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Written statement* submitted by United Nations Watch, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[18 August 2022]

* Issued as received, in the language of submission only.



Impartiality Requirement for United Nations Fact-Finding Missions

United Nations Watch wishes to remind the Human Rights Council of the impartiality requirement for international fact-finders. In 2021, the UNHRC held five Special Sessions: on coups in Myanmar, Afghanistan and the Sudan, the year-long civil war in the Tigray region of Ethiopia and the 11-day Hamas-Israel war. Only the special session on Israel resulted in the creation of an “independent, international Commission of Inquiry.”

International scholars like the late NYU Professor Thomas M. Franck and K.T. Samson, former human rights coordinator for the ILO, have affirmed the impartiality requirement for international fact-finders.¹ McGill University law professor Frédéric Mégret criticized the practice of appointing fact-finders whose impartiality is undermined based on their past public statements, and he called on such fact-finders to recuse themselves.²

The UN Declaration on Fact-Finding lists impartiality twice as a requirement for fact-finders.³ Article 3 provides: “Fact-finding should be comprehensive, objective, impartial and timely.” Article 25 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.”

Moreover, the Office of the High Commissioner, as Secretariat for the UNHRC, published a Guidance and Practice on Commissions of Inquiry in 2015 (“OHCHR Guide”) which refers to the UN Fact-Finding Declaration as one of the international legal and methodological standards and instruments for fact-finding missions.⁴ In the section on “Qualifications,” the OHCHR Guide expressly states that Commission of Inquiry (COI) members should “have a proven record of independence and impartiality” and that “prior public statements” could impact on their “independence and impartiality,” or “create a perception of bias.”⁵

The gravity of this requirement for “independence and impartiality” is underscored by further rules obligating candidates to disclose “any information that may lead to questions” about their “independence, impartiality and integrity,” and obligating COI members to sign an undertaking to act independently and impartially throughout their tenure.⁶

Furthermore, both the rules and precedents of international war crimes tribunals are a relevant source of international law. While they relate to judicial proceedings, their principles are analogous to the due process principles of the quasi-judicial process of international fact-finding.

Court rules for these 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.”⁷ The parallel Rule 15(A) of the International Criminal Tribunal for Rwanda contains a similar provision.⁸ This has been interpreted to permit any allegation of bias to be raised as a basis for disqualification.⁹ Rule 15(B) of the Special Court for Sierra Leone provides for disqualification of judges on grounds of impartiality.¹⁰

The rules of the ICC similarly provide for disqualification of judges on grounds of impartiality. Article 41(2) of the ICC’s Rome Statute expressly states that “a judge shall not participate in any case in which his or her impartiality might reasonably be questioned on any ground.”¹¹ Rule 34(d) of the ICC Rules of Procedure further provides that grounds for disqualification of a judge include “expression of opinions” that “objectively, could adversely affect the [judge’s] required impartiality.”¹²

The requirement of impartiality is violated not only where a judge is actually biased, but also where there is even an appearance of bias. 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.”¹³

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.”¹⁴ An appearance of bias exists where “the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.”¹⁵

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 for comments in a 2002 book about the events in Sierra Leone.¹⁶ 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 himself, his fellow judges ordered him to do so, finding there was “no doubt” that “a reasonable man will apprehend bias, let alone an accused person.”¹⁷

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*.¹⁸ For example, United States of America federal law provides that “Any justice, judge, or magistrate judge of the United States of America shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”¹⁹ The United States of America Supreme Court has ruled that what matters “is not the reality of bias or prejudice but its appearance,” and that a judge should recuse 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, 548 (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).

Ultimately, as the United States of America courts 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).

Accordingly, when a COI is mandated to investigate a conflict, and it appoints a commissioner who has made numerous inflammatory and highly partisan statements against one of the countries in the conflict, declared that country guilty in the very case and controversy that the COI is mandated to examine, and lobbied governments to boycott that country, then “to give the person in question the benefit of the doubt if s/he claims to be nonetheless impartial is to ask too much of the public.”²⁰

Similarly, when another commissioner in the same COI is condemned for racism against one of the sides that he is investigating—condemned by 20 governments, the Secretary General, President of the Human Rights Council, and the Special Rapporteur on Freedom of Religion—then that member fails the impartiality test and compromises the integrity of the COI.

1 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 pp. 313, 344; 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.

2 Frédéric Mégret, *International Judges and Experts’ Impartiality and the Problem of Past Declarations*, 10 *Law & Prac. Int’l Cts. & Tribunals* 31 (2011) 31-66, at p. 64.

3 Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, U.N. Doc. A/RES/46/59, Annex (1991), <https://undocs.org/en/A/RES/46/59>.

4 Commissions of Inquiry and Fact-Finding Missions on International Human Rights Law: Guidance and Practice, p. 106, OHCHR (2015), https://www.ohchr.org/documents/publications/coi_guidance_and_practice.pdf.

5 *Id.* at p. 19.

6 *Id.* at pp. 21-22.

- 7 Rules of Procedure and Evidence, Special Court for Sierra Leone (last visited Nov. 24, 2021), <http://hrlibrary.umn.edu/instrree/SCSL/Rules-of-proced-SCSL.pdf>.
- 8 Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, (last visited Nov. 24, 2021), <https://unictr.irmct.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf>.
- 9 Prosecutor v. Karemera et. al., Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion For disqualification of Judges Byron, Kam, and Joensen (Bureau) (March 7, 2008), http://www.worldcourts.com/icttr/eng/decisions/2008.03.07_Prosecutor_v_Karemera.htm.
- 10 Rules of Procedure and Evidence, Special Court for Sierra Leone (last visited Nov. 24, 2021), <http://hrlibrary.umn.edu/instrree/SCSL/Rules-of-proced-SCSL.pdf>.
- 11 Rome Statute, Article 41(2), <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.
- 12 ICC Rules of Procedure, Rule 34(d), <https://www.icc-cpi.int/resource-library/Documents/RulesProcedureEvidenceEng.pdf>.
- 13 Prosecutor v. Furundzija (Appeal Judgement), IT-95-17/1-A, International Criminal Tribunal for the former Yugoslavia, 179 (July 21, 2000), <https://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf>.
- 14 Id. at 189.
- 15 Id. at 189.
- 16 Prosecutor v. Sesay, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 16 (Sierra Leone Appeals Chamber, March 13, 2004), <https://sierralii.org/sl/judgment/special-court-sierra-leone/2004/1>.
- 17 Id. at 15.
- 18 See Furundzija, supra note 13 at 183-188.
- 19 Disqualification of justice, judge, or magistrate judge, 28 U.S.C. 455(a).
- 20 International Judges and Experts' Impartiality and the Problem of Past Declarations, supra note 2 at p. 64.