



# **The Independence and Impartiality of the Court under the ICCPR and the ECHR**

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## **Executive summary**

The thesis constitutes a research study on the concept of “independence and impartiality of the court established by law”, that is one of the fundamental rights of every individual guaranteed under Article 6 paragraph 1 of the European Convention of Human Rights and article 14 paragraph 1 of the International Covenant of Civil and Political Rights.

The thesis primarily deals with the issue whether there are consistencies or inconsistencies within the interpretations of the European Court of Human Rights and the Human Rights Committee while examining the cases regarding different aspect of the concept of “independence and impartiality of the tribunal established by law”. In particular, what is the “tribunal” for the purposes of the ECHR and for the purposes of the ICCPR; whether there is different understandings of the concept of “established by law”; or whether the notions of “independence” and “impartiality” are correspondingly or differently interpreted by the Court and the Committee. In this regard the case law of the Court and the Committee is discussed in comparative analyses.

The thesis also focuses on the issue whether the High Contracting Parties endeavour to make their domestic law in conformity with the findings and interpretations of the Court or the Committee in cases where the violations have been found due to the fact that the domestic tribunal in concrete case did not meet the requirements of “independent and impartial tribunal established by law”

for the purpose of the ECHR and the ICCPR, especially when there is a problem of systemic nature.

## **Introduction**

My thesis deals with the one of the most important elements of the right to fair trial – “independence and impartiality of the court” as it is guaranteed under the 1950 European Convention on Human Rights (hereinafter the ECHR) and the 1966 Covenant on Civil and Political Rights (hereinafter the ICCPR).

It should not be considered to be exaggerated that the thesis topic concerns the issue that is one of the most important aspects of the right to a fair trial, guaranteed under Article 6 paragraph 1 of the ECHR and Article 14 paragraph 1 of the ICCPR. Analyses of the issue is interesting by virtue of the fact that despite nobody contests that the independent and impartial judiciary is one of the main characteristics of every democratic society and at the same time inherent aspect of the doctrine of separation of powers, it is still at stake in most of the countries of the world.

The issue of my research will be discussed in comparative analyses of the case law of the two international human rights mechanisms – the ECHR and the ICCPR; the main similarities as well as differences, if any, in practices of the European Court of Human Rights (hereinafter the Court) and the Human Rights Committee (hereinafter the Committee) will be discussed. In case of any

inconsistency with the case law of the Court and the Committee, as well as within the case law of one of the human rights protection bodies itself, the study will focus to show what might be the motivation of those international mechanisms to reach different outcomes for the cases of a similar nature.

Comparative analysis is also useful to show the diversities among the judicial systems of various countries along the principle of the independence and impartiality. In this respect it becomes more interesting to examine the case-law of the Committee as the number of the ICCPR Member States is 160<sup>1</sup> and consequently covers many countries of Asia, Africa and South America, while the ECHR has only 46 High Contracting Parties<sup>2</sup> with more or less similar judicial system.

During my research, attention will be also paid to the changes in the domestic legal systems of Member States (organizational aspect, functions, hierarchy, composition of courts, essential guarantees insuring independence and impartiality), after the violation of the requirements of “independent and impartial tribunal established by law” are found by the Committee or the Court in concrete cases.

My research principally will be based on the case law of the Court and the Committee, also on concluding observations of the Committee and resolutions of the Committee of Minister of the Council of Europe concerning execution of

<sup>1</sup> See at <http://www.ohchr.org/english/countries/ratification/4.htm>

<sup>2</sup> See at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=7&DF=11/26/2006&CL=ENG>

judgments of the Court. In addition, references will be made to the academic articles by human rights scholars concerning the various aspects of independent and impartial tribunals established by law, however, restricted to the system of the ECHR and the ICCPR.

As for the structure of my thesis it is divided into five chapters, and several subchapters, consequently.

The first chapter gives a general idea about the right of everyone to have his or her criminal charges or a suit at law examined by an independent and impartial tribunal established by law, as one of the aspects of wider concept of right to a fair trial; while it is asserted that the independence and impartiality of the court is of a paramount importance, this chapter in details deals with the issue why it is essential to preserve this principle in every situation according to the interpretation of the Court and the Committee.

The second chapter examines in details what is the interpretation of the term “tribunal” according to the case law of the Court and the Committee for the purposes of the ECHR and the ICCPR. The chapter analyses why it is essential for the Court and the Committee to introduce autonomous meaning of the term “tribunal” and what is the range of domestic courts or bodies covered by this term for the purposes of these two international instruments. In the present chapter it will be also discussed whether the adequate changes have followed in national legislations of the respondent states when the Court or the Committee established that the concrete domestic tribunal has not been in conformity with the

requirements of “tribunal” as established by the case law of one of these international bodies. Comparative analyses of the case law of the Court and the Committee will be presented, whether both international bodies establish the same requirements for a domestic body in order to be considered as a tribunal for the purposes of Article 6.1 of the ECHR and article 14.1 of the ICCPR or not.

The third chapter will deal with the concept of “established by law” (“independent and impartial tribunal established by law”) which is one of the requirements of an independent and impartial tribunal under Article 6 paragraph 1 of the ECHR as well as under Article 14.1 of the ICCPR. It will be analysed whether the Court and the Committee has the same understanding of the concept, and what are the differences if any. The present chapter will contain one subchapter dealing with the concept of “competent tribunal” that is recognised under article 14 paragraph 1 of the ICCPR, however, not stipulated in Article 6 paragraph 1 of the ECHR. After examining what is meant by the Committee under the notion of “competent tribunal” it will be compared with the case law of the Court in order to determine whether the same concept is implied in Article 6 paragraph 1 of the ECHR and respectively guaranteed with the interpretations given by the Court in its case law.

The forth Chapter deals with the notion of “independent tribunal” as it is understood under the case law of the Court and the Committee. On the first place importance of the notion will be discussed in the light of the doctrine of separation of powers. It will be analysed from which of the branches of the government the main threats can be inflicted to the independence of judiciary. It

will be also examined whether the Court and the Committee tries to cure the violations caused as a result of systemic problems existing in a country and related to the general principles of separation of powers. This examination will be done in comparative analyses of the case law of the Court and the Committee. Apart from that the chapter will consist of four subchapters, dealing with four aspects that are established by the Court and the Committee to be essential for determining whether the tribunal can be considered as independent. In particular, manner of appointment of members of a tribunal, duration of the term of office and dismissal of judges, guarantees against outside pressure and appearance of independence will be discussed. Comparative analyses of the case law of the Court and the Committee will be given in this respect a well.

The last, fifth chapter deals with the other important aspect of the court – impartiality. On the first place it will be examined how the Court and the Committee interprets the notion of “impartiality” of the Court. Subsequently, the chapter is divided into two subchapters – subjective and objective aspects of impartiality. It will be analysed whether these aspects are similarly understood by the Court and the Committee and what are the similarities and differences within the case law of the Court and the Committee in this respect.

The main idea and the outcome of the thesis will be to show similarities and differences between the case law of the Court and the Committee, while examining the issue of independence and impartiality of the courts; also whether the Court or the Committee tries to “cure” the systemic problems existing in judicial systems of Members States causing the violation of the requirement of

independence and impartiality of the courts. Basing on the concluding observations of the Committee and resolution of the Committee of Minister on execution of judgments of the Court it will be shown whether the finding of a violation of independence and impartiality of the court, having of a systemic character, leads to the changes in the judicial system of the respondent state.

## **I. Importance of preserving the independence and impartiality of the Court**

Article 14 of the International Covenant on Civil and Political Rights (hereinafter the ICCPR) as well as Article 6 of the European Convention for the Protection of the Human Rights and Fundamental Freedoms (hereinafter the ECHR) guarantees the right to a fair trial, that itself consists of various aspects determined to embody the very essence of the right concerned. One of those aspects is the right of everyone, in the determination of his/her civil rights and

obligations or criminal charges against him or her, to have a hearing by a competent, independent and impartial tribunal established by law (Article 14.1. of the ICCPR and Article 6.1. of the ECHR).

The right to a fair trial is not an absolute right.<sup>3</sup> Generally, the notion of non-absolute rights implies that some of its features can be restricted because of the exigencies of an emergency situation or waived when a person, whose civil rights and freedoms are under consideration or against whom a criminal charge has been brought, so decides. In case of the right to a fair trial this definition is particularly true for the so called “fairness rights” guaranteed under Article 6.3 of the ECHR and Article 14.3 of the ICCPR - the rights that on the first place serve the interests of the defendant in criminal cases.

However, it has been also asserted that despite the right to a fair trial is not an absolute right and hence, derogation from it is in theory possible, it must be extremely difficult to justify.<sup>4</sup> It is also claimed that this is so due to the fact that “a “fair trial” is both - a right available to the accused and itself a general public interest.”<sup>5</sup> That is particularly true for the chain of rights guaranteed under Articles 6.1 and 14.1 of the ECHR and ICCPR respectively, the rights which have some additional functions except the aim of protecting the rights and interests of the defendants in criminal cases, in particular, to endorse the trust of the whole

<sup>3</sup> Neither the Article 15 (derogation in time of emergency) of the ECHR nor the Article 4 (derogation in time of public emergency) of the ICCPR states the right to a fair trial as a non-derogable right.

<sup>4</sup> Leach Philip, “Derogation and Reservation” in *Taking a case to the European Court of Human Rights*, ed. John Wadham, Second Edition, 389, (Oxford University Press, 2005).

<sup>5</sup> See case of *Engel and Others v. the Netherlands*, Judgment of 8 June 1976, Application nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, para 58; see also case of *Timurtas v. Turkey*, judgment of 13 June 2000, Application no. 23531/94, para 103.

society in proper administration of justice. That acquires of especially high significance with regard to one of the aspects of the right to a fair trial – independence and impartiality of the court.

The right to an independent and impartial tribunal established by law is one of the features of the wider concept of the right to a fair trial. Despite neither Article 6 nor Article 14 of the ECHR and the ICCPR respectively, stipulates this right to be non-derogable, it can be claimed, taking into account the respective case law of both international human rights protection mechanisms and views of the numerous human rights scholars, that the right to a independent and impartial tribunal established by law does not belong to the list of rights that can be restricted because of the emergency situation or waived even if so requested by a defendant during his criminal conviction or by a party to the civil case; that is so due to the significance the independent and impartial tribunal “inspires in the public” during the administration of justice. The European Court of Human Rights (hereinafter the Court) has held in one of its judgments: “a court whose lack of independence and impartiality has been established cannot in any circumstances guarantee a fair trial.”<sup>6</sup>

Independence and impartiality of the tribunals creates an institutional guarantee and is a prerequisite of the right to a fair trial; as it has been already stated, it serves not exclusively the interest of a person involved in the trial, but it is also within the interest of the whole community for the purpose of instigating the trust of proper administration of justice. In case of *Kostovski v. Netherlands* the Court

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<sup>6</sup> Case of *Hunki Gunes v. Turkey*, judgment of 19 June 2003, application No. 28490/95, para. 84.

held: “the right to a fair administration of justice holds so prominent a place in democratic society that it cannot be sacrificed to expediency”.<sup>7</sup> As one of the authors stated “although what counts as an independent and impartial tribunal may be open to interpretation, and although there may be some trade-offs between public interests and certain civil and administrative justice procedures, Article 6 provides no scope for diluting the impartiality or independence of tribunals in order to accommodate competing collective goals, e.g. costs and administrative convenience”.<sup>8</sup>

While neither under the ECHR nor under the ICCPR the right to a hearing by a competent independent and impartial tribunal established by law is an absolute right, the Court as well as the Human Rights Committee (hereinafter the Committee) has repeatedly implied in their case-law that no derogation from this right can be justified.

The Court has established that while the independence and impartiality of the court is questioned by a party involved in the court proceeding “[w]hat 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.”<sup>9</sup> The Court has further underlined the importance of the principle of impartiality of the courts in the *De Cubber judgment* – “a restrictive interpretation of Article 6 para. 1 - notably in regard to observance of the

<sup>7</sup> Case of *Kostovski v. the Netherlands*, Judgment of 20 November 1989, Application no. 11454/85, para 44.

<sup>8</sup> Greer Steven, “Constitutionalizing Adjudication under the European Convention on Human Rights,” Oxford Journal of Legal Studies, Autumn 2003, Oxford University Press, p. 11.

<sup>9</sup> Case of *De Cubber v. Belgium*, Judgment of 26 October 1984, application no. 9186/80, para. 26; See also case of *Piersack v. Belgium*, Judgment of 1 October 1982, application no. 8692/79, para 30.

fundamental principle of the impartiality of the courts - would not be consonant with the object and purpose of the provision, bearing in mind the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention.”<sup>10</sup>

In its judgment on case of *Pfeifer and Plankl v. Austria* the Court stated in more open terms than it had done in its previous judgments, for example, in the case of *Oberschlick v. Austria*,<sup>11</sup> that the right to an independent and impartial tribunal established by law is not a right that can be waived by a defendant and that its exercise cannot depend on the parties alone.<sup>12</sup> The Court recalled that “according to the Court’s case-law, the waiver of a right guaranteed by the Convention - insofar as it is permissible - must be established in an unequivocal manner (see, *mutatis mutandis*, the above mentioned *Oberschlick judgment*, p. 23, para. 51). Moreover, the Court agrees [...] that in the case of procedural rights a waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance”. Therefore, contrary to Austrian Governments assertion that the defendant waived his right to have his case examined by an impartial tribunal established by law, the Court found that *even supposing that the rights in question can be waived by a defendant* [emphasis added], the circumstances of the case revealed the violation of Article 6.1 of the Convention. Similarly, in case of *Hakansson and Sturesson v. Sweden* the Court reiterated:

<sup>10</sup> Above cited *De Cubber judgment*, para 30.

<sup>11</sup> Case of *Oberschlick v. Austria*, Judgment of 23 May 1991, Application no. 11662/85, para 51.

<sup>12</sup> Case of *Pfeifer and Plankl v. Austria*, Judgment of 25 February 1992, application no. 10802/84, paras 38-39.

“nothing suggests that the applicants had waived their right to a court, *even assuming that this would have been permissible*” [emphasis added].<sup>13</sup>

In case of *D. N. v. Switzerland*, which concerned the violation of Article 5.4 of the Convention rather than Article 6.1, the Court reiterated the principles enshrined in its case law with regard to the importance of independence and impartiality of the courts in the democratic society and held the following: “it is true that Article 5 § 4 of the Convention, which enshrines the right “to take proceedings [in] a court”, does not stipulate the requirement of that court’s independence and impartiality and thus differs from Article 6 § 1 which refers, *inter alia*, to an “independent and impartial tribunal”. However, the Court has held that independence is one of the most important constitutive elements of the notion of a “court”, as referred to in several Articles of the Convention. In the Court’s opinion, it would be inconceivable that Article 5 § 4 of the Convention [...] should not equally envisage, as a fundamental requisite, the impartiality of that court”.<sup>14</sup>

Importance of the principle of independence and impartiality of the tribunals is similarly assessed by the United Nations human rights bodies.

Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR stipulates that despite the right to a fair trial is not an absolute right and it can be restricted because of the exigencies of an emergency situation, some fundamental rights can not be restricted even in this situation. One of such elements of the right to fair trial is that any person charged with an offence shall be entitled to a

<sup>13</sup> Case of *Hakansson and Sturesson v. Sweden*, Judgment of 21 February 1990, application No. 11855/85, para. 60.

<sup>14</sup> Case of *D.N. v. Switzerland*; Judgment of 29 March 2001, Application no. 27154/95, para 42.

fair trial by a competent, independent and impartial court established by law. Respect for these fundamental rights is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation.<sup>15</sup>

The Committee in its General Comment No. 29 on state of emergency of 2001 implied that although the right to a fair trial is not a non-derogable right under Article 4 of the ICCPR, actually, it shall be considered to be such in order to insure the full protection of those non-derogable rights explicitly mentioned in the Covenant. The Committee mentioned that in order to achieve the absolute protection of right explicitly recognized as non-derogable under article 4, paragraph 2, of the ICCPR they must be secured by procedural guarantees, including, often, judicial guarantees. It is further stated: “the provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15”.<sup>16</sup> The Committee established that “the principles of legality and the rule of law require that fundamental requirements of

<sup>15</sup> United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4, 1984.

Available at <http://hei.unige.ch/~clapham/hrdoc/docs/siracusa.html>

<sup>16</sup> Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para 15, available at <http://www1.umn.edu/humanrts/gencomm/hrc29.html>

fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence”.<sup>17</sup>

One of the arguments given by the Committee for such an interpretation of the right to a fair trial was that the certain elements of the right to a fair trial are guaranteed under international humanitarian law during armed conflicts, thus no derogation from these elements can be justified in other state of emergency.<sup>18</sup> In the light of the above mentioned, also taking into account the relevant norms of Four Geneva Conventions (common Article 3, Article 84) it can be argued that the independence and impartiality of tribunals obviously is one of those elements of fair trial rights no derogation from which is enshrined in the Committee’s General Comment No. 29.

Furthermore, while underling the importance of every element of the right guaranteed under Article 14 of the ICCPR as a safeguard for proper administration of justice and a guarantee for securing the series of fundamental rights, the Committee has stated in its General Comment No. 32 that general reservation to Article 14 cannot be permissible, however, reservations to certain of its elements is acceptable.<sup>19</sup> This statement once again shows the significance of the right guaranteed under Article 14 of the ICCPR, especially the right to have the criminal charges or a suit at law heard by the independent and impartial tribunal, as it is the institutional guarantee for the proper administration of

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<sup>17</sup> *Ibid* para 16.

<sup>18</sup> *Ibid*.

<sup>19</sup> Human Rights Committee, General Comment No. 32, Article 14, Right to equality before Courts and Tribunals and to a fair trial, para 5.

available at

[http://sim.law.uu.nl/SIM/CaseLaw/Gen\\_Com.nsf/Treaty?OpenView&Start=1&Count=30&Expand=6#6](http://sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/Treaty?OpenView&Start=1&Count=30&Expand=6#6)

justice and a prerequisite for the protection of every other right enshrined in the Covenant.

The importance of protection of the right of every individual to be tried or to have his suit at law examined by an independent and impartial tribunal had long before recognised by the Committee in its case law. In its view on the communication of *Gonzalez Del Rio v. Peru* the Human Rights Committee recalled that “*the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception*” [emphasis added].<sup>20</sup>

Apart from the case law of the Court and the Committee the preamble of the Basic Principles on the Independence of the Judiciary states that the independence and impartiality of judges shall be enshrined in the system of justice of every Member State, the States should recognise and promote the independence of judiciary.<sup>21</sup> Furthermore, this principle should remain unchanged in any circumstances. As one of the scholars stated the “guarantees of the independence of the judiciary and of the legal profession shall remain intact. In particular, the use of emergency powers to remove judges or to alter the structure of the judicial branch or otherwise to restrict the independence of the judiciary shall be prohibited by the constitution.”<sup>22</sup>

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<sup>20</sup> Communication of *González del Río v. Peru*, communication no. 263/1987, View of 28 October 1992, para. 5.2.

<sup>21</sup> Basic Principles on the Independence of the Judiciary, The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. available at [http://www.unhchr.ch/html/menu3/b/h\\_comp50.htm](http://www.unhchr.ch/html/menu3/b/h_comp50.htm)

<sup>22</sup> Lillich B. Richard, “Current developments, the Paris minimum standards of human rights norms in a state of emergency,” *The American Journal of International Law*, Vol. 79, No. 4. October 1985, pp. 1072-1081, para 70.

To conclude, as it has been shown above, the importance of preserving the principle of independence and impartiality of tribunals has been recognised similarly by the universal (*i.e.* the UN Human Rights Committee) or regional (*i.e.* European Court of Human Rights) mechanisms of human rights protection even in situation of public emergency. Even though it is not the right explicitly belonging to the list of non-derogable rights, it has been interpreted by the Court as well as by the Committee in their case law of having such a status. Therefore, it can be found to be established that the principle of independence and impartiality of the tribunal is one of having a paramount importance for a democratic society, and this is so due to the fact that it serves not only the interest of a concrete individual involved in the case proceedings, but also the interests of society as a whole to inspire in it the trust of proper administration of justice.

## **II. Autonomous meaning of the notion of “tribunal” under the ECHR and the ICCPR**

Article 14.1 of the Covenant on Civil and Political Rights (hereinafter the ICCPR) provides *“everyone shall be entitled to [...] a competent, independent and*

*impartial tribunal established by law*". Respectively, under Article 6.1 of the European Convention on Human Rights (hereinafter the ECHR) "*everyone is entitled to a fair and public hearing [...] by an independent and impartial tribunal established by law*".

The term "tribunal", as it is provided in both above-mentioned articles, has its own autonomous meaning for the purposes of these two international documents. The Human Rights Committee has stated in its General Comment no. 32 of 27 July 2007 on Article 14 the following: "while [States Parties] should report on how these guarantees [in Article 14] are interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees".<sup>23</sup> As it will be shown below this statement refers to the meaning of "tribunal" as it is understood by the Committee.

Generally, as it can be understood from the texts of the above cited Articles, the "tribunal" covers all criminal and civil courts existing under every domestic system, however, due to the fact that the judicial system of member states of the ECHR and especially the ICCPR varies significantly, and it is admitted that the state is in a position to create a body neither called as a court nor tribunal, though possessing the powers similar to the courts, the Committee as well as the Court, establishing the autonomous meaning of the term ensure the common understanding of a body, which should be independent and impartial while examining every criminal charge or civil case in order to be considered as in

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<sup>23</sup> Human Rights Committee, General Comment No. 32 of 27 July 2007, cited above, para. 4.

compliance with the requirements of Article 14.1 of the ICCPR and Article 6.1 of the ECHR. As it was defined by the Professor Mr. Manfred Nowak for the purposes of Article 14 of the ICCPR “[o]n the one hand it is not enough for the national legislature to designate an authority as a court if this does not correspond to Article 14(1)'s requirements of independence and impartiality. On the other hand administrative authorities that are largely independent and free of directives may, under certain circumstances, satisfy the requirements of a tribunal pursuant to Article 14”.<sup>24</sup>

It should be also mentioned that the principle of independence and impartiality established under the case law of the Court and the Committee similarly applies to jurors, as they do to professional judges and lay judges.<sup>25</sup> In case of *Pullar v. UK* the Court held that the jury, which convicted [the applicant] formed part of a "tribunal" within the meaning of [Article 6 of the Convention].<sup>26</sup>

Military and special courts are also covered by the term “tribunal” for the purposes of Article 6.1 of the ECHR and article 14.1 of the ICCPR. Usually, the aim of creation of military or special courts is that states try to create the bodies which are distinct from the ordinary court system and are subjected to special rules and procedures; especially interesting are instances where special or military tribunals which are entitled under domestic law to try civilians. therefore

<sup>24</sup> Nowak M, *UN Covenant on Civil and Political Rights - CCPR Commentary*, 2<sup>nd</sup> revised edition, N. p. Engel, Publisher, 2005, p. 319.

<sup>25</sup> Case of *Holm v. Sweden*, judgment of 25 October 1993, Para. 30; see also the communication of *Mulai v. Republic of Guyana*, communication No. 811/1998, Views of 20 July 2004; also the communication of *Dole Chadee et al. v. Trinidad and Tobago*, communication No. 813/1998, Views of 29 July 1998.

<sup>26</sup> Case of *Pullar v. UK*, judgment of 20 May 1996, Para. 29.

the Court as well as the Committee subjects them to the requirements of the autonomous meaning of “tribunal” established in their case law.

***i. “Tribunal” for the purposes of Article 6.1 of the ECHR***

The European Court of Human Rights (hereinafter the Court) has defined in its case law what are the features a national body should satisfy in order to be considered as a “tribunal” for the purposes of Article 6.1 of the Convention.

According to the well-established case law of the Court “the word “tribunal” in Article 6, paragraph 1, is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country”,<sup>27</sup> a “tribunal” is characterised in the substantive sense of the term by its judicial function.<sup>28</sup>

In case of *Campbell and Fells v. United Kingdom* nobody disputed that the Board of Visitors, which was appointed by the Home Secretary for each prison in England and Wales and had adjudicatory and supervisory functions, in particular, the power to inquire into the charges of disciplinary offences, to control the conditions of the premises, the administration of prison and the treatment of inmates, also to examine complaints from the prisoners, was not a court of classic kind integrated in the judicial system of the UK, however, the Court, taking into

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<sup>27</sup> Case of *Campbell and Fells v. United Kingdom*, Judgment of 28 June 1984, Application no. 7819/77, 7878/77, para 76.

<sup>28</sup> Case of *H v. Belgium*, Judgment of 30 November 1987, application no. 8950/80, para. 50.

account its character and functions, found that it was a “tribunal established by law” for the purposes of Article 6.1 of the Convention.<sup>29</sup>

In case of *H v. Belgium* it was contested that the *Ordre des avocats*, no appeal against the decision of which laid, was a “tribunal” within the meaning of Article 6.1. However, the Court did not agree with the allegation of the Applicant and concluded that the fact that the *Ordre des avocats* performed the variety of functions - administrative, regulatory, adjudicative, advisory and disciplinary, could not be considered as a ground for failure to constitute the “tribunal” for the purposes of Article 6.1. The Court reached the decision that “this kind of plurality of powers cannot in itself preclude an institution from being a “tribunal” in respect of some of them”.<sup>30</sup>

One of the elements essential for the notion of a “tribunal” for the purposes of Article 6.1 is the existence of a power to decide matters “on the basis of rules of law, following proceedings conducted in a prescribed manner.”<sup>31</sup>

This principle has been established by the Court, *mutatis mutandis*, in the case of *Sramek v. Austria*, where the applicant complained the violation of Article 6.1 of the ECHR claiming that the Regional Real Property Transaction Authority that examined her case on the domestic level was not independent and impartial tribunal established by law. Despite the Regional Authority was not classified as a court under Austrian law, the Court concluded that “for the purposes of Article 6, however, it comes within the concept of a “tribunal” in the substantive sense of

<sup>29</sup> Above mentioned *Campbell and Fells judgment*, paras 32-33.

<sup>30</sup> Above stated case of *H v. Belgium*, para. 50.

<sup>31</sup> Case of *Sramek v. Austria*, judgment of 22 October, 1984, Application no. 8790/79, Para 36.

this expression: its function is to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner.”<sup>32</sup>

One more element that is characteristic for the notion of “tribunal” for the Conventional purposes is the power to have full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision.<sup>33</sup>

In case of *Chevrol v. France* the Court found that the *Conseil d'Etat* (administrative court in France), which examined the applicant’s case on the domestic level failed to meet the requirement of a “tribunal” within the meaning of Article 6.1, as it had no, or had not accepted sufficient jurisdiction to examine all the factual and legal issues relevant to the determination of the dispute.<sup>34</sup> The problem in the mentioned case was that the *Conseil d'Etat* while examining the issue like the one raised in the applicant’s case, had to ask for interpretation of applicability of a specific international treaty to the Ministry of Foreign Affairs of France and then was abided by this interpretation in all circumstances,<sup>35</sup> thus there was an interference of the executive power in the jurisdictional competences of the *Conseil d'Etat*. In the instant case the *Conseil d'Etat* fully complied with this rule, and despite the Applicant presented the evidences confirming the opposite of the submissions made by the Ministry of Foreign Affairs, the *Conseil d'Etat* did not take them into account and rendered decision fully in accordance with the interpretation made by the Ministry.<sup>36</sup> Therefore, the

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<sup>32</sup> *Ibid.*

<sup>33</sup> Case of *Fischer v. Austria*, judgment of 26 April 1995, application no. 16922/90; case of *Le Compte, Van Leuven and De Meyere v. Belgium*, Judgment of 23 June 1981, Application no. 6878/75; 7238/7; see also *Terra Woningen B.V. v. the Netherlands*, judgment of 17 December 1996, Reports 1996-VI, pp. 2122-23, § 52;

<sup>34</sup> Case of *Chevrol v. France*, Judgment of 13 February, 2003, application no. 49636/99, para. 83.

<sup>35</sup> *Ibid.* para. 78.

<sup>36</sup> *Ibid.* para. 82.

Court found that the *Conseil d'Etat* was in breach of the principles established in its case law to be a “tribunal” for Conventional purposes, as it did not have full jurisdiction to examine the disputes before it without interference from the executive branch.

The above cited case constitutes a good example to show that the system how the *Conseil d'Etat* was functioning in France was in breach of the requirements the “tribunal” should satisfy for the purposes of Article 6 paragraph 1 of the ECHR, that definitely would lead to the violation of similar kind in future. Resolution of the Committee of Ministers of 2 November 2006 concerning the execution of judgment on *Chevrol v. France* case demonstrates that the French Government took general measures to avoid further violations of this kind, in particular, as the violation in the case concerned had occurred due to the practice the *Conseil d'Etat* followed while examining the disputes like the present one, rather than as a result of the law in force in France, the *Conseil d'Etat* started to apply directly the principles established in the judgment on case of *Chevrol v. France* in its jurisprudence (among numerous examples the judgment of 30 December 2003, Mr. Beausoleil, Ms Richard – no251120), in order to avoid further violations of similar kind.<sup>37</sup>

The issue whether the national court had or used its full jurisdiction to examine the dispute raised before it, in other words, whether it complied with the requirements of Article 6.1. in terms of exercising functions of “tribunal” as

<sup>37</sup> Appendix to Resolution ResDH(2006)52 of the Committee of Ministers of 2 November 2006, information provided by the Government of France during the examination of the *Chevrol case* by the Committee of Ministers.

established under the case law of the Court, was examined in case of *Terra Woningen B. V. v. the Netherlands*.

According to the facts of the case the Applicant Company complained that the district court, while examining its case, considered itself bound with the findings of the administrative authority; consequently the Applicant did not have opportunity to have examined the decision of the administrative authority affecting its rights. Likely to the above discussed case of *Chevrol v. France*, the Court held that “the district court, a “tribunal” satisfying the requirements of Article 6 para. 1 (art. 6-1) (as was not contested), deprived itself of jurisdiction to examine facts which were crucial for the determination of the dispute, [... thus] the applicant company cannot be considered to have had access to a tribunal invested with sufficient jurisdiction to decide the case before it”.<sup>38</sup>

Therefore, it is obvious from this judgment that the Dutch district court that was a court of classic kind included in the Dutch judicial system, appeared to be in breach of requirements of the notion of “tribunal” for the purposes of the ECHR, as it failed to exercise its full jurisdiction to adjudicate in full terms on cases under its examination. It is also significant that in order to comply with the findings of the Court in the present case and to avoid further violations of similar kind in future, the Dutch Government ensured in its information submitted to the Committee of Ministers with regard to the execution of the judgment in question, that the domestic courts shall not find themselves bound by the factual findings of

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<sup>38</sup> Case of *Terra Woningen B.V. v. the Netherlands*, judgment of 17 December 1996, Reports 1996-VI, pp. 2122-23, paras. 54-55.

the administrative authorities in similar cases, hence, shall exercise full jurisdiction as required under Article 6 paragraph 1 of the Convention.<sup>39</sup>

In case of *Obermeier v. Austria* the Court reiterated that “the conditions laid down in Article 6 § 1 (art. 6-1) are met only if the decisions of the administrative authorities binding the courts were delivered in conformity with the requirements of that provision”.<sup>40</sup> In the light of this principle the Court found with regard to the issues raised in the application concerned that “neither the Disabled Persons Board nor the Provincial Governor [who were in charge of examining complaints against the dismissal of employees, and among them the Applicant], who [heard] appeals against the decisions of the Board, [could] be regarded as independent tribunals within the meaning of Article 6 § 1”.<sup>41</sup> Therefore, the Court held that as far as the Provincial Governor’s decisions might be subject of an appeal to the Administrative Courts, this appeal could be considered sufficient under Article 6 paragraph 1, only if the Administrative Court could be described as “a judicial body that has full jurisdiction” within the meaning of the Court’s established case law.<sup>42</sup> But, in the instant case the Court reached the decision that while examining the disputes like the present one the Administrative Court did not exercise its full jurisdiction to scrutinise the facts that had been established by the Board and Provincial Governor. Therefore, the Court concluded that the “decision taken by the administrative authorities, which declares the dismissal of a disabled person

<sup>39</sup> Appendix to Resolution DH (98) 204 of the Committee of Ministers of 10 July 1998, information provided by the Government of the Netherlands during the examination of the *Terra Woningen B.V.* case by the Committee of Ministers; see also Blackburn Robert and Polakiewicz Jorg, “the Netherlands” in *Fundamental Rights in Europe, the European Convention on Human Rights and its Member States*, 605-623, (Oxford University Press, 2001).

<sup>40</sup> Case of *Obermeier v. Austria*, Judgment of 28 June 1990, application no. 11761/85. para. 70.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

to be socially justified, remains in the majority of cases, including the present one, without any effective review exercised by the courts”, which resulted in violation of the requirements of Article 6.1. of the Convention.<sup>43</sup>

In accordance with the decision delivered in *Obermeier case*, the Austrian Government, in order to comply with the findings of the Court amended the national law, in particular, the Disabled Persons Employment Act. According to the amended act an independent and impartial Appeals Board was set up, instead of pre-existing Provincial Governor, which was in charge of examining appeals submitted against the decisions of Disabled Persons Board within the full jurisdiction. Appeals Board’s decisions on their part could be subject of an appeal to the Administrative and Constitutional Courts as it was previously.<sup>44</sup>

Unlike to the *case of Obermeier*, in cases of *Zumtobel* and *Fischer v. Austria* the Court did not find the violation of Article 6.1. concluding that the Administrative Courts, examining the Applicants’ complaints against the decision of the administrative authorities, “in fact considered these submissions on their merits, point by point, without ever having to decline jurisdiction in replying to them or in ascertaining various facts”.<sup>45</sup>

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<sup>43</sup> *Ibid.*

<sup>44</sup> Appendix to Resolution DH(92)51 of the Committee of Ministers of 17 September 1992, information provided by the Government of Austria during the examination of the *Obermeier case* by the Committee of Ministers; see also, Blackburn Robert and Polakiewicz Jorg, “Austria” in *Fundamental Rights in Europe, the European Convention on Human Rights and its Member States 1950-2000*, 109-123, (Oxford University Press, 2001).

<sup>45</sup> See case of *Zumtobel v. Austria*, Judgment of 21 September 1993, Application no. 12235/86, para. 32; also case of *Fischer v. Austria*, Judgment of 26 April, 1995, Application no. 16922/90, para. 34.

Interesting is the case of *McMichael v. United Kingdom*, where the Applicant challenged the compatibility of the children's hearing adjudicatory body and Sheriff Court with the requirements of the "tribunal" within the meaning of Article 6.1 of the ECHR. It was not disputed that the adjudicatory body was composed of three specially trained persons with substantial experience in children and the hearing was informal and less adversarial than in ordinary courts, also, there were some signs of questioning the independence of this body from administrative authorities, however, the Court accepted that "in this sensitive domain of family law there might be good reasons for opting for an adjudicatory body that did not have the composition or procedures of a court of law of the classic kind".<sup>46</sup> As for the Sheriff Court the Court concluded that it satisfied the conditions of Article 6 paragraph 1 as far as its composition and jurisdiction were concerned, as it had the jurisdiction to examine both the merits and alleged procedural irregularities.<sup>47</sup>

When analysing the Court's judgment on the above-mentioned *McMichael case* in the light of the Court's case law, it might be concluded that the Court was relatively flexible while examining the compatibility of children's hearing with the requirements of Article 6.1 for the purposes of the notion of "tribunal", also taking into account the fact that there was an appellate body with the full jurisdiction to examine the case on questions of law and facts, fully satisfying the requirements of autonomous meaning of "tribunal" within the meaning of Article 6.1. That might be considered as a decisive element for the Court's decision in the present case.

<sup>46</sup> Case of *McMichael v. United Kingdom*, Judgment of 24 February, 1995, para 80.

<sup>47</sup> *Ibid* paras. 82-83.

The Court has established in its case law that inherent in the notion of “tribunal” for the purposes of Article 6.1. of the ECHR, is also that the decision taken by the tribunal may not be deprived of its effect by a non-judicial authority to the disadvantage of the individual party. This power can also be seen as a component of the “independence” required by Article 6 paragraph 1 of the ECHR.<sup>48</sup>

One of the first judgments where the Court found the violation of Article 6.1 due to the fact that the tribunal’s final decision had not been given effect as a result of the interference from the executive branch, was the case of *Van De Hurk v. the Netherlands*.<sup>49</sup> The Court held that the law in force in the Netherlands at the material time “allowed the Minister partially or completely to deprive a judgment of the Tribunal of its effect to the detriment of an individual party. One of the basic attributes of a “tribunal” was therefore missing”.<sup>50</sup> The Court further defined that “a defect of this nature may, however, be remedied by the availability of a form of subsequent review by a judicial body that affords all the guarantees required by Article 6”, however, in the instant case the Court considered that there was no such a remedy available for the Applicants. Therefore, there has been the violation of Article 6 paragraph 1, “in that the applicant’s civil rights and obligations were not “determined” by a “tribunal”.<sup>51</sup>

<sup>48</sup> Case of *Van De Hurk v. the Netherlands*, judgment of 19 April, 1994, Application no. 16034/90, para. 45; see also Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak, “Independent and Impartial Tribunal” in *Theory and Practice of the European Convention on Human Rights*, Fourth Edition, (Intersentia, Antwerpen – Oxford, 2006), p. 612.

<sup>49</sup> Supra note.

<sup>50</sup> Above cited *Van De Hurk judgment*, para. 52.

<sup>51</sup> *Ibid.* paras. 52-55.

The judgment on *case of Van De Hurk* also led to the changes in the Dutch domestic legislation, in order to comply with the requirements of the Convention. In particular, a number of new enactments were adopted and they contained no provisions empowering an executive authority to interfere with the binding force of a judgment.<sup>52</sup>

In case of *Brumarescu v. Romania* the Applicant alleged that she did not have access to fair hearing by a tribunal, due to the fact that at the material time the Prosecutor General of Romania had the power under the Civil Code of Procedure to apply for a final judgment to be quashed and there was no any time limit for that power.<sup>53</sup> The Court found the violation of Article 6.1. submitting the following: “one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question”.<sup>54</sup> The Court further observed: “by allowing the application lodged under [the power of the Prosecutor General to quash the final judgment], the Supreme Court of Justice set at naught an entire judicial process which had ended in – to use the Supreme Court of Justice’s words – a judicial decision that was “irreversible” and thus *res judicata* – and which had, moreover, been executed”.<sup>55</sup> In the present case the Court recalled the principle of legal certainty rather than the principle established in its previous case law, that the decision taken by the tribunal may not be deprived of its effect by a non-judicial authority to the disadvantage of the

<sup>52</sup> Appendix to Resolution DH (94) 63 of the Committee of Ministers of 21 September 1994, information provided by the Government of the Netherlands during the examination of the *case of Van de Hurk* by the Committee of Ministers.

<sup>53</sup> Case of *Brumarescu v. Romania*, judgment of 28 October 1999, Application no. 28342/95, paras. 56-62.

<sup>54</sup> *Ibid.* para. 61.

<sup>55</sup> *Ibid.* para. 62.

individual party, as it was in above discussed case of *Van De Hurk*, however, still finding the violation of Article 6.1 of the ECHR.<sup>56</sup>

The other characteristic of the notion of “tribunal” according to the case law of the Court is that the professional organizations adjudicating on disciplinary offences, that is widespread practice in most of the European countries, can be considered as “tribunals” within the meaning of Article 6.1 of the ECHR if they satisfy the requirements of at least one of the following two systems; in particular, either the jurisdictional organs themselves comply with the requirements of Article 6 paragraph 1, or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 paragraph 1.<sup>57</sup>

In case of *Albert and le Compte v. Belgium* the Court held that “in many member States of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where Article 6 para. 1 (art. 6-1) is applicable, conferring powers in this manner does not in itself infringe the Convention”.<sup>58</sup> In the present case the Court did not examine whether the Provincial Council, i.e. professional association, satisfied the conventional notion of “tribunal”, as far as the Applicants’ case had been examined by the Appeals Council (also composed by professional physicians) and the Court of Cassation, therefore, as the Court concluded “the Court must

<sup>56</sup> See also the case of *Sovtransavto Holding v. Ukraine*, where the Court found the violation of Article 6.1. of the ECHR in the light of the findings in *Brumarescu case*, finally concluding that the Applicant did not benefit from the right to have the case examined by an independent and impartial tribunal, judgment of 25 July 2002, Application No. 48553/99, paras. 71-82.

<sup>57</sup> Case of *Albert and le Compte v. Belgium*, Judgment of 10 February 1983, Application no. 7299/75; 7496/76, para. 29.

<sup>58</sup> *Ibid.* para. 29.

satisfy itself that before the Appeals Council or, failing that, before the Court of Cassation [the Applicants] had the benefit of the "right to a court" and of a determination by a tribunal of the matters in dispute".<sup>59</sup> Hence, the Court examined the case in the light of the above-described second system applicable to the professional associations, while examining their compatibility with the requirements of Article 6.1 and found that the Appeals Council as well as the Court of Cassation met the standards of independent and impartial tribunal established by law.<sup>60</sup>

In case of *H v. Belgium* despite the *Ordre des avocats* was a professional association having various functions, among them adjudicating on disciplinary offences, and no appeal against its decision laid under the law, was considered by the Court to satisfy the requirements of Article 6.1. Consequently, it was found by the Court that the *Ordre des avocats* complied with the first system, where the professional association should itself satisfy the requirements of Article 6 paragraph 1 of the Convention.

As for the issue of special or military court it has been already mentioned that existence of such tribunals is not prohibited by according to the interpretation of

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<sup>59</sup> *Ibid.* Prior to the judgment on case of *Albert and le Compte* the Court examined the case of *Le Compte, Van Leuven and De Meyere v. Belgium*, dealing with the same issue of alleged violation of Article 6.1. The Court found that "whilst Article 6 par. 1 (art. 6-1) embodies the "right to a court", it nevertheless does not oblige the Contracting States to submit "contestations" (disputes) over "civil rights and obligations" to a procedure conducted at each of its stages before "tribunals" meeting the Article's various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system." Therefore in this case it was essential whether the Appeal Court satisfied the requirements of the notion of "tribunal" for the purposes of Article 6.1. of the Convention. Judgment of 23 June 1981, Application no. 6878/75; 7238/7, paras. 51-53.

<sup>60</sup> *Ibid.* para 32; see also *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, paras 55-58.

the Court given with regard to Article 6.1 of the ECHR. However, the Court subordinates their structure and procedure of examination of cases to the general requirements the courts should satisfy in order to comply with the requirements of Article 6.1 of the ECHR.

In case of *Findlay v. UK* one of the arguments that the court martial did not meet the requirements of independent and impartial tribunal under article 6.1 was that the decision of the court martial was not effective until ratified by the “confirming officer”. The Court reiterated that this was against the well-established principle that the “power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of “tribunal” and can also be seen as a component of the “independence” required by Article 6 para. 1.”<sup>61</sup>

It is significant that after the Court’s judgment on above-cited *case of Findlay*, the UK government amended the domestic law; many factors that were found by the Court to be contrary to the principles of independence and impartiality had been amended; also the function of the “confirming officer” was changed and according to the introduced amendments the decision of the court martial had been subjected to automatic review by “reviewing authority”, which was empowered to change completely the verdict issued by the court martial.<sup>62</sup>

However, compatible of the system of court martial with the requirement of Article 6.1 once again has been examined by the Court in *Morris v. UK* case. The Court established that introduction of the “reviewing authority”, that was not a

<sup>61</sup> *Findlay v. UK*, judgment of 21 January 1997, Para. 77.

<sup>62</sup> Resolution of the Committee of Ministers on the execution of judgment of *Findlay v. UK* of 18 February 1998.

judicial body, however, had the power entirely quash the verdict of the court martial, was against the requirements of Article 6.1 of the ECHR and status of “tribunal” established under the said provision.<sup>63</sup>

Interesting is the case of *Incal v. Turkey*, where the Court, while finding the violation of the principle of independence by the domestic court examining the case of the applicant, attached great importance to the fact that the civilian had been tried by the court that was composed, though only in part, by the members of the armed forces.<sup>64</sup> This finding has been reaffirmed by the Court in case of *Ocalan v. Turkey*.<sup>65</sup>

It can be concluded that the Court attaches significant importance to the requirements of autonomous meaning of “tribunal” when the applicants complain about the violation of right to independent and impartial tribunal established by law, and the Court has established the principles which are essential to be met by a domestic court in order to comply with the requirement of Article 6.1 of the ECHR. As it is apparent from the cases discussed above, in order to avoid further violations of similar kind, the high contracting parties modified, in number of cases, the structure or functions of domestic courts that had been found by the Court to be in breach of the notion of “tribunal” for the Conventional purposes.

<sup>63</sup> Case of *Morris v. UK*, judgment of 26 May 2002, application no. 38784/97, paras. 75-77; see also the case of *Moore and Gordon v. UK*, judgment of 29 September 1999, application nos. 36529/97 and 37393/97, paras. 21-24; however, no changes followed in the UK domestic legislation, see ECHR Portal at [www.echr.coe.int](http://www.echr.coe.int)

<sup>64</sup> *Incal v. Turkey*, judgment of 9 June 1998, Para. 72; no changes in the domestic system followed the judgment, see ECHR Portal at [www.echr.coe.int](http://www.echr.coe.int) ;

<sup>65</sup> The Court implied that the very existence of a military judge in the court proceedings renders the proceedings partial and not-independent; see *Ocalan v. Turkey*, judgment of 12 May, application no. 46221/99; see also Yang Meishya, “the Court system on Trial in Turkey,” *Loyola of Los Angeles international & Comparative Law Review*, Spring 2004, available via Legal Research Westlaw.

**ii. “Tribunal” for the purposes of Article 14.1 of the Covenant on Civil and Political Rights**

As it has been defined by the UN Human Rights Committee (hereinafter the Committee) in its General Comment No. 32 “the notion of a “tribunal” in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature”.<sup>66</sup> According to the interpretation of the Committee provisions of Article 14 applies to all courts and tribunals, ordinary or specialised, civilian or military, courts based on customary law, or religious courts that perform judicial functions.<sup>67</sup> It goes without saying that the notion of “tribunal” under Article 14.1. of the ICCPR covers much more wide type of bodies in various countries all over the world, than it is in case of Article 6.1 of the ECHR evidently due to the sphere of operation of the Covenant and the Convention.

In its dissenting opinion on case of *Salim Abbassi v. Algeria*, where the Committee found the violation of Article 14.1 because the author of the communication, who was civilian, had been tried and convicted by military tribunal, the Committee member Mr. Abdelfat Tan Amor stated: “the Article 14 is not concerned with the nature of the tribunals. It contains nothing which prohibits, or expresses a preference for, any particular type of tribunal. The only

<sup>66</sup> Human Rights Committee, General Comment No. 32 of 27 July 2007, cited above, para. 18.

<sup>67</sup> *Ibid.* Paras. 22-24.

tribunals which may not be covered by article 14 are those which have nothing to do with the safeguards and procedures which it provides. No category of tribunal is inherently ruled out”.<sup>68</sup>

The Committee has also established in its case law that the judiciary or state bodies dealing with the issue of extradition must respect the principles of impartiality, fairness and equality as required by Article 14.1.<sup>69</sup> Therefore, despite most of the communications, where the authors of the communications allege the violation of independence and impartiality of the administrative bodies for the purposes of Article 14.1, are found inadmissible due to the fact of being unsubstantiated by the authors in the view of the Committee, or no violation on merits has been found, still the Committee considers those administrative bodies to be “tribunal” for the purposes of Article 14.1.<sup>70</sup>

Similarly to the case law of the Court the Committee has established in its precedents that it is not required under Article 14 paragraph 1 that the state parties ensure all decisions to be taken by the “courts of classic kind”, significant is that there is a “tribunal” for the purposes of Article 14.1 of the ICCPR which re-examines the case. As it has been stated by the Committee in its General Comment No. 32 “[...] any criminal conviction by a body not constituting a tribunal is incompatible with [the provision of Article 14.1], [s]imilarly, whenever rights and obligations in a suit at law are determined, this must be done *at least*

<sup>68</sup> *Salim Abbassi v. Algeria*, 28 March 2007, communication no. 1172/2003, dissenting opinion by the Committee Member MR. Abdelfat Tan Amor.

<sup>69</sup> See *Everett v. Spain*, communication No. 961/200, Views of 9 July 2004, para 6.4.

<sup>70</sup> See above cited *Everett case*; see also *Daljit Singh v. Canada*, communication No. 111315/2004, Views of 31 March 2006.

at one stage of the proceedings by a tribunal within the meaning of this sentence”  
[emphasis added].<sup>71</sup>

Correspondingly, in case of *Franz Deisl* and *Maria Deisl v. Austria* the Committee held that the communication was not admissible concerning the author’s complaint that her case had not been heard by an independent and impartial tribunal, in particular, the competent authorities, *i.e.* administrative authorities were not impartial. The Committee in this respect concluded “article 14, paragraph 1, does not require States parties to ensure that decisions are issued by tribunals at all appellate stages.”<sup>72</sup> The Committee further observed that significant was that the Provincial Government’s decision was subsequently quashed by the administrative court.<sup>73</sup>

In this respect, in communication of *Mariam Sankara v. Burkina Faso* the Committee held: “while [...] request for public inquiry and legal proceedings do not need to be determined by a court or tribunal, the Committee considers however that whenever, as in the present case, a judicial body is entrusted with the task of deciding on the start of such inquiry and proceedings, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee.”<sup>74</sup>

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<sup>71</sup> Human Rights Committee, General Comment No. 32, (Article 14), 27 July 2007, cited above, para. 18.

<sup>72</sup> See *Franz Deisl* and *Maria Deisl v. Austria*, communication no. 1060/2002, Views of 27 July 2004, para. 10.7.

<sup>73</sup> *Ibid.*

<sup>74</sup> Communication of *Mariam Sankara v. Burkina Faso*, communication no. 1159/2003, Views of 28 March 2006, para. 12.4.

Similarly, in communication of *Savvas Karatsis v. Cyprus*, the Committee held “while the revocation of appointments within the judiciary must not necessarily be determined by a court or tribunal, the Committee recalls that whenever a judicial body is entrusted under national law with the task of deciding on such matters, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee”.<sup>75</sup>

As for the military tribunals, similarly to the findings of the Court, the Committee does not consider court martial to be manifestly unacceptable for the purposes of article 14.1 of the ICCPR. As it has been already mentioned above, it is enshrined in the Committee’s General Comment No. 32 that under the term “tribunal” all kind of special and military courts are covered, as far as they satisfy the requirements of independence and impartiality for the purposes of the said Article.

However, special problems are related to the trials of civilians by military courts in State Parties. Although the Committee has never stated explicitly that the trial of civilians by military tribunals is prohibited, it can be inferred from the case law that State Parties’ such a practice is not most welcomed by the Committee and they are required to present reasonable and strong arguments before the Committee that the trial of a civilian by the court martial had not alternative in given case. In case of *Salim Abbassi v. Algeria*, the Committee held that “while the Covenant does not prohibit the trial of civilians in military courts, nevertheless

<sup>75</sup> Communication of *Savvas Karatsis v. Cyprus*, communication. no. 1182/2003, Views of 25 July 2005, para. 6.5.

such trials should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14”.<sup>76</sup> The Committee further established that the “State party has not shown why recourse to a military court was required. [...] it has not indicated why the ordinary civilian courts or other alternative forms of civilian court were inadequate to the task of trying him.”<sup>77</sup>

Similarly, in case of *Patricio Ndong Bee v. Peru* one of the aspects of finding the violation of Article 14.1 considered by the Committee was the fact that the authors had been tried by the tribunal that was partiality composed by military personal.<sup>78</sup>

Interesting is the case law of the Committee with regard to the special tribunals with “faceless judges” existing in some Member States, that do not have analogue in the system of the ECHR.

Although the Committee has, in all cases concerning the trial by “faceless judges”, established the violation of Article 14.1 of the ICCPR, it never stated in explicit terms that the system of “faceless judges” as such is incompatible with the requirements of Article 14.1 of the ICCPR. Though, in its General Comment no. 32 the Committee enumerated all aspects that are usually breached during the trials by “faceless judges” and concluded that “tribunals with or without faceless judges, in circumstances such as these, do not satisfy basic standards of

<sup>76</sup> *Salim Abbassi v. Algeria*, communication no. 1172/2003, View of 28 March 2007, para. 8.7.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Patricio Ndong Bee v. Peru*, communication no. 1152&1190/2003, View of 31 October 2005, para. 6.3.

fair trial and, in particular, the requirement that the tribunal must be independent and impartial,”<sup>79</sup> thus implying its inconsistency with the requirements of Article 14.1 of the ICCPR.

In the light of the above-stated it can be concluded that the principles established for the notion of “tribunal” have much more similar characteristics for the purposes of the ECHR and the ICCPR, taking into account the variety of domestic systems covered by these two international instruments. As a general rule neither the Court nor the Committee considers that the “tribunal” for the purposes of Article 6.1 of the ECHR and Article 14.1 of the ICCPR respectively, must be “a court of classic kind” “within the judiciary system of the state”; decisive for their purposes is that, whatever their composition or name, the tribunals respect the well-established principles of independence and impartiality and are established by law. Nevertheless, in this regard it should be also mentioned that despite the general approach of the Court and the Committee concerning to the notion of “tribunal” is similar, the case law of the Court is much more substantiated than it is in case of the Committee.

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<sup>79</sup> Human Rights Committee, General Comment No. 32, 27 July 2007, para. 23; see also *Polay Campos v. Peru*, communication no. 577/1994, para. 8.8; *Gutiérrez Vivanco v. Peru*, communication no. 678/1996, para. 7.1.

### **III. Concept of “established by law” under Article 6.1 of the ECHR and Article 14.1 of the ICCPR**

Article 6 paragraph 1 of the European Convention on Human Rights (hereinafter the ECHR) as well as Article 14 paragraph 1 of the Covenant on Civil and Political Rights (hereinafter the ICCPR) stipulates that any tribunal hearing a criminal conviction or a suit at law must be one that has been “established by law”. Principle 5 of the basic Principles on the Independence of Judiciary provides that “everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.” Some of the human rights scholars interpret that “the prescription that the tribunal must be “established by

law” implies the guarantee that the organization of the judiciary in a democratic society is not left to the discretion of the executive, but is regulated by law”.<sup>80</sup>

The case law of the European Court of Human Rights (hereinafter the Court) and the Human Rights Committee (hereinafter the Committee) are the most analogous in this respect. Both international mechanisms give the same importance to the requirement of priorly established procedure and composition of the tribunal.

It is similar to almost all international mechanisms of human rights protection that a tribunal established by law may have been established by the constitution or other legislation passed by the law-making authority, or created by common law. The aim of this requirement is to ensure that trials are not conducted by tribunals set up to decide a particular individual case at issue.<sup>81</sup>

Existence of legal basis of establishing the tribunals in the domestic law has been indicated in case of *Le Compte, Van Leuven and De Meyere v. Belgium* where the Court held that “since it was set up under the Constitution (Article 95), the Court of Cassation is patently established by law. As for the Appeals Council [...] like each of the organs of the Ordre des médecins, it was established by an Act [...] and re-organised by Royal Decree [...]”.<sup>82</sup> Thus considered to satisfy the requirement of “established by law” within the meaning of Article 6.1 of the ECHR.

<sup>80</sup> Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak, “Independent and Impartial tribunal” in *Theory and Practice of the European Convention on Human Rights*, Fourth Edition, page 623 (Intersentia, Antwerpen – Oxford, 2006).

<sup>81</sup> Amnesty International Fair Trials Manual, Section B: Rights at Trials. Available at [http://www.amnesty.org/ailib/intcam/fairtrial/indxftm\\_b.htm#12](http://www.amnesty.org/ailib/intcam/fairtrial/indxftm_b.htm#12)

<sup>82</sup> Above cited case of *Le Compte, Van Leuven and De Meyere v. Belgium*, para. 56.

In addition to the legal basis for the very existence of a “tribunal”, the notion of “established by law” also covers the aspect whether the composition and functioning of the tribunal has legal basis in the domestic law.

One of the first cases the above raised issue fell under the consideration of the Court was the case of *Piersack v. Belgium*. The applicant complained that the domestic court was not a “tribunal established by law” for the purposes of Article 6.1 of the Convention as one of the judges’ presence in the bench contravened with the requirements of domestic legislation.<sup>83</sup> In this respect the Court declared that “in order to resolve this issue, it would have to be determined whether the phrase “established by law” covers not only the legal basis for the very existence of the “tribunal” - as to which there can be no dispute on this occasion [...] but also the composition of the bench in each case”.<sup>84</sup> However, at that stage the Court did not go into details and left the issue unsolved by stating that in the circumstances of the given case, as it coincided with another aspect of Article 6.1, in particular, impartiality of the tribunal, that had been already well-established to be infringed, it did not prove to be necessary to examine the other aspect.<sup>85</sup>

The same conclusion has been reached by the Court in case of *Pfeifer and Plankl v. Austria*, where the Court held that “the complaint of the lack of an “impartial” tribunal and that of the lack of a tribunal “established by law” coincide in substance in the present case”,<sup>86</sup> thus did not examine separately whether the

<sup>83</sup> Above cited *Piersack judgment*, para. 33.

<sup>84</sup> *Ibid.* para. 34.

<sup>85</sup> *Ibid.*

<sup>86</sup> Case of *Pfeifer and Plankl v. Austria* cited above, para 36.

infringement of the legal basis of composition of the tribunal under domestic law, constituted the violation of the notion of a tribunal “established by law”.

However, later on the Court went on analysing the legal basis of the composition of the tribunal to be in compliance with the notion of “established by law” for the purposes of Article 6.1. of the Convention.

In case of *Posokhov v. Russia* the Court reiterated that “the phrase “established by law” covers not only the legal basis for the very existence of a “tribunal” but also the composition of the bench in each case”.<sup>87</sup> The Court concluded that the failure of the responsible body to have a list of lay judges implied the lack of any legal grounds for the participation of the lay judges in the administration of justice on the day of the applicant’s trial and therefore, amounted to a violation of Article 6 in so far as the requirement of a “tribunal established by law” was not met.<sup>88</sup>

The precedents of the Committee are in line with the case law of the Court. The Committee has also held that the existence of legal basis for composition of the tribunal is another aspect of the notion of “tribunal established by law”.

In communication of *Bandajevsky v. Belarus* the author complained that he was sentenced by the Military Chamber of the Supreme Court which was sitting in an unlawful composition, as pursuant to a decision of the Supreme Council of Belarus of 7 June 1996, people's jurors (assessors) in military courts must be in active military service, whereas in his case, only the presiding judge was a

<sup>87</sup> Case of *Posokhov v. Russia*, Judgment of 4 March 2003, application No. 63486/00, para. 39.

<sup>88</sup> *Ibid.* para. 43.

member of the military but not the jurors. Thus the tribunal did not meet the requirement of “established by law”.<sup>89</sup> The Committee concluded that “the unchallenged fact that the court that tried the author was improperly constituted means that the court was not established by law, within the meaning of article 14, paragraph 1”, and thus found the violation the Article concerned.<sup>90</sup>

To sum up, it can be inferred from the above discussed case law of the Court and the Committee that both institutions consider the requirement of a tribunal to be “established by law” as a significant institutional guarantee under Articles 6.1 and 14.1 of the ECHR and ICCPR respectively; furthermore, the concept of “established by law” covers legal basis not only for the very existence of a tribunal but also for the composition of such a tribunal under domestic law.

#### ***i. Notion of “competent tribunal” under Article 14.1 of the CCPR***

As the Amnesty International Fair trial Manual interprets “the right to a hearing before a competent tribunal requires that the tribunal has jurisdiction to hear the case. A tribunal which is competent in law to hear a case has been given that power by law: it has jurisdiction over the subject matter and the person, and the trial is being conducted within any applicable time limit prescribed by law”.<sup>91</sup> However, from the case law of the Human Rights Committee it is not apparent enough what are the requirements for a tribunal to be “competent” for the purposes of Article 14 paragraph 1 of the ICCPR.

<sup>89</sup> Communication of *Bandajevsky v. Belarus*, communication No. 1100/2002, Views of 28 March 2006, para. 10.10.

<sup>90</sup> *Ibid.*

<sup>91</sup> Amnesty International Fair Trials Manual, Section B: Rights at Trials. Available at [http://www.amnesty.org/ailib/intcam/fairtrial/indxftm\\_b.htm#12](http://www.amnesty.org/ailib/intcam/fairtrial/indxftm_b.htm#12)

If we analyse the case law of the Committee in this respect, it becomes obvious that allegations that the tribunal which examined the authors' cases on the domestic level were not "competent tribunals" for various reasons; usually lack of independence and impartiality of those tribunals is at the same time alleged. The Committee has found in number of those cases the violation of Article 14.1, however, without indicating that exactly the requirement of "competent tribunal" has been infringed.

For example, in the communication of *Salim Abbassi v. Algeria* it was complained that Abbassi was sentenced by an incompetent, manifestly partial and unfair tribunal; that the tribunal came under the authority of the Ministry of Defence and not of the Ministry of Justice and was composed of officers who reported directly to it (investigating judge, judges and president of the court hearing the case appointed by the Ministry of Defence); it was the Minister of Defence who initiates proceedings and had the power to interpret legislation relating to the competence of the military tribunal.<sup>92</sup> The Committee held that while the trial of civilians was not generally prohibited under Article 14.1, due to the fact that in the instant case the State party could not demonstrate why the recourse to the military tribunal had been required there was the violation of Article 14.1 of the Covenant.<sup>93</sup>

Similar conclusion has been reached by the Committee in the communication of *Kurbanova v. Tajikistan*. The author claimed that her son's rights under article 14, paragraph 1 were violated through a death sentence pronounced by an

<sup>92</sup> Above cited *Salim Abbassi case*, para. 3.3. supra note 59.

<sup>93</sup> *Ibid.* para. 8.7.

incompetent tribunal. The Committee upheld her claim: “the State party has neither addressed this claim nor provided any explanation as to why the trial was conducted, at first instance, by the Military Chamber of the Supreme Court. In the absence of any information by the State party to justify a trial before a military court, the Committee considers that the trial and death sentence against the author's son, who is a civilian, did not meet the requirements of article 14, paragraph 1”.<sup>94</sup>

From the Committee’s conclusions on above cited cases it can be inferred that the reason of finding the violation of Article 14, paragraph 1 was that the military tribunals had no jurisdiction to try civilians, especially when the State Party did not give any justification for that. Therefore, on the one hand, it can be concluded that if this is the case, the military tribunals, trying civilians without adequate justification from the State Party, have to be considered as being in breach of the concept of “competent tribunal” for the purposes of Article 14.1 of the ICCPR, though, on the other hand, in the Committee’s views there is no explicit indication that a tribunal having no jurisdiction over a certain group of persons cannot be considered as a “competent tribunal” for the purposes of Article 14.1 of the ICCPR .

Interesting is the communication of *Orejuela v. Colombia* where the author complained that he was tried by an “incompetent tribunal” in breach of Article 14, paragraph 1, because the domestic courts which tried his case were established after the alleged crime had been committed. Therefore, they were not competent

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<sup>94</sup> *Kurbanova v. Tajikistan*, communication No. 1096/2002, Views of 6 November 2003, para. 7.6.

to try his case. He also enumerated the domestic courts, which might be, in his view, competent to judge on his case. However, the Committee took into account the State parties submissions that the establishment of new domestic courts and examination of the author's case by these newly established tribunals were important for the purposes of proper administration of justice; also the Committee considered that "the author has not demonstrated how the entry into force of new procedural rules and the fact that these are applicable from the time of their entry into force, constitute in themselves a violation of the principle of a competent court" and concluded that there was no violation of Article 14, paragraph 1 of the ICCPR.<sup>95</sup>

In the light of the above mentioned it can be concluded that the Committee has not established in clear terms what are the requisites for a "competent tribunal" for the purposes of Article 14.1 of the ICCPR. It is apparent that the Committee prefers to decide this issue from the circumstances of every single case. It should be also noted that unlike Article 14 paragraph 1 of the ICCPR Article 6.1 of the ECHR does not explicitly recognise the notion of "competent tribunal". However, in the light of the above-examined case law of the Committee, it can be asserted that the Court has covered the notion of "competent tribunal" in its interpretations of the notion of "tribunal" itself.<sup>96</sup>

<sup>95</sup> Communication of *Orejuela v. Colombia*, communication No. 848/1999, Views of 23 July 2002, para. 7.2.

<sup>96</sup> See above pages 18-29.

#### **IV. Concept of “independence of the court” under the ECHR and the ICCPR**

Independence of a tribunal is an essential aspect of the right to a fair trial. The European Court of Human rights (hereinafter the Court) has stated in one of its judgments that “a court whose lack of independence and impartiality has been established cannot in any circumstances guarantee a fair trial”.<sup>97</sup> Independence of the tribunal means that the decision-makers are free to act independently while deciding on case, to examine the case solely on the basis of the fact and in accordance with the law, without any interference, pressures or improper influence from any branch of government or elsewhere. It also means that the people appointed as judges are selected primarily on the basis of their legal expertise.<sup>98</sup>

It is inherent for the notion of “independence” of a tribunal that the institutional independence of the judiciary is guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. States should ensure that there are structural and functional safeguards against political or other interference in the administration of justice.<sup>99</sup>

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<sup>97</sup> Case of *Hunki Gunes v. Turkey*, judgment of 19 June 2003, application No. 28490/95, para. 84.

<sup>98</sup> The UN Basic Principles on the Independence of the Judiciary, available at [http://www.unhchr.ch/html/menu3/b/h\\_comp50.htm](http://www.unhchr.ch/html/menu3/b/h_comp50.htm) ; see also, Amnesty International Fair Trials Manual, Section B: Rights at Trials. Available at [http://www.amnesty.org/ailib/intcam/fairtrial/indxftm\\_b.htm#12-4](http://www.amnesty.org/ailib/intcam/fairtrial/indxftm_b.htm#12-4)

<sup>99</sup> Basic Principles on the Independence of the Judiciary, Principle 1, available at [http://www.unhchr.ch/html/menu3/b/h\\_comp50.htm](http://www.unhchr.ch/html/menu3/b/h_comp50.htm)

The notion of “independence of the court” constitutes an inseparable aspect of the concept of separation of powers. The constitutional provision of a judicial branch of government, and the formal assurance that it is separate and independent of the other branches, represents the main way by which most states seek to comply with the principles contained in the Article 6.1 and Article 14.1. of the ECHR and the CCPR respectively.<sup>100</sup> However, frequently the reason of the infringement of the principle of “independence of the court” is not the law but the practice of how this law is implemented in reality. It is also claimed that the “total separation of the judicial power is not possible in the real world. In many countries, the executive government appoints judges. The legislature provides for their salaries and pensions. It funds the activities of the courts”.<sup>101</sup> However, in this regard it is essential that all these aspects of interrelation between different branches of government do not impinge the very essence of the notion of “independent tribunal”.

As one of the authors stated “while [the principle of separation of powers is] of general application, problems of lack of independence arise more specifically in the context of relations between the judiciary and other branches of State authority, especially the executive branch”,<sup>102</sup> thus inherent for the concept of “independence of a tribunal” is the institutional independence. That might be considered to be true in the light of the case law of the Court and the Human Rights Committee (hereinafter the Committee). Although both international human rights mechanisms have mostly examined independence of the tribunals

<sup>100</sup> The Hon Justice Michael Kirby, “Independence of the Judiciary – Basic Principles, New challenges”, International Bar Association, Human Rights Institute, Conference Hong Kong, 12-14 June, 1998.

<sup>101</sup> *Ibid.* p. 2.

<sup>102</sup> *Ibid.*

from executive branch, independence from legislature has also been subject of their examination.

The Court has in numerous occasion stated in its case law that the tribunal satisfies the requirements of Article 6.1 of the ECHR as it is independent from the executive and also from the parties to the proceedings.<sup>103</sup> In case of *T v. UK* the Court found that there has been a violation of Article 6.1 of the Convention as the the Home Secretary, who set the applicant's tariff, thus exercised the sentencing power against the applicant, was clearly not independent of the executive.<sup>104</sup>

Later on the Court has extended this principle of "independent tribunal" to the independence from the legislature, though the applicants are required to substantiate their claims significantly, as a mere reference to the infringement of the principle of separation of powers have not been considered to be enough.<sup>105</sup> In particular, in case of *Pabla Ky v. Finland* the Court held that it was not persuaded that the mere fact that M.P. was a member of the legislature at the time he sat on the applicant company's appeal was sufficient to raise doubts as to the independence and impartiality of the Court of Appeal. "While the applicant

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<sup>103</sup> See case of *Ringeisen v. Austria*, judgment of 16 July 1971, application no. 2614/65, para. 95; see also *Neumeister judgment* of 27 June 1968, Series A, p. 44, para. 24.

<sup>104</sup> Case of *T. v. UK*, judgment of 16 December 1999, application No. 24724/94, para. 113.

<sup>105</sup> It should be also indicated that the doubts towards the "independence" of a judicial body caused from that institution's structural formation are frequently examined by the Court in the light of the notion of "objective impartiality" of a tribunal (that will discussed in details below), explained by the Court to be closely linked to each other; see case of *Findlay v. UK*, judgment of 27 September 1996, para 73; also case of *McGonnell v. UK*, judgment of 8 February 2000, application no. 28488/95; case of *Procola v. Luxembourg*, judgment of 24 April 1995; also case of *Kleyn and Other v. Netherlands*, judgment of 6 May 2003, application Nos. 39343/98, 39651/98, 43147/98 and 46664/99.

company relies on the theory of separation of powers, this principle is not decisive in the abstract”.<sup>106</sup>

Despite the latest developments that it has become increasingly difficult to reconcile with the notion of separation of powers between the executive, or other branches of government and the judiciary, a notion which has assumed growing importance in the case-law of the Court,<sup>107</sup> the Court has tried to avoid the endorsement of any theory of separation of powers in its case law, also the Court has not endeavoured to “cure” the systemic aspects of separation of powers, if the facts of a concrete case does not reveal the violation of the principle of “independence of the court”.

In case of *Kleyn and Other v. Netherlands* the Court stated the following: “although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court’s case-law (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 78, ECHR 2002-IV), neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers’ interaction. The question is always whether, in a given case, the requirements of the Convention are met”.<sup>108</sup> Similarly, in case of *McGonnell v. UK* the Court held that “neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts as such. [...] The present case does not, therefore, require the

<sup>106</sup> Case of *Pabla ky v. Finland*, judgment of 22 September 2004, application No. 47221/99, para. 34.

<sup>107</sup> Case of *Stafford v. UK*, judgment of 28 May 2002, application No. 46295/99, para. 78.

<sup>108</sup> Case of *Kleyn and Other v. Netherlands*, judgment of 6 May 2003, application Nos. 39343/98, 39651/98, 43147/98 and 46664/99, para. 193.

application of any particular doctrine of constitutional law [...]: the Court is faced solely with the question whether [the tribunal] had the required “appearance” of independence, or the required “objective” impartiality”.<sup>109</sup>

Slightly different might be the case law of the Human Rights Committee (hereinafter the Committee) in this respect. The Committee has held in case of *Oló Bahamonde v. Equatorial Guinea*, where the author claimed that the judiciary in Equatorial Guinea could not act independently and impartially, since all judges and magistrates were directly nominated by the President, and that the president of the Court of Appeal himself was a member of the President's security forces, that “a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal”.<sup>110</sup> Afterwards, in its concluding observations of 2004 on Equatorial Guinea the Committee expressed its concern at the absence of an independent judiciary in the State party and at the conditions for the appointment and dismissal of judges, which are not such as to guarantee the proper separation of the executive and the judiciary. The Committee also mentioned that in an infringement of the powers of the judiciary, trials are being conducted by the House of Representatives of the People. It is apparent that unlike the Court, the Committee directly referred to the principle of separation of powers between the executive and judiciary, as a guarantee for the “independence” of a tribunal, although the complaint in the above cited communication was stated in relatively general terms.

<sup>109</sup> Case of *McGonnell v. UK*, judgment of 8 February 2000, application no. 28488/95, para. 51.

<sup>110</sup> Case of *Oló Bahamonde v. Equatorial Guinea*, communication No. 468/1991, para. 9.4; see also The UN Human Rights Committee, General Comment No. 32, cited above, para. 19.

In every particular case, where the independence of a national tribunal is challenged by the applicant, the Court examines whether the tribunal concerned satisfied the requirements of “independence” set out by the Court in its case law for the purposes of Article 6.1. of the ECHR. As it is well established in the Court’s case-law, in order to establish whether a tribunal can be considered “independent” for the purposes of Article 6 paragraph 1, regard must be had, *inter alia*, to

- the manner of appointment of its members and their term of office,
- the existence of safeguards against outside pressures and
- the question whether it presents an appearance of independence.<sup>111</sup>

Similar requirements of establishing the “independence” of a tribunal for the purposes of Article 14 paragraph 1 of the ICCPR has been set out by the Committee, though these criteria are given in a more detailed manner in its General Comment No. 32. As it has been stated by the Committee “in order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law”.<sup>112</sup>

### ***i. Manner of appointment of members of a tribunal***

As it has been already mentioned above the manner of appointment judges or members of a tribunal is considered by the Court and the Committee to be one of the aspects of the concept of “independent tribunal” for the purposes of Article

<sup>111</sup> Case of *Campbell and Fell v. UK*, judgment of 28 June 1984, application No. 7819/77; 7878/77, para. 78.

<sup>112</sup> Human Rights Committee, General Comment No. 32, (Article 14), 27 July 2007, cited above, paragraph 19.

6.1 and Article 14 .1 of the ECHR and CCPR respectively. However, it follows from the case law of both international human rights bodies that the appointment *per se* does not influence the independence of judges or members of a tribunal.

Furthermore, the Court and the Committee has never laid down guidelines what might be considered as the appropriate or optimum procedures for the appointment of judges. However, both the Court and the Committee has examined number of specific systems operating in various countries, especially in case of the Committee, and from their findings it can be concluded that the international human rights protection mechanisms pay the most attention to the independence of judges or generally, of the members of various tribunals, after their nomination. The Court and the Committee generally, if there is no any other indication of encroaching on the independence of a tribunal, take the procedure of nomination of members of a tribunal existing in State Parties for granted.<sup>113</sup>

In case of *Sramek v. Austria*, that can be considered to be the leading case with regard to the independence of the tribunal in the case law of the ECHR, the Court held that “although the power of appointing the members [of the Regional Authority] - other than the judge - is conferred on the Land Government, this does not suffice, of itself, to give cause to doubt the members’ independence and impartiality: they are appointed to sit in an individual capacity and the law prohibits their being given instructions by the executive”.<sup>114</sup>

<sup>113</sup> In this regard interesting is the above cited case of *Oló Bahamonde v. Equatorial Guinea*, where the Committee concluded that there was a violation of Article 14.1. as all judges and magistrates in the country were directly nominated by the President. See *supra* pages 45-46.

<sup>114</sup> Case of *Sramek v. Austria*, judgment of 22 October 1984, application No. 8790/79, para. 38.

The same approach has been reaffirmed by the Court in the case of *Absandze v. Georgia*. The Court stated “although the judges of the Supreme Court are elected by Parliament on a proposal by the Head of State, it cannot be deduced from that that the latter gives instructions to those judges in the area of their judicial activity.”<sup>115</sup>

Similarly, in the case of *Sacilor-Lormines v. France* the Court reiterated that “the mere nomination of judges by a member of the executive or by Parliament does not in itself create a relationship of dependency, provided that once they are appointed they do not receive any pressure or instructions in exercising their judicial functions”.<sup>116</sup>

In the case of *Filippini v San Marino*, the Court went as far as to say that even the fact that political sympathies might play a role in the nomination process was insufficient in itself to raise doubts as to the independence and impartiality of judges.<sup>117</sup>

Similarly to the case law of the Court, in case of *Dergachev v. Belarus* the Committee did not even find admissible the author’s complaint concerning the lack of independence and impartiality of judges relying on a single argument that they were appointed by the President.<sup>118</sup> Similar allegation were raised by the

<sup>115</sup> Case of *Absandze v. Georgia*, decision of 15 October 2002, application No. 57861/00, cited by Dr. S. H. Naismith, “the Right to an Independent Tribunal,” Human Rights & UK Practice, Registry of the European Court of Human Rights, EMIS Professional Publishing (27 July 2007), available via Legal Research Westlaw; the application was struck out of the list by the Chamber judgment of 20 July 2004.

<sup>116</sup> Case of *Sacilor-Lormines v. France*, judgment of 9 November 2006, application No. 65411/01.

<sup>117</sup> Case of *Filippini v San Marino*, decision of 26 August, 2003.

<sup>118</sup> *Dergachev v. Belarus*, communication No. 921/2000, Views of 2 April 2002, para. 6.4.

author in the communication of *Bandajevsky v. Belarus*, where the author claimed that the State Party's courts were not independent because judges were nominated by the President; in line of its case law the Committee concluded that “in the absence of further relevant information from the author to the effect that he was personally affected by the alleged lack of independence of the courts that tried him, [...] the facts before it do not disclose a violation of article, 14, paragraph 1, on this count”.<sup>119</sup>

Likewise, in case of *Dranichnikov v. Australia* the Committee did not find substantiated for the purposes of admissibility the author's claim concerning the lack of independence of the Refugee Review Tribunal due to the mere fact that it was government-funded and the members were nominated by the Minister for Immigration.<sup>120</sup>

## ***ii. Duration of the term of Office and dismissal of judges***

With regard to the term of office of judges or members of a tribunal it can be asserted that the best form to guarantee the independence of judges is their appointment for life tenure. Obviously, in this situation the risk that they will be influenced by other branches of the government is less than when judges are appointed for a definite period of time, especially when they can be again reappointed for the second term. However, some of the authors consider that the appointment of judges for a life term has caused problems in number of countries giving the example of Australia, where according to the changes in legislation the

<sup>119</sup> *Bandajevsky v. Belarus*, communication No. 1100/2002, Views of 18 April 2006, para. 10.8.

<sup>120</sup> *Dranichnikov v. Australia*, communication No. 1291/2004, Views of 16 January 2007, paras. 3.2. and 6.7.

judges of the highest court must retire at the age of 70, while before they served the office for a life term.<sup>121</sup> It is also asserted that “the life tenure is not a prerequisite to the kind of judicial independence of which the CCPR is speaking”.<sup>122</sup>

Definitely, neither the Court nor the Committee requires from the member states to ensure the life term office for the member of the tribunals, neither the definite term of office is defined by the Court or the Committee to be the best fit for the notion of “independent tribunal” for the purposes of Articles 6.1 and 14.1 of the ECHR and the ICCPR, respectively. Though the irremovability of a judge until retirement has been considered by the Court as a strong indication of independence, only with the exception if there is a ground of incapacity or misbehaviour from a member of a tribunal, with the guarantee that before any power of removal is exercised adequate reasons are given and consequently the decision concerning the removal can be subjected to judicial review.<sup>123</sup>

Although the irremovability of a judge has been considered by the Court as a strong guarantee for the independence of a tribunal, in the light of the circumstances of a concrete case even a relatively short term of office has been considered as enough guarantee for the independence of a tribunal. In particular, in case of *Campbell and Fell v. UK*, where the members of the Board with the adjudicatory power held the office for three years or less as the Home Secretary might had decided, the Court found that the appointment for such a short period

<sup>121</sup> The Hon Justice Michael Kirby, “Independence of the Judiciary – Basic Principles, New challenges,” International Bar Association, Human Rights Institute, Conference Hong Kong, 12-14 June, 1998.

<sup>122</sup> *Ibid.*

<sup>123</sup> Case of *Clarke v. UK*, decision on admissibility of 25 August 2005, application No. 23695/02.

of time was due to “a very understandable reason: the members are unpaid and it might well prove difficult to find individuals willing and suitable to undertake the onerous and important tasks involved if the period were longer”.<sup>124</sup> The Court further stated that it is true that the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6 paragraph 1, however, the absence of a formal recognition of the irremovability of a judge does not in itself imply a lack of independence provided that independence is recognized in fact and that the other necessary guarantees are present.<sup>125</sup>

In spite of the fact that the Committee, like the Court, has not established the appropriate term of office for judges or the best way of their dismissal for the full protection of the concept of independent tribunal, it has recalled the State Parties in its General Comment No. 32 to adopt the laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.<sup>126</sup>

Although the Committee has not had a precedent examined where the term of office of a tribunal has been challenged, but dismissal of judges, before the expiry of the term for their office, has been considered by the Committee as direct attack to the independence of judiciary. In case of *Pastukhov v. Belarus* the Committee concluded that the author's dismissal from his position as a judge of the

<sup>124</sup> Case of *Campbell and Fell* cited above, para. 80.

<sup>125</sup> *Ibid.*

<sup>126</sup> Human Rights Committee, General Comment No. 32, (Article 14), 27 July 2007, cited above, para. 19; see also the Concluding Observation of the Human Rights Committee, Slovakia, 1997, para. 18. Available at <http://www1.umn.edu/humanrts/hrcommittee/slovakia1997.html>

Constitutional Court, several years before the expiry of the term for which he had been appointed, constituted an attack on the independence of the judiciary and failed to respect the author's right of access, on general terms of equality, to public service in his country, especially taking into account that the author did not have any possibility to challenge his dismissal by the executive.<sup>127</sup>

In case of *Busyo, Wongodi, Matubuka v. Democratic Republic of the Congo*, where the authors complained that they were dismissed from their offices as judges by the Presidential Decree in breach of domestic procedure, without possibility to challenge the violation of their rights effectively before the Courts, the Committee concluded that the authors did not benefit from the guarantees to which they were entitled in their capacity as judges and by virtue of which they should have been brought before the Supreme Council of the Judiciary in accordance with the law, and on the other hand, that the President of the Supreme Court had publicly, before the case had been heard, supported the dismissals that had taken place thus damaging the equitable hearing of the case. Consequently, the Committee considers that those dismissals constitute an attack on the independence of the judiciary protected by article 14, paragraph 1, of the Covenant. It has been further noted that “the dismissal of the authors was ordered on grounds that cannot be accepted by the Committee as a justification of the failure to respect the established procedures and guarantees that all citizens must be able to enjoy on general terms of equality” (it was submitted by the State Party that their dismissal was caused due to the fact of being corrupted).<sup>128</sup> It is worthy to mention that following the recommendation of the Committee the judges who

<sup>127</sup> *Pastukhov v. Belarus*, communication No. 814/1998, Views of 5 August 2003, para. 7.3.

<sup>128</sup> *Busyo, Wongodi, Matubuka v. Democratic Republic of the Congo*, communication No. 933/2000, Views of 31 July 2003, para. 5.2.

wrote the above mentioned communication were given the opportunities to practice again their profession freely and were compensated for the arbitrary suspension from the office.<sup>129</sup>

### ***iii. Guarantees against outside pressure***

The requirement to protect the tribunal or members of the tribunal from the outside pressure is a significant element for ensuring the independence and impartiality of judiciary. This requirement involves the pressure not only from the other branches of the government or even from the highest judicial bodies due to the hierarchical or organizational system existing in a country, but also the pressure that might be coming from the parties of the proceedings, society, media, or any other element that can have influence on the independent and impartial process of administration of justice. Due to this in addition to guarantee the exclusion of any kind of pressure on judiciary due to its institutional and organization structure the state should take all appropriate measures to ensure its protection from the outside pressure, such can be media, industry, political parties. In this regard an important role is also played by the criticism of judges, whether the decision will be popular in the government or might be highly criticized in media. In some countries even the physical protection of judges is at

<sup>129</sup> Concluding observations of the Human Rights Committee, Democratic Republic of the Congo, 2006, UN Doc, CCPR/C/COD/CO/3, para. 9. Available at <http://www1.umn.edu/humanrts/hrcommittee/congo2006.html>

stake, which no doubt put a significant pressure on judiciary and undermines the very essence of independence from the outside influences. The Committee specially emphasized in its concluding observations on Brazil that the judiciary must be protected from threats and reprisals from discontented litigants, in this regard the Committee expressed its concern that these factors compromise on the independence and impartiality of judiciary, which is a fundamental right guaranteed under Article 14 of the ICCPR.<sup>130</sup>

Unlike the Committee the Court examines the existence of outside pressure on judiciary mainly in the light of organizational and institutional framework. In other words, the Court analysis the existence of external pressures on judges, that can be caused due to the dependence on the executive for their salaries, future career and pensions, for the renewal of their term of office, as well as because of the fact that the judges are subject to disciplinary authority which may also be expose them to pressure.

If analyze the case law of the Court it can be said that it is not easy to convince the Court that the mere institutional or hierarchical dependence of a tribunal or its members on the executive can be enough for concluding of existence of outside pressure on judiciary. In case of *Gasper v. Sweden* the Court held that the supervisory functions exercised by the Swedish Chancellor of Justice over the courts were not such as to affect the independence and impartiality of judges: "It is true that the Chancellor of Justice performs supervisory functions in respect of *inter alia* the courts and the judiciary. The Commission notes, however, that when

<sup>130</sup> Concluding Observations of the Human Rights Committee, Brazil, 1996, UN Doc. A/51/40, para. 316. Available at <http://www1.umn.edu/humanrts/hrcommittee/brazil1996.html>

supervising the courts the Chancellor - being a public authority within the meaning of Chapter 11, Section 7 of the Instrument of Government - enjoys guarantees against undue influence from other authorities, e.g. the Government. Moreover, when performing the supervisory functions, the Chancellor is bound to comply with the above-mentioned constitutional provisions. From these provisions it follows that the Chancellor must not interfere in the adjudicatory role of the courts and that, contrary to what the applicant seems to suggest, judges need not fear to be prosecuted by the Chancellor".<sup>131</sup>

Similarly, in case of *Clarke v. UK* the Court considered that there was no hierarchical or organisational connection between the judges and the Lord Chancellor's Department. "Further, there is no suggestion that pressure is actually put on district or circuit judges to decide cases one way rather than another".<sup>132</sup> The Court also indicated that despite the Lord Chancellor could remove judges, the decision on dismissal should have been substantiated and there further existed a guarantee of this decision to be examined by the domestic courts.<sup>133</sup>

It is significant that in both of the above mentioned cases, while examining the issue whether the applicants' fears of existence of outside pressure on the tribunal could be real, the Court relied on the safeguards existed in the domestic legislation against the composition of such a pressure. In *case of Gasper* the Court found these safeguards to be presented in the Constitutional and other norms of domestic legislation, while in *case of Clarke* the Court accepted as one of the

<sup>131</sup> Case of *Gasper v. Sweden*, decision on admissibility of 6 July 1998, application No. 18781/91.

<sup>132</sup> Above cited decision on the case of *Clarke v. UK*, p. 8.

<sup>133</sup> *Ibid.*

safeguards against possible outside pressure the judicial oath taken by the judges.<sup>134</sup> It should be also mentioned that fixing of salaries and pensions by statute and promotion by seniority has been identified by the Court as other safeguards against undue influence of judges.<sup>135</sup>

Unlike to the cases discussed above, in case of *Salov v. Ukraine* the Court found the violation of Article 6.1 of the ECHR considering that there were insufficient guaranteed against the outside pressure on judges. Namely, the Court held that there were the lack of legislative and financial guarantees in respect of possible pressure from the President of the Regional Court as the President at the material time had influence over the appointment of judges of the lower courts, the assessment of their work, the initiation of disciplinary proceedings and their career development. The Court also noted that domestic legislation did not lay down clear criteria and procedures for the promotion, disciplinary liability, appraisal and career development of judges, or limits to the discretionary powers vested in the presidents of the higher courts and the qualifications commissions in that regard.<sup>136</sup>

Same requirements are established by the Human Rights Committee for the member States to guarantee the tribunals and its members from the outside pressure. The Committee has stated in its general Comment No. 32 that the “states should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures

<sup>134</sup> See cases of *Clarke and Gasper* cited above.

<sup>135</sup> Case of *Sacilor-Lormines v. France*, judgment of 9 November 2006, application No. 65411/01.

<sup>136</sup> Case of *Salov v. Ukraine*, judgment of 6 December 2005, application No. 65518/01, Paras. 83 and 86.

and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them”.<sup>137</sup> Though alongside with the Court the Committee requires from the authors of the communications to substantiate their claims for alleged existence of the outside pressure over the judiciary. In the communication of *Sandra Fei v. Columbia* the Committee took into account the submissions of the State party concerning the observance of full guarantees of independence and impartiality of judiciary, that had not been rebutted by the author and found that it had no reason to conclude that the Colombian judicial authorities had failed to observe their obligation of independence and impartiality. The Committee further stated that there was no indication of executive pressure on the different tribunals seized of the case, paying attention to the fact that one of the magistrates charged with an inquiry into the author's claims indeed had requested to be discharged, on account of his close acquaintance with the author's ex-husband.<sup>138</sup>

#### ***iv. Appearance of independence***

<sup>137</sup> Human Rights Committee, General Comment No. 32 (Article 14), 27 July 2007, cited above, Para. 19; see also the Concluding Observations of the Human Rights Committee, Slovakia, 1997, UN Doc. CCPR/C/79/Add 79, Para. 18. Available at <http://www1.umn.edu/humanrts/hrcommittee/slovakia1997.html>

<sup>138</sup> The Communication of *Sandra Fei v. Columbia*, communication No. 514/1992, Views of 4 April 1995, Para. 8.3.

The requisite of “appearance of independence” is considered to be one of the elements of considering the tribunal or its members to be truly independent for the purposes of Article 6.1 and Article 14.1 of the ECHR and ICCPR, respectively. However, it should be mentioned that the Committee has never recognised this concept in its case law separately, unlike the practice of the Court, and usually considered it to be one of the composing aspect of wider requirement of independence and impartiality, mostly the requirement of objective impartiality.<sup>139</sup> However, it has to be mentioned that the last period case law of the Court also does not strictly distinguish between the “appearance of independence” and the objective impartiality of the tribunal and examines this issue together; “this is notably the case where the structural relationship between a judge and another authority is at issue”.<sup>140</sup>

In case of *Sramek v. Austria*, the Court concluded that although there was nothing to indicate that the Transactions Officer could take advantage of his hierarchical position to give to the rapporteur instructions to be followed in the handling of cases, it could not confine itself “to looking at the consequences which the subordinate status of the rapporteur vis-à-vis the Transactions Officer might have had as a matter of fact”. The Court concluded that “in order to determine whether a tribunal can be considered to be independent as required by Article 6 *appearances may also be of importance*” [emphasis added].<sup>141</sup> Subsequently the

<sup>139</sup> Human Rights Committee, General Comment No. 32 (Article 14), 27 July 2007, cited above, Paras. 19-21.

<sup>140</sup> Dr. Naismith S. H. “The Right to an Independent Tribunal,” Human Rights & UK Practice (27 July 2007), available via Legal Research Westlaw; see also *mutatis mutandis*, the case of *McGonnell v. UK*, judgment of 8 February 2000, application No. 28488/95; with regard to the professional associations exercising adjudicatory functions see, *mutatis mutandis*, the case of *Gautrin and Others v. France*, judgment of 20 May 1998.

<sup>141</sup> Case of *Sramek v. Austria*, judgment of 22 October, 1984, Application no. 8790/79, Paras. 41-42.

Court concluded in the instant case that “where [...] a tribunal’s members include a person who is in a subordinate position, in terms of his duties and the organisation of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person’s independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society”.<sup>142</sup>

Similarly in case of *Belilos v. Switzerland* the Court held that “even appearances may be important”.<sup>143</sup> In the instant case it was established that the member of the Police Board, who was granted with the judicial functions on concrete cases, was a senior civil servant who was liable to return to other departmental duties. Consequently, the Court conferred that “the ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues”.<sup>144</sup> According to the information submitted to the Committee of Ministers the Swiss Government amended its national law in May 1988 in order to avoid further violations of similar kind in future. Under the new legislative Act it became possible to appeal against any sentence pronounced by the municipality to the Police Court.<sup>145</sup>

However, as it has been held in case of *Clarke v. UK* a mere exercise of supervisory functions by the Swedish Chancellor of Justice over the courts were found not to affect the independence and independence of the Swedish courts in the light of the requirement of “appearance of independence” of the tribunals.<sup>146</sup>

<sup>142</sup> *Ibid.* See also the case of *Piersack v. Belgium*, Para. 30.

<sup>143</sup> Case of *Belilos v. Switzerland*, judgment of 28 April 1988, application No. 10328/83, Para. 67.

<sup>144</sup> *Ibid.*

<sup>145</sup> Resolution of the Committee of Ministers of 19 September 1989 on case of *Belilos v. Switzerland*.

<sup>146</sup> The above cited decision on admissibility on case of *Clarke v. UK*; see also the case of *Gasper v. Sweden*, Decision of 7 July 1998, application No. 18781/91.

The Court has also held that the power of the executive to invoke at any time, even during the court proceedings, the power of the Inspector to decide an appeal, can be considered as a lack of “appearance of independence”. Under this principle the Court found in the case of *Bryan v. UK* that “the very existence of this power available to the Executive, whose own policies may be in issue, is enough to deprive the inspector of the requisite appearance of independence, notwithstanding the limited exercise of the power in practice [...] and irrespective of whether its exercise was or could have been in issue in the present case”.<sup>147</sup>

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<sup>147</sup> Case of *Bryan v. UK*, judgment of 25 October 1995, Para. 38.

## V. Concept of “impartiality of the court” under the ECHR and the ICCPR

Article 6.1 and Article 14.1 of the ECHR and the ICCPR respectively, requires the tribunals, in the sense of the autonomous meaning of this term under both international instruments, to be impartial. The Court has well-established in its case law that “the principle of impartiality is an important element in support of the confidence which the courts must inspire in a democratic society”.<sup>148</sup> Worth mentioning is that it is inherent for the principle of impartiality, which applies to each individual case, that each of the decision-makers, whether they be professional or lay judges or juries, be unbiased.

It is well established in the case law of the Court and the Committee that there are two aspects to the requirement of impartiality in Article 6 paragraph 1 and Article 14 paragraph 1 of the ECHR and the ICCPR. This view is reaffirmed by the Committee its General Comment No. 32 of 27 July 2007 on the issue of impartiality of a tribunal. Consequently, first aspect is that the tribunal must be subjectively impartial, that is, no member of the tribunal should hold any personal prejudice or bias, nor harbour preconceptions about the particular case before him or her. Secondly, the tribunal must also be impartial from an objective

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<sup>148</sup> See, above cited *Sramek case*, Para 42.

viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.<sup>149</sup>

It is also noteworthy that, although the Court generally makes distinction between subjective and objective aspects of impartiality of tribunals in its case law, it has also established that because the Court finds difficulties to establish a breach of Article 6.1 of the Convention on account of subjective impartiality, in the vast majority of cases, raising impartiality issues, it focus on the objective test, as “[...] there is no watertight division between the two notions since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test).”<sup>150</sup> The Court has brought the example of its above statement in case of *Kyprianou v. Cyprus*. The Court stated the following: “where a court president publicly used expressions which implied that he had already formed an unfavourable view of the applicant’s case before presiding over the court that had to decide it, his statements were such as to justify objectively the accused’s fears as to his impartiality (see *Buscemi v. Italy*, application no. 29569/95, § 68). On the other hand, in another case, where a judge engaged in public criticism of the defence and publicly expressed surprise that the accused had pleaded not guilty, the Court approached the matter on the basis

<sup>149</sup> See, amongst other authorities, the case of *De Cubber v. Belgium*, judgment of 26 October 1984; see also the case of *Hauschildt v. Denmark*, judgment of 24 May, 1989, application No. 10486/83; *Piersack v. Belgium*, judgment of 1 October 1982, application No. 8692/79; *Fey v. Austria*, judgment of 24 February 1993, application No. 14396/88; see also the General Comment No. 32 of the Human Rights Committee, para. 21; also the communication of *Karttunen v. Finland*, communication No. 387/1989, Views of 23 October 1992.

<sup>150</sup> Case of *Kyprianou v. Cyprus*, judgment of 15 December 2005, application no. 73797/01, para. 119.

of the subjective test (*Lavents v. Latvia*, application no. 58442/00, §§ 118 and 119, 28 November 2002)."<sup>151</sup>

In the same *Kyprianou* case the Court made clear the distinction between pure objection aspect of the test of objective impartiality and the aspect which might be considered objectively as well subjectively impartial at the same time depending on the circumstances of a case. In particular, the Court stated the following: "[there are] two possible situations in which the question of a lack of judicial impartiality arises. The first is functional in nature: where the judge's personal conduct is not at all impugned, but where for instance the exercise of different functions within the judicial process by the same person (see the *Piersack v. Belgium* case), or hierarchical or other links with another actor in the proceedings (court martial cases, for example *Grievés v. the United Kingdom*, and *Miller and Others v. the United Kingdom*, nos. 45825/99, 45826/99 and 45827/99, 26 October 2004), objectively justify misgivings as to the impartiality of the tribunal, which thus fails to meet the Convention standard under the objective test. The second is of a personal character and derives from the conduct of the judges in a given case. In terms of the objective test, such conduct may be sufficient to ground legitimate and objectively justified apprehensions as in the above-mentioned *Buscemi* case [cited above], but it may also be of such a nature as to raise an issue under the subjective test (for example the *Lavents* case, cited above) and even disclose personal bias."<sup>152</sup>

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<sup>151</sup> *Ibid.* para. 120.

<sup>152</sup> *Ibid.* para. 121.

Consequently, the case of *Kyprianou v. Cyprus* is the only precedent where the Court found the violation of objective as well as subjective test of impartiality of tribunal.<sup>153</sup> To that extent the case has been somehow criticised alleging that the Grand Chamber somewhat departed from its previous case law of distinguishing between subjective and objective impartiality of a tribunal.<sup>154</sup>

The fact that the subjective and objective tests of impartiality are still the parts of the one inseparable concept of impartiality of tribunal is even more clear from the case law of the Committee. Although, in its General Comment of 27 July 2007 the Committee made distinction between these two aspects of impartiality, in its Views the Committee generally states that from the facts submitted by the author it is apparent that the tribunal while examining the author's case was not impartial, without indicating which aspect of impartiality has been violated.<sup>155</sup> This is apparent from the leading case of the Committee, case of *Karttunen v. Finland*, where the definition of "impartial tribunal" under Article 14.1 of the ICCPR has been given by the Committee for the first time. However, even in this View the Committee did not draw a clear line between subjective and objective aspects of impartiality.<sup>156</sup>

<sup>153</sup> *Ibid.* paras. 128, 133; details of the finding the violation on the basis of subjective as well as objective aspect will be discussed below.

<sup>154</sup> Dr. Naismith H. Stanley, "Contempt of Court and the Right to a Fair Trial," Human Rights & UK Practice, Registry of the European Court of Human Rights, XPL publishing, page 3, (16 November 2006). Available via Legal Research Westlaw.

<sup>155</sup> See, among other authorities, *Ashurov v. Tajikistan*, communication no. 1348.2005, View of 2 April 2007, para. 6.6; *Juan Larranaga v. Philippines*, communication no. 1421/2005, View of 14 September 2006, para. 7.9; *Wright v. Jamaica*, communication no. 349/1989, Views of 27 July 1992, para. 8.3.

<sup>156</sup> Communication of *Karttunen v. Finland*, View of 23 October 1992, communication no. 387/1989, para. 7.2.

Furthermore, in number of its Views the Committee, unlike the Court, has stated the violation of the requirement of impartiality in too general terms. It is sometimes even difficult to distinguish which aspect of the right to a fair trial is addressed by the Committee as to be violated. Example can be the communication of *M. Sankara v. Burkina Faso*. Here the Committee referred to the infringement of the principle of equality of arms and at the same time concluded that there has been a violation of impartiality of the court.<sup>157</sup> Furthermore, in case of *Wright v. Jamaica* the Committee mentioned that it was asked by the author to examine the communication in the light of the principle of impartiality.<sup>158</sup> The Committee, after addressing certain facts from the communication, in particular, that the court did not notify the jury about the decisive factor in the case file, concluded that this deemed to be a denial of justice and therefore, constituted the violation of Article 14.1 of the Covenant, however, again without referring to the principle of impartiality.<sup>159</sup>

In this regard it is worthy to note that when the manner of evaluation of facts and evidence by the domestic courts is contested by the author, the Committee usually underlines that this is primarily the task of domestic courts, unless it can be ascertained that the evaluation was “clearly arbitrary or amounted to a denial of justice”. In some of its cases, as its can be stated to be the case in the above-mentioned communication, the Committee refers to this principle finding that the

<sup>157</sup> Communication of *M. Sankara v. Burkina Faso*, communication of 1159/2003, View of 11 April 2006, Paras. 12.4, 12.5.

<sup>158</sup> Communication of *Wright v. Jamaica*, communication of 349/1989, View of 27 July 1992, Para. 8.2.

<sup>159</sup> *Ibid.* para. 8.3.

domestic court while evaluating the facts and evidences presented before it, acted in a biased and arbitrary manner.<sup>160</sup>

Interesting is also the communication of *Saidova v. Tajikistan*, where the Committee took into account the author's allegation that the domestic court behaved in a biased manner as, *inter alia*, refused even to consider the revocation of the author's husband's confession made during the investigation. Therefore, the Committee concluded that the facts addressed by the author revealed the violation of Article 14.1 of the ICCPR, however, without indication which aspect of the right to a fair trial has been infringed.<sup>161</sup>

In the light of the above stated, it can be asserted that although both international mechanisms, the Court and the Committee, recognise the existence of two aspects of the concept of "impartiality of tribunal", the case law of the Court is more precise in this regard than the Views of the Committee.

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<sup>160</sup> See, among other authorities, communication of *Kurbonov v. Tajikistan*, communication no. 1208/2003, View of 19 April 2006, Para. 6.3.

<sup>161</sup> Communication of *Saidova v. Tajikistan*, communication no. 964/2001, View of 8 July 2004, Para. 6.7.

### ***i. Subjective impartiality***

The Court has established in its case law that the subjective impartiality according to Article 6 paragraph 1 of the ECHR is examined on the basis of the personal conviction of a particular judge in a given case.<sup>162</sup> There is relatively small number of cases where the Court found the violation of Article 6.1 of the ECHR on the basis of subjective partiality of a judge or jury. From the perspective of the ECHR the Court perceives that judges *per se*, are free from subjective bias; in other words, as it has been put by the Court in its case law “the personal impartiality of a judge must be presumed until there is proof to the contrary”.<sup>163</sup> “As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill-will or has arranged to have a case assigned to himself for personal reasons.”<sup>164</sup> However, the Court has also established that the behaviour of judges has paramount importance for preserving the image of impartiality of judiciary. In case of *Buscemi v. Italy* the Court stressed “the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty”.<sup>165</sup>

<sup>162</sup> See, case of *Piersack v. Belgium*, judgment of 1 October 1982, application No. 8692/79, Para. 30; *Hauschildt v. Denmark*, judgment of 24 May 1989, application No. 10486/83, Para. 46; *Castilo Algar v. Spain*, judgment of 28 October 1998, application No. 79/1997/863/1074, Para. 43;

<sup>163</sup> *Ibid.*

<sup>164</sup> Case of *Kyprianou v. Cyprus*, cited above, para. 119; see also case of *De Cubber v. Belgium*, judgment of 26 October 1986, application no. 9186/80, para. 25.

<sup>165</sup> Case of *Buscemi v. Italy*, judgment of 16 September 1999, application No. 29569/95, Para. 67.

The same standard of subjective impartiality is established for jurors under Article 6 paragraph 1 of the ECHR. In case of *Sander v. UK* the Court reiterated that a tribunal, including a jury, must be impartial from a subjective as well as an objective point of view. The Court also recalled that the personal impartiality of a judge, that holds true in respect of jurors, must be presumed until there is proof to the contrary.<sup>166</sup>

The above-mentioned *case of Sander* also presents a good example to show that it is difficult enough for the applicant to prove the lack of personal impartiality from a judge or jury. In the instant case the applicant complained that he was tried by racially prejudiced jury, thus subjective element of impartiality was involved. Although, despite it was established that at least one of the jurors openly made racist remarks and jokes, the Court found that this did not on its own amount to evidence that the juror in question was actually biased against the applicant. Moreover, the Court noted that it was not possible for the trial judge to question the jurors about the true nature of these comments and the exact context in which they had been made. Therefore, the Court concluded that it was not established that the court that tried the applicant was lacking in impartiality from a subjective point of view.<sup>167</sup>

With regard to the subjective impartiality of jurors it is interesting to mention the applicant's view in case of *Pullar v. UK* conceding that there was no available evidence of personal partiality on the part of the juror, due to the fact that according to the national law applicable in his case any investigation into matters

<sup>166</sup> Case of *Sander v. UK*, judgment of 9 August 2000, application No. 34129/96, Paras. 22-25; see also the case of *Gregory v. UK*, judgment of 25 February 1997.

<sup>167</sup> Above cited *case of Sander v. UK*, Para. 26.

which occurred in the jury-room was prohibited, and juries in the United Kingdom, as in other countries, gave no reasons for their verdicts. Therefore, the applicant claimed that there were no practicable or legal means open to him by which to adduce any evidence in rebuttal of the presumption.<sup>168</sup>

In case of *Kyprianou v. Cyprus* the Court examined whether the summary proceedings to deal with the Applicant's contempt in the face of the Court involved the personal bias from the judges sitting on trial. While examining the issue the Court drew its attention to number of arguments and expressions mentioned in the verdict against the applicant sentencing him to five day's imprisonment. First was that the judges acknowledged in the decision that they were "deeply insulted" "as persons" by the applicant; secondly, "the emphatic language used by the judges throughout their decision conveyed the sense of indignation and shock"; thirdly, when defining that the sentence was five day's imprisonment the judges added that it was the "only adequate response"; also they even expressed their opinion in their early discussions with the applicant that they considered him to be criminally liable for contempt of the court.<sup>169</sup>

Taking into account all these circumstances the Court concluded: "although the Court does not doubt that the judges were concerned with the protection of the administration of justice and the integrity of the judiciary and that for this purpose they felt it appropriate to initiate the *instanter* summary procedure, it finds, in view of the above considerations, that they did not succeed in detaching

<sup>168</sup> Case of *Pullar v. UK*, judgment of 20 May 1996, Para. 31.

<sup>169</sup> Case of *Kyprianou*, Para. 130.

themselves sufficiently from the situation”,<sup>170</sup> therefore, the Court found the violation of Article 6.1 on the basis of subjective test of impartiality.<sup>171</sup>

In the case law of the Committee the landmark case dealing with the issue of impartiality is the communication of *Karttunen v. Finland*. As it has been already mentioned above this is the very first case where the Committee gave detailed description of impartiality test under Article 14.1. of the ICCPR.<sup>172</sup> However, it should be noted that the Committee did not give explicit distinction between the subjective and objective aspects of impartiality. Although the author alleged violation of impartiality under subjective as well as objective points of view, that actually became the reason of the Committee’s interpretation what was meant under the term “impartial” for the purposes of the ICCPR, the Committee drew its attention to the factors which attacked the impartiality of the court from the point of objective impartiality. In particular, the author claimed that two of the lay judges had interest in his case, also while interrogating his wife, who testified as a witness, one of the lay judges sitting in court allegedly interrupted her by saying “She is lying”,<sup>173</sup> therefore, it could be said that the subjective aspect of impartiality was involved. However, the Committee did not refer to this aspect of the author’s complaint and confine itself with the evaluating the facts of the communication from the point of objective impartiality, although not explicitly mentioned that this was the objective aspect of the concept of “impartiality” guaranteed under Article 14.1. of the ICCPR.<sup>174</sup> This approach of the Committee

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<sup>170</sup> *Ibid*, Para. 131.

<sup>171</sup> *Ibid*. Para. 133.

<sup>172</sup> Communication of *Karttunen v. Finland*, View of 23 October 1992, communication no. 387/1989, para. 7.2.

<sup>173</sup> *Ibid*. Para. 2.3.

<sup>174</sup> *Ibid*. Para. 7.3.

can be again evaluated as the well-established perception that it is hard enough to contest subjective impartiality of the members of tribunal, irrespective of being professional or lay judges, jurors or other members of the tribunal, like it is in case of the Court's approach.<sup>175</sup>

Although the Committee generally does not explicitly mention in its views that there has been a violation of Article 14.1 of the ICCPR due to the failure of national court to comply with the requirement of subjective impartiality, from the facts of the communications, and from the Committee's reference to the concrete circumstances of the case concerned, it can be concluded that the breach has been found on the basis of violation of subjective aspect of impartiality on number of cases. Example might be the communication of *Ashurov v. Tajikistan*, where the Committee stated the following: "the judge presiding over the second trial conducted it in a biased manner, asked leading questions, gave instructions to modify the trial's transcript in an untruthful way and sought to exclude the Tajik-speaking lawyer from participation in the case;"<sup>176</sup> the Committee further stated that the judge denied all the request made by the defence without giving any reasons and also the Supreme Court did not address the complaints alleged by defence. Therefore, the Committee concluded that all these circumstances disclosed the violation of Article 14.1. of the Covenant, however, without explicitly stated which aspect of impartiality has been infringed.<sup>177</sup>

<sup>175</sup> See above pages 65-67.

<sup>176</sup> Communication of *Ashurov v. Tajikistan*, View of 2 April 2007, communication no. 1348/2005, Para. 6.6.

<sup>177</sup> *Ibid.*

The same can be inferred from the case of *Kurbonov v. Tajikistan* where the Committee stated that it was clearly demonstrated from the fact of the case that “the Supreme Court acted in a biased and arbitrary manner, [...] because of the summary and unreasoned rejection of the evidence, properly and clearly documented by the author, that he had been tortured”.<sup>178</sup> Therefore, the Committee concluded that the facts revealed the violation of Article 14.1 of the ICCPR, however, without explicit statement which aspect of impartiality has been breached.

With regard to the subjective element of impartiality it can be concluded that although the Court as well as the Committee recognise the existence of subjective element of impartiality of the court, there are very few cases where the violation of Article 6.1 of the ECHR or Article 14.1 of the ICCPR has been found on this account. In case of the Court, it finds extremely difficult for the applicants to prove subjective bias from the members of the tribunal; actually, there are only two cases where the Court found the violation of the right to a fair trial explicitly referring to the infringement of subjective aspect of impartiality.<sup>179</sup> As for the Committee, the situation is even more complex, as in none of its cases there is an explicit reference to the infringement of the subjective element of impartiality. Although, if we analyse the case law of the Committee on the basis of the interpretation of subjective impartiality of the court given in its General Comment no. 32, it becomes apparent that there are several examples of finding the

<sup>178</sup> Communication of *Kurbonov v. Tajikistan*, communication no. 1208/2003, View of 19 April 2006, Para. 6.3.

<sup>179</sup> See, above cited judgment on cases of *Sander v. UK*, *Kiprianou v. Cyprus*, *Lavents v. Latvia*, *Saidova v. Tajikistan*.

violation of article 14.1 of the ICCPR basing on subjective impartiality, although this is stated in much more general terms than it is in case of the Court.<sup>180</sup>

## **ii. Objective impartiality**

Objective aspect of impartiality is of having especially high importance. In most cases when the impartiality of a tribunal is raised by the applicant, the Court as well as the Committee examines it in the light of the objective aspect of the concept. In case of *Pullar v. UK* the Court stated that “although in some cases, [...] it may be difficult to procure evidence with which to rebut the presumption [of subjective impartiality of judges], it must be remembered that the requirement of objective impartiality provides a further important guarantee.”<sup>181</sup>

Generally it is established under the case law of the Court and the Committee that “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”.<sup>182</sup> In other words, under objective test it is essential whether the judge offers procedural guarantees sufficient to exclude any legitimate doubt of partiality.

The Court has further stated with regard to the objective approach of impartiality that “account must also be taken of considerations relating to the functions exercised and to internal organisation. In this regard, even appearances may be

<sup>180</sup> See above cited Views on communications of *Ashurov and Kurbonov v. Tajikistan*;

<sup>181</sup> Case of *Pullar v. UK*, judgment of 20 May 1996, Para. 32.

<sup>182</sup> See, among other authorities, cases of *Piersack and De Cubber v. Belgium* cited above, Paras. 30 and 24 respectively.

important”.<sup>183</sup> Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. 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 decisive is whether this fear can be held objectively justified”.<sup>184</sup> For instance, in case of *Kraska v. Switzerland* the Court concluded that in order to demonstrate bias the applicant must show not only that he feared bias, but that the possibility of such bias is capable of being objectively justified.<sup>185</sup>

Similarly to the findings of the Court the Committee has established in its case law that where the grounds for disqualification of a judge are set out in law, national courts must consider these grounds and replace members of the court who fall within the disqualification criteria; a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.<sup>186</sup>

In case of *Pescador Valero v. Spain* the applicant claimed that one of the judges of the Supreme Court lacked impartiality due to the fact of being an associated professor at the University that was the other party in his case. The Court did not accept the Government’s argument that the applicant raised the issue about the possible partiality of one of the members of the tribunal only after two years of the court proceedings, that became the reason to refuse the judge’s withdrawal.<sup>187</sup>

<sup>183</sup> Case of *De Cubber v. Belgium* cited above, para. 26.

<sup>184</sup> See case of *Hauschildt v. Denmark* cited above, para. 48; see also cases of *Piersack* and *De Cubber v. Belgium* cited above, paras. 31 and 26 respectively.

<sup>185</sup> Case of *Kraska v. Switzerland*, judgment of 19 April 1993, application no. 13942/88.

<sup>186</sup> Case of *Karttunen v. Finland*, cited above, Para. 7.2.

<sup>187</sup> *Pescador Valero v. Spain*, judgment of 24 September 2003, application no. 62435/00, Para. 26.

The Court drew its attention to the fact that the applicant has right under Spanish Law to challenge a judge in situation similar to the instant case, furthermore, generally under the Spanish law judges have obligation to withdraw themselves if there are certain grounds for withdrawal without awaiting to be challenged.<sup>188</sup> With regard to the impartiality the Court stated that the fact that the judge was receiving considerable income for his teaching activities from the University, that was the party to the court proceedings, raised objective doubts of his impartiality. Hence, the applicant's fear has been considered to be reasonable.<sup>189</sup>

In case of *Karttunen v. Finland* the Committee held that "where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria".<sup>190</sup> The Committee further continued that "a trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14."<sup>191</sup> However, the Committee has also established that these irregularities could have been corrected by the appellate courts. Apart from giving general principles, in the light to the concrete circumstances of the instant case, the Committee concluded that due to the fact that the court of appeal refused to conduct an oral hearing of the authors case, though, acknowledging the fact that the lay judge should have been disqualified from the lower court proceedings, the examination of the author's case could not be

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<sup>188</sup> *Ibid.* Para. 24.

<sup>189</sup> *Ibid.* Para. 27.

<sup>190</sup> *Karttunen v. Finland*, judgment of 23 October 1992, communication no. 387/1989, Para. 7.2.

<sup>191</sup> *Ibid.*

considered to be impartial, which led to the violation of Article 14.1 of the ICCPR.<sup>192</sup>

Similarly, in communication of *Perterer v. Austria* the Committee concluded that “if the domestic law of a State party provides for a right of a party to challenge, without stating reasons, members of the body competent to adjudicate disciplinary charges against him or her, this procedural guarantee may not be rendered meaningless by the re-appointment of a chairperson who, during the same stage of proceedings, had already relinquished chairmanship, based on the exercise by the party concerned of its right to challenge senate members.”<sup>193</sup> Therefore, in the Committee’s view the tribunal in question lacked impartiality required under article 14.1 of the ICCPR.

Most cases examined by the Court and the Committee concerning the objective impartiality of judges concern multiple involvement of members of the tribunals in the proceedings. In the light of the Court’s case law two main types of involvement can be distinguished: examination of a case by a judge who has been already involved in the proceedings on the investigation stage and multiple involvement of a judge in court proceedings (at appeal stage, referral cases, *trial in absentia* cases and penal order proceedings).

Leading case in the case law of the Court concerning the involvement of a judge on the investigation stage is the case of *Piersack v. Belgium* examined by the Court 1982.<sup>194</sup> The applicant claimed that due to the fact that the judge presiding

<sup>192</sup> *Ibid.* Para. 7.3.

<sup>193</sup> *Perterer v. Austria*, communication no. 1015/2001, View of 20 July 2004, Para. 10.3.

<sup>194</sup> *Piersack v. Belgium*, , judgment of 1 October 1982, application no. 8692/79.

over the Court of Appeal in his case was the head of Section of the Public Prosecutor's Department under examination of which was his case on the investigation stage raised serious doubts of his impartiality.<sup>195</sup> While examining the issue the Court first of all established a very important principle, that the mere fact that a judge previously worked for the Office of Public Prosecutor is not a reason for fearing of his impartiality. However, the Court also held that if a person previously worked for the public prosecutor's office and his function was such to deal with the given case while exercising his duties and at the given moment sits as a judge in the same case, the public are entitled to fear that he does not offer sufficient guarantees of impartiality.<sup>196</sup> Furthermore, the Court drew his attention to the fact that from the case material it was obvious that the judge played certain part in the proceedings on the investigation stage; although he was not the person directly conducting the investigation however, from his position as a head had the power to revise any written submissions and give advise on point of law. Therefore, the Court considered that although further enquires were necessary to determine the exact extent of the role played by the judge in the investigating proceedings, even the certain role was "sufficient to find that the impartiality of the "tribunal", which had to determine the merits of the charge was capable of appearing open to doubt;"<sup>197</sup> hence, the violation of Article 6.1 has been found by the Court.

In the *Piersack judgment* the Court established very important principles with regard to the questioning the objective impartiality of a judge, who has been previously involved in the investigation proceedings. In particular, the Court

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<sup>195</sup> *Ibid.* Para. 28.

<sup>196</sup> *Ibid.* Para. 30.

<sup>197</sup> *Ibid.* Para. 31.

found that objective impartiality cannot be open to doubts due to a mere fact that a judge sitting in a trial has been generally involved in the proceedings on the investigation stage; essential is the intensity of his involvement and the role he played in such a proceedings. These principles have been used by the Court in its following precedents as well.

The case of *De Cubber v. Belgium* also concerned multiple involvement of a judge in investigation and trial proceedings, however, unlike the *case of Piersack* in the present case the Court was to examine whether the “successive exercise of the functions of investigating judge and trial judge by one and the same person in one and the same case raised the doubts to his impartiality.”<sup>198</sup> Similarly to the findings in the *Piersack case* the Court took into account the intensity of involvement of the investigating judge in the proceedings on the investigation stage. It has been found that the investigation judge had a very wide-ranging powers, also attention has been paid to the inquisitorial nature of investigation proceedings.<sup>199</sup> Therefore, the Court mentioned that by virtue of this involvement the investigating judge would have already acquired a particularly detailed knowledge of the applicant’s case files before the hearing, which might reasonable cause the feeling in the applicant that the judge concerned could play a crucial role in the trial court and even to have a preformed opinion which is liable to weigh heavily in the balance at the moment of the decision.<sup>200</sup> The Court also mentioned that the trial court might review the lawfulness of the measures taken by the investigating judge and therefore, the applicant could reasonable fear about the involvement of the investigating judge in the process of review.

<sup>198</sup> *De Cubber v. Belgium*, judgment of 26 October 1984, Application no. 9186/80, Para. 27.

<sup>199</sup> *Ibid.* Para. 29.

<sup>200</sup> *Ibid.*

Therefore, the Court concluded that although the Court itself did not have any reason to doubt the impartiality of the investigating judges the trial “court was capable of appearing to the applicant to be open to doubt.”<sup>201</sup> It is also significant that in the instant case the Court made it clear that the domestic procedure established under Belgian law excluding participation of investigating judge in the trial proceedings on the appellate and cassation level was to the same extent essential for the first instance trial proceedings.<sup>202</sup>

However, different views have been reached by the Court in the cases involving minor crimes. In particular, in case of *Padovani v. Italy*, where the applicant had also challenged the impartiality of a trial judge who had questioned him on the investigation stage and ordered his arrest. The Court mentioned that the magistrate only questioned the applicant and the arrest warrant was issued only on the basis of the applicant’s statements, thus no objective reason of fearing the court’s impartiality was at issue.<sup>203</sup>

The Court reached the decision similar to the above cited *case of Padovani* in case of *Fey v. Austria*. In is noteworthy that the Court once again underlined that the mere fact of involvement in the process if taking pre-trial measures is not in itself enough to raise objective fears to the impartiality of the court, decisive is the extent and nature of the pre-trial measures taken by the judge.<sup>204</sup> Therefore, in the light of the facts of the instant case the Court considered that although the one of the members of the tribunal took part in various pre-trial measures the

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<sup>201</sup> *Ibid.* Paras. 29-30.

<sup>202</sup> *Ibid.* Para. 29.

<sup>203</sup> *Padovani v. Italy*, judgment of 26 February 1993, application no. 13396/87, Para. 28.

<sup>204</sup> *Fey v. Austria*, judgment of 24 February 1993, application no. 14396/88, Para. 30.

involvement was not of such an extent to led to the preconceived view on the merits.<sup>205</sup> However, the judgment appeared to be controversial causing two dissenting and one concurring opinion. It is significant that all separate decisions questioned the majority's view with regard to making difference between the present case and the above discussed case of *De Cubber v. Belgium*.<sup>206</sup>

Interesting is the case of *Hauschildt v. Denmark*, where the applicant challenged the impartiality of a trial judge sitting in his case who had previously taken a decision on his pre-trial detention. The Court made distinction between the present case and the cases of *Piersack* and *DeCubber* cited above, as to the functions and involvement of a judge in the investigation process<sup>207</sup> and concluded that "the mere fact that a trial judge or an appeal judge [...] has also made pre-trial decisions in the case, including those concerning detention on remand, cannot be held as in itself justifying fears as to his impartiality".<sup>208</sup> However, the Court took into account the particular circumstances of the case, namely, while deciding on the issue of using a measure of pre-trial detention against the applicant, the judge relied on a domestic law provision which provided the usage of such a measure in case of a "particularly confirmed suspicion" that a person committed the crime, thus "the difference between the issue the judge has to settle when applying this section and the issue he will have to settle when giving judgment at the trial becomes tenuous".<sup>209</sup> Consequently, the Court concluded

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<sup>205</sup> *Ibid.* Paras. 34-35.

<sup>206</sup> See dissenting opinion of Judge Spielmann, also dissenting opinion of Judge Loizou and concurring opinion of Judge Martes on case of *Fey v. Austria*.

<sup>207</sup> *Hasuchildt v. Denmark*, judgment of 24 May 1989, application no. 10486/83, Para. 50.

<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.* Para. 52.

that by virtue of these particular circumstances the impartiality of the tribunal was open to doubts and the applicant's misgivings were objectively justified.

In order to meet the standards established by the Court in the *Hauschildt judgment* and to avoid further violations of this kind in future, Danish Government amended the Law under which no judge who has taken pre-trial decisions concerning remand in custody or in exercising certain other measures, may act as trial or appeal judge in the same case.<sup>210</sup>

Different approach has been reached by the Court in case of *Nortier v. the Netherlands*, which concerned the juvenile trial by the very same juvenile judge on the pre-trial level as well as on merits. The Court tried to make this decision into line with the Court's findings in case of *Hauschildt* by making difference between the concept of "particularly confirmed suspicion" in Danish case of the concept of "serious indications" in the instant case, which became the grounds for the domestic courts to take the decisions on detention on remand of the applicants.<sup>211</sup> However, it can be argued that the decision of the Court had been influenced by the fact that the case concerned the trial of a juvenile, that is also apparent from the concurring opinions of judges.<sup>212</sup>

In the light of the above discussed cases it can be argued that although the Court's case law could be considered to be coherent with regard to the multiple involvement of judges on the investigation stage and during the trial on merits,

<sup>210</sup> Appendix to the Resolution of the Committee of Ministers on case of *Hauschildt v. Denmark*, 13 February 1991; available at ECHR Portal [www.echr.coe.int](http://www.echr.coe.int)

<sup>211</sup> *Nortier v. the Netherlands*, judgment of 24 August 1993, application no. 13924/88, para. 35.

<sup>212</sup> See the concurring opinion of Judge Walsh, also the concurring opinion of Judge Morenilla.

however, still the Court makes differences and has established different standards for the cases involving minor crimes and cases dealing with juveniles from the cases dealing with the adult offenders or with serious crimes..

As for the case law of the Committee it is apparent that similarly to the Court's findings the extent of involvement in the preliminary proceedings has especially high significance to assess the objective impartiality of the members of the tribunal. In communication of *Juan Larranaga v. Philippine* the Committee found that "the involvement of these judges in the preliminary proceedings was such as to allow them to form an opinion on the case prior to the trial and appeal proceedings, [t]his knowledge is necessarily related to the charges against the author and the evaluation of those charges."<sup>213</sup> In the instant case the judges sitting in the author's trial in the Supreme Court were previously involved in the evaluation of the preliminary charges against the author; they had the power of questioning and cross-questioning the witnesses. In the light of these circumstances the Committee concluded that the judges' multiple involvement in the proceedings was incompatible with the requirement of impartiality of Article 14.1 of the ICCPR.<sup>214</sup>

Unfortunately, there is no possibility to compare the Committee's findings with that of the Court's concerning the minor crimes or juvenile offenders as such examples have not yet been the issue of consideration of the Committee.<sup>215</sup>

<sup>213</sup> *Juan Larranaga v. Philippine*, communication no. 1421/2005, View of 14 September 2006, Para. 7.9.

<sup>214</sup> *Ibid.*

<sup>215</sup> See the database of the Jurisprudence of the Human Rights Committee. Available at [http://sim.law.uu.nl/SIM/CaseLaw/CCPRcase.nsf/\(Keyword\)?OpenView&Startkey=i&Count=30](http://sim.law.uu.nl/SIM/CaseLaw/CCPRcase.nsf/(Keyword)?OpenView&Startkey=i&Count=30)

Apart from the situation discussed above the issue of objective impartiality arises in cases where one and the same judge is involved on different levels of court proceedings, although every kind of involvement does not necessarily result in the violation of the requirement of objective impartiality of the court.

In case of *Oberschlick v. Austria* the Court found that where withdrawal of a judge is required under the national law, due to the fact of having participated in the previous court proceeding on the very same case and this requirement is not fulfilled, it means that the case has been heard by a tribunal whose impartiality was open to doubts by national law itself.<sup>216</sup>

In case of *Ringeisen v. Austria* the Court has established that when a superior court sets aside an administrative or judicial decision, in order to consider the re-examination of a case by the lower court to be in compliance with the requirement of impartiality, it is not necessary “to send the case back to a different jurisdictional authority or to a differently composed branch of that authority.”<sup>217</sup> However, in later decisions the Court found that the issue of impartiality arises when the rehearing of the case by the very same judge, whose decision has been set aside and referred back is final or does not subject to the thorough examination on fact and law.<sup>218</sup>

<sup>216</sup> *Oberschlick v. Austria*, judgment of , application no. Paras. 50-51.

<sup>217</sup> *Ringeisen v. Austria*, Application no. 2614/65, judgment of 16 July 1971, para. 97.

<sup>218</sup> See case of *De Haan v. the Netherlands*, judgment of 26 August 1997, Paras. 52-54;

## Conclusion

A number of conclusions can be drawn from the analysis of the case law of the European Court of Human Rights (the Court) and the Human Rights Committee (the Committee) concerning the independence and impartiality of the court, also from the practice of Member States, following the interpretations of these two international human rights protection mechanisms, when the violation of respective Articles of the ECHR and the ICCPR are found.

On the first place, as a general outcome of the research, it can be concluded that despite the sphere of operation of the ICCPR is much more wide, covering not only the systems of European countries, general approaches of the Court and the Committee towards the aspect of the “independence and impartiality of the court” are similar, however, with slight differences in construing their argumentation or dividing one aspect of the wider concept into different elements or giving them different names.

With regard to the notion of “tribunal” it should be stated that the case law of the Court and the Committee is almost identical. Both international mechanisms consider that in order to comply with the notion of “tribunal”, as it is understood for the purposes of the ECHR and the ICCPR, it is essential to meet the significant guarantees of independence and impartiality, despite the body is a “court of classic kind” or not. However, the Court has interpreted this requirement in more explicit terms and more comprehensively, than it has been done by the Committee.

Analogous is also the interpretation of the concept of “established by law” by the Court and the Committee, as both international bodies recognize that the notion covers importance of existence of legal basis for establishment as well as for composition of the courts. The only difference in this regard might be the concept of “competent tribunal” that is explicitly mentioned only in Article 14.1 of the ICCPR, but not enshrined in article 6.1 of the ECHR. However, as it has been shown by above conducted research, it can be asserted taking into account the interpretation of this notion by the Committee, that the Court covers this concept with its comprehensive interpretation of the concept of tribunal.<sup>219</sup>

With regard to the concept of “independence of the court” the practice of the Court and the Committee is also comparable, as both international human rights bodies pay attention to the same elements which, according to their interpretation, are essential for the court to be independent. It should be also mentioned that while both of these bodies recognize the importance of separation of powers in order to guarantee institutional independence of the courts, they are not determined to “cure” the gaps of systemic nature existing in national systems of the Member States, rather they are focused on the concrete violations in every particular case, caused due to the institutional dependence or hierarchy of national bodies. Although it should be also mentioned that unlike the practice of the Court the Committee in case of *Oló Bahamonde v. Equatorial Guinea* directly referred to the necessity of proper separation of power between the executive and

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<sup>219</sup> See above pages 18-29, see also page 41.

judiciary in order to meet the requirement of “independence” guaranteed under Article 14.1 of the ICCPR.<sup>220</sup>

Differences between the case law of the Court and the Committee can be seen while analyzing the issue of “outside pressure” as one of the element of “independence of the court”. While the Court envisages this aspect only in the light of structural and organization framework, the Committee has examined this issue in the light of much more wide sense of “outside pressure”, in some cases even including direct or even physical pressure on judges, that was explicitly mentioned by the Committee in its concluding observations on Brazil.

Generally similar is the case law of the Court and the Committee with regard to the notion of “impartiality of the court”. Both bodies recognise the existence of two aspects of this concept – subjective and objective elements of impartiality, however, the case law of the Court is more precise in this regard than the Views of the Committee. Also similarly there are very few cases where the violation of subjective impartiality has been found by the Court and the Committee, the only difference might be of a technical character as the Committee has never stated in its case law that there has been a violation due to the establishment of subjective bias from the members of a tribunal. With respect of the objective impartiality the case law of the Court is much more broad and comprehensive, although the main elements for the tribunal to be objectively independent are identical.

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<sup>220</sup> See also the concluding observations of the Committee on Equatorial Guinea.

Separately should be mentioned the issue of military tribunals and special courts of “faceless judges”. From the analyses it is obvious that none of the instruments prohibit existence of military or special courts; however, both, the Court as well as the Committee has implied in their case law that trial of civilians by military tribunals would be unacceptable for the purposes of article 6 paragraph 1 of the ECHR and article 14 paragraph 1 of the ICCPR. As for the institute of “faceless judges” it is characteristic only for the ICCPR system, not having its counterpart in the system of the ECHR, however, the Committee has reiterated in every occasion of deciding this issue, as well as underlined in its General Comment No. 32 that such institutions does not comply with the requirements of independent and impartial tribunal for the purposes of Article 14.1 of the ICCPR.

It has to be mentioned that the judgments of the Court and the Views of the Committee with regard to the military tribunals and faceless judges, especially the judgment on case of *Findlay*, are examples of those few cases where the Court and the Committee questioned the properness of the whole system of trial by military courts. Although generally, the Court as well as the Committee finds it very risky to ascertain that the whole system of judiciary is contrary to the principles established by the ECHR and the ICCPR.

As for the practice of the respondent states, when the violation has been found due to the non-compliance with the requirements of a “tribunal”, usually such findings are followed by changes in domestic law.<sup>221</sup> However, there are also exceptions. In particular, the changes in the domestic legislations, made by the

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<sup>221</sup> See above discussed cases: *Chevrol v. France*; *Terra Woningen B.V. v. the Netherlands*; *Obermeier v. Austria*; *Van de Hurk v. the Netherlands*.

UK Government after the judgment on the case of *Findlay v. UK*, have been still found to be in breach of Article 6.1 of the ECHR in case of *Morris v. UK*, however, no amendments were followed by the respondent government on this occasion.<sup>222</sup> Also no changes in domestic legislation were adopted by the Government of Turkey after the Court found the violation of Article 6.1 in the case of *Incal v. Turkey*.<sup>223</sup>

Unfortunately negative is the attitude of the respondent government towards the views of the Committee with regard to the one of the most crucial problems in practice of the Committee, namely, the special courts of “faceless judges”. Despite significant number of cases against Peru involving the same violations as a result of trials conducted by the special courts of “faceless judges” no steps were taken by the government in order to end the violations of similar kind.<sup>224</sup> Similar is the practice with Tajikistan, where despite numerous cases with the same infringements of the principle of independence and impartiality of the courts, the Government does not take measures to end the breaches of the same kind.

In the light of all above stated it can be asserted that no significant difference can be found in the interpretations of the Court and the Committee of the concept of the “independence and impartiality of the court”, however, the case law of the Court with regard to every aspect of independent and impartial tribunal is much more comprehensive than it is in case of the Committee. Also it should be mentioned that although there are some diversities in the case law of these two

<sup>222</sup> See above page 28.

<sup>223</sup> See above page 28.

<sup>224</sup> See concluding observations of the Human Rights Committee on Peru, available at <http://www1.umn.edu/humanrts/hrcommittee/hrc-country.html> ; also the Human Rights Committee’s General Comment No. 32, para. 23.

international mechanisms due to some special systems of judiciary or practices existing in the Member States, generally they try to establish the same principles for the importance of preserving the independent and impartial judiciary in all situations.

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