27] This requirement implies, according to Professor Franck, that "the persons conducting an investigation should be, and should be seen to be, free of commitment to a preconceived outcome."[28] The credibility and impact of fact-finding depends upon the extent to which it is perceived to have been objective, fair and impartial. Fact-finding must be "as impartial and as fair to the parties as procedural and evidentiary rules can render it without making the inquiry's task impossible, not merely for ethical reasons but in order to maximize the credibility and impact of the facts found."[29] In his outline of the procedural law applicable to international fact-finding in the field of human rights, K. T. Samson, the former coordinator for human rights of the ILO, cited the following principle first: "A basic requirement is to ensure the impartiality and objectivity of the fact-finders."[30]

UN Declaration on Fact-Finding Requires Impartiality

22. There is no one set of comprehensive standards adopted by the United Nations to govern UN fact-finding[31], but a statement of general standards is found in the *Declaration on Fact-finding by the UN in the Field of the Maintenance of International Peace and Security*.[32] Impartiality is twice listed as a requirement. Article 3 provides: "Fact-finding should be comprehensive, objective, impartial and timely." Article 25

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[27] Franck & Fairley, at 313, 344.

[28] *Id.* at 313.

[29] *Id.* at 310.

[30] K.T. Samson, "Procedural Law," in B.G. Ramcharan, ed., *International Law and Fact-Finding in the Field of Human Rights* (Boston and London, 1982), at 41-42.

[31] Lillich, Hannum, Anaya and Shelton (eds.), *International Human Rights: Problems of Law, Policy, and Practice* (Aspen Publishers, 2006), at 1025.

[32] U.N. Doc. A/RES/46/59, Annex (1992), *available at* http://www.un.org/documents/ga/res/46/a46r059.htm.

renders this obligatory: "Fact-finding missions have an obligation to act in strict conformity with their mandate and perform their task in an impartial way." While recusal is not expressly listed in this declaration, several UN human rights bodies do list it.[33] Accordingly, by retaining Prof. Schabas as chair—someone who has already taken as a "given" that which inherently is meant to be a "non-given"—the COI will necessarily be in breach of this UN resolution.

International Law Requires Disqualification of Prof. Schabas for Actual or Apparent Bias

23. Both the rules and precedents of international war crimes tribunals are a relevant source of international law for the purposes of the case at bar. While they relate to judicial proceedings, their principles are analogous to the due process principles of the quasi-judicial process of international fact-finding, and should be applied where pertinent. Court rules for these international tribunals provide that a judge whose impartiality is affected must recuse herself or be disqualified. For example, Rule 15(A) of the UN-created Special Court for Sierra Leone provides that "a Judge may not sit at a trial or appeal in any case in which his impartiality might reasonably be doubted on any substantial ground."[34] Similarly, the parallel Rule 15 (A) of the International Criminal Tribunal for Rwanda provides that a judge may not sit in any case "concerning which he has or has had any association which might affect his impartiality."[35] This provision has

[33] UN human rights fact-finding bodies contemplate recusal as an option, like the Human Rights Committee and the Committee Against Torture. *See* Rules of Procedure of the Human Rights Committee, Rules 84 and 85; Rules of the CAT Committee, Rules 103 and 104, cited in Frans Viljoen, "Fact-Finding by UN Human Rights Complaints Bodies: Analysis and Suggested Reforms," *Max Planck Yearbook of United Nations Law* Vol. 8, No. 1 (2004) 49 at 86-87, http://www.mpil.de/shared/data/pdf/pdfmpunyb/viljoen_8.pdf.

[34] Special Court for Sierre Leone, Rules of Procedure and Evidence, *at* http://www.scsl.org/LinkClick.aspx?fileticket=1YNrqhd4L5s%3d&tabid=70.

[35] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, *at* http://www.ictr.org/ENGLISH/rules/290695/290695e.pdf.

been interpreted to permit any allegation of bias to be raised as a basis for disqualification.[36] The remedy for bias is disqualification of the judge or fact-finder, as contemplated by Rule 15(B) of the Special Court for Sierra Leone: "Any party may apply to the Chamber of which the Judge is a member for the disqualification of the said Judge on the above ground."[37]

In His Own Textbook, Prof. Schabas Described the Test as "Reasonable Apprehension of Bias"

24. The requirement of impartiality is violated not only where a judge is actually biased, but also where there is an appearance of bias. Professor Schabas himself has summarized the law of international war crimes tribunals as follows:

> A judge may be disqualified in any case in which he or she has a personal interest, or some other association, which might affect his or her impartiality. The test is one of a "reasonable apprehension of bias.[38]

The authoritative exposition of this rule comes from the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY). In the case of *Prosecutor v. Anto Furundzija*, the Appeals Chamber found that, "as a general rule, courts will find that a Justice 'might not bring an impartial and unprejudiced mind' to a case if there is proof of actual bias or of an appearance of bias."[39]

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[36] *Prosecutor* v. *Karemera et. al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Request For Disqualification of Judges Byron, Kam, and Joensen (Bureau), *at* http://www.ictr.org/ENGLISH/cases/Karemera/decisions/080307.pdf.

[37] Special Court for Sierre Leone, Rules of Procedure and Evidence, *at* http://www.scsl.org/LinkClick.aspx?fileticket=1YNrqhd4L5s%3d&tabid=70.

[38] William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006), at 316.

[39] *Furundzija* (Appeal Judgement), IT-95-17/1-A, International Criminal Tribunal for the former Yugoslavia, 21 July 2000, at par. 179, http://www.icty.org/x/cases/furundzija/acjug/en/furaj000721e.pdf.

25. The ICTY reached its ruling in part by analyzing the jurisprudence of the European Court of Human Rights:

> In considering subjective impartiality, the [European Court of Human Rights] has repeatedly declared that the personal impartiality of a Justice must be presumed until there is proof to the contrary. In relation to the objective test, the Court has found that this requires that a tribunal is not only genuinely impartial, but also appears to be impartial. Even if there is no suggestion of actual bias, where appearances may give rise to doubts about impartiality, the Court has found that this alone may amount to an inadmissible jeopardy of the confidence which the Court must inspire in a democratic society.[40]

The ICTY further noted that the European Court considers that it must determine whether or not there are "ascertainable facts which may raise doubts as to...impartiality":

> In doing so, it has found that in deciding "whether in a given case there is a legitimate reason to fear that a particular Justice lacks impartiality the standpoint of the accused is important but not decisive.…*What is decisive is whether this fear can be held objectively justified."* Thus, one must ascertain, apart from whether a Justice has shown actual bias, whether one can apprehend an appearance of bias.[41]

26. The ICTY Appeals Chamber concluded that "there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias."[42] An appearance of bias exists, inter alia, where "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[43]

27. Applying this rule to our case, Prof. Schabas' commitment to a preconceived outcome clearly constitutes substantial grounds to reasonably doubt his

[40] *Id.* at par. 182.

[41] *Id.* at par. 182.

[42] *Id.* at par. 189.

[43] *Id.* at par. 189.

impartiality. Prof. Schabas' prior determination of Israeli guilt for war crimes—by declaring on the BBC during this war that Israel's actions were prima facie disproportionate, and hence outside the bounds of self-defense—constitutes an overt case of actual bias on the very question that the COI members are meant to impartially assess. Even if, somehow, Prof. Schabas' statement did not give rise to actual bias, there is legitimate reason to fear that a reasonable observer, properly informed, would reasonably apprehend bias, a fear that can be held objectively justified.

28. In addition, a reasonable observer, properly informed, would reasonably apprehend bias by virtue of Schabas' statement, from less than two years ago, that Israel's prime minister was his "favorite" to see in the dock of the ICC, together with all of the other numerous statements and actions, documented above, in which Schabas seeks to indict Israel—but not Hamas or its sponsor Iran—for war crimes.

Case of *Sesay*: Precedent for Disqualifying Biased International Fact-Finder

29. This rule does not exist only in theory. Where actual or apprehended bias has been found, international tribunals will apply the remedy of disqualification. The Appeals Chamber of the Special Court of Sierra Leone did so in 2004, in the case of *Sesay*, when it granted defendant's motion to disqualify Justice Geoffrey Robertson, the President of the Special Court, for comments he made in a 2002 book about the events in Sierra Leone.[44] Justice Robertson had accused the Revolutionary United Front, whose members included the defendant as well as two other accused that subsequently joined the motion, of committing war crimes. When the judge refused to voluntarily recuse

[44] *Prosecutor v. Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber (Sierra Leone Appeals Chamber), 13 March 2004, par. 16, http://www.scsl.org/LinkClick.aspx?fileticket=uabm35Hc0jg%3d&tabid=195.

himself, his fellow judges on the Appeals Chamber ordered him to do so, finding there was "no doubt" that "a reasonable man will apprehend bias, let alone an accused person."[45]

30. The precedent of *Sesay* applies *a fortiori* to the remarks of Prof. Schabas. In both cases, a judge or fact-finder required to be impartial made statements prior to their sitting that gave the appearance of bias. Prof. Schabas' case is more severe, however, both because of the substantially higher number of his comments, expressed over decades, and because those comments directly related to the actions of one of the concerned parties in the very case and controversy that the COI is pledged to examine impartially.

National Legal Systems
Require Recusal in Cases of Bias

31. National legal systems equally apply the remedy of recusal in cases of real or apprehended bias, as surveyed by the ICTY Appeals Chamber in *Furundzija*.[46] For example, U.S. federal law provides that "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[47] The U.S. Supreme Court has ruled that what matters here "is not the reality of bias or prejudice but its appearance," and that a judge should recuse him or herself when it would appear to a reasonable person, knowing all the relevant facts, that a judge's impartiality might reasonably be questioned. *Liteky* v. *United States*, 510 U.S. 540, 555 (1994). "[T]he appearance of partiality is as dangerous as the fact of it." *United States* v. *Conforte*, 624 F.2d 869, 881 (9th Cir. 1980).

[45] *Id.*at par. 15.

[46] *Furundzija,* at pars. 183-188.

[47] 28 U.S.C. 455(a).

The Defense of Schabas and His Allies Fail to Apply Any Legal Test, for Actual or Apprehended Bias

32. In a series of recent interviews, Prof. Schabas has insisted that he is competent to serve because (a) everyone has views and (b) he pledges to put all his views behind him. For example:

> I don't want to taint the inquiry and obviously we want everybody to respect the fact that we will do our very best to ensure that the commission of inquiry is independent and impartial. I made it very clear that my views are left behind me when I start this role… It's not possible to find people who don't have opinions on this. To make that a qualification that you rule out anybody who has opinions or who has expressed them is not really going to be very helpful and not going to get us to having an appropriate commission.[48]

A Canadian colleague of Prof. Schabas, Francois Crepeau, similarly came to his defense:

> His vast expertise and experience… guarantee his independence from political pressure. Moreover, his intellectual probity and personal integrity have never been challenged and guarantee that he will act with impartiality… It is because Professor Schabas is such a strong human rights advocate and scholar that, contrary to his critics' claims, we can trust that he will keep the focus of the commission's work on the *victims* of human rights abuse, from whichever side, and not on the political power games at play.[49]

33. Yet the applicable test, as one of Prof. Crépeau's colleagues at McGill, Frédéric Mégret, has pointed out in a seminal law journal article on the subject of UN fact-finders, has no connection to how much we ought to "trust" the commissioner:

> "[W]hat is required of judges who subjectively think that they are impartial but realize that this may not be evident to the ordinary reasonable person is to in a sense 'sacrifice' themselves for the sake of the appearance of justice. Simply a declaration that one is impartial, or even a sworn statement to that effect, or a colleague vouching for one's impartiality, therefore, will not

[48] http://www.dw.de/this-is-not-going-to-sit-on-the-shelf/a-17877782

[49] Francois Crépeau, "In defence of William Schabas and his UN commission," *Toronto Star*, 24 August 2014, at http://www.thestar.com/opinion/commentary/2014/08/24/in_defence_of_william_schabas_and_his_un_commission.html.

> suffice to dispel an appearance that one is already committed to an outcome.[50]

34. What matters legally, rather, is the objectively justified apprehension of bias created by Schabas' statements and actions, based on knowledge of all the relevant circumstances. The apprehension of bias test reflects the maxim that "[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done." *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256.

35. Ultimately, as the courts in the U.S. have determined, "[T]he judge's actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue. … The standard is purely objective. The inquiry is limited to outward manifestations and reasonable inferences drawn therefrom. In applying the test, the initial inquiry is whether a reasonable factual basis exists for calling the judge's impartiality into question." *United States* v. *Cooley*, 1 F.3d 985, 993 (10th Cir. 1993). Therefore, colleagues' impressions of Schabas' sincerity, integrity or probity are entirely irrelevant.

36. What matters, rather, is this: Would the reasonable person, aware that Prof. Schabas has repeatedly called for Israel's leaders to be indicted—indeed, his "favorite" choice from any other country in the world—and made numerous other prejudicial statements, including on the very question to be decided by this commission of inquiry, apprehend him to be biased on the COI's assigned question of whether Israel committed violations of international human rights and humanitarian law?

[50] F. Mégret, "International Judges and Experts' Impartiality and the Problem of Past Declarations" (2011) 10 *The Law and Practice of International Courts and Tribunals* 31, at 42.

37. The answer, without a doubt, is yes. Therefore, if justice is to be done—and to be seen to be done—the only remedy is for Prof. Schabas to recuse himself. Failure to act would have a potentially deleterious impact on the international rule of law.

CONCLUSION

38. Wherefore, for the reasons stated above, Petitioner respectfully urges Prof. William Schabas to immediately withdraw permanently and forthwith from this Commission of Inquiry.

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Respectfully submitted,

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