INDEPENDENCE AND IMPARTIALITY: INTERNATIONAL STANDARDS FOR NATIONAL JUDGES AND COURTS

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I. INTRODUCTION

The proliferation of international courts and tribunals in recent years reflects the increasing scope and content of international law. It also signifies the growing importance of the role of adjudication in the resolution of many sorts of international disputes.¹ It is to be expected that these developments will be accompanied by interest in the independence and the impartiality of those making the decisions, both the institutions (i.e. the courts and tribunals) and the individuals (i.e. the judges). With the growth in numbers of the decision-makers, it becomes appropriate to inquire whether there exist, or whether there should be formulated, generally-applicable standards concerning issues such as the establishment and operation of the institutions and the appointment and conduct of the individuals. Such standards have long existed at the international level in respect of domestic courts and judges, and it may therefore be asked if, and to what extent, these standards can be appropriated for use in the context of international courts and the international judiciary.

This article presents a survey of the international standards of independence and impartiality that are expected of domestic courts and judges. In the first section, it proceeds by examining the articulation of the requirement of independence and impartiality across a number of sources: the principal international and regional human rights conventions dealing with civil and political rights; other conventions; and a range of other instruments that, although non-binding, have been widely endorsed and are potentially of value in the formulation of relevant standards for international courts and judges.² The second section examines the

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¹ These developments have been the subject of considerable academic interest, see the sources referred to in Chester Brown, “The Evolution and Application of Rules Concerning Independence of the ‘International Judiciary’” (2003), note 1, in this volume.

² The general requirement of independence and impartiality, and even perhaps some of the more basic elements of those two concepts, may be viewed as having the status of customary international law or as constituting general principles of
elaboration of the requirement of independence and impartiality in the jurisprudence of the supervisory mechanisms set up under the human rights conventions and in the non-binding instruments. It does so, first, by reference to general standards of independence and impartiality, and secondly, by examining more precise standards pertaining to a number of specific issues that are of particular relevance to the international judiciary, namely: the appointment, election, and re-election of judges; the prior involvement of a judge with a party or an issue before the court; the exercise by judges of outside judicial or non-judicial functions; and the permissibility of part-time or occasional judicial appointments. Some initial observations are made in the concluding section about the applicability of these national-level standards to international courts and judges.

II. ARTICULATION OF THE REQUIREMENT OF INDEPENDENCE AND IMPARTIALITY

A. Principal Human Rights Conventions

The independence and impartiality of national courts and judges have been viewed as indispensable elements of the right to a fair trial, which is guaranteed by all of the principal universal and regional conventions concerning civil and political rights. At the universal level, the starting point is the Universal Declaration of Human Rights (1948) ("UDHR"). Although several articles may be regarded as recognising implicitly a requirement of judicial independence and impartiality, that is set out expressly in the context of the right to a fair trial in Article 10: 

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3 UN GA Res. 217A (III), UN Doc. A/810 at 71 (10 December 1948).
4 E.g. those articles that provide for equality before the law (Article 7), the right to an effective remedy by a competent national tribunal (Article 8), freedom from arbitrary arrest, detention or exile (Article 9), and the right, if charged with a criminal offence, to a public trial at which there are all the guarantees necessary for a defence (Article 11(1)).