International Judges: Is There a Global Ethic?

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Since the last decade of the twentieth century the number of international and transnational judges has burgeoned. There are now in excess of 100 international courts and tribunals, with thousands of international judges who sit on them.[1] They come from all corners of the globe and bring with them the experience of many systems of justice.

The first truly international criminal court was the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY).[2] I arrived in The Hague on August 15, 1994, as the Tribunal's first Chief Prosecutor. There were then serious questions raised as to whether judges and prosecutors from different systems, including the common and civil law jurisdictions, could work together and fashion a system of criminal justice that would be considered fair by international standards. Those doubts have been allayed, and there is now widespread agreement that international criminal courts have complied with international standards of fairness.

The fairness of any court system, whether domestic or international, will depend upon the quality of the judges who are appointed and, in particular, the judges' actual or perceived integrity. Their professional and personal conduct should be beyond reproach. For the most part, the ethical standards by which we assess this conduct are common to international and domestic judges.

Ethical Standards for Domestic Judges

Over the years there have been attempts at fashioning international standards for domestic judges. One early code of conduct, adopted over thirty years ago, was

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that of the International Bar Association (IBA).[3] The IBA paid particular attention to incompatible conduct—for example, instances where judges, in addition to fulfilling their judicial functions, also held positions in the executive branch of government or in political parties. So, too, the IBA agreed that judges should not practice law and should refrain from business activities during their tenure.[4]

In 1985 the United Nations issued its Basic Principles on the Independence of the Judiciary.[5] However, the document contains no explicit ethical norms. Then, in Taipei in 1999, the International Association of Judges agreed on the Universal Charter of the Judge.[6] There was again an exhortation for judges to refrain from other functions, public or private, that are not compatible with their duties and status.[7]

The most important international attempt at codifying the ethical standards of domestic judges is found in the Bangalore Principles of Judicial Conduct. The principles were elaborated in 2001 by a group of eminent judges who called on members of their profession to act with integrity.[8] For example, one of the principles states that "a judge shall ensure that his or her conduct is above reproach in the view of the reasonable observer."[9] However, the Bangalore Principles were drafted in the widest terms and without any attempt to list any specific guidelines, and thus did not set international standards for the ethical behavior of domestic judges.

The international legal community has largely left the task of determining what constitutes conduct unbecoming of a judge to national authorities and judges themselves. Some international courts have themselves adopted codes of conduct. For instance, in Article 3 of its Code of Judicial Ethics, the International Criminal Court provides that:

> 1. Judges shall uphold the independence of their office and the authority of the Court and shall conduct themselves accordingly in carrying out their judicial functions.
> 2. Judges shall not engage in any activity that is likely to interfere with their judicial functions or to affect confidence in their independence.[10]

Article 4 provides that judges shall be impartial and shall ensure the appearance of impartiality in the discharge of their judicial functions.[11] Judges are furthermore required to avoid any conflicts of interest. All such guidance aside, situations have arisen in international courts that have engaged judges with questions of professional ethics and conflicts of interest.

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Preparing Witnesses

I begin with an illustration that relates to an issue of professional conduct of counsel and the intervention of the judges with respect to it. When we began our work in the Office of the Prosecutor at the ICTY we assumed that the differences in procedures and possibly professional ethics between the common law and civil law systems would become apparent. However, the first manifestation of a difference of professional ethics arose among three counsel, each coming from a common law background. The issue was the preparation of witnesses (or "proofing," as it is called in some jurisdictions).

In the first trial before the ICTY, the *Tadić* trial, three of the prosecutors found themselves at odds with each other. One practiced at the London Bar and he explained that, according to his professional rules, it was considered unprofessional conduct to meet with witnesses prior to their appearance on the witness stand—and, further, that he could be disbarred for doing so. The second prosecutor came from the Edinburgh Bar. He relayed that, according to Scottish rules, not only was such conduct regarded as unprofessional, it was also considered criminal. The third counsel came from the New York Bar and he explained that under the rules governing legal practice in the United States, failure to prepare a witness would be regarded as unprofessional, and is conduct for which he could be disbarred. (I might mention that in my own country, South Africa, we would follow the approach of the United States.)

I considered that as we were not practicing within the jurisdictions of any of the three bars, but rather in an international court, we were free to fashion our own rules of professional conduct. It appeared to me and my senior colleagues at the ICTY that in a multicultural and multilingual environment it would be folly not to prepare witnesses. After all, it was important to explain the procedures to witnesses, most of whom would be entirely unfamiliar with them; and it would facilitate the leading of accurate evidence if they and the counsel discussed the evidence before the witness entered the witness stand. This was especially sensible given the need for the evidence of the majority of the witnesses to be interpreted into one of the two official languages of the tribunal, English or French. This practice of preparing witnesses was also adopted and followed by the defense counsel. The judges soon became aware of the practice and initially implicitly acquiesced to it—and later explicitly approved it.[12] The same procedure was followed in the United Nations International Criminal Tribunal for Rwanda

(ICTR) and the so-called hybrid or mixed tribunals for Sierra Leone, Cambodia, and Lebanon.

Initially, the judges of the International Criminal Court (ICC) took a different view. In three cases preparing witnesses was prohibited. The first was that of *Thomas Lubanga Dyilo*.[13] Both the Pre-Trial and Trial Chambers rejected the prosecution request for witness preparation. Nonetheless, the judges decided to allow the Victims and Witness Unit, an office of the Registry (one of the four organs of the ICC, responsible for the nonjudicial aspects of the administration and the servicing of the court), to carry out the process of "witness familiarization." Under this procedure, the witness was allowed to read through his or her statement and to make "courtesy calls" on the legal representatives appearing for the parties as well as to be informed by the Registry of the courtroom layout. That procedure was followed in both the *Ngudjolo*[14] and *Bemba*[15] cases. However, in 2012, in both the trials arising from the Kenya situation, the prosecution applied for more extensive rights to prepare witnesses. This was opposed by the defense, but the prosecution motion was successful. The Trial Chamber disagreed with the earlier decisions and allowed witness preparation in both cases. The Chamber held that the risk of witness coaching could be prevented or mitigated by appropriate safeguards as well as cross-examination. These decisions are all of first-instance Trial Chambers, and the issue is still to be considered by the Appeals Chamber of the ICC.

Part-time Judges

I turn to consider an issue peculiar to some international judges, those appointed to serve part-time. The institution of part-time judges arose first with the appointment of ad-litem (ad hoc) judges in the ICTY. This became necessary when the workload of the ICTY surpassed the capacity of the eighteen full-time judges. What are the activities and occupations appropriate for such judges?

The General Assembly agreed to a list of judges who were nominated as ad-litem judges by UN member states, and who could be called upon by the president of the ICTY to sit with one or two permanent judges of the tribunal. These ad-litem judges would remain occupied in their home countries until called for duty to The Hague. This led to such questions as to what occupations they should avoid. For example, would it be appropriate for such a judge to work for an international organization that is engaged with issues relevant to a case on which that

judge is called to sit? In approaching this issue, it is important to consider not only actual impartiality but even the perceptions of impartiality.

This issue is likely to arise with the many judges who have been appointed to serve part-time on the Mechanism for International Criminal Tribunals—the mechanism established by the Security Council to supervise the work of the ICTY and ICTR in their closing years. Former judges of the two tribunals have been appointed to serve part-time on this body, and they could be called to service at The Hague should judicial proceedings become necessary in the coming years. The president of the mechanism will have to ensure that conflicts of interest and perceptions of bias are not likely to arise.

Conduct Prior to Judicial Appointment

Of course, the issue of inappropriate conduct can also present itself with regard to activities that precede the appointment of a permanent judge. As co-chair of the Human Rights Institute of the IBA, I was involved in a case where we alleged that the appointment to the ICTY of Elizabeth Gwaunza, a Zimbabwean judge, as an ad-litem judge in the case of Croatian General Gotovina was inappropriate.[16] It had come to our attention that Gwaunza, while sitting on the High Court of Zimbabwe, had accepted a farm as a gift from the government of President Mugabe. According to the terms of the gift, which the judge had accepted, the farm could be revoked at any time without compensation. It seemed to us that such a gift was calculated to impugn the independence of the judge, and her acceptance of it rendered her unsuitable to hold judicial office. The president of the ICTY disagreed and took the view that the matter was not one for the IBA to address.

Prior conduct as a ground for disqualification also arose in the Special Court for Sierra Leone. The court's first president was Geoffrey Robertson, an eminent member of the London Bar. Some time prior to his appointment he had written a book entitled *Crimes against Humanity: The Struggle for Global Justice*.[17] In it he made comments about the egregious crimes committed by the Revolutionary United Front, a group whose leaders were among those brought before the court. Judge Robertson refused to recuse himself. However, his four colleagues, correctly I would suggest, came to a different conclusion. They held that there was a well-founded apprehension of bias and that he was not to sit in cases in which members of the Revolutionary United Front were indicted.

Public Lobbying by Judges for Support for Their Courts

Some judges sitting on international criminal courts, and especially those holding the position of president of these institutions, have publicly called upon their governments to support their work. Thus, Judge Antonio Cassese, the first president of the ICTY, called for governments and the United Nations to carry out the arrest warrants issued by his tribunal. He also called upon UN member states to legislate provisions to enable them to respond effectively to requests issued by the tribunal with regard to such issues as the furnishing of information and facilitating investigations to be conducted within their jurisdiction. The first president of the ICC, Judge Philippe Kirsch, made similar calls for states to ratify the Rome Statute. I would suggest that these activities were entirely appropriate and in no way demonstrated even a perception of bias in respect of any actual or potential defendant who might appear before the ICTY or ICC.

Conflict of Interest

There have been some fanciful applications before the ICTY for judges to be disqualified. In one case before the tribunal the defendant, Vojislav Šešelj, applied for the three judges appointed to try him to disqualify themselves on grounds of nationality or religion. It was alleged by Šešelj that there was an apprehension of bias on the part of Judge Wolfgang Schomburg, a German, on the ground that Germany was "traditionally" opposed to Serbia and its people. Judges Florence Mumba and Carmel Agius were Catholics and, so he alleged, Catholics had "contributed" to the downfall of Serbia. Unsurprisingly, this motion was dismissed as frivolous. It was held that the religion or nationality of a judge was irrelevant to the perception of bias.[18]

A different and equally unmeritorious objection was also raised against Judge Mumba in the same case.[19] The complaint was that, as the former Zambian delegate to the United Nations Commission on the Status of Women, she would share the views of that commission and those of her government, and that she should therefore not sit in cases in which the violation of rights of women were raised. This objection was dismissed. In particular, the judges pointed out that one of the qualifications for appointment of judges to the ICTY was expertise in international human rights, and experience in that field could hardly constitute a disqualification.

More recently, a more cogent objection arose in the ICTY in the trial of Radovan Karadžić, the former "president" of Republic Srpska, the Bosnian enclave of Bosnia and Herzegovina. Karadžić sought to have Judge Alphons Orie disqualified from sitting as one of his judges, complaining that Orie had appeared as defense counsel for Dusan Tadić, the defendant in the first trial held by the ICTY, and that, as such, he would have heard and appraised evidence in that case that was relevant to allegations made against Karadžić. Orie had also sat as a trial judge in prosecutions of senior members of the Bosnian Serb army, and those defendants were found guilty and sentenced to terms of imprisonment. Karadžić claimed that he would be presenting evidence to contradict the findings made by Orie and others against those defendants. Soon after Karadžić made the complaints, a new panel of judges was appointed by the president of the tribunal, excluding Judge Orie.

Judges Sitting as Arbitrators

One potentially worrying activity of full-time international judges relates to their sitting as paid international arbitrators. Many of the judges of the International Court of Justice (ICJ) have accepted such positions. It has been a contentious issue. As full-time and fully paid members of the ICJ, judges should devote their time and work solely to that court. In most domestic jurisdictions, judges are usually strictly limited in the amount and nature of outside remunerated work they may accept. However, as I have been informed by former members of the ICJ, such outside work has been found acceptable over many years.[20] Nevertheless, the judges of the ICTY took a contrary view. In its early years, one of the judges on the ICTY accepted paid work as an arbitrator. The other judges objected to this on the ground that once appointed to the ICTY, judges should devote their full time and attention to its work. That judge preferred his work as an arbitrator and resigned from the tribunal.

Method of Appointing Judges

The most important safeguard of the probity of international judges is their method of appointment. This essay is not the appropriate place to canvass the many ways in which judges are appointed, but I will consider two situations that have potentially impugned the appropriateness of judges appointed to international courts.

Some courts, and importantly the ICTY, ICTR, the European Court of Justice, and, until 2010, the European Court of Human Rights (ECHR), have allowed judges to serve for two limited terms of office. In the case of the ECHR, each state party is entitled to have a judge on the court, appointed by their respective government. In these situations, there is the danger that a judge seeking a second term might be perceived as having rendered decisions in favor of his or her government in order to enhance his or her prospects of reappointment. In recent years there has been a movement away from allowing consecutive terms of office.

In the case of the ICC there was a different problem with regard to elections. Each of the court's eighteen judges is elected to serve a single nonrenewable term of nine years. The Rome Statute provides that nominees are required to be persons of high moral character, demonstrate impartiality and integrity, and be eligible for appointment to the highest judicial office in their own country.[21] The Assembly of States Parties (ASP), on which each member of the Rome Treaty has one vote, elects the judges—each of whom requires a two-thirds majority vote. The Rome Treaty further provides that nominees for election must possess competence in criminal law and procedure or in relevant areas of international law. The problem that arose, however, was that the Rome Treaty made no provision for the ASP to scrutinize the qualifications of the nominees. Consequently, in a few cases judges were elected without having the requisite qualifications.

There was an unusual intervention by a civil society organization, the Coalition for the International Criminal Court (CICC), to ameliorate this situation. The CICC represents over 2,500 organizations in some 150 countries. With the approval of the leaders of the Assembly of States Parties, in 2011 the CICC established an independent panel to scrutinize nominees for the election that was scheduled to take place that year. Joined by four other jurists, I chaired the panel. We found that three of the nominees were not qualified for appointment. This decision was made public, and none of the three was elected by the ASP. We further recommended that the ASP should establish its own scrutiny committee—a recommendation that was accepted by the ASP—and there is now a permanent Advisory Committee on nominations of judges. That Committee has since held that some of the judges nominated were not eligible for appointment, and they were not elected by the ASP.

Combating perceptions about—or the actual fact of—conflicts of interest and bias by international judges is a work in progress. Creating viable long-term

ethical standards lies at the heart of the fairness of international judicial proceedings. Its importance for the standing and respect for these courts cannot be overemphasized. One potential avenue to solving these issues might be through organizing an international convention regulating ethical standards for international judges. Much has been done to specify these standards for the international legal system over the last thirty years, but in an ad hoc manner. It is now time to take a more systematic approach to the issue of professional ethics for international judges. This task is too important to leave to the whims of the now many international courts. Rather, we need to engage the attention of the United Nations, judges' and lawyers' associations (both international and domestic), as well as the academic community in developing a global ethic for international judges.

NOTES

[1] Project of International Courts and Tribunals (PICT), Synoptic Chart, www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf.
[2] "The Tribunal irreversibly changed the landscape of international humanitarian law." From the website of the International Criminal Tribunal for the Former Yugoslavia (ICTY), "About the ICTY," www.icty.org/sections/AbouttheICTY.
[3] International Bar Association (IBA), Minimum Standards of Judicial Independence (adopted 1982).
[4] Ibid., Sec. F, "Standards of Conduct."
[5] Basic Principles on the Independence of the Judiciary (Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, endorsed by General Assembly resolution 40/32 of November 29, 1985 and welcomed by General Assembly resolution 40/146 of December 13, 1985), www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx.
[6] The Universal Charter of the Judge (approved by the International Association of Judges on November 17, 1999), www.domstol.dk/om/otherlanguages/english/publications/Publications/The%20universal%20charter%20of%20the%20jugde.pdf.
[7] Ibid.
[8] The Bangalore Draft Code of Judicial Conduct 2001 (adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25–26, 2002), www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.
[9] Ibid., Value 2, "Impartiality."
[10] Code of Judicial Ethics, No. ICC-BD/02-01-05, July 22, 2004, www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105_En.pdf.
[11] Ibid.
[12] Prosecutor v. Limaj, Bala, and Musliu, "Decision on Defense Motion on Prosecution Practice of 'Proofing' Witnesses," IT-03-66-T, December 10, 2004, www.icty.org/x/cases/limaj/tdec/en/041210.pdf.
[13] Prosecutor v. Thomas Lubanga Dyilo, "Decision on the Practices of Witness Familarization and Witness Proofing," ICC-01/04-01/06-679, November 8, 2006, www.icc-cpi.int/iccdocs/doc/doc243711.PDF.
[14] Prosecutor v. Mathieu Ngudjolo Chui (Situation in the Democratic Republic of the Congo), ICC-01/04-02/12, February 27, 2015, www.icc-cpi.int/iccdocs/doc/doc1918951.pdf.
[15] Prosecutor v. Jean-Pierre Bemba Gombo (Trial), ICC-01/05-01/08, www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/icc%200105%200108/Pages/case%20the%20prosecutor%20v%20jean-pierre%20bemba%20gombo.aspx.
[16] International Bar Association, "IBAHRI Expresses Concern at the Presence of Judge Gwaunza on the Bench of the ICTY," November 3, 2008, www.ibanet.org/Article/Detail.aspx?ArticleUid=811b4e19-8a01-4455-aeob-1db9dcb24d47.

[17] Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*, 3rd ed. (New York: W. W. Norton, 2007).
[18] Prosecutor v. Šešelj, "Decision on Motion for Disqualification," IT-03-67-PT, June 10, 2003: Judge Agius voluntarily self-recused, though he saw no merit to the motion for his disqualification.
[19] Ibid.
[20] See Ruth Mackenzie and Philippe Sands, "International Courts and Tribunals and the Independence of the International Judge," Harvard International Law Journal 44, no. 1 (2003), pp. 271–86, http://www.pict-pcti.org/publications/PICT_articles/mackenzie2.pdf: "ICJ judges are full-time, but the ICJ has taken a flexible attitude with regard to certain outside activities. For example, some of the judges have accepted appointments to act as arbitrators. The practice may still not raise concerns where the arbitral dispute is between two states that are not involved in proceedings before the ICJ."
[21] Rome Statute of the International Criminal Court, Article 36(3)(a), UN document A/CONF. 183/9, 37 ILM 1002 (1998)/2187 UNTS 90.