INDEPENDENCE AND IMPARTIALITY OF THE INTERNATIONAL CRIMINAL JUDICIARY

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Laïty Kama presided over the first international prosecution for the crime of genocide, that of Jean-Paul Akayesu.1 The pronouncements in that case set out many of the principles that have been applied in subsequent rulings of the International Criminal Tribunal for Rwanda,2 the International Criminal Tribunal for the former Yugoslavia,3 reports of international commissions of inquiry4 and experts,5 and decisions of national tribunals.6 In the appeal, Akayesu accused Judge Kama of showing a lack of independence and impartiality in his behaviour during the trial. Judge Kama had interrupted Akayesu’s counsel, during cross-examination of a rape victim: “Is that important? […] She was raped so frequently that she can no longer remember how often it was; 4, 5, 6, 7 times.” Akayesu’s counsel argued that this indicated he believed the witness, and sought to protect her from questions that might have embarrassed her. The Appeals Chamber

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6 e.g., Mugesera v. Canada (Minister of Citizenship and Immigration), 2005 SCC 40, paras. 84., 86-89, 134, 135, 143, 153-155; District Court of The Hague, Criminal Law Section, Public Prosecutor’s Office number 09/751003-04, 23 December 2005, para. 7.2.
considered that, in the context of the entire cross-examination, Judge Kama was merely exercising the normal functions of a presiding judge.⁷

The Appeals Chamber considered Judge Kama’s comments in the context of a more general debate about impartiality. It explained:

The Appeals Chamber recalls that impartiality is one of the obligations that the Judges undertook to abide by upon assuming their duties. The tests governing the duty of impartiality, which derives from the Statute, were defined by ICTY Appeals Chamber, thusly:

“[…] a Judge should not only be subjectively free from bias, but also […] there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:

A. A Judge is not impartial if it is shown that actual bias exists.
B. There is an unacceptable appearance of bias if:
   (i) a Judge is a party to the case, or has a financial or proprietary
       interest in the outcome of a case, or if the Judge’s decision will lead to
       the promotion of a cause in which he or she is involved, together with
       one of the parties. Under these circumstances, a Judge’s disqualification
       from the case is automatic; or
   (ii) the circumstances would lead a reasonable observer, properly
        informed, to reasonably apprehend bias.”⁸

Article 14 of the International Covenant on Civil and Political Rights, on which the fair trial provisions in the statutes are modelled, states that all persons are entitled to trial before “a competent, independent and impartial tribunal established by law”.⁹ One of the adaptations of the fair trial provisions in the statutes of the ad hoc tribunals is the removal of this requirement. The deletion is not explained in the Secretary-General’s reports

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⁸ Ibid., para. 203 (references have been omitted; the Appeals Chamber cited Rule 14(A) of the Rules of Procedure and Evidence, concerning the oath of office of a judge, article 12(A) of the Statute, requiring that judges be independent and impartial, and the Appeals Chamber ruling in Prosecutor v. Furundžija (IT-95-17/1-A), Judgment, 21 July 2000, para. 189.