CHAPTER 7

Challenges of Judges in International Criminal Courts and Tribunals

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1 Introduction

The independence and impartiality of judges are overwhelmingly accepted as fundamental prerequisites to the rule of law. The requirements of independence and impartiality are general principles of law recognized in all legal systems that ensure the protection of one of the most fundamental human rights: the right to a fair trial.¹

In the international context, this right is perhaps most important in criminal courts and tribunals, as these courts pronounce on the responsibility of individuals for international crimes. In fact, unlike other international courts and tribunals whose primary litigants are states, international criminal courts pronounce on individuals, and their decisions directly impact the liberty of the accused. The independence and impartiality of the judges who determine the fate of these individuals is thus particularly important to ensure the due process rights of the accused.

Indeed, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) has confirmed that

[t]he fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognized as being an integral component of the requirement that an accused should have a fair trial.²

To this end, a number of guidelines and principles have been developed to ensure judicial independence, applicable to all international judges. There have also been numerous guidelines and principles developed at the

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international level to apply to domestic courts and judges, as well as guidelines on conflict of interest in international arbitration.\(^3\) This chapter will focus on those developed specifically for the international judiciary setting the general framework, most notably the Burgh House Principles on the Independence of the International Judiciary ("Burgh House Principles"). This chapter focuses on rules governing independence and impartiality in international criminal courts and tribunals: the International Criminal Tribunal for the former Yugoslavia; the International Criminal Tribunal for Rwanda ("ICTR"); the International Mechanism for Criminal Tribunals (the "Mechanism") that will take over the mandates of the ICTY and ICTR at the completion of their work; the Special Court for Sierra Leone ("SCSL"); the Special Tribunal for Lebanon; and the International Criminal Court ("ICC").

The statutes and rules of the various international criminal courts and tribunals address the independence and impartiality of judges in general terms. These rules normally set out the criteria for the qualification of judges and requirements of independence and impartiality through restricting outside activities, and in many instances they provide detailed guidance on when judges should recuse themselves.\(^4\)

Challenges to the judicial process based on an alleged lack of independence and impartiality have been raised in the ICTY, the ICTR, the SCLC, and the ICC. Moreover, certain developments at the ICTY, most notably the leaked email of Judge Frederik Harhoff where allegations of impartiality were levied against the ICTY’s president, raise certain issues regarding the independence and impartiality of the ICTY and its judges. These developments will be discussed in the context of the present chapter. Before concluding, the chapter will also briefly compare the approaches to other international regimes, the International

\(^3\) For a full discussion of these principles and guidelines, most notably the Basic Principles on the Independence of the Judiciary and the Bangalore Principles of Judicial Conduct, see International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors—A Practitioners Guide (2d ed. 2007), Geneva Switzerland. See also IBA Guidelines on Conflicts of Interest in International Arbitration 2014 (having been revised to reflect the accumulated experience of the IBA Guidelines on Conflict of Interest in International Arbitration 2004); Chapter 2 by Meg Kinnear and Frauke Nitschke in this volume (discussing the International Centre for Settlement of Investment Disputes ("ICSID") regime); Chapter 3 by Sarah Grimmer in this volume (discussing the Permanent Court of Arbitration ("PCA"); Chapter 9 by Judith Levine in this volume (discussing the PCA).