PARTIALLY DISSENTING OPINION OF JUDGES

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INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF SCOT COCHRAN *V.* COSTA RICA

JUDGMENT OF MARCH 10, 2023
(Preliminary objections and merits)

1. With the usual respect for the majority decision of the Inter-American Court of Human Rights (hereinafter, "the Court" or "the Inter-American Court"), we issue this opinion[1] in order to express our position on the admissibility of establishing the international responsibility of the State of Costa Rica for the violation of the right to judicial guarantees, in particular the guarantee of an impartial judge, based on Article 8(1) of the American Convention on Human Rights in relation to Article 1(1) of this instrument.

2. To this end, we will refer, first, to the right to be tried by an impartial judge as part of due process of law and then analyze the merits of the dispute in order to set out the arguments that support our position.

I. The right to be tried by an impartial judge as part of due process of law

3. Article 8(1) of the American Convention indicates the following:

> Article 8. Right to a Fair Trial
> 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

4. Several standards developed in the Inter-American Court's case law have been derived from this provision and, based on them, the so-called "due process of law" – a guarantee that establishes the right to be tried by an impartial judge – has been articulated and provided with content.[2] Thus, the Court has asserted that, in a democratic society, the guarantee of judicial impartiality allows the courts of justice to inspire the necessary trust and confidence in the parties to a case, as well as in the general public.[3]

5. Consistent with the case law of the European Court of Human Rights (hereinafter, "the European Court"), the Inter-American Court has indicated that judicial impartiality has two aspects: one subjective and the other objective.[4]

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[1] Article 65(2) 65(2) of the Rules of Procedure of the Inter-American Court: "Any judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the President so that the other judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment."

[2] *Case of Genie Lacayo v. Nicaragua*. *Merits, reparations and costs*. Judgment of January 29, 1997. Series C No. 30, para. 74.

[3] *Cf. Case of Herrera Ulloa v. Costa Rica*. *Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107, para. 171.

[4] *Cf. Case of Herrera Ulloa v. Costa Rica*, *supra*, para. 170.

6. On the one hand, the subjective aspect signifies that the Court must be free of personal prejudices when undertaking the hearing and deciding of a case.[5] In this context, the existence of impartiality must be determined on the basis of the personal conviction of a particular judge in a given case.[6]

7. On the other hand, the objective aspect refers to the duty to provide sufficient guarantees to ensure that no legitimate doubt can exist in relation to the right in question.[7] Thus, the objective is to eliminate any doubt that the defendant or the community may entertain regarding the absence of impartiality.[8] From this perspective, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts that may raise doubts as to his impartiality.[9] Thus, the judge must appear to act without being subject to any influence, inducement, pressure, threat or interference, direct or indirect, and only and exclusively in accordance with – and on the basis of – the law.[10]

8. Bearing in mind the foregoing, the purpose of this dissent focuses on the presumed responsibility of the Costa Rican State for the violation of the guarantee of an impartial judge from its objective perspective. We will refer to this aspect in the following section.

II. Analysis of this specific case

9. Regarding the deliberations conducted in this case concerning the right to judicial guarantees, in particular to an impartial judge in relation to the obligations to respect and to ensure rights, it will be useful to briefly describe the crucial point of these deliberations.

10. As indicated in paragraph 119 of the judgment, the dispute is rooted in determining whether or not the fact that Judge LGBG ruled on the appeal against one of the decisions extending Scot Cochran's pre-trial detention and, subsequently, became a member of the collegiate court that convicted him resulted in a situation of lack of impartiality in this specific case because, according to the representatives, the judge "had already advanced his opinion on the same case just one year previously."[11]

11. In the course of the aforementioned deliberations, most members of the Court chose to reject the State's responsibility for the alleged violation of the right to judicial protection established in Article 8(1) of the American Convention in relation to its Article 1(1), to the detriment of Scot Cochran.[12]

12. To reach this conclusión, the Court indicated the following:

> The Court finds that there are three elements that are crucial for its assessment of the impartiality of the judge in this case: (i) the object and scope of the decision issued by Judge LGBG on the appeal against the measure of deprivation of liberty, which merely verified the existence of the legal requirements for

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5 *Cf. Case of Herrera Ulloa v. Costa Rica*, *supra*, para. 170.

6 *Cf.* ECHR *Hauschildt v. Denmark*, no. 10486/83, Judgment of May 24, 1989, para. 46.

7 *Cf. Case of Herrera Ulloa v. Costa Rica*, *supra*, para. 170.

8 *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. *Preliminary objection, Merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 56.

9 *Cf.* ECHR *Hauschildt v. Denmark*, *supra*, para. 48.

10 *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, supra*, para. 56; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of February 26, 2016. Series C No. 310, para. 162.

11 Paragraph 115.

12 *Cf.* Paragraph 126.

> the measure and did not assess the merits of the matter; (ii) the decision to convict Scot Cochran was taken by a collegiate court, where LGBG was only one of three judges, and the vote was unanimous; thus, even without the participation of LGBG the result would have been the same – since the other two judges had not been challenged, and (iii) even though the possibility existed of challenging LGBG as a member of the collegiate court, neither Scot Cochran nor his representatives filed this challenge.[13]

13. Bearing in mind these three elements used by the Court to establish the absence of State responsibility for the alleged violation of judicial impartiality, we will now set out the reasons why we believe that, in this specific case, the said international responsibility was verified. To this end, we will refer to each of the elements described in the Court's majority decision.

14. First, we consider that the reason set out in paragraph 122 of the judgment is not correct when it finds that "although the participation in the trial court of a judge who has previously examined the case may have an impact on the guarantee of impartiality, it should be underscored that, in this case, this participation occurred at the investigation stage and not to order pre-trial detention; rather it was to decide the appeal against the precautionary measure." To support this thesis, the Court cites *Amrhein et al. v. Costa Rica* in which it did not consider that the right to be tried by an impartial judge had been violated because the judge did not enter into the merits of the matter, but rather merely examined the elements required to order pre-trial detention.[14] Consequently, the majority decision concluded that "[t]hus, it cannot be considered that the assessment made by the appeals judge at this stage had been sufficient to influence a subsequent determination of responsibility and guilt."[15] However, we believe that this argument is erroneous for at least two reasons.

15. First, it should be recalled that the standard cited by the majority in the case of *Amrhein et al. v. Costa Rica*, was re-examined recently in *Tzompaxtle Tecpile et al. v. Mexico.*[16] And, according to the latter decision, when examining pre-trial detention and its elements, specifically in relation to the substantive assumptions relating to the existence of the wrongful act and the participation of the person being processed, the Court indicated that this premise should be "understood taking into account that, in principle and in general, this decision [of the admissibility of pre-trial detention] should not have any effects in relation to the responsibility of the accused, because it should be taken by a **different**[17] judge or judicial authority to the one that eventually takes a decision on the merits."[18]

16. We believe that this criterion should not be interpreted alone, but rather it must necessarily be understood as a way of effectively implementing the right to be tried by an impartial judge within the framework of domestic law. Thus, it is not possible to provide adequate guarantees of impartiality and of the absence of uncertainty for the procedural subjects, unless it is ensured, at least, that the aforementioned decisions are decided by different judges.

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13 Paragraph 121.

14 *Cf.* Paragraph 122.

15 Paragraph 122.

16 It should be recalled that in *Herrera Ulloa v. Costa Rica,* the Court had already indicated that "the justices of the Third Chamber of the Supreme Court of Justice should have abstained from taking cognizance of the two cassation remedies filed to challenge the November 12, 1999, judgment because […] when deciding the remedy of cassation to challenge the May 29, 1998, acquittal the same justices examined the merits and ruled on not merely the form." *Cf.* Paragraph 174.

17 Bold added.

18 *Case of Tzompaxtle Tecpile et al. v. Mexico*. *Preliminary objection, merits, reparations and costs.* Judgment of November 7, 2022. Series C No. 470, para. 102.

17. Second, we should not lose sight of the European Court's findings in a similar case to this one.[19] In this situation, it noted 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."[20] Thus, it asserted that:

> The application of the [law regulating the admissibility of detention on remand) requires, *inter alia*, that the judge be satisfied that there is a "particularly confirmed suspicion" that the accused has committed the crime(s) with which he is charged. This wording has been officially explained as meaning that the judge has to be convinced that there is "a very high degree of clarity" as to the question of guilt […]. 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. The Court is therefore of the view that in the circumstances of the case the impartiality of the said tribunals was capable of appearing to be open to doubt and that the applicant's fears in this respect can be considered objectively justified.[21]

18. Based on those arguments, the European Court considered that there had been a violation of the right to be heard by an impartial court, as established in Article 6(1) of the European Convention on Human Rights.[22] This matter is very similar to the judgment that is the subject of this opinion. Thus, the judge's satisfaction referred to in the European Court's judgment regarding the existence of "a very high degree of clarity" as to guilt, when ordering pre-trial detention, is an aspect that is also present in the facts of the Scot Cochran case. Indeed, in the instant case, when the judge of appeal decided on the extension of the precautionary measure, he explicitly considered that: "… regarding the evidence proving the charges, this case has sufficient evidence that at least supports a **strong probability of the participation** of the accused Scott Cochran in these facts."[23]

19. Accordingly, as is clear from the factual framework and indicated in the judgment of the Inter-American Court, when issuing the order for pre-trial detention, "the judge considered that there was the required degree of probability that Scot Cochran was the author of the wrongful act attributed to him, because the Judicial Investigation Department had conducted a series of procedures and received witness statements to this effect."[24] Consequently, as in the case heard by the European Court, the distinction between what was decided by the judge in the context of pre-trial detention (either initially, in the context of a review and extension of the pre-trial detention, or in the context of an eventual appeal) and the matter that had to be decided when handing down a judgment in the main trial becomes tenuous. This issue becomes more relevant, especially given the existence of probative elements gathered during the investigation stage relating to Scot Cochran's participation in the wrongful act.

20. The foregoing also reveals the insufficiency of the second argument; that, since the vote was unanimous and the court was collegiate, the result would also have been a conviction.[25] In this context, it is necessary to recall our observation in the first section of this opinion; that the central purpose of objective impartiality is to eliminate any doubt that the defendant or the community could have as to the absence of impartiality.[26] Thus, it is difficult to inspire adequate confidence in the system of justice if, at the same time, the possible flawed

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19 We are grateful to Esteban Oyarzún for his contribution as research assistant for this opinion.

20 *Cf.* ECHR, *Hauschildt v. Denmark*, *supra*, para. 50.

21 ECHR, *Hauschildt v. Denmark, supra,* para. 52.

22 *Cf.* ECHR, *Hauschildt v. Denmark*, *supra*, para. 53.

23 Ruling No. 235-03 of the Criminal Trial Court of the First Judicial Circuit of San José of August 11, 2003, signed by Judge LGBG, confirming the decision appealed against (evidence file, folios 55 to 58).

24 Paragraph 53.

25 *Cf.* Paragraph 123.

26 *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, *supra*, para. 56.

composition of a jurisdictional organ is not challenged on the grounds that, anyway, "the result would have been a conviction."

21. When examining objective impartiality, the European Court has indicated that, when doubt exists as to the lack of impartiality of one of the judges who composes a court, in view of the secrecy of the deliberations, it is impossible to ascertain a judge's actual influence in that context.[27] Therefore, "the impartiality of that court could be open to genuine doubt,"[28] and this led that court to conclude that there had been a violation of Article 6(1) of the European Convention on Human Rights.[29] Consequently, in such contextual circumstances, similar to those of the instant case, any reasonable observer would consider that a judge who had decided aspects related to pre-trial detention and had, subsequently, ruled on the merits of the same case, would inevitably inspire legitimate misgivings in the defendant regarding the guarantee of the court's impartiality. Moreover, it goes without saying that, during the deliberations, each member of the court sets out reasons aimed at persuading the other members in one way or the other so that the final decision is the best and most appropriate for the case in question. Judges do not act as separate entities in sealed compartments. The decision taken as a result of the deliberations is an act that is the outcome of dialogic reasoning and, due to its nature, this is collective. Consequently, it is not enough to eliminate the judge implicated to automatically deduce that the opinion of that judge had no impact on the decision of the majority. It is precisely because the final ruling is the result of a decision of the court as a whole, adopted in the context of secret deliberations, that it is not possible to identify and isolate the influence of the opinion of one of the judges. Asserting the contrary would mean ignoring the value, importance and impact of this collegiate procedure.

22. Lastly, regarding the third argument, the Court indicated that "even though the possibility of filing a challenge was available at the time of the facts, this was not filed against Judge LGBG during the criminal proceedings that culminated in the guilty verdict […] rather, it was submitted for the first time during the third review procedure, [in which it was] found that there was no suspicion of partiality because there was no evidence that the judge had assessed the body of evidence when deciding the appeal against pre-trial detention."[30]

23. Here, we consider it necessary to recall the Inter-American Court's considerations in relation to the mechanism of challenge:

> [T]he Court considers that the mechanism granting the right to challenge judges has a twofold purpose; on one hand, it works as a guarantee for the parties to the proceedings, and on the other hand, it aims at providing credibility to the role performed by the jurisdiction. Indeed, challenging gives the parties the right to move for the exclusion of a judge when, regardless of the personal conduct of the questioned judge, there are proven facts or convincing elements that lead to grounds for misgivings or legitimate suspicions regarding his partiality, thus impeding his decision from being seen as made based on reasons in conformity with the law; therefore, the functioning of the judicial system is distorted. Challenging should not necessarily be seen as a judgment on the moral rectitude of the challenged official, but rather as a tool to build trust in those resorting to the State for the intervention of bodies that are and appear to be impartial.[31]

24. Despite the foregoing, we should not forget that, in addition to the possibility of

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[27] *Cf.* ECHR, *Case of Otegi Mondragon and Others v. Spain*, nos. 4184/15, Judgment of November 6, 2018, para. 67.

[28] ECHR, *Case of Otegi Mondragon and Others v. Spain*, *supra*, para. 67.

[29] *Cf.* ECHR, *Case of Otegi Mondragon and Others v. Spain, supra*, para. 69.

[30] Paragraph 124.

[31] *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, *supra*, para. 63; *Case of López Lone et al. v. Honduras*. *Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, para. 224.

procedural subjects availing themselves of challenges in the case of a possible situation of lack of impartiality, this guarantee must be respected by judges or judicial authorities *ex officio.*[32] Thus, "the judge or court must withdraw from a case submitted to their consideration when there is some reason or doubt that has an adverse impact on the integrity of the court as an impartial body."[33]

25. The foregoing is in keeping with the assertion of the European Court that "even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public, including the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw."[34]

26. In this regard, European case law has added that "it is the responsibility of the individual judge to identify any impediments to his or her participation and either to withdraw or, when faced with a situation in which it is arguable that he or she should be disqualified, although not unequivocally excluded by law, to bring the matter to the attention of the parties in order to allow them to challenge the participation of the judge."[35]

27. Consequently, in this specific case, above all, it was incumbent on the judges or judicial authorities involved in deciding the matter to refrain from hearing it or to inform those intervening in it of the possibility of challenging their participation in the clear existence of reasonable doubts about a lack of impartiality. This, in order to crystallize the necessary trust that the administration of justice must instill in procedural subjects and in the general public.

III. Final considerations

28. The foregoing reasons show that, by failing to take measures to avoid the same judge being involved in the pre-trial stage of the wrongful act and Scot Cochran's participation in this and, subsequently, being called on to decide on his guilt during the criminal trial, the State violated the guarantee of the impartiality of the court recognized in Article 8(1) of the American Convention. Indeed, in this case, the judge who decided the appeal, confirming the continuation of pre-trial detention, clearly considered the existence of evidence gathered during the investigation stage related to Scot Cochran's participation in the wrongful act. Evidently this makes the distinction between the elements taken into account when deciding on the precautionary measure and those assessed to deliver the judgment on the merits extremely tenuous.

29. It is not correct to found the decision not to declare this violation on the precedent in *Amrhein et al. v. Costa Rica* because, on November 7, 2022, the Court re-evaluated the said criterion in *Tzompaxtle Tecpile et al. v. Mexico* indicating that the judges who hear the precautionary measures and those who hear the merits of a case should be different.

30. The preceding conclusion is supported by the fact that the judgment recommends that, "owing to the situation [that a same judge had taken part in the decision on pre-trial detention and on the merits of the case], the State should take the necessary measures to further

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[32] *Cf. Case of Palamara Iribarne v. Chile*. *Merits, reparations and costs*. Judgment of November 22, 2005. Series C No. 135, para. 147.

[33] *Case of Palamara Iribarne v. Chile*, *supra*, para. 147.

[34] ECHR *Castillo Algar v. Spain*, no. 28194/95, Judgment of October 28, 1998, para. 45. Similarly: ECHR *Škrlj v. Croatia*, no. 32953/13, of July 11, 2019, para. 43.

[35] ECHR *Sigríður Elín Sigfúsdóttir v. Iceland,* no. 41382/17, Judgment of February 25, 2020, para. 35.

strengthen the guarantee of an impartial judge."[36] It is our understanding that, in order to rectify this structural problem, it would have been better and clearer to declare the violation of this guarantee directly.

31. As Lord Hewart said, "justice should not only be done, but should manifestly and undoubtedly be seen to be done."[37] Thus, the form is important. The participation of a judge in the conditions described above may detract from the perception that not only the defendant, but also society as a whole, should have concerning the impartiality of a court.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Patricia Pérez Goldberg
Judge

Pablo Saavedra Alessandri
Registrar

[36] Paragraph 125.

[37] *Rex v. Sussex Justices,* [1924] 1 KB 259.