



Summary of relevant case law on conflict of interest

I. Summary

1. This note reviews relevant case law concerning issues surrounding conflict of interest and impartiality of courts and tribunals. The focus of this note is on relevant case law from the International Court of Justice, but it also includes case law from the special courts and tribunals established by the United Nations as well as the European Court of Human Rights (ECtHR), Human Rights Committee and Inter-American Court of Human Rights. In relation to the human rights bodies, the case law highlighted addresses interpretation of relevant provisions of their respective instruments and not the operation of the Courts themselves.
2. In summary, there are a number of common elements which can be derived from the case law:
3. Application of a subjective and objective test to the facts;
4. Importance of the ‘appearance of bias’ and need to ensure confidence of the public in judicial systems;
 - (a) Judges presumed to be impartial;
 - (b) Consideration of the specific, factual circumstances of the matter, including:
 - (i) examination of the work undertaken by the judge and the capacity in which they undertook this work, e.g. whether they were government representatives;
 - (ii) whether that work was undertaken contemporaneously.
5. These elements are reviewed below in the context of the specific case law.

II. International Court of Justice

A. Relevant provisions of the Statute of the ICJ

6. The relevant provisions of the Statute of the ICJ are set out below:

Article 16

 - (a) *No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.*
 - (b) *Any doubt on this point shall be settled by the decision of the Court.*¹

Article 17

 - (a) *No member of the Court may act as agent, counsel, or advocate in any case.*
 - (b) *No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.*

¹ Statute of the International Court of Justice.



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(c) *Any doubt on this point shall be settled by the decision of the Court.*²

Article 20

*Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.*³

B. Review of Case Law

1. Legal consequences of the construction of a wall in the occupied Palestinian territory: Advisory Opinion of 9 July 2004⁴ and Order of 30 January 2004⁵

7. This case concerned a request from the Tenth Emergency Session of the United Nations General Assembly for an Advisory Opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory. At the commencement of the proceedings, Israel wrote to the Registrar stating that a Member of the Court had played a leading role in recent years in the Emergency Session from which the request had come. In a further confidential letter to the President of the Court, Israel drew to the President's attention the Member's involvement in other activities, including his role as Principal Legal Advisor to the Egyptian Ministry of Foreign Affairs and to the Egyptian delegation to the Camp David Middle East Peace Conference of 1978 as well as giving an interview three years previously on questions concerning Israel. Israel contended that the Member has been actively engaged in opposition to Israel.

8. The Court decided that the matters brought to its attention by Israel were not such as to preclude the Member from participating in the case.⁶ The Court recalled the South West Africa case, and noted that,

*[T]he activities of Judge Elaraby referred to in the letter of 15 January 2004 from the Government of Israel were performed in his capacity of a diplomatic representative of his country, most of them many years before the question of the construction of a wall in the occupied Palestinian territory, now submitted for advisory opinion, arose; whereas that question was not an issue in the Tenth Emergency Special Session of the General Assembly until after Judge Elaraby had ceased to participate in that Session as representative of Egypt; whereas in the newspaper interview of August 2001, Judge Elaraby expressed no opinion on the question put in the present case; whereas consequently Judge Elaraby could not be regarded as having 'previously taken part' in the case in any capacity.*⁷

9. However, in his Dissenting Opinion to the Order, Judge Buergenthal took issue with the Court's "formalistic and narrow construction of Article 17, paragraph 2."⁸ In particular, Judge Buergenthal stated that:

² *Id.*

³ *Id.*

⁴ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136.

⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Order of 30 January 2004, I.C.J. Reports 2004, p. 3.

⁶ Construction of a Wall -- Dissenting Opinion of Judge Buergenthal (Order of 30 January 2004 was decided by 13 votes to 1).

⁷ I.C.J., *supra* note 5, at p. 5

⁸ I.C.J., *supra* note 6, at p. 10.



It is clear, of course, that the language of Article 17, paragraph 2, does not apply in so many words to the views Judge Elaraby expressed in the above interview. That does not mean, however, that this provision sets out the exclusive basis for the disqualification of a judge of this Court. It refers to what would generally be considered to be the most egregious violations of judicial ethics were a judge falling into one of the categories therein enumerated to participate in a case. At the same time, Article 17, paragraph 2, reflects much broader conceptions of justice and fairness that must be observed by courts of law than this Court appears to acknowledge. Judicial ethics are not matters strictly of hard and fast rules -- I doubt that they can ever be exhaustively defined -- they are matters of perception and of sensibility to appearances that courts must continuously keep in mind to preserve their legitimacy.

A court of law must be free and, in my opinion, is required to consider whether one of its judges has expressed views or taken positions that create the impression that he will not be able to consider the issues raised in a case or advisory opinion in a fair and impartial manner, that is, that he may be deemed to have prejudged one or more of the issues bearing on the subject-matter of the dispute before the court. That is what is meant by the dictum that the fair and proper administration of justice requires that justice not only be done, but that it also be seen to be done. In my view, all courts of law must be guided by this principle, whether or not their statutes or other constitutive documents expressly require them to do so. That power and obligation is implicit in the very concept of a court of law charged with the fair and impartial administration of justice. To read them out of the reach of Article 17, paragraph 2, is neither legally justified nor is it wise judicial policy.⁹

2. Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970): Advisory Opinion of 21 June 1971¹⁰ and Orders No. 1¹¹, No. 2¹² and No. 3¹³ of 26 January 1971

10. This case concerned a request by the Security Council for an Advisory Opinion on the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970). In the course of the proceedings, objections were raised by South Africa against participation in the proceedings of three Members of the Court. These objections were based on statements which the Judges in question had made in their former capacity as representatives of their Governments in United Nations organs dealing with matters concerning Namibia, or their participation in the same capacity in the work of those organs.

⁹ *Id.* at p. 9.

¹⁰ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16.

¹¹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Order No. 1 of 26 January 1971, I.C.J. Reports 1971, p. 3.

¹² Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Order No. 2 of 26 January 1971, I.C.J. Reports 1971, p. 6.

¹³ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Order No. 3 of 26 January 1971, I.C.J. Reports 1971, p. 9.



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11. The Court came to the conclusion that none of the three cases called for the application of Article 17, paragraph 2, of its Statute.¹⁴ In doing so the Court stated that,

In making Order No. 2 of 26 January 1971, the Court found no reason to depart in the present advisory proceedings from the decision adopted by the Court in the Order of 18 March 1965 in the South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa) after hearing the same contentions as have now been advanced by the Government of South Africa. In deciding the other two objections, the Court took into consideration that the activities in United Nations organs of the Members concerned, prior to their election to the Court, and which are referred to in the written statement of the Government of South Africa, do not furnish grounds for treating these objections differently from those raised in the application to which the Court decided not to accede in 1965, a decision confirmed by its Order No. 2 of 26 January 1971. With reference to Order No. 3 of the same date, the Court also took into consideration a circumstance to which its attention was drawn, although it was not mentioned in the written statement of the Government of South Africa, namely the participation of the Member concerned, prior to his election to the Court, in the formulation of Security Council resolution 246 (1968), which concerned the trial at Pretoria of thirty-seven South West Africans and which in its preamble took into account General Assembly resolution 2145 (XXI). The Court considered that this participation of the Member concerned in the work of the United Nations, as a representative of his Government, did not justify a conclusion different from that already reached with regard to the objections raised by the Government of South Africa. Account must also be taken in this respect of precedents established by the present Court and the Permanent Court wherein judges sat in certain cases even though they had taken part in the formulation of texts the Court was asked to interpret. (P.C.I.J., Series A, No. 1, p. 11 ; P.C.I.J., Series C, No. 84, p. 535; P.C.I.J., Series E, No. 4, p. 270; P.C.I.J., Series E, No. 8, p. 251 .) After deliberation, the Court decided, by three Orders dated 26 January 1971, and made public on that date, not to accede to the objections which had been raised.¹⁵

3. South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa):
Judgment of 18 July 1966¹⁶ and Order of 18 March 1965¹⁷

12. This case concerned a dispute concerning alleged contraventions of a League of Nations Mandate for South West Africa. In the course of the proceedings, South Africa made an application to the Court relating to the composition of the Court. The Court heard the application in a closed hearing and there is no official record of the details of the application. However, it was widely believed to concern the position taken by a Member when he represented his Government at United Nations General Assembly meeting that discussed the matter of South West Africa.

13. The Court decided not to accede to the application.¹⁸

¹⁴ I.C.J., *supra* note 10 (Orders No. 1 and No. 2 were decided unanimously, Order No. 3 was decided by 10 votes to 4).

¹⁵ *Id.* at p. 6.

¹⁶ South West Africa Cases (*Ethiopia v. South Africa; Liberia v. South Africa*), Second Phase, Judgment of 18 July 1966, I.C.J. Reports, p. 6.

¹⁷ South West Africa Cases (*Ethiopia v. South Africa; Liberia v. South Africa*), Order of 18 March 1965, I.C.J. Reports, p. 3.

¹⁸ *Id.* (Order of 18 March 1965 was decided by a majority of 8 votes to 6).



III. Special International Tribunals

A. Relevant provisions of the International Criminal Tribunal for Former Yugoslavia (ICTY)

14. The relevant provisions of the ICTY Statute and its Rules of Procedure are set out below:

Article 13 of the Statute of the ICTY: Qualifications of Judges

*The permanent and ad litem judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.*¹⁹

Rules of Procedure: Rule 15 Disqualification of Judges

*(A) 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.*²⁰

15. The International Criminal Tribunal for Rwanda has similar provisions, while the Special Court for Sierra Leone Rules of Procedure provide for a slightly different formulation.²¹

B. Review of relevant case law

16. Numerous cases concerning the impartiality of judges have been brought to the special international tribunals and courts, namely the ICTY;²² the International Criminal Tribunal for Rwanda²³ and the Special Court for Sierra Leone.²⁴

17. The ICTY has considered the requirement of impartiality of judges set out in Article 13 of its Statute in the case of *Prosecutor v. Anto Furundzija*.²⁵ This case involved an appeal against the finding that the Appellant was an aider and abetter of outrages upon personal dignity, including rape, as a

¹⁹ Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (September 2009).

²⁰ Rules of Procedure and Evidence of the International Criminal Tribunal for Former Yugoslavia (December 2009).

²¹ Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (March 2008); Rules of Procedure and Evidence of the Special Court for Sierra Leone (May 2008) (Part III, § 1 states 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.”).

²² *Prosecutor v. Celebici*, IT-96-21-A, Appeal Judgment, 20 February 2001, para. 682; *Prosecutor v. Anto Furundzija*, IT-95-17/1-A, Appeals Judgment, 21 July 2000, para. 164.

²³ *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Trial Judges, 17 May 2004, p. 9.

²⁴ *Prosecutor v. Sesay*, SCSL-04-15-T, Decision on Sesay, Kallon and Gbao Appeal Against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the Ruf Case, 13 March 2004, para. 15; *Prosecutor v. Norman*, SCSL-2004-14, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004.

²⁵ *Anto Furundzija*, *supra* note 22.



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violation of the laws or customs of war. The Appellant appealed on four grounds, including the ground that the Presiding Judge should have been disqualified pursuant to Rule 15 of the Rules. This ground was based on the Presiding Judge's former involvement with the United Nations Commission on the Status of Women (UNCSW) and its implications on the Appellant's trial.

18. The ICTY reviewed international and national jurisprudence on impartiality of judges, in particular looking at the case law of the ECtHR with respect to Article 6.1 of the ECHR. The ICTY noted that the interpretation of the requirement of impartiality by national legal systems, in particular the application of the appearance of bias test, generally corresponds to the interpretation under the ECHR. However, a variation in the rule in common law systems was noted, in particular regarding the test of the "*reasonable man*."

19. Following that review, the ICTY found 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*".²⁶ On that basis the ICTY considered that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute of the Court and its Rules of Procedure and Evidence:

- (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 from the case is automatic; or*
 - (ii) *the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.*²⁷

20. In this last branch, namely b(ii), the ICTY adopted the approach that the "*reasonable person must be an informed person with knowledge of all relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.*"²⁸

21. In applying these principles to the case before it, the ICTY distinguished the situation in the Pinochet case, in that the Presiding Judge's membership was not contemporaneous with her period as tenure of judge as well as her more tenuous link with the UNCSW.²⁹ The ICTY also considered the allegation in light of the provisions of Article 13 of its Statute and stated that a Judge should not be disqualified because of qualifications he or she possesses which, by their very nature, play an integral role in satisfying the eligibility requirements for becoming a member of the court.

22. The ICTY upheld the presumption of impartiality which attaches to a judge. The appellant must adduce sufficient evidence and that there is a high threshold to rebut the presumption of impartiality.

23. The Court also rebutted the Appellant's allegation that the Presiding Judge acted in her personal capacity during her time with the UNCSW. The ICTY held the view that the Presiding Judge acted as a

²⁶ *Id.* at para. 189.

²⁷ *Id.*

²⁸ *Id.* at para. 190.

²⁹ *Id.*; *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte* (No. 2) [1999] 1 A.C. 119.



representative of her country and therefore served in an official capacity. As a representative of her country, she spoke on behalf of her country and the views presented before the UNSCW should be treated as the views of her government.

24. In applying the principles identified, to the circumstances of the case, the ICTY found that there was no substance in the appellant's allegations on this ground. The approach set out in the *Furundzija* case has been applied in a number of the subsequent cases.³⁰

IV. International Criminal Court

A. Relevant provisions of the International Criminal Court (ICC)

25. The relevant provisions of the ICC Statute and its Rules of Procedure and evidence are set out below:

Article 41: Excusing and disqualification of judges

- (a) *The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.*
- (b) *A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.*
- (c) *The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.*
- (d) *Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.³¹*

Rule 34: Disqualification of a judge, the Prosecutor or a Deputy Prosecutor

- (a) *In addition to the grounds set out in article 41, paragraph 2, and article 42, paragraph 7, the grounds for disqualification of a judge, the Prosecutor or a Deputy Prosecutor shall include, inter alia, the following:*
 - (i) *Personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties;*
 - (ii) *Involvement, in his or her private capacity, in any legal proceedings initiated prior to his or her involvement in the case, or initiated by him or her subsequently, in which the person being investigated or prosecuted was or is an opposing party;*

³⁰ *Karemera et al.*, *supra* note 23; *Prosecutor v. Delalic et al.*, IT-96-21-A, Judgment of 20 February 2001; *Prosecutor v. Brdjanin*, IT-99-36-R 77, Decision on Application for Disqualification of 11 June 2004; *Sesay*, *supra* note 24; *Norman*, *supra* note 24.

³¹ Rome Statute of the International Criminal Court, A/CONF.183/9 (17 July 1998).



- (iii) *Performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned;*
- (iv) *Expression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned.*
- (b) *Subject to the provisions set out in article 41, paragraph 2, and article 42, paragraph 8, a request for disqualification shall be made in writing as soon as there is knowledge of the grounds on which it is based. The request shall state the grounds and attach any relevant evidence, and shall be transmitted to the person concerned, who shall be entitled to present written submissions.*
- (c) *Any question relating to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by a majority of the judges of the Appeals Chamber.*³²

B. Review of Relevant Case Law

26. The ICC does not appear to have interpreted Article 41 to date.

V. European Court of Human Rights

A. Relevant provisions of the European Convention on Human Rights

27. Article 6.1 of that Convention states that:

*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*³³

B. Review of relevant case law

28. In contrast to the previous sections, the relevant case law of the ECtHR is focused on the interpretation of Article 6 of the European Convention on Human Rights (ECHR) rather than the application of its own Statute and Rules.

29. The ECtHR case law has considered the requirements of impartiality and independence set out in Article 6 of ECHR numerous times. The majority of cases have concerned the involvement of the same person in different functions in criminal proceedings. In its jurisprudence, the ECtHR has given particular weight to the need for an objective approach and the importance of appearance, i.e. that “justice must not only be done: it must also be seen to be done.”³⁴

³² *Id.*

³³ Council of Europe - Convention for the Protection of Human Rights and Fundamental Freedoms (September 2003).

³⁴ *De Cubber v. Belgium*, Judgment of 26 October 1984, Eur. Ct. H.R., Series A, No. 86, para. 26.



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30. The ECtHR considers the interpretation of an “*impartial tribunal*” in *Piersack v. Belgium*, which concerned the President of a national court in a criminal matter who had previously served as a senior deputy to the procureur du Roi during the earlier stages of the matter.³⁵ The ECtHR considered that “*A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.*”³⁶ The ECtHR went on to say that,

*[I]t is not possible to confine oneself to a purely subjective test. In this area, even appearances may be of a certain importance (see the Delcourt judgment of 17 January 1970, Series A no. 11, p. 17, § 31). As the Belgian Court of Cassation observed in its judgment of 21 February 1979 . . . any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts must inspire in the public in a democratic society.*³⁷

31. In this case, given the President’s former role as a senior deputy to the procureur du Roi, who as a superior of the deputies in charge of the file, was entitled to revise written submissions, discuss the approach to the case and advise on points of law, the ECtHR concluded that he had taken a role in the proceedings. The ECtHR did not consider it necessary to endeavour to gauge the precise extent of the role played by the President. The ECtHR stated that “*it is sufficient to find that the impartiality of the ‘tribunal’ which had to determine the merits (in the French text: ‘bien-fondé’) of the charge was capable of appearing open to doubt.*”³⁸

32. The judgment in the *Piersack* case has been applied in a number of cases³⁹. The ECtHR in *Hauschildt v. Denmark*, considered that whether the fear of impartiality can be held to be objectively justified. The ECtHR stated that,

[T]he existence of impartiality for the purposes of Article 6 para. 1 (art. 6-1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect . . . Under the objective test, it must be determined whether, quite apart from the judge’s personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. 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. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see, mutatis mutandis, the De Cubber judgment previously cited, Series A no. 86, p. 14, para. 26). 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

³⁵ *Piersack v. Belgium*, Judgment of 1 October 1982, Eur. Ct. H.R., Series A, No. 53.

³⁶ *Id.* at para. 30(a).

³⁷ *Id.* at para. 31.

³⁸ *Id.*

³⁹ *De Cubber*, *supra* note 34; *Hauschildt v. Denmark*, Judgment of 24 May 1989, Eur. Ct. H.R., Series A, No. 154; *Bulut v. Austria*, Judgment of 23 January 1996, Eur. Ct. H.R., Series A, No. 5; *Castillo Algar v. Spain*, Judgment of 28 October 1998, Eur. Ct. H.R., Series A, No. 95; *Incal v. Turkey*, Judgment of 9 June 1998 Eur. Ct. H.R., Series A, No. 78.



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(see the *Piersack* judgment of 1 October 1982, Series A no. 53, p. 16, para. 31). What is decisive is whether this fear can be held objectively justified.⁴⁰

33. Two further cases, namely *Procola v. Luxembourg*⁴¹ and *Kleyn and Others v. the Netherlands*⁴² concerned the operation of the Conseil d'Etat in Luxembourg and the Council of State in the Netherlands respectively. In the *Procola* case, the applicant complained that the Judicial Committee of the Conseil d'Etat was not independent and impartial in accordance with Article 6.1 in that 4 of the 5 members sitting on the Judicial Committee when it ruled on the *Procola* issue had previously sat on the advisory panel of the Conseil d'Etat which had given its opinion on the draft regulation pertaining to the matter. That is, the members had been acting in an advisory and judicial function with respect to the same matter. The ECtHR considered that “*in the context of an institution such as Luxembourg's Conseil d'Etat the mere fact that certain persons successively performed these two types of functions in respect of the same decisions is capable of casting doubt on the institution's structural impartiality*”.⁴³ The ECtHR held that there had been a breach of Article 6.1 in this case.

34. The case of *Kleyn and Others v. the Netherlands* concerned the Administrative Jurisdiction Division of the Netherlands Council of State and the combination of different functions of the Division. In applying the *Procola* case, the ECtHR considered that “*the consecutive exercise of advisory and judicial functions within one body may, in certain circumstances, raise an issue under Article 6.1 of the Convention as regards the impartiality of the body seen from the objective viewpoint*.”⁴⁴ On the facts of this case, the ECtHR found no violation of Article 6.1.

35. The ECtHR has also held that a Judge must be presumed to be impartial until there is proof to the contrary.⁴⁵

VI. The Human Rights Committee

A. Relevant provisions of the International Covenant on Civil and Political Rights

36. Article 14.1 of the International Covenant states that:

*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*⁴⁶

⁴⁰ *Hauschildt*, *supra* note 39, at paras. 46 to 48.

⁴¹ *Procola v. Luxembourg*, Judgment of 28 September 1995, Eur. Ct. H.R., Series A. No. 326.

⁴² *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, ECHR 2003-VI.

⁴³ *Id.* (Dissenting opinion of Judge Thomassen).

⁴⁴ *Id.* at para. 196.

⁴⁵ *Le Compte, Van Leuven and de Meyere v. Belgium*, Judgment of 23 June 1981, Eur. Ct. H.R., Series A, No. 43, para. 58.

⁴⁶ Human Rights Committee International Covenant on Civil and Political Rights, Part III, Article 14(1) (March 1976).

**B. Review of relevant case law**

37. The Human Rights Committee has examined Article 14.1 in the case of *Karttunen v. Finland*.⁴⁷ In this case, the Committee considered that “[i]mpartiality’ of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.”⁴⁸ The Human Rights Committee has also considered the application of Article 14.1 to military and special tribunals, but the issues in front of the Committee do not appear to be directly on point.⁴⁹

VII. The Inter-American Court of Human Rights**A. Relevant provisions of the American Convention on Human Rights**

38. Article 8.1 of that Convention states that:

*Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.*⁵⁰

B. Review of relevant case law

39. In case of *Barbera et al. v. Venezuela*, the application was related to the removal from office of former judges of the First Court of Administrative Disputes, on the grounds they had committed an inexcusable judicial error.⁵¹ The Inter-American Court considered that “*impartiality demands that the judge acting in a specific dispute approach the facts of the case subjectively free of all prejudice and also offer sufficient objective guarantees to exclude any doubt the parties or the community might entertain as to his or her lack of impartiality.*”⁵² The Inter-American Court also recalled the subject and objective approach as set out by the ECtHR.

40. In addition the Inter-American Court of Human Rights has considered this provision in relation to military or special tribunals. In *Palamara-Iribarne v Chile*, the Inter-American Court held that,

*The impartiality of a court implies that its members have no direct interest in, a pre-established viewpoint on, or a preference for one of the parties, and that they are not involved in the controversy. The judge or court must withdraw from a case being heard thereby where there is some reason or doubt which is in detriment to the integrity of the court as an impartial body. For the sake of safeguarding the administration of justice, it must be ensured that the judge is free from any prejudices and that no doubts whatsoever may be cast on the exercise of jurisdictional functions.*⁵³

⁴⁷ Communication No. 387/1989, *Karttunen v. Finland* (views adopted on 23 October 1992, forty-sixth session), UN doc. G AOR, A/48/40 (Part II), p. 120.

⁴⁸ *Id.*

⁴⁹ Communication No. 577/1994, *De Polay v. Peru* (Views adopted on 6 November 1997), UN doc G AOR, A/53/40 (vol II).

⁵⁰ American Convention on Human Rights, Article 8(1).

⁵¹ *Barbera et al. v. Venezuela*, Judgment of August 5, 2008, Inter-Am. Ct. H.R. (ser. C) No. 182, at para. 56.

⁵² *Id.*

⁵³ *Palamara-Iribarne v. Chile*, Judgment of November 22, 2005, Inter-Am. Ct. H.R. (ser. C) No. 135, at para. 146.



41. Similarly, in the case *Ramirez v. Venezuela*, the Inter-American Court noted that,
- [T]his Court has declared previously that judges must separate themselves from a cause brought to their attention when doubt or other motives goes against the integrity of the tribunal as an impartial body. In order to safeguard the administration of justice, it must be assured that a judge is free from any prejudice and there is no fear at all raising any doubts about the exercise of his jurisdictional functions.*⁵⁴
42. Given that one of the magistrates who heard the appeal filed by the applicant was the person who ordered the investigation in his capacity as Military Attorney, the Inter-American Court considered that serious doubts about his impartiality were raised. As such, the Inter American Court considered there had been a violation of Article 8.1.

VIII. The African Commission on Human and Peoples' Rights

A. Relevant provisions of the African Charter on Human and Peoples' Rights

43. Article 7.1 of the African Charter states that:
- Every individual shall have the right to have his cause heard. This comprises:*
- (a) *The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;*
 - (b) *The right to be presumed innocent until proved guilty by a competent court or tribunal;*
 - (c) *The right to defence, including the right to be defended by counsel of his choice;*
 - (d) *The right to be tried within a reasonable time by an impartial court or tribunal.*⁵⁵

B. Review of relevant case law

44. The African Commission on Human and Peoples' Rights has also considered the issue of impartiality with respect to special tribunals. The case of the *Constitutional Rights Project v. Nigeria, African Commission on Human and Peoples' Rights*⁵⁶ concerned special tribunals set up in Nigeria, composed of civilian as well as military and police personnel. As such, the tribunal was largely composed of members belonging to the executive branch, the same branch that had passed the legislation under which the applicants were tried. The African Commission stated that: "*Article 7.1(d) of the African Charters requires the court or tribunal to be impartial. Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality. It thus violates Article 7.1(d).*"⁵⁷

⁵⁴ *Ramirez v. Venezuela*, Judgment of November 20, 2005, Inter-Am. Ct. H.R., at para. 118.

⁵⁵ African Charter on Human and Peoples' Rights, Article 7(1) (June 1981).

⁵⁶ *The Constitutional Rights Project v. Nigeria, African Commission on Human and Peoples' Rights*, Comm. No. 87/93 (1995).

⁵⁷ *Id.* at para. 14.