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Judicial Independence in The Hague and Freetown: A Tale of Two Cities

YUVAL SHANY AND SIGALL HOROVITZ*

Abstract
This note evaluates the application of rules on judicial independence and impartiality in two international decisions issued in 2004 – the ICJ Order on Composition in the *Wall* Advisory Proceedings and the disqualification decision of the Special Court for Sierra Leone in *Sesay* – and compares them with a code of judicial conduct recently prepared by an ILA study group (the Burgh House Principles on the Independence of the International Judiciary). We assert that the approach taken by the ICJ in *Wall* is excessively restrictive and is out of step with contemporary tendencies to embrace stricter standards of judicial independence and impartiality.

Key words
disqualification of judges; International Court of Justice; judicial impartiality; judicial independence; mixed international criminal tribunals; Special Court for Sierra Leone; *Wall* Advisory Opinion

On 30 January 2004, the International Court of Justice (ICJ) issued an Order on the Composition of the Court (ICJ Order) in the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Wall* case).[1] The ICJ Order denied a request by the state of Israel to preclude Judge Nabil Elaraby from sitting in the *Wall* case – a request that was based on the judge's prior involvement in the Israeli–Palestinian conflict as an Egyptian diplomat and on the allegedly prejudicial views against Israel that he expressed in a 2001 newspaper interview.[2] Israel argued that Judge Elaraby's acts and statements demonstrated opposition to Israel 'on matters which go directly to aspects of the question now before the Court' and should result in his disqualification.[3] Still, the ICJ rejected the Israeli motion by a majority of 13 to 1 (Judge Buergenthal dissenting, Judge Elaraby himself not

* Yuval Shany is the Hersch Lauterpacht Chair in Public International Law, Faculty of Law, Hebrew University, Jerusalem. He served as a rapporteur to the ILA Study Group on the Independence of the International Judiciary and consulted the Israeli government with relation to the advisory proceedings before the ICJ on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Sigall Horovitz is a legal assistant to the President of the International Criminal Tribunal for Rwanda. She previously served at the Office of the Prosecutor at the Special Court for Sierra Leone. The views expressed in the note should not be attributed to any person or institution other than the authors.

1. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 Jan. 2004, [2004] ICJ Rep. 3 (hereinafter ICJ Order).
2. A. Sami, 'Nabil Elaraby: A Law for All Nations', *Al-Ahram Weekly On-Line*, August 2001, available at http://weekly.ahram.org.eg/2001/547/profile.htm.
3. ICJ Order, *supra* note 1, at para. 5, referring to a claim made by the government of Israel in a confidential Letter from the Government of Israel to the President of the ICJ, dated 15 January 2004.

participating in the disqualification proceedings) on the grounds that 'Judge Elaraby could not be regarded as having "previously taken part" in the case in any capacity'.[4]

By contrast, on 13 March 2004, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) – a mixed court comprising international and domestic judges[5] – disqualified Judge Geoffrey Robertson from sitting in a case by reason of certain views he had expressed in the past. Prior to his appointment to the SCSL, Judge Robertson had published a book in which he sharply criticized the crimes perpetrated by the Revolutionary United Front (RUF), a rebel faction involved in the recent armed conflict in Sierra Leone.[6] Issa Sesay, one of the defendants in the proceedings brought against members of the RUF before the SCSL (the RUF case), requested the Appeals Chamber to disqualify Judge Robertson from sitting in the case, arguing that the views in his book demonstrated clear bias against RUF members and, alternatively, that they objectively gave raise to the appearance of such bias. The Chamber found that a reasonable person might apprehend bias when reading the relevant book passages and, accordingly, issued a decision precluding Judge Robertson from participating in the RUF case.[7]

The similarities between the two disqualification motions that were submitted to the ICJ and SCSL are striking: both motions implicate, *inter alia*, views expressed publicly by judges in their private capacity, prior to their appointment as judges; in both cases the expressed views did not directly address the specific *lis* under consideration (the lawfulness of the Israeli separation wall or the individual criminal responsibility of Sesay); still, in both cases it was alleged that the expressed views were indicative of possible prejudice and created the appearance of judicial bias.[8] Nonetheless, a markedly different legal standard was applied by the two tribunals in their decisions on the disqualification requests. While the SCSL examined whether the views expressed by Robertson created a reasonable appearance of bias, the ICJ applied a more restrictive standard, finding that no grounds for disqualification existed since Judge Elaraby did not 'previously take part' in the *Wall* case, and did not express opinions on the specific question presented in the advisory proceedings.

The purpose of this note is to evaluate the application of the rules of judicial conduct which emerge from the two cases and to compare them with the code of judicial conduct recently codified by an International Law Association (ILA) study group on the Burgh House Principles on the Independence of the International

4. ICJ Order, *supra* note 1, at para. 8.
5. For a comprehensive discussion of the nature of mixed or hybrid international tribunals, see C. P. Romano, A. Nollkaemper, and J. K. Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (2004).
6. G. Robertson, *Crimes against Humanity: The Struggle for Global Justice* (2002).
7. *Prosecutor v. Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, Case No. SCSL-2004-15-AR15, A.Ch., 13 March 2004.
8. This is because the view that RUF forces engaged in widespread criminal conduct was relevant to the question of individual criminal responsibility to be determined in the RUF case (although the judges still had to examine the links between the accused RUF member and the commission of specific crimes), and because a negative view on the legality of Israeli presence, policies, and conduct in the Occupied Palestinian Territory was relevant to the issue determined in the *Wall* case, namely the legality and legal consequences of a decision by Israel to construct a wall within that territory (although the judges still had to examine whether the specific action and consequences of constructing the wall breached specific international law provisions).

Judiciary.[9] We assert that the approach taken by the ICJ in the *Wall* case is excessively restrictive and is out of step with the more robust efforts of younger courts, such as the SCSL, to seek public legitimacy through embracing high standards of judicial independence and impartiality. Significantly, we do not believe that the difference in the approach of each court can be fully explained by way of pointing to the criminal law nature of the proceedings before the SCSL.

Section 1 of this note describes the facts and legal standards applied in the ICJ Order in the *Wall* case, as well as in the Dissenting Opinion of Judge Buergenthal appended thereto. Section 2 examines the disqualification proceedings brought before the SCSL. The comment then introduces, in section 3, the relevant judicial principles identified by the ILA study group on judicial independence and the international law precedents which support them. We then examine whether differences in the institutional character and functions of the two fora could account for the different approaches adopted. Section 4 concludes by suggesting that the standards applied by the SCSL and in the Dissenting Opinion of Judge Buergenthal are more appropriate than those employed by the majority of ICJ judges. Hence we believe that a flexible 'appearance of bias' test, which factors in a variety of potentially prejudicial acts and statements, should be applied by international courts and tribunals in the future, even in the absence of explicit guidance in their constitutive instruments.

1. The *Wall* Advisory Opinion disqualification proceedings

On 8 December 2003 the Tenth Emergency Special Session of the United Nations General Assembly requested an advisory opinion from the ICJ on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[10] On 19 December 2003 the ICJ issued an order on the organization of the proceedings which introduced an expedited schedule for the submission of written and oral pleadings by interested parties.

On 31 December 2003 the government of Israel forwarded a letter to the Registrar of the ICJ, claiming that one member of the Court 'has played a leading role in recent years in the very Emergency Special Session from which the advisory opinion request has now emerged'.[11] The government of Israel therefore argued that '[i]t is inappropriate for a Member of the Court to participate in decisions in a case in which he has previously played an active, official and public role as an advocate for a cause that is in contention in this case', and concluded by stating that it would write on this matter directly to the president of the ICJ.[12]

9. The Burgh House Principles on the Independence of the International Judiciary, 25 November 2004 (hereinafter Burgh House Principles), reprinted in (2005) 4 *The Law and Practice of International Courts and Tribunals* 247.
10. General Assembly Res. ES-10/14, UN Doc. A/ES-10/L.16 (2003).
11. Letter by the Government of Israel to the Registrar of the ICJ of 31 December 2003. See reference to this letter in ICJ Order, *supra* note 1, at paras. 2 and 3.
12. Ibid.

On 15 January 2004 the government of Israel sent a confidential letter to the president of the ICJ.[13] This follow-up letter disclosed that Judge Elaraby was the judge to whom the government of Israel had referred in its previous letter to the Registrar, and in it Israel highlighted certain facts that it considered relevant for ascertaining the propriety of Judge Elaraby's participation in the *Wall* proceedings. These included Judge Elaraby's previous involvement in the Israeli–Palestinian conflict in his capacity as a diplomatic representative of Egypt – particularly, the role he played as the Egyptian UN ambassador in convening the Tenth Emergency Special Session of the General Assembly (which eventually resulted in the request for the *Wall* advisory opinion).[14] The letter also referred to an interview given by Judge Elaraby to an Egyptian newspaper, *Al-Ahram*, in August 2001 (just before his appointment to the Court), in which he expressed his views on several matters relating to Israel's activities in the Occupied Territories. The published interview included, *inter alia*, the following statement:

> It has long been very clear that Israel, to gain time, has consistently followed the policy known as 'establishing new facts' . . . Grave violations of humanitarian law ensue: the atrocities perpetrated on Palestinian civilian populations, for instance, but also such acts as the recent occupation of the PNA's headquarters . . . Israel is occupying Palestinian territory, and the occupation itself is against international law.[15]

According to Israel, Judge Elaraby's past professional activities, as well as the views expressed in the *Al-Ahram* interview, demonstrated that he 'has been actively engaged in opposition to Israel including on matters which go directly to aspects of the question now before the Court'.[16] As a result, Israel asked for his disqualification.

On 30 January 2004 the ICJ issued an Order on the composition of the bench, in which Israel's request to preclude Judge Elaraby from sitting in the *Wall* case was rejected (by a 13-to-1 majority). In its Order, the Court held that no grounds for disqualification had been shown:

> Whereas however the activities of Judge Elaraby referred to in the letter of 15 January 2004 from the Government of Israel were performed in his capacity of a diplomatic representative of his country, most of them many years before the question of the construction of a *Wall* in the occupied Palestinian territory, now submitted for advisory opinion, arose; whereas that question was not an issue in the Tenth Emergency Special Session of the General Assembly until after Judge Elaraby had ceased to participate in that Session as representative of Egypt; whereas in the newspaper interview of August 2001, Judge Elaraby expressed no opinion on the question put in the present case;

13. Letter written and sent confidentially by the Israeli Foreign Ministry's Legal Advisor, on behalf of the Government of Israel, to the President of the ICJ of 15 January 2004 (hereinafter Follow-Up Letter). See reference to the Follow-Up Letter in the ICJ Order, *supra* note 1, at paras. 3–5.
14. See reference to these arguments in the ICJ Order, *supra* note 1, at para. 4. The Follow-Up Letter, *supra* note 13, also pointed to Elaraby's involvement in a number of initiatives concerning the establishment of autonomy in the West Bank and Gaza Strip, as well as to his previous positions as Legal Advisor to the Egyptian Ministry of Foreign Affairs and as Legal Advisor to the Egyptian Delegation to the Camp David Middle East Peace Conference of 1978. It is, however, unclear whether and how these specific activities could compromise his judicial independence or create an appearance of bias.
15. Sami, *supra* note 2.
16. ICJ Order, *supra* note 1, at para. 5 (referring to the Letter sent to the President of the Court by the Government of Israel).

> whereas consequently Judge Elaraby could not be regarded as having 'previously taken part' in the case in any capacity.[17]

The legal standard applied by the Court – whether the challenged judge had 'previously taken part' in the dispute at hand – is derived from Article 17(2) of the ICJ Statute,[18] which provides that '[n]o member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity'. Finding that this standard was not breached in the case before it, the ICJ rejected the disqualification request.[19]

In his Dissenting Opinion, Judge Buergenthal took issue with the position implicit in the majority's decision that Article 17(2) of the ICJ Statute constituted an exhaustive disqualification standard for impermissible bias:

> It is clear, of course, that the language of Article 17, paragraph 2, does not apply in so many words to the views Judge Elaraby expressed in the above interview. That does not mean, however, that this provision sets out the exclusive basis for the disqualification of a judge of this Court . . . A court of law must be free and, in my opinion, is required to consider whether one of its judges has expressed views or taken positions that create the impression that he will not be able to consider the issues raised in a case or advisory opinion in a fair and impartial manner, that is, that he may be deemed to have prejudged one or more of the issues bearing on the subject-matter of the dispute before the court . . . That power and obligation is implicit in the very concept of a court of law charged with the fair and impartial administration of justice. To read them as out of the reach of Article 17, paragraph 2, is neither legally justified nor is it wise judicial policy.[20]

Moving on to apply this 'perceived prejudice' standard, Judge Buergenthal concluded,

> It is technically true, of course, that Judge Elaraby did not express an opinion on the specific question that has been submitted to the Court by the General Assembly of the United Nations. But it is equally true that this question cannot be examined by the Court without taking account of the context of the Israeli/Palestinian conflict and the arguments that will have to be advanced by the interested parties in examining 'The Legal Consequences of the Construction of the *Wall* in the Occupied Palestinian Territory'. Many of these arguments will turn on the factual validity and credibility of assertions bearing directly on the specific question referred to the Court in this advisory opinion request. And when it comes to the validity and credibility of these arguments, what Judge Elaraby has to say in the part of the interview I quoted above, creates an appearance of bias that in my opinion requires the Court to preclude Judge Elaraby's participation in these proceedings.[21]

The positions of the majority and minority on the ICJ thus revealed widely differing approaches on the legal framework governing disqualification motions,

17. ICJ Order, *supra* note 1, at para. 8.
18. Statute of the International Court of Justice, 26 June 1945, 59 Stat. 1055.
19. ICJ Order, *supra* note 1, disposition. Indeed, Israel never alleged that Judge Elaraby had any involvement with the specific dispute over the construction of the *Wall* in the Occupied Territories.
20. Ibid., at paras. 10–11 (Judge Buergenthal, Dissenting Opinion).
21. Ibid., at para. 12.

as well as on the application of the relevant legal standards. As the next section demonstrates, the *Sesay* disqualification proceedings before the SCSL lend support to the flexible method advocated by Judge Buergenthal and not to the more conservative approach taken by the ICJ majority.

2. The *Sesay* disqualification proceedings

On 27 February 2004, defence counsel for Issa Sesay, one of the defendants in the RUF case before the SCSL, filed a motion seeking the disqualification of Judge Robertson from the Special Court's Appeals Chamber (over which Judge Robertson presided). The defence motion was based on a book published by Robertson prior to his appointment to the SCSL Appeals Chamber that demonstrated, according to the defence, clear bias against the RUF defendants, or, at least, created the appearance of such bias.[22] The defence therefore requested that Judge Robertson withdraw from the Appeals Chamber pursuant to Rule 15(A) of the SCSL Rules of Procedure and Evidence (SCSL Rules), which provided that '[a] Judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has a personal interest or concerning which he has or has had any personal association which might affect his impartiality'.[23] In the event that Judge Robertson refused to withdraw, the defence requested the Appeals Chamber to disqualify him from sitting in the Chamber, pursuant to Rule 15(B) of the SCSL Rules.[24]

Specifically, the defence based its motion on numerous passages from Judge Robertson's book, including, for example, the following:

> Styled the Revolutionary United Front (RUF), it recruited gangs of violent, dispossessed youths and armed them with AK47s for their mission of pillage, rape and diamond-heisting . . . By [1996] the RUF had perfected its special contribution to the chambers of horror: the practice of 'chopping' the limbs of innocent civilians. It was a means of spreading terror, especially the slogan, 'Don't vote or don't write', came true for thousands of citizens, forced to lay their right hand on RUF chopping-blocks after they had chosen to vote. Mutilation worked, as a means of terrifying the population, and so the RUF devised more devilish tortures, such as lopping off a leg as well as an arm, sowing up vaginas with fishing lines, and padlocking mouths. Given their level of barbarism, how could Sankoh and the RUF ever have been invited by Western diplomats to share power?[25]
>
> So much for hindsight: a warring faction . . . [referring to the RUF] . . . guilty of atrocities on a scale that amounts to a crime against humanity must never again be forgiven

22. Robertson, *supra* note 6.
23. Special Court for Sierra Leone Rules of Procedure and Evidence (hereinafter SCSL Rules), Rule 15(a). On 29 May 2004 (following the *Sesay* decision), Rule 15(A) of the SCSL Rules was amended and it now stipulates that 'A Judge may not sit at a trial or appeal in any case in which his impartiality might reasonably be doubted on any substantial ground.'
24. Rule 15(B) of the SCSL Rules, stipulated (at the time) as follows: 'Any party may apply to the Chamber of which the Judge is a member for his disqualification on the above grounds. If the judge does not withdraw, the issue of disqualification will be determined by the other judges of that Chamber.' This Rule was also amended on 29 May 2004, and it now stipulates that 'Any party may apply to the Chamber of which the Judge is a member for the disqualification of the said Judge on the above ground.'
25. Robertson, *supra* note 6, at page 466.

> sufficiently to be accorded a slice of power; on the contrary, its leaders deserve to be captured and put on trial.[26]

Remarkably, on 1 March 2004, the prosecution filed its response to the defence motion, in which it conceded that 'there could be a valid argument that there is an appearance of bias on the part of Judge Robertson'.[27] Still, Judge Robertson issued a statement on 12 March 2004, in which he refused to withdraw from the case, as requested by the defence.[28]

On 13 March 2004 the SCSL Appeals Chamber issued its decision.[29] Judge King, writing on behalf of the Chamber, articulated the following legal test, which governs the interpretation and application of Rules 15(A) and 15(B) of the SCSL Rules and constitutes, according to Judge King, a 'sacred' and 'overriding' principle of law:

> The crucial and decisive question is whether an independent bystander so to speak, or the reasonable man, reading those passages will have a legitimate reason to fear that Justice Robertson lacks impartiality. In other words, whether one can apprehend bias.[30]

The Chamber answered this question in the affirmative, and held that the relevant book passages would lead a reasonable man to apprehend bias against members of the RUF, despite the fact that none of the defendants in the RUF case before the SCSL was actually named in them. As a result, the Chamber ordered that Judge Robertson be disqualified from adjudicating on 'motions involving alleged members of the RUF for which decisions are pending, in this Chamber', and on '[c]ases involving the RUF if and when they come before the Appeals Chamber'.[31]

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26. Ibid., at 496.
27. *Prosecutor v. Sesay*, Case no. SCSL-2004-15-PT, Prosecution Response to the Defence 'Motion Seeking Disqualification of Judge Robertson from the Appeals Chamber', para. 2.
28. In his statement, Judge Robertson opined that Rules 15(A) and 15(B) of the SCSL Rules do not permit the removal of judges from the Chamber, but rather deal exclusively with the withdrawal of judges from sitting in particular cases.
29. *Prosecutor v. Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, Case No. SCSL-2004-15-AR15, A.Ch., 13 March 2004.
30. Ibid., at para. 15. Judge Robertson himself did not sit in the Chamber in the disqualification proceedings.
31. One should note that, on 20 April 2004, Sesay's defence counsel filed a motion seeking clarification of the Disqualification Decision, in which it was argued that 'Justice Robertson must take no part in any decision (including decisions taken in the course of plenary sessions of the judges concerning the rules of the Special Court of Sierra Leone), insofar as any such decision relates to or concerns in any way the trials of defendants formerly members of the RUF.' The basis for this argument was that the appearance of bias is 'indivisible as regards the numerous functions and decisions of Justice Robertson both as a judge and member of the Plenary Council of judges, insofar as they relate to and impact upon the cases of the RUF'. Thus the defence essentially requested the disqualification of Judge Robertson from participating in the work of the SCSL. On 25 May 2004 the Appeals Chamber dismissed this defence motion, holding that 'the Disqualification Decision was clear, explicit and unambiguous' and reaffirming its decision to preclude Judge Robertson from 'adjudicating on the following matters: (1) Those Motions involving alleged members of the RUF for which decisions are pending, in this Chamber; and (2) Cases involving the RUF if and when they come before the Appeals Chamber'. On 28 May 2004 Sesay's defence counsel filed another motion, this time requesting that Judge Robertson be barred from 'all judicial functions involving the RUF (including those exercised pursuant to Rule 24 of the Rules of Procedure and Evidence)'. Rule 24 of the Rules of Procedure and Evidence concerns the roles of the SCSL judges at plenary meetings (which include, *inter alia*, adopting and amending the Rules of Procedure and Evidence, as well as deciding on matters relating to the internal functioning of the Chambers and the SCSL). On 6 August 2004 the defence counsel, however, asked to withdraw this motion. On 15 October 2004 the Appeals Chamber granted the defence counsel leave to withdraw the motion, emphasizing, nonetheless, that it considered that 'the merits of the Motion have been fully argued before this Chamber'.

3. Analysis

3.1. The need to preserve judicial independence and impartiality

The perceived independence and impartiality of international courts and tribunals are important elements in their quest for legitimacy in the eyes of the parties, other potential litigants, and the international community at large.[32] Independence and impartiality sustain the image (or myth) of the law as a social decision-making process offering fair and equal treatment of all parties to litigation[33] and the professed objectivity of judicial norm-application projects. Hence the notions of independence and impartiality seem to be indispensable to the long-term attractiveness of international adjudication and its credibility as a depoliticized alternative to diplomatic dispute resolution.[34] The consensual basis of many international adjudication processes, the weakness of international enforcement procedures, and the democratic deficit in the operation of international judicial bodies (i.e., their lack of accountability to an identifiable constituency), lend additional support for resorting to the strictest standards of independence and impartiality in order to build confidence over time in the work of the international judiciary and to facilitate voluntary compliance with its decisions.[35]

Furthermore, mixed or hybrid courts, such as the SCSL (and to some degree, perhaps, other international courts, such as the ICC or the ICJ) bear the extra burden of setting an exemplary procedure for certain domestic courts – especially in developing countries – to follow.[36] This serves as additional impetus for introducing appropriate standards of proper judicial conduct and ensuring the fairness of proceedings before international or internationalized courts.

Finally, some anachronistic rules of procedure governing the conduct of international adjudication proceedings, such as the right to insist on the appointment of judges bearing the nationality of litigant states[37] (a procedure arguably based on a hidden assumption that judges are likely be more sympathetic to the position of their state of nationality than non-national judges), already adversely affect the

32. See, e.g., T. Meron, 'Judicial Independence and Impartiality in International Criminal Tribunals', (2005) 99 AJIL 359, at 359–60. For the importance of legitimacy in international life, see generally T. M. Franck, *Fairness in International Law and Institutions* (1995).
33. Cf. J. Rutherford, 'The Myth of Due Process', (1992) 72 *Boston University Law Review* 1.
34. On the importance of judicial independence see L. R. Helfer and A. Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo', (2005) 93 *California Law Review* 899; L. R. Helfer and A. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', (1997) 107 *Yale Law Journal* 273, at 312–15; R. Keohane et al., 'Legalized Dispute Resolution: Interstate and Transnational', (2000) 54 *International Organization* 457, at 459–62. But see E. Posner and J. Yoo, 'Judicial Independence in International Tribunals', (2005) 93 *California Law Review* 1; E. A. Posner and J. C. Yoo,'Reply to Helfer and Slaughter', (2005) 93 *California Law Review* 957.
35. See, e.g., D. Shelton, 'Legal Norms for Independence and Accountability of International Tribunals', (2003) 2 *Law and Practice of International Courts and Tribunals* 27.
36. See, e.g., N. K. Stafford, 'A Model War Crimes Court: Sierra Leone', (2003) 10 *ILSA Journal of International & Comparative Law* 117, 133; D. Cohen, 'Hybrid Justice in East Timor, Sierra Leone, and Cambodia: Lessons Learned and Prospects for the Future', (2007) 43 *Stanford Journal of International Law* 1, at 37.
37. See, e.g., ICJ Statute, *supra* note 18, Art. 31; European Convention on Human Rights, 4 November 1950, Art. 27(2), ETS 5.

perceived objectivity and credibility of international courts.[38] Hence veteran international courts, such as the ICJ, ought to be particularly cognizant of the need to protect their integrity through application of the highest ethical standards. These policy considerations strongly encourage the development of a judicial code of conduct which would prohibit, or otherwise restrict, the participation of judges in cases where their involvement might raise the appearance of bias.

3.2. The Burgh House Principles

An informal attempt to draft a code of practice relating to judicial independence and impartiality was recently undertaken by an ILA-sponsored working group – comprising prominent judges, academics, and lawyers – that promulgated in November 2004 the Burgh House Principles on the Independence of the International Judiciary. Principle 9, which recommends that judges with past links to cases pending before their courts, is of particular relevance to our discussion:

9.1 Judges shall not serve in a case in which they have previously served as agent, counsel, adviser, advocate, expert or in any other capacity for one of the parties, or as a member of a national or international court or other dispute settlement body which has considered the subject matter of the dispute.

9.2 Judges shall not serve in a case with the subject matter of which they have had any other form of association that may affect or may reasonably appear to affect their independence or impartiality.

Whereas Principle 9.1 essentially mirrors Article 17(2) of the ICJ Statute, Principle 9.2 significantly expands the grounds for disqualification so as to cover 'any other form of association' which might compromise independence or impartiality in a way that resembles the 'any personal association' standard used in the original text of Rule 15(A) of the SCSL Rules. It can hardly be disputed that statements attributed to individual judges that raise concerns about their ability to adjudicate impartially a specific case would fall within the scope of Principle 9(2).[39] Such a construction may be further supported by the general precept found in the preamble to the Burgh House Principles, that 'judges shall decide cases impartially'.[40] So, according to the Burgh House Principles, statements which suggest actual bias or raise the appearance of bias in the eyes of a reasonable observer should justify judicial recusal or disqualification.[41]

38. But see *Prosecutor v. Seselj*, Decision on Motion for Disqualification, Case No. IT-03-67-PT, A. Ch., 10 June 2003, at para. 3 ('The nationalities and religions of Judges of this Tribunal are, and must be, irrelevant to their ability to hear the cases before them impartially').
39. This is confirmed, *inter alia*, by Principle 7 of the Burgh House Principles, which covers judicial expressions incompatible with judicial independence and impartiality. Although this last principle covers only expressions issued by sitting judges, the same impartiality rationale would restrict service by judges who have issued compromising statements prior to their appointment to the bench.
40. Another specific application of this general precept is found in restrictions introduced by the Principles on past and future links with the parties and *ex parte* contacts with them. Burgh House Principles, *supra* note 9, Principles 10, 12, 13.
41. The reference to objective appearances is grounded on the common law maxim that 'justice must not only be done, but should manifestly and undoubtedly be seen to be done'. *Rex v. Sussex Justices, ex parte* McCarthy,

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Although of a merely recommendatory nature, Principle 9(2) of the Burgh House Principles arguably reflects *lex lata*. Indeed, the 'reasonable appearance of bias' standard it adopts finds ample support in international and national practice. First, as already mentioned, Rule 15(A) of the SCSL Rules in its original, and certainly in its revised, version adopts this standard. Other constitutive instruments of international courts and tribunals also facilitate the disqualification of judges whose independence and impartiality may reasonably be questioned.[42] The ICJ Statute's failure to incorporate a Principle 9(2)-type disqualification standard may thus be viewed as out of step with the ethical standards explicitly governing the work of its newer counterparts.

Second, the ICTY Appeals Chamber judgment in the *Furundžija* case demonstrates the acceptability and workability of the standard enumerated in Principle 9(2).[43] In that case the ICTY addressed a challenge against the decision not to disqualify Judge Mumba – the presiding judge of the trial chamber – by reason of her past work on the UN Commission on the Status of Woman, which involved calls for the punishment of perpetrators of sexual offences in the war in Yugoslavia. The Appeals Chamber held that 'there is a *general rule* that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias'.[44] Significantly, the Appeals Chamber held that Rule 15(A) of its Rules of Procedure and Evidence (which mirrors the original language of Rule 15(A) of the SCSL Rules) should be construed in the light of this general principle. Still, the Chamber decided to reject the specific challenge raised against Judge Mumba; in particular, it noted that her work for the UN was in an official, not personal, capacity, and did not necessarily reflect her views on the matter; moreover, even if Judge Mumba held personal views on the need to punish sexual offenders in general, there was no indication that she would be inclined to find individual guilt in the specific case at hand.[45]

Third, there is considerable evidence that 'reasonable appearance of bias' is the dominant legal standard governing disqualification proceedings under domestic law. This is corroborated not only by a cursory review of domestic case law and legislation,[46] but also by the jurisprudence of the European Court of Human Rights,

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[1924] 1 KB 256, at 259. It also sits well with the Roman law notions that 'litigations should proceed without suspicion'. See Code of Justinian, Book III, Title 1, section 3 ('Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before an issue joined, so that the cause go to another'; translated in H. Putnam, 'Recusation', (1923) 9 *Cornell Law Quarterly* 1, at 3, at n. 10.

42. Rome Statute of the International Criminal Court (ICC), Art. 41(2)(a) ('A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground'); ICC Rules of Procedure and Evidence, Rule 34(1) (authorizing the Prosecutor to move to disqualify judges if their functions or expressed opinions 'objectively, could adversely affect the required impartiality of the person concerned'); ICTY Rules of Procedure and Evidence, Rule 15(A) ('A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality'); ICTR Rules of Procedure and Evidence, Rule 15(A) ('A Judge may not sit on a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality').
43. Meron, *supra* note 32, at 367.
44. *Prosecutor v. Furundžija*, Judgement, Case No. IT-95-17/1-A, A. Ch., 21 July 2000, at para. 189 (emphasis added).
45. Ibid., at paras. 199–200.
46. See, e.g., *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte* Pinochet Ugarte, [1999] 1 All ER 924 (HL) (per Lord Hope of Craighead) ('Where a judge is performing a judicial duty, he must not only bring to

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which laid down judicial independence standards for national courts to follow,[47] and the contents of other international legal texts that require states to ensure that their domestic judiciary remain independent.[48]

The converging practice of international and national courts and the growing regulation of the proscription of perceived bias in international instruments suggest that the standard has been accepted as a general principle of law governing international judicial proceedings. Alternatively, one could invoke the notion that courts are entrusted with certain 'inherent powers' to conduct their judicial business.[49] Such inherent powers arguably include the power to disqualify judges whose participation in the proceedings might undermine their fairness and legitimacy. While the exercise of inherent powers by courts, whose constitutive instruments explicitly confer upon them general powers to regulate the proceedings, is likely to draw little, if any, opposition,[50] other courts may resort to such powers nonetheless.

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the discharge of that duty an unbiased and impartial mind. He must be seen to be impartial'); *Hoekstra v. Her Majesty's Advocate*, 2000 SCCR 367, 368 (HCJ); *A.S.M. Shipping Ltd. of India v. T.T.M.I. Ltd. of England* [2005] EWHC 2238 (Comm), [2005] All ER (D) 271 (Nov); *Webb v. The Queen* (1994) 181 CLR 41, 30 June 1994 (Australia) (per Mason CJ and McHugh J)('Of the various tests used to determine an allegation of bias, the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality'); *R.D.S. v. The Queen*, 151 DLR (4th) 193, at 229 (1997)(Can. Sup. Ct.)('When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias'); *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others, Judgment on Recusal Application*, 1999 (7) BCLR 725 (CC), at para. 35, 3 June 1999 ('Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes'); *U.S. v. Bremers et al.*, 195 F 3d 221, 226 (5th Cir. 1999) ('Since the goal of section 455(a) is to avoid even the appearance of impropriety . . . recusal may well be required even where no actual partiality exists'); *Liljeberg v. Health Services Acquisition Corp.*, 486 US 847, 860 (1988). See also the following provisions in civil law systems: Arts. 22–24 of the German Code of Criminal Procedure (Strafprozeßordnung); Art. 668 of the French Code de Procédure Pénale; Arts. 34–36 of the Italian Codice de Procedura Penale; Arts. 512–519 of the Dutch Code of Criminal Procedure (Wetboek van Strafvordering); Sections 13 and 14 of the Swedish Code of Judicial Procedure (1998).

47. See *Sramek v. Austria*, Judgment of 22 October 1984, Eur. Ct HR, Series A, No. 84, para. 42; *Campbell and Fell v. United Kingdom*, Judgment of 28 June 1984, Eur. Ct HR, Series A, No. 80, para. 85.

48. Universal Declaration of Human Rights, Art. 10 ('Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'); International Covenant on Civil and Political Rights, Art. 14(1) ('In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established'); American Convention on Human Rights, Art. 8(1) ('Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal'); European Convention on Human Rights, Art. 6(1) ('[E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'); African Charter on Human and Peoples' Rights, Art. 7(1)(d) ('[Every individual shall have the right to] be tried within a reasonable time by an impartial court or tribunal'). Arguably, such standards could also govern the right of individuals to fair trial before independent and impartial *international* tribunals.

49. See, e.g., *Prosecutor v. Bobetko*, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge, Case Nos. IT-02–62-AR54 *bis* & IT-02-62-AR108 *bis* at 29, A. Ch., 29 November 2002, at para. 15; *Prosecutor v. Jelisic*, Decision on Request to Admit Additional Evidence, Case No. IT-95-10-A, A. Ch., 15 November 2000; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United States)*, Order of 14 April 1992, [1992] ICJ Rep. 3, at 113 (Judge El-Kosheri, Dissenting Opinion) (courts have inherent power to ensure the proper administration of justice).

50. See, e.g., International Centre for Settlement of Investment Disputes, Rules of Procedure for Arbitration Proceedings (as amended on 29 September 2002), Art. 19, available at http://www.worldbank.org/icsid/basicdoc/partF.htm; United Nations Convention on the Law of the Sea, 10 December 1982, Annex VII, Art. 5 (Arbitration Rules), (1982) 21 ILM 1261; Understanding on the Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the Agreement Establishing the World Trade Organization), 15 April 1994, Art. 12.1, (1994) 33 ILM 1226.

3.3. The normative framework underlying the ICJ's decision

If we are right then, and existing international law authorizes international courts to disqualify judges from sitting in cases in circumstances where their participation may create the appearance of bias, then the decision of the ICJ to refrain from stepping outside the grounds for disqualification specified in Article 17(2) of the Statute implicit in the ICJ Order[51] is disappointing. This is because the implications of construing the meagre grounds for disqualification stipulated in the Court's constitutive instruments as exhaustive would bar the Court in future cases from invoking not only Principle 9(2)-type restrictions but also other important judicial independence and impartiality principles such as the prohibition against judges sitting on a case in whose outcome they have an interest[52] or the need to respect post-service limitations vis-à-vis parties to litigation.[53] Curiously, the position taken by the Court in the *Wall* case on the exhaustive nature of Article 17(2) is also at odds with the Court's recent inclination to issue practice directions which introduce new ethical standards of conduct for judges, ad hoc judges, and registrars that go beyond the explicit prescriptions of the Statute.[54]

We believe that all the aforementioned policy considerations render the dissenting opinion of Judge Buergenthal on the non-exhaustive nature of Article 17(2) far more attractive than the majority's view. Buergenthal's legal position is premised upon three interpretative propositions which strive to reconcile his expansive view on ethical standards with the letter and spirit of the Statute:[55] (i) Article 17(2) should not be construed as introducing exhaustive grounds for disqualification;[56] (ii) Article 17(2) supports broader principles of justice and fairness, which warrant sensitivity to appearances of judicial bias;[57] and (iii) the Court has inherent powers to apply these broader principles – in Buergenthal's words, this 'power and obligation is implicit in the very concept of a court of law charged with the fair and impartial administration of justice'.[58]

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51. This is because Article 17(2) is the only legal source identified by the Court in the substantive part of the decision.
52. Burgh House Principles, *supra* note 9, Principle 10.
53. Ibid., Principle 13.
54. ICJ Practice Directions, Directions VII–VIII (VII: 'The Court considers that it is not in the interest of the sound administration of justice that a person sit as judge *ad hoc* in one case who is also acting or has recently acted as agent, counsel or advocate in another case before the Court. Accordingly, parties, when choosing a judge *ad hoc* pursuant to Article 31 of the Statute and Article 35 of the Rules of Court, should refrain from nominating persons who are acting as agent, counsel or advocate in another case before the Court or have acted in that capacity in the three years preceding the date of the nomination. Furthermore, parties should likewise refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge *ad hoc* in another case before the Court'; VIII: 'The Court considers that it is not in the interest of the sound administration of justice that a person who until recently was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court (principal legal secretary, first secretary or secretary), appear as agent, counsel or advocate in a case before the Court. Accordingly, parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court').
55. For a discussion of the origins of the relevant 1929 amendments of Article 17 of the (then PCIJ) Statute, see S. Rosenne, *The Law and Practice of the International Court of Justice, 1920–2005* (2006), Vol. I, at 400–2.
56. ICJ Order, *supra* note 1, at para. 10 (Judge Buergenthal, Dissenting Opinion).
57. Ibid.
58. Ibid., at para. 11.

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This interpretative manoeuvre performed by Judge Buergenthal sits well with our position that Principle 9 of the Burgh House Principles reflects *lex lata* and should be applied, either as a general principle of law or as stemming from the inherent powers of the judiciary, even in the absence of explicit provisions to the effect in the constitutive instruments governing the work of international courts. It is also compatible with the flexible construction of Rules 15(A) and 15(B) of the SCSL Rules offered by the Appeals Chamber in *Sesay*, which is indicative of a willingness to apply a robust version of the judicial independence and impartiality principle and read it into a text whose explicit language under-protects the principle.[59]

3.4. The application of the independence and impartiality standards in the *Wall* and *Sesay* decisions

Although the ICJ Order appears, at first glance, to resist the possibility of invoking non-enumerated grounds for qualification, a closer look at the text of the decision suggests some willingness on the part of the Court to introduce a certain degree of flexibility into the text of Article 17(2) of the ICJ Statute after all. In addressing Israel's objections to the participation of Judge Elaraby, the Court stated that 'Judge Elaraby expressed no opinion on the question put in the present case; . . . consequently Judge Elaraby could not be regarded as having "previously taken part" in the case in any capacity'.[60] By implication, one may assume, perhaps, that had Elaraby discussed the actual pending case in its comments, the Court might have been willing to regard such comments as an inappropriate form of participation – that is, adopt a flexible construction of the term 'taken part'.[61]

But even this limited manifestation of flexibility is disappointing. First, it reveals an unjustifiable preference of formal manifestations of past involvement (participation in the *same* case) over less direct, but no less troubling, manifestations of personal involvement that raise strong independence or impartiality concerns; while previous participation in the same case, minor as it might be, could lead to disqualification, clear indication of prejudice or bias which is not accompanied by participation in the same case would not require withdrawal from the bench – an outcome that seems to be hardly coherent. Furthermore, the narrow definition given by the Court to the term 'the case' – that is, the dispute over the construction of the *Wall*, and not the background conditions that led to its construction (e.g., the Israeli occupation, the Israeli settlements, the Palestinian *intifada*) – fails to reflect the rationales underlying Article 17 (as well as Principle 9 of the Burgh House Principles). Here, too, we prefer Judge Buergenthal's position, criticizing the Court for artificially dissociating the specific legal question at hand, on which Judge Elaraby

59. See, e.g., ibid., at paras. 6–8.
60. Ibid., at para. 8.
61. Interestingly, it was alleged that in another interview given by Judge Elaraby to an Egyptian newspaper after the advisory proceedings were brought before the Court, he commented that 'There is historical and international evidence that demonstrates that this action of Israel is illegitimate, I believe that Israel's arguments in this suit will be groundless, and that Israel will be in a position where it will be possible to impose sanctions upon it for the first time, if the International Court of Justice decides to convict it.' 'ICJ Denies Judge Criticized Fence', *Jerusalem Post*, 8 February 2004. Judge Elaraby denied ever giving that interview, however, and the matter was not pursued any further by the Court.

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indeed did not comment, from the essential legal context, on which Elaraby's expressed positions in the *Al-Ahram* interview created, according to Buergenthal, a reasonable appearance of bias.

A comparison between the *Wall* and *Sesay* decisions offers additional support to Buergenthal's criticism of the narrow definition given by the majority in *Wall* to the term 'the case': although Judge Robertson's remarks on the nature of the crimes perpetrated by RUF members in the course of the civil war in Sierra Leone pertained to the same pattern of crimes with which the accused before the SCSL were charged, he never identified by name any of the accused or specifically alluded to any distinct *actus reus* attributable to any of them. In other words, Robertson's book addressed the *background conditions* to the RUF case – expressing the view that RUF members were responsible for numerous heinous crimes – but not the specific indictment against Sesay. In fact, one could have argued in *Sesay* that, as in *Furundžija*, a distinction ought to have been made between the judge's previous conviction that RUF members had committed horrible crimes and his determination that a specific RUF member brought before the Court was guilty as charged. Thus the decision of the SCSL to reject the distinction between expression of general and specific views on the contested issues and to disqualify Robertson accordingly appears to stand for even stronger ethical standards than those adopted by the ICTY in *Furundžija*.[62]

By contrast, the views expressed by Judge Elaraby in the *Al-Ahram* interview on Israel's objectionable policy of 'establishing new facts' on the ground in illegally occupied Palestinian territories, and the ensuing violations of international humanitarian law, reveal in our mind a strong prejudice against Israel's practices in the Occupied Territories. The fact that the Advisory Opinion dealt with one specific measure, which fits well within the pattern of 'establishing new facts on the ground' through unilateral activities – that is, the construction of the Wall (which came into being after the date of the interview) – can hardly dissipate the concerns about Judge Elaraby's impartiality on the matter. In short, it seems to us that the linkage between the views expressed by the judge and the specific circumstances of the case adjudicated by the Court were at least as strong in the *Wall* case as they were in the *Sesay* case. The comparative analysis of the two cases thus highlights the inadequacy of the restrictive approach taken by the ICJ on the definition of what constitutes 'the case' for the purposes of identifying judicial bias.

Another issue glossed over by the ICJ Order is the effect, on appearances of impropriety, of acts performed in an official capacity. Upon dismissing Israel's complaints that were based on the involvement of Judge Elaraby in the Israeli–Palestinian conflict in his previous role as an Egyptian diplomat, the Court noted that Elaraby's acts were 'performed in his capacity of a diplomatic representative of a country'.[63]

62. Obviously, there may be circumstances in which barring judges from serving on cases because they involve general legal issues on which these judges previously expressed their opinions may be excessive. We do not, however, believe that *Sesay* represented such a case, given the unequivocal and elaborate views of President Robertson on the factual events in Sierra Leone and their legal implications.

63. ICJ Order, *supra* note 1, at paras. 6–8.

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This language is compatible with earlier ICJ case law on the matter,[64] and mirrors the language used by the ICTY in *Furundžija*. There, too, the Appeals Chamber held that 'Judge Mumba acted as a representative of her country and therefore served in an official capacity',[65] and that as a result 'Judge Mumba's view presented before the UNCSW [UN Commission on the Status of Women] would be treated as the view of her government'.[66] These *dicta* seem to suggest that only pre-service acts performed by a judge in her non-official capacity can create an improper appearance of bias covered by the relevant constitutive instrument provisions.

However, this conclusion, too, is perhaps open to question. First, it is important to note that the Appeals Chamber in *Furundžija* qualified its holding by adding that 'There may be circumstances which show that, in a given case, a representative personally identified with the views of his or her government, but there is no evidence to suggest that this was the case here'.[67] In other words, official acts might nonetheless give rise in certain situations to the appearance of bias, and it seems that, in the context of the *Wall* case, the *Al-Ahram* interview confirmed the personal identification by Judge Elaraby with the positions he advanced as a diplomat for Egypt. Second, the distinction between official and private capacity is incompatible with the rationale underlying some of the grounds of disqualification introduced in Article 17(2) of the ICJ Statute. Since the article bars, *inter alia*, the participation of judges who were previously 'agent, counsel, or advocate for one of the parties', it is difficult to understand why involvement in the case as a diplomat would always be permissible. On the contrary, the same rationales – that advocating a cause is likely to lead to self-persuasion and prejudice, and that intensive involvement in the case might create an appearance of bias (regardless of the official or private capacity of the involved person) – would seem to support the disqualification of diplomats-turned-judges whose involvement in the case had been substantial. While it may very well be the case that Elaraby's involvement in certain aspects of the Israeli–Palestinian conflict relating to the *Wall* case did not meet the degree of intensity that would create an appearance of bias in the eyes of a reasonable observer, this should have been the subject of more meticulous examination.[68]

64. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 18, at para. 9; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Order of 18 March 1965, [1965] ICJ Rep. 3.
65. *Furundžija*, *supra* note 44, at para. 199.
66. Ibid.
67. Ibid. For an analogous decision, see *Prosecutor v. Delalić*, Decision of 25 September 1999, Case. No. IT-96-21-A, A. Ch., 25 September 1999, at para. 10 (ICTY AC) (the fact that a judge engages in political, administrative, or professional activities may in certain cases also imply that he or she lacks impartiality by virtue of personal interest or association with the case).
68. Cf. ICJ Order, *supra* note 1, at para. 6 (Judge Buergenthal, Dissenting Opinion) ('I share the Court's opinion that Judge Elaraby's prior activities, performed in the discharge of his diplomatic and governmental functions, do not fall within the scope of Article 17, paragraph 2 . . . This conclusion can be justified on the ground that these views were not Judge Elaraby's personal views, but those of his Government whose instructions he was executing . . . Although I can imagine circumstances where this general rule will not withstand closer scrutiny, I agree with the Court in applying it to the instant case').

3.5. Is there a difference between ethical standards governing criminal and advisory proceedings?

Clearly, the ICJ proceedings in *Wall* differed considerably from the SCSL proceedings in *Sesay*; the latter were part of criminal proceedings designed to determine the fate of individual defendants, whereas the former was a non-binding advisory process indirectly affecting the interests of states that are parties to international disputes. But should this difference justify the introduction of different ethical standards of judicial independence and impartiality? One could argue that the harsh penalties associated with the criminal process and the higher standard of proof in criminal cases might also justify the adoption of more exacting standards of judicial conduct. At the same time, the lower stakes associated with advisory proceedings, which are non-binding in nature, could arguably justify looser ethical standards of judicial conduct.

To our mind, the proposition that differences in the nature of the proceedings warrant different ethical standards is unpersuasive for a number of reasons. First, all international courts aspire to conduct their business in accordance with notions of justice and fairness that underlie the principles of judicial independence and impartiality, and the International Court of *Justice* is no exception. Indeed, Article 2 of the ICJ Statute explicitly espouses the notion of judicial independence.[69] Moreover, a theory of linking between judicial roles and degrees of judicial independence and impartiality is without support in analogous domestic case law pertaining to the judicial independence and impartiality of domestic courts.

Second, it may be argued that general courts, such as the ICJ, operate under extraordinarily difficult conditions – they address politically sensitive questions, rely, almost completely, on the voluntary co-operation of states and possess very limited enforcement capabilities. Hence their position might be even more precarious than that of international and mixed criminal courts whose judicial powers have stronger compulsory features. In addition, some of the ICJ's unique characteristics (which may derive from its roots as a permanent arbitration forum)[70] – such as the participation of national judges in the proceedings[71] – are already in tension with the notions of judicial independence and impartiality. As a result, courts such as the ICJ suffer from a certain deficit in their level of independence and impartiality and should, arguably, strive harder than other judicial institutions to maintain their legitimacy in the eyes of prospective parties to litigation and the larger international community. While advisory proceedings do indeed give rise to a unique set of considerations, we do not believe that the Court's pursuit of legitimacy and interest in promoting compliance with the international norms it identifies in such cases is significantly different from that in 'ordinary' contentious cases (especially in advisory cases such as the *Wall* case, which have obvious contentious features).

So the need to adhere to strict ethical standards in interstate cases, or even advisory opinions affecting state interests, before the ICJ is not necessarily less than in

69. ICJ Statute, *supra* note 18, Art. 2 ('The Court shall be composed of a body of independent judges').
70. See, e.g., I. Brownlie, *Principles of Public International Law* (2003), 677.
71. ICJ Statute, *supra* note 18, Art. 31.

criminal cases. Indeed, neither the Burgh House Principles nor any other national and international codes of judicial ethics known to us espouse the distinction between criminal and non-criminal processes in matters related to judicial independence and impartiality.

4. Conclusion

The restrictive approach taken by the ICJ in the *Wall* case seems to stem from a conservative approach to judicial independence and impartiality (which may ultimately be linked to the historical foundations of the Court as a permanent substitute for arbitration tribunals).[72] The Court was reluctant to read into its constitutive instruments new grounds for disqualification and read rather narrowly the existing relevant provision (Article 17(2) of the ICJ Statute). Such an approach is, however, out of step with the more robust protection of judicial independence and impartiality adopted by newer courts such as the SCSL.

Since the effective functioning of all legal systems, including the international legal system, depends to some degree on the impartiality of their judicial mechanisms, we believe that the ICJ should strive to strengthen the perceived propriety – and, hence, legitimacy – of its proceedings. Arguably, it should follow in future cases the position taken by Judge Buergenthal, according to which Article 17(2) does not set out 'the exclusive basis for the disqualification of a judge of this Court', or issue new practice directions to obtain that same effect. By expanding and clarifying the grounds for judicial qualification, the Court may achieve greater universal respect for its integrity and efficiency, and serve as a role model for national courts and a growing number of international courts that face similar issues.

72. For the argument that arbitration bodies are less independent than most permanent courts, see Posner and Yoo, 'Judicial Independence in International Tribunals', *supra* note 34.

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