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How to cite

MBENGUE, Makane Moïse. Challenges of Judges Before International Criminal Courts. In: Challenges and Recusals of Judges and Arbitration in International Courts and Tribunals. Chiara Giorgetti (Ed.). Leiden : Brill, 2015. p. 183–226.

This publication URL: https://archive-ouverte.unige.ch/unige:137361

CHAPTER 7

Challenges of Judges in International Criminal Courts and Tribunals

Makane Moïse Mbengue

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

1 Antonio Cassesse, International Criminal Law 393–94 (2003).

2 *Prosecutor v. Anto Furundzija*, Case No. IT-95-71/1-A99, Appeals Chamber, Judgment, ¶ 177 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000), http://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf.

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).

4 For a more general discussion of the statutes and rules of various international courts and tribunals, see Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 Harv. Int'l L.J. 271, 275 (2003).

Centre for the Settlement of Investment Disputes ("ICSID"), the World Trade Organization ("WTO"), and the International Court of Justice ("ICJ").

2 Independence and Impartiality in the Context of International Criminal Courts

The requirements of independence and impartiality are particularly important in the context of international criminal courts and tribunals since these tribunals have jurisdiction over individuals, thus triggering the extensive due process rights provided by human rights law. Virtually all international and regional human rights instruments provide for the guarantee to a competent, independent, and impartial tribunal established by law.[5]

Of note, also are the Burgh House Principles, which develop

> guidelines of general application to contribute to the independence and impartiality of the international judiciary, with a view to ensuring the legitimacy and effectiveness of the international judicial process.[6]

In so doing, the Burgh House Principles clearly set the general application of the parameters of judicial independence and impartiality. They provide that in order to ensure judicial independence

5 *See, e.g.*, American Convention on Human Rights Art. 8(1), *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36 (entered into force July 18, 1978); International Covenant on Civil and Political Rights Art. 14(1), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6. I.L.M. 368 (1967), 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms Art. 6(1), *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 262 (1952); Universal Declaration of Human Rights, Art. 10, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); African Charter on Human and Peoples' Rights Arts. 7(a)–(c), June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1981) (entered into force Oct. 21, 1986); *see* Francois-Xavier Bangamwabo, *The Right to an Independent and Impartial Tribunal: A Comparative Study of the Namibian Judiciary and International Judges, in* The Independence of the Judiciary in Namibia 244–45 (Nico Horn & Anton Bösl eds., 2008); International Commission of Jurists, *supra* note 3, at 5–7.

6 The Centre for International Courts & Tribunals, *The Burgh House Principles on the Independence of the International Judiciary*, pmbl., *available at* http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf (reproducing the Burgh House Principles on the Independence of the International Judiciary) (last visited Apr. 00, 2015).

> judges must enjoy independence from the parties to the cases before them, their own states of nationality or residence, the host countries in which they serve, and the international organizations under the auspices of which the court or tribunal is established.[7]

They further provide that "judges must be free from undue influence from any source," that "judges shall decide cases impartially, on the basis of the facts of the case and the applicable law," and that

> judges shall avoid any conflict of interest, as well as being placed in a situation which might reasonably be perceived as giving rise to any conflict of interest.[8]

These are the basic principles contained in most statutory documents of the various international courts and tribunals, with varying degrees of detail and elaboration.

Some argue that independence and impartiality are inherently linked and cannot be distinguished, while others consider that they are different concepts and should be treated as such.[9] The ICTR has highlighted the distinction between the two noting that "[j]udicial independence connotes freedom from external pressure and interference. Impartiality is characterized by objectivity in balancing the legitimate interests at play."[10] Independence may be most easily understood as "freedom from influence," while impartiality may be understood as "freedom from bias."[11]

The conditions for judicial independence and impartiality have been the subject of debate and include, but are not limited to, the election and appointment of judges, including their qualifications; security of tenure of their office and their privileges and immunities; their salaries and financial security; their discipline, removal, or disqualification; and their institutional independence.[12] Nonetheless, this chapter concentrates on those issues that could potentially form the basis of a challenge to a judge in international criminal courts or

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7 *Id.*

8 *Id.*

9 Bangamwabo, *supra* note 5, at 246.

10 *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, Appeal Chamber, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinions by Judge MacDonald and Judge Vohrah, ¶ 35 (June 3, 1999).

11 Bangamwabo, *supra* note 5, at 246.

12 *Id.* at 244.

tribunals. It therefore focuses on the procedural rules established to determine whether judges are prevented from sitting in a particular case due to the requirements of independence and impartiality as encompassed in their governing instruments (i.e., statutes and rules).

Ensuring the independence of judges in the context of international criminal law may pose particular challenges not faced in other areas.

Two considerations make the endeavor of ensuring judges' independence and impartiality more challenging in this context. First, is the greater role of politics: trials occur in the face of political realities and ongoing wars, such that criminal proceedings against individuals may not always be a political priority.[13] This could result in uneven or selective prosecution of crimes where political will is present. Experience has shown that "many states only want to end impunity when it does not conflict with other political aims."[14] Judges may feel obliged to bow to the might and pressures of politically and/or economically important powers as a result. Second, is the tendency to expect convictions given the gravity of international crimes and the need to combat impunity.[15] There seems to be a perception that an acquittal of an alleged perpetrator is a failure of the process by which he/she was tried.[16] There is thus a risk to judicial independence to fold to political or other pressures to convict those accused of the most heinous crimes falling within the jurisdiction of international criminal courts and tribunals. Some have therefore opined,

> In the world political arena many of the supporters of an international criminal justice system advocate it as a way of achieving reconciliation and peace, impunity and deterrence. Justice may indeed assist towards these desirable goals in many cases; but it must be accepted that when a just trial results in an unpalatable result, it cannot be compromised for the sake of other aims.[17]

These are not just theoretical risks to judicial independence and impartiality. One small example of this influence and pressure was the call of Judge Antonio Cassese, then president of the ICTY, to the International Olympic Committee in 1996 to prevent Serbia from participating in the Olympic games of that

13 Sylvia de Bertodano, *Judicial Independence in the International Criminal Court*, 15 Leiden J. Int'l L. 409, 409 (2002).

14 *Id.* at 423.

15 *Id.* at 410.

16 *Id.*

17 *Id.* at 414.

year unless it helped arrest Radovan Karadzic and Ratko Mladic, whom he specifically referred to as "war criminals."[18] This presumption of guilt before the accused were even tried suggests a lack of impartiality required of that judge at trial.[19] One can only assume that such a presumption of guilt (in direct contradiction to the presumption of innocence required to ensure the due process rights of the accused) is a result of political pressure and the gravity of the international crimes.

Moreover, the heightened role of politics in international criminal law suggests that judges may feel obliged to bow to the might and pressures of politically and/or economically important powers.[20] In fact, Judge Frederik Harhoff of the ICTY suggested that Judge Theodore Meron, the ICTY's current president, did just that in an email that was leaked to the press.[21] The real difficulty in this area is that states setting up tribunals that may potentially have jurisdiction over their own nationals are more inclined to exert pressure and control over the court and judges appointed by them.[22] These considerations make the independence and impartiality of judges in international criminal courts even more difficult to ensure. The fact that these judges have jurisdiction over individuals rather than over states makes their independence and impartiality even more important to ensure the fundamental human rights of the accused.

The statutes and rules of each court or tribunal elaborate how the independence and impartiality of judges may be attained within the auspices of each court or tribunal. These, along with the established procedural mechanism to determine whether a judge should be prevented from sitting on a particular case in the ICTY, the ICTR, the Mechanism, the Special Court for Sierra Leone, the Special Court for Lebanon, and ICC are examined below. The cases in which judges have been challenged in the ICTY, the ICTR, the Special Court for Sierra Leone, and the ICC are highlighted to demonstrate the application of these rules and the elaboration of the principles behind them. These principles, and the procedural rules to uphold them, are particularly important in the context of international criminal courts and tribunals given the inherent

18 *Id.* at 417.

19 *Id.*

20 *Id.* at 428.

21 Marlise Simons, *Judge at War Crimes Tribunal Faults Acquittals of Serb and Croat Commanders*, N.Y. Times (June 14, 2013), http://www.nytimes.com/2013/06/15/world/europe/judge-at-war-crimes-tribunal-faults-acquittals-of-serb-and-croat-commanders.html?_r=0.

22 De Bertodano, *supra* note 13, at 429.

challenges described above related to the due process rights of the accused, the vulnerability of international criminal law to political pressures, and the gravity of international crimes. In addition, certain questions concerning the independence and impartiality of judges at the ICTY raised by Judge Harhoff's letter are highlighted to demonstrate the difficulties in ensuring independence and impartiality in the context of international criminal law.

3 The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda

3.1 *The Statutory Requirements*

The statutes and rules governing the ICTY and ICTR are virtually identical since both were created by the Security Council in the exercise of its powers under Chapter VII of the United Nations Charter.[23] There have been later amendments to the rules of procedure for each tribunal that have led to some minor differences in the two.[24] Article 13 of the Statute of the ICTY and Article 12 of the Statute of the ICTR provide that all judges shall be "persons of high moral character, impartiality and integrity."[25] These provisions and the procedures for determining such impartiality are elaborated upon in the Rules of Procedure and Evidence of the ICTY ("ICTY Rules") and in the Rules of Procedure and Evidence of the ICTR ("ICTR Rules"). In particular, Rule 14 (of both the ICTY Rules and the ICTR Rules) requires each judge to make a declaration before taking up duties solemnly declaring to discharge his/her duties "honourably, faithfully, impartially and conscientiously."[26] In essence, this is a declaration of

23 The ICTY was created by Security Council Resolution 808 (1993) and the ICTR was created by Security Council Resolution 955 (1994).

24 For differences in the two, see the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, adopted on February 11, 1994 and revised dozens of times, most recently on May 22, 2013 and the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, adopted on June 29, 1995 and amended dozens of times, most recently on April 10, 2013. see *infra*, at 8.

25 Statute of the International Tribunal for Rwanda Art. 12, S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 Art. 13, 48th Sess., U.N. Doc. S/25704 (May 25, 1993) [hereinafter ICTY Statute].

26 International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 14, U.N. Doc. ITR/3/Rev. 1 (entered into force June 29, 1995) [hereinafter ICTR Rules]; Rules of

independence and impartiality to ensure the fundamental due process rights of the accused.

Rule 15 for both the ICTY Rules and ICTR Rules provides details on the substance and procedure for the disqualification of judges. Rule 15(A) provides that a judge may not sit on a case in which he/she has a personal interest or has had any associations that might affect his/her impartiality, and in such cases requires the judge to withdraw.[27] Rule 15(B) provides the right of any party to apply to the presiding judge for the disqualification and withdrawal of a judge on the grounds listed in Rule 15(A).[28] However, Rule 15(B) of the ICTY Rules contains a more detailed procedure in four sub-paragraphs that were amended in July 2005, examined below.[29] These additional sub-paragraphs are not included in the ICTR Rules, perhaps because the ICTY has had to determine cases pertaining to the judicial independence and impartiality of its judges more frequently than the ICTR.[30]

Rule 15(B)(i) of the ICTY Rules provides that any party may apply to the presiding judge for the disqualification of a judge, and that the presiding judge shall confer with the judge in question and report to the president.[31] Rule 15(B)(ii) provides that following the report of the presiding judge, the president shall appoint a panel of three judges from other chambers if necessary to report its decision on the merits of the application.[32] It further provides that if the decision is to uphold the application for disqualification, then the president shall assign another judge to sit in his/her place.[33] Rule 15(B)(iii) provides that the decision of the panel of three judges shall not be subject to interlocutory appeal.[34] It is not clear whether the report of the presiding judge would be subject to appeal if the panel of three judges were not deemed necessary. Finally, Rule 15(B)(iv) provides that if the challenged judge is the president, then the

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Procedure and Evidence, Rule 14, IT/32 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 11, 1994) [hereinafter ICTY Rules].

27 ICTR Rules, *supra* note 26, Rule 15(A); ICTY Rules, *supra* note 26, Rule 15(A).

28 ICTR Rules, *supra* note 26, Rule 15(B); ICTY Rules, *supra* note 26, Rule 15(B).

29 *See* ICTY Rules, *supra* note 26, Rule 15(B) (amended on July 5, 2005 by IT/32/Rev. 36).

30 *See* Bangamwabo, *supra* note 5, at 259. The ICTY has had at least four such cases, while the ICTR has only had one. These will be discussed below. In addition, the amendments related to the disqualification of judges in the ICTY Rules were made in 2002 and 2005, whereas the last amendments to the ICTR Rules were made in 2000. The continued amendments to the ICTY Rules may also be explained by its busier docket.

31 ICTY Rules, *supra* note 26, Rule 15(B)(i) (amended on July 5, 2005 by IT/32/Rev. 36).

32 *Id.*, Rule 15(B)(ii).

33 *Id.*

34 *Id.*, Rule (B)(iii).

vice president shall assume the responsibility of the president in accordance with Rule 15.[35]

The procedure is less detailed in the ICTR Rules but is the same in substance. Rule 15(B) of the ICTR Rules provides that any party may apply to the presiding judge for disqualification of a judge on the grounds listed in Rule 15(A), and that the Bureau[36] shall determine the matter, after the presiding judge has conferred with the challenged judge.[37] It further provides that if the Bureau upholds the application, the president shall assign another judge to replace the disqualified judge.[38] Rule 15(C) of both the ICTY Rules and the ICTR Rules further clarifies that a judge who reviews an indictment against an accused shall not be disqualified from sitting as a member of a trial chamber for the trial of that accused.[39] However, the ICTY Rules, as amended in July 2005, go further in Rule 15(C) by providing that such a judge shall also not be disqualified from sitting as a member of the Appeals Chamber to hear any appeal in that case.[40] The remaining sub-paragraphs of the ICTY Rules and ICTR Rules are different and specific to each tribunal.

Rule 15(D)(i) of the ICTY Rules further provides that no judge shall sit on an appeal in a case in which he/she sat as a member of the trial chamber.[41] Rule 15*bis* (C) of the ICTY Rules and the ICTR Rules[42] clarify that if a judge is unable to continue sitting in a part-heard case, then the president may assign another judge to the case and order either a rehearing or continuation of the proceedings from that point.[43] However, the Rule provides that the continuation of

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35 *Id.*, Rule (B)(iv).

36 The ICTR Rules define "bureau" as "[a] body composed of the President, the Vice-President and the more senior Presiding Judge of the Trial Chambers." ICTR Rules, *supra* note 26, Rule 2.

37 *Id.*, Rule 15(B).

38 *Id.*

39 *Id.*, Rule 15(C); ICTY Rules, *supra* note 26, Rule 15(C).

40 ICTY Rules, *supra* note 26, Rule 15(C).

41 *Id.*, Rule 15(D)(i). It was last amended in July 2005. Rule 15(D)(ii) further provides that

> "[n]o Judge shall sit on any State Request for Review pursuant to Rule 108 *bis* in a matter in which [he/she] sat as a member of the Trial Chamber whose decision is to be reviewed."

Rule 15(D) of the ICTR Rules was deleted when amended; it provided that

> "no member of the Appeals Chamber shall sit on any appeal in a case in which another Judge of the same nationality sat as a member of the Trial Chamber."

No equivalent rule relating to the nationality of the judges on appeal exists in the ICTY Rules.

42 Rule 15*bis* is identical in both the Rules of Procedure and Evidence of the ICTY and ICTR.

43 ICTR Rules, *supra* note 26, Rule 15*bis* (C); ICTY Rules, *supra* note 26, Rule 15*bis* (C).

the proceedings can only be ordered with the consent of the accused after the opening statements have taken place, except as provided in paragraph (D). Rule 15*bis* (D) provides that "the remaining Judges may nonetheless decide" that proceedings may be continued with a substitute judge even if the accused withholds his/her consent "if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice."[44] This rule further clarifies that this decision on continuation is subject to appeal directly to a full bench of the Appeals Chamber by either party.[45] The ICTR has dealt with the circumstances described in paragraph (D) above.[46]

These rules thus establish the procedure to be followed in the event a party challenges the independence and/or impartiality of a judge, in pursuit of the due process rights of the accused. The ICTY and, to a lesser extent the ICTR, have elaborated upon the substance of the independence and impartiality requirements within their frameworks. A brief review of the authoritative case law follows.

3.2 *Jurisprudence*

3.2.1 The Jurisprudence of the ICTY

As noted, the ICTY has had to decide cases related to the independence and impartiality of its judges on more than one occasion.[47] In *Prosecutor v. Delalic, Mucic, Delic, & Landzo*, a judge was challenged on the basis of her appointment as vice president of her country of origin impacting her independence, considering that her new appointment involved political activities in the executive branch of the government.[48] At the time of the case in 1998, the ICTY Rules

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44 ICTY Rules, *supra* note 26, Rule 15*bis* (D). Include a citation to ICTR?

45 Rule 15*bis* (D) further specifies that

> "[i]f no appeal is taken or the Appeals Chamber affirms the decision of the Trial Chamber, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made."

46 For clarifications of these circumstances, see *infra* Part 3.2.2.

47 *See, e.g.*, *Prosecutor v. Seselj*, Decision on Motion for Disqualification, Case No. IT-03-67-PT (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2003); *Prosecutor v. Blagovic*, Case No IT-02-60-PT, Decision on Motion for Disqualification (Int'l Crim. Trib. for the Former Yugoslavia Mar. 19, 2003); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A 99, Appeals Chamber, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000); Prosecutor v. Delalic et al., Case No. IT-96-21-T, Decision of the Bureau on Motion on Judicial Independence (Int'l Crim. Trib. for the Former Yugoslavia Sept. 4, 1998).

48 *Delalic*, Case No. IT-96-21-T.

were the same as those of the ICTR Rules (i.e., the amendments and subparagraphs of Rule 15 (B) as noted above did not yet exist), and the presiding judge referred the matter to the Bureau for determination. Interestingly, the Bureau first reviewed the jurisprudence of the European Court of Human Rights ("ECHR") in relation to the due process guarantees provided in Article 6(1) of the European Convention on Human Rights.[49] This example provides a clear instance of cross-fertilization between international courts and tribunals.

The ICTY recalled the two-fold test developed by the EHCR for assessing the impartiality of a tribunal:

> The existence of impartiality . . . must be determined according to a subjective test, that is on the basis of the personal conviction that a particular judge has in a given case, and also according to an objective test, *that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect*.[50]

The ICTY thus considered that under the objective component of the test, it must "assess relevant circumstances that may give rise to an 'appearance' of partiality" and recalled that if there is " 'legitimate reason to fear' a lack of impartiality in a judge, he or she must withdraw from the case."[51]

The ICTY then recalled the test for measuring independence as developed by the ECHR:

> In determining whether a body can be considered to be independent—notably of the executive and the parties in the case—the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.[52]

After a more in depth survey of the ECHR's case law, the Bureau concluded that the concerned judge was not disqualified under Rule 15(A) because she had committed not to take up her post or assume any duties as vice president of Costa Rica until the completion of her judicial duties.[53] Interestingly, the

49 *Id.*

50 *Id.* (quoting Hauschidt v. Denmark, A 154, ¶ 46 (1989) (emphasis in original).

51 *Id.* (quoting *Hauschidt*, A 154, ¶ 48).

52 *Id.* (quoting App. No. 8209/78).

53 *Id.*

applicants contended that although there is no express provision in the ICTY's statute stating that judicial and political offices are incompatible, the effects of Article 13 of the Statute and ICTY Rule 15, taken together, have the same effect as Article 16(1) of the Statute of the International Court of Justice that provides that "[n]o member of the Court may exercise any political or administrative function."[54] The ICTY conceded this point, but made clear that the issue is not whether there is a prohibition against the exercise of any political or administrative function, but rather whether the concerned judge is exercising such a function. Having determined that the judge was not in fact exercising such functions, the judge was not disqualified under Rule 15(A).

In the later case of *Prosecutor v. Furundzija*, the tribunal developed its jurisprudence again, elaborating upon the jurisprudence of the ECHR.[55] In this case, the defendant sought the disqualification of a judge and the vacation of the judgment and sentence based on the judge's involvement with the U.N. Commission on the Status of Women that dealt with allegations of systematic rape in the former Yugoslavia. After a review of ECHR jurisprudence and the two-pronged test noted above, as well as some national jurisprudence, the tribunal set out the principles for interpreting and applying the impartiality requirements of the ICTY.[56] It held that:

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

54 *Id.* (quoting Statute of the International Court of Justice Art. 16(1), 15 U.N.I.C.I.O. 35559 Stat. 1055 (1945) [hereinafter ICJ Statute]).

55 *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A 99, Appeals Chamber, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000).

56 *Id.; see also* Mackenzie & Sands, *supra* note 4, at 280 (discussing the *Furundzija* case and the test developed therein).

together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or

(ii) the circumstance would lead a reasonable observer, properly informed, to reasonably apprehend bias.[57]

With regard to the "reasonable observer" referred to in standard B(ii) above, the ICTY observed that

> the "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."[58]

The ICTY noted that there were no allegations of actual bias under standard B(i) above, and considered whether the circumstances would lead a reasonable and informed observer to apprehend bias. It noted in this regard that "there is a presumption of impartiality which attaches to a Judge"[59] and that in the absence of evidence to the contrary, it must be assumed that judges can free their mind of any personal beliefs or predispositions.[60] It observed that it is for the appellant to adduce sufficient evidence to satisfy the tribunal that a judge was not impartial, and that "there is a high threshold to reach in order to rebut the presumption of impartiality."[61] Subsequent cases in the ICTY,[62] the ICTR,[63] the Special Court for Sierra Leone,[64] and the ICC[65] have followed this approach.

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57 *Furundzija*, Case No. IT-95-17/1-A 99, ¶ 189.

58 *Id.*, ¶ 190.

59 *Id.*, ¶ 196.

60 *Id.*, ¶ 197.

61 *Id.*

62 *See Prosecutor v. Vojislav Seselj*, IT-03-67-PT, Decision on Motion for Disqualification (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2003); *Prosecutor v. Momcilo Krajisnik*, Case No. IT-00-39-PT, Decision by a Single Judge on the Defence Application for Withdrawal of a Judge from the Trial (Int'l Crim. Trib. for the Former Yugoslavia Jan. 22 2003); *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo*, IT-96-21-A, Appeals Chamber, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

63 *See infra* Part 3.2.2.

64 See *infra* Part 4.2.

65 *See infra* Part 6.1.3.

The tribunal then considered the objectives of the U.N. Commission on the Status of Women as coinciding with the objectives of the resolutions leading to the establishment of the tribunal.[66] It thus observed and concluded that

> "concern for the achievement of equality for women, which is one of the principles reflected in the United Nations Charter, cannot be taken to suggest any form of prejudgment in any future trial for rape." To endorse the view that rape as a crime is abhorrent and that those responsible for it should be prosecuted within the constraints of the law cannot in itself constitute grounds for disqualification.[67]

The tribunal further observed that her experience as part of the U.N. Commission on the Status of Women gave her the relevant qualifications under Article 13(1) of the Statute, and that it would be an "odd result if the operation of an eligibility requirement were to lead to an inference of bias."[68] Thus, the tribunal rightly found no appearance of bias in the circumstances of the case.[69] The "reasonable observer" test and the presumption of impartiality have been adopted in subsequent cases in most criminal courts and tribunals: the ICTR, the SCSL, and the ICC. The *Furundzija* case thus seems to set the standard and threshold for the independence and impartiality of judges in international criminal courts and tribunals.

3.2.2 The ICTR's Jurisprudence

The ICTR has followed the two-pronged test set out in the *Furundzija* case above in adopting and enunciating the "reasonable observer" test in the *Karemera* case.[70] In the *Karemera* case,[71] the accused eventually alleged that the decisions in the case itself showed a bias against him but these allegations were initially denied as the defense failed to illustrate either actual or perceived bias in the judge's actions.[72] A decision, finding actual bias or a reasonable appre-

66 *Furundzija*, Case No. IT-95-17/1-A 99, ¶ 201.

67 *Id.*, ¶ 202.

68 *Id.*, ¶ 205.

69 *Id.*, ¶ 215.

70 *Prosecutor v. Karemera et al.*, ICTR, Bureau, ¶¶ 8–11 (May 17, 2004); *see* Guido Acquaviva et al., *Trial Process, in* International Criminal Procedure: Principles and Rules 782 (Göran Sluiter et al., eds., 2013).

71 *Karemera*, ICTR, Bureau. Although, please note that there are several decisions in this case with contradictory observations that are extremely difficult to find on the internet and decipher, which will be set out in this chapter.

72 *Id.; see* Acquaviva, *supra* note 70, at 782.

hension of bias, triggers the procedures in Rule 15*bis* discussed above.[73] In the *Karemera* case, a judge was challenged on the basis of her domestic situation (living with a member of the prosecution team), and the judge withdrew from the proceedings due to an apprehension of bias.[74] However, before she withdrew from the proceedings, the two other judges declined a defense motion on disqualification on the grounds of impartiality even though they were aware of her cohabitation with a member of the prosecution team.[75] Following her withdrawal from the case, the remaining members of the chamber considered that it was in the interests of justice to continue with a substitute judge, even though most of the witness testimony had not been video recorded.[76] The Appeals Chamber later held that a reasonable apprehension of bias against the tribunal as a whole could be found due to their declining the defense motion against the judge despite being aware that she was cohabiting with a member of the prosecution team.[77] In light of this finding, the Trial Chamber III held that it was endowed with "inherent powers to make judicial findings that were necessary to achieve the primary obligation to guarantee a fair trial to the accused."[78] It declared that a decision on leave to amend the indictment

73 Whereby another judge may be assigned to the case and order a rehearing or continue with the proceedings with the consent of the accused (if past the opening statements) unless the remaining judges deem it in the interests of justice to continue even without the consent of the accused. *See* ICTR Rules, *supra* note 26, Rule 15*bis* (C); ICTY Rules, *supra* note 26, Rule 15*bis* (C); *see also* Acquaviva, *supra* note 71, at 783.

74 *Prosecutor v. Karemera et al.*, ICTR, Appeals Chamber, ¶ 67 (Oct. 22, 2004); *see* Acquaviva, *supra* note 71, at 784.

75 *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR15bis. 2, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, ¶ 69 (Oct. 22, 2004). For more detail on these provisions, particularly discussions during the preparatory phase of the State, Rules, and Code, providing another overview of these complicated decisions, see Yvonne McDermott, *Article 41—Excusing and Disqualification of Judges, The Rome Statute, in* The Commentary on the Law of the International Criminal Court (Mark Klamberg, ed., forthcoming 2015), *available at* http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-4/#c3760 (last visited Apr. 00, 2015) and Acquaviva, *supra* note 71, at 784.

76 *Karemera*, Case No. ICTR-98-44-AR15bis. 2.

77 *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Severance of André Rwamakuba and Amendments of the Indictment, ¶ 22 (Dec. 7, 2004); *see* McDermott, *supra* note 76; Acquaviva, *supra* note 71, at 784.

78 *Prosecutor v. Karemera et al.*, ICTR, Trial Chamber, ¶ 22 (Dec. 7, 2004); *Acquaviva, supra* note 71, at 784.

was affected by the later finding of apprehension of bias against the bench and should thus no longer have effect.[79]

This review of the case law and statutory requirements shows that applicants face a particularly high burden to demonstrate a lack of impartiality in the ICTY and the ICTR. The presumption of impartiality described above could be at odds with the presumption of guilt that accompanies most accused of international crimes, along with the requirement of impartiality as a fundamental human right, and the fact that these criminal courts are the sole international tribunals with jurisdiction over individuals and the power to deprive freedom. Nonetheless, the above reasoning regarding the objectives of the U.N. Commission on the Status of Women and the resolutions establishing the ICTY are quite valid. To hold otherwise would lead to a slippery slope where defendants could potentially challenge female judges in rape cases based on an appearance of bias as a female, given that females are the predominant victims of rape. The judgment thus strikes the appropriate balance between the rights of the accused and the requirements of international justice. Nonetheless, the importance of the requirements of independence and impartiality cannot be downplayed in the context of international criminal courts and tribunals, and the challenges specific to this context must be understood.

3.3 *Particular Challenges of Ensuring Independence and Impartiality in Both the ICTY and the ICTR*

As noted above, there is a perceived risk that judges of international criminal courts and tribunals may bow to the pressures from major economic and political powers given the inherent politicization of international criminal law.[80] In fact, Judge Frederik Harhoff raised allegations against the American/Israeli President of the Court, Judge Meron, of pressuring other judges into approving the acquittals of top Croatian and Serbian commanders, Ante Gotovina, Momčilo Perišić, Jovica Stanišić, and Franko Simatović.[81] He alleged that Judge Meron exerted pressure over the other judges in order to protect the military establishments of powerful states, such as the United States and Israel, from expansive forms of criminal liability, as developed through the joint criminal enterprise jurisprudence of the ICTY.[82] The legal controversy of the decisions

79 *Id.*

80 For a full discussion, see de Bertodano, *supra* note 13.

81 *See* Simons, *supra* note 21.

82 The English version of the e-mail can be found at E-mail from Judge Frederick Harhoff, Int'l Crim. Trib. for the Former Yugoslavia (June 6, 2013) [hereinafter E-mail from Judge Harhoff], *available at* http://www.bt.dk/sites/default/files-dk/node-files/511/6/6511917-

relates to the degree of responsibility that top military commanders should have for war crimes committed by their subordinates. The allegations were contained in an e-mail sent by Judge Harhoff to fifty-six lawyers, friends, and associates, which were subsequently published by a Danish newspaper. In the e-mail, Judge Harhoff severely criticizes the controversial acquittals and the "tenacious pressure" exerted by Judge Meron on other judges in such a way "that makes you think he was determined to achieve an acquittal."[83]

Many have observed a softening of the law towards the protection of military interests, but Judge Harhoff is the first to attribute the apparent change to the tribunal's current president, Judge Meron.[84] Judge Harhoff observes:

> Have any American or Israeli officials ever exerted pressure on the American presiding judge (the presiding judge for the court that is) to ensure a change of direction? We will probably never know. But reports of the same American presiding judge's tenacious pressure on his colleagues in the Gotovina-Perisic case makes you think he was determined to achieve an acquittal—and especially that he was lucky enough to convince the elderly Turkish judge to change his mind at the last minute. Both judgments then became majority judgments 3–2.[85]

This raises serious concerns as to the independence of Judge Meron, and the ICTY as a whole. The *New York Times* reports that some comments by unnamed ICTY senior officials seem to corroborate Judge Harhoff's accusations which led to a

> mini-rebellion . . . brewing against Judge Meron, prompting some of the 18 judges of the [ICTY] to group around an alternative candidate for the election for tribunal president.[86]

However, it seems that these allegations were not taken seriously enough to warrant his replacement since Judge Meron was reelected as president on October 1, 2013, after the e-mail had been leaked. It is unclear whether any

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letter-english.pdf; *see also* Marko Milanovic, *Danish Judge Blasts ICTY President*, EJIL: Talk! (June 13, 2013), http://www.ejiltalk.org/danish-judge-blasts-icty-president/ (last visited Apr. 00, 2015).

83 *See* Simons, *supra* note 21; E-mail from Judge Harhoff, *supra* note 83.

84 *See id*.

85 *See* E-mail from Judge Harhoff, *supra* note 83.

86 Simons, *supra* note 21.

action was taken to ensure his independence and freedom of influence from the United States and Israel. Nonetheless, Judge Harhoff describes the risks inherent in international criminal law:

> The latest judgments here have brought me before a deep professional and moral dilemma, not previously faced. The worst of it is the suspicion thatsome of my colleagues have been behind a shortsighted political pressure that completely changes the premises of my work in my service to wisdom and the law.[87]

He seems to suggest that the alleged pressure by Judge Meron to satisfy political power alters the role of judges from that of serving the rule of law to serving the will of political powers. On the other hand, the leaked e-mail in and of itself has been criticized as uncorroborated slanderous accusations and reflecting a "conspiracist attitude, tinged with anti-Semitism."[88] Defenders of Judge Meron argue that he exerted no such pressure and is being unfairly attacked for decisions that were reached by a majority of the tribunal in each case.[89] Some argue that there is no evidence that Judge Meron acted out of influence from the United States or Israel, but that the judge was implementing his conservative view of international humanitarian law.[90] Others contend that

> it was deeply unethical, and far more scandalous than any of the allegations in the letter, for Judge Harhoff to reveal confidential discussions between the judges.[91]

In this regard they contend that

> the fact that Judge Harhoff still has a job indicates the need . . . for a binding code of judicial ethics at all international criminal tribunals, not just at the ICC.[92]

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87 E-mail from Judge Harhoff, *supra* note 83.

88 *See* Luka Misetic, *Comment, in* Milanovic, *supra* note 83.

89 David Rohde, *Gutting International Justice*, Reuters (July 13, 2013), http://blogs.reuters.com/david-rohde/2013/07/12/gutting-international-justice/.

90 *Id.*

91 Kevin Jon Heller, *The Real Judge Meron Scandal at the ICTY*, Opinio Juris (June 17, 2013, 9:57 PM), http://opiniojuris.org/2013/06/17/the-real-judge-meron-scandal-at-the-icty/.

92 *Id.*

The controversy had important ramifications. In July 2013, Rwanda called for the resignation of Judge Meron, requesting that Judge Meron step down and a retrial of all the cases that he worked on "or influenced the decisions of the judges."[93] Considering that the ICTY and the ICTR share an Appeals Chamber, the independence of the president of this chamber equally impacts both the ICTY and the ICTR. It is unclear how, and if these concerns were addressed, but Judge Meron's subsequent reelection suggests that the accusations were found to be baseless and that Judge Meron's independence is intact. Media reports simply report Rwanda's calls for his resignation; there is no further reporting or information on how the situation was handled. In any case, Judge Meron's subsequent reelection indicates that the matter was resolved.

These developments demonstrate the very real risk of political influence on judges' independence. Even if states do not pressure judges to rule in a certain way, judges may feel obliged to cooperate with their governments and find a legal solution to a case that supports their own national interest, particularly concerning the individual criminal responsibility of top military commanders of powerful states. Moreover, one judge has observed, "At my court, judges are no doubt aware that taking a controversial position in an unpopular decision could have an effect on their re-election" but that he was "confident that the judges' sense of professionalism would prevail.[94] The political influence, combined with the election of judges, makes the principles and procedures to ensure the independence and impartiality of judges in international criminal courts all the more important.

3.4 *The International Residual Mechanism for Criminal Tribunals*

The International Residual Mechanism for Criminal Tribunals (the "Mechanism") was established by the Security Council acting under Chapter VII of the United Nations Charter to carry out the residual functions of the ICTY and the ICTR following the completion of all of their trials and appeals.[95] It was established to commence as of July 1, 2012 for the ICTR branch and July 1, 2013 for the ICTY branch.[96] The Security Council requested the ICTY and the

93 Edwin, Musoni, *Rwanda Wants ICTR Judge Meron to Resign*, New Times (June 19, 2013), *available at* http://allafrica.com/stories/201306200232.html.

94 Brandeis Inst. for Int'l Judges, Challenges to Judicial Independence 2 (2010).

95 Security Council Resolution on the Establishment of the International Residual Mechanism for Criminal Tribunals with Two Branches, S.C. Res. 1966, pmbl., U.N. Doc. S/RES/1966 (Dec. 22, 2010) [hereinafter Mechanism].

96 *Id.*, ¶ 1.

ICTR to complete all their remaining work no later than December 31, 2014 and to prepare their closure to ensure a smooth transition to the Mechanism.[97] Although the Mechanism commenced operations according to the timeline provided by the Statute above,[98] it does not seem that the ICTY and the ICTR have successfully completed all judicial activities by December 31, 2014, since the Appeals Chamber is still rendering judgments as of January 2015.[99]

The Mechanism's statute sets out the same qualifications in Article 9 as those set out in the statutes of the ICTY and the ICTR, and adds that "[p]articular account shall be taken of experience as judges of the ICTY or the ICTR."[100] The Rules of Procedure and Evidence of the Mechanism are virtually identical to those of the ICTY Rules and the ICTR Rules: Rules 18, 19, and 20 on the qualification, disqualification, and absence of judges respectively are identical to those of the ICTY,[101] with variations where necessary for the Mechanism. For example, they refer to an "ICTY or ICTR Judge who has reviewed an indictment against an accused" in Rule 18(C) in order to suit the specific circumstances of the Mechanism. Given this, it may be presumed that they will be interpreted and applied in the same manner and that the line of jurisprudence laid out above will apply in the event that a challenge is raised.

4 The Special Court for Sierra Leone

The Special Court for Sierra Leone ("SCSL") was established by agreement between the United Nations and the government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of August 14, 2000 to prosecute persons responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996.[102] The Statute of the SCSL ("SCSL Statute") and its Rules of Procedure and Evidence ("SCSL Rules") govern the independence and impartiality of its

97 *Id.*, ¶ 3.

98 *See* Letter from the President of the International Residual Mechanism for Criminal Tribunals addressed to the President of the Security Council, S/2014/826, ¶ 5 (Nov. 19, 2014).

99 *See* Press Release, Int'l Crim. Trib. for the Former Yugoslavia, Appeals Chamber Upholds Convictions of Five Senior Bosnian Serb Officials for Srebrenica and Zepa Crimes, The Hague (Jan. 30, 2015), *available at* http://www.icty.org/sid/11618.

100 Mechanism, *supra* note 96, Art. 9.

101 *See* ICTY Rules, *supra* note 26, Rules 14–16.

102 *See* Statute of the Special Court for Sierra Leone, S.C. Res. 1315, pmbl., Art. 1, U.N. Doc. S/RES/1315 (Aug. 14, 2000) [hereinafter SCSL Statute].

judges and set out the procedure for the disqualification of judges in a similar manner as the other courts and tribunals have, as discussed in this chapter. The jurisprudence of the SCSL has interpreted these provisions in a similar manner as the ICTY and has expressly adopted the approach of the ICTY in the *Furundzija* case.

4.1 *The Statutory Requirements*

Article 13 of the SCSL Statute sets out the qualifications and appointment of judges in an identical manner as the ICTY,[103] the ICTR,[104] and the ICC.[105] However, the SCSL Statute goes further in its formulation relating to the qualification and appointment of judges by adding a second sentence after the usual "high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices."[106] The second sentence of Article 13 provides that judges "shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source."[107]

As in other courts and tribunals, the SCSL Rules further elaborate the requirements of independence and impartiality and deal with the disqualification of judges. In particular, Rule 14 requires each judge to make a solemn declaration before taking up duties to discharge his/her duties "honestly, faithfully, impartially and conscientiously" in a similar manner as the declaration in the ICTY and the ICTR; but the SCSL Rules add that these duties will be discharged "without fear or favor, affection or ill-will."[108] The declaration as provided for in the SCSL seems to encompass more elements of independence and impartiality.

Rule 15 deals with the disqualification of judges and provides that

> a judge may not sit at a trial or appeal in any case in which his impartiality might reasonably be doubted on any substantial grounds.[109]

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103 ICTY Statute, *supra* note 25, Art. 13.

104 ICTR Statute, *supra* note 25, Art. 12.

105 Rome Statute of the International Criminal Court Art. 36(3)(a), U.N. Doc. A/CONF. 189/9, 37 I.L.M. 999 (July 17, 1998) [hereinafter Rome Statute].

106 SCSL Statute, *supra* note 103, Art. 13(1).

107 *Id.*

108 Another difference in the formulation in the Rules of the ICTR and ICTY is that they begin with "honorably, faithfully, impartially and conscientiously," whereas the rules of the SCSL begin with "*honestly*" rather than "honourably."

109 Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 15(A) (entered into force Mar. 7, 2003) [hereinafter SCSL Rules], *available at* https://www1.umn.edu/

Rule 15(D) provides that any judge who reviews an indictment shall not be prohibited from sitting as a member of the Trial Chamber in the trial of the accused or that reason, in a similar manner as the ICTY Rules and ICTR Rules. However, the SCSL Rules are broader in scope than the ICTY Rules and ICTR Rules, as they refer to any judge who approved the indictment or who had any involvement at the pre-trial or interlocutory stages of the proceedings.[110] Rule 15(D) of the ICTY Rules expressly prevents any judge who sat in the trial stages of the proceedings from being a member of the Appeals Chamber in the same case. It has been noted that while this is not expressly included in the rules for the ICTR or SCSL, "this is presumably implicit to the SCSL and ICTR regimes, or at least no practice to the contrary has ever been shown."[111] The jurisprudence of the SCSL has adopted the same approach as the ICTY in applying the "reasonable observer" test in the interpretation of this provision.[112]

Rule 15 clarifies that any party may apply for the disqualification of a judge on the above ground,[113] and that the president may assign an alternate judge where a judge voluntarily withdraws from a case.[114] Rule 15*bis* sets out the procedure where a disqualification of a judge is sought. It provides that

> where it is alleged that a Judge is not fit to sit as a member of the Special Court, the President may refer the matter to the Council of Judges.[115]

It further provides that:

> Should the Council of Judges determine that:
>
> (i) the allegation is of a serious nature, and
> (ii) there appears to be a substantial basis for such allegation,

humanrts/instree/SCSL/Rules-of-proced-SCSL.pdf. It should be noted, however, that this provision was amended in May 2004 and November 2006, after the cases discussed below. The differences in wording and organization do not in any case affect the substance or standard set in this jurisprudence. It seems that the provision was identical to that of the ICTY and the ICTR, as well as the Special Court for Lebanon, prior to these amendments.

110 *See* Acquaviva, *supra* note 70, at 781.

111 *Id.*

112 *See infra* Part 4.2.

113 SCSL Rules, *supra* note 110, Rule 15(B).

114 *Id.*, Rule 15(C).

115 *Id.*, Rule 15*bis*(A).

> it shall refer the matter to the Plenary Meeting which will consider it and, if necessary, make a recommendation to the body which appointed the Judge.[116]

The Rule also provides that the challenged judge shall be entitled to present his/her comments on the matter at each stage,[117] as in other courts and tribunals. Although that wording does not exactly mirror the procedure set out in the ICTY, the ICTR, and the ICC, the jurisprudence of the SCSL has adopted the same approach as these tribunals, as discussed in the following section.

Rule 16(B) deals with the procedure in case of absence and resignation if a judge is disqualified and provides that the president may designate an alternate judge in such an instance. It is a similar provision as in the ICTY and the ICTR (and the Special Court for Lebanon discussed below), but it does not include the requirement of consent if the case has proceeded past the oral argument phase.[118] The SCSL seems to do less to protect the due process rights of the accused.

4.2 *Jurisprudence*

The SCSL has noted that

> the applicable test for determining applications made under Rule 15(B) is whether an independent bystander or reasonable person will have a legitimate reason to fear that the judge in question lacks impartiality, "in other words, whether one can apprehend bias."[119]

It thus seems to adopt the "reasonable observer" test developed by the ICTY. The SCSL has confirmed that the test set out above is "consistent with the ICTY jurisprudence, in particular the test derived from the Judgment in the case of

116 *Id.*, Rule 15*bis*(B).

117 *Id.*, Rule 15*bis*(C).

118 As further discussed below, the procedure in the SCSL thus seems to be more in line with the ICC in not requiring consent to replace a judge after the oral proceedings have passed. However, in the ICC's case, this is countered by its extensive Judicial Code of Ethics, while in the SCSL's case, there is no such counter balance to ensure the due process rights of the accused. *See infra* Part 6.

119 *Prosecutor v. Norman*, Case No. SCSL-2004-14-PT, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, ¶ 22 (May 28, 2004) (quoting *Prosecutor v. Sesay*, Case No. SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, ¶ 15 (Mar. 13, 2004).

Furundzija as set out as follows."[120] It then recalled the entire test set out in the *Furundzija* case and affirmed that "the focus is therefore on 'an unacceptable appearance of bias'."[121] However, it noted that "the starting point for any determination of such claim . . . is that 'there is a presumption of impartiality which attaches to a Judge.' "[122] It thus directly quoted the ICTY in the *Furundzija* case and brought the approach of the SCSL directly in line with that of the ICTY and the ICTR.

The first case of the SCSL dealing with disqualification, the *Sesay* case, did not discuss the test or presumption of impartiality in such express terms, and did not refer to the ICTY's jurisprudence. In that case, the SCSL stated that the relevant question is "whether one can apprehend bias."[123] A judge was challenged on the basis of the authorship of a book on crimes against humanity that expressly referred to atrocities committed by the Sierra Leone's Revolutionary United Front, of which some of the accused standing trials were highly ranked members.[124] The SCSL did not recall the presumption of impartiality but instead found that publication to give rise to a reasonable apprehension of bias.[125] However, the fact that the judge made direct comments on the atrocities committed by the armed group to which the accused belonged is perhaps strong enough grounds to rebut the presumption of impartiality in any case.

In the subsequent case of *Norman*, which recalled the test and presumption set out in the *Furundzija* case, the judge's involvement in children's rights advocacy was not seen to give rise to actual or perceived bias in a case involving child soldiers.[126] This is not only in line with the legal test set out in the *Furundzija* case, but in keeping with its findings since involvement in children's rights groups does not create bias with regard to child soldiers just as involvement in women's rights groups does not create bias with regard to rape. This is also in line with a similar case at the ICC where the judge was involved in UNICEF in a case involving the use of child soldiers.[127] Considering the *Sesay* and *Norman* decisions together

120 *Id.*, ¶ 23.

121 *Id.*

122 *Id.*, ¶ 25 (quoting *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A 99, Appeals Chamber, Judgment, ¶ 196 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000)).

123 *Sesay*, Case No. SCSL-2004-15-AR15, ¶ 15.

124 See *id.*; McDermott, *supra* note 76; Acquaviva, *supra* note 71, at 782.

125 *See id.*

126 *Norman*, Case No. SCSL-2004-14-PT; *see also* McDermott, *supra* note 76.

127 *See supra* notes 167–73.

> might lead one to conclude that while some prior involvement in causes correlating in some way to the subject-matter of the case will not in itself be a ground to apprehend judicial bias, involvement in activities concerning in some way the individual accused certainly will.[128]

It should be noted that the Bangalore Principles on Judicial Conduct permit judges to serve on advisory or official bodies, so long as such membership is not inconsistent with the perceived impartiality of the judge, in keeping with these decisions.[129] The Bangalore Principles on Judicial Conduct were developed to apply to judges in national courts, but the underlying principles governing judicial conduct (and their independence and impartiality) are generally shared in all of the guidelines and rules established and should govern all judiciary, whether national or international.[130] Nonetheless, the Bangalore Principles seem to be the only guidelines that expressly allow the membership of advisory or official bodies and are therefore relevant to recall here to confirm the line of jurisprudence discussed above.

5 The Special Court for Lebanon

Like the SCSL, the Special Court for Lebanon ("SCL") was established by agreement between the United Nations and the Lebanese Republic pursuant to Security Council Resolution 1664 (2006) of March 29, 2006. It has jurisdiction over persons responsible

> for the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the SCL finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal

128 Acquaviva, *supra* note 710, 782–783.

129 The Bangalore Principles on Judicial Conduct, Principle 4.11.3 (2002) [hereinafter Bangalore Principles]; *see* Acquaviva, *supra* note 71, at 783. The Burgh House Principles are silent with regards to membership of these bodies but they deal with extra judicial activity and provide that judges shall not engage in any extra judicial activity that is incompatible with their judicial function or might reasonably appear to affect their independence and impartiality. *See* Bangalore Principles, *supra*, Principle 8 (discussing extrajudicial activity). This formulation is more in keeping with the wording of the statutory documents of international criminal courts and tribunals.

130 *See* International Commission of Jurists, *supra* note 3, at 141.

> justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.[131]

It should be noted, however, that the SCSL has jurisdiction over serious violations of international humanitarian law and Sierra Leonean law, while the SCL only has jurisdiction over violations of Lebanese law.[132]

5.1 *The Statutory Requirements*

Article 9 of the Statute of the SCL deals with the qualification and appointment of judges in an identical manner as all other courts and tribunals examined in this chapter, but refers instead to "extensive judicial experience" rather than "qualifications required in their respective countries for appointment to the highest judicial offices" as referred to in all other texts.[133] This is most likely due to the fact that the statute expressly requires that one of the three judges in the Trial Chamber shall be Lebanese, and that two of the five judges in the Appeals Chamber shall be Lebanese.[134]

Rule 24 of the Rules of Procedure and Evidence for the SCL ("SCL Rules") provides an identical text for the solemn declaration as that provided in the ICTY Rules and the ICTR Rules.[135] In fact, the SCL Rules seem virtually identical to those of the ICTY Rules and the ICTR Rules. Rule 25 deals with the disqualification of judges in an identical manner as that of Rule 15 in the ICTY Rules and the ICTR Rules.[136]

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131 Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, Art. 1, U.N. Doc. S/RES/1757 (May 30, 2007) [hereinafter STL Statute], *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/363/57/PDF/N0736357.pdf?OpenElement.

132 *See id.*, Art. 2; SCSL Statute, *supra* note 103, Art. 1.

133 *See* SCSL Statute, *supra* note 103, Art. 13; *see also* Rome Statute, *supra* note 106, Art. 36(3)(a); ICTR Statute, *supra* note 25, Art. 12; ICTY Statute, *supra* note 25, Art. 13.

134 *See* STL Statute, *supra* note 132, Art. 8.

135 *See* ICTR Rules, *supra* note 26, Rule 14; ICTY Rules, *supra* note 26, Rule 14.

136 Special Tribunal for Lebanon, Rules of Procedure and Evidence, STL-BD-2009-01-Rev. 7, Rule 25 (Mar. 20, 2009), http://www.stl-tsl.org/images/RPE/RPE_EN_February_2015.pdf [hereinafter STL Rules].

In addition, Rule 26 governs the procedure in case a judge is disqualified and is virtually identical to Rule 15*bis* (C) of the ICTY Rules and the ICTR Rules.[137] Given that these statutory requirements are virtually identical to those in the ICTY and ICTR, it may be assumed that they will be interpreted in the same manner by the Court in the application of the "reasonable observer" test and the presumption of impartiality. The fact that the SCSL has done so supports this, particularly considering that the statutory requirements of the SCL are more similar to those of the ICTY and the ICTR than to those of the SCSL.

6 The International Criminal Court

6.1 *The Statutory Requirements*

6.1.1 The Statute and Rules of Procedure and Evidence

Perhaps in response to the challenges faced at the ICTY and the ICTR, the ICC has very detailed rules and procedures governing the independence and impartiality of its judges in its statute, Rules of Procedure and Evidence ("ICC Rules") and binding Code of Judicial Ethics. Article 40 of the Rome Statute provides for the independence of judges in the performance of their functions.[138] It provides that judges shall not engage in any activity that is likely to interfere with their judicial function or "affect confidence in their independence."[139] Article 40 further provides that any question regarding the independence of a judge shall be decided by an absolute majority of the judges.[140]

Article 41 of the Rome Statute sets out the procedure for the excusal and disqualification of judges. Article 41(1) provides that the president may excuse a judge at his/her request from the exercise of his/her functions and Article 41(2) lists the specific instances in which a judge should be disqualified, and provides that the prosecutor or accused may request disqualification as well.[141] Article 41(2)(a) provides that a judge shall not participate "in any case in which his or her impartiality might reasonably be doubted on any ground."[142] The wording thus seems to follow the reasonable observer test as developed by

137 Rule 15*bis* is identical in the ICTY Rules and the ICTR Rules. *See supra* notes 42–45 and accompanying text.

138 Rome Statute, *supra* note 106, Art. 40.

139 *Id.*, Art. 40(2).

140 *Id.*, Art. 40(4).

141 *Id.*, Art. 41(2)(b) (granting the prosecutor and the accused the right to disqualify a judge under Article 41).

142 *Id.*, Art. 41(2)(a).

the ICTY. It is unclear whether the presumption of impartiality would equally apply in the ICC.

Article 41(2)(a) further expressly provides that a judge shall be disqualified on grounds of impartiality if he/she has been involved in the case before the court or at the national level in any capacity, or on any other grounds as provided in the ICC Rules. Lastly, Article 41(2)(c) provides that any question as to the disqualification of a judge shall be decided by "an absolute majority of the judges"[143] and that the challenged judge may present comments on the matter, but shall not take part in the decision. The ICC Rules further elaborate upon these provisions and provide additional grounds for disqualification.

In particular, Rule 34 sets out the additional grounds for disqualification of a judge and provides more detail on the procedure to be followed in case of a challenge. Rule 35 further requires a judge to request recusal if circumstances exist or arise that might call his/her impartiality into question.[144] Rule 34 sets out examples of such circumstances that complement those set out in Article 41.[145] The grounds provided in Rule 34 include: personal interest in the case, including any personal or professional relationship with any of the parties;[146] involvement in his/her private capacity in any legal proceedings involving the accused;[147] performance of functions prior to taking office during which he/she could be expected to have formed an opinion on the case in question on the parties or their legal representatives that "objectively, could adversely affect the required impartiality of the person concerned";[148] and expression of opinions "through the communications media, in writing or in public actions, that objectively, could adversely affect the required impartial-

143 The case law has interpreted "an absolute majority of the judges" to indicate a plenary session and has convened such a plenary session in the application of Article 41 of the Rome Statute. *See Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-3040-Anx, Decision of the Plenary of Judges on the Defence Application of 20 February 2013 for the Disqualification of Judge Sang-Hyun Song from the Case of *The Prosecutor v. Thomas Lubanga Dyilo* (June 11, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1603064.pdf [hereinafter Lubanga Decision]; *see also infra* Part 6.2 (discussing the jurisprudence).

144 For more detail on these provisions, particularly discussions during the preparatory phase of the Statute, Rules and Code, see McDermott, *supra* note 76.

145 *See supra* notes 142–44.

146 International Criminal Court, Rules of Procedure and Evidence, Rule 34(1)(a), http://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf [hereinafter ICC Rules].

147 *Id.*, Rule 34(1)(b).

148 *Id.*, Rule 34(1)(c).

ity of the person concerned."[149] Ensuring objectivity with regard to the legal representatives may be difficult given that "international criminal law is a very small community. Judges [and lawyers] are more likely to have worked together, studied together."[150]

Rule 34(2) further details the procedure to be followed in a request for disqualification: the request shall be made in writing "as soon as there is knowledge of the grounds on which it is based," shall state the grounds, attach any relevant evidence, and shall be transmitted to the person concerned who is entitled to present written submissions.[151] This wording suggests that a party waives its right to request disqualification where it is not sought as soon as there is knowledge of the grounds for disqualification. Rule 38 deals with the replacement of a judge in the event of disqualification in a much less detailed manner than all other criminal courts and tribunals. Rule 38 simply provides that "replacement shall take place in accordance with the pre-established procedure in the Statute, the Rules and the Regulations."[152] It is unclear what pre-established procedure it is referring to. The only relevant provision in the Rome Statute seems to be Article 74, which deals with the requirements of the decision and provides that

> [t]he Presidency may, on a case-by-base basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.[153]

This is clearly different than the ICTY, the ICTR, and the SCL that provide for the consent of the accused if the case has proceeded past opening statements. It is unclear how the due process rights of the accused are secured without a consent requirement when the case has proceeded past the oral arguments phase as in the other tribunals. Nonetheless, the end result seems the same since the judges may proceed with the case even without the consent of the accused where they consider it in the interests of justice to do so.

149 *Id.*, Rule 34(1)(d).

150 Brandeis Inst. for Int'l Judges, Integrity and Independence: The Shaping of the Judicial Persona 3 (2007).

151 ICC Rules, *supra* note 147, Rule 34(2).

152 *Id.*, Rule 38(2).

153 Rome Statute, *supra* note 106, Art. 74.

6.1.2 The Code of Judicial Ethics of the ICC

Article 45 of the Rome Statute also provides that before taking up their duties, judges must make a "solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously."[154] Rule 5 of the ICC Rules provides the text of the undertaking. This is similar to the declaration required in the ICTY and the ICTR, but the undertaking in the ICC is given more teeth and substance through the adoption of the binding Code of Judicial Ethics and elaboration of the undertaking in Rule 5. The Code of Judicial Ethics was adopted pursuant to the undertaking required by Article 45, the principles "concerning judicial independence, impartiality and proper conduct specified in the Statute and Rules," the "need for guidelines of general application to contribute to judicial independence and impartiality" and the "special challenges facing the judges of the Court in the performance of their responsibilities."[155]

Article 3 of the Code of Judicial Ethics provides more substance to the requirement of judicial independence and expressly prohibits judges from engaging in any activity that is likely to interfere with the judicial function. This is an elaboration of Article 40(2) of the Rome Statute and is given more substance in Article 10 of the Code of Judicial Ethics, which adds that "judges shall not exercise any political function."[156] Article 4 sets out the requirements of impartiality and provides that the appearance of impartiality shall be ensured and that judges shall avoid any conflict of interest "or being placed in a situation which might *reasonably be perceived* as giving rise to a conflict of interest."[157] These provisions thus seem to follow the approach adopted by the ICTY and the ECHR, as noted above. Again, it is unclear whether the presumption of impartiality would also apply in the ICC. Given the more detailed provisions governing impartiality in the ICC, however, one can assume that it would not. Such a presumption is unnecessary since the statutory requirements are more clear and detailed.

Article 5 sets out the requirements of judges' integrity and expressly provides that they shall not receive gifts or remuneration. Article 6 requires judges to respect the confidentiality of the consultations that relate to their judicial functions and the "secrecy of deliberations."[158] Interestingly, although this may

154 Rome Statute, *supra* note 106, Art. 45.

155 International Criminal Court, Code of Judicial Ethics, ICC-BD/02-01-05, pmbl., http://www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105_En.pdf [hereinafter ICC Code of Ethics].

156 *Id.*, Art. 10.

157 *Id.*, Art. 4 (emphasis added).

158 *Id.*, Art. 6.

be an implicit requirement in all courts and tribunals, there is no such express requirement in relation to the ICTY and the ICTR. If there was, then the leaked e-mail of Judge Harhoff would arguably violate it, given the information divulged relating to the last minute change of vote of the Turkish judge. One can only wonder how this violation would be treated. In this regard, Article 9 of the Code of Judicial Ethics deals with public expression and association and expressly provides that judges "shall avoid expressing views which may undermine the standing and integrity of the Court."[159] Judge Harhoff's leaked e-mail (or perhaps the influence of Judge Meron on the other side of the coin) seems to have done just that.

Judge Harhoff's e-mail could be interpreted in two ways: leaked to uphold the standing and integrity of the ICTY by drawing attention to the increased role of politics in the face of the law, in order to counter this and restore its integrity; or as undermining the credibility of the tribunal as a whole with unsubstantiated allegations in breach of the secrecy of deliberations that call into question the legitimacy of the court itself. Regardless of how one looks at the e-mail, the Code of Judicial Ethics would certainly provide grounds to address the impropriety. Depending on the perspective, this could take the form of another judge, prosecutor, or the accused seeking the disqualification of Judge Harhoff or Judge Meron for failing to discharge their judicial functions in accordance with the Statute, Rules, and Code of Judicial Ethics.

In any event, the ICC has developed more detailed and strict requirements for the independence and impartiality of its judges than in the ICTY and the ICTR—a welcomed development. The approach mirrors that enunciated in the jurisprudence in the ICTY related to the reasonable observer and reasonable apprehension of bias, and the case law of the ICC has followed the test set out in the *Furundzija* case. Despite the more elaborate detailed provisions governing impartiality in the ICC, the ICC has reiterated the presumption of impartiality enunciated by the ICTY and reaffirmed the high burden to rebut it. A review of this case law follows.

6.2 *Jurisprudence*

The ICC noted in its first decision on an application for disqualification of a judge that the "relevant standard of assessment was whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[160] It thus adopted the reasonable observer test as developed

159 *Id.*, Art. 9(2).

160 *Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus*, Case No. ICC-01/05-03/09-344-Anx, Decision of the Plenary of the Judges on the Defence

by the ICTY, but did not expressly refer to this line of jurisprudence.[161] It further affirmed the presumption of impartiality in line with the jurisprudence of the ICTY, noting that:

> The . . . disqualification of a judge was not a step to be undertaken lightly, [and] a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice. When assessing the appearance of bias in the eyes of the reasonable observer, unless rebutted, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case.[162]

The ICC has thus stressed that there is a high threshold for the disqualification of judges in international criminal courts and tribunals. This presumption of impartiality seems at odds with the more detailed provisions of the Judicial Code of Ethics at the ICC, which could potentially provide more grounds for disqualification. It could be the case that the detailed provisions of the Code could provide additional grounds for the accused to buttress the difficulty in overcoming the high burden of rebutting this presumption. As noted above, the Code expressly prohibits actions and activities that are not dealt with in the rules governing other international criminal tribunals. Thus, where the benefit of the doubt may go to the judges in fulfillment of the presumption of impartiality in other tribunals, the Code may expressly prohibit such acts or activities, which would in turn help rebut the presumption in that case in the ICC.

In the *Banda/Jerbo* decision above, the majority of the plenary judges dismissed the request for disqualification on the basis of a blog post written by Judge Chile Eboe-Osuji.[163] The blog post was written before the judge was appointed to the Court and discussed the relationship between the African

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Request for the Disqualification of a Judge of 2 April 2012, ICC-01/05-03/09-344-Anx, ¶ 11 (June 5, 2012) [hereinafter Banda/Jerbo Decision], http://www.icc-cpi.int/iccdocs/doc/doc1423447.pdf.

161 The jurisprudence of the Special Court of Sierra Leone expressly refers to the test developed in the *Furundzija* case and adopts the same standard, including the presumption of impartiality. *See supra* Part 4.

162 *Banda/Jerbo Decision*, Case No. ICC-01/05-03/09-344-Anx, ¶ 14.

163 *See id.*; McDermott, *supra* note 76.

Union and the ICC and the situation in Sudan, which involved *Banda* and *Jerbo*.[164] The majority found that the general comment in the blog cast no doubt on the impartiality of the judge, particularly in light of the strong presumption of impartiality.[165] The decision did not make any reference to the Code of Judicial Ethics.

In a subsequent case, the *Lubanga* decision, the ICC engaged with the Code of Judicial Ethics when faced with a request based on five provisions of the Code, namely:[166] the prohibition on engaging in any activity that is likely to interfere with the judicial functions or "affect confidence in their independence;"[167] the prohibition of conflict of interest, or being in situations that "might reasonably be perceived as giving rise to a conflict of interest;"[168] the requirement to exercise freedom of expression in a manner compatible with the judicial office "and that does not affect or appear to affect their judicial independence or impartiality;"[169] the prohibition from commenting on pending cases and "expressing views which may undermine the standing and integrity of the Court;"[170] and particularly the prohibition from engaging in any extra-judicial activity that is incompatible with their judicial function or that "may affect or may reasonably appear to affect their independence or impartiality."[171] In this case, an alleged incompatibility arose between Judge Sang-Hyun Song's concurrent role as judge and President of UNICEF Korea, since the accused was charged with the conscription and use of child soldiers.[172]

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164 The judges discussed the request for disqualification relating to the blog commentary in most detail, but the request also raised grounds relating to the nationality of the judge (as the same as the accused) and relating to the election campaign of the judge for his candidacy for election at the ICC. *See Banda/Jerbo Decision*, Case No. ICC-01/05-03/09-344-Anx, ¶¶ 15–21; For a discussion of the nationality issue, particularly that nationality as a grounds for impartiality was expressly considered and rejected for inclusion in the ICC Statute, see also McDermott, *supra* note 76.

165 *See Banda/Jerbo Decision*, Case No. ICC-01/05-03/09-344-Anx, ¶¶ 17–20.

166 *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-3040-Anx, Decision of the Plenary of Judges on the Defence Application of 20 February 2013 for the Disqualification of Judge Sang-Hyun Song from the Case of *The Prosecutor v. Thomas Lubanga Dyilo* (June 11, 2013).

167 ICC Code of Ethics, *supra* note 156, Art. 3(2).

168 *Id.*, Art. 4(2).

169 *Id.*, Art. 9(1).

170 *Id.*, Art. 9(2).

171 *Id.*, Art. 10(1).

172 *See Lubanga Decision*, Case No. ICC-01/04-01/06-3040-Anx, Decision of the Plenary of Judges on the Defence Application of 20 February 2013 for the Disqualification of Judge Sang-Hyun Song from the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, ¶ 20 (June 11,

The Court first recalled the standard set in the *Banda/Jerbo* decision referred to above (the "reasonable observer" test) and reiterated the strong presumption of impartiality.[173] It referred to the presumption of impartiality as "a long-standing principle accepted in a number of different jurisdictions," and then proceeded to recount support in national jurisdiction, without expressly referring to the presumption of impartiality enunciated in the jurisprudence of the ICTY.[174] It also refers to support in national jurisdiction for the reasonable observer test again without reference to the jurisprudence of the ICTY in this regard.[175] Other international criminal courts, like the Special Court for Sierra Leone, have expressly referred to the ICTY's jurisprudence when adopting the same standard, as noted above. Perhaps the exclusive reliance on national courts in the ICC is grounded in the principle of complementarity and the primary role of national courts in prosecuting crimes within the jurisdiction of the ICC. This may explain why the ICC grounds the test and presumption in the jurisprudence of national courts rather than on the well-established test in the *Furundzija* case. Other tribunals, like the ICTY, have primacy over national courts and are thus less anchored to them.

The ICC nonetheless followed the same approach as noted above by setting out the "reasonable observer" test and the presumption of impartiality in the ICC. It found that a reasonable observer with knowledge of all the facts,

> including the limited nature of the Judge's work with UNICEF/Korea, the context and entire contents of the statements in the article in the *Korea Herald*, and the extent of the involvement of UNICEF in the appeals at hand, would not reasonably apprehend bias.[176]

This is the same result as in the *Furundzija* case and the *Norman* decision of the SCSL: just as involvement in a group advocating the rights of women cannot prejudice a case involving rape, involvement in a group advocating and representing the rights of children cannot prejudice a case involving child soldiers. However, UNICEF had a greater role in this case than the U.N. Commission

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2013). The request also raised disqualification on the grounds of statements made by the judge on the verdict and sentence in the case against Lubanga, but the decision engages with the argument related to his role in UNICEF in most detail. For a discussion of Article 10 of the Judicial Code of Ethics in this regard, see also McDermott, *supra* note 76.

173 *Lubanga Decision*, Case No. ICC-01/04-01/06-3040-Anx, ¶¶ 9–10.

174 *See id.*, ¶¶ 37–38, 48–50.

175 *Id.*, ¶¶ 35–36.

176 *Id.*, ¶ 50.

on the Status of Women, as UNICEF was an intervening party in this case.[177] Nonetheless, the judge in the *Furundzija* case was not a member of the U.N. Commission on the Status of Women while serving as a judge,[178] whereas the judge in the *Lubanga* case was. The ICC distinguished the case from the infamous *Pinochet* case[179] because the relationship between the judge and UNICEF was less direct than the relationship between Lord Hoffman and Amnesty International, the concerned judge in the *Pinochet* case.[180] The Court noted that the judge was only nominally the President of UNICEF/Korea, but in actual fact had appointed another individual as Acting President of the organization who ran it instead.[181] It also noted that Amnesty International had made submissions directly before Lord Hoffman in the House of Lords as intervening party, whereas UNICEF had not made any submissions before the judge in the *Lubanga* case in the Appeals Chamber; its submissions were limited to proceedings before the Trial Chamber.[182] The approach of the ICC is thus in line with the other international criminal courts and tribunals discussed herein in setting the "reasonable observer" test and reaffirming the strong presumption of impartiality and the corresponding high burden to rebut it.

As an interesting procedural point, a question was raised in the same case and an additional case regarding whether Article 41(2) of the Rome Statue (on the disqualification of judges) could apply to judicial assistants as well as judges.[183] The prosecutor argued that an adviser or clerk to a judge cannot work

177 *See id.*, ¶ 44.

178 *See Prosecutor v. Anto Furundzija*, Case No. IT-95-71/1-A99, Appeals Chamber, Judgment, ¶ 166 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000).

179 Lord Hoffman was disqualified from sitting in the case in the House of Lords of the United Kingdom against General Pinochet because of his involvement with Amnesty International, an intervening party in that case. *See* Andrea Bianchi, *Immunity Versus Human Rights: The* Pinochet *Case*, 10(2) EJIL 237, 237–277 (1999) (providing one of the many examples of an overview of the saga involved in this case).

180 *Lubanga Decision*, Case No. ICC-01/04-01/06-3040-Anx, ¶ 44.

181 *Id.*

182 *Id.*

183 *See Prosecutor v. Joseph Kony, Vincent Otti et al.*, Case No. ICC-02/04-01/05, Decision on the Prosecutor's Request to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice Regarding the Case (Oct. 31, 2006), http://www.icc-cpi.int/iccdocs/doc/doc1922560.pdf; *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Prosecutor's Application to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice Regarding the Case (Oct. 27, 2006) [hereinafter Lubanga Decision on Prosecutor's Application]. Both cases concern the same legal advisor and the factual background concerning the application of Article 41 to the legal advisor to the judge who had worked on the cases in the office of the prosecutor.

on cases in which he or she has already been involved as a prosecuting lawyer.[184] It seems reasonable to suggest that an individual who has previously worked for the prosecution should recuse him/herself from the position of adviser to a judge in that case, although the Statute and Rules do not address the impartiality of judicial advisors.[185] In both cases, the Pre-Trial Chamber requested the president to convene a plenary of judges to consider whether Article 41 could apply to a senior legal advisor to the chamber and separated the legal advisor "from any functions he might have in relation to the case"[186] as a provisional measure.[187] The president convened the plenary that then noted that the concerned legal advisor had been separated from any functions relating to the case and therefore considered that the issue was addressed by the president of the Pre-Trial Division. The fact that the separation from the case ordered by the president of the Pre-Trial Division was a provisional measure was not considered or discussed by the plenary. It seems odd that stating that

> a provisional measure pending determination of the matters raised . . . by the appropriate organ of the Court, the President of the Pre-Trial Division has separated the Senior Legal Advisor . . . from, *inter alia*, the case[188]

is enough to consider the matter "addressed." Provisional measures are provisional in nature, they hardly seem like the proper mechanism to adequately address and close the matter. Perhaps the lack of discussion indicates that the provisional measures cease to be provisional and that the proper approach is to separate the individual from all functions related to the case, arguably in accordance with Article 41 of the Statute.[189]

The plenary of judges considered

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184 *Id.*

185 McDermott, *supra* note 76.

186 *Kony et al.*, Case No. ICC-02/04-01/05, at 3.

187 *See id.*; *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/07, Decision of the President on the Request of the President of the Pre-Trial Division of 20 October 2006 (Nov. 7, 2006); *Lubanga Decision on Prosecutor's Application*, Case No. ICC-01/04-01/06.

188 *See Lubanga Decision on Prosecutor's Application*, Case No. ICC-01/04-01/06.

189 *See supra* notes 192–93 and accompanying text. In any case, there would certainly be something in the staff rules and regulations governing staff members of the court (both in the Office of the Prosecutor and Judges Chambers) that would prevent such a blatant violation of the independence and impartiality of the judiciary (and by extension, those responsible for fulfilling the judicial function).

> further that the Prosecutor's Application may be construed as amounting to a request for disqualification of the judges or as a "question as to the disqualification of a judge," as such to be decided by an absolute majority of the judges, in accordance with article 41, paragraph 2 of the Statute.[190]

This seems to suggest that the disqualification of judges' advisors or clerks may be addressed under Article 41 of the Statute, but the decisions are far from clear. However, commentaries on the Statute have interpreted these cases as

> declin[ing] [the President of the Pre-Trial Division's] request on the basis that the remaining judges in a later meeting unanimously held that Article 41 did not apply, since the request had nothing to do with the disqualification of a judge.[191]

The precise wording of the decision as reflected above does not coincide with this interpretation which seems to suggest the opposite, that the prosecutors request in that case "may be construed as amounting to a request for disqualification of the judge" within the meaning of Article 41.

It thus seems that both judges and their advisors may be challenged under Article 41 of the Statute and that the "reasonable observer" test and the presumption of impartiality apply. However, it is unclear whether the presumption of impartiality would apply to a judge's advisor by extension, although it is unlikely given the high offices of the international judiciary and the high burden that accompanies the presumption of impartiality. The presumption of impartiality results from the nature of the judiciary itself: by virtue of their training and experience (and in order for any dispute settlement system to function smoothly), judges are "capable of deciding on the issue before them while relying . . . on the evidence adduced in the particular case."[192] It is questionable whether this same esteem and experience may be accorded to junior lawyers working as advisers and clerks, especially when considering the high burden accompanying the presumption and the delicate due process rights of the accused.

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190 *Kony et al.*, Case No. ICC-02/04-01/05, at 4.

191 McDermott, *supra* note 76.

192 *Banda/Jerbo Decision*, Case No. ICC-01/05-03/09-344-Anx, Decision of the Plenary of the Judges on the Defence Request for the Disqualification of a Judge of 2 April 2012, ICC-01/05-03/09-344-Anx, ¶ 14 (June 5, 2012); *see infra* at 33.

7 Comparison with Other International Courts and Tribunals

Considering that the guarantee of a competent, independent, and impartial tribunal established by law is a fundamental requirement of the rule of law, each different legal regime has adopted its own approach to ensure that judges are independent and impartial. For the most part, these approaches reflect the above approaches and encompass the necessary principles to ensure independence and impartiality. Nonetheless, there are some differences in the various approaches, which will be highlighted below.

7.1 *The Approach of the International Centre for the Settlement of Investment Disputes*

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) allows the challenge of arbitrators on grounds that include a lack of independence and impartiality. It has been suggested, however, that the threshold for a successful challenge is higher than under other regimes.[193]

Recent decisions demonstrate a shift towards a higher threshold for the disqualification of arbitrators in the International Centre for Settlement of Investment Disputes ("ICSID") regime.[194] One tribunal has held that it is essential to determine whether a challenged arbitrator "manifestly lacks the quality of being a person who may be relied upon to exercise independent judgment."[195] This suggests that a reasonable doubt as to his/her independence would not be

193 James Crawford, *Challenges to Arbitrators in ICSID Arbitrations, in* PCA Peace Palace Centenary, Seminar Confronting Global Challenges: From Gunboat Diplomacy to Investor-State Arbitration 1 (Oct. 11 2013). For a full account of the disqualification of arbitrators under the ICSID Regime and the applicable rules and standards therein, see Chapter 2 by Meg Kinnear and Frauke Nitschke in this volume. Article 57 of the ICSID Convention provides that a party may propose the disqualification of an arbitrator "on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14." This raises several questions, most notably whether "manifest" describes the *seriousness* of the lack of one of the qualities or the *standard* to which the lack thereof must be established. There has not been a uniform approach in the jurisprudence. Some tribunals have considered the relevant inquiry as to whether the *evidence* of unreliability is manifest, meaning that it is clear, while others have considered whether the *degree* of the unreliability is manifest, meaning that it is *serious*.

194 Crawford, *supra* note 193, at 2.

195 *Id.* at 3; *see also Suez et al. v. Argentine Republic*, ICSID Case No. ARB/03/17, ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007).

enough[196] (i.e. the "reasonable observer" test developed by the ICTY would not suffice to disqualify an arbitrator). Rather, it suggests that obvious evidence as to a lack of independence is required. However, the presumption of impartiality enunciated by the ICTY and the expressed high threshold for disqualification could be in line with the higher threshold of the ICSID Convention and the clear and obvious evidence required to rebut the presumption of impartiality.

Nonetheless, the second *Suez* decision from 2008 further suggests that the standard of "reasonable doubt" is different and incompatible with the requirement of "manifest lack" in Article 57.[197] This case considered a challenge to arbitrators under Article 10.1 of the UNCITRAL Rules, which expressly adopts a standard of "reasonable doubt," and an additional challenge under Article 57 of the ICSID Convention.[198] Regarding the UNCITRAL Rules, the Tribunal determined that the relevant question is whether

> a reasonable, informed person viewing the facts [would] be led to conclude that there was a justifiable doubt as to the challenged arbitrator's independence or impartiality.[199]

This approach thus reflects the approach of the ICC and the ICTY, although again, it is unclear whether the presumption of impartiality as enunciated by them would push the threshold as high as that under the ICSID Convention.

With regard to the standard under the ICSID Convention, the Tribunal held that in order to disqualify an arbitrator under Article 57,

> the Respondent . . . must prove such facts that would lead an informed reasonable person to conclude that [the challenged arbitrator] clearly or obviously lacks the quality of being able to exercise independent judgment and impartiality.[200]

One tribunal also noted the difference between the standard under the ICSID Convention and that encompassed in the International Bar Association

196 Crawford, *supra* note 193, at 3.

197 *Id.*

198 *Id.*; *see Suez et al. v. Argentine Republic*, ICSID Case No. ARB/03/17, ICSID Case No ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (May 12, 2008).

199 *Id.*, ¶ 22.

200 *Id.*, ¶ 29.

Guidelines on Conflict of Interest in International Arbitration ("IBA Guidelines"). It held that

> the conflict of interest text incorporated in [IBA Guideline] 2(b) is significantly different from that in Article 57 of the Convention and is easier to satisfy. The [IBA] standard requires resignation or disqualification "if facts or circumstances have arisen since the appointment that from a reasonable third person's point of view, having knowledge of the relevant facts, give rise to *justifiable doubts* as to the arbitrators impartiality or independence."[201]

The jurisprudence of various tribunals suggests two trends.[202] First is that the requirement of a 'manifest' lack of independence permits disqualification only when certain or almost certain lack of independence is proved.[203] However, this seems to encapsulate exactly what the ICTY described as necessary to rebut the presumption of impartiality. Second is the express confirmation that the "reasonable doubt" standard contained in the UNCITRAL Rules, IBA Guidelines, and the approach of the ICTY, the ICTR, the SCSL and the ICC, is not applicable in ICSID disqualification cases.[204] Again, although the standard in international criminal courts and tribunals is that of the reasonable observer/apprehension of bias as seen above, it is unclear whether the enunciated presumption of impartiality creates a higher threshold in line with the ICSID Convention.

Nonetheless, the ICSID Convention sets a higher threshold than other regimes because the reasonable doubt or observer test would not disqualify an arbitrator under Article 57. However, it may not be a higher threshold than that enunciated by the ICTY, the ICTR, the SCSL and the ICC, given the presumption of impartiality as discussed above. It is easier to disqualify a judge under the approach of international criminal courts and tribunals where a reasonable observer would apprehend bias, rather than it being actually proved to exist. However, despite the reasonable apprehension/observer test developed by these courts and tribunals, the presumption of impartiality and the expressly enunciated high threshold to rebut it, leave unanswered ques-

201 Crawford, *supra* note 193, at 7 (quoting *ConocoPhillips Co. et al v. Venezuela*, ICSID Case No ARB/07/30, Decision on the Proposal to Disqualify L Yves Fortier QC, Arbitrator, ¶ 59 (Feb. 27, 2012) (emphasis added by Tribunal)).

202 *Id.*

203 *Id.*

204 *Id.*

tions as to whether the threshold is as high as that in the ICSID regime. Given the higher stakes involved in international criminal courts surrounding the gravity of international crimes (and potential role of politics) and the potential deprivation of the liberty of the accused, there should be a lower threshold to demonstrate a lack of independence and impartiality in the context of international criminal courts. The presumption of impartiality as enunciated by these international criminal courts and tribunals could thus interfere with the due process rights of the accused.

7.2 *The Approach of the World Trade Organization*

The approach of the World Trade Organization ("WTO") seems to represent a middle ground between the high threshold of ICSID's "manifest lack" and the lower "reasonable observer" approach of international criminal courts and tribunals (setting aside the issue of the presumption of impartiality).[205] In fact, the approach mirrors the IBA Guidelines to a large degree by setting the standard of 'justifiable doubt' as discussed above.

Article 17(3) of the Dispute Settlement Understanding of the WTO deals with the composition of the Appellate Body ("AB"). Unlike other statutory documents, it does not expressly refer to the requirements of independence and impartiality, but instead provides that AB members "shall be unaffiliated with any government" and "shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest."[206] The formulation in the Dispute Settlement Understanding of the WTO is less detailed and specific with regards to the requirements of independence and impartiality.

The Working Procedure for Appellate Review[207] requires each person covered by the rules to be independent and impartial, to avoid any direct

205 For a full account and overview of the approach of the WTO, see Chapter 6 by Gregory J. Spak and Ron Kendler in this volume.

206 World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 17(3), https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (last visited Apr. 00, 2015).

207 The Working Procedures for Appellate Review therefore provide for the substance of the requirements of independence and impartiality and the procedure for disqualification in case of failure to adhere to those requirements. In particular, Annex II thereof establishes rules of conduct for the understanding on rules and procedures governing the settlement of disputes, "[a]ffirming that the operation of the DSU would be strengthened by rules of conduct designed to maintain the integrity, impartiality and confidentiality of proceedings." *See* the Working Procedures for Appellate Review, Annex II, Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, pmbl. (Jan. 4, 2005), https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm [Working

or indirect conflict of interests, and to respect the confidentiality of the proceedings.[208] To ensure the observance of these principles, the rules of conduct require covered persons to disclose

> the existence or development of any interest, relationship or matter that that person could reasonably be expected to know and that is likely to affect, or give rise to *justifiable doubts* as to, that person's independence or impartiality[209]

and to take due care to avoid any direct or indirect conflict of interests in respect of the subject matter of the proceeding.[210]

The approach of the WTO thus seems to reflect the lower threshold of the IBA Guidelines noted above, in line with the approach of international criminal courts and tribunals. Again, the presumption of impartiality enunciated by these criminal courts and tribunals makes it unclear where they fall on this spectrum. On the one hand, the criminal courts and tribunals expressly adopt the "reasonable observer" test as set out by the *Furundzija*, case, which seems in line with the lower standard above. On the other hand, the presumption of impartiality, and the express high threshold to rebut the presumption, may bring these tribunals more in line with the higher threshold of the ICSID Convention. Moreover, a "justifiable doubt" could perhaps set a slightly higher threshold than "reasonable doubt," but any imbalance in that regard seems countered by the presumption of impartiality that prevails in the regimes that adopt the "reasonable doubt" standard.

7.3 *The Approach of the International Court of Justice*

The Statute and Rules of Court of the International Court of Justice ("ICJ") also contain the essence of the requirements of independence and impartial-

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Procedures for Appellate Review]. Perhaps the lack of express mention of independence is a reflection of the fact that the World Trade Organization ("WTO") is a "member driven" organization in which states are reluctant to grant such extensive independent powers to an Appellate Body. Moreover, the involvement of the Dispute Settlement Body in the administration of the rules and procedure, the authority to establish panels, and the adoption of reports could seriously call the independence of the process into question if it were expressly included as a requirement. For the role of the Dispute Settlement Body, see Article 2(1) of the Dispute Settlement Understanding of the WTO.

208 Working Procedures for Appellate Review, *supra* note 208, ¶ II, Governing Principle, Observance of the Governing Principle, ¶ III(1)(2).

209 *Id.*, Observance of the Governing Principle, ¶ III(1)(2) (emphasis added).

210 *Id.*, ¶ III, Observance of the Governing Principle, ¶ 1.

ity, and provide for the right to challenges in the event that the requirements are not respected.[211] The provisions governing the ICJ, however, are far less detailed than those governing international criminal courts and tribunals, and there does not seem to be a clear line of jurisprudence as to the requirements like that set out in the latter regimes.

The Statute of the ICJ provides that the Court "shall be composed of a body of independent judges, elected regardless of their nationality" who possess the qualifications required for appointment to the highest judicial offices, or have recognized competence in international law. Article 20 of the Statue of the ICJ provides that all judges must make a solemn declaration in open court that he/she will exercise his/her powers "impartially and conscientiously."[212] The substance of the declaration is contained in Article 4 of the Rules of Court. This mirrors the undertaking in the ICC since it is both provided for in the Statute and elaborated upon in the rules, whereas it is only mentioned in the rules of court for the ICTY and ICTR. However, the declaration perhaps has more force in the context of the ICC where it is backed up by the binding Code of Judicial Ethics.

Whether the express formulations of the statutory documents of each regime are the same or not, the requirement of an independent and impartial tribunal established by law is a fundamental requirement of the rule of law that each court or tribunal must endeavor to ensure. Moreover, it represents one of the most basic human rights in a society governed by the rule of law. The ability to challenge judges for a lack of such independence and impartiality is a natural consequence of that right. Although the express formulations may vary, the essence of the requirements of independence and impartiality is present in each regime reviewed above. However, it is most developed in the statutory requirements of the ICC where the human rights of the accused are the most relevant, particularly since a decision potentially deprives the accused of freedom.

The less detail provided in the approach of the ICJ is perhaps explained by the fact that the ICJ does not have jurisdiction over individuals, but states. The due process rights of responding states are perhaps not as delicate as the due process rights of an individual charged with an international crime. The more detailed provisions of the WTO on the other hand may be explained by the delicate economic interests at play in each dispute within the auspices of the WTO. In any case, it seems that the approach of the ICTR, the ICTY, and the ICC

211 For an overview of the regime at the International Court of Justice, see Chapter 1 by Chiara Giorgetti in this volume.

212 ICJ Statute, *supra* note 54, Art. 20.

rightly sets a lower threshold for the disqualification of judges for a lack of independence and impartiality to ensure the protection of the accused. However, it is unclear whether the presumption of impartiality as enunciated by these international criminal courts and tribunals signifies a higher threshold in the context of these regimes.

8 Conclusion

The independence and impartiality of a court and its judges are fundamental requirements to the rule of law and are a basic human right. The above has demonstrated that international criminal courts face particular difficulties in ensuring this right, given the inherently political nature of international criminal law and the presumption of guilt attached to those accused of heinous international crimes. Perhaps in response to these challenges, the rules and procedures to ensure such independence and impartiality seem to be more elaborate in the ICC in particular, and in the jurisprudence of the ICTY as followed and enhanced by the ICTR, the SCSL, and the ICC.

In response to these specific challenges, the ICC has developed its Code of Judicial Conduct that gives teeth to the requirements of independence and impartiality. One can assume that given these detailed rules and procedures, there may be more possibilities to rebut the presumption of impartiality before the ICC than before other international criminal courts.