



WORLD  
& ARBITRATION  
& MEDIATION  
REVIEW

2011  
VOLUME 5, No. 3

INSTITUTE FOR  
TRANSNATIONAL ARBITRATION



THE CENTER FOR AMERICAN  
AND INTERNATIONAL LAW



# EDITORIAL COMMENT: THE INDEPENDENCE AND IMPARTIALITY OF LEGAL SYSTEMS

*David D. Caron*

As lawyers, we often focus on the independence and impartiality of a judge or of an arbitrator. At least as important, however, is whether the system itself is independent or impartial. This is particularly true given that the task of building robust rule of law around the world is an initiative near the top of many foreign policy lists and that a central component of robust rule of law is the existence of a system of independent and impartial courts and tribunals. But what does it mean to require independence and impartiality at the level of the system rather than in a particular court or judge within the system? In this editorial comment, I trace in broad terms the internationally shared concept of impartial and independent courts and the fundamental place this concept has in both efforts to ensure justice and good governance.

In significant part, the concept of a system of impartial and independent tribunals arises in the context of human rights instruments where a right of access to courts is premised on the existence of courts that are independent and impartial. The concept of impartial and independent courts arises also in the context of good governance and the promotion of rule of law around the world. This comment refers to both strands of discussion, but primarily looks to the strand found in human rights. The emphasis on the human rights instruments is taken because this comment does not seek to define what is sought ideally in governance, but rather to frame what is regarded internationally as the minimum characteristics of a system of independent and impartial courts. The question examined is not how a particular system of tribunals could be more impartial or independent, but rather what may be said to be the minimum threshold of independence and impartiality.

## I. FRAMING THE CONCEPT

### A. *The Concept of Impartial and Independent Courts and Tribunals in Human Rights Instruments*

The question of what constitutes an impartial and independent tribunal arises in various human rights regimes as an aspect of the basic right of access to justice. This right of access to justice is founded in the understanding that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>1</sup> Throughout the history of human rights instruments, the right to an independent and impartial judiciary to decide claims of persons has been a critical component not only as the particular right in issue, but also as the avenue by which all other rights are protected.

Following World War II, the global community, in the face of the massive devastation suffered during the War, came together in renewed efforts at peacekeeping and cooperation that led to advances, among other things, in human rights.<sup>2</sup> The right to an impartial and independent tribunal for the adjudication of disputes was one focus of these human rights regimes from the beginning. In 1948, the United Nations adopted General Assembly resolution 217A(III) – the Universal Declaration of Human Rights – which, at Article 10 provides:

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.<sup>3</sup>

---

<sup>1</sup> International Covenant of Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 99 U.N.T.S. 171, *adopting and opening for signature, ratification and accession* Dec. 16, 1966, *entry into force* Mar. 23, 1976, Preamble [hereinafter “CCPR”].

<sup>2</sup> Human Rights Education Associates, Study Guide on the European Human Rights System, Introduction, *available at* [http://www.hrea.org/index.php?doc\\_id=365](http://www.hrea.org/index.php?doc_id=365).

<sup>3</sup> The Universal Declaration of Human Rights, United Nations, G.A. Res. 217 (A) (III) (Dec. 10, 1948).

Soon after, various regional conventions and principles were adopted that recognized the essential nature of an independent and impartial tribunal for the fair adjudication and protection of fundamental rights. The countries of the Organization of American States recognized the right to an impartial and public hearing as a fundamental “right and duty of Man” in its 1948 American Declaration of Rights and Duties of Man. In particular, that Declaration provides at Article XXVI: “Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, . . .”<sup>4</sup> In 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms – a treaty among the Member States of the Council of Europe – was drafted; it came into force three years later. Article 6 of the European Convention provides: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . . .”<sup>5</sup>

The United Nations in the following decades proceeded to promulgate several important human rights conventions that included the requirement of an impartial and independent tribunal. Most prominent among these is the International Covenant on Civil and Political Rights (“CCPR”) which was adopted and opened for signature, ratification and accession in 1966. Article 14(1) addresses the rights pertaining to judicial proceedings:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in suit at

---

<sup>4</sup> American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, *adopted by* the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82 doc. 6 rev. 1 (1992) [hereinafter “American Declaration of Rights and Duties of Man”], art. XXVI (establishing the right to an impartial and public hearing).

<sup>5</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, 11/4/1950, CETS No. 005, *entry into force* Sept. 3, 1953 [hereinafter “European Convention for the Protection of Human Rights”], art. 6 (providing for right to a fair trial).

law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. . . .<sup>6</sup>

The CCPR also establishes a Human Rights Committee (“HRC”), with one of its functions being to “publish its interpretations of the content of human rights provisions” which are known as “general comments.”<sup>7</sup> In 2007, the HRC issued a General Comment that explains that the first sentence of Article 14(1) “guarantees in general terms the right to equality before courts and tribunals,” a requirement of all courts and tribunals: “whenever domestic law entrusts a judicial body with a judicial task.”<sup>8</sup> In addition, the HRC explains that such a right is guaranteed not only to citizens of State Parties, but all individuals who might find themselves in the territory of or subject to the jurisdiction of the State Party.<sup>9</sup>

---

<sup>6</sup> CCPR, art. 14(1).

<sup>7</sup> See official website of the Human Rights Committee of the Office of the United Nations High Commissioner for Human Rights, *available at* <http://www2.ohchr.org/english/bodies/hrc/index.htm>. The duties of the Human Rights Committee include *inter alia*: examination of the States’ periodic reports and recommendations to them in the form of “concluding observations;” consideration of inter-state and individual complaints; and publication of its “interpretation of the content of human rights provisions, known as general comments on thematic issues or its methods of work.”

<sup>8</sup> CCPR, *General Comment No. 32*, ¶ 7. The rationale for this provision is explained at ¶ 2:

The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the Covenant aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights.

The earlier Comment No. 13 took as its goal to address different aspects of Article 14 because of the Article’s complex nature and consequent need for specific comment; in addition it responds to problems raised – and often important information lacking – in the reports that the State Parties are obliged to submit regularly on the implementation of these rights. Comment 32, on the other hand, presents a comprehensive explanation of each clause of the Article and, in this manner, addresses both the problems raised in Comment No. 13, as well as moving beyond them to address other problems and questions, and adds a wholly new section on the relationship of Article 14 with other provisions of the Covenant. In this way, the Comments do not diverge in their advice and explication, but build upon each other.

<sup>9</sup> *Id.*, ¶ 9.

The American Convention on Human Rights – another product of the OAS – entered into force in 1978.<sup>10</sup> It provides at Article 8 for a “Right to a Fair Trial”: “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.”<sup>11</sup>

In 1985, a United Nations Conference adopted the “Basic Principles on the Independence of the Judiciary.” Its Preamble observes: “judges are charged with the ultimate decisions over life, freedoms, rights, duties and property of citizens.”<sup>12</sup> The Basic Principles therefore recognized that, to achieve its goals of respect for human rights and fundamental freedoms and equality before the law, it was “appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct.”<sup>13</sup> In this sense, it should not be surprising that access to independent and impartial courts and tribunals is viewed as so fundamental to the provision of justice that it is itself a right recognized in many, if not all, human rights instruments.

---

<sup>10</sup> See Department of International Law, Organization of American States, Washington, D.C., available at <http://www.oas.org/juridico/english/sigs/b-32.html>.

<sup>11</sup> American Convention on Human Rights (“Pact of San Jose, Costa Rica”), O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev. 1, at 25 (1992), art. 8(1).

<sup>12</sup> Basic Principles on the Independence of the Judiciary, Preamble, Office of the United Nations High Commissioner for Human Rights, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan (Aug. 26 – Sept. 6, 1985) and endorsed by General Assembly resolutions 40/32 of Nov. 29, 1985 and 40/146 of Dec. 13, 1985 [hereinafter “OHCHR Basic Principles on the Independence of the Judiciary”].

<sup>13</sup> *Id.*

B. *The Concept of Impartial and Independent Courts and Tribunals in Good Governance and Rule of Law Initiatives*

While the human rights conventions and principles focus on the importance of an impartial and independent tribunal as a fundamental right of every citizen to have his person and property judged fairly and with integrity, other international sources address the importance of an impartial judiciary to the promotion of good governance and the rule of law as an avenue ensuring good governance. This latter focus is stated succinctly by the Judges' Charter in Europe: "The independence of the judiciary is one of the foundations of the rule of law."<sup>14</sup> The importance of this requirement is described by the U.S. Agency for International Development ("USAID"):

Judicial independence is important for precisely the reasons that the judiciary itself is important. If a judiciary cannot be relied upon to decide cases impartially, according to law, and not based on external pressures and influences, its role is distorted and public confidence in government is undermined.

In democratic, market-based societies, independent and impartial judiciaries contribute to the equitable and stable balance of power within the government. They protect individual rights and preserve the security of person and property. They resolve commercial disputes in a predictable and transparent fashion that encourages fair competition and economic growth. They are key to countering public and private corruption, reducing political manipulation, and increasing public confidence in the integrity of government.<sup>15</sup>

Because of this great importance, the Office of Democracy and Governance of the USAID produced a 188-page guide entitled

---

<sup>14</sup> Judges' Charter in Europe, European Association of Judges, Introduction (Mar. 20, 1993) [hereinafter Judges' Charter in Europe].

<sup>15</sup> *Guidance for Promoting Judicial Independence and Impartiality*, Office of Democracy and Governance, Bureau of Democracy, Conflict, and Humanitarian Assistance, U.S. Agency for International Development (USAID), Revised Edition, Introduction, at 5-6 (Jan. 2002) [hereinafter USAID, *Guidance for Promoting Judicial Independence and Impartiality*].

“Guidance for Promoting Judicial Independence and Impartiality” in January 2002.<sup>16</sup> In introducing the publication, the authors note that, “Judicial independence lies at the heart of a well-functioning judiciary and is the cornerstone of a democratic, market-based society based on the rule of law.”<sup>17</sup>

Similarly, the Council of Europe Recommendation No. R (94) 12 on the Independence, Efficiency and Role of Judges provides a standard by which judges must be independent in terms of their appointment, review of their decisions and their dismissal.<sup>18</sup> They must be free of governmental and administrative interference, improper influence, inducements, and “threats or other interferences, direct or indirect, from any quarter or for any reason.”<sup>19</sup> This independence should be guaranteed in constitutions or legislation and should be ensured by the executive and legislative powers.<sup>20</sup> The Universal Charter of the Judge succinctly explains this necessity of independence: “The independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence.”<sup>21</sup> The Charter provides at Article 5: “In the performance of the judicial duties the judge must be impartial and must so be seen.” This impartiality and

---

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*, at Preface, ¶ 1.

<sup>18</sup> Council of Europe, Committee of Ministers, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges (Adopted by the Committee of Ministers on Oct. 13, 1994 at the 518<sup>th</sup> meeting of the Ministers’ Deputies), Principle I(2)(a), (c), VI [hereinafter, “Council of Europe Recommendation No. R (94) 12”]. In 2008, a project to revise this Recommendation began. Both Recommendation No. R (94) 12 and the terms of reference for the revision efforts are *available at* [http://www.coe.int/t/dghl/standardsetting/cdcj/cjsjud\\_EN.asp](http://www.coe.int/t/dghl/standardsetting/cdcj/cjsjud_EN.asp).

<sup>19</sup> *Id.*, Principle I(d) (providing that the law should include sanctions for anyone seeking to influence judges).

<sup>20</sup> *Id.*, Principle I(2)(a), (b).

<sup>21</sup> Universal Charter of the Judge, General Council of the International Association of Judges in Taipei (Nov. 17, 1999), art. 1(2) [hereinafter Universal Charter of the Judge].

independence is to be supported through objective procedures for appointment and termination of judges.<sup>22</sup>

## II. THE CHARACTERISTICS OF A SYSTEM OF IMPARTIAL AND INDEPENDENT COURTS

The presence of the requirement of “impartial and independent tribunals” in all these instruments has led to interpretations and rulings as to what is specifically required by this phrase. This section examines each instrument from this perspective and seeks to identify from their provisions and explanations a “core set” of characteristics common to independent and impartial tribunals and then to define with greater specificity the requirements of each of these characteristics.

From examination of these various conventions, principles and guidelines, there are in my opinion three “core” characteristics: (1) freedom from improper influence by other branches of government, (2) independence of appointment, review and dismissal, and (3) impartiality. I note that the first two characteristics – freedom from interference by other branches of government and independence of appointment, review and dismissal – are two facets of the independence requirement. In addition, all three characteristics support a single overriding principle: freedom of the tribunal from improper influence both within and without. I explore each characteristic in turn.

### A. *Free from Improper Influence by Other Branches of Government*

The first characteristic of an impartial and independent tribunal as described in numerous international law instruments is the independence of the judiciary from other branches of government.

The CCPR Human Rights Committee, for example, opined that a system in which the judiciary and other branches of government are not “clearly distinguishable” is incompatible with the requirements of an independent judiciary:

---

<sup>22</sup> *Id.*, arts. 8, 9, 11.

The requirement of independence refers, in particular, to ... the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.<sup>23</sup>

Similarly, the Third Restatement of Foreign Relations Law of the United States, for example, provides examples of the types of acts that it would find exhibiting partiality and lack of independence, including influence by other branches of government: "Evidence that the judiciary was dominated by the political branches of the government or by an opposing litigant . . . would support a conclusion that the legal system was one whose judgments are not entitled to recognition."<sup>24</sup>

The fundamental importance of the independence of the Judge and Judiciary is restated as affirmative obligations of both the Judge and surrounding powers by the Judges' Charter of Europe: "The independence of every Judge is unassailable. All national and international authorities must guarantee that independence. . . . The Judge is only accountable to the law. He pays no heed to political parties or pressure groups. He performs his professional duties free from outside influence and without undue delay."<sup>25</sup>

Similarly, the OHCHR Basic Principles on the Independence of the Judiciary require that "[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance

---

<sup>23</sup> CCPR, *General Comment No. 32*, ¶ 19 (internal citations omitted).

<sup>24</sup> Restmt. 3d, Foreign Relations (1987), § 482, cmt. b.

<sup>25</sup> Judges' Charter in Europe, arts. 1, 2.

with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”<sup>26</sup> To support this impartiality and independence, Principle 1 provides for State action at the highest level: “The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. . . .”<sup>27</sup> Principles 3 and 4 further promote judicial independence by requiring exclusive jurisdiction of the judiciary over all issues of juridical nature, thus allowing non-judicial review of court opinions only in limited circumstances, such as commutation or pardon.

#### *B. Independent in Appointment, Review and Dismissal*

The necessity of formal and independent procedures for the appointment, review and removal of judges is also integral to the independence – and thus proper functioning – of the judiciary. “Security of tenure is basic to judicial independence. It is universally accepted that when judges can be easily or arbitrarily removed, they are much more vulnerable to internal or external pressures in their consideration of cases.”<sup>28</sup>

With respect to appointment and review, the OHCHR Basic Principles on the Independence of the Judiciary provide that judges should be selected on the basis of legal training and experience, specifically ability, integrity and experience.<sup>29</sup> In addition, any method of selection must “safeguard against judicial appointments for improper motives.”<sup>30</sup> This is echoed by the Universal Charter of the Judge: “The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification. Where this is not ensured in other ways, that are rooted in established and proven tradition, selection should be

---

<sup>26</sup> OHCHR Basic Principles on the Independence of the Judiciary, Principle 2.

<sup>27</sup> *Id.*, Principle 1.

<sup>28</sup> USAID, *Guidance for Promoting Judicial Independence and Impartiality*, at 19.

<sup>29</sup> OHCHR Basic Principles on the Independence of the Judiciary, Principle 10.

<sup>30</sup> *Id.*

carried out by an independent body that includes substantial judicial representation.”<sup>31</sup>

The Judges’ Charter in Europe provides guidelines that aim to guarantee judicial independence in these processes of selection and appointment. With respect to selection, the Charter provides: “The selection of Judges must be based exclusively on objective criteria designed to ensure professional competence. Selection must be performed by an independent body which represents the Judges. No outside influence and, in particular, no political influence, must play any part in the appointment of Judges.”<sup>32</sup> Promotion likewise must be determined by this independent body, and judicial administration must be “carried out by a body which is representative of the Judges and independent of any other authority.”<sup>33</sup> This is echoed in the European Charter on the Statute of Judges that recommends that such an authority be “independent of the executive and legislative powers” and that at least one-half of its members be sitting judges.<sup>34</sup>

In these instruments, a trend can be seen toward relying more on independent bodies to carry out judicial appointments as a procedure that is most likely to ensure independence and

---

<sup>31</sup> Universal Charter of the Judge, art. 9.

<sup>32</sup> Judges’ Charter in Europe, art. 4.

<sup>33</sup> *Id.*, art. 5, 6.

<sup>34</sup> European Charter on the statute for judges (and Explanatory Memorandum), DAJ/DOC (98) 23, July 8-10, 1998, Council of Europe, Strasbourg, Themix Plan Project N° 3, ¶ 1.3 [hereinafter The Charter]. The Council of Europe drafted the European Charter on the statute for judges to compile and maximize the results of many discussions of the Council on the “organisation of Justice in a democratic State by the rule of law,” and to build upon the judicial protection documents that came before it. *Id.*, Foreword and Preamble. The previous documents mentioned include: Article 6 of the CCPR, the OHCHR Basic Principles on the Independence of the Judiciary, and Recommendation R (94) 12 on the independence, efficiency and role of judges. The Charter provides procedures that are calculated to be best able to guarantee the objectives of competence, independence and impartiality (¶ 1.1) with respect to selection, appointment, career progress and termination of judicial offices (¶¶ 1.3, 2.1-4.4) and the judges’ main duties including availability, respect for individuals, the maintenance of confidentiality, and competence (¶ 1.5). The Charter has no formal status, and is instead aimed to judges, lawyers, politicians and those with “an interest in the rule of law and democracy.” The Charter, Foreword.

impartiality. It is acknowledged, however, that the ideal of an independent body is as of yet unattained in many States, and even many international courts, and it remains the government that appoints judges. It is therefore understood that, although the use of an independent body is the ideal for which to strive, other established and objective procedures that seek to ensure the objectives of independence and impartiality may also suffice. Council of Europe Recommendation No. R (94) 12, for instance, provides, in such a situation of governmental appointment, “there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria. . . .”<sup>35</sup> It goes on to provide examples of these guarantees that could include one or more of the following: (1) an independent body advises the government; (2) individuals have a right of appeal against a decision before an independent authority; or (3) the decision-making authority should safeguard against undue and improper influences.<sup>36</sup>

With respect to dismissal, I wish to be clear that judges may of course be removed from office; they are removed at the end of terms if they are not re-elected or re-appointed, they are removed during their terms for cause, and they may be temporarily removed – or recused – from individual suits for various reasons including knowledge or acquaintance with the parties or dispute. It is not this type of removal that is likely to deny important human rights or undermine the promotion of governance and the rule of law. It is appointment, review or removal of judges that evince dominance or capture either within the judiciary by a small politicized faction or, more likely, by another branch of government that ring the bells of caution.

Well-established and faithfully followed procedures separating the removal of judges from political motives and interference can be the difference between an impartial judiciary and one that is impermissibly captured.

---

<sup>35</sup> Council of Europe Recommendation No. R (94) 12, Principle I(2)(c).

<sup>36</sup> *Id.*

Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary. The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law.<sup>37</sup>

Stated more succinctly: “Security of tenure means that a judge cannot be removed from his or her position during a term of office, except for good cause (e.g., an ethical breach or unfitness) pursuant to formal proceedings with procedural protections.”<sup>38</sup> In addition, when judges are dismissed, they must be accorded due process of law.<sup>39</sup> The resulting security of tenure is integral in insulating judges from concern that political reactions to their decisions might affect their post.

The USAID explored the characteristics of review and removal procedures that would help to ensure a judiciary’s independence. Included in these characteristics are: (1) judges should be afforded due process protections in disciplinary actions; (2) penalties should be proportionate to the offence; (3) removal should only be effected for official incapacity or serious and clearly specified misconduct; (4) the disciplinary authority should be structured to exclude improper influences by being transparent and perhaps including representation from the judiciary itself or retired members thereof; and (5) judicial tenure should be sufficiently long to reduce the vulnerability of judges to those who may affect their employment prospects.<sup>40</sup>

---

<sup>37</sup> CCPR, *General Comment No. 32*, ¶ 20 (internal citations omitted).

<sup>38</sup> USAID, *Guidance for Promoting Judicial Independence and Impartiality*, at 19.

<sup>39</sup> Council of Europe Recommendation No. R (94) 12, Principle VI (3).

<sup>40</sup> USAID, *Guidance of Promoting Judicial Independence and Impartiality*, at 20-23.

### C. *Impartiality*

Finally, impartiality is a critical component of guaranteed justice. As stated by the Judges' Charter in Europe, "Not only must the Judge be impartial, he must be seen by all to be impartial."<sup>41</sup> As in this quote, impartiality is usually addressed in terms of the particular court or tribunal deciding the particular case. This section considers international understanding of impartiality in this sense, but it then also turns to the less discussed question of what it means for a system of courts and tribunals to lack impartiality.

The Human Rights Committee of the United Nations International Covenant on Civil and Political Rights explored and defined the requirement of impartiality in its review of its own Article 14: "Right to equality before courts and tribunals and to a fair trial" as introduced above:

The requirement of impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbor preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.<sup>42</sup>

Impartiality is read as requiring judges to have "no interest or stake in a particular case and do not have pre-formed opinions about it."<sup>43</sup> The Basic Principles on the Independence of the Judiciary state the requirement of impartiality as the obligation to conduct judicial proceedings "fairly" in which "the rights of the parties are respected."<sup>44</sup> The Human Rights Committee similarly

---

<sup>41</sup> Judges' Charter in Europe, art. 3.

<sup>42</sup> CCPR, *General Comment No. 32*, ¶ 21 (internal citations omitted).

<sup>43</sup> Amnesty International Fair Trial Manual, AI Index: POL 30/02/98 (1998), at 93.

<sup>44</sup> OHCHR Principles on the Independence of the Judiciary, Principle 6.

has explained that impartiality “implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.”<sup>45</sup> The OHCHR Principles on the Independence of the Judiciary require that Judges conduct themselves in a manner that preserves the impartiality and independence of the judiciary.<sup>46</sup>

A more systemic aspect to impartiality is present in Council of Europe Recommendation No. R (94) 12 which provides that: “Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.”<sup>47</sup>

In this sense, to assess impartiality at the systemic level requires looking to the judiciary in general – all or most of its courts – and whether they are structured in law and in practice so as to accord impartial treatment to all parties in all situations. Systemic bias is usually visible against a certain class of plaintiffs or defendants, or with subject matter of comparable import or topic. Such class-based partiality is usually the result of interference by another branch of the government or another third party and, therefore, impartiality at the systemic level blurs into, and is generally inseparable from, the considerations already discussed in regard to independence.

---

<sup>45</sup> *Karttunen v. Finland*, Communication No. 387/1989. U.N. Doc. CCPR/C/46/D/387/1989 (1992), Report of the HRC, ¶7.2. According to the Amnesty International Fair Trials Manual, the Human Rights Court applies a two-part test to examine impartiality of tribunals. The first is an objective test examining the procedural guarantees offered by the judge and whether they were sufficient to exclude legitimate doubt of partiality. The second is subjective and examines personal bias. Amnesty International Fair Trials Manual, at 94.

<sup>46</sup> OHCHR Principles on the Independence of the Judiciary, Principle 8.

<sup>47</sup> Council of Europe Recommendation No. R (94) 12, Principle I(d). As part of impartiality, Judges are endowed with the duty “to ensure that a fair hearing is given to all parties and that the procedural rights of the parties are respected pursuant to the provisions of the Convention.” *Id.*, Principle V(3)(b).

### III. CONCLUSION

This comment identifies and then examines three “core” characteristics of a system of courts that is impartial and independent: (1) freedom from improper influence by other branches of government, (2) independence of appointment, review and dismissal, and (3) impartiality. The first two characteristics – freedom from interference by other branches of government and independence of appointment, review and dismissal – are two facets of the requirement that the courts be independent from the other branches of government. The question of the impartiality of a system of courts, the third characteristic, may be manifest as an issue internal to the courts, but may also be a consequence of the interference prohibited by the first two characteristics. In this sense, it is significant that the conclusion that a country lacks a system of impartial and independent courts is more likely a criticism of interference by the executive or legislative branches, than it is a criticism of the courts themselves.

David D. Caron  
Co-Editor-in-Chief