

Leggi di seguito il commento del giudice rumeno Cristi Danilet che ricostruisce gli standards internazionali sulle garanzie di imparzialità e indipendenza della magistratura, con particolare riferimento agli orientamenti del Consiglio d'Europa *(e aderisci al rinnovato social network ww w.concorrenzaeavvocatura.ning.com*
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Independence and Impartiality of Justice

- International Standards -

22.03.2000 Cristi Danileţ
Judge, ROMANIA
contact: cdanilet@just.ro

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Abbreviations

U.N. United Nations
UNODC United Nations Office of Drugs and Crime
ECHR European Court for Human Rights (the number indicating the year represents the date of the decision)
UN Principle Principle from the Basic Principles of the Independence of Justice
IBA International Bar Association

Independence and Impartiality of Justice

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I. Introductory considerations

1. Preamble

In order for judges to secure the supremacy of law while correctly fulfilling their duties, they need a statute and special safeguards: independence and impartiality. There is a broad range of internaţional instruments available in this matter, which belong to what is essentially an international judicial Corpus Iuris. They reflect the concern of the various world or regional inter-government or non-government bodies for strengthening the role of the judiciary. These legal instruments, binding or non-binding, make up the foundation of a set of internaţional legal standards which, in turn, could lead to the consolidation of the judiciary in connection to the executive and legislative powers or in front of other groups or individuals that act with or without an empowerment f rom the state.

2. International instruments

All the international and regional instruments guarantee the right to a fair hearing before an independent and impartial court of law. While the independence of the judge is enshrined by his professional statute, impartiality is more a private matter. It is a virtue. The former means that there must be no subordination whatsoever, while the latter means the absence of any prejudice, passion, weakness, or personal feeling. The former is to be looked at in relation to a third party while the latter is analysed in relation to the magistrate himself.

a. instruments generated by formal organisations:

The Universal Declaration of Human Rights (UN, Paris, 1948) and The International Covenant on Civil and Political Rights (UN, 1966);
The American Declaration of the Rights and Duties of Man (International Conference of American States, Columbia, 1948);
The Declaration on Human Rights in Islam (Organisation of the Islamic Conference, Cairo, 1990);
The European Convention on Human Rights (Council of Europe, Rome, 1950);
The American Convention on Human Rights ("The San Jose Covenant", Costa Rica, 1978);
The African Charter on Human and Peoples' Rights (Organisation of African Unity, Banjul, 1981);
The Canadian Charter of Rights and Freedoms (annex to the 1982 Constitution);
The Basic Principles on the Independence of the Judiciary (UN, 1985);
The European Charter on the Statute for Judges (Council of Europe, 1998);
The Charter of Fundamental Rights of the European Union (European Council, Nice, 2000);
Opinion no. 1 on standards concerning the independence of the judiciary and the irremovability of judges; Opinion no. 2 on the funding and management of courts, with reference to the efficiency of the judiciary and to art. 6 of the European Convention on Human Rights; Opinion no. 3 on the principles and rules governing judges` professional conduct, in particular ethics,

incompatible behaviour and impartiality - of the Consultative Council of European Judges of the Council of Europe, 2001 and 2002;

b. instruments generated by magistrates associations:
The Judges Charter in Europe (European Association of Judges1, 1987);
The Universal Statute of the Judge (International Association of Judges,1999).

c. instruments generated by NGO`s or various other bodies:
Minimum Standards of Judicial Independence (The "New Delhi Standards", International Bar Association, 1982);
Draft Universal Declaration on the Independence of Justice (The "Singhvi Declaration", 1989);
The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (Asia Pacific Legal Association, 1995);
The Caracas Declaration (The Ibero-American Summit of Presidents of Supreme Courts and Tribunals of Justice, 1999);
The Beirut Declaration (Arab Conference on Justice, 2003);
The Bangalore Principles of Judicial Conduct (UNODC, Judicial Group on Strengthening Judicial Integrity, 2001);
The Suva Statement on the Principles of Judicial Independence and Access to Justice (INTERIGHTS, The Fiji Human Rights Commission, Fiji Judiciary, 2004), etc.

II. Independence

Relying on the theory of the separation of powers in the state, the independence of justice applies to both justice as an institution, as a system, and to the individual judges who decide on specific matters. Judges must be capable of discharging their professional duties without being influenced by the executive/legislative branches of government, by economic stakeholders, or by interest groups.

1. Independence of justice (institutional, structural independence)
There is a need for an independent justice to make the other powers responsible and prevent them from committing abuses ("power stops power") and to safeguard human rights and fundamental freedoms. It is the general rule tnat the independence of the judiciary should be regulated by the Constitution or through legal provisions.

1.1. Judiciary and the Legislature
Apart from its legislative competence, the Parliament is not supposed to intervene in justice matters except for particular situations where it may grant amnesty or pardon. The issuing of normative acts designed to block jurisdictional or execution procedures, or hearing judges in connection with decisions they pass are inadmissible practices.
To prevent the courts and judges from being affected by specific regulations adopted with the purpose of intervening in justice matters, the IBA Standards2 state that the legislature shall not pass legislation which retroactively reverses specific court decisions. Legislation introducing

changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service (points 19 and 20).

1.2. Judiciary and the Executive

The activity of the Government in the specific area of justice is acceptable only where it performs the legislative delegation function. It is also believed that the power of pardon vested with the Executive power or with the president of the country does not interfere with the work of the judiciary.

The IBA Standards provide that the ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges or of the judiciary as a whole (point 6).

1.3. Military and special (extraordinary) courts

The UN Human Rights Committee unequivocally maintained that "the right to be tried by an independent and impartial tribunal is an absolute right that maysuffer no exception"3. Therefore, they are to be applied under any circumstance and by all courts of justice, either ordinary or extraordinary. The organisation and operation of military and special courts separately from the civil, ordinary courts of justice raises issues with regards to the composition of the panel of judges, civilians being heard before military courts, and military personnel being tried for violating civilians' rights.

Under special circumstances, the creation of military courts or of courts with special competence, such as Courts of State Security, Revolutionary Courts, Courts for Robberies and Fire Weapons, represents a regular case of violation of the right to a fair judicial procedure. "While the International Covenant on Civil and Political Rights does not ban such categories of courts, the conditions it sets clearly indicate the fact that civilians should only be heard by such courts of law in exceptional circumstances and under conditions that indeed fulfil the complete safeguards set forth in article 14"4.

According to the judicial practice of the European Commission of Human Rights, special courts cannot be established by decision of the Executive, but "the purpose behind demanding that courts should be established by law is that the organisation of justice must not be left at the discretion of the Executive power, but has to be regulated by laws passed by the Parliament." Addressing the military courts of law, the African Commission adds that "the criticai factor is whether the process is fair, just and imparţial." Finding that "a military tribunal perse is not offensive to the rights in the Charter nor does it imply an unfair or unjust process", the Commission stated that "military tribunals must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process. What causes offence is failure to observe basic or fundamental standards that would ensure fairness".5

Recognising the fact that the Executive branch often interferes in the functions and affairs of judicial authorities, including judicial appointments, transfers, mandating, promotion, discipline, as well as management of the judicial profession in most Arab countries, the signers of the Cairo Declaration on Judicial Independence6 proposed the abolishment of emergency laws and

extra-judicial courts, which restrict the freedoms and rights of individuals. Such restrictions of rights include the right to appear before an ordinary court, the right to due process (recommendation no. 8). The signers also proposed to restrict the jurisdiction of military courts to cases that concern only those who serve in the military (recommendation no. 11).
Ad-hoc tribunals are not admitted according to point 21 of the IBA Standards.

1.4. Independence in practice
Concretely speaking, structural independence has to become manifest in a number of fileds.

a. Independence in administrative matters
According to the IBA Standards, judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration. The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive (points 8 and 9).
Article 14 of the Basic Principles on the Independence of the Judiciary7 stipulates that "the assignment of cases to judges within the court to which they belong is an internal matter of judicial administration." In addition, Principle 1, point 2, letters e) and f) in Recommendation no. R (94) 12 of the Committee of Ministers of the Council of Europe states that, "the distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order or some similar system. A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges."
Examples of internal matters can also be found in article 36 of the Beijing Statement8. The article states that the principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary, or in a body in which the judiciary is represented and has an effective role. The head of the court may legitimately have supervisory powers to control judges on administrative matters (point 32, The IBA Standards).

b. Independence in financial matters
According to Principie 7 of the Basic Principles, it is the duty of each UN Member State to provide adequate resources to enable the judiciary to properly perform its functions. Principle 3 of Recommendation no. R (94) 12 of the Council of Europe refers to the proper working conditions as something that may influence independence.
International instruments recognise the fact that the Executive and the Legislative have control over the budget of the judiciary. However, since that poses a potential threat to the

independence of the latter power, point 1.8 of the European Charter on the Statute for Judges provides for the need for judges to be associated with their representatives and their professional organizations in decisions relating to the administration of the courts and the determination of their means, as well as their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare9.

c. Judicial autonomy in matters of jurisdictional competence

In conformity with principle no. 3 of the Basic Principles, the judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

Principle 1 point 2, letter a) III of Recommendation no. R (94) 12 stipulates that no organ other than the courts themselves should decide on its own competence, as defined by law10.

d. Independence of decision-making and authority of the judiciary

As shown by principie 1 of the Basic Principles, all branches of the government, including other institutions, are under a duty "to respect and observe the independence of the judiciary." This is not only a passive duty. Principle 1 point 2, letter b) in Recommendation no. R (94) 12 stipulates that the executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges, and Principle 2, point 1 of the same Recommendation stresses the fact that all persons connected with a case, including state bodies or their representatives, should be subject to the authority of the judge. More drastic, the Beirut Declaration11 in its fifth recommendation states that "refraining from implementing judicial rulings by law enforcement officials is a crime the penalty of which shall be stiffened. Impeding the implementation of rulings shall be considered as refraining from the implementation."

The requirement of independence of the judiciary in decision-making is further upheld by principie 4 of the Basic Principles: "There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principie is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law". In line with the same idea, Recommendation no. R (94) 12 reads: "decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law" (Principle 1.2.a.i).

The independence of the judiciary has to manifest itself towards the very judicial system under which it operates. Point 46 of the IBA Standards shows that, in the decision-making process, a judge must be independent vis-a-vis his judicial colleagues and supporters. A judge's attitude should also be an active one, upholding and defending independence. A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary12.

2. Independence of the judges (personal independence)

As justice is served through the judiciary that is made up of judges, it means that the judicial

power is enforced only through the court of law represented by the judge13, the sole carrier of all those powers.
In the opinion of the law, the independence of the judge will negate the notion of a hierarchy of subordination. International principles expressly state that the judiciary shall decide matters before them impartially, on the basis of facts, and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason14. The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary15. The independence of a court is appreciated by this point of view, both from the Executive and the parties, and from exterior powers such as the mass-media.
The legislation must postulate the independence of the judges, and public authorities must be banned for instructing them on activities falling in their competence. The Council of Europe recommends that the law provide for sanctions against persons seeking to influence judges in any such manner16. It is important to realise that the principle of the independence of the judiciary was not conceived for the personal benefit of the judges themselves, but rather to protect people from abuses of power. Therefore, the independence is not a privilege of the judge, but a benefit for the public. The Universal Charter of the Judge for that reason begins with regulating independence not as a right, but as an obligation: "Judges shall in all their work ensure the rights of everyone to a fair trial. They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them."17
Points 5 and 6 in the Suva Statement18 make it the duty of judges to ensure equality of access to justice, but also an effective access to justice requiring a full understanding of the language and procedures.
Some infringements on independence are legally enshrined by the very norms that regulate the statute of judges: their exclusive appointment by the Executive or Legislative power, the limited tenure, inadequate remuneration, and refusal to authorise establishment of professional associations. Apart from those, other forms of pressure can be found: public criticism intended to intimidate extended by the Executive or Legislative power, arbitrary detention of judges, threats or attacks against judges or their families19. These acts of pressure are often committed not only by the state authorities, but by individual persons either privately or in complicity with various organisation such as criminal groups or drug cartels.
The purpose of the independence of the judiciary is exactly to render impartial justice.
The international instruments enshrine a number of safeguards for implementing it that need to be examined for each particular member of the tribunal in question20.

a. Appointment of judges
Systems: There are several national systems for the recruitment (appointment) of judges. There are countries where they are recruited by the corps of judges itself, while, in other states, they are elected by the public or are appointed after a competition, without the interference of any power in the procedure. In most countries judges are appointed by the Executive.
The international law does not limit itself to a single appointment modality. Nonetheless, in

enforcing article 24 of the Covenant, the UN Human Rights Committee showed major reservations about the system by which judges are elected in a few of the American states. It stated its concern about "the impact that the current system of electing judges may have, in a few states, on the enforcement of the rights" guaranteed in article 14 of the Covenant, and commended "the efforts made by a few states in adopting a merit-based selection system." The Committee also recommended that the system "for the appointment of judges by election should be re-considered in view of replacing it with a merit-based appointment system by an independent body. "21

Criteria: The only selection criterion should be an objective one that assesses the integrity, training, and competence of recruited persons. The Beijing Statement introduces another criterion in purposing the independence of the individual and requiring the chosen person be best qualified for the judicial office.22

Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, naţional or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concemed, shall not be considered discriminatory23.

Mechanism: The appointment of judges should be a strong factor of independence itself and it cannot be left to the exclusive discretion of the Executive and Legislative.

There has to be an independent mechanism in charge of recruiting and disciplining magistrates. The Council of Europe indicates that the authority taking the decision on the selection and career of judges should be independent of the govemment and the administration24. The European Association of Judges directly states that selection must be performed by an independent body which represents the judges25.

b. Tenure and stability of term

Under the international norms, judges shall have guaranteed tenure until a mandatory retirement age or the expiration of their term of office, where such exists26. In this latter case, it is believed that a period of les than ten years in office does not satisfy the condition of independence27.

Appointed judges may not be removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law28, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules29. Any change to the judicial obligatory retirement age must not have retroactive effect30.

There are countries where there are procedures in place for the evaluation or re-certification of judges on a regular basis. It is the view of the UN Human Rights Committee that the practice is contrary to article 14, paragraph 1 of the International Covenant on Civil and Political Rights.

c. Irremovability of judges during office

The strongest safeguard of the independence of judges is their irremovability. A judge holding office at a court may not in principle be moved by transfer, delegation, secondment elsewhere,

even by way of promotion, without having freely consented thereto. Judges can be suspended or dismissed from office only under the law that regulates their statute.
The irremovability should not be seen as a privilege of the judges, but rather as a safeguard for justice-seekers. That is why irremovability should also apply to how judges are appointed to the various chambers of the courthouses and to the allocation of cases and the possibility of recusing the judge. There is a rule that a case should not be withdrawn from a particular judge without valid reason, such as serious illness or conflict of interest31.
The Council of Europe recognizes three exceptions to the principle of irremovability: 1) where transfer is provided for and has been pronounced by way of a disciplinary sanction; 2) when a lawful alteration of the court system occurs; and, 3) in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute32. Point 29 of the Beijing Statement says the abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status and tenure. Members of the court for whom no alternative position can be found mustbefully compensated.

d. Financial security
Remuneration. UN principle no. 11 foresees that judges be provided adequate payment as well as adequate pensions. When establishing the payment both the importance of their activity, and the fact that, as a rule, judges are forbidden to undertake any other private or public functions, should be considered33. The Council of Europe underlines that judges exercising judicial functions in a professional capacity are entitled to renumeration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions. More generally, it shields their behaviour within their jurisdiction, thereby promoting their independence and impartiality. Renumeration may vary depending on length of service, the nature of the duties which judges are assigned to discharge in a professional capacity, and the importance of the tasks which are imposed on them, assessed under transparent conditions34.
Point 14 in the IBA Standards foresees that Judicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of executive control.
Reduction in salary. In certain countries, salaries of judges are protected against decrease, although salary increase can depend on the Executive and Legislative powers. IBA accepts the fact that judicial salaries cannot be reduced during the judges' services except as a coherent part of an overall public economic measure (art. 15b).
Retirement. Retired judges also enjoy a special financial regime. Under Article 13, paragraphs 3 and 4 in the Universal Charter of the Judge, "the judge has a right to retirement with an annuity or pension in accordance with his or her professional category. After retirement a judge must not be prevented from exercising another legal profession solely because he or she has been a judge."

e. Protection of the judge

The power of decision held by the judges can lead to unpopular decisions being made, which calls for a protection system to be in place for the judge.

Physically speaking, judges need to be provided with an adequate venue to conduct the proceedings in good conditions, and to be sure they are safe form any aggressive behaviour that may come from parties unhappy with their judgement, directed either at them or at their families. The security and physical protection of judges and of their families, according to Article 40 of the Beijing Statement, must at all times be ensured by the Executive authorities. Principie 3 point 2 in Recommendation no. R (94) 12 foresees that "all necessary measures should be taken to ensure the safety of judges, such as ensuring the presence of security guards on court premises or providing police protection for judges who may become or are victims of serious threats."

Nevertheless, at a professional level, they need to be protected by a body independent from the Executive or Parliament. The Council of Europe recommends such a body within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary. Every judge who considers that his or her rights under the statute, or more generally his or her independence, or the independence of the legal process, are threatened or ignored in any way, should be able to refer to such an independent authority. In turn, this authority should be empowered with effective means available in order to remedy the situation35. The LAWASIA Organization maintains that such a body should be formed only of representatives of the highest jurisdiction and of the legal, independent professions36.

f.Liability of the judge

Concerning civil and criminal liability, art. 10 in the Universal Charter of the Judge foresees "civil action, in countries where this is permissible, and criminal action, including arrest, against a judge must only be allowed under circumstances ensuring that his or her independence cannot be influenced."

As they are guardians of independence and the ones construing the law, judges cannot become the subject of disciplinary action on the basis of a simple discharge of their judicial functions, except when a judges undignified behaviour has been proven. Of a much greater importance is the fact that a judge should not have to operate under the threat of a financial penalty, even though less than imprisonment. The presence of this threat may sub-consciously affect his judgment37. Judicial errors should be solved by appeal, respecting jurisdiction and procedure, and interpreting and applying the law or evaluating the evidence. Other judicial errors which cannot be mended in this manner should lead to nothing more than an action against the state taken by the dissatisfied party seeking redress.

Providing a somewhat different approach, both, the UN Principle no. 16 and point 32 in the Beijing Statement grant civil immunity to judges "without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State. In accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions." That, of course, does not negate the responsibility of the state for judicial errors.

In cases of professional incapacitation or disciplinary offences, there are measures that can be taken against the judge. The issue that is raised is that of determining the types of sanctions

and the bodies that should be empowered to enforce them.
Protection of independence: Principle 6 pt. 2 of Recommendation R(94) 12 explicitly requires that the enforcement of the sanctions should not prejudice judicial independence. It is essential that judges not be subjected to disciplinary measures for their position on the merit of a case. With regard to Belarus, trie Human Rights Committee noted "with concern the allegation that two judges were dismissed by the President, on the ground that in the discharge of their judicial functions they failed to impose and collect a fine imposed by the executive."38
Competent body: Under international law, judges subject to disciplinary procedures should be guaranteed due process of law before a competent, independent, and impartial body that should be an authority independent from the Executive power, or under the control of an authority that should be independent from the Executive power. IBA admits that the Executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters39.
Principle 6 point 3 in Recommendation no. R (94) 12 suggests that states should consider creating, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures. In this way, such sanctions or measures would not be dealt with by a court, and the decisions would be controlled by a superior judicial organ. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the Convention. For instance the case should be heard within a reasonable time and the accused should have a right to answer any charges.
Much simpler, Judges' Charter in Europe foresees that disciplinary sanctions for judicial misconduct must be entrusted to a body comprised of members of the judiciary in accordance with fixed procedural rules rather than ad-hoc (principle no. 9).
Reasons: According to principles no. 18 and 19 of the UN Principles, judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
Principle 6 pt. 1 in the Recommendation no. R (94) 12 foresees the possibility of measures to be taken against judges who fail to carry out their duties in an efficient and proper manner or in the event of disciplinary offences.
Eventually, according to principle no. 9 of the Judges' Charter in Europe, measures may be taken against judges for judicial errors.
The grounds for removal of judges shall be fixed by law and shall be due to a criminal act, gross or repeated neglect, or physical or mental incapacity the result of which has demonstrated a manifest unfitness to hold the position of judge40.
Measures: Only Recommendation no. R (94) 12 sets forth measures that may be taken:
a. withdrawal of cases from the judge;
b. moving the judge to other judicial tasks within the court;
c. economic sanctions such as a reduction in salary for a temporary period;
d. suspension.

g. Freedom of expression and association
The freedom of expression and association are essential in a democratic society of rule of law and respect for human rights. The right of the judge to belong to a professional association must be recognized in order to permit the judges to be consulted, especially concerning the

application of their statutes, ethical and otherwise, and the means of justice, and in order to permit them to defend their legitimate interests41.
According to UN Principle 9, judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training, and to protect their judicial independence. Principle 4 of Recommendation no. R (94) 12 foresees that judges should be free to form associations which, either alone or with another body, have the task of safeguarding their independence and protecting their interests.

h. Training and education
Principle V.3.g of Recommendation no. R (94) 12 of the Council of Europe stipulates that judges should "undergo any necessary training in order to carry out their duties in an efficient and proper manner." States should take effective measures for that purpose as well as the necessary measures to make sure that large numbers of judges benefit from adequate training.
The Cairo Statement stipulates in its third recommendation that all matters pertaining to the education and training programmes provided by the state should be subject to judicial supervision. Furthermore, the qualification programmes shall be focussed both on professional and judicial training and on individual development. The responsibility for adequate training is equally incumbent on the judges themselves and on their professional associations, according to Basic Principle 9.
The training should not only be in domestic law substantive and procedural but also international law, human rights, and educational programmes regarding the social context.

i. The right and duty to provide due process
Principle 6 in the Basic Principles foresees that the principie of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. This means that judges hold the obligation of solving the cases before them according to the law, protecting the rights and freedoms of individuals, and consistently granting the various procedural rights under the domestic and internaţional law.
According to principie V pt. 3 b) in the Recommendation no. R (94) 12, it is the judges' responsibility to conduct cases in an impartial manner in accordance with their assessment of the facts and their understanding of the law.

j. Publicity of proceedings
Public court proceedings are a guarantee of the court's impartiality, fairness, and independence. At the same time, public proceedings contribute to elevating the public's confidence in the administration of justice.
Article 6 in the European Convention on Human Rights permits the court to exclude the press and public from all or part of the trial in the interest of morals, public order, or national security in a democratic society. Furthermore, this exclusion is allowed where the interests of juveniles or

the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. The judge is called to make a permanent assessment of the public and private interest in the case.

k. Stability of judgement

Once a binding court decision has been passed, it can no longer be amended by a non-judicial authority to the detriment of either party to the adjudicated case42. As for decisions passed by the merged chambers of a higher jurisdiction, while the judges are under a duty to act consistently with existing jurisprudence, independence is not infringed as long as judgements have a value in principle in judicial activity and the courts of lower instance retain their independence in adjudicating concrete cases43.

l. Obligation to motivate the decision

Principie V pt 3 b) in Recommendation no. R (94) 12 shows that judges, except where the law or established practice otherwise provides, have the obligation to give clear and complete reasons for their judgments using language which is readily understandable. Regarding this aspect, the European Court maintained in Higgins and others, that the obligation "cannot be understood as requiring a detailed answer for each argument," but that "the extent to which the requirement to reason may vary according to the nature of the decision and it is to be determined taking into consideration the particular circumstances of the case."44 When the Court of Cassation did not provide exact and specific reasons in its decision in a complaint raising an alleged impartiality of the Court of Appeal, the Court held that there had been a violation of article 6 paragraph (1)45.

m. Appearance of independence

One of the criteria considered in appreciating independence is the appearance. The case law of the Court of Strasbourg46 shows that it is necessary not only for justice to be made, but also for the conditions set by law in governing a fair trial appear to have been met. The appearance of independence from this point of view means the confidence that courts of justice are supposed to inspire in the public in a democratic society. The requirement is intemationally enshrined through the adagio imported from the common law, according to which "justice must not only be done, it must be seen to be done"47.

In addressing suspicions concerning the possible lack of independent appearance, the point of view of the accused is considered. However, his/her claims must nevertheless beobjectively justified48.

Thus, it has been established that, as long as in a court of law there is a person reporting to one of the parties as position and tasks, justice-seekers have a point in legitimately questioning that person's independence. This enshrines the need for a judge to be independent not only from the Executive and Parliament, but also from the parties49. The same decision was passed in

the case of a municipal police commission worker who in that capacity was viewed as an authority with jurisdictional competence. The worker had been in a senior position in the police before and was suspected of being called to fulfil such tasks again. Justice-seekers would always be inclined to see in that person a member of the police force who is part of a hierarchy and who would act in solidarity with his colleagues50.

II. Impartiality

The independence of justice and judges is not a purpose in itself, nor is it sufficient for justice to be done in an equitable manner. Impartiality is needed as well. But the two notions are not to be mistaken for one another. Thus, the independence of justice is a state of mind which is to be made whole at the level of the judge by an adequate statute, and at an institutional level by establishing relations with the Executive and Parliament51.

Judicial impartiality is also concerned with the state of mind, the attitude of the court on the matters and parties of the case (non-discrimination, tolerance, etc), as well as the way in which proceedings are conducted. Impartiality of the court implies that judges must make objective decisions solely based on their own appraisal of the relevant facts and of the applicable law. They must not harbour preconceptions about the matter put before them, and they must not act in ways that promote the interests of one of the parties52.

Impartiality is very closely connected to independence. While a court can be independent while not being impartial, a court that lacks independence cannot be imparţial under any circumstance. The requirement of being independent from the parties is practically subject to the need for impartiality.

Article 5 of the Universal Charter of the Judge reads: "In the performance of the judicial duties the judge must be imparţial and must so be seen. The judge must perform his or her duties with restraint and attention to the dignity of the court and of all persons involved." Impartiality assumes the lack of all prejudice or interest of the judge in the matter before him53.

Professional deontology obliges judges to practice their office objectively, having as a unique basis the law and the general principles of law, without responding to externai pressures and influence. Moreover, they are bound to adopt a behaviour that would reflect even the

appearance of impartiality (meaning that they should appear to justice-seekers to be impartial), in order to remove any doubt regarding the correct fulfilment of their professional duties.54
The impartiality of the judge means that he must be equidistant, so that he will not grant any favour by statements or action to either party. Moreover, his goal will permanently be that none of the parties be or feel disadvantaged. In civil matters, the neutrality of the court means to prioritize the settlement of the litigation according to the wish of the parties whe they choose to settle out of court. In criminal matters, the neutrality of the judge will be restricted to prevent any procedural misbalance between the parties, since it is the judge who eventually decides on the outcome of the proceedings.

1. Requirements of impartiality
The most thorough analysis on impartiality has been done by the European Court of Human Rights. Pursuant to article 6, paragraph 1 of the European Convention, the Court of Strasbourg held that the impartiality of a court is to be determined by tackling a subjective as well as an objective aspect, analysed for every particular judge on the panel 55:

a) The subjective approach
Personal (subjective) impartiality starts from the assumption that no member of the panel should have any prejudice or predilection. The judge must have no reason to favour or disfavour either party. The subjective approach to determining a judge's impartiality would therefore mean determining the judge's private conviction during trial and in the adjudication of a particular case. The conduct favouring or disfavouring one of the parties may, for example, consist of making remarks suggesting that the judge is convinced of the guilt of the accused or of the judge's kinship with one of the parties.
The Court in Strasbourg ruled that a member of a jury in a court that had been overheard saying that he was a racist56 did not fulfil the condition of impartiality. Likewise, neither did a criminal chamber judge who had made a public statement suggesting the accused was guilty57.
Recognising that subjective impartiality brings up the "interior forum" of the judge, the European Court of Human Rights recalled that the personal impartiality of a judge must be presumed until there is proof to the contrary58. This applies to professional judges, members of a jury, and specialised professionals who participate alongside the judges in the adjudication ofthematter59.

b) The objective approach
The European Court finds the notion of impartiality contains not only a subjective, but also an objective element. Not only must the court be mentally impartial, by that "none of its members should have personal prejudice of predilections," but it also "has to be impartial from an objective point of view", meaning that "it must of fer guarantees to rule out all justified doubt in that regard."60
For this aspect, the criterion introduces the need to analyse whether or not, independently from

the personal conduct of the judge, there are any determinant and verifiable facts that may justify doubts on his impartiality61. Under scrutiny is the judge's functional competence. The purpose of this analysis is to determine if the judge has offered sufficient guarantees to rule out any legitimate doubt in the case he is hearing. From that point of view, the concepts of independence and objective impartiality seem to be intimately related.
In the Constitutional Rights Project matter, the African Commission on Human and People's Rights had to consider, among other things, compatibility with article 7 paragraph (1) in the African Charter on Human and Peoples' Rights with the Civil Disturbance (Special Tribunal) Act which states that the tribunal shall consist of one judge and four members of the armed forces. As such, the Commission found that the tribunal is "composed of persons belonging largely to the executive branch of government, the same branch that passed the Civil Disturbance Act."62 The Commission afterwards recalled that article 7, paragraph (1) letter (d) in the Charter, "requires the court or tribunal to be impartial" and continues by saying that "regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality. It thus violates Article 7.1 (d)."63

2. Appearance of impartiality
In determining the existence of reasonable suspicion of a lack of impartiality on behalf of a judge, the stand-point of the accused is first considered. However, his/her view is not decisive, as such claims of impartiality have to be objectively sustained.
Principle number 3 of the Judges Charter in Europe expressly states that not only must the judge be impartial, he must be seen by all to be impartial. The European Court, in its turn, elevates the requirement of the appearance of impartiality to the rank of principle. This is necessary in order to not undermine the trust of the public (and, in criminal matters, the trust of the accused above anything else) that a court of law is supposed to inspire in any democratic society64. The Court attached great importance to the English adagio, "justice must not only be done, it must be seen to be done." The result is that the manner, attitude, and manifestations of a judge hearing a case must be of a nature to show the parties that he/she does not intend to favour or disfavour either. It is therefore explicitly maintained that "the court must be and must appear to be independent and impartial." The consequence is that the system of "faceless tribunals" (judges wearing face masks to remain anonymous for anti-terrorist rationales) fails to guarantee the needed appearance of independence and impartiality.

3. Evolution of ECHR jurisprudence in impartiality matters
Impartiality is also analysed with respect to the involvement of the judge in the various procedural phases of a case. A judge, in order to prevent prejudice, has to avoid the occurrence of successively exercising the duties of distinct jurisdictional functions in the same case. Construing the notion of an independent and impartial court and of a fair trial, the Court in Strasbourg held that there has to be a separation of the prosecution and the adjudication function65, of the investigation and adjudication functions66, and of the prosecution and investigation functions67. The enforcement of this rule has undergone a certain evolution in the jurisprudence of the Court from a restrictive and abstract interpretation of objective impartiality

to a concrete one.
It was originally established that a judge cannot adjudicate the case on the merits if, when the prosecution was launched, he had previously served as public prosecutor in charge of the department responsible for the accused's case68 or as an investigating judge69. For this reason, the Strasbourg Court concluded, his/her impartiality was capable of appearing open to doubt because the trial judge had been involved in the previous procedural phases. A case known to the judge may cause him/her to base his/her adjudication on a view already stated in a previous circumstance. It has been nevertheless realized that a strict application of this rule might lead to backlogs of jurisdictional work because of the insufficiency of personnel. Critics of this rule often refer to the theory as a "tyranny of appearance."
The Court, thus, began to demand that doubts of impartiality be objectively justified by making the connection to the concrete circumstances of the case70. From that point on, specific types of cumulated function have been accepted provided that the investigations conducted by the judge in pre-trial phases are concretely analyzed. If the investigations are found to have been summary to avoid giving the impression that the judge has already developed a prejudice on the substance of the case, a judge who has made pre-trial decisions concerning detention on remand71 or one who has served as an investigating judge72 may rule on the merit of a case. The simple fact that a judge becomes acquainted with a case before trial is not enough reason to sustain a doubt of his/her impartiality73.

4. Purpose of impartiality
It is impossible to require a judge who has had pre-trial contact with the contents of a case not to make an opinion on how he would probably rule on the case. However, based on the aforementioned situations, impartiality does not prohibit a judge from forming an opinion; it only prohibits a determination not to change it (in which case the hearings would become pointless). The judge must remain open to receiving new facts, arguments and interpretations.

5. Safeguards of impartiality

5.1. Conflicts of interest
Principle 5 point 3 c) in Recommendation no. R (94) 12 of the Council of Europe maintains that judges should withdraw from a case or decline to act where there are valid reasons that should be defined by law and may, for instance, relate to serious health problems, conflicts of interest, or interests of justice.

Definition: A conflict of interest is that particular situation or circumstance of a judge where his/her direct or indirect personal interest is in conflict with the public interests. This conflict thus affects or possibly affects his/her independence and impartiality in decision-making or the

speedy and objective discharge of the professional tasks associated with his/her office.
The judge, in fact, has to choose between the public interests that justice should be done and the private interests to procure a benefit for himself/herself. This observation prompts us to state that the rule of avoiding competing interests is an application of the nemo in rem suam auctor esse potest - no one can hear his/her own principle case74.

Types of interest: Apart from the "no prejudgement" condition, impartiality assumes there is no conflict of interest, i.e., the absence of all private, material, or moral interest of the judge in the matter.
The interest can be material, as held in D vs. Ireland where the judge owned stocks in the company taken to court in the case before him/her.
The interest can equally be a moral one. For example, in Remly vs. France, the matter at issue was the fact that one of the jurors had declared himself a racist; in Pescador Valiero vs. Spain (2003), the impartiality debate was that the plaintiff had been laid off by the university with which the trial judge had close professional connections.
The beneficiary of a decision made in conflict of interest situation may be: the one who decides (direct interest); his/her family, friends, close ones (indirect interest); individuals or organisations with whom/which he/her has had or has (current interest) or will have (prospective interest) relations that are business, political, personal, etc. Of course, the interest may be real, when it is grounded on probing facts, or apparent, when it only creates suspicion on faimess. Regarding such a situation, the simple fact that an adjudicator knows one of the heard witnesses personally is not enough to draw the conclusion that he has a favourable prejudice on the testimony, as the nature and intensity of the relation needs to be also analysed75. The same was held in a case where one of the parties and the trial judge belonged to the same society (the Francmasonery76).
In the instance where the plaintiff had a polemic in the mass-media with the presiding judge on his case over the activity of the court and the presiding judge made public negative statements about the plaintiff s case prior to hearings, the Court found that the doubts of the plaintiff on the impartiality of the court had been reasonably justified77. In a different case, the decision was that the participation in the overall proceedings of the individuals whose behaviour was being denounced by the litigious item was sufficient to make the impartiality of the decision-making body an object of doubt. Courts are not impersonal authorities but they operate through the judges sitting in the court rooms. To be impartial, a judge must keep the necessary distance when he is called to determine whether or not an offence had been caused to the judicial authority78. If the judges who found against the defendant are the same as those in front of whom the offence had taken place that reason enough to raise legitimate doubts that are objectively substantiated on the impartiality of the court (nemo judex in causa sua). Where there is a person in a tribunal who reports in terms of office and tasks to one of the parties, justice-seekers may have legitimate doubts on the independence of that particular adjudicator79.

5.2. Incompatibilities and interdictions

Article 7 in the Universal Charter of the Judge holds that "the judge must not carry out any other function, whether public or private, paid or unpaid, that is not fully compatible with the duties and status of a judge. The judge must not be subject to outside appointments without his or her consent."
The IBA Standards list the activities that are incompatible with the judicial office: judges may not serve in executive functions, such as ministers of the govemment, nor may they serve as members of the Legislature or of municipal councils, unless by long historical traditions these functions are combined; judges may serve as chairmen of committees of inquiry in cases where the process requires skill of fact-finding and evidence-taking; judges shall not hold positions in political parties; a judge, other than a temporary judge, may not practice law during his/her term of office; a judge should refrain from business activities, except his/her personal investments, or ownership of property (points 35 to 39).

5.3. Disqualification of the judge
A judge who does not meet the condition of appearance of complete impartiality must refrain from hearing the case.
Point 2.5 in the Bangalore Principles on Judicial Conduct lay down the situations where a judge can be removed from a case. A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.
Such proceedings include, but are not limited to instances where the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings; where the judge previously served as a lawyer or was a material witness in the matter in controversy; or where the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy. However, disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.