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**THE RIGHT OF AN ACCUSED TO A FAIR TRIAL: THE INDEPENDENCE
AND THE IMPARTIALITY OF THE INTERNATIONAL CRIMINAL COURTS**

BY

BAHMA SIVASUBRAMANIAM

A DOCTORAL THESIS SUBMITTED TO

UNIVERSITY OF DURHAM

IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE DEGREE

DOCTOR OF PHILOSOPHY

(LAW)

AUGUST 2008

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ABSTRACT

It is a sacrosanct principle of the due process of law that the right of the accused to a fair trial should be observed. A condition precedent to that requirement is that he should be tried by an independent and impartial tribunal. Whilst the concepts of judicial independence and impartiality have been explored extensively in national jurisdictions, they have not been examined vis-à-vis the international arena. The increase in the number of international criminal tribunals corresponded with an increase in the size of the international judiciary. It is therefore vital that there remains in place, a body of uniformly applicable standards of international judicial independence and impartiality which would provide guidelines to international practice.

The research undertaken raises interesting questions, such as the sources of these principles, the mechanism of their application in the national and international arenas, in particular to international criminal courts. It explores the relationships between the national and international standards and concludes that standards of independence and impartiality are applicable as of right to international criminal proceedings and validation through international human rights instruments, statutes and jurisprudence of the international criminal tribunals is not necessary.

A comparative study has been made with national and international standards of fair trial, independence and impartiality. It is the premise of this thesis that the latter two concepts are necessary for the guarantee of the fair trial right. Jurisprudence of regional, national and international courts was explored to support this aim with particular attention focussed on the international criminal tribunal and the permanent international court. Finally, a conclusion is formed on the independence and impartiality of the international judiciary and the efficacy of the international criminal judicial system in ensuring that the right of the accused to receive a fair trial.

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AJIL 638

Sramek v Austria (1984) 7 EHRR 236

X v United Kingdom (Application No. 6998/75)

TABLE OF ABBREVIATIONS AND ACRONYMS

ACHR	American Convention on Human Rights
Am C-HRs	American Court of Human Rights
AfCHPR	African Charter on Human and Peoples' Rights
Af. Hum. Rts. L. J	African Human Rights Law Journal
AJIL	American Journal of International Law
ALJ	Australian Law Journal
All ER	All England Reports
AMR	All Malaysian Reports
Am Crim L Rev	American Criminal Law Review
BYIL	British Yearbook of International Law
Berkeley J. Int'l L	Berkeley Journal of International Law
Cr.App.Rep.	Criminal Appeals Reports
Crim L F	Criminal Law Forum
Crim L. R	Criminal Law Report
Columbia J. Transnat'l L	Columbia Journal of Transnational Law
Cornell Int'l L.J	Cornell International Law Journal
DR	European Commission of Human Rights Decisions and Reports
Dick. L. J	Dickinson Law Journal
Duke JCIL	Duke Journal of International and Comparative Law
DePaul L. Rev	DePaul Law Review
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECHR (Rep)	European Court of Human Rights Series A: Judgments & Decisions
EJIL	European Journal of International Law
EHRR	European Human Rights Reports

EWCA Crim Decisions	England and Wales Court of Appeal Criminal
UN GA	United Nations General Assembly
HRC	Human Rights Committee
HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly
Harv.ILJ	Harvard International Law Journal
Harv. HRJ	Harvard Human Rights Journal
Hum. Rts. Brief	Human Rights Brief
ICC	International Criminal Court
ICCPR Rights	International Covenant on Civil and Political
ICJ	International Court of Justice
ICJ Rep	ICJ Reports
ICLQ	International and Comparative Law Quarterly
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IIHRL	Interights International Human Rights Law
Int'l L	International Lawyer
Int'l Legal Proc.	International Legal Procedure
ILC	International Law Commission
ILSA JICL	International Law Students Association Journal of International and Comparative Law
ILM	International Legal Materials
IMT	International Military Tribunal
Int'l L.F.D. Int'l	International Law FORUM Du Droit International
JICJ	Journal of International Criminal Justice
Hous. J. Int'l L	Houston Journal of International Law
LJIL	Leiden Journal of International Law
LPIT	Law and Practice of the International Tribunals

MLR	Modern Law Review
Max Planck YB	Max Planck Year Book
Mil LRev	Military Law Review
Mich L. Rev	Michigan Law Review
N.Y.U.J.Int'l L & Pol	New York University Journal International Law and Politics
New Eng L. Rev	New England Law Review
Nordic J.I.L	Nordic Journal of International Law
Stetson L. Rev.	Stetson Law Review
SCR	Supreme Court Reports
SLR	Singapore Law Reports
Yale JIL	Yale Journal International Law
UDHR	Universal Declaration of Human Rights
U. Pa. J. Const. L	University of Pennsylvania Journal of Constitutional Law
UN	United Nations
Va. J. Int'l L.	Virginia Journal of International Law
WLR	Weekly Law Reports

DECLARATION

I declare that this thesis is my own work and has not been submitted in any form for another degree or diploma at any university or other institute of tertiary education. Information derived from the published or unpublished work of others has been acknowledged in the text and a list of references is given.

The Copyright of this thesis rests in the author. No quotation from it should be published in any form, including electronic and the internet, without the author's prior written consent. All information derived from this thesis must be acknowledged separately.

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Undertaking this Ph.D was one of the hardest things I ever did in my life. There were times when I questioned my own sanity and there were times when I felt like walking away. I give dubious thanks to God for those inexplicabilities that cloud my life – the insatiable need for knowledge and the relentless single-mindedness to complete any task, whether large or small. Most importantly, it was the love and support from my family and friends that provided that impetus to complete my journey.

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My parents have always been encouraging in my pursuit for knowledge. I am blessed with having a father who taught me from a young age the difference between right and wrong and a mother who shared with me her love for literature. Whilst I do not profess to be the legal architect envisaged by Bacon, I am what I am today because of my parents.

To my supervisor, Professor Colin Warbrick, I am in debt for the wealth of knowledge you imparted to me. Also Professors Kayan Kaikobad and Michael Bohlander, everyone in the Law Department, my colleagues, my friends for always willing and ready to assist me. To the British Council, for sponsoring my studies. To the wonderful, warm and always welcoming Rotary Club of Spennymoor – the late Alan Sowerby, Alan Phillips, Ian Lavery and all the other Rotarians – I will never forget your hospitality and kindness to me.

When I was a fledgling at the Bar, a senior barrister made an everlasting impression on me with his humility and nobility of character. I was privileged to have known and considered as a friend of the Honourable Raja Aziz Addruse. He was a gentleman in every aspect and attracted respect from lawyers and judges alike. The only person who was the President of the

Malaysian Bar for an unprecedented three terms, coming to the aid of an embattled Bar by leading us against the oppression of the judiciary by an arbitrary Establishment holding scant respect for the rule of law. You were and will always be my hero, Ungku. When God made you, He broke the mould. Rest in peace.

Lastly, my dearest friends Lalini, Jaya and the late and greatly missed Thila. You were there when I found it so hard to carry on. Your humour and your shoulders were my props.

Thila, I miss you so bad. I am grateful to God Almighty that you were able to see me complete my insane journey before you were called away for good. I think of these lines every time I think of you. Which is daily.

*They told me, Heraclitus, they told me you were dead,
They brought me bitter news to hear and bitter tears to shed.
I wept as I remember'd how often you and I
Had tired the sun with talking and sent him down the sky.*

In the immortal words of Tiny Tim

God bless us, everyone.

Bahma Sivasubramaniam
Kuala Lumpur 2008.

DEDICATION



*Vakra-Tunndda Maha-Kaaya Surya-Kotti Samaprabha
Niroighnam Kuru Me Deva Sarva-Kaaryessu Sarvadaa*

O Lord Ganesha, of Curved Trunk, Large Body, and with the Brilliance of a
Million Suns,
Please Make All my Works Free of Obstacles, Always.

*For Thila and Ungku
For brightening up my life
Miss you both so much
I'll see you in Heaven one day*

PROLOGUE

THE DEVELOPMENT OF THE INTERNATIONAL CRIMINAL SYSTEM

The establishment and proliferation of international criminal courts and tribunals in the last decade and a half have brought about an unprecedented pace in the growth in the international criminal law and justice systems. There was not much activity¹ seen since the end of the Second World War² until 1995, with the establishment of the International Criminal Tribunal for the former Yugoslavia (the “ICTY”). Since then, a discernible and substantive body of international criminal system has emerged, fortified with legal norms, legal principles and procedural rules.³ Many criminal law principles, hitherto tested and applied in domestic courts were applied in international criminal courts and have made international criminal law vibrant and challenging.⁴ If anything could be said with a degree of certainty is that international criminal

¹ The Treaty of Versailles of 1919 and the subsequent Leipzig Trials, the main events of the post-First World War period on the prosecution of war crimes, has largely been ignored by legal experts. cursory reference has been made to events after the First World War, if only to show a historical framework of the international criminal courts rather than an analytical discussion of the impact if any, of the Trials on the international criminal law and justice. For a narrative on the Trials, see M. Cherif Bassiouni, *From Versailles to Rwanda in 75 Years: The Need to Establish an International Criminal Court* (1997) 19 Harv. Hum.Rts J 11

² A proposal to set up an international criminal court arose out of the post-War examination and crystallisation of what is now known as “Nuremberg Principles”, deriving its name from the Judgement of the International Military Tribunal at Nuremberg. The International Law Commission was established by the United Nations to examine this possibility, amongst other duties and responsibilities. Several factors, political entente being the most significant one, posed obstacles to this and work was sporadic at best and indifferent at worst. 1 Virginia Morris & Michael Scharf, *An Insider’s Guide to the International Criminal Tribunal for the former Yugoslavia*, (Irvington-on-Hudson, NY: Transnational Publishers, 1995) 13-15. (“1 Morris & Scharf”)

³ There is even an international version of the prestigious and leading authority of criminal practice in the United Kingdom: *Archbold: International Criminal Courts: Practice, Procedure and Evidence*, Rodney Dixon and Karlm Khan (Eds) (London: Sweet and Maxwell; 2005). Both the ICTY and its counterpart, the International Criminal Tribunal for Rwanda have examined and now decided on many legal issues such as elements of crimes under international criminal law, defences and other matters of substantive law. The International Tribunals have also made inroads into other areas of law as well, such as the doctrine of *stare decisis* and contempt of court. See for example, Patricia M. Wald, *Remarks on The “Horizontal” Growth Of International Courts and Tribunals: Challenges and Opportunities* (2002) 96 ASIL Proc. 369, 377

⁴ There are numerous articles on the proliferation of international criminal courts and tribunals. See for example, Thomas Buergenthal *Proliferation of International Courts and Tribunals: Is it Good or Bad?* (2001), 14 LJIL 267 Jonathan Charney, Notes on *The “Horizontal” Growth Of International Courts and Tribunals: Challenges and Opportunities* (2002) 96 ASIL Proc. 369, Cesare P.R. Romano *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle* (1998-1999) 31 N.Y.U. Journal of Int’l & P 709, Gilbert Guillaume *The Future of International Criminal Judicial Institutions* (1995) 44 ICLQ 848

law has been roused from the comatose state that it was in and is constantly evolving either through statutory provisions or judgements and decisions of the various international criminal courts and tribunals.⁵

1. THE NUREMBERG AND TOKYO TRIBUNALS

Much has been written elsewhere about the Nuremberg and Tokyo Tribunals.⁶ It is not proposed to regurgitate those issues here. However, some mention must be made of these two Tribunals. The first and obvious reason is that they are the precursors of this era's international judicial bodies with criminal jurisdiction. Secondly, challenges and criticisms were made to the Tribunals' independence and impartiality and subsequently, their ability to guarantee the right of the accused to a fair trial. The judgment of the Nuremberg Tribunal to various legal issues has been referred to in the judgements of the International Tribunals. Nuremberg Tribunal and its judgement have therefore not lost its relevance in the 20th century.⁷

The International Military Tribunal at Nuremberg ("the *Nuremberg Tribunal*") and the International Military Tribunal for the Far East ("the *Tokyo Tribunal*") were established to prosecute those who were alleged to have committed

⁵ Buergethal, *op cit* 272. See also Patricia Wald *ICTY Judicial Proceedings: an Appraisal from Within* (2004) 2 JCIJ 466. The author, a Supreme Court judge from the United States and a former serving judge of the ICTY states: "...what is arguably the ICTY's premier accomplishment – the development of a corpus juris of international humanitarian law", 471. It goes without saying that like all established or establishing areas of law, not all developments in international criminal law are universally welcomed, such as the blanket granting of protective measures for witnesses. See the discussion in Chapter 1, 41 *et seq.*

⁶For an excellent review of the Nuremberg Tribunal and its proceedings, see Telford Taylor, *The Anatomy of Nuremberg Trials: A Personal Memoir* (Boston, Back Bay Books: Little, Brown and Company (Canada) Ltd, 1992). See also John Tusa and Ann Tusa, *The Nuremberg Trial*, (London: MacMillan,1984) for critical appraisal of the Nuremberg Tribunal, Richard Minear, *Victor's Justice: The Tokyo War Crimes Tribunal* (Princeton, NJ: Princeton University Press, 1971) for a critical and impassioned analysis of the proceedings at the Tokyo Tribunal, Hans Ehard *The Nuremberg Trial Against Major War Criminals and International Law* (1949) 43 AJIL 223 and Roger S. Clark: *Nuremberg and Tokyo In Contemporary Perspective* in T.L.H McCormack and G Simpson. (Eds) *The Law Of War Crimes: A Synthesis of National and International Approaches* (Boston MA: Kluwer Law International, 1996)

⁷ Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslavia War Crimes Trials* (1996) 14 Dick. J.I.L 57

serious breaches of international humanitarian law namely war crimes, crimes against humanity and crimes against peace during the Second World War.

Challenges were made to the independence and impartiality of the Nuremberg Tribunal. The defence argued that there was a *prima facie* presumption of lack of independence on the part of the Tribunal as it was an exercise of “*victor's justice*”⁸ in that the Tribunal was set up by one side to the war and it prosecuted only the vanquished for violations of international humanitarian law whilst ignoring similar offences committed by the Allies.⁹ Moreover, the judges were nationals of the victorious States.¹⁰ Their appointments by these States raised doubts on their independence and impartiality. Other factors such as the roles and involvement of the judges in pre-trial proceedings such as the selection of the defendants, the drafting of the indictments and the supervision on the collation of evidence were criticised.¹¹ These extrajudicial roles put the required objectivity of the judges in jeopardy as there was a real possibility for an apprehension that their impartiality would have been affected.¹² Corollary to the argument that the judges came from victorious nations were the criticisms that there were no judges from neutral States or national judges of Germany or Japan.¹³ Needless to say, these challenges failed.

⁸ 1 Morris & Scharf, *supra* n.2 9. Other criticisms included the application of *ex post facto* law, the status of the court as the first and last court of resort and procedural criticisms such as limited procedural rules for the defence, the misuse of affidavit evidence and inequality of arms between the prosecution and defence. See generally Michael Scharf *Have We Really Learnt the Lessons of Nuremberg?* (1995) 1 Mil. L. Rev 49, 65-66. Morris & Scharf, *ibid* and Otto Kranzbuhler, *Eighteen Years Afterward* (1964) 14 DePaul L. Rev 33, 334, 336 on inequality of arms. On use of *ex parte* affidavits, see Taylor *supra* n.6, 240-244. See also Jonathan Turley *Transformative Justice and Ethos of Nuremberg* (2000) 33 AJIL 655, 675.

⁹ The Soviets tried to accuse the Germans with the Katyn Forest Massacre for which they were largely responsible. Taylor *ibid* 117, 467- 472.

¹⁰ Virginia Morris & Michael Scharf, *The International Court for Rwanda* (“The ICTR”) (Irvington-on-Hudson: New York, Transnational Publishers 1998)

¹¹ *Ibid*

¹² *Ibid* The Soviet judge General Nikitchenko and the French alternate, Robert Falco were involved in the drafting of the Charter and the indictments. Taylor, *supra*, n.6 627. Judge Jackson observed that some proprieties were abused when Nikitchenko, who was the Soviet Prosecutor, was appointed to the Tribunal. Taylor *ibid* 134 Ironically Justice Jackson himself was rather imprudent in his conduct as a prosecutor with his *ex parte* communications with Judge Biddle. *Ibid*

¹³ See Chaney *supra* n.7, 73. Ehard, *supra*, n.6, 243. For viewpoints of defence counsel of the Nuremberg accused, see Herbert Kraus, *The Nuremberg Trial of the Major War Criminals: Reflections*

Whilst the standards of fair trial at the Nuremberg Tribunal would fall considerably short of the standards demanded and expected in contemporary times,¹⁴ it is generally accepted that the Tribunal conducted itself as a judicial organ under limiting circumstances. The Trial itself was construed as essentially fair within the framework of the basic procedural guarantees provided. Even though there were no specific provisions in the Charter for the criteria for selection and qualifications of the judges to the Tribunal thereby setting out standards which the judges could be assessed by, they were generally considered to be highly-qualified and independent.¹⁵ Despite the Prosecution's aim of securing convictions of all the twenty-two German accused, only nineteen were found guilty. The Tribunal acquitted the remaining three.¹⁶

Lessons have been learnt through the experiences at Nuremberg. Both its strengths and weaknesses arising out of the trial were instructive to the creators of the present-day international criminal courts and tribunals. Despite its shortcomings, the Nuremberg Tribunal, its Charter and its Judgment ("*Nuremberg*") have made significant contributions to the

After Seventeen Years (1963) 13 DePaul L. Rev 233, Carl Haensel, *The Nuremberg Trial Revisited* (1963) 13 DePaul L. Rev 248, Otto Pannenbecker, *The Nuremberg War-Crimes Trial* (1964) 14 DePaul L.Rev 348 and Kranzbuhler *supra* n.8

¹⁴ "The proceedings of the Nuremberg and Tokyo Tribunals were far more summary than would be consistent with modern international human rights law" Patrick Robinson, judge of the ICTY: *Ensuring Fair and Expedient Trials at the International Criminal Tribunal for the former Yugoslavia*" (2000) 11 EJIL 569, 584. , The general consensus amongst legal experts and commentators however, is that the judges at the Nuremberg Tribunal ensured that the defendants did receive a fair trial in a procedural sense in most aspects. See also David Harris *The Right to a Fair Trial in Criminal Proceedings as a Human Right* (1967) 16 ICLQ 352, 356, Kraus, *supra* n.13, 247 Haensel, *supra* n.13 258 and Minear, *supra* n.67.

¹⁵ Bassiouni, *supra*, n.1, 33. It does not mean however, that all of the judges were truly independent and highly-qualified. There were judges with pre-conceived notions of guilt, judges with language problems and judges with little or no experience or knowledge of international law. (Justice Pal of India was the only judge with knowledge and experience in international law amongst his colleagues of the Tokyo Tribunal). In fact, these problems are nothing new to the international criminal law observer, as these are the shortcomings that are complained of regarding the present-day international criminal judiciary, which are discussed in detail in following Chapters. Minear, *supra* n. 6 81. Today, one of the qualifications required of a judge of an international criminal tribunal or court is that he or she must possess some experience or knowledge of international criminal law and/or international humanitarian law.

¹⁶ 1 Morris & Scharf *supra* n.2 8

development of international criminal law. The Tribunal must be judged by the standards of its time.¹⁷ It cannot be denied that the contributions of *Nuremberg* to international criminal law have been both immense and significant. *Nuremberg* was responsible for creating legal innovations in international law, including laying the foundation for an international criminal process. The Judgment formalised the concept of individual criminal responsibility. The principles gleaned from the judgment of the *Nuremberg Tribunal* and the Charter were codified by the General Assembly into fundamental principles of international law leading to the development of a concrete body of international criminal law, such as elements of international crimes. It established precedents for international criminal tribunals and criminal prosecution. There were a robust international criminal judiciary as well as a legal profession, institutions hitherto existing only in national systems, even if the Tribunal's jurisdiction was temporally limited. The Nuremberg Charter was the first formal document that established a set of minimum fair trial standards for a defendant in an international criminal trial.¹⁸ It also was the first legal instrument that explicitly provided for the prosecution of crimes against humanity distinct from war crimes.¹⁹

The Judgment of the Tribunal was a point of reference for the Commission of Experts in preparing their report on situation in the former Yugoslavia.²⁰ Finally, the Charter of the *Nuremberg Tribunal*, the trial proceedings and the legal principles arising thereto established the general principles of international criminal law and procedure. The *Nuremberg Tribunal* also demonstrated that insofar as international criminal jurisdiction is concerned, an international criminal court and an international criminal process are

¹⁷ "But the Nuremberg Trials must be judged within the context of its epoch" Monroe Leigh, *Evaluating Present Options For An International Criminal Court*, (1995) 149 Mil. L. Rev 113 115

¹⁸ 1 Morris & Scharf *The ICTR*, *supra* n.10, 14. For a comparative study of the fair trial standards at the International Military Tribunals and the ICTY, see Antonio Cassese *The International Criminal Tribunal for the Former Yugoslavia and Human Rights* (1997) EHRLR 329, 330-331

¹⁹ Bartram Brown: *Primacy or Complimentarity: Reconciling the Jurisdiction Of National Courts and International Criminal Tribunals*" (1998) 23 Yale J.I.L 382, 422

²⁰ *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780* (1992) UN SCOR, Annex, UN Doc S/1994/674 (27th May 1994)

possible.²¹*Nuremberg* is the prototypical precedent for the *ad hoc* tribunals and the international criminal court in aspects of procedural and substantive laws, rules and proceedings.

2. POST-NUREMBERG: THE ESTABLISHMENT OF THE *AD HOC* INTERNATIONAL CRIMINAL TRIBUNALS AND THE INTERNATIONAL CRIMINAL COURT

The resurgence of activity in international criminal law and procedure arose out of the circumstances surrounding the creation of the two *ad hoc* tribunals for the former Yugoslavia²² and Rwanda²³ (collectively known as the “International Tribunals”) by the United Nations, and in particular the Security Council. Exercising its powers under *Chapter VII* of the Charter of the United Nations in an innovative manner, the Security Council created these tribunals as (a) measures under *Article 41* to address the threats to international peace and security as envisaged by *Article 39* of the Charter and (b) as subsidiary organs with judicial powers.²⁴ These “measures” were adopted primarily to address the bloody conflicts in the Balkans area and in Rwanda as well as the areas surrounding it. Both Tribunals were given mandates to prosecute and punish persons responsible for serious violations

²¹ 1 Morris & Scharf *supra*, n.2, 7. 1 Morris & Scharf *The ICTR, supra* n. 10, 16

²² Established by Security Council Resolution 827 (1993) S/RES/827 (25 May 1993) reprinted in (1993) 33 ILM 1203. For further reading, see 1 Virginia Morris & Michael Scharf, *supra* n.2, D. Shraga and R. Zacklin, *The International Criminal Tribunal for the former Yugoslavia* (1994) 5 EJIL 360, James O’Brien: *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia* (1993) 87 AJIL 639. Theodor Meron *War Crimes Law Comes of Age* (1998) 92 AJIL 462, . D. Sarooshi *The Powers of the United Nations International Criminal Tribunals* (1998) 2 Max Planck Yearbook of U.N. Law 141, M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* 1-63 (Irvington-on-Hudson, NY: Transnational Publishers Inc, 1996)

²³ Established by Security Council Resolution 955 (1994) S/RES/955(Nov 8 1994). Reprinted in (1994) 33 ILM 1602 See generally 1 Morris & Scharf, *the ICTR supra*, n.10.

²³ See also D. Shraga and R. Zacklin *The International Criminal Tribunal for Rwanda* (1996) 7 EJIL 501. It has been observed the ICTR was established because of the ICTY precedent. Payam Akhavan *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment* (1996) 90 AJIL 501.

²⁴ For a discussion on the relationship between the Security Council and the *ad hoc* tribunals *qua* parent-subsiary organs, see D. Sarooshi, *The Legal Framework Governing United Nations Subsidiary Organs* (1996) 67 BYIL 413

of international humanitarian law. The creation of these tribunals by the Security Council was unprecedented and did not go unchallenged.²⁵ Despite scepticism and outright refusal to recognise their standing as judicial organs,²⁶ the International Tribunals have become properly functioning international criminal tribunals with an intense workload, making a substantial input into the field of international criminal law.²⁷

Completely unconnected to, but perhaps accelerated by the creation of the *ad hoc* tribunals, the project to establish a permanent international criminal court ("*ICC*")²⁸ with universal jurisdiction, having faded into the background, took a life of its own.²⁹ Triggered off by a request from a coalition of Latin-American States to establish such a court to deal with narco-terrorism, the *ICC* today is a fully-established and functioning legal institution. As opposed to the Security Council created *ad hoc* tribunals, the *ICC* was established by a treaty.³⁰ The *ICC* is a fully-fledged judicial organ and is functioning with investigations and prosecutions.³¹

²⁵ The first accused before the ICTY challenged the legitimacy of the Tribunal and its establishment. *The Prosecutor v Dusko Tadic* Case No: IT-94-1 available at the ICTY website: <<http://www.un.org/icty>>

²⁶ "You are not a judicial institution; you are a political tool!" Slobodan Milosevic's address to the Trial Chamber. Michael P. Scharf *The Legacy of Milosevic Trial* (2002-2003) 37 *New Eng. L. Rev* 915.

²⁷ This fact gives the impression that the International Tribunals enjoy a reputation *par excellence* in the arena of international criminal justice. A busy tribunal does not necessarily mean a successful court of law.

²⁸ See generally William A. Schabas, *Introduction to the International Criminal Court* (2nd Ed), (Cambridge: Cambridge University Press, 2004), Hans-Peter Kaul *Construction Site for More Justice: The International Criminal Court After Two Years*, (2005) 99 *AJIL* 370, Mauro Politi and Giuseppe Nesi (Eds) *The Rome Statute of the International Criminal Court - A Challenge to Impunity* (Aldershot: Ashgate Publishing Ltd: 2001) Mahnoush H. Arsanjani and W. Michael Reisman *The Law-in-Action of The International Criminal Court* (2005) 99 *AJIL*, 385, McGoldrick, Rowe and Donnelly (Eds) *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart Publishers 2004) 9, 20, Morten Bergsmo *Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court and Their Possible Implications for the Relationship between the Court and the Security Council* (2000) 69 *Nordic JIL* 87, Phillipe Sands: *International Law Transformed? From Pinochet to Congo....?* (2003) 16 *LJIL* 37

²⁹ Cristian deFrancia *Due Process in International Criminal Matters: Why Procedure Matters* (2001) 87 *Virginia Law Review* 1381, 1389 Guillame *supra* n.4, 858

³⁰ The Statute of the International Criminal Court ("the Rome Statute") establishing the permanent criminal court entered into force on 1st July 2002, being the first day of the month after the 60th day from the date of the deposit of the instrument of ratification by the 60th State: Article 126. The ratification by Cook Islands on 18th July 2008 has brought the number of ratifications to the Statute to 108. There are 139 State signatories to the treaty. Available at <www.iccnw.org> State Parties to the ICC presently comprise of almost all countries from the European Union, 30 countries from Africa and

Other international criminal tribunals, with various characteristics have been established and are in existence. One of these is the *Special Court for Sierra Leone* (the “*Special Court*”).³² The *Special Court* is a hybrid court, established through an agreement between the United Nations and the Government of Sierra Leone and is mandated to try persons who “*bear the greatest responsibility*” in committing serious violations of international humanitarian law and Sierra Leonean law.³³ The composition of the *Special Court* is different from the *ICTY*, *ICTR* and the *ICC* in that the judges come from both national and international jurisdictions. This is actually a common thread that runs through all hybrid courts established by or with the assistance of the United Nations.

The United Nations Transitional Authority in East Timor (“*UNTAET*”) was yet another United Nations-sponsored institution and was established by *Resolution 1272 of 1999* to, *inter alia*, “*administer justice*”.³⁴ In pursuant of this task entrusted to it, the *UNTAET* established the Special Panels for Serious Crimes. The Special Panels have jurisdiction over war crimes, crimes against humanity, genocide, and specific domestic crimes under the laws of East Timor committed in that region between 1 January and 25 October 1999.

all but four countries from Latin America and a mere 14 States from Asia. The United States, an influential power is not a party to the Statute.

³¹On 14th of July 2008, the Prosecutor of the ICC presented evidence to the judges of the court to indict President Omar Al Bashir of Sudan, a current Head of State, for crimes against humanity, genocide and war crimes in Darfur. He has also requested for a warrant of arrest. See <<http://www.icc-cpi.int/home.html&l=en>> Interestingly, the Darfur situation is based on Article 13(b) referral to the ICC by the Security Council acting under Chapter VII of the Charter of the United Nations.

³²Established by an Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court dated the 16th of January 2002, initiated through Security Council Resolution 1315 dated 14th August 2000, U.N. Doc. S/RES/1315 (Aug. 14, 2000). Available at <<http://www.sc-sl.org/Documents/scsl-agreement.html>> See also Laura A. Dickinson: *The Promise of Hybrid Courts* (2003) 97 AJIL 97 295, Michael Scharf: *Special Court for Sierra Leone ASILInsights*, October 2000. Accessible at: <<http://www.asil.org/insights/insigh53.htm>> Celina Schocken *The Special Court for Sierra Leone : Overview and Recommendations* (2002)20 Berkeley J. Int'l L 436

³³Article 1 of the Agreement. *ibid*.

³⁴Resolution 1272 authorised *UNTAET* to prosecute those responsible for committing acts of violence that arose out of the referendum for Independence. See Mikhail Wladimiroff *Milosevic & Hussein on Trial: PANEL 3: The Trial Process: Prosecution, Defense and Investigation: Former Heads of State on Trial* (2005) 38 Cornell Int'l L.J. 949, 953

A United Nations hybrid court that has also made inroads in applying international and national criminal courts is the collective Special Panels in Kosovo. The United Nations Interim Administration Mission in Kosovo (“UNMIK”) was established on 10th June 1999 by the Security Council exercising its Chapter VII powers.³⁵ *Resolution 1244* gave UNMIK the power and authority to exercise legislative and administrative functions and to administer justice. In 2002, UNMIK, through a regulation,³⁶ created courts of a hybrid nature that were composed of both international and national judges. These courts, called Special Panels were part and parcel of the domestic legal system and were entrusted with jurisdiction over war crimes and certain post-conflict crimes such as inter-ethnic crimes, corruption and organized crime. The Special Panels apply local laws as well as regulations promulgated by the head of the mission which are considered legislative acts.

The *Cambodian Extraordinary Chambers* (“CEC”) is another member of the growing circle of hybrid courts that the United Nations created to prosecute those who have committed serious violations of international humanitarian law. It was established pursuant to an agreement between the United Nations and the Government of Cambodia called Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea, 6 June 2003.³⁷

The *Special Tribunal for Lebanon* is a unique hybrid Tribunal. It was established pursuant to Security Council *Resolution 1664 (2000)* and is mandated to try persons accused of the attack on Beirut on 14th February 2005

³⁵ For an overall discussion on the Kosovo courts, see Laura A. Dickinson *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo* (2003) 34 New Eng L. Rev 1059. The official website of UNMIK is at <<http://www.unmik.org>>

³⁶ UNMIK Regulation 1991/1 Para 1.1: “All legislative and executive authority with respect to Kosovo is vested in UNMIK and is exercised by the Special Representative of the Secretary-General”. See the official website.

³⁷ UN Doc. A/RES57/228B (Annex) (13 May 2003).

Available at <<http://www.cambodia.gov.kh/krt/pdfs/Agreement%20between%20UN%20and%20RGC.pdf>>

in which the former Lebanese Prime Minister Rafiq Hariri and 22 others were killed.³⁸ There are several noteworthy issues. First, the hybrid court, comprising of national and international judges³⁹ will apply the national law of Lebanon, in particular the Lebanese Criminal Code. However, the death penalty and forced labour, which are acceptable punishments under Lebanese law, are excluded from the sentences applicable in the hybrid courts. This demonstrates a superseding of national law by international law. Secondly, it was emphasised that the Tribunal would apply international standards and principles of due process of law as applied in “other international tribunals.” It would appear by this statement that standards of due process of law as applied by the *ICTY*, *ICTR* and *ICC*, amongst others would be applied to the Special Tribunal for Lebanon.⁴⁰

The establishment of these various special courts with various mandates and unique characteristics is a phenomenon that was hardly envisaged fifty years ago. The proliferation of these courts has brought about a parallel development of a burgeoning international criminal judiciary.⁴¹ This particular aspect of the international criminal legal system poses new and interesting issues to academics, judges, lawyers, experts and commentators alike – the identification, clarification and the crystallisation of the principles relating to specific characteristics of the judicial organ as an institution and international criminal judges individually: that of judicial independence and impartiality. These characteristics of the international judiciary have become the focus of much academic research and debate.⁴² Indeed, there is a trend towards establishing a body of rules and principles governing the

³⁸ See <<http://www.un.org/apps/news/infocus/lebanon/tribunal/docs.shtml>>

³⁹ *Ibid*

⁴⁰ Other courts include the Iraqi Special Tribunal to try Crimes Against Humanity that tried and sentenced many Iraqis accused of committing crimes against humanity, including Saddam Hussein. See Daniolo Zolo *The Iraqi Special Tribunal: Back to the Nuremberg Paradigm?* (2004) 2 JCIJ 313

⁴¹ Romano states that the expansion and transformation of the international judiciary is the single most important development of the post- Cold War era. *supra*, n.4, 709

⁴² See for example, the work of the Project of the Independent Criminal Tribunals whose aims and activities can be gleaned from its official website: <www.pict-pecti.org>

independence of the international judiciary and covering matters such as ethics, discipline and dismissal of international criminal judges.⁴³

3. THE RIGHT TO A FAIR TRIAL: INDEPENDENCE, IMPARTIALITY AND THE INTERNATIONAL CRIMINAL JUDICIARY.

A vital principle in domestic legal systems is the right of the accused to a fair trial in criminal proceedings. That right, as is discussed in this thesis, has been extended to the international criminal justice system. The fair trial right, as observed from international and regional human rights instruments, is a multi-faceted right. One such facet is the right of the accused to have his case heard by an independent and impartial tribunal.⁴⁴

The right of an accused person to have his case heard by an independent and impartial tribunal at international criminal proceedings is a relatively new focal point for legal research and study. Numerous principles and non-binding instruments have been passed by the United Nations and non-governmental organisations on the issues of independence and impartiality of the judiciary.⁴⁵ With so much interest and activity in this aspect of international criminal law, a study on these issues is relevant.

⁴³ For example the Statute of the International Criminal Court: *Part IV Composition and Administration of the Court*: Articles 34-48.

Available at: <http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf>. See also Code of Judicial Ethics, available at <<http://www.icc-cpi.int/legaltools/>>

⁴⁴ Certain human rights instruments, for example the International Covenant on Civil and Political Rights 1967 refer to the right of the accused to have his case heard by a competent, independent and impartial tribunal. The competence factor is not considered in this thesis.

⁴⁵ It must be noted though that none of them specifically refer to the independence and impartiality of the international criminal judiciary. Amongst the instruments are *Basic Principles of the Independence of Judiciary* 1985, *Draft Principles on the Independence of the Judiciary (Syracusa Principles)* 1981; *Draft Principles on the Independence of the Legal Profession (Noto Principles)* 1982; *The Rule of Law and Human Rights (Declaration of Delhi, Law of Lagos, Resolution of Rio Declaration of Bangkok)*, *International Bar Association: Minimum Standards of Judicial Independence* 1982; *Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence* (1998); *the Bangalore Principles of Judicial Conduct* (2002), *the Beirut Declaration of 1999* and *the Cairo Declaration of 2003*.

This work examines the independence and impartiality of the judiciary from the angle of the fair trial right. As the third arm of the Government, the judiciary has a very important role to play in upholding the law and dispensing justice in society in national systems. These characteristics of judicial independence and impartiality must be preserved and upheld if the judiciary is to carry out its functions and duties impeccably without fear or favour. The premise of this thesis is that independence and impartiality of the judiciary are legal canons that are essential to the broader right of the accused to receive a fair trial in criminal proceedings.⁴⁶

Two modes of approach to the dual issues of judicial independence and impartiality have been identified. The first approach is from the rule of law or the doctrine of the separation of powers perspective. This perspective examines judicial independence and impartiality as characteristics of the Judiciary as the third arm of Government. Threats to independence and impartiality in this perspective are usually from the other two arms of the Government, which are the Legislature and the Executive. This approach has also been called as the constitutional approach.

The second approach is the fair trial perspective. This perspective examines these dual postulates as corollaries to the right of the accused to a fair trial, their relevance and the role they play in ensuring that the accused does enjoy this right. The international and regional human rights instruments that would be referred to extensively in this thesis set out the independence and impartiality of the court explicitly as a requirement of fair trial. The stance adopted here is in support of that requirement, that an independent and impartial judiciary is an essential safeguard of the right of the accused to a fair trial. As stated earlier, the fair trial right has many component rights. The right to be heard by an independent and impartial judiciary is one of them.

⁴⁶The concepts of independence and impartiality are crucial to civil proceedings also. However, civil proceedings are outside the scope of this study. It is also to be noted that the male pronoun for judges are used throughout for ease of reference, unless otherwise stated.

This thesis elaborates this provision and studies its relevance and application to international criminal proceedings and in particular, the proceedings at the International Tribunals.

Chapter 1 examines the right of the accused to a fair trial generally and as is embodied in international and regional human rights instruments. It is an exposition of the fair trial right; and its recognition and application in international criminal proceedings. It is proposed to highlight and emphasise the particular provisions relating to fair trial rights and where required, reference is made to decisions of regional and international human rights adjudicating bodies. It sets up the groundwork or foundation for the subsequent chapters.

Chapter 2 deals with general discussion of the provisions relating to judicial independence and impartiality as embodied in various human rights instruments. It is a general Chapter and sets out the necessary international and regional provisions relating to judicial independence and impartiality, their definitions and the different interpretations given to it. It also discusses the concepts of judicial independence and impartiality and the relationship between them.

Chapter 3 focuses on the first pillar of the two concepts, which is that of judicial independence. There are many aspects and indeed interpretations of judicial independence. It is this issue that is tackled first, as it is the premise of this thesis that judicial independence is the overarching principle of the whole concept of independence and impartiality. It is argued that if there is no independence at all, then the issue of impartiality is also tainted. Also tackled in the same chapter are the many layers of judicial independence, including contemporary facets of judicial independence as well as its role, relevance and application in the international criminal court and tribunals. Both institutional and individual independence are discussed at length and other ancillary

issues relating to judicial independence such as ethics, discipline and codes of conduct applicable to the international criminal judiciary.

Chapter 4 discusses judicial impartiality. Here, there is an in-depth discussion of judicial impartiality, the tests for judicial impartiality as applied in the domestic courts as well as the application of this concept at the international criminal courts and tribunals, with an examination of the jurisprudence of the courts. An examination of national decisions as well as decisions of the international criminal tribunals is also undertaken in this chapter to present a more holistic view of the issue of judicial impartiality.

There are overlaps between judicial independence and impartiality as explained in *Chapter 2*. Therefore some arguments and observations are bound to be repeated in order to reinforce the relevance of that argument to that particular concept. For example, individual independence and judicial impartiality are intertwined. A judge who is not independent cannot be said to be impartial even if he does not show any obvious biasness in a particular case. Conversely, a judge who is not impartial cannot be said to be independent. Likewise, discussions on the case of *The Prosecutor v Tadic (IT-94-1)* may be referred to in different Chapters, depending on the relevance of the legal principle espoused by the Appeals Chamber in that case. All cases, judgements, decisions and orders of the Trial Chambers and the Appeals Chamber of the *ICTY*, *ICTR* and the *Special Court* can be accessed at the official websites of the respective courts.

The thesis concludes with several observations made from the case-law, Statutes and subsidiary legislation of the international criminal courts and tribunals as well as the various human rights instruments. An assessment of the international criminal tribunals as judicial organs, with particular focus on whether they had succeeded in living up to their reputation as a truly

independent and impartial judicial institution forms a crucial part of the conclusion.

The methodology adopted here is research-based, including analysis of case-law of various courts and tribunals involving judicial independence and impartiality. Empirical research has contributed to this thesis as well, through a fact-finding mission undertaken by the author to the International Criminal Tribunal for the former Yugoslavia in The Hague in 2002.

THE RIGHT OF THE ACCUSED TO A FAIR TRIAL: A GENERAL APPRAISAL AND ANALYSIS

“Whether there are convictions or whether there are acquittals will not be the yardstick [of the ICTY]. The measure is going to be the fairness of the proceedings”

Judge Richard J. Goldstone¹
Former Chief Prosecutor
International Criminal Tribunals
for the former Yugoslavia and Rwanda

1.1 INTRODUCTION

This Chapter discusses the right of the accused to a fair trial generally and the application of that right at the international criminal tribunals specifically. The reasoning for this approach has already been mentioned briefly in the *Prologue* to this thesis. Judicial independence and impartiality are components of the more complex right of an accused to a fair trial. It is therefore relevant to discuss the fair trial right issue first before embarking on the specific issues of judicial independence and impartiality. This is followed by an analysis of the application of the fair trial right at the International Tribunals. Such an analysis would ultimately lead to a discussion of the right of the accused to have his case heard by an independent and impartial tribunal and in particular, the relevance of that right at the International Tribunals.

¹Address Before the Supreme Court of the United States, 1996 CEELI Leadership Award Dinner (October 1996) quoted in Mark J. Ellis *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defence Counsel* (1997) 7 Duke JCIL 519, 526 n.37

It is imperative that trials are presided over by judges who are both *individually impartial*, free from prejudice or bias and *individually independent*, devoid of any ties with any parties which may have a bearing on his *objectivity*. A court of law and its members therein should also, collectively as an organ, be *independent* from political, administrative and other forms of control, pressure or influence. It is therefore necessary that the right to have his case heard in those conditions be included in the accused's general right to a fair trial, otherwise his trial may be deemed "unfair".

The judiciary is the bulwark of fundamental freedoms and its independence and impartiality are arguably essential guarantees of fair trial. It is argued that these principles are so sacrosanct that any deviation, compromise or impingement, however slight they may be, would taint the proceedings before the court, even if the other fair trial rights are scrupulously observed. Extending that argument further, could it also be said that even if the judiciary was truly independent and impartial, the fact that they did not scrupulously observe the fair trial right could mar the proceedings against the accused? If they did not ensure that the fair trial right was not scrupulously observed, would this then reflect adversely on their independence and impartiality or merely their competence?² This was the dilemma that the International Tribunals found themselves in as a result of several debatable decisions. Years later, the dust has still not settled on the controversial decisions. Unfortunately, these decisions have raised the perception that the justice meted by the International Tribunals is flawed justice. It is also unfortunate that such a perception is not ungrounded.

A discussion on the different United Nations human rights texts as well as the regional texts and the provisions of the statutes of the international criminal

²This though is a risky attribute as judges have no right to be at the International Tribunals if they were not competent.

tribunals and courts are also vital to this Chapter. The similarities between the contents of the provisions and the application of those provisions within the different legal frameworks reinforces the underlying argument that the fair trial norm is a universal norm and that by extension, the concepts of judicial independence and impartiality enjoy the same universal status. Universality in this context is not limited to different national or regional jurisdictions but also includes the jurisdictions within which the international criminal tribunals and court operate. However, as observed from the various provisions of the human rights instruments, whilst the rights may be similar, the contents of those rights do vary.

1.1 THE RIGHT TO A FAIR TRIAL: GENERAL

Article 10 of the **Universal Declaration on Human Rights** states as follows:

*“Everyone is entitled in full equality to a fair and public hearing by an **independent and impartial tribunal**, in the determination of his rights and obligations and of any criminal charge against him.”*³ (Emphasis added)

The right to a fair trial owes its origins to the Magna Carta.⁴ The genesis of this right centred on the initial premise that no person shall be deprived of life, liberty or property without the due process of law.⁵ In the twenty-first century, however, this basic and rudimentary right has evolved into a complex and non-exhaustive set of rights. Almost every constitution and legal systems of the world provide for the right to fair trial in varying

³<<http://www.un.org/Overview/rights.html>>

⁴ Salvatore Zappala *Human Rights in International Criminal Proceedings* (Oxford; Oxford University Press: 2003), 3. Dinah Shelton *Legal Norms to Promote the Independence and Accountability of International Tribunals* (2003) 2 *The Law and Practice of the International Tribunals* 27

⁵Zappala, *ibid*

degrees.⁶ Such is its importance that the right to a fair trial has been touted as an important human right.⁷

At the international criminal legal system, the fair trial right is a fairly recent phenomenon, going back a mere 60 years. From the bare right that was enshrined in the Charters of the International Military Tribunals at Nuremberg and for the Far East, the fair trial has become a sophisticated right in international criminal law, and has been accorded recognition by the International Tribunals through their Statutes and case-law.⁸

A conviction which is obtained through a compromised or prejudiced legal process would be tainted as such process is not a fair process. It is axiomatic therefore that the right to a fair trial should be observed and respected by the courts so that justice is not only done, but manifestly seen to be done. In effect, establishing a court that does not ensure that the accused does not enjoy the right to a fair trial would defeat the very character of that court, which is that of an organ that dispenses justice fairly and judiciously.

In this regard, it is incumbent upon the court or tribunal hearing a criminal trial to ensure that the accused person is given every opportunity to defend his case and provided with safeguards to ensure that his fair trial right is not curtailed as that right is “*aimed at ensuring proper administration of justice*”.⁹ The adjudicating authority bears the responsibility of ensuring that the trial the

⁶ See generally M.Cherif Bassiouni *Human Rights in the Context of International Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions* (1992-1993) 3 Duke JICL 235

⁷ See generally Harris, *supra* Prologue n.14.

⁸ **Article 16** of the *Charter of the International Military Tribunal at Nuremberg* recognised that the right of the accused to a fair trial. Such was the consensus on the importance of this right that it was the only right that was crystallised as a Nuremberg Principle unanimously and without debate at the proceedings of the International Law Commission at the United Nations. *Report of the International Law Commission* (1950) 44 AJIL Supplement: Official Documents 105, 129. See also Yuen-LiLiang *Notes on Legal Questions Concerning the United Nations* (1951) 45 AJIL 509, 521.

⁹ *Report of the Human Rights Committee, General Assembly Official Records: Thirty-Ninth Session, Supplement No.40 (A/39/40), General Comment 13/21*, 143.

accused receives is fair.¹⁰ Only then could it be said with certainty that the due process of law has been observed.¹¹ There is a connection between the right to fair trial and an independent and impartial judiciary for it is the latter who is entrusted with ensuring that the accused enjoys all the other fair trial rights and are even called upon to rectify situations where such rights are compromised or omitted. The sub-right, that of an independent and impartial court, is the right which is relied on to ensure that the main right or the “parent” right is protected. It must also be noted that the deprivation of a fair trial in itself is not a right to be used as a device to attack the substance of the verdict or the judgement but a guarantee of the safety of the proceedings.¹² Fair trial right is relevant only to procedural safeguards, not to the correctness of the decision.

The fair trial right itself is not defined *per se* in any specific convention or treaty.¹³ It is a general right, comprised of a myriad of numerous and complex standards.¹⁴ This is the reason why there has been no attempt to formulate a definition of fair trial since it would be difficult to formulate a comprehensive definition.¹⁵ Whilst fair trial standards are explicitly set out in international and regional treaties as well as domestic law, they are by no means absolute

¹⁰ Christoph Safferling *Towards An International Criminal Procedure* (Oxford; Oxford University Press, 2001) 20. Safferling also discusses the development of fair trial right as a human right: pp 21-31.

¹¹ Amnesty International. “*Fair Rights Manual*” Introduction, David Weissbrodt *available at* <www.amnesty.org>

¹² See also the decision of the Human Rights Committee in the case of *B.d.B. v The Netherlands* (273/88) of 30th March 1989 where the Committee held that whilst the fair trial provision of the International Covenant on Civil and Political Rights (relating to fair trial) guarantees procedural equality, it cannot be taken to mean as guaranteeing equality of results or absences of error on the part of the tribunal. S. Joseph, Schultz and Castan (Eds): *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd Ed) (Oxford: Oxford University Press, 2004) 408.

¹³ It could be said however that the **ICCPR**, **European Convention** and the **ACHR** “*between them define the right to a fair trial in criminal proceedings in full and basically satisfactory terms*”. Harris, *supra*, Prologue n.14, 352

¹⁴ The diversity in criminal practice between civil and common law jurisdictions has demonstrated that there are different fair trial guarantees in those systems. Michail Wladimiroff in Felde, Kitty, McDonald, G.K. *et al The Prosecutor v Dusko Tadic* (1997-1998) 12 Am. U. Int’l L. Rev 1441, 1449.

¹⁵ It has been held that the concept of fair trial should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings and expeditious procedure. *Moraël v France* (207/86) D. McGoldrick: *The Human Rights Committee, Its Role in the Development of the International Covenant and Political Rights* (Harlow: Clarendon Press Oxford; 1994) 417

or exhaustive.¹⁶ In addition to the specific standards, there are residual standards, including those with “*indefinable characteristics*”,¹⁷ which are not necessarily set out or formulated but the non-observance of which could nonetheless render a trial unfair. The nature of the fair trial right is best explained thus:

“The right to a fair hearing has an open-ended residual quality: It provides for an opportunity both for adding other specific rights not listed in Article 6¹⁸ that are considered essential to a “fair hearing” and for deciding whether a ‘fair hearing’ has occurred on the particular facts of a given case when the proceedings are looked at as a whole.”¹⁹

The fair trial provisions in international and regional treaties are mere examples of what is termed as “minimum guarantees.” The purpose of

¹⁶ Harris, *supra* Prologue, n.14, 369.

¹⁷*The Law of the European Convention on Human Rights*, Harris, O’Boyle, Warbrick (Eds) (London: Butterworths, 1995) 203 where the authors refer to the European Court decision of using the *Barberá, Messegué and Jabardo v Spain* [1988] ECHR 25 as an example of breach of the right to a fair trial caused by the cumulative effect of breaches of several residual rights. Matters such as the distance travelled by the accused before the trial, the brevity of a complex trial, excessive judicial intervention, prejudicial summing-up, adverse inference on a right to silence could vitiate a trial, if when considered as a whole, the hearing was unfair. *Condron v The United Kingdom* (Application No. 35718/97), 2nd August 2000. The incident involving the “sleeping” judge of the ICTY could fall under these “indefinable characteristics”. That a judge must be alert and take proceedings seriously is not set out in any fair trial provisions. It is something so fundamental and prosaic that it is automatically assumed. However, if he loses concentration or, as in the case at hand, falls asleep, his conduct could render the trial unfair if, taking all the circumstances of the case, the accused did not get a full, fair and unequivocal hearing. The International Tribunals however held that the conduct of the judge did not deprive the accused of a fair trial. Michael Bohlander *The International Criminal Judiciary – Problems of Judicial Selection, Independence and Ethics* 377-383 in Michael Bohlander (ed) *International Criminal Justice – A Critical Analysis of Institutions and Procedures* (London; Cameron May; 2007). It is argued that the sleeping incident would be an example of “lack of seriousness on the part of the Court” when dealing with particularly significant allegations which arise in criminal proceedings, especially in a complex international criminal proceedings as those that take place at the International Tribunals. Harris *supra* Prologue, n.14 357, 376. Harris argues that “seriousness” is a necessary characteristic of a court in the context of human rights. It would appear therefore that based on Harris’ argument, the fair trial right of the accused in the *Celibici* case has been compromised. In a hypothetical scenario, assuming that an accused is being tried at the International Tribunal and is found guilty on votes of 2-1. Where did the vote of the sleeping judge go? If he was the only judge who voted against a finding of guilt, did he choose the easy way out, since he knew he was not paying attention to the proceedings? If he was one of the two who found the accused guilty, how assured is the accused that the finding of guilt was reached after a fair weighing of evidence? This scenario is regrettable but not impossible.

¹⁸ **Article 6** of the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950*. (“*European Convention*”) discussed in detail below.

¹⁹ Harris *et al supra* n.17, 202

guarantees and the obligations of State Parties in relation to them were explained in this manner:

*“Guarantees are designed to protect, to ensure or to assert the entitlement to a right or exercise thereof. The State Parties not only have the obligation to recognize and to respect the rights and freedoms of all the persons, they also have the obligation to protect and ensure the exercise of such rights and freedoms by means of the respective guarantees...., that is through suitable measures that will in all circumstances ensure the effectiveness of those rights and freedoms.”*²⁰

All international and regional human rights instruments contain minimum guarantees²¹ but as pointed out earlier, those guarantees may not necessarily be the same. Some instruments contain more and detailed standards than others.²² State Parties²³ to an international or a regional treaty are obliged to ensure that their national laws attain those standards set out in those instruments at the very least. They could provide for higher standards in their national laws than those guaranteed by the instruments. However, it is the application of the “minimum guarantees” of the treaty to a particular trial that would be assessed against the international standards, and not the abstract provisions of domestic law.²⁴ In other words, a fairness of a trial depends on whether the minimum guarantees applied in that particular trial measured up against the standards contained in the treaty.

²⁰ Advisory Opinion of the Inter-American Court of Human Rights in *Habeas Corpus in Emergency Situations* (Article 27(2,) 25 and Article 7(6) of the American Convention on Human Rights) Advisory Opinion OC-8/87, 30th January 1987, Series A no.8, Inter-Am. Ct. H.R.173 Paragraph 35.

²¹ “Minimum guarantees” are relevant to the proceedings of the International Tribunals as discussed below.

²² See discussion on the specific provisions in international and regional human rights instruments, *infra* text, 22 *et seq.*

²³ State parties to a human rights instrument, whether international or regional, are bound to apply the fair trial provisions in the instrument. The issue that is of interest here is what considerations, if any, would an international criminal tribunal give to such an instrument, as it is not a “State Party” and therefore is not bound by the provisions of the human rights instrument. However, could the International Tribunal ignore an important document such as the ICCPR? This is more so since both the entity and the instrument are “creatures” of the United Nations.

²⁴ For example, a case referred to the European Court from a national jurisdiction would be based on alleged breaches of the provisions of the *European Convention*, even though the national proceedings of the case would have conformed to national standards. It should be noted that referrals to the European Court are not appeals against decisions of the national courts.

A point that needs to be stressed is that whether a trial is fair or not depends on the circumstances of the case. On one hand, the observation of all codified fair trial standards would not necessarily guarantee a fair trial. On the other, not every breach of a fair trial standard would render a decision wrong or a conviction unsafe. Whilst a breach of a particular fair trial standard may put the fairness of the trial of the accused in doubt, it may not necessarily mean that the judgement was tainted or was made *mala fides* or indeed that the conviction was unsafe. Equally, a conviction should not be allowed to stand where the trial process has been vitiated by a grave breach of due process even if there is no doubt as to the guilt of the accused.²⁵ It is for the court to decide, taking into consideration the breaches complained of in the context of the whole case, whether the fair trial standards were seriously breached to the extent that the guilty verdict and the conviction, arising from that verdict, were unsafe.²⁶ Applying these principles to the twin pillars of judicial independence and impartiality, it could very well be that the conviction of an accused could be rendered unsafe by virtue of partiality and dependence by the court shown either by the judges individually or the court as a whole.²⁷ A truly independent and impartial court should decisively to guarantee the fair trial right as well as to remedy any breach that has occurred.²⁸

Insofar as the identification of fair trial standards is concerned, these may be gleaned from international and regional human rights instruments as well as

²⁵*R v Davis, Rowe and Johnson* [2000] JCL 366, 372. *R v Forbes* [2001] 1 All ER 686, 697. In the cases of *R. v. Roohi* (1997) EWCA Crim 1800, *R. v. Frixou* [1997] [1998] Crim LR 352, *R. v. Roncoli* [1997] [1998] Crim LR 584 and *R. v. Kartal* [1999] EWCA Crim 1987, the convictions of the appellants were set aside although there was convincing evidence against them. The appellate court examined the proceedings as a whole and came to the conclusion that the convictions were unsafe as a result of unfair trials caused by excessive intervention by the trial judges. These cases were referred to with approval by the European Court of Human Rights in *C.G. v The United Kingdom* (Application No: 43373/98) [2001] ECHR (Rep) 870

²⁶*Edwards v United Kingdom* (1992) 14 EHRR 417, 431. The court must decide whether the proceedings taken in entirety were fair.

²⁷Whether the International Tribunals have actually rendered a conviction unsafe on ground of unfair trial is another matter altogether. The discussions on fair trial rights at the international court and tribunals paint a pessimistic picture. See 1.2 *infra*

²⁸An example would be where the court or tribunal acts independently and impartially by rectifying an abuse of process.

national constitutions²⁹ and legislation. Whether these standards are binding or not depends on the status of the instruments and the obligations of the States arising therefrom and State practice. In certain instances, the standards may be of persuasive effect. Where the standards are not binding, they may acquire a binding status through legislation, treaties, practice, custom and judicial decisions. Otherwise, fair trial standards will have a binding effect on States when they are found in treaties, are rules of customary international law or are general principles of law.

1.3 THE RIGHT TO A FAIR TRIAL: AN INTERNATIONAL AND REGIONAL APPROACH AND UNDERSTANDING

Fair trial standards at the international forum have acquired recognition through various international and regional human rights instruments.³⁰ However, the concept of fair trial standards in international criminal proceedings is rather problematic. International criminal tribunals and courts are dictated by their Statutes. The provisions of those Statutes are of paramount importance to the Tribunals. Any instrument other than the Statutes would have a lesser impact on the Tribunals. Where the Statutes are silent, the international judge must identify and apply standards to the proceedings before them to ensure a fair trial.³¹ However, unlike their counterparts in the Nuremberg and Tokyo Trials whose resources were limited to national laws and practice, the international judge would be able to refer to standards which are now encompassed in treaties, conventions and other instruments.³²

²⁹ Bassiouni, *supra* n. 6, 269. According to a survey undertaken by the author, the right to a fair trial in criminal proceedings has been guaranteed in at least thirty-eight national constitutions.

³⁰ The issue of fair trial right in customary international law, for the purposes of this section, will not be dealt with.

³¹ See e.g. Michael Bohlander and Mark Findlay *The Use of Domestic Sources as a Basis for International Criminal Law Principles* (2002) 2 *The Global Community Yearbook of International Law* 3

³² Harris *supra*, Prologue, n.14, 279. Safferling, *supra* n.10, 22-23

International and regional human rights instruments that contain the right to a fair trial include the *Universal Declaration of Human Rights*, (“Universal Declaration”) the *International Covenant on Civil and Political Rights* (“ICCPR”), the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (“European Convention”), the *American Convention on Human Rights* (“ACHR”) and the *African Charter on Human Rights*. (“Af.CHR”)³³ Each has its own conception of what a fair trial is – certain conventions such as *European Convention* have detailed provisions of fair trial rights whereas others such as the *Arab Charter of Human Rights* have very general provisions.

The international fair trial standards are not limited to the conventions and treaties alone.³⁴ They are now buffered with standards derived from the jurisprudence of international and regional tribunals such as the *European Court of Human Rights* (European Court), and lately, the decisions of the International Tribunals for the former Yugoslavia and Rwanda as well as their respective Statutes. The decisions of *European Court* in particular are instructive to national courts of State Parties to the *European Convention*.³⁵ These decisions are significant in that they may also identify standards that are residual and which have not been set out explicitly in any instrument.

³³ Also includes the NATO Status of Forces Agreement 1951. Harris Prologue, *supra* n.14 352. Other important international instruments that contain provisions relating to fair trial include the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (1984) and the *Convention on the Rights of the Child* (1984).

³⁴ Detailed discussions on these standards and measures of strengthening the right to a fair trial are set out in a report commissioned by the then-Commission on Human Rights. See Chernichenko S and Treat W: *The Administration of Justice and the Human Rights of Detainees: The right to a fair trial: Current Recognition and Measures Necessary for its Strengthening* dated 3rd June 1994, E./CN.4/Sub.2/1994/24.

³⁵ For example, *Section 2(1)* of the *Human Rights Act 1998* of the United Kingdom obligates the national court, when determining a question that involves a European Convention on Human Rights right, to take into account decisions and opinions of the European Court and Commission of Human Rights and the Council of Ministers. It has been held that *Section 2* does not create a binding status for European Court decisions.

1.3.1 THE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

1.3.1.a . UNIVERSAL DECLARATION ON HUMAN RIGHTS

The *Universal Declaration* is the foremost United Nations text on human rights in general and the right to a fair trial specifically. A consequence of a shocked and grieving world suffering the aftermath of the war, the *Universal Declaration*³⁶ was framed by the United Nations as an instrument that would both reflect the avowal of the world community to avoid such a catastrophe in the future as well as prevention of human rights abuses on such a devastating and widespread scale again. The *Universal Declaration* included for the first time a universal³⁷ definition of human rights. It was hailed as “an authoritative interpretation of the human rights obligations of the Member States of the United Nations”.³⁸ The right to a fair trial was included in that definition of human rights.

However, the *Universal Declaration* *per se* is limited in its application as it is a declaratory instrument and is therefore not binding on member States of the United Nations.³⁹ Whilst references to the *Universal Declaration* have been made in the preambles to all international and regional human rights

³⁶Resolution 217 A (III) of 10 December 1948 reprinted in Malcolm Evans, *Blackstone's International Law Documents* 5th Ed (London: Blackstone Press Ltd, 2001) 39, 40. The Charter of the United Nations did not define “human rights” but presupposed it. The Human Rights Commission established in 1946 had a three stage plan to develop a universally accepted definition of human rights. The first stage was to pronounce a non-binding declaration, which was to be the basis of the second stage, a convention and finally, to create international implementation mechanism. Manfred Nowak *Introduction to the International Human Rights Regime* (Leiden; Boston; Martinus Nijhoff, 2005) 75

³⁷ In the past decade, this definition has been disputed by several Asian countries who argued that the universal definition of human rights is a western definition and is not compatible with “Asian values”, particularly political and civil rights and passed the Bangkok Declaration of 1993: see Christian Tomuschat : *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press 2003) 76

³⁸ David Weissbrodt: *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (The Hague: Kluwer Law International, 2001) 1. The *Universal Declaration* could be indirectly considered as constituting international treaty law. Nowak, *supran.* 36, 76.

³⁹ Malcolm Shaw *International Law*, 5th Edition (Cambridge: Cambridge University Press, 2003) 259. However, it is now recognised as a normative instrument, setting out human rights obligations of Member States of the United Nations. Thomas Buergenthal *Centennial Essay: The Evolving International Human Rights System* (2006) 100 ASIL Proc 783, 787. Together with the Charter of the United Nations, the *Universal Declaration* spells out the general human rights of all Member States of the United Nations. Buergenthal, *ibid.*

instruments,⁴⁰ not all of the provisions of the *Universal Declaration* have been replicated in them. The content of some *Universal Declaration* principles have been explicated in various binding instruments such as the *ICCPR*, the *International Covenant on Economic, Social and Cultural Rights of 1966* (“ICESCR”), the *International Convention on the Elimination of All Forms of Racial Discrimination of 1963* and the *Convention on the Elimination of All Forms of Discrimination Against Women of 1979*. However, all the relevant international and regional human rights treaties contain wider fair trial provisions which are more detailed than the provisions of the *Universal Declaration*. An example of this is *Article 10* aforesaid, the contents of which has been replicated and expanded in *Article 14* of the *ICCPR*. The importance of the *Universal Declaration* should not be undermined by the non-binding status of the instrument as the *Universal Declaration* provisions “specify with great precision the obligations of member nations under the Charter.”⁴¹ It was observed that the *Universal Declaration* “is an authoritative statement of the international community” and is considered *in toto* as part of binding customary international law.

Article 10 is now generally interpreted as part of customary international law or general principles of law.⁴² Hence it is a source of law as identified by the *Statute of the International Court of Justice*. This goes without saying as *Article 10* contains very fundamental principles that are needed to ensure the protection of an individual against arbitrary conduct by a State, the Establishment and/or an organisation, including the International Tribunals.

⁴⁰ The regional human rights instruments refer to the *Universal Declaration* in affirmative language; the weight given to the *Universal Declaration* is seemingly considerable. Bassiouni has identified forty national constitutions that quote or reproduce the *Universal Declaration*. *Supra* n.6, 237

⁴¹ *Filartiga v Pena-Irala* (1990) 19 ILM 966, 973,974.

⁴² *Ibid.* See also J. Rehman, *International Human Rights Law: A Practical Approach* (Harlow: Longmans, 2003) 57-59. Whether States actually adhere to the principles in the *Universal Declaration*, or indeed the *ICCPR*, is of course in reality, highly debatable. The country-by-country reports by Non-Governmental Groups such as Amnesty International and Human Rights Watch as well as the Annual Reports and Country Visits submitted by the Special Rapporteur for the Independence of the Judiciary paint a bleak and a less idealistic picture altogether. The Annual Reports of the Special Rapporteur can be accessed at

<<http://www2.ohchr.org/english/issues/judiciary/annual.htm>> and the Country Visits at <<http://www2.ohchr.org/english/issues/judiciary/visits.htm>>

It is manifest therefore that *Article 10* should enjoy the status of customary international law and/or general principle of law as its provisions are fundamental to mankind and the due process of law.

1.3.1.b THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 1966⁴³

The *ICCPR*⁴⁴ is the detailed treaty that the *Universal Declaration* was not. It acted on the original premise of the *Universal Declaration* and went further by expanding the basic provisions contained therein. It is the most prominent international human rights treaty and contains comprehensive provisions on civil and political rights of citizens of Member States. The provisions of the *ICCPR* are binding on the State Parties. *Article 2(1)* sets out the obligations of States Parties and compels them to immediately implement and ensure that the substantive rights within the Covenant are respected and observed in their jurisdictions.⁴⁵ The general Covenant obligations and the specific obligation under *Article 2* to give effect to the provisions are binding on every State Party.⁴⁶ *Article 2(1)* imposes a duty on State Parties to adopt domestic legislation or other measures to give effect to the Covenant rights unless such

⁴³ For a detailed exposition of the *ICCPR*, see Joseph *et al* n.12. The *ICCPR* was adopted together with the *ICESCR*. These two principal human rights documents relate to different set of rights, evolved from the *Universal Declaration*. As the *ICESCR* suggests, this instrument is designed to protect the economic, social and cultural rights of the individual. The *ICESCR* came into force on the 3rd of January 1976. The rights that fall within this Covenant include the right to work, the right to adequate housing, the right to social security and so forth. The *ICESCR*, together with the *ICCPR* and the *Universal Declaration* form the International Bill of Human Rights.

⁴⁴ Reprinted in 6 ILM 368 (1967). The *ICCPR* was adopted by the General Assembly on 16th December 1966 and came into force on 23rd March 1976 when it had thirty-five ratifications. Joseph, *op cit*, 8. As of May 2006, there are 156 State Parties to the *ICCPR*.

Available at <<http://www.ohchr.org/english/countries/ratification/4.htm>>

⁴⁵ *General Comment No. 31[80]: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26th May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, Paragraph 3. Substantive rights are those contained in Part III of the *ICCPR* (Article 1 is also considered a substantive right). Part III is comprised of Articles 6 to 50. These rights include, *inter alia*, the right to life, freedom from torture, inhuman and degrading treatment, and punishment, the rights to liberty and security of the person, the right to a fair trial and the right to equality before the law and rights of non-discrimination. Joseph, *supra* n.12, 9. Manfred Nowak *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: Engel, 1993) 36,37

⁴⁶ *General Comment* *ibid* Paragraph 4. Joseph, *ibid* 9, 10

rights are already part of national law.⁴⁷ The requirement on the State to take measures to give effect to the rights is unequivocal and is to take effect immediately. A State cannot justify its failure to comply with *Article 2 (1)* by relying on national, political, social, cultural or economic considerations.⁴⁸

*Article 14(1)*⁴⁹ is the general fair trial guarantee provision in the *ICCPR* and states as follows:

*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*⁵⁰ (Emphasis added)

Article 14(1) avers the general guarantee of the accused to receive a fair trial, which is to have his case heard by a competent, independent and impartial tribunal established by law.

The phrase “*equality before the law*”⁵¹ in *Article 14 (1)* needs a little explanation. It is a guarantee that the judges and judicial officers should apply the law without discrimination.⁵² The law itself should not be discriminatory in that it should be applicable to all accused, regardless of their status.⁵³ This would therefore mean that immunity from prosecution on grounds such as Head of State is incompatible with *Article 14(1)*.⁵⁴

⁴⁷ *General Comment*, *supra* n.45, Paragraph 13. Joseph, *supra* n.12

⁴⁸ *Ibid* Paragraph 14

⁴⁹ *Article 14* applies to both civil and criminal proceedings. See decision of Human Rights Committee in *Moraal v. France* *supra*, n.15. Joseph, *supra* n.12 409

⁵⁰ See <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>

⁵¹ The *ICCPR* is the only human rights instrument that contains the “*equality before the law*” provision. Nowak *supra* n.43 238

⁵² Joseph *et al*, *supra* n.12, 282

⁵³ Discriminatory application of the law is incompatible with *Article 14*. Joseph *et al*, *ibid*. See the discussion of the Human Rights Committee on this issue. See McGoldrick, *supra* n.15 397

⁵⁴ Joseph *et al*, *supra* n.12, 395. The equality provision was also considered to be breached in a case where the prosecution was able to appeal against a decision whilst the defendant was not availed of the same right. *Weiss v Austria* (1086/02). Joseph *et al*, *ibid*

Article 14(1) should be read together with *Article 14(3)* of the ICCPR. The sub-section sets out in detail the rights of the accused to a fair trial in criminal proceedings. Its structure is fairly complex and includes a variety of independent and complementary component rights.⁵⁵ These are *inter alia*, the right to be informed promptly and in detail and in a language that the accused understands the nature of the charge that he faces and the reasons therein,⁵⁶ to be tried without undue delay,⁵⁷ to be defended by himself or by his legal counsel, to receive legal aid⁵⁸ and so forth. These rights are specific and minimum guarantees, the observance of which is expected at the very least of State Parties.⁵⁹ The importance of judicial independence and impartiality is crucial and apparent here – for these rights could only be enjoyed if they are respected by a judiciary that has both these postulates.

The Human Rights Committee⁶⁰ made the following observation of *Article 14(3)*:

*“Paragraph 3 of the article elaborates on the requirements of a “fair hearing” in regard to the determination of criminal charges. However, the requirements of Paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by Paragraph 1.”*⁶¹

The comment by the Human Rights Committee is of relevant application to the right to a fair trial generally. *Article 14(1)* is a general fair trial requirement provision whilst *Article 14(3)* sets out the specific guarantees.⁶² It

⁵⁵ Safferling calls it a “kaleidoscope of rights”. *Supra* n.10, 30. Ultimately the purpose of all these various rights, duties and obligations is to ensure that the trial is fair.

⁵⁶ Article 14(3)(a)

⁵⁷ Article 14(3)(c)

⁵⁸ Article 14(3)(d)

⁵⁹ *General Comment 13/21*, *supra* n.9, Paragraph 4. *Joseph et al, supra*, n.12, 279

⁶⁰ The Human Rights Committee is established pursuant to Article 28 of the ICCPR and is a panel of eighteen human rights experts who are nationals of States Parties. They are elected by a ballot for a four-year term. *Joseph et al, ibid* 16.

⁶¹ *General Comment 13/21 supra* n.9, 144, Paragraph 6. See McGoldrick, *supra* n.15 405.

⁶² See the Separate Opinion of Bertil Wennergren in *Karttunen v Finland* (Communication 387/89) for clarification of the two sections. Also McGoldrick, *ibid* for the discussion by the Human Rights Committee on each and every of the seven provisions of Article 14(3), 405 *et seq*

reiterates the tenet that the specific rights set out in *Article 14(3)* are not exhaustive and that the observance of all the specific rights therein may not necessarily guarantee the accused a fair trial.

Most of the content of the fair trial provisions of *Article 14* of the *ICCPR* are also set out for in the regional human rights instruments. *Article 6* of the *European Convention*⁶³, *Article 8* of the *ACHR* and *Article 7* of the *AfCHR* contain similar content of the minimum guarantees of *Article 14(3)*.

1.3.2 REGIONAL HUMAN RIGHTS INSTRUMENTS

There are several prominent regional human rights instruments. The provisions of these instruments are considered to be binding on States that are members of that particular regional organisation.

Foremost of these instruments is the *European Convention*. Like the *ICCPR*, the *European Convention* provides protection for civil and political rights of individuals and protects the very rights that the *Universal Declaration* was formulated to protect. The *European Convention*⁶⁴ is arguably one of the most developed human rights instruments with a substantial jurisprudence of its provisions.⁶⁵

Article 6 (1) of the *European Convention* states as follows:

*“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”*⁶⁶

⁶³ The English version of the *European Convention* can be accessed at <<http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>>

⁶⁴ 87 UNTS 103. Evans, *supra*, n.36, 43. For a general exposition on the European Convention, see Harris *et al supra* n. 17 1-36 and Rosalyn Higgins *The European Convention on Human Rights* 495 in *2 Human Rights in International Law: Legal and Policy Issues*, Meron (Ed) (Oxford: Clarendon Press, 1994).

⁶⁵ Colin Warbrick *International Criminal Courts and Fair Trial* (1998) 3 JACL 45, 47

⁶⁶ Evans, *supra*, n.36, 44. For a detailed discussion on Article 6, see Harris *et al supra* n.17202.

The right to a fair trial is a paramount right in the *European Convention*. Not only has *Article 6* attracted a great volume of applications, the jurisprudence of the European Court of Human Rights (“European Court”) on fair trial rights is ample and comprehensive. The *European Convention* as well as the decisions of the European Court have been referred to in different contexts at the International Tribunals.⁶⁷

Other regional instruments that contain similar provisions are the *American Declaration of the Rights and Duties of Man*,⁶⁸ the *American Convention of Human Rights 1969*,⁶⁹ and the *African (Banjul) Charter on Human and People’s Rights 1981*.⁷⁰

Articles XVIII and XXVI of the *American Declaration of the Rights and Duties of Man* read together assure the accused of the right to a fair trial and to due process of the law. *Article XXXVI* in particular states that an accused person has the right to an impartial hearing. Like the *Universal Declaration*, the *American Declaration* is declaratory and was not intended to be legally binding.⁷¹ However, the principles in this instrument have been cemented and elaborated in the *ACHR*.

⁶⁷ See for example the approach of the Trial Chamber in its *Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed “B” Through To “M”, The Prosecutor v Delalic* Case No. IT-96-21-T, Paragraph 27.

Available at <<http://www.un.org/icty/celebici/trialc2/decision-e/70428PM2.htm>> It is also arguable whether such decisions were applied because the judges of the ICTY considered the jurisprudence of the European Court illuminating or because many of them were from Member States of the European Union. Whilst they did not consider these decisions binding, which is the right approach, the decisions were used as highly-persuasive authority for the legal principles that they were espousing. However, judges in the same panel have adopted contradictory approaches to the same legal issue that is being argued before them by interpreting differently the same decision of the European Court. See the *Tadic (Protective Measures) Decision infran*.¹¹¹ this Chapter. It is also interesting to note that some of the judges came from countries who are neither State Parties to the ICCPR nor to any regional instrument on human rights, e.g Malaysia and Pakistan.

⁶⁸ 9 ILM 673 (1970)

⁶⁹ Evans, *supra*, n.36 141

⁷⁰ 21 ILM 58 (1982), also reprinted in Evans, *supra*, n.36, 200. The Charter was promulgated in 1981 and entered into force in 1986. 53 States have ratified the Charter. Available at the official website: <<http://www.africa-union.org/>>

⁷¹ Scott Davidson *The Civil and Political Rights Protected in the Inter-American Human Rights System* in David Harris and Stephen Livingstone in *The Inter-American System of Human Rights* (Oxford: Clarendon, 1998) 213

The *ACHR*⁷² took cognisance of the principles set forth in the *Universal Declaration* and the *American Declaration*. It also dealt primarily with civil and political rights. *Article 1* of the *ACHR* imposes a duty on the State Parties to ensure that the Charter rights are respected and that all persons under their jurisdiction are entitled to full and free exercise of those rights, including the right of the accused to a fair trial.⁷³ *Article 8* is the equivalent provision to *Article 6* of *European Convention* and relates to fair trial.⁷⁴ In a decision against Argentina, the Inter-American Commission on Human Rights held that *Article 8* is a fundamental right in the *ACHR* and the enforcement of the principles of judicial guarantees in *Article 8* cannot be confined to a mere formal verification of procedural requirements. The requirements of the fair trial provision must actually be exercised and met.⁷⁵

Article 1 of the *AfCHR* creates a primary duty on State Parties to recognise and give effect to the rights under the Charter, including the right to a fair trial under *Article 7(1)*. *Article 7 (1)* contains very few fair trial rights and has been criticised as inadequate, although it does include the right to be tried within a reasonable time by an impartial tribunal.⁷⁶

A lesser-known regional human rights instrument is the *Arab Charter on Human Rights, 1994*.⁷⁷ *Article 7* of the *Arab Charter* states merely that:

“The accused shall be presumed innocent until proved guilty at a lawful trial in which he has enjoyed the guarantees necessary for his defence”.⁷⁸ It does not

⁷² Evans, *supra*, n.36, 141. The American Convention was adopted on 22nd of November 1969 and came into force on 18th July 1978. It has 25 state parties. Available at the official website: < <http://www.oas.org>.>

⁷³ See the Preamble to the Convention

⁷⁴ Scott Davidson: *The Inter-American Human Rights System* (Aldershot; Dartmouth Publishing Co, 1997), 290

⁷⁵ *Case 9850 (Argentina)* Inter-American Commission on Human Rights, 1990-1991 Annual Report, Paragraph 4.

⁷⁶ Christof Henys *Civil and Political Rights in the African Charter* in Malcolm Evans and Murray *The African Charter on Human Rights* (Cambridge; Cambridge University Press, 2002) 137, 145

⁷⁷ Available at <www.1.umn.edu/humanrts/instree/arabhrcharter.html>

contain any detailed provisions as to what these necessary guarantees are and the provision “*which he has enjoyed*” is vague and imprecise.

There are however two main instruments from the Arab region that should be considered together with *Article 7* as these elaborate and elucidate *Article 7*. The first is the *Beirut Declaration of Justice of 1999*.⁷⁹ Although the *Beirut Declaration* does not make any reference to the Arab Charter, the intentions of both these instruments are similar – the upholding of the due process of law by respecting the right of the accused to a fair trial.

The *Declaration* was signed by representatives from 13 States in the Arab region and contain provisions relating to the right of the accused to a fair trial⁸⁰ including specific provisions relating to the independence and impartiality of the judiciary.⁸¹ The second relevant instrument is the *Cairo Declaration of Independence of Justice 2003* reaffirmed the principles of *Beirut Declaration* although it did not make any specific reference to fair trial.⁸²

⁷⁸ Reprinted 18 Hum.Rts L.J. 151(1997). However, almost every constitution in the Arab region guarantees judicial independence. For example, Article 65 of the Egyptian Constitution provides “*The independence and immunity of the judiciary are two basic guarantees to safeguard rights and liberties*”. See *The Importance of Judicial Independence* Remarks by Sandra Day O’Connor, Associate Justice, Supreme Court of the United States before the Arab Judicial Forum, Manama, Bahrain, Sept 15th 2003, available at

⁷⁹ Available at <<http://www.pogar.org/activities/justice/beirut.pdf>>

⁸⁰ Articles 22-30. *Ibid*

⁸¹ Articles 1-22 *ibid*

⁸² See

<http://www.abanet.org/rol/docs/judicial_reform_cairo_declaration_judicial_independence_2003_english.pdf>

1.4 THE RIGHT TO FAIR TRIAL: ITS SIGNIFICANCE AT THE INTERNATIONAL CRIMINAL TRIBUNALS

Amongst the very many duties that is entrusted to the International Tribunals is the role of the watchdog of protection of fundamental rights.⁸³ The question of fair trial and the duty of the International Tribunals to respect and observe the right of the accused is imperative. The heavy mantle on their shoulders of being the first international criminal tribunals since Nuremberg and Tokyo carries with it the task of ensuring that they do not attract similar criticisms that the post-Second World War Tribunals did, primarily that of not according the accused the full might of the right to a fair trial.⁸⁴

It has been averred by the Secretary-General and legal commentators that an international tribunal such as the ICTY, which is charged with the prosecution and punishment of individuals guilty for the commission of the most heinous crimes, must *scrupulously* (emphasis added) observe the rights of the accused.⁸⁵ There is an expectation that the international tribunals should aspire to the highest standards set by international human rights treaties, customary international law and general principles of law.⁸⁶ The legitimacy of the International Tribunals would face a barrage of criticisms⁸⁷ if those individuals found guilty are not afforded *full* fair trial guarantees to the extent

⁸³Sara Stapleton *Ensuring Fair Trial at the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation* (1998-1999) 35 N.Y.U. J Int'l L & Politics 535

⁸⁴ 1 Morris & Scharf *supra* Prologue n.2, 9.

⁸⁵ See for example, James Sloan: *The International Criminal Tribunal for the former Yugoslavia and Fair Trial Rights: A Closer Look* (1996) 10 LJIL 479 and Antonio Cassese *Opinion: The International Criminal Tribunal for the former Yugoslavia* (1997) 5 EHRLR 329, 300. Cf Warbrick, *supra* n.65 where it is argued that the international human rights standard of fair trial should be "fair enough" rather than "aspiring to an exemplary or superior level of "fairest of all". 54,55

⁸⁶ Jacob Katz Cogan *International Criminal Courts and Fair Trials: Difficulties and Prospects* (2002) 27 Yale LJIL 111, 117. See also decision of the Trial Chamber in *the Prosecutor v Slobodan Milosevic* Case No. 99-IT-37-PT *Decision on Preliminary Motions (Kosovo)* dated 8th November 2001, Paragraph 38. The Court referred to **Art 9** of the **ICCPR** which allows a detained individual to apply for *habeas corpus*. Although there is no similar provision in the Statute of the ICTY, the Trial Chamber held that the spirit of that Article is applicable to the Tribunal as it is one of the fundamental rights of an accused person under customary international law.

Available at < <http://www.un.org/icty/milosevic/trialc/decision-e/1110873516829.htm>>

⁸⁷Such criticisms have already emerged. See for example the criticisms and comments on the decision of the Trial Chamber of the ICTY in *Tadic (Protective Measures)* discussed in detail in Section 1.3.1.b of this Chapter.

that the trials are unfair or perceived to be unfair. The onus on the International Tribunals to ensure that the accused receives a fair trial is more stringent than the national courts. Being pioneers of international criminal judicial institutions set up by exceptional methods in exceptional circumstances, the Tribunals need to show that they are as effective, if not more, than national judicial institutions. States who have had their sovereign power over their national legal proceedings circumscribed in favour of international legal proceedings at the Tribunals have an expectation that the International Tribunals comply with international standards of fair trial.⁸⁸ Further, the accused before an international criminal tribunal is there because he is charged with the most heinous and egregious of crimes. The onus on the International Tribunals to ensure fair trial for him is weighty.

That fair trial standards are applicable to international criminal proceedings was not an issue that evoked debate at the preparatory stages to the *Report of the Secretary-General*. The complexities arise when identifying what those standards are, the sources of the standards and whether *those* standards from *those* sources are applicable to the International Tribunals. Which human right instrument should they give prominence to? The *European Convention* or the *ACHR*?

Thus, the issue of the degree of significance that the International Tribunals should attribute to those standards is also important. Should or would they consider themselves bound to apply the fair trial provisions of the United Nations instruments? Or are they highly-persuasive only and could be circumvented by the International Tribunals to fit the functional purpose and proceedings of the Tribunals, which are significantly different in many aspects from the purpose and proceedings of national courts? The difficulty is

⁸⁸ Cogan, *supra* n.86115. “There is an expectation for extraordinary trial procedures, at least from the perspective of domestic legal norms.” [to be applied at the international tribunals] Also since the International Tribunals are Chapter VII creations, States are bound to give preference and priority to them.

that there has been no procedural application of fair trial proceedings at an international forum which could be of instructive significance to the Tribunals. The precedential value of international fair trial rights of Nuremberg and Tokyo are limited since first, the rights were rudimentary and secondly, international human rights have developed to a vast and sophisticated corpus of legal principles since 1945.⁸⁹ Whatever standards the International Tribunals choose to apply to the proceedings before them, it is submitted that those standards applied should not be what the Tribunals perceive them to be, but rather objective standards which would lead to the satisfied observation amongst the accused, his counsel and legal commentators alike that the accused did have the benefit of a fair trial.⁹⁰ It is unfortunate that the International Tribunals have not delivered decisions to the satisfaction of the international community vis-à-vis the fair trial rights generally, and *Article 14* of the *ICCPR* in particular. This is even more perplexing in light of the averments in the *Report of the Secretary-General*. The particular paragraph that is of relevance is *Paragraph 106* which stated as follows:

*“It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of the proceedings. In the view of the Secretary-General, such internationally recognised standards, are in particular, mentioned in article 14 of the International Covenant on Civil and Political Rights.”*⁹¹ (emphasis added)

The very tenor of *Paragraph 106* connotes an obligation on the Tribunals to observe the fair trial rights of the accused and in particular, the provisions of

⁸⁹ Warbrick *supra* n.65 46, 47.

⁹⁰ Analogous to the opinion of the defence counsel of the accused at Nuremberg that their clients, did overall, receive a fair trial. *supra* Prologue n.14

⁹¹ *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808(1993) S/25704*, 3 May 1993 and Corrigendum S/25704/Corr.1, 30 July 1993 reprinted in 2 Virginia Morris & Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia*, (Irvington-on-Hudson, NY: Transnational Publishers, 1995) 3-38 and D. Shraga and R. Zacklin, *The International Criminal Tribunal for the former Yugoslavia* (1994) 5 EJIL 360, 362-380. It was accepted that the ICC would follow the same premise as the International Tribunals. Warbrick *supra* n.65 46

*Article 14.*⁹² *Paragraph 106* suggests that the Tribunals must conform to *Article 14* at the very least and that they should aspire for higher fair trial standards than the minimum content of *Article 14.*⁹³

Prima facie, the obligation of the International Tribunals is similar to that of State Parties to the *ICCPR* and their national courts, that being the obligation to observe standards nothing less than the minimum guarantees of *Article 14*. Therefore, the International Tribunals are bound to observe standards greater than those that are contained in *Article 14*. However, whether this was the actual practice at the International Tribunals is another matter altogether, as was observed at the proceedings of the first case before the *ICTY*.

⁹² Whether a directive of the Secretary-General is binding on a judicial organ is another matter altogether. The Secretary-General is the head of the Secretariat of the United Nations which is the executive organ and the Tribunal is the subsidiary organ of the Security Council, which is a principal organ of the United Nations. See the discussion of the Appeals Chamber of the Special Court for Sierra Leone on the position of the Secretary-General in the United Nations in the *Prosecutor v Sam Hinga Norman (SCSL-2004-14-AR72(E), Decision on the Constitutionality and Lack of Jurisdiction* dated 13th March 2004, 64. Available at:

<<http://www.sc-sl.org/Documents/SCSL-04-15-PT-059-I.pdf>> However, since the Report was accepted by the Security Council *in toto*, the presumption would be that the International Tribunals would give importance to the observations in the Report. There is also the perception that the Security Council, being the creator of the International Tribunals would have expected nothing less from the Tribunals vis-à-vis their treatment of the rights of the accused. Adherence to the United Nations texts on the right to a fair trial would be one of them.

⁹³ Sloan, *supra*, n.85 481

1.4.1 THE PROSECUTOR v DUSKO TADIC⁹⁴

Tadic has the dubious distinction of being the first person charged with and convicted of serious violations of international humanitarian law since the accused at Nuremberg and Tokyo. More importantly, the case of *the Prosecutor v Tadic* is significant, for the case has churned out decisions on many legal principles,⁹⁵ relating to both procedural and substantive matters and applicable in an international criminal setting. Not all of the decisions of the Tribunals however have been unanimously welcomed or accepted by legal commentators.

There are several decisions arising from Tadic that are relevant to the discussion at hand. The first decision, a substantive issue, relates to an application by the accused challenging the jurisdiction of the ICTY ("*Tadic Jurisdiction*"). The significance of this Decision is remarkable, for it discusses

⁹⁴Available at <<http://www.un.org/icty/ind-e.htm>>. There is a vast body of literature on Tadic's case. These include but not limited to Natasha A. Affolder, *Tadic, The Anonymous Witness and the Sources of International Procedural Law* (1998) 19 Michigan J. Int'l L. 445, George H. Aldrich: *Jurisdiction of the International Criminal Tribunal for Yugoslavia* (1996) 90 AJIL64. Jose E. Alvarez *The Likely Legacies of Tadic* (1997) 3 ILSA J. Int'l & Comp. L. 358, Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgement* (1998) 96 Michigan L. Rev. 2031, Jose E. Alvarez *Nuremberg Revisited: The Tadic Case* (1996) 7 EJIL 245, Dorothea Beane, *After the Tadic War Crimes Trial* (1997) 27 Stetson L. Rev. 589, Raymond M. Brown, *A fronte praecipitium a tergo lupi* (1997) 3 ILSA J. Int'l & Comp. L. 597, Kitty Felde et al., *The Prosecutor v. Dusko Tadic* (1998) 13 American U. Int'l L. Rev. 1441, Paul Hoffmann, *The Dusan Tadic Trial and Due Process Issues* (1997) 19 Whittier L. Rev. 313, Michael P. Scharf, *The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Tribunal since Nuremberg* (1997) 60 Albany L. Rev. 861, Deborah L. Ungar, *The Tadic War Crimes Trial: The First Criminal Conviction since Nuremberg Exposes the Need for a Permanent War Crimes Tribunal* (1999) 20 Whittier L. Rev. 677, Colin Warbrick & Peter Rowe: *The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber On the Interlocutory Appeal on Jurisdiction in the Tadic Case* (1996) 45 ICLQ 691. Geoffrey R. Watson, *The Humanitarian Law of the Yugoslavia War Crimes Tribunal* (1996), 36 Va. J. Int'l L. 687), Mark S. Zaid, *Trial of the Century?* (1997) 3 ILSA J. Int'l & Comp. L. 589. Similar challenges were launched against the International Criminal Tribunal for Rwanda in the case of *the Prosecutor v Joseph Kanyabashi*. Available at <<http://69.94.11.53/default.htm>> under *Cases*. In the *Decision on the Defence Motion on Jurisdiction* dated the 18th July 1997, the Trial Chamber dismissed the challenges by the defendant on its jurisdiction. There was no appeal against that decision. Virginia Morris *The Prosecutor v Joseph Kanyabashi* (1998) 92 AJIL 66.

⁹⁵ See for example Michal Bohlander *Prosecutor v Dusko Tadic: Waiting to Exhale* (2000) 11 Crim. L. F. 217 where the author discusses other decisions arising from Tadic relating to matters as diverse as factual disputes, equality of arms, factual disputes, "protected persons" under *Article 2* of the *Statute of the ICTY*, accomplices and common purpose under *Article 7* and other issues. Tadic is also significant for it produced decisions on contempt of court matters in international criminal courts. The power to charge counsel for contempt that arose in *Tadic* is a novel issue that has attracted commentaries and discussions. By the same author, *International Criminal Tribunals and their Power to Punish Contempt and False Testimony* (2001) 12:1 Crim L.F.

many issues relating to the constitutionality and legitimacy of the Tribunal, including its establishment. The issue that is of particular relevance here is the pronouncement of the Tribunal on its duty to respect and observe the right of the accused to a fair trial. The second decision relates to the procedural law of the Tribunal and arose out of an interlocutory application made by the Prosecution for protective measures in the form of confidential and anonymity orders for the witnesses in the trial proceedings against the accused ("*Protective Measures Decision*"). The *Protective Measures Decision* is of particular significance for it relates to the right of the accused to a fair trial vis-à-vis the interests of the victims and witnesses. An analysis is then embarked on a reconciliation between the two decisions and queries whether the International Tribunal has adhered to its duty as a court in upholding and respecting the right of the accused to a fair trial. It should be noted that whilst the decision of the Trial Chamber on the jurisdiction issue was appealed, the decision of the Trial Chamber on the protective measures was not.⁹⁶

THE FACTS IN BRIEF:

Dusko Tadic, a Bosnian Serb, was charged with gross violations of international humanitarian law including grave breaches of the *1949 Geneva Conventions* under *Article 2*, violations of laws and customs of war under *Article 3* and crimes against humanity under *Article 5* of the *Statute of the ICTY*.⁹⁷

⁹⁶This could perhaps be attributed to Rule 72(B) of the Rules of Practice and Procedure of the Tribunal which stated, as at 2nd of October 1995 that : "*The Trial Chamber shall dispose of preliminary motions in limine litis and without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction.*"Rule 72(B) as at 1st February 2008 is more detailed. See <<http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev41eb.pdf>> Also Cogan,*supra* n. 86 484

⁹⁷ Tadic was charged with 34 offences. Paragraphs 36-51 of Opinion and Judgement of the Trial Chamber dated the 7th May 1999. The judgement can be accessed at < <http://www.un.org/icty/tadic/trialc2/judgement/index.htm>>

1.4.1.a THE JURISDICTION DECISION⁹⁸

By an interlocutory motion filed through his counsel, Tadic challenged the jurisdiction of the Tribunal. It was a three-pronged challenge, aimed at the very foundation of the Tribunal as well as its subject-matter jurisdiction. These were pigeon-holed as the illegal foundation or unlawful establishment of the Tribunal, the wrongful primacy over national courts and finally the lack *ratione materiae* or subject-matter jurisdiction.

Tadic's first ground of challenge is an issue that is germane to the issue of independence and competence of the Tribunal.⁹⁹ He contended that the establishment of the Tribunal was invalid as it was contrary to the general principle that courts must be "*established by law*".¹⁰⁰ Tadic's argument basically centred on the premise that the Tribunal was not established by law since it was created by Security Council and that such creation was *ultra vires* its powers.¹⁰¹

The Tribunal held that "*established by law*" connotes different interpretations and the interpretation relied on by Tadic¹⁰², contained in the international and regional human rights instruments applied to national courts and not international courts.¹⁰³ The Appeals Chamber held that the interpretation of the phrase "*established by law*" as established by a legislature could not apply

⁹⁸ See Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Decision of the Appeals Chamber dated 2nd October 1995 available at <<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>> ("Appeal Decision") Unless otherwise stated, the Decision referred to in the discussion hereinafter is that of the Appeals Chamber. The Decision of the Trial Chamber may be referred to whenever it is deemed necessary and shall be acknowledged thus.

⁹⁹ Another issue relating to this case but which emerged at the appellate proceedings is the Tribunal's competence to decide on its own establishment. This issue is dealt with in the chapter relating to judicial impartiality.

¹⁰⁰ **Article 14** provides for this characteristic of a court but there is no equivalent provision in **Article 21** of the Statute of the ICTY.

¹⁰¹ *For the Defence it is said that it is a basic human right of an accused to have a fair and public hearing by a competent, independent and impartial tribunal established by law.* Decision of the Trial Chamber *supra* n.97 Paragraph 8.

¹⁰² Tadic referred to *Articles 14, 6 and 8 of the ICCPR, European Convention and ACHR* respectively. *Appeal Decision supra* n.98 Paragraph 41.

¹⁰³ *Appeal Decision ibid* Paragraph 42

to international courts as there is no doctrine of separation of powers and the three arms of Government as traditionally understood in national law.¹⁰⁴ Therefore, the proper interpretation of “*established by law*” with regards to Tribunal is whether it was established *in accordance with the rule of law*.¹⁰⁵ (Emphasis added). This means that the establishment must be in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.¹⁰⁶

The Appeals Chamber agreed with the Trial Chamber in this regard, that the important consideration, when weighing the question of “*established by law*” was not whether it was “*pre-established*” or established for a specific situation or purpose, but whether it was established by a competent organ in accordance with the relevant legal procedures and that whether it has observe the requirements international standards of fair trial guarantees and the requirements of procedural fairness.¹⁰⁷ The Appeals Chambers further averred that the provisions of the Statute of the Tribunal relating to fair trial guarantees in *Article 21*, supplemented by its Rules of Evidence and Procedure demonstrated that such requirements of procedural fairness have been fulfilled by the Tribunal and is therefore established by law.¹⁰⁸ This ground of challenge was dismissed by the Trial Chamber and Tadic’s appeal to the Appeals Chamber also failed.

Thus the phrase “*established by law*” was interpreted by the judges to mean a court that which has an onus to “*.... provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments*” as opposed to established by a legislature as

¹⁰⁴ See also Colin Warbrick *The United Nations System: A Place for Criminal Courts?* (1995) 5 *Transnational Law & Contemporary Problems* 237

¹⁰⁵ *Appeal Decision, supra* n.98 Paragraph 43

¹⁰⁶ *Ibid*, Paragraph 45

¹⁰⁷ *Ibid*.

¹⁰⁸ *Appeal Decision supra* n.98 Paragraphs 46 and 47

conventionally accepted and practised in national legal systems. This *dictum* presents a compelling impression that the Tribunal is under a mandatory duty to ensure a fair trial by applying standards which has to conform to the international human rights instruments.¹⁰⁹

The International Tribunal seemed to be mindful of this duty when the Appeal Chambers said in the *Tadic (Jurisdiction)* decision:

*“An examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law. The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute. Other fair trial guarantees appear in the Statute and the Rules of Procedure and Evidence.”*¹¹⁰

The initial approach of the International Tribunal towards this essential issue did not live up to what was pronounced with judicial gusto in the above paragraph. Subsequent dicta of the Tribunal led legal commentators to believe that the Tribunal had failed to live up to its responsibilities in upholding the provisions of either *Article 14* of the *ICCPR* or *Article 21* of the Statute. If the above paragraph was accepted verbatim, it would appear, that following the controversial decision in the *Protective Measures* application, that the ICTY was not established in accordance with the rule of law!

¹⁰⁹The Trial Chamber described the ICTY as *a structure appropriate to the conduct of fair trials.*” *Tadic Jurisdiction* Trial Chamber Decision dated 10th August 1995, Paragraph 8. Accessible at <<http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm>>

¹¹⁰*Appeal Decision, supran.*98, Paragraph 46. See also the decision of the Appeals Chamber of the ICTR in Jean-Paul Barayagwiza *Case No: ICTR-97-19-AR72. Decision* dated 3rd November 1999. Judicial Supplement No.9, November 1999 Paragraph 40 where the Appeals Chamber observed that the *Report of the Secretary-General* had identified sources of law for the Tribunal and that the *ICCPR* is part of general international law and is applied on that basis. Regional human rights instruments such as the *European Convention* and the *ACHR* are persuasive and may be of assistance in applying and interpreting the ICTR’s applicable law. Although they are not binding on the Tribunal, they are authoritative as evidence of international custom.

1.4.1.b THE PROTECTIVE MEASURES DECISION (“*Tadic (Protective Measures) Decision*”)¹¹¹

Proof that a court is independent and impartial is best gleaned from the appraisal as to whether the court and by extension, its members uphold the fair trial rights of the accused. The Trial Chamber was put to test in this regard when it had to rule on a motion filed by the Prosecutor requesting protective measures for its witnesses. Before discussing the proceedings and judgment, it would be helpful if the relevant statutory provisions are highlighted.

Article 20 of the Statute of the ICTY,¹¹² which relates to the commencement of the trial and the conduct of its proceedings, contains a fair trial provision with a limited effect. This itself shows that *Article 20* is not an unequivocal declaration of the duty and responsibility of the Trial Chamber to protect the right of the accused to a fair trial. Sub-article (1) states as follows:

“The Trial Chamber shall ensure that a trial is fair and expeditious and that the proceedings are conducted in full accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” (Emphasis added)

The dichotomy between the rights of the accused and due regard for the protection of victims and witnesses is unique to the proceedings of the Tribunals. Nowhere in any of the international and human rights instruments

¹¹¹*Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses in The Prosecutor v Dusko Tadic* Case No: IT-94-1 “*Tadic (Protective Measures)*” Paragraph 36. Available at <<http://www.un.org/icty/tadic/trialc2/decision-e/100895pm.htm>>

¹¹² The Judges have drafted Rules which are wider than the Statute and contain more fair trial provisions, such as respect for the privilege against self-incrimination and the prohibition of coerced confessions, the right to be questioned in the presence of his counsel after being informed of his right to remain silent and the right to be warned of the possible use of any incriminating evidence against him. 1 Morris & Scharf *supra* Prologue, n.2 223-227. Warbrick, *supra* n.65, 48

is there any mention of a qualification to the right of the accused to a fair trial in this manner.

Article 20 should be read together with *Article 21* which is the fair trial provision. *Article 21(4)* repeats almost verbatim the seven specific fair trial rights of *Article 14(3)*.¹¹³ *Article 21(3)* contains minimum guarantees of fair trial, and applying the general principle of minimum guarantees, the fair trial standards of this provision is not exhaustive. The main difference is that *Article 21*, is subject to a limitation which is not included in *Article 14*. The limitation contained in *Article 20 (1)* is repeated in *Article 22(1)*. *Article 21(2)* states that:

In determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute. (Emphasis added)

Article 22:

*“The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but not shall not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity.”*¹¹⁴

The measures to be taken by the Tribunal are presumably left to its discretion. *Article 22* does not list those measures except setting out examples of some of the measures that the Tribunal may take such as holding the proceedings *in camera* and protecting the victim’s identity.

¹¹³The seven rights include, *inter alia*, to be informed promptly and in detail the charge against him, to have adequate time and facilities for the preparation of his defence, to be tried without undue delay, to be tried in his presence, to be legally represented and legally-aided and to examine, or have examined, the witnesses against him.

¹¹⁴Note also Paragraph 108 of the *Report of the Secretary-General* which observed that it is necessary for the International Tribunal to provide protective measures for victims and witnesses. *Protective Measures Decision, supra* n.111 Paragraph 36.

Both *Articles 21* and *22* show conflicting interests. One is a qualified Article that purportedly ensures that the accused enjoys fair trial rights subject to the interests of victims and witnesses which are protected by the other. The following discussion shows how the Trial Chamber dealt with this “conflict”.

Briefly, the Prosecutor in *Tadic* filed an interlocutory procedural motion requesting protective measures for witnesses for the prosecution. The protective measures requested for were, *inter alia* confidentiality and anonymity measures¹¹⁵ in the form of withholding of the identities of some of the witnesses from the public and the media, the withholding of identities of witnesses from the accused and his counsel and certain parts of the hearing to be held in closed session.¹¹⁶ The *Decision on the Prosecutor’s Motion for Protective Measures for Victims and Witnesses*¹¹⁷ attracted much comment as it discussed several vital issues relating to fair trial rights at the International Tribunals. Amongst these were sources of law for those rights and the relationship between the *ICCPR* and the *ICTY*, in particular whether the Trial Chamber was bound by the international standards of fair trial as contained in that international instrument. Further, the Tribunal had to consider, in the event of a conflict between the fair trial right of the accused and the interests of victims and witnesses, which should prevail and the factors that need to be taken into consideration in deciding the issue. The Tribunal was faced with the task of reconciling of these two opposite interests.

¹¹⁵ Confidentiality measures are those which involves non-disclosure to the public whereas anonymity measures relate to non-disclosure of any particulars of the witnesses against him, including identities and addresses, not just to the accused but in some cases, to his counsel . Vincent Creta *The Search for Justice In The Former Yugoslavia And Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia* (1997-1998) 20 *Hous JIL* 381, 395

¹¹⁶ *Tadic (Protective Measures)* *supra* n.111, Paragraph 3.

¹¹⁷ There was no appeal against the decision of the Trial Chamber as an appeal on a preliminary motion is not allowed under Rule 72(B) unless such appeal is based on a question of jurisdiction. The Rules were subsequently amended in 1996 to allow appeals on interlocutory matters where the Trial Chamber had certified that matter could be appealed on. The *Tadic (Witness) Decision* was issued on 10th August 1995. See also Monroe Leigh *The Yugoslav Tribunal: The Use of Unnamed Witnesses* (1996) 90 *AJIL* 235

The arguments put forward by the defence in resisting some of the requests of the Prosecutor are quite relevant in the context of the fair trial rights of the accused at the International Tribunals. The defence averred that the right to a fair trial as envisaged by *Article 20* invoked certain minimum standards which could only be understood by reference to jurisprudence from other judicial organs from other jurisdictions, in particular, the *European Court*.¹¹⁸ This approach was relevant as the Statute was silent on these non-specific rights. As one of the minimum standards is the right of the accused to cross-examine the witnesses against him, the effect of the granting of the requests by the Prosecutor would have circumvented that fair trial standard.¹¹⁹ The measures requested were against the notion of the right of the accused to the fair trial as guaranteed by *Article 14* of the *ICCPR* and *Articles 20* and *21* of the Statute. It was argued further that the International Tribunal was bound by international standards, as provided for by the *ICCPR*.

The Trial Chamber granted some of the confidentiality and anonymity requests by the Prosecutor. The anonymity measures granted included blanket withholding of the identity of the witnesses from both the accused as well as his counsel.¹²⁰

A preliminary but crucial issue relating to the interpretation of fair trial provisions in the Statute was the sources of law applicable to the Tribunals. Of particular importance was the impact, if any, of the *ICCPR* on the *ICTY*. The question was whether the International Tribunal was bound by decisions of other international judicial bodies or whether it could adapt those rulings to suit its own special proceedings.¹²¹ It was this issue that compelled the majority of the Trial Chamber to grant some of the requests made by the

¹¹⁸ Cf the approach of the Trial Chamber in the considering a similar motion by the Prosecutor requesting protective measures in *The Prosecutor v Delalic et al supra* n.67

¹¹⁹ Paragraph 7. *Tadic (Protective Measures) Decision supra* n.111. Sloan, *supra* n.85 484, 485

¹²⁰ Rules 69 and 75 of the Rules of Procedure and Evidence of the *ICTY* read together allow the prosecution to withhold identities of certain witnesses.

¹²¹ *Tadic (Protective Measures) Decision supra* n.111 Paragraph 17

Prosecutor, including the blanket withholding of the identities of some of the witnesses for the Prosecution.

The majority was “troubled” by the lack of guidance from the *Report of the Secretary-General* as to the applicable sources of law in the construction and application of the Statute and the Rules and in particular the relevance of interpretations by international judicial organs of the provisions of the human rights instruments on which the relevant provisions of Statute and the Rules were formulated.¹²² Unlike other pieces of legislation, such as the Statute of the International Court of Justice¹²³ and the Statute of the International Criminal Court,¹²⁴ there are no provisions in the Statutes of the International Tribunals that provide for sources of law for them. In any event, the issue of lack of guidance from the Secretary-General may be vexing but should not be debilitating. There is a certain latitude given to judges generally to apply the law, to do legal research and seek “guidance” from other jurisdictions and jurisprudence.¹²⁵ It is argued that international criminal judges would have had a greater latitude than domestic judges since the sources of law for them are rather limited and uncertain.

Having decided that *Article 14* is indeed relevant to the International Tribunal, the Trial Chamber deliberated on the interpretation of the provisions of the *ICCPR* within the context of the object and the purpose and unique characteristics of the Statute.¹²⁶ The Tribunal is statutorily bound to consider the interests of the victims and witnesses, a consideration not included in *Article 14*. That distinction was the basis for the Trial Chamber’s reasoning that the decisions of the Human Rights Committee were only of limited

¹²²*ibid*

¹²³Article 38 of the Statute of the International Court of Justice

¹²⁴ Article 21 of the Rome Statute of the International Criminal Court.

¹²⁵Under Section 3 of the Civil Law Act 1957 of Malaysia, for example, the judges can refer to English common law and equity and apply such legal principles to domestic situations, where such principles are applicable and relevant to the domestic legal system.

¹²⁶*Ibid* Paragraph 26

relevance to its proceedings.¹²⁷ The Tribunal adopted a teleological approach in interpreting the fair trial right.

The majority concluded that the International Tribunal must interpret its provisions within its own context and determine the balance between the right of the accused to a fair and public trial and the protection of the victims and witnesses. The jurisprudence of the other judicial bodies are relevant when examining concepts such as “fair trial” but the achievement of that balance depends on the context of the legal system, i.e. the international criminal proceedings of the Tribunal, in which the concepts are applied.¹²⁸

The majority decision was paradoxical with accepted meaning of fair trial, in particular, the right of the accused to cross-examine witnesses against him. The judges sought to justify the granting of the anonymity requests by averring that the balance of these two interests is inherent in the notion of “fair trial”, which was taken to mean not only fair treatment to the defendant but also to the prosecution and to the witnesses.¹²⁹ The court found that the fair trial standard under *Article 21(4)* of the right to cross-examine will not be infringed by the anonymity orders. This justification is wholly unacceptable, for fair trial rights do not include “fair treatment to the prosecution and to the witnesses”, and such a proviso is not provided for in any of the international or regional human rights instruments. Extension of that fair trial right, the

¹²⁷*supra* n.111 Paragraph 27. The Trial Chamber viewed its framework, in certain aspects, comparable to a military tribunal to justify its “*limited rights of due process and more lenient rules of evidence*”. Paragraph 28. The judgement to this effect is disconcerting as military tribunals have always had a controversial status where international human rights and in particular, fair trial, is concerned. The Human Rights Committee have stressed the need for military tribunals to apply Article 14 provisions to their proceedings. General Comment 13, *supra* Chapter One, n.9 Paragraph 4. Sloan, *supra* n. 85, 487. Note also McGoldrick *supra* Chapter One n. 15 400.

¹²⁸*Tadic (Protective Measures) Decision*, *supra* n.111, Paragraph 30.

¹²⁹*Ibid* Paragraph 55. The Trial Chamber relied on an obscure decision of a domestic court of Australia. Unfortunately, the Judgement did not elaborate under what circumstances the judge discussed the balancing requirement “inherent” in the fair trial concept. Judge Stephen, in his Dissenting Opinion, construed the Australian decision differently. There the Court held that the *true* names of the witnesses may be withheld. It was not, as the majority of the Trial Chamber stated, authority for blanket anonymity. See *Separate Opinion of Judge Stephen on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses* dated 10th August 1995
Available at <<http://www.un.org/icty/tadic/trialc2/decision-e/50810pmn.htm>>

purpose and intention of which has always been to respect the rights of the accused, to victims and witnesses is an interpretation that was and is not envisaged by any of the human rights instruments.

Judge Stephen's very robust Minority Decision was at odds with his colleagues.¹³⁰ The judge was of the view that the category of anonymity orders in the form requested by the Prosecutor was not a measure contemplated by the Statute since they were likely to substantially disadvantage the defendant.¹³¹ Judge Stephen concluded that the Statute did not authorise measures such as the anonymity orders where this would in real sense affect the rights of the accused under *Article 21*.¹³² The proviso "subject to Article 22" clause in *Article 22* applies only to the "public hearing" antecedent and not to the right to a fair trial.

The decision of Judge Stephen is more relevant to the international criminal proceedings than the decision of the majority. The decision of the majority was drastic and gave preferential consideration to the victims and witnesses at the expense of the accused's fair trial rights.¹³³ What is even more worrying was the Trial Chamber's view that the notion of fair trial meant fair to the prosecution and witnesses. This interpretation does not make sense for the very concept of fair trial was aimed for the protection of the accused, not the prosecution. If this interpretation is applied to national court proceedings, it

¹³⁰ *Separate Opinion of Judge Stephen, supra* n.129

¹³¹ *Ibid*

¹³² *Ibid* (The paragraphs of the Separate Opinion are unnumbered)

¹³³ For a commentary that supported the decision of the Majority, see Y.M.O. Featherstone *The International Criminal Tribunal for the former Yugoslavia: Recent Developments in Witness Protection* (1997) 10 LJIL 197. The article discusses the facts that were the basis of the motion in detail, including the number of witnesses who obtained anonymity orders and confidential orders, the criteria applied by the Trial Chambers for granting such orders and the reasons those orders were sought, e.g some witnesses were participants, other witnesses were chance observers. See also Olivia Swaak-Goldman *The ICTY and the Right to a Fair Trial: A Critique of the Critics* (1997) 10 LJIL 215. But see the view of the then Deputy Prosecutor Graham Blewitt who confessed that he was "personally uncomfortable with the notion of going forward with witnesses whose identities are not disclosed to the accused." Interview with Graham Blewitt, Deputy Prosecutor in the Tadic Trial in The Hague, Netherlands, July 12 1996. Michael Scharf in *The Prosecutor v Dusko Tadic, supra* n.94 871

would be a notion that would be open to abuse by unscrupulous Government machinery. The fair trial doctrine is lost if this interpretation is accepted.

Stephen J summed it up succinctly when he said:

*“Of course, the Statute clearly mandates the protection of victims and witnesses, including protection of their identity. But this is not to say that it mandates unqualified anonymity.”*¹³⁴

It is true that the proceedings of the Tribunal are unique to the extent that measures are needed to be taken for protection of the categories of people aforementioned. However, simple protection of identity would have sufficed, as could be observed from national practice. The Secretary-General’s request that the International Tribunals “fully respect” the rights of the defendant carries a stronger sense of expectation from the International Tribunals than a mere “due regard” to protection of victims and witnesses.¹³⁵ Neither the nature nor the suitability of the protective measures caused the controversy. It was the extent of those measures which were considered far-reaching and contrary to the right of fair trial as envisaged by the international and regional human rights instruments. In fact *Rule 75* of the *Rules of Procedure and Evidence* of the ICTY states that protective measures in the form of privacy and protection of witnesses may be granted, provided that such measures are *consistent with the rights of the accused*. The Tribunal should therefore give prominence to the fair trial rights of the accused, which must be used as the

¹³⁴ *Ibid*

¹³⁵ Monroe Leigh *Witness Anonymity is Inconsistent With Due Process* (1997) 91 AJIL 80. The *Tadic (Witness)* decision sparked a debate between the late Professor Leigh and Professor C. Chinkin. See Leigh in *The Yugoslav Tribunal: The Use of Unnamed Witnesses* (1996) 90 AJIL 235 followed by a reply by Chinkin in *Due Process and Witness Anonymity* (1997) 91 75 and then Leigh again in *Witness Anonymity is Inconsistent With Due Process*, *ibid*. Professor Chinkin submitted an *amicus curiae* brief in support of the Prosecutor’s motion whereby she argues that the nature of the offences committed and the concerns on the welfare of the rape victims/witnesses justify the veil of anonymity for the witnesses. Professor Chinkin also justified the majority decision of the Trial Chamber. Professor Leigh was against the anonymity orders as they were against the due process of law and that the majority had no authority to make the blanket anonymity orders: *Witness Anonymity*, *ibid*, 80. It is submitted that Professor Leigh’s views are more in line with the notion and intention of the right of the accused to a fair trial.

gauging factor in deciding the *extent* of the protective measures for the victims and witnesses. It is a short-sighted approach, as the accused has much more at risk if he was found guilty.¹³⁶

A factual issue that showed a crack in the justification of the Trial Chambers in granting the protective measures to the witnesses as requested by the Prosecutor was the discovery that one of the witnesses was subsequently discovered to be blatantly lying.¹³⁷ When confronted with this fact, he said that he was told by the Government of Bosnia to lie.¹³⁸ Whatever the reason may be, the purpose of the protective measures was defeated. Not only that, it laid bare the unpalatable fact that protective measures could be abused. This clearly showed the disadvantage of not allowing the accused the right to confront witnesses against him. It appeared that the Prosecutor himself discovered the discrepancies and upon further investigations, found that the witness was unreliable and misleading. The Prosecutor was ethical to bring this matter to the attention of the court but an unscrupulous prosecutor could very well hide this fact from the court. The Court in turn would have inadvertently be party to the abuse of the fair trial rights of the accused, thus compromising its independence and impartiality.

Further, by agreeing to grant the measures requested by the Prosecutor, the Court could raise a perception of lack of impartiality, as it would appear that it had favoured one party, the Prosecutor against another, the accused.

¹³⁶ The charges of rape were withdrawn before the full trial of *Tadic* began. Leigh., *Witness Anonymity*, *ibid*, 82, n.10

¹³⁷ See also Featherstone, *supra* n. 133, 195. There are however conflicting reports as to who discovered that Witness L was lying. Certain quarters argue that it was the defence who discovered that the witness was lying. William Walker *The Yugoslavia War Crimes Tribunal: Recent Developments* (1997) Whittier L. Rev 303. In the same volume Paul Hoffman *Dusko Tadic Trial and Due Process Issues* 313, 315

¹³⁸ Some commentators were of the view that the Witness L fiasco was an attempt by certain States to manipulate the ICTY. If this view was indeed proven true, then the vulnerability of the independence of the International Tribunals is exposed. The Tribunals should therefore be careful that they do not become tools of States. Cogan, *supra* n.86 128.

A subsequent Trial Chamber decision on similar issues followed the dissenting opinion of Judge Stephen rather than the majority. In the *Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" Through "M" in The Prosecutor v Delalic et al* Case No. IT-96-21-T dated 28th April 1997, a differently constituted Trial Chamber quoted another Trial Chamber decision with approval:

*"The philosophy which imbues the Statute and the Rules of the Tribunal appears clear: the victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media."*¹³⁹

The Trial Chamber decision reaffirmed the fair trial norm that the accused has the right to confront and cross-examine witnesses against him and that his right must take precedence and the veil of anonymity must be lifted in his favour as it goes against the notion of fair trial. The Trial Chamber was careful to point out that protective measures can be given to victims and witnesses until before trial. Once trial starts, the veil of anonymity will be lifted in favour of the right of the accused to a fair trial.

That is not to say that there will not be or should not be any protection for witnesses and victims. Aside from the relevance of the measures to that particular trial, it is the degree of the measures that should be given significant consideration. The Tribunal would and should ensure that such protection does not flagrantly compromise the fair trial rights of the accused.

¹³⁹ Paragraph 59. Quoting the decision of Trial Chamber in *Decision on the Application of the Prosecution dated 17th October 1996 Requesting Protective Measures for Victims and Witnesses in The Prosecutor v Tihomir Blaskic* (Case No: IT-95-14). The *Delalic (Protective Measures) Decision*, *supra* n.65.

Insofar as the application of law is concerned, notwithstanding the *Protective Measures* decision, the general approach of the International Tribunals towards interpretation of legal principles has been to refer to the practice of national and regional courts when seeking to apply fair trial standards to their proceedings, especially the jurisprudence arising from the *ICCPR* and the *ECHR* which the Tribunal considers as “*authoritative and applicable*”.¹⁴⁰ There is no hard rule but generally the International Tribunals have consistently used this approach when interpreting international fair trial rights.

The *Tadic* Case made an impact in the international law field, at times for the wrong reasons. In one decision, the ICTY stressed the requirement that it must fully respect the right of the accused to a fair trial. In another decision, it stated that such a right is neither unequivocal nor unqualified.¹⁴¹ It seems difficult to reconcile these two decisions. In its defence however, it could be argued that the ICTY found itself in that situation due to the drafting of the statutory provisions. By including provisions relating to the victims and accused, in particular the protective measures, the Tribunal was put in a position where it could not very well ignore the position of the victims and witnesses. The confusion lies in two areas: one, the interpretation of *Article 21*. The Majority took the Article *in toto* and held that the right to fair trial is subject to the interests of victims and witnesses. The dissenting opinion of Stephen J held otherwise, that the “*subject to*” clause in *Article 21* was to be applied to public hearing. Secondly, the granting of blanket anonymity was

¹⁴⁰ *Delalic (Protective Measures)*, *ibid* Paragraph 27. See also the Judgment of the Trial Chamber in the case of *The Prosecutor v Kupreskic*, Case No. IT-95-16-T where the Tribunal held that such practice is necessary since both substantive and procedural criminal laws are at a rudimentary stage in international law. National practice, and presumably by extension, regional practice, may be referred to in order to fill in the *lacunae* of the Statute and customary international law. Paragraphs 537-542. Available at <<http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm>> Cogan *supra* n.86 117. See also the Declaration of Judge Mohammed Shahabuddeen in *The Prosecutor v Anto Furundzija* Case No: IT-95-17/1 on the approach of the International Tribunals to the question of applying hitherto national legal principles to international criminal proceedings. The Declaration envisaged that there may be value in consulting the jurisprudence and practice of other judicial bodies as a guidance to see how a legal principle is applied in the particular circumstances before the Tribunal. Paragraph 258. Available at <<http://www.un.org/icty/furundzija/appeal/judgement/index.htm>>

¹⁴¹ It could perhaps be argued that the latter decision should prevail simply because it was issued by the Appeals Chamber compared to the latter decision which was that of a Trial Chamber.

also repugnant to the right of the accused to cross-examine the witnesses against him. Anonymity such as holding back the true names of the witnesses is acceptable, but it should stop there. Overall therefore, the Majority Decision circumscribed the right of the accused to a fair trial.

The position of the International Tribunals is best summed-up by a former serving Judge of the ICTY:

*".....overly liberal grants of witness protection measures, includingeven pseudonyms, threaten the goals of the Tribunal – accurate historical records of terrible events and fair treatment of the accused war criminals who need to know the identity of witnesses in advance to prepare properly for trial."*¹⁴²

One of the issues that was of interest whilst research was undertaken for this thesis is the nationalities of the judges of the ICTY and whether the State which they are nationals of were parties to the *ICCPR* or any of the regional human rights instruments. The table compiled below identifies the States and also which human rights instrument the country had signed or ratified.

¹⁴² Patricia Wald *Dealing with Witnesses in War Crimes Tribunal: Lessons from the Yugoslav Tribunal* (2002) 5 Yale Hum.Rts & Dev L.J.217

Judges at the ICTY as at 2001

NAME	NATIONALITY	HUMAN RIGHTS INSTRUMENT SIGNED OR RATIFIED BY JUDGE'S STATE ¹⁴³
Abi-Saab Elmahdi	Egypt	Arab Charter on Human Rights; ¹⁴⁴ ICCPR; ¹⁴⁵ AfCHR ¹⁴⁶
Agius	Malta	ICCPR; European Convention ¹⁴⁷
Bennouna Fassi-Fahri	Morocco	Arab Charter on Human Rights; ICCPR
Cassese Pocar	Italy	ICCPR; European Convention
Deschenes	Canada	ICCPR
Hunt Stephen	Australia	ICCPR.
Jorda Le Foyer de Costil ¹⁴⁸	France	ICCPR; European Convention
Karibi-Whyte	Nigeria	ICCPR; AfChR
Kwon	Korea	ICCPR
Li Liu Tieya	China ¹⁴⁹	ICCPR
May	United Kingdom	ICCPR; European Convention
McDonald Meron Wald	United States of America	ICCPR; ACHR
Mumba	Zambia	ICCPR; AfChR
Nieto-Navia ¹⁵⁰	Colombia	ICCPR; ACHR
Odio Benito	Costa Rica	ICCPR; ACHR
Orie	Netherlands	ICCPR; European Convention
Riad	Syria	ICCPR
Robinson	Jamaica	ICCPR; ACHR
Schomburg	Germany	ICCPR; European

¹⁴³ Declarations and reservations were considered as immaterial to this study.

¹⁴⁴ <www1.umn.edu/humanrts/instree/arabhrcharter.html>

¹⁴⁵ <http://www.unhchr.ch/pdf/report.pdf>

¹⁴⁶ <<http://www.africa-union.org/>>

¹⁴⁷ <http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp>

¹⁴⁸ Resigned shortly after the judges convened in The Hague. Antonio Cassese *The ICTY: A Living and Vital Reality* (2004) 2 JCIJ 585

¹⁴⁹ The People's Republic of China signed the ICCPR

¹⁵⁰ Judge Nieto-Navia also served as President and judge of the InterAmerican Court of Human Rights prior to his appointment to the ICTY.

		Convention
Sidhwa	Pakistan	-
Vohrah	Malaysia	-

The table above includes judges who had sat on the *Tadic (Jurisdiction)* decisions, both at the first instance and at the appellate proceedings as well as the *Protective Measures Decision*. Also included in the list are the judges who sat in the Appeals Chamber in the case of the *Prosecutor v Jean-Bosco Barayagwiza*, a case involving the abuse of process doctrine which is discussed in the following chapter.

It can be seen from the table above that all but two judges are nationals of States which are member parties to the *ICCPR* and a regional human rights instrument. Therefore judges come from jurisdictions that should know the importance of adherence to the right of the accused to a fair trial. It appears surreal, for example, that a judge who has to apply the provisions of *Article 14* strictly in his own domestic court, could compromise it at an international setting.

1.5 MISCELLEANOUS ISSUES OF FAIR TRIAL AT THE INTERNATIONAL TRIBUNALS

Concern over the rights of the accused, in particular his fair trial rights have been expressed in relation to the Completion Strategies of the International Tribunals.¹⁵¹ The dissenting opinion of Judge David Hunt in the case of the *Prosecutor v. Nyiramasuhuko et al., Decision re Proceedings Under Rule 15 bis(D), No. ICTR-98-42-A15bis, (Sept. 24, 2003)* raised the issue of the danger of compromising fair trial rights under the pretext of meeting the deadlines imposed by the Completion Strategies.

¹⁵¹ See for example Daryl Mundis *The Judicial Effects Of The "Completion Strategies" On The Ad Hoc International Criminal Tribunals* (2005) 99 AJIL 142. The Completion Strategies are discussed in detail in Chapter 3 in relation to the institutional independence of the International Tribunals.

The judge said:

“.....very proper endorsement by the Security Council "in the strongest terms" of the Completion Strategy of the Yugoslav Tribunal, and its urging of the Rwanda Tribunal to formalise a similar strategy to complete its work within a particular time, should not be interpreted as an encouragement by the Security Council to either Tribunal to conduct its trials so that they would be other than fair trials.”¹⁵²

This misgiving was reiterated by Judge Hunt in an Appeals Chamber decision in another interlocutory motion in *the Prosecutor v Milosevic*¹⁵³ case. In the *Decision on the Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the form of Written Statements*,¹⁵⁴ the majority of the Chamber received a rebuke from the Judge who was of the view that the decision of the majority on the interpretation of application of Rule 92bis was a capitulation to the Completion Strategy.¹⁵⁵

“The Majority Appeals Chamber Decision drives a horse and cart through the previous interpretation of Rule 92bis, and it seriously prejudices the accused in the ways already pointed out. I recently stated, in an appeal from the Rwanda Tribunal,¹⁵⁶ that the very proper endorsement by the Security Council “in the strongest terms” of the Completion Strategy of the Yugoslav Tribunal should not be interpreted as an encouragement by the Security Council to the Tribunal to conduct its trials so that they would be other than fair trials. It is necessary to repeat that statement in the present case in order to apply it directly to the Majority Appeals Chamber Decision.

¹⁵² Paragraph 17. Available at < <http://69.94.11.53/default.htm> >

¹⁵³ *supra* n.86

¹⁵⁴ The appeal was on the application of Rule 92bis (“*Proof of Facts Other than by Oral Evidence*”). Rule 92bis relates to admissibility of written statements of prospective witnesses prior to the witness giving evidence *viva voce*. The Appeals Chamber was asked to consider whether a written statement had to comply with the requirements set out in the Rule if the witness was present in court and was willing to attest to the written statement. The majority in the Appeals Chamber held that in such a case the requirements of Rule 92bis do not apply. Rule 92bis was meant to apply for admissibility of written statement in lieu of oral testimony. The separate opinion of Judge Mohammed Shahabuddeen disagreed with his fellow judge and asserted that the Completion Strategy was not mentioned in the decisions. However, although there was no outright reference to the Completion Strategy, the Chamber did discuss issues such as “*economic management of trials*”. Mundis, *supra* n.140, 161

¹⁵⁵ James Upcher *Politics, Justice and the ICTY* (Book Review) (2005) 10 Deakin L Rev 813

¹⁵⁶ The *Nyiramasuhuko et al* Decision. *supra* n.125

*That Decision unfortunately follows the trend of other recent decisions of the Appeals Chamber which reverse or ignore its previously carefully considered interpretations of the law or of the procedural rules, with a consequential destruction of the rights of the accused enshrined in the Tribunal's Statute and in customary international law. The only reasonable explanation for these decisions appears to be a desire to assist the prosecution to bring the Completion Strategy to a speedy conclusion."*¹⁵⁷

The compromise of the fair trial rights of the accused by the Completion Strategy is a serious matter of concern that should be avoided. The Tribunals have a duty to ensure that the trial management or the Completion Strategy should not impinge the fairness of the trials and due process, invoking the maxim that "*justice hurried is justice buried*" with regrettable implications as to its credibility.

1.6 FAIR TRIAL AT THE INTERNATIONAL CRIMINAL COURT

The judges of the ICC would not be troubled with problematic questions involving fair trial standards like their colleagues at the International Tribunals. *Article 21* of the Rome Statute allows the judges of the ICC a greater flexibility in applying legal principles to the proceedings before them. Besides the Statute and the Rules of Procedure and Evidence, the Court is statutorily authorised to refer to international treaties, national law and decisions as long as these principles and decisions are not inconsistent with the Statute and with international law and internationally recognised norms and standards.¹⁵⁸

Applying this principle to the fair trial right, the ICC will have a wider jurisprudence for guidelines to their own approach to a complex fair trial

¹⁵⁷*Dissenting Opinion of Judge David Hunt on the Admissibility of Evidence in Chief* Oct 21 2003, Paragraph 20. Available at <<http://www.un.org/icty/milosevic/appeal/decision-e/031021.thm>>

¹⁵⁸ International human rights instruments do not offer guidance in the determination of the scope of the fair trial rights. It is the national legal systems that develop the rules and procedures to substantiate the international provisions. Warbrick *supra* n.65, 46, 47

issue when considering *Article 67*.¹⁵⁹ It would be of particular assistance when the Court has to decide on residual rights.

Paragraph 1 of *Article 67*, the chapeau provision contains an amalgam of norms contained in *Article 14 (1)* and *(3)* of the *ICCPR*.¹⁶⁰

Article 67 repeats almost all of the content of *Article 14* of the *ICCPR*.¹⁶¹ The provision has nine fair trial standards specified, the minimum guarantees that must be observed at the ICC. The provision of “*fair hearing*” in *Article 67(1)* allows the accused to go beyond the parameters of the Statute.¹⁶² The residual right to a fair hearing would be useful in filling in the *lacuna* in the more specific fair trial provisions.¹⁶³ Breaches of *Article 67* specific rights may not, on their own, amount to a violation of the provision but a cumulative effect of minor or insignificant breaches may cause a breach of fair trial.¹⁶⁴

1.7 CONCLUSION

The right to a fair trial is crucial to the due process of law. It is applicable to all proceedings, whether civil or criminal, whether at a national judicial forum or an international one. The difference lies in the variety of the standards applied and the degree of application of those standards in these forums. Special attention is required when applying the standards to international criminal courts and tribunals as these institutions exist in an incomplete legal environment.

¹⁵⁹ Article 67 provides several specific fair trial rights to the accused. It reflects the fair trial tenets of the International Tribunals. The fair trial rights are not absolute; they are subject to victims’ and witnesses’ rights.

¹⁶⁰ William A. Schabas : *Article 67: Rights of the Accused* in *Commentary on the Rome Statute of the International Criminal Court* O.Triffterer (Ed) (Baden-Baden; Nomos, 1999) 845. See also Kevin R Gray *Evidence Before the ICC* in McGoldrick *et al supra* n.15, 287, 301

¹⁶¹ Schabas, *ibid*, 845.

¹⁶² *Ibid* 851

¹⁶³ *Ibid* 852

¹⁶⁴ Warbrick, *supra* n.63, 62

Fair trial rights include rights which are minimum guarantees that are set out in the specific fair trial provisions, rights which are not minimum guarantees, which have not been set out in any provisions, but have been crystallised through judgements and rights which are neither specific nor crystallised but fall under the generic “residual” category. In certain cases, the breach of the fair trial rights may vitiate the fairness of a trial, whereas in others, it may not be of sufficient gravity to render the case unfair. The premise is that each case will be decided on its peculiar facts and circumstances when deciding that the trial of the accused was fair and *ergo*, the conviction safe. This is the general practice at national and regional courts as well as the Human Rights Committee.

The obligations on the International Tribunals to conform with the *ICCPR* arise from more of an expectation rather than compulsory binding obligations, even though the *Report of the Secretary-General* has stressed the importance of Article 14 in the context of international criminal proceedings at the Tribunals. Extending the premise of Article 14, a failure to meet any of these guarantees may breach the rights of the accused. The *Protective Measures* Decision was a setback to the notion that the International Tribunals had scrupulously observed at least the international provisions of the international and regional human rights instruments. However, the decisions of other Trial Chambers seem to have corrected the imbalance created by the majority decision. The International Tribunals have reverted to the spirit of Article 21(4)(d) which was to ensure that an accused could cross-examine witnesses against him.

The Trial Chamber in the *Decision on Preliminary Motions (“Kosovo”)*¹⁶⁵ in the case of the Prosecutor v Slobodan Milosevic, for example, referring to Article

¹⁶⁵ *Decision* dated 8th November 2001.

Available at <<http://www.un.org/icty/milosevic/trialc/decision/111087351829>>

9(4) of the ICCPR which affords the accused the right to challenge the validity of his detention, incorporated it into the criminal proceedings before the Tribunals.

The right of the accused to a fair trial at the International Tribunals faces two main difficulties. The first difficulty is the dichotomy between the fair trial rights of the accused and the rights of the victims and the accused. It is a difficult balancing act that the International Tribunals have to deal with but it cannot be refuted that the rights of witnesses and victims are important in a criminal trial of this nature. The Tribunals have taken genuine efforts to ensure the implementation of international human rights in their substantive and procedural laws¹⁶⁶ but the controversy that arose from the *Protective Measures* decision was unsettling especially to the reputation of the ICTY as a prominent international criminal tribunal that is a fierce safeguard of the right of the accused to a fair trial.

The International Tribunals must dispel any perceived impression that its proceedings in reality are more constricted than the Statute provides for and the expectations of the international community. Fair trial rights have been evolved since 1945 and should be improved on, not derogated from.

As the Trial Chamber itself said in the *Protective Measures* Decision,

*The drafters of the Report recognised that ensuring that the proceedings before the International Tribunal were conducted in accordance with international standards of fair trial and due process was important not only to ensure respect for the individual rights of the accused but also to ensure legitimacy of the proceedings and set a standard for proceedings before other ad hoc tribunals or a permanent international criminal court of the future.*¹⁶⁷

¹⁶⁶ Sloan, *supra* n. 85, 501

¹⁶⁷ *Decision supra* n.111 Paragraph 156.

The Tribunals, and by extension, the International Criminal Court, could well be guided by the decisions of the European Court which have declared that the right to a fair trial has a prominent place in a democratic society within the *European Convention* ¹⁶⁸ and that it should not be construed restrictively.¹⁶⁹ The fair trial standards that the International Tribunals should apply should be as good as those applied at national proceedings. Otherwise the primacy of the International Tribunals over national courts would have served no purpose whatsoever when the practice of the Tribunals would not have measured up to the standards in national courts.

Indeed, it appears that the ICTY has now adopted a more sensible and practical approach in identifying fair trial standards.

The divergent approaches to the interpretation of fair trial rights as demonstrated by the Majority decision and the decision of Stephen J in the *Tadic (Protective Measures)* decision have been resolved in the decisions of the Trial Chamber in the *Delalic* and *Kupreskic*. The *Delalic* decision is illuminating in particular, where the Trial Chamber said:

*“Similarly, decisions on the provisions of the International Covenant on Civil and Political Rights ("ICCPR") and the European Convention on Human Rights ("ECHR") have been found to be authoritative and applicable. This approach is consistent with the view of the Secretary-General that many of the provisions in the Statute are formulations based upon provisions found in existing international Instruments (See paragraph 17 of the Report).”*¹⁷⁰

The approach of the *ICTY* as advocated in this case was to look at the practice of national courts and regional human rights as a starting-point in

¹⁶⁸*De Cubber v Belgium* (1984) A 189 Paragraph 66. Harris *et al supra* n.12, 164

¹⁶⁹*Delcourt v Belgium*.(2685/65) [1970] ECHR 1Harris *et al supra* n.12, 164

¹⁷⁰The *Delalic (Protective Measures)* Decision Paragraph 27. See also Cogan, *supra* n. 86 117.

interpreting international fair trial rights.¹⁷¹ This approach is commendable, as it indicates a pioneering international criminal court that is willing to be guided by established legal principles in regional and international jurisprudence in guaranteeing a very fundamental human right of an individual. Only then an international court can live up to the expectations and aspirations of being independent, a fundamental characteristic of a court.

The opportunities for manipulation of the interpretation of the elements of fair trial against the interest of the defendants by unscrupulous, partial and dependent tribunals are obvious. The need for independent and impartial tribunals to conduct criminal trials and to assure the protection of fair trial standards is imperative. Given that the application of some of those standards during the course of a trial itself can be difficult to the point of impossibility, it is highly desirable that there be an effective and accessible appellate process. The superintendence of national laws and proceedings by international human rights bodies is a further guarantee that the minimum standards of human rights law have been complied with. Achieving independent and impartial tribunals is one of the most intractable of constitutional puzzles in international law but all the more necessary because, while all the international tribunals have an appellate process, none of their final decisions are subject to the jurisdiction of any international human rights body.

¹⁷¹ In the main Judgement in the case of the *Prosecutor v Kupreskic, Case No.IT-95-16-T*, the Trial Chamber opined that judicial decisions may prove to be of invaluable importance in determination of existing law. Paragraph 541.
Available at <<http://www.un.org/icty/kupreskic/trialc2/judgement/kup-tj000114e.pdf>>

JUDICIAL INDEPENDENCE AND IMPARTIALITY : AN OVERVIEW

“The principles of impartiality and independence are the hallmarks of the rationale and legitimacy of the judicial function in every State. The concepts of the impartiality and independence of the judiciary postulate individual attributes as well as institutional conditions. These are not mere vague nebulous ideas but fairly precise concepts in municipal and international laws. Their absence leads to a denial of justice and makes the credibility of the judicial process dubious. It needs to be stressed that impartiality and independence of the judiciary is more a human right of the consumers of justice than a privilege of the judiciary for its own sake.”

Report of the Special Rapporteur on the Independence of the Judiciary and
the Legal Profession
6th February 1995¹

2.1 INTRODUCTION

The following Chapter is a prelude to the main Chapters relating to judicial independence and impartiality discussions in the following Chapters. It is intended to provide an overview of the whole umbrella of judicial independence and impartiality. It embarks on a general discussion of the formal standards of these two concepts. Issues relating to the content of

¹Report of the Special Rapporteur on Independence and Impartiality of the Judiciary, Jurors, Assessors and the Independence of Lawyers dated 6th of February 1995E/CN.4/1995/39, Paragraph 34.

judicial independence and impartiality and the relevant provisions in the international and regional human rights instruments are the primary focus of this Chapter. Restating the provisions may be superfluous if taken on their own, but there is a connection between what the law says in this Chapter and how it is applied in the following Chapters. A discourse is undertaken on the *Basic Principles on the Independence of the Judiciary* as that is the most foremost of the United Nations instrument on independence and impartiality of the judiciary. There are questions to be asked about its status and enforceability in international law but it is argued that the *Principles* are restating general principles of law which are already contained in national laws and judgements, and as would be demonstrated, it is also a very significant United Nations instrument.² References to the *Principles* in case-law of the International Tribunals and in different declarations of various international and regional³ organisations may not necessarily give them the legal efficacy that an international treaty would have, but the importance of this instrument cannot be understated. The contents of the *Basic Principles* are fairly detailed which would assist members of the judiciary and the administrative authority in assessing the standards that exist in their own

² The creation of the position of the Special Rapporteur for the Rapporteur for the Independence of the Judiciary and the mechanisms to encourage States to incorporate the Principles *in toto* into national laws are two United Nations initiatives in this regard.

³ Such as the *Cairo Declaration*, the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region and the Burgh House Principles on the Independence of the International Judiciary*. The *Beijing Statement* was adopted by the Sixth Conference of Chief Justices of Asia and the Pacific.

Available at <<http://www.law.murdoch.edu.au/icjwa/beijst.htm>>. There are 32 State signatures to the instrument in the Asia-Pacific region. LAWASIA is the acronym for Law Associations of Asia and the Pacific. It was founded in 1966 and is an influential association of law societies, bar councils and judiciaries. It enjoys consultative status with Economic and Social Council of the United Nations. The signatories to this instrument are heads of judiciaries of Member States who represent different and diverse legal systems such as the common law systems such as Malaysia and Australia and civil law systems such as Vietnam. The People's Republic of China is also a party to the Beijing Statement. Mention should also be made of The Burgh House Principles, an innovative instrument formulated by the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals intended to apply to members of the international judiciary. The Study Group is made up of legal experts and commentators including judges from national, international and regional systems, leading academics, heads of national prosecution bodies and international lawyers from the United Nations and its agencies. The Burgh House Principles are available at <www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf>.

national systems.⁴ They could also come useful when assessing the standards applied at the international criminal court and tribunals.

It must be stressed that the references to national practice are general and succinct, the purpose of which is to reiterate the argument that judicial independence and impartiality are principles that already exist in States. It is not within the scope of this thesis to investigate and critically analyse the defects and weaknesses of State practice

2.2 GENERAL

Amnesty International stated in its Fair Rights Manual:

“A fundamental principle and prerequisite of fair trial is that the tribunal charged with the responsibility of making decisions in a case must be established by law, and must be competent, independent and impartial.”⁵

The independent and impartiality standards are part of the fair trial rights of the accused as elaborated in the preceding Chapter. These standards apply to the panel⁶ of judges both as an institution and as individuals. There will bound to be a certain degree of overlap between these two standards as there is a close connection between the guarantees of “independence” and “impartiality”.⁷ However, each standard has to be observed in its own right as

⁴ It has been argued that the *Basic Principles*, together with the other United Nations sponsored instruments on lawyers and prosecutors and “are today the acknowledged yardstick by which the international community measures that independence.” See P.Cumaraswamy, US Special Rapporteur on the Independence of the Judiciary “*The UN Basic Principles and the work of the UN Special Rapporteur on the Independence of Judges and Lawyers*”, paper delivered to ICJ Conference on The Rule of Law in a Changing World, Cape Town, South Africa, 20-22 July, 1998 quoted in D.C. Prefontaine and J Lee *The Rule of Law And the Independence of the Judiciary* available at <<http://www.icclr.law.ubc.ca/Publications/Reports/RuleofLaw.pdf>>

⁵ Chapter 12.<<http://www.amnesty.org/torture/resource/Thematic>> .

⁶ “Panel” in this discussion refer to the coram of judges sitting to try criminal cases. The members of military tribunals, administrative tribunals and other judicial and quasi-judicial bodies fall outside the scope of this thesis.

⁷ Harris *et al supra* Chapter One, n. 17 234.

they have separate characteristics to them even if their aim is a common one in ensuring the protection of fair trial rights for the accused.

2.3 THE STANDARDS OF JUDICIAL INDEPENDENCE AND IMPARTIALITY

The two United Nations texts as well as the *European Convention*⁸ contain provisions as guarantees of both the institutional framework of the character of the court as well as the individual judges who make up the court. Such guarantees are necessary to ensure the fair trial rights of the accused. It is not enough that the accused should have a fair trial; that fair trial must be guaranteed by an independent and impartial tribunal. It could be argued that the observation of these guarantees of independence and impartiality is necessary to ensure that the other fair trial standards are protected.

The character of the court would have an effect on the fairness of a trial if its quality is impaired in any manner, whether direct or indirect. One example of this situation would be where a breach of the fair trial rights of the accused has occurred, such as the right to be informed of the charge against him in a language he could understand, and that breach is not corrected by the court as it is not independent of the prosecuting authority or the State. A tribunal that is not independent of the Executive will not be able to show that it was impartial in matters where the Executive is a party. An individual member of the tribunal will not be independent or impartial if there is a connection with him and a party to the case that he is adjudicating.⁹

⁸ Neither the ACHR nor the AfCHR contain any provision that entitles the accused to have his case heard by an independent and impartial judiciary. There is a qualification on the ACHR but other than that, there is no reference to the independence and impartiality of the judiciary. See Harris, *supra* Prologue, n.47 354. However, the Arab Region has had two instruments in the form of Declarations on judicial independence. The Beirut Declaration of Independence of 1999 and the Cairo Declaration of Justice of 2003 have extensive articles on aspects of judicial independence. *Supra* Prologue, n.45.

⁹ Harris *et al supra* Chapter One n.17, 234

Although the concepts of judicial independence and impartiality are distinct and separate, infringement of one concept could negate the due process principle even if the other remains intact. The difference between the two was stated thus:

*“The often fine distinction between independence and impartiality turns mainly, it seems, on that between the status of the tribunal determinable largely by objective tests and the subjective attitudes of its members, lay or legal. Independence is primarily freedom from control by, or subordination to, the executive power in the State; impartiality is rather absence in the members of the tribunal of personal interest in the issues to be determined by it, or some form of prejudice.”*¹⁰(emphasis added)

However, it may be that the consequences of the breach of the characteristics of judicial independence and impartiality will not be grave enough to vitiate the trial or render the conviction unsafe. The approach is similar to the general approach to fair trials. When deciding whether the trial was an unfair as a result of a lack of independence or impartiality on the part of the court, the proceedings of a trial should be gauged in entirety. The two issues of fair trial and the character of court are thus intertwined. The court might have ensured that the minimum guarantees of a fair trial were protected, and indeed proffered additional safeguards to the accused. But the conviction could be set aside if it was discovered that the court as a whole or the members as individuals were not independent or impartial and that lack of independence, impartiality or both was of sufficient gravity so as to vitiate the fairness of the trial. National, regional and international courts have devised legal tests on independence and impartiality, which have provided guidelines in assessing whether a trial has been fair.

¹⁰ J.E.S Fawcett *The Application of the European Convention Of Human Rights* (Oxford;Clarendon Press, 1987) 156

The concepts of judicial independence and impartiality are both abstract and complex. They have not been spelt out in the human right treaties¹¹ although they are included in many principles, declarations, reports and guidelines, both at international, regional and at national levels. Although there are no legally-binding instruments specifically on these issues, the United Nations and various international non-governmental bodies have formulated principles and guidelines that are aimed at States and their organs. The initiative of the United Nations on the two postulates of judicial independence and impartiality, in particular, serves as a directive to Member States to take into account the principles formulated. Most national legal systems provide guarantees of judicial independence and impartiality but the content of those standards and the manner in which they are guaranteed may vary from State to State. An exact definition of the principles and the parameters of the scope of their application may be difficult as they may vary within the diverse legal systems based on different cultures that exist. Differences might arise between national practice and the standards provided for in the United Nations instrument.¹² Even a detailed binding human rights instrument, whether international or regional, may not cover all and every aspect and content of this pluralism. The standards in principles should therefore be regarded as minimum standards which the States must attain. Much also depends on the binding effect of those United Nations and regional instruments.

Another problematic issue regarding the identification of specific internationally-recognised and accepted standards is the attitude of States to such standards. States may object to such standards being used as yardstick

¹¹ The concepts have been developed through jurisprudence of the adjudicating organs and monitoring bodies authorised by those instruments. E.g. the Human Rights Committee hears complaints on breaches of the provisions of *ICCPR*.

¹² There may be differences between actual national practice and the jurisprudence of regional courts and the Human Rights Committee.

by which their standards are measured against as they may not wish to admit their standards are lacking.¹³

Two major steps taken by the United Nations are of particular relevance to this study. One was the drafting and the adoption of the *Basic Principles on the Independence of the Judiciary* and the other was the creation of the position of the *Special Rapporteur for the Independence of the Judiciary and Lawyers*.

2.4 ASPECTS OF JUDICIAL INDEPENDENCE AND IMPARTIALITY

Judicial independence is a traditional constitutional value. It connotes not merely a state of mind or attitude in the actual exercise of judicial functions but also in the traditional legal system, a status or relationship with other organs of the Government and of the parties. Independence rests on objective conditions or guarantees and may be examined in two different contexts – with regards to a specific case, or with regards to the overall institutional structure of the tribunal. The state of mind aspect relates to individual independence, which could overlap with judicial impartiality since that concept also involves the state of mind. The objective guarantees of personal independence of a judge include matters such as manner of appointment, duration of his term in office and the existence of guarantees against outside pressures.

Impartiality indicates a lack of prejudice or bias. In order to satisfy that requirement, the tribunal must comply with a test that has both objective and subjective aspects to it. The subjective test applies to the personal convictions

¹³ See generally Giovanni E.Longo *The Human Right to an Independent Judiciary: International Norms and Denied Application Before A Domestic Jurisdiction* (1996) 70 St. John L. Rev 111 on the problems faced in the process of adopting the Basic Principles.

of the judge whereas the objective test relates to the overall issue of whether the judge has given sufficient guarantees sufficient to exclude any legitimate doubt in this context. The subjective test has a high threshold to achieve as it has to be shown that the judge showed actual bias. Cases where breaches of the subjective test were proved are rare.¹⁴ All that needs to be shown for the objective guarantee is that there is a “*legitimate doubt*”. The standard of proving this element is obviously less burdensome than proving actual bias. The objective test is best summed up with the legal doctrine that justice must not only be done but seen to be done.

The objective test will be particularly relevant in international proceedings where a judge had taken part in various international activities prior to his appointment. It is for the judge to offer objective guarantees as to his impartiality. This issue came up for discussion at the ICTY when the impartiality and consequently, the independence of certain judges were challenged due to their activities prior to their appointments to the Tribunal.¹⁵

These aspects of independence and impartiality are dealt with in detail in the chapters on judicial independence and impartiality respectively.

2.5 THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY ¹⁶(“the Basic Principles”)

Recognising the importance of the role and the power of judges and the failure in upholding judicial impartiality and independence by some States at national level, the United Nations formulated a set of provisions on judicial independence and impartiality in a document called the *Basic Principles on*

¹⁴ Harris *et al supra* Chapter One, n.17, 234, 235

¹⁵ *The Prosecutor v Anto Furundzija infra* n.21

¹⁶ UN Doc A/CONF 121/22/Rev.1 at 59(1983). Annexed herewith.
available at <http://www.unhchr.ch/html/menu3/b/h_comp50.htm>

the Independence of the Judiciary. The content of these provisions is in greater detail than the general and rather abstract reference to judicial independence and impartiality contained in the *UDHR* and the *ICCPR*. The *Basic Principles* were adopted unanimously by the *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders* (“the Congress”) and subsequently endorsed by the General Assembly through two Resolutions.¹⁷ *Resolution 40/146* in particular “invites Governments to respect them (the Principles) and to take them into account within the framework of their national legislation and practice”¹⁸ Thus the functional significance of these principles is to offer guidance to Member States in respecting and maintaining national standards of judicial independence and impartiality and ensuring that they are in conformity with the international standards.

The *Basic Principles* were endorsed twice, unanimously and without debate. On paper, it appears that the lack of debate or dispute reflected a unanimous acceptance of the *Principles* and that such was the legitimacy of these Principles that they needed no debate, comparable to the status of the fair trial right in the *Nuremberg Principles*.¹⁹ However, events revealed that the *Basic Principles* were resisted and the final result was a watered down version of the original proposal.²⁰

The task of formulating the *Basic Principles* was entrusted to the U.N. Committee on Crime Prevention and Control by the Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders.²¹ Originally 100 articles were drafted. These were then reduced to forty-four

¹⁷ Resolution 40/32 of 29th November 1985: A/Res/40/32 and Resolution 40/146 of 13th December 1985: A/Res/40/146: see <<http://www.un.org/Depts/dhl/res/resa40.htm>>. (Annexed herewith). The *Basic Principles* were drafted and presented for adoption by the Committee on Crime Prevention and Control.

¹⁸ <http://www.un.org/documents/ga/res/40/a40r146.htm>

¹⁹ Prologue n.2

²⁰ Longo, *supra* n.11

²¹ *Ibid* 113-114

articles as delegates raised objections to them.²² Finally the forty-four articles were reduced to a mere 20.²³

It would be convenient to write off the *Basic Principles* as idealistic norms which States sign up to earnestly but have no intention of conforming to them or making half-hearted attempts to incorporate them into their national legal systems. However, the United Nations has taken steps to show that it is serious about implementing them. In 1989, the General Assembly approved certain implementation mechanisms of the *Basic Principles*. The Secretary-General was duty-bound to compile a report every five years which would monitor whether the *Principles* are observed by Member States.²⁴ Secondly, the General Assembly passed the *Implementation of the United Nations Standards to Norms in Criminal Justice* where the United Nations is authorised to assist States to incorporate United Nations instruments, including the *Basic Principles* into the national legal systems.²⁵

There are two modes of approach to the *Basic Principles*. First, that it is a United Nations instrument which does not carry much weight. Regardless of the intentions of the United Nations and any effort taken by the organs to implement them, the *Basic Principles* do not have binding effect on Member States. The second approach would be to examine the *Basic Principles* as general principles of law as recognised by civilised nations.

Unlike domestic jurisdictions, it is rather challenging to trace a particular law in the international arena since there is no Government or a similar structure of a domestic system. In order to ensure whether the *Basic Principles* has binding legal effect, it is important to determine its legal status. This

²²*Ibid.* The author, a judge from Italy, was a member of the Committee that was involved in the drafting of the Principles. Delegates at the Congress meeting in Milan were either indifferent or objected strenuously to the articles as “long-winded”. *op cit* 114.

²³*Ibid.*

²⁴*Ibid* 116. Those Reports are now made annually by the Special Rapporteur.

²⁵*Ibid* n.20.

determination can be made through reference to *Article 38(1)* of the *Statute of the International Court of Justice* which has been hailed as being “widely-recognised as the most authoritative statement as to the sources of international law.”²⁶

Article 38(1) is a provision that deals with sources of international law generally. It states that the International Court of Justice shall apply various sources of law to the disputes that is before it, including

- (a).....
- (b).....
- (c) the general principles of law recognized by civilised nations.²⁷

Identifying a general principle of international law recognised by civilised nations is an inductive process by which legal principles and norms are gleaned from domestic systems.²⁸ It is this method that is being adopted in this Chapter.

Contents of judicial independence and impartiality provided for in the Constitutions²⁹ or legislation or case-law of many States are usually rather detailed. ³⁰ It needs to be emphasised that the standards of these two postulates are not necessarily the same from jurisdiction to jurisdiction. For example, elements of judicial independence such as security of tenure may be different from jurisdiction to jurisdiction. Some States may fix retirement age of judges at 65, whereas some may fix it at 70 and yet others would fix life tenureship. Certainly the qualifications requirement for a candidate to be

²⁶ Shaw *supra* Chapter One, n.39

²⁷ See <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II>

²⁸ Bassiouni *supra* Chapter One n.6 234.

²⁹ Bassiouni identifies fifty-four national constitutions that provide for an independent judiciary. Bassiouni *ibid* 271

³⁰ The purpose of this survey is to show that States provide for standards of judicial independence and impartiality. These are theoretical assumptions and the reality may not be what exactly is contemplated in the legal documents.

appointed to judicial office will vary.³¹ However, it is submitted that whilst the details of such standards may vary, the basic premise is the same which is to provide safeguards for the independence and impartiality of the judiciary.

It is argued that the *Basic Principles* is an international instrument that reflects widely-enacted and applied legal principles in national legal system. A survey of State law and practice, as well as the existence of national judicial decisions shows that the embodiment of much that is propounded by the *Basic Principles* originates from national legal systems.³² The following is a sample of an exposition of State practice on the core issues relating to judicial independence and impartiality.³³

2.6 VALENTE v THE QUEEN³⁴ AND STATE PRACTICE ON JUDICIAL INDEPENDENCE.

The decision of the Supreme Court of Canada in the Commonwealth jurisprudence is very instructive in discussing the issue of judicial independence. It would be helpful to discuss its judgement as a starting point of reference. This case involved a constitutional issue on the interpretation of *S. 11(d)* of the *Canadian Charter of Human Rights and Freedoms*.³⁵

³¹ For a study on various State practice in the appointment of the judiciary and the problems arising therein, see *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* Kate Malleson and Peter H. Russell (eds) (Toronto: University of Toronto Press; 2006).

³² See the *Report of the Special Rapporteur on Independence and Impartiality of the Judiciary, Jurors, Assessors and the Independence of Lawyers* dated 6th of February 1995E/CN.4/1995/39. Paragraph 34 of the Report refers to an earlier report (the “Singhvi Report”) whereby it was averred that “*Historical analysis and contemporary profiles of the judicial functions and machinery of justice shows worldwide recognition of the role of the judiciary.*”

³³ For detailed case study of national decisions relating to judicial impartiality, refer to Chapter Four of this thesis.

³⁴ (1985) 2 S.C.R 673. Available at <<http://csc.lexum.umontreal.ca/en/1985/1985rcs2-673/1985rcs2-673.pdf>>

³⁵ Section 11 insofar as relevant provides that “*Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.*”

Accessible at <http://www.canlii.org/en/ca/charter_digest/s-11-d.html>

The Supreme Court, whilst discussing the issue of judicial independence stated in its judgement:

*“The test for independence for purposes of s. 11(d) of the Charter should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. This perception must be a perception of whether the tribunal enjoys the **essential objective conditions or guarantees of judicial independence** and not a perception of how it will in fact act regardless of whether it enjoys such conditions or guarantees.”*
(Emphasis added)

The Court identified the first essential condition of judicial independence. This was

“Security of tenure, because of the importance traditionally attached to it, is the first of the essential conditions of judicial independence for purposes of s. 11(d) of the Charter. The essentials of such security are that a judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.”³⁶

Therefore security of tenure includes removal of judges in exceptional cases and that such removal should be subject to review. Such removal can only be done after the judge is given an opportunity to be heard – the *audi alteram partem* rule. Interestingly, security of tenure, according to the judgement applies not only to permanent judges but also judges appointed on an *ad hoc* basis. This, it is submitted, is the correct interpretation of security of tenure as a judge should be able to carry out his duties independently, regardless of the period of his appointment.

³⁶ Judgement, *supra* n.34, per Le Dain J at Paragraph 31.

The next guarantee of judicial independence is as follows:

“The second essential condition of judicial independence for purposes of s. 11(d) of the Charter is, in my opinion, what may be referred to as financial security. That means security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to a pension and a pension that depends on the grace or favour of the Executive.”³⁷

Finally, the third condition of judicial independence is that of financial security. On this issue the court said as follows:

“The third essential condition of judicial independence for purposes of s. 11(d) is in my opinion the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function.”³⁸

The three core characteristics should exist before judicial independence can be ascertained. States do provide for these characteristics as can be seen below.

2.6.1. The United Kingdom

The *Act of Settlement of 1701* is the oldest piece of legislation that provided for the security of tenure and financial security of judges.³⁹

Appointments of judges were shrouded in secrecy and posed a problem for many commentators who preferred a transparent process.⁴⁰ However, the United Kingdom now enjoys several pieces of legislation which cover judicial

³⁷ *Judgment supra* n.29 40

³⁸ *Ibid* Paragraph 47

³⁹ US v Will 449 US 200 (1980). See the Appeals Chamber in the *(Lack of Jurisdiction) Judgment* in the *Prosecutor v Sam Hinga Norman* SCSL NO: 2004-14-PT-034-I Paragraph 15.

⁴⁰ See Bohlander *The International Criminal Judiciary* Chapter One, n.17, 358.

independence. The Constitutional Reform Act of 2005,⁴¹ and the Tribunals, Courts and Enforcement Act 2007⁴² read together, deal with qualifications, appointments and security of tenure of the judges in the United Kingdom, matters relating to the office of the judge.

A series of decisions relating to judicial impartiality has established the rule against bias. The *Basic Principle* on bias in this regard is similar to the law in the United Kingdom.⁴³

2.6.2. Federal Republic of Germany⁴⁴

In Germany, the principle of judicial independence is set down in its Constitution,⁴⁵ the *Grundgesetz*, as well as the constitution of the different States. There are different pieces of legislation that covers judicial independence in Germany. One of these is the *Judiciary Act* which covers various issues such as independence of the judiciary, qualifications, security of tenure, incompatible duties between the office of the judge and his extra-judicial activities relating to federal judges.⁴⁶ There are machinations for the judges to lodge complaints if there is threat to their independence by the Executive or any other party.⁴⁷

⁴¹ <<http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1974190>> Bohlander *ibid* 360.

⁴² <<http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=3388262>>

⁴³ National decisions on judicial impartiality are discussed in Chapter 4.

⁴⁴ Peter Schlosser and Walther Habscheid *Federal Republic of Germany* in S. Shetreet and J. Deschenes: *Judicial Independence: The Contemporary Debate*, 78. On appointments, see Christine Landfried *The Selection Process of Constitutional Court Judges in Germany* in Malleon and Russell (Eds) *supra* n.31, 196

⁴⁵ Matters relating to security of tenure, transfer and independence of the judges are provided for in the Constitution. Articles 92,97. See also German Judges Law 1961, Schlosser and Walther Habscheid, *supra* n.23, 79

⁴⁶ Michael Bohlander and Christian Latour *The German Judiciary in the Nineties: A study of the recruitment, promotion and remuneration of judges in Germany* (Aachen: Shaker Verlag: 1998) 23,24

⁴⁷ Schlosser and Walther Habscheid, *supra* n.43

2.6.3. Canada

Judicial independence in Canada is provided for in its Constitution, namely *Sections 96 to 100* of the *Constitution Act, 1867*. These provisions provide for matters such as appointment and security of tenure of judges. *Valente v Queen* is the leading authority for the need to ensure judicial independence and the standards required to secure such independence. The *Canadian Charter of Rights and Freedoms*⁴⁸ guarantee judicial independence as set out in its *Section 11*, discussed above.

Section 101 provides for the appointment of the judges of the Supreme Court, Federal Court and Tax Court. Provincial court judges are appointed pursuant *Section 92*.⁴⁹

2.6.4. India

The *Constitution of India* provides for the independence of the judiciary from the other two arms of the Government.⁵⁰ *Article 124* provides for the appointment of the judges, security of tenure and removal of judges.⁵¹ *Article 125* and the *Supreme Court Judges (Conditions of Service) Act 1958* provide for the financial security of the judges by providing that salaries of judges should only be reviewed upwards and not “downwards”.⁵²

⁴⁸ The Charter is annexed as Schedule B to the Constitution Act 1980. See *Prefontaine & Lee, supra* n. 2

⁴⁹ For a general discussion on judicial appointments in Canada see *Judicial Appointments in Post-Charter Canada: A System in Transition* in Malleson and Russell (eds) *supra* n.31, 56, 57-58

⁵⁰ Article 50. See also decision of the Indian Supreme Court in *S.C. Advocates-on-Record v Union of India* A.I.R 1994 S.C.268. M.P.Singh *Securing the Independence of the Indian Judiciary* (1999-2000) 10 *Indian Int'l L & Comp Rev* 252

⁵¹ *Ibid* 252

⁵² Article 360 of the Constitution however states that the salaries of judges may be reduced in times of financial emergency. *Ibid* 253

2.6.5. United States

Article 111 of the *US Constitution* sets out judicial independence and security of tenure for the federal judges of the country. It further provides that the salaries of judges shall not be reduced. The Constitution also provides for the removal of judges.

Matters relating to ethics, discipline and code of conduct for judges are contained in *Code of Conduct* that federal and state judges should adhere to. *Canon 1* of the *Code of Conduct* for federal judges, for example, thrusts the duty to "uphold the integrity and independence of the judiciary" on the judges. The importance of judicial independence is emphasised in the Code of Conduct which states that "[a]n independent and honorable judiciary is indispensable to justice in our society."⁵³

The *Code of Conduct* controls and restrains the conduct of judges, including prohibiting them from deciding a case in which the judge has a personal interest. The *Code of Conduct* recognizes the importance of perceptions of the judiciary which should not be clouded by apprehension of bias.

2.6.6 South Africa⁵⁴

The independence and impartiality of the judiciary in South Africa is protected by *Section 165* of the *Constitution of the Republic of South Africa Act 108 of 1998*. *Section 174* deals with the appointment and qualifications of judges, such appointments, promotions, transfers and dismissals to be made "without favour or prejudice."⁵⁵

⁵³ Sandra Day O'Connor, *supra* Chapter One n.78

⁵⁴ Gretchen Carpenter *Without fear or favour: Ensuring the independence and credibility of the weakest and least dangerous branch of Government*" (2005) SALJ 499, 500.

⁵⁵ Carpenter, *supra* n.54, 501.

2.6.7 Malaysia

Articles 121 to 131A of the *Federal Constitution* of Malaysia cover the Judiciary. The Articles cover matters such as appointment of judges, transfer, qualifications, tenure of office, remuneration and other matters relating to the personal independence of the judiciary. The *Constitution* also includes Code of Ethics for the judges.

2.6.8 The International Tribunals

It is pertinent to discuss the practice at the International Tribunals and courts regarding judicial independence and impartiality. The *Basic Principles* have been specifically referred to in judgements but what is of interest for this particular research is the application of the concepts at the proceedings before them.

In the case of *Jean-Bosco Barayagwiza v the Prosecutor*, the International Tribunal recognised that as a judicial organ, its independence is paramount. Judge Nieto-Navia said:

*"The concept of "the separation of powers" plays a central role in national jurisdictions. This concept ensures that a clear division is maintained between the functions of the legislature, judiciary and executive and provides that "one branch is not permitted to encroach on the domain or exercise the powers of another branch". It ensures that the judiciary maintains a role apart from political considerations and safeguards its independence."*⁵⁶

⁵⁶ Paragraph 9. Declaration of Judge Nieto-Navia dated 31st March 2000. See *Decision (Prosecutor's Request for Review or Reconsideration)* in *The Prosecutor v Jean Bosco Barayagwiza*. Available at <<http://69.94.11.53/default.htm>>

Judge Shahabuddeen added in his Declaration;

*...the Security Council chose a judicial method in preference to other possible methods. The choice recalls the General Assembly's support for the 1985 Milan Resolution on Basic Principles on the Independence of the Judiciary, paragraph 2 of which reads: "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".*⁵⁷

The provisions of the *Statutes* of the *ICTY* and the *ICTR* make it imperative that the accused shall be tried by an independent tribunal.⁵⁸ The *Basic Principles* do nothing more than reinforce these statutory requirements and add details to the bare provisions.

2.6.8.a Sierra Leone

The *Special Court* in *The Prosecutor v Sam Hinga Norman* was asked to consider the issue of judicial independence and impartiality vis-a-vis the independence of the Special Court.⁵⁹ In the course of its judgement, the Appeals Chamber traced the concept of judicial independence to the Constitution of the Sierra Leone. *Sections 138(1)* and *138(3)* guarantee judicial remuneration of the judges of Sierra Leone⁶⁰ whereas *Sections 135,136* and *137* are safeguards for their appointment and tenure.⁶¹

⁵⁷*Ibid.* Separate Opinion of Judge Mohammed Shahabuddeen, Paragraph 72.

⁵⁸ Articles 20 and 21 of the Statute of the ICTR and ICTY respectively. See the following Chapters.

⁵⁹*supra* n.39

⁶⁰*Ibid* Paragraph 26.

⁶¹ An issue arising out of this proceedings that may be of interest is whether the rulings and judgements of the hybrid courts on judicial independence and impartiality will also be applicable and binding to those members of the judiciary who are national judges, such as Sierra Leone.

2.6.8.b Kosovo

Pillar 1 of UNMIK is responsible for “police” and “judiciary”⁶² in Kosovo. UNMIK *Regulation 2000/59*⁶³ imposed a duty on any person holding public office or undertaking public duties to observe the internationally recognised human rights standards which are provided for, *inter alia* by the *UDHR*, *ICCPR* and *European Convention*. These standards therefore include the right to be heard by an independent and impartial judiciary.

2.6.8.c Cambodia

Article 128 of the *Constitution of Cambodia* states that the judiciary shall be independent and is entrusted to *guarantee and uphold impartiality and protect the rights and freedoms of citizens*”.⁶⁴

What is remarkable about the Cambodia situation is that the United Nations Transitional Authority in Cambodia (UNTAC) Code has incorporated the *Basic Principles* into domestic law of Cambodia.⁶⁵ Thus that which has been touted as a non-binding instrument has now gained binding status under national law.⁶⁶

⁶² There are four pillars that comprise the UNMIK. Besides Pillar I, Pillar II is in charge of Civil Administration, Pillar III is in charge of Democratization and Institution Building and finally Pillar IV is in charge of Reconstruction and Economic Development. For an overview of the collapse of the judicial system in Kosovo and its subsequent reconstruction see Hansjorg Strohmeyer *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor* (2001) 95 AJIL 46, Gylbehare Murati *The Independence of the Judiciary and Its Role in the Protection of Human Rights under UN Administration Using the case of Kosovo* European Society of International Law, ESIL, available on : <http://www.esil-sedi.org/english/papers.html>

⁶³ Available at <www.unmikonline.com> Murati, *ibid*

⁶⁴ Suzannah Linton *Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers* (2006) 4 JCIJ 327, 328, 329.

⁶⁵ UNTAC Code was adopted in 1992. *Ibid* 331

⁶⁶ This sounds like a dream come true for lawyers and human rights activists who firmly uphold the principles of judicial independence and impartiality. However, Linton paints a very dismal and depressing picture. The author states that the judicial system is in a catastrophic state and that “*five-star justice, such as that practised at the International Tribunals, is out of the question for CEC – the challenge is to raise the standard to which that is acceptable, i.e. meeting the minimum standards of fair trial and due process.*” Linton, *supra* n.4, 129.

The position of the *Basic Principles* in international law could therefore be construed as *general principle of law recognised by civilised nations*⁶⁷ and may be acknowledged as a source of international law under *Article 38(1)* of the *Statute of the International Court of Justice*. This finding is based on the number of domestic laws and judicial decisions as well as a combination of both that have been promulgated and issued. The declarations of the concepts in this manner have demonstrated the existence of a general principle of law.

The Special Rapporteur had concluded that the “... *principles of judicial independence and impartiality are reflected in the legal systems of the world by constitutional and legislative means supported by an overwhelming practice*”.⁶⁸ However, the contents of the standards that maintain judicial independence, such as financial security, security of tenure, administrative independence may vary from State to State and from the content of the *Principles* themselves. It is argued, that even so, following a helpful dictum of Lord McNair in a decision of the International Court of Justice, that *Basic Principles* are accepted general principles of law in any event.⁶⁹

“it is not the concrete manifestation of the principle in different national systems--which are anyhow likely to vary--but the general concept of law underlying them that the international judge is entitled to apply under paragraph (c).”⁷⁰

⁶⁷ This view is confirmed by the Special Rapporteur for the Independence and Impartiality of the Judiciary, Jurors and the Independence of Lawyers who “asserts the underlying concepts of judicial independence and impartiality are general principles of law recognised by civilised nations in the sense of Article 38(1)(c) of the Statute of the International Court of Justice”. See *Report, supra* n.20 Paragraph 34.

⁶⁸ *Report, ibid.* Paragraph 35.

⁶⁹ For example Principles 8 and 9 of the Basic Principles recognise the rights of the members of the judiciary to freedom of expression, association and so forth. Certain States have these provisions in their national law, such as Germany and Austria. Certain States do not make any mention of it. Conversely, there are certain State provisions that are not reflected in the Basic Principles. An example of this is Article 126 of the Federal Constitution of Malaysia, for example, states that the Courts have powers to punish any contempt of themselves but there is no similar provision in the Basic Principles. The Special Rapporteur also argues that the concepts of judicial independence and impartiality are customary international law as set out in Article 38(1)(b) of the Statute of the International Court of Justice. *Report supra* n.20 Paragraph 35.

⁷⁰ A principle of law need not be “universal” to be general. See H.C. Gutteridge *The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice* (1952) 38 Transactions of the Grotius Society 125

Insofar as the International Tribunals are concerned, the *Declaration* of Judge Rafael Nieto-Navia is of interest:

.....I note the importance accorded to the principle [of judicial independence] by the United Nations, in appointing a Special Rapporteur on the Independence of Judges and Lawyers and by the General Assembly, in the promulgation of the 1985 UN Basic Principles on the Independence of the Judiciary. The Principles as a whole are of utmost importance...⁷¹

That declaration was in reference to the implication in the Prosecutor's submissions that the cooperation of the Government of Rwanda is important to ensure that the ICTR functions and continues to operate as judicial organ.⁷²

Judge Nieto-Navia said in connection with the *Basic Principles*:

"1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all government and other institutions to respect and observe the independence of the judiciary;

2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."⁷³

The judgment of the Appeals Chamber recognised the application of the *Basic Principles* to its proceedings and jurisprudence. It is reiterated that the *Basic Principles* are not creating anything new or remarkable. It is merely reiterating what many national courts practice and in certain cases,

⁷¹ Paragraph 11. This aspect of the Declaration found agreement in the Declarations of Judges L.C. Vohrah and Mohammed Shahabuddeen.

⁷² Barayagwiza is discussed in detail in Chapter 3, 152 *et seq*

⁷³ *Ibid*

elaborating and clarifying in detail certain principles of independence and impartiality.

Another approach to State practice vis-a-vis *Article 38(1)* of the *Statute of the International Court of Justice* is to have regard to decisions of the international and regional human rights monitoring bodies. Thus, a member State who falls under the jurisdiction of the European Court would be compelled to comply with decisions of the court such as *Belilos v Switzerland*⁷⁴(on judicial independence)and a Member State to the *ICCPR* should adhere to the decisions of the Human Rights Committee such as *Gonzalez del Rio v Peru*.⁷⁵

The *Basic Principles* contain *minimum standards* of judicial independence and impartiality.⁷⁶ National legal systems are expected to conform to the minimum standards.⁷⁷ The *Principles* are comprehensive and there will be bound to be situations in which national practice does not live up to the standards of the *Basic Principles*.⁷⁸ The dilemma arises where national systems do not provide for the minimum standards contained in the *Basic Principles*. The issue is whether the States consider themselves bound by the *Basic Principles* or at least give cognisance to that instrument by either ensuring that their national legal practice achieves the standards set by the *Basic Principles* or by incorporating them into national legislation or practice. Although it is not as significant as the *UDHR* or the *ICCPR*, Member States

⁷⁴(1988) A 132

⁷⁵ Communication No.263/1987, U.N. Doc.CCPR/C/46/D/263/1987 (1992)

⁷⁶ See the “Caracas Conference” organised by the International Commission of Jurists, under the auspices of the United Nations. Available at <www.icj.org>. The International Commission of Jurists is a non-governmental organisation established in 1952. Its membership is made up of jurists representing different legal systems of the world and enjoys a consultative status with the United Nations. The Commission was actively involved in canvassing support from Governments for the adoption of the then Draft Basic Principles. Another initiative suggested by the Commission which was subsequently adopted by the United Nations was the creation of a complaint procedure mechanism in the form of a United Nations mechanism.

⁷⁷ Many States have a long and comprehensive tradition of judicial independence and impartiality. Theodor Meron *Judicial Independence and Impartiality in International Criminal Tribunals* (2005) 99 AJIL 359

⁷⁸ See the reports on country-by-country visit of the Special Rapporteur available at <<http://www2.ohchr.org/english/issues/judiciary/visits.htm>>

should give importance to the *Basic Principles* since it is the expression of the intention of the international community.⁷⁹ Also, the adoption of the *Basic Principles* into the national systems would provide a comprehensive set of standards as they are fairly detailed and cover a wide-ranging of issues as stated above. The *Principles* are considered influential in practice as they have been adopted by the Special Rapporteur as the main point of reference source in carrying out his duties and responsibilities under the mandate granted to him.⁸⁰ It is argued that the incorporation of *Basic Principles* into both national law and international law as practised at the international criminal court and tribunals would ensure the details of adherence to the principles of judicial independence and impartiality. At present, the principles of law in State practice and State Constitutions relating to these postulates are embodied in substance rather than details.

2.7 SUMMARY OF THE BASIC PRINCIPLES

An overall picture of the provisions of the *Principles* and a mention in brief of their contents and scope of application is necessary for completeness of this study.

The relevant principles can best be summed up in this particular manner. *Principles 1-7* cover the independence and impartiality of the judiciary. *Principle 1* ascribes a positive duty on States to guarantee judicial independence through taking necessary measures through Constitutions or

⁷⁹ The Special Rapporteur's duties include examining State practice and addressing various complaints by individuals, agencies and non-governmental organisations. The Special Rapporteur's work has borne some positive results. Many States who the Special Rapporteur had approached in 2004 with various communications in the form of concerns and recommendations on national practice on the observation and arrangements of the judicial independence and impartiality principles, had responded, some more comprehensively than others. *Civil and Political Rights, Including the Questions of Independence of Judges and Lawyers – Addendum – Situations in Specific Countries or Territories* E/CN.4/2005/60/Add.1 18th March 2005.

⁸⁰ Ben Olbourne *Independence and Impartiality of the Judiciary: International Standards for National Courts and Judges* (2004) 2 LPIT 97, 107

legislation. The duty to respect and observe judicial independence is not limited to Governments alone. It is also expected of other institutions. This would include national judiciaries themselves who are expected to ensure that their independence is not compromised.

Principle 2 is of wide application. This Principle is aimed at national judiciaries and individual judges in particular. Basically it requires that judges be free to decide matters before them impartially, without being adversely affected by any extraneous factors that may influence their judgements. The range of those factors is very wide and includes improper influences, inducements, pressures, threats or interferences, direct or indirect from any quarter and for any reason. The Principle recognises the possibility that a threat or influence that may affect the impartiality of a judge may come from a party other than the State. *Principle 3* bestows the judiciary the sole competence to decide on its jurisdiction. This would mean that States are not entitled to prevent a judicial organ from validly exercising its jurisdiction.

Principle 4 extends the application of *Principle 2* to prevent any inappropriate and unwarranted interference with the judicial process, including revision of those decisions by non-judicial parties. *Principle 5* obligates the courts to use established trial procedures.

Principle 6 embodies the spirit of the right of fair trial. It states that the purpose of the principle of independence of judiciary is to ensure that the rights of the parties are respected and that the trial is fair. *Principle 7* requires Member States to provide adequate resources, which would include financing and qualified personnel to ensure that the judiciary would be able to perform its duties properly.

Principles 8 and 9 encompass certain freedoms to which judges are entitled. *Principle 8* is relevant insofar as it caters for situations where the

independence and impartiality of judges may be affected by their extrajudicial activities. Whilst judges have a right to the various freedoms of expression, association, belief and assembly, they must ensure that these freedoms do not adversely affect the dignity of their office.

Principle 10 deals with aspects of qualifications, selection and training of judges. It calls for a careful mode for selection of judges, without improper motives. It emphasises that not only the candidates for judicial offices have the integrity but they should also have appropriate training and qualifications in law. This *Principle* aims to ensure that the mode of selection and appointment of judges are not vulnerable to criticisms on judicial independence.

Principles 11-14 on the other hand cover conditions of service and tenure. As will be discussed below, these are core elements that guarantee judicial independence. They are personal to the office of the judge and have an effect on both the individual and personal aspects of judicial independence. Finally, *Principles 17 to 20* encompass the discipline, removal and suspension of judges. They provide that procedural guarantees must be in place for the fair and expeditious investigation and that they have the right to a fair hearing. Judges can be suspended or removed only based on grounds of incapacity and “*behaviour that renders them unfit to discharge their duties*” (*Principle 18*)

In sum, the *Basic Principles* is a useful international instrument. It reflects State practice generally and contains principles of law that are common to many national jurisdictions. Reference to this instrument is relevant when measuring existing standards of practice.

2.8 THE SPECIAL RAPPORTEUR FOR THE INDEPENDENCE OF THE JUDICIARY AND LAWYERS

An important step taken by the United Nations in relation to the judiciary was the creation of the position of the *Special Rapporteur for the Independence of the Judiciary and Lawyers*. This step was seen as a mechanism of monitoring the implementation of the *Basic Principles*⁸¹ as well as investigating complaints at the national level on breaches of the *Principles*. The Special Rapporteur for this area joins the list of other Special Rapporteurs appointed by the United Nations as a monitoring mechanism whose mandates focus on the examination of various areas of human rights identified by the then-Commission of Human Rights. They are part of what is known as thematic mechanisms of the United Nations. They are usually appointed by the United Nations Commission on Human Rights and are mandated to look into various human rights violations. Their mandates are decided by the Commission.⁸² The Special Rapporteurs make findings on their allocated themes and present annual reports to the General Assembly.

The position of the **Special Rapporteur for Independence of the Judiciary** was created by the Commission on Human Rights in 1994. In Resolution 1994/41 dated 4th March 1994, the Commission voiced its concerns on “*the increasing frequency of attacks on the independence of judges, lawyers and court officials*”.⁸³ It also observed that there was a link between what it perceived to be “*the weakening of safeguards for the judiciary and lawyers*” and the gravity and frequency of violations of human rights.⁸⁴ The Commission requested the Chairman to appoint a Special Rapporteur for the purposes of looking into the question of the independence and impartiality of the judiciary, and the

⁸¹ *Prefontaine and Lee, supra* n.2, 6

⁸² <http://www.amnesty.org/torture/resource/Thematic>.

⁸³ Available at:

<<http://www.unhchr.ch/Huridocda/Huridoca.nsf/2848af408d01ec0ac1256609004e770b/34a30d007de68b3d8025672e005b0410?OpenDocument#41>>

⁸⁴ *Ibid*

nature of the problems that would be liable to affect their independence and impartiality. At its 42nd plenary meeting on 22nd July 1994, the Economic and Social Council considered the Resolution of the Commission as aforesaid and endorsed the creation and the appointment of a monitoring mechanism in the form of a Special Rapporteur.⁸⁵ The Special Rapporteur was mandated to inquire into any complaints pertaining to his thematic responsibility, to identify the positive steps taken to preserve judicial independence in States as well as to investigate into attacks on judicial independence.⁸⁶

The Special Rapporteur's duties not only include investigations into the affairs of the judiciary but also matters affecting the legal profession. His mandate is very wide and has been summed-up as incorporating investigatory, advisory, legislative and promotional activities.⁸⁷

The Annual Reports of the Special Rapporteur set out the work undertaken by the Special Rapporteur that includes the investigation of complaints against attacks on the judges and the judicial systems of States. The Special Rapporteur has produced various mission reports as well as general reports detailing complaints received and measures taken to investigate these complaints. His activities include advising States on ways to improve structural weaknesses in their judicial systems.⁸⁸

The terms of reference adopted by the Special Rapporteur include the treaty standards of the *ICCPR* and the other non-treaty standards contained in instruments such as the *Basic Principles*, the *Basic Principles on the Role of Lawyers*⁸⁹ and the *Guidelines on the Role of Prosecutors*.⁹⁰ The latter two instruments were adopted by the 8th Congress on the Prevention of Crime and

⁸⁵ *Supra* n.43

⁸⁶ *ibid*

⁸⁷ Prefontaine and Lee, *supra*, n.2, 6

⁸⁸ *Ibid* 10

⁸⁹ <http://www.unhchr.ch/html/menu3/b/h_comp44.htm>

⁹⁰ *Ibid*

the Treatment of Offenders in 1990. However, only the *Basic Principles for the Independence of the Judiciary* has been endorsed by the General Assembly.

Notwithstanding the lack of binding effect of these instruments, they are important in at least providing guidelines for the work of the Special Rapporteur. In assessing the quality of the independence and impartiality of the judiciary in member States, the Special Rapporteur will use the standards contained in the *Basic Principles* to decide whether the States have succeeded or failed in measuring up to the standards in those instruments.⁹¹

Although the mandate of the Special Rapporteur focuses on national practice, he has also been monitoring the activities at the ICC. There are two issues that he is interested in – the ratification of the *Rome Statute* by States and *Article 16* of the *Rome Statute* and the potential threat to the independence of the court by the Security Council. However, his current comments on these issues are couched in general terms with no serious implications on the independence and impartiality of the Court. It would be interesting to see whether the Special Rapporteur would be mandated to examine any complaints arising out of judicial independence at the ICC.

It would have been also relevant and appropriate to have included the proceedings at the International Tribunals in the scope and mandate of the work of the Special Rapporteur. Having an independent assessor of their work could be helpful to the judges and allay doubts amongst members of the international community as to the independence and impartiality of the Tribunals' judges. Both are creatures of the United Nations and who better to assess the work of the courts than someone who has a strong and long legal background? Unfortunately this is not the case and the prevalent view is that

⁹¹ The Commission of Human Rights has been criticised for not following up on the Special Rapporteur's recommendations. Editorial, *Human Rights Features (2003) Vol 6 Issue 4, 1*

the judges at the International Tribunals are powerful figures with no obligations of accountability.⁹²

2.9 CONCLUSION

Standards of judicial independence and impartiality are inherent in many national justice systems. As fair trial standards, they are protected by specific rules and practices, derived from established legal sources such as, constitutions, statutes and precedents.

There are no significant special attributes⁹³ to the international standards of judicial independence and impartiality that distinguish them from the standards applied in domestic legal systems. As in the domestic systems, the dual requirements of judicial independence and impartiality are crucial towards ensuring that the right of the accused to receive a fair trial is guaranteed. They are important to the rule of law and due process. The concerns about international judicial independence and impartiality are no different than those at national level – that judges should be free from bias and that both they and the tribunal as a whole should be able to exercise their functions free from pressure from political organs and other parties.

The main and obvious differences between the international and national standards are the evolution, the effectiveness and the enforcement of the international standards. Unlike the national standards which derive their legal authority from statutes and binding case-law, the international standards lack a legally-binding foundation. However, international norms of impartiality and independence as recognised at present have evolved from

⁹²Michael Bohlander *The International Criminal Judiciary* supra Chapter One, n.17, 325

⁹³ There are some differences such as the qualifications requirement, where judges at the international criminal courts are expected to have knowledge of international criminal and humanitarian laws. Also, the “past link” and “previous activities” of the judges vis-à-vis the judicial impartiality concept are far wider in the international courts. These matters are dealt with in greater detail in the following chapters.

general provisions in the human rights instruments and United Nations documents to specific provisions in the Statutes of the international courts and tribunals, as well as principles of law from judgements of the *ad hoc* tribunals. There is no real functional difference in these norms and standards as their very purpose is to ensure that the rights of the accused are safeguarded and affirm public confidence in the administration of justice.⁹⁴

In sum, the function of the international criminal courts is the same as that of a domestic criminal court, which is to ensure that the right of the accused to a fair trial is guaranteed, and this includes the right to have his case heard by an independent and impartial tribunal. The principles of independence and impartiality in international law are applicable to international criminal proceedings through transference from domestic systems,⁹⁵ from the judgements of the Nuremberg and Tokyo Tribunals, the regional and human rights instruments and as general principles of international law and the provisions of the Statutes of the Tribunals. Added to these instruments is the *Basic Principles of the Independence of the Judiciary*.

⁹⁴Ruth Mackenzie and Phillippe Sands *International Courts and the Independence of the International Judge* (2003) Harv.JIL 271 275

⁹⁵ Quincy Wright *Due Process And International Law* (1946) 40 AJIL398, 402 where it is argued that international law should discover the general principles underlying major legal systems as well as customary international law, diplomatic conventions and opinions of international tribunals and academic writing.

JUDICIAL INDEPENDENCE

The Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights (Art. 14(1)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent judiciary is indispensable to the implementation of this right.

Beijing Statement of the Principles of the Judiciary
in the LAWASIA region
Principle 2¹

3.1 INTRODUCTION

An independent court and its members are bulwarks against abuse of due process and the breach of the right of the accused to a fair trial. It is this role of the International Tribunals that is the focus of this Chapter. In doing so, the issues of institutional independence of the international criminal tribunals and court and the individual independence of their judges are examined. The position of the International Tribunals is unique from that of the national courts. Whilst in the conventional framework, threats to the independence of the judiciary can emanate from the other two arms of the Government, in the international framework, threats can emanate from various parties such as States, members of international organisations and the organisations themselves.

¹ See Chapter Two, *supra* n.2

Specific incidents where threats were posed to the independence of the International Tribunals by the Security Council, the Government of Rwanda and the Non-Alliance Treaty Organisation (NATO) are discussed.

Of particular interest to this study is the Completion Strategy which has arguably become an unintentional tool for trading justice for expediency. Another issue that is cause for concern is the financing of the Tribunals. Both these issues are key threats to the judicial independence of the International Tribunals and by extension, to the impartiality of its judges.

It is axiomatic that the individual independence of the judges should be secured and guaranteed. How this security or guarantee is protected at the international courts and tribunals is a germane issue to the topic under discussion. Again, the Completion Strategy has had an unexpected impact on this issue and this is highlighted in this Chapter.

Before a detailed discussion is embarked on the judicial independence of the International Tribunals, it is proposed to discuss judicial independence generally and how it is traditionally interpreted in domestic and regional courts. Reference is also made to provisions of international and regional human rights instruments as well as case-law that propound the principle. The discussion then forays into a discussion on the application of this principle to the international criminal courts and tribunals.

3.2 JUDICIAL INDEPENDENCE: GENERAL

Judicial independence is vital in upholding the due process of law and in ensuring that the fair trial right of the accused is observed. There is an expectation, both by the individual accused and society as a whole, that the judiciary would serve as a bastion against abuse or arbitrary action by the

State in relation to the rights of the accused. It is instrumental in the protection of the rights of the individual.²

The *European Court of Human Rights* has given a broad definition of an independent and impartial tribunal in the case of *Belilos v Switzerland*,³ The Court defined the meaning of a “tribunal” within the context of *Article 6(1)* of the *European Convention* meant:

“.....a “tribunal” is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner.....It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members’ terms of office; guarantees afforded by its procedure...”

According to this definition, independence (and impartiality) is inherent in the word “tribunal” and contains organisational and procedural elements.⁴ It is a comprehensive definition and is helpful to have in consideration when assessing the independence of a particular tribunal.⁵ Judicial independence is crucial to safeguard the functional considerations as well as procedural guarantees of a fair trial right.

The concept of judicial independence itself demands a detailed consideration. Like the fair trial it serves to protect, it is a complex right. As briefly mentioned in Chapter Two, the standards required to protect judicial independence itself are numerous and differ from jurisdiction to jurisdiction. Much depends on State practice. State Parties to the *ICCPR* will be guided in

²Theodor Meron *Judicial Independence and Impartiality in International Criminal Tribunals* (2005) 99 AJIL 359

³*supra* Chapter Two, n.72 Paragraph 64. Harris *et al supra* Chapter One n.17, 231

⁴*Cf* The ICTY’s discussion of the establishment of a tribunal by law in the *Tadic (Jurisdiction) Decision*, *supra* Chapter One, n.97, 98

⁵ Harris *et al supra* Chapter One n.18 232.

structuring their domestic practice by the comments of the Human Rights Committee and its decisions.

The Committee expects the States to specify the

*“relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular to the manner in which judges are appointed, with qualifications for appointment, and the duration of their terms of office; the conditions governing promotion, transfer and cessation of their function and the actual independence of the judiciary from the executive branch and the legislative.”*⁶

Even so, the content of the standards themselves could be similar and yet different in State practice.⁷ Identifying the standards could therefore be difficult and even problematic. There is however a minimum content, other than the above aspects suggested by the Committee in the *General Comment*, which should be satisfied for judicial independence to be guaranteed. The minimum content or standards have been identified in the international and regional instruments.⁸ Further standards could be gleaned through jurisprudence of national courts and regional courts such as the *European Court*.

The problem of a lack of any binding definitions or guidelines in the international and regional human rights instruments on judicial independence could make it particularly difficult to gauge whether State practice is in conformity with the comprehensive international standards⁹ on judicial independence contained in the international and regional instruments

⁶*General Comment 13/21 supra* Chapter One, n. 9. Paragraph 3,

⁷ These include factors such as qualifications, security of tenure, appointment, termination relating to judicial office that form some aspects of judicial independence.

⁸ *Basic Principles on the Independence of the Judiciary, supra* Chapter Two, 69

⁹ Notwithstanding the mandate and work undertaken by the Special Rapporteur, the problem of addressing the complaints and the enforcement of his recommendations still lie within the discretion of the “offending State”.

such as the *Basic Principles* and the *Beijing Statement on Principles of the Independence of the Judiciary*.

The *Report of the Special Rapporteur on the Independence of the Judiciary and Lawyers* is useful in identifying the different aspects of the judicial independence. These could largely be classified under the dual postulates of institutional and individual independence.¹⁰ State of mind and relationship to third parties are key elements which are inherently relevant to these two postulates.

Institutional independence emphasises the requirement that the judicial institution itself, as an organ, should be free of control and pressures. This requirement is not just addressed to the whole judicial organ as an institution, but also to a specific panel hearing a matter. Threats to the institutional independence through control, pressure or any form of improper influence could emanate from external as well as internal sources.

Personal independence or **individual independence** on the other hand, rests on the individual judge who should be able to exercise his judicial functions without fear or favour of any control or pressure from any party. Personal independence may have an effect on the impartiality of the judge. If it could be shown that a judge is not independent by virtue of his connection to a party to the action, whether a private party or the State, there would be doubts as to his impartiality¹¹ and consequently, the correctness of his decision, even if he did ensure that the proceedings were fair in every other aspect.

¹⁰ *Report of the Special Rapporteur, supra*, Chapter Two n.1 Paragraph 34

¹¹ Stephanos Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Application of the Convention and a Comparison with Other Instruments* 125 (Dordrecht; London: Martinus Nijhoff, 1993). *Findlay v United Kingdom* (1997) 24 EHRR 221 Paragraph 93

Both postulates of judicial independence have a bearing on each other. A judge may be individually independent but if the tribunal, of which he is a member, is not independent, then, any convictions issued by the tribunal could be rendered unsafe by virtue of that dependence. This would adversely affect the decisions of the tribunal even if the convictions were arrived at after observation of other standards of fair trial.

Lack of judicial independence would also have an effect on the legitimacy and credibility of the judicial institution even if the personal matters relating to the office of the judge, such as the appointment, methods of selection, security of tenure, dismissal matters are scrupulously observed.¹² Conversely, if all the personal matters are not guaranteed, there could be a lack of independence on the part of the court if there could be shown a connection between these omissions and the actions of the court. The court may be said to lack independence in respect of any case which it hears.¹³ This would mean that the objective guarantees of independence have not been secured.

On the other hand, the lack of independence of an individual judge may have an affect only on decisions or convictions of which the judge was part of. It does not mean that the decision would be automatically adversely affected or overruled on appeal. Again, that depends on the trial proceedings as a whole. Of course, the chances of finding a conviction unsafe are much stronger if the judge sat alone. On the other hand, if the trial was presided by a panel of three judges, as is the practice at the International Tribunals,¹⁴ the chances of finding the conviction unsafe depends on the overall proceedings of the tribunal and whether the tests for independence and impartiality have been fulfilled.

¹² Harris, *The Right to A Fair Trial in Criminal Proceedings as a Human Right*, *supra* Prologue n.14 354

¹³ *Ibid*

¹⁴ See however Rule 15 *bis* of the Rules of Procedure and Evidence of the ICTY which allows two judges to carry on adjudicating if the third judge cannot continue sitting in a trial because of illness, resignation or failure to get re-elected.

In this aspect, it is argued that the international courts are no different from domestic or regional courts. Judicial independence is sacrosanct to these courts, whether it is a court with civil jurisdiction such as the International Court of Justice or whether a court with criminal jurisdiction such as the *ICTY*. Tied in with the institutional independence of the International Tribunals is the personal independence of the judges that make up the Tribunals' composition.

3.3 INSTITUTIONAL INDEPENDENCE

The independent character of the adjudicating tribunal is an essential component of the fair trial rights. It is a requirement that is provided for in the major human rights instruments.¹⁵

The traditional definition of the institutional aspect of judicial independence in relation to State practice involves the relationship between the Judiciary and the other arms of the Government, namely the Legislature and the Executive.¹⁶ The administration and funding of the courts are usually within the purview of the Executive and that gives the Executive considerable power and control over the judiciary.¹⁷ The interference by the Executive can take many forms, such as cutting down budgetary allocation to the courts and

¹⁵ *Article 14* of the ICCPR requires that the tribunal should also be “competent” whereas Article 8 of the ACHR requires that the tribunal be “previously established by law.” The Statutes of the International Tribunals provide that their judges shall be independent and impartial as *individuals*. The Rome Statute provides for the right of the accused to an “impartial” hearing. These issues are discussed in detail below.

¹⁶ The jurisprudence arising from the *European Convention* interpreted the independent element as independent of the Executive and the parties. *Ringeisin v Austria* (1971) A 13 Paragraph 95. Independence also means independence from Parliament, which traditionally comprises of the Legislature and elected members of the Opposition. *Crociani v Italy* Application No 8603/79 (1980) 22 DR 147. Harris *et al supra* Chapter One, n.17, 231.

¹⁷ There is a call for increased judicial autonomy in deciding matters relating to the personal office of the judges. See Shetreet S: *The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration* 393 in Shetreet S and Deschenes J (Eds): *Judicial Independence: The Contemporary Debate* (Dordrecht, The Netherlands: Lancaster Martinus Nijhoff Publishers, 1985)

removal of the jurisdiction of the courts on matters relating to the State.¹⁸ Matters such as the selection and qualification of judges may also fall under the purview of the Executive and these in turn could have an adverse effect on the independence of the judiciary and open to abuse.

3.3.1 INSTITUTIONAL INDEPENDENCE OF THE INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

The trite principles that a judicial organ must be independent and that such independence is at the root of the principle of fair trial are equally applicable to international criminal courts. The international criminal judicial system does not have the benefit of the Government structure that a national system has, and gauging as well as preserving independence from the creators of the international judicial systems are hard tasks to achieve. Nevertheless, it cannot be denied that whatever weaknesses there may be in an international legal system lacking a proper Legislature and Executive, the international criminal courts must be independent, even if no traditional form of checks and balances exist. Further, the lack of a specific provision for the requirement of institutional independence in the Statutes of the International Tribunals and the ICC does not mean that such a requirement could be dispensed with. In fact, a strong show of independence is necessary, particularly where the International Tribunals are concerned, to show that they are independent of their highly-political creators, the Security Council and powerful States.¹⁹ There are other possible sources of threats to the International Tribunals as well.

¹⁸For example, the African Commission found that the Government of Nigeria had undermined the independence of the courts when the Government issued decrees to remove the jurisdiction of the courts over challenges to government decrees. See *Civil Liberties Organization v Nigeria (129/93)* 8th Annual Report of the African Commission 1994-1995.

¹⁹For example, the late Slobodan Milosevic argued vehemently that the ICTY was a political tool of the United States and NATO members. Michael Scharf *The Legacy of the Milosevic Trial* (2002-2003) 37 New Eng L. Rev 915, 919. Of course, it is also possible that Milosevic's challenge was not altruistic as his conduct prior to his own arrest and presence in court indicated that he had accepted the legitimacy of the ICTY, such as the signing of the Dayton Accords in 1995. 57% of over 1 000 Serbs

3.3.1.a THE INTERNATIONAL TRIBUNALS

One of the major tasks faced by the International Tribunals faced was establishing themselves as an independent judicial institution, notwithstanding the nature of the organ creating the courts and the manner by which they were created. The independence of the tribunal as an institution and of the judges as individuals from the Security Council and the General Assembly is central to the other duties and responsibilities that they bear. Whether they have succeeded in doing so will be assessed below.

The potential threat to the independence of the International Tribunals could emanate, *inter alia*, from the relationship they have with the Security Council as its subsidiary organs. This issue is particularly relevant when considering two aspects of the principal organ-subsidary organ relationship that the Security Council has with the International Tribunals.. First, three permanent members of the Security Council are also members of the Non-Alliance Treaty Organisation, an organisation that the ICTY relies heavily on for various issues, such as producing the accused in court, carrying out the enforcements and other matters to ensure that the Tribunal runs and functions smoothly. Secondly, the role of the Security Council in the endorsement of the Completion Strategy has highlighted its culpability as demanding the International Tribunals to wind-up its proceedings resulting in the unfortunate consequence of compromising the right of the accused to a fair trial. The parent-subsidary organs relationship is therefore very relevant to judicial independence and the right of the accused to a fair trial.

interviewed harboured a perception that the ICTY was not independent. Scharf *op cit* 920, 921,923. Also see *Letter dated 19th May 1993 from the Charge d'Affaires A.I.(sic) of the Permanent Mission of Yugoslavia (Serbia and Montenegro) to the United Nations*, addressed to the Secretary-General, A/48/170, S/25802, 21st May 1993, questioning the independence and impartiality of the ICTY, reprinted in 2 Morris & Scharf *supra* Chapter One n.92479-480. The Letter was actually sent by the Deputy Prime Minister and Minister of Foreign Affairs of the Federal Republic of Yugoslavia

3.3.1.b THE INTERNATIONAL TRIBUNALS AS SUBSIDIARY ORGANS

The relationship between a principal organ and its subsidiary in the framework of the United Nations is characterised by many factors other than the authority derived from the Charter. Definitional issues, mandates, functional limitations, relationship factors, such as the degree of independence between the entities, the control and authority of one entity over the other and the discretionary powers of the parent body to terminate the lifespan of the subsidiary organ are significant considerations in assessing the independence of the International Tribunals.²⁰

The Charter does not define what a subsidiary organ is and what it can do, other than assist in the performance of the functions of the principal organ. An accepted definition, gleaned from documents of the United Nations, invokes the following criteria. The definitional issues would assist in gauging the overall independence of the Tribunals. These issues have been identified as follows:

- (a) A subsidiary organ is *created* by, or under the authority of, a principal organ of the United Nations;
- (b) The membership, structure and terms of reference of a subsidiary organ are *determined*, and may be modified by, or under the authority of, a principal organ.
- (c) A subsidiary organ may be *terminated* by, or under the authority of, a principal organ.²¹

²⁰ For a detailed study on the United Nations subsidiary organs, see Danesh Sarooshi, *The Legal Framework Governing United Nations Subsidiary Organs* (1996) 67 BYIL413

²¹ These have been classified as “common features” between the subsidiary organs of the United Nations despite wide differences between them. See *Repertory of Practice of the United Nations Organs*’s commentary on Article 7(2), 228 at paragraph 21.

Available at

<http://untreaty.un.org/cod/repertory/art7/english/rep_orig_voll1-art7_e.pdf#pagemode=none>

These characteristics denote crucial matters of dependence by the subsidiary organ on the principal organ: its establishment, its structure, membership and scope of work and its termination are all within the discretion of the principal organ.

The general rule relating to the issue of principal organs and their subsidiaries in the United Nations is that it is essential for the subsidiary organ to establish a degree of independence from the principal organ.²² This requirement is necessary, first for ensuring that the subsidiary organ is not simply a part of the principal organ and secondly, to distinguish it from another entity which is an integral part of a principal organ.²³

However, independence in this context does not apply to the International Tribunals as they are not exercising the same powers and functions of their creator in the sense that they are not directly responsible in maintaining international peace and security but are rather measures in the form of a subsidiary organ employed to that end. Hence the International Tribunals, as judicial organs, are undoubtedly distinguishable from the Security Council.²⁴ A further factor that would distinguish the International Tribunals is that they do not form an integral part of the Council like a commission, committee or other such entities.

The issues of institutional framework and lifespan of a subsidiary organ are intertwined for the purposes of the institutional independence of the International Tribunals. Read together, they raise various issues of control and authority of the United Nations, in particular the Security Council over

Also Sarooshi *supra* n.20, 416, *ibid*. An additional criterion of a subsidiary organ of the United Nations is that its establishment does not violate the boundaries of Charter powers between the principal organs. *Sarooshi op cit*.

²²Sarooshi *ibid* 416

²³*Ibid*

²⁴ This distinction is necessary for it is important for the International Tribunals to maintain their integrity of independence from their creator, which is highly-political organ.

the Tribunal. These include issues such as the existence of control and authority and the effect of that control and authority over the independence of the Tribunals. These are issues that cannot be ignored. Although there is no direct connection between the independence of the International Tribunals from the Security Council and the right of the accused to receive a fair trial, any imputation of dependence would raise the doubt in the international community whether the accused would receive a fair trial. A clear example of such connection is the implementation of the Completion Strategy.

The second requirement or characteristic of a subsidiary organ pertaining to the membership, structure and terms of reference of the Tribunal has been determined by the Statute, the Resolutions of the Security Council and the *Report of the Secretary-General*.²⁵ This fact in turn raises two matters that require examination. First, whether there should be a degree of authority and control over a judicial organ by the Security Council, which is a highly political body, and secondly, whether the intrinsic characteristic of independence of the Tribunal as a judicial organ is adversely compromised as a result of that authority and control.

Insofar as the first issue of control is concerned, it is necessary to make a distinction in the dual functions of the International Tribunals before “control” is considered. This distinction is pertinent, given the intrinsic judicial nature of the International Tribunals, between its operational functions and its judicial functions. The former relates to the administrative aspect of the Tribunal which includes the appointment of judges, the organisational structure of the institution, the staffing, the resources, the finances and various administrative matters. The latter relates to the conduct of legal proceedings before the International Tribunals in their judicial capacity. The proceedings and indeed the decisions of the Tribunals are not subject to

²⁵ The membership of the International Tribunals is determined both by the Security Council and the General Assembly. It involves a fairly complicated process, discussed in this text at page 183 *et seq.*

authority or control of the Security Council.²⁶ A condition of institutional independence, that is, the courts should be the sole arbiter of their jurisdiction and that their decisions are not reviewable by a third party is therefore observed.²⁷ The independence of the International Tribunals from the Security Council is thus preserved in this aspect. It was clearly intended that this should be so as observed from the statement by the Secretary-General in his *Report*: Whilst acknowledging that the ICTY was established as a subsidiary organ under **Chapter VII**, it was made clear that the Tribunal was:

*"...one of a judicial nature. This organ would, of course, have to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions"*²⁸

There are some interesting issues that have arisen out of the above statement. Ideally, the International Tribunals would perform its functions independently of political considerations and as a judicial organ, it would not be subject to the authority of Council with regard to the performance of its duties. Of course, the Report is at pains to emphasise that the International Tribunals would be independent in this regard. However, as several decisions of the International Tribunals would demonstrate, this was not strictly accurate. Secondly, whilst the Tribunals would be free from control vis-à-vis its judicial functions, there are other ways by which a possibility of control by a political organ could arise. The budget of the International Tribunals, the appointment and renewal of the judges to the Bench of the International Tribunals, the Completion Strategies are but some of the licences that the

²⁶ In an interview with the author at the Hague on June 29th 2002, the late Sir Richard May asserted that the judges do not feel that the Security Council interfered with the independence of the ICTY. He was also very comfortable with the distance between the parent and subsidiary organs. "They (the Security Council) are in New York. We (the ICTY) are in the Hague", thus stressing that they were not within the beck and call of the Council. the distance helps."(*on file with the author*)But whilst it may be correct to say that the Security Council did not interfere directly with the Tribunal, it is argued that the interference came through indirect ways.

²⁷ Principle 3 of Basic Principles, *supra* Chapter Two, 69

²⁸ *Report of the Secretary-General*, Chapter One, *supra* n. 91 Paragraph 28

Security Council may and indeed have resorted to as means of indirect control of the International Tribunals which in turn may affect the judicial functions of the Tribunals, including their duty to ensure the right of the accused to a fair trial. These issues are discussed later in this work.

The issue of “truly independent” from the Security Council is central to the International Tribunals as judicial organs, not merely uninfluenced but even tainted by political considerations, the International Tribunals must truly be independent from the Security Council in order to achieve legitimacy and credibility as judicial organs and consequently, ensuring that the right of the accused to a fair trial is maintained.

The Appeals Chamber said this in *Tadic*:

To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council "intended" to entrust it with, is to envisage the International Tribunal exclusively as a "subsidiary organ" of the Security Council (see United Nations Charter, Arts. 7(2) & 29), a "creation" totally fashioned to the smallest detail by its "creator" and remaining totally in its power and at its mercy. But the Security Council not only decided to establish a subsidiary organ (the only legal means available to it for setting up such a body), it also clearly intended to establish a special kind of "subsidiary organ": a tribunal²⁹

The decision in the *Prosecutor v Joseph Kanyabashi* Case No. ICTR-96-15-T (Trial Chamber, *Decision on the Defence Motion on Jurisdiction*)³⁰ is relevant vis-à-vis the issue of the institutional independence of the International Tribunals. The defence argued that the ICTR could not be both a subsidiary organ of the Security Council and an independent judicial organ.³¹ It was

²⁹ *Appeal Decision*, Chapter One n.98, Paragraph 15

³⁰ Dated the 18th of June 1997. Available at <<http://www.ictt.org/default.htm>> See Virginia Morris International *Decisions: Prosecutor v Kanyabashi* (1998)92 AJIL 66. The other challenges by counsel for Kanyabashi were substantially similar to those raised by *Tadic*.

³¹ *Ibid*, Paragraph 38

further argued, as it was at the *ICTY*, that the Tribunal could not be impartial and independent as it was established by the Security Council, a political organ³²

The Trial Chamber dealt with these issues by comparing its mode of creation with that of national courts. The court was untroubled by the fact that the Tribunal was created by a political body. This issue was addressed by a comparison with national courts. National courts, it was opined, were the creations of legislatures which were eminently political bodies.³³ In this regard, whilst there is no legislature³⁴ as one of the three arms of Government as is traditionally recognised in the national system,³⁵ it is the common political characteristics of both the national legislatures and the Security Council that was the underlying factor in the Trial Chamber arriving at the conclusion that the Security Council is entitled to do what national legislatures could do, which is the establishment of a judicial organ. In support of this finding, the Trial Chamber referred to the decision of another principal organ of the United Nations, that of the ICJ in the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal Case* and concluded that a political organ could and had created “an independent and truly judicial body”.³⁶

³² It was argued that the ICTR was “just another appendage of an international organ of policing and coercion, devoid of independence.” *Ibid* Paragraph 37

³³ Kanyabashi, *supra* n. 30 Paragraph 38

³⁴ See also the *Appeal Decision supra* Chapter One, n.97 Paragraph 43.

³⁵ See Warbrick, in *The United Nations System: A Place for Criminal Courts? Supra*, Chapter One, n. 104.

³⁶ Kanyabashi, *supra* n.30, Paragraph 39. The Trial Chamber gave other reasons to reiterate both its personal and institutional independence such as the non-binding effect of national rules of evidence thus allowing it to apply the Rules of Evidence that is best suited to a fair determination of the case before it, the oath-taking by judges to exercise their judicial duties independently and impartially and Article 12(1) of the Statute which reiterates the independence and the impartiality of judges. *Ibid*, Paragraphs 40-42. All in all, the Trial Chamber was adamant that it was independent from the Security Council. “Judges do not account to the Security Council for their judicial functions”. *Ibid* Paragraph 41. This statement invites comment. For example, whilst it may be true that a particular judge may not be accountable to the Security Council for a particular judgement, but the Tribunal themselves and their Presidents may be questioned as to its case management process under the Completion Strategy Assessment and Reports. Also, they might not be re-elected if they do not “please” the Security Council or the General Assembly. See Bohlander, *supra* Chapter One n.17, 363.

In this regard, an analogous reference was made to the decision of the International Court of Justice in the *Administrative Tribunal* case. Although the judgement related to the power of a subsidiary body to bind the principal organ, the same principle could be applied to the Tribunal in gauging its independence from the Security Council. The test is the intention of the Security Council in establishing the Tribunal. As the International Court of Justice said:

“Moreover, the fact that the Tribunal is a subsidiary, subordinate or secondary organ is of no importance. What is of importance is the intention of the General Assembly in establishing the Tribunal, and what it intended to establish was a judicial body.”

The issue here should not be whether the status of the Tribunal is a subsidiary, subordinate or secondary organ but rather, the intention of the Security Council in establishing it. The intention of the Security Council was to create a judicial organ, albeit a *Chapter VII* measure. A judicial organ should necessarily be an independent institution, even if it is a *Chapter VII* measure. It would defeat the purpose and intention of creating a judicial organ if the principal organ impedes its functions by interfering through its authority and control. This corresponds with the argument that the fact that the Tribunal is exercising a function that the Security Council itself does not possess is significant in ascribing independence which prohibits interference by the Security Council in the proceedings of individual cases.³⁷

The *Report of the Secretary-General* made it a point to declare that the Security Council should not interfere with the Tribunal’s “performance of its judicial functions”.³⁸ It is argued that this is a myth. Whilst the Council will not interfere *directly* with the judicial proceedings and the decisions of the

³⁷*Sarooshi, supra* n.20, 453. Again, there are other ways in which such independence could be trifled with: extension of the judges’ term of office is one such mode which could be used or abused by the appointing authority.

³⁸*Report of the Secretary-General supra* Chapter One, n. 91Paragraph 21.

Tribunal, there has been indirect interference with the Tribunals' existence and functions through the Completion Strategies. The institutional independence of the Tribunals became uncertain as a result of the implementation of this grand scheme to bring about the end of the international *ad hoc* criminal tribunals.

3.3.1.c THE COMPLETION STRATEGIES OF THE INTERNATIONAL TRIBUNALS³⁹

(i). INTRODUCTION

A significant scheme, which has become ingrained in the framework of the International Tribunals is the "Completion Strategy", a scheme purportedly designed by the Tribunals themselves to wind up their proceedings and ultimately, end their life spans. A detailed discussion on this issue is necessary for it is argued that such a scheme have compromised the efficacy of the Tribunals, and hence their independence.⁴⁰ This is an unfortunate development after the declaration of bravado by the Appeals Chamber in the *Tadic* and *Kanyabashi* cases that the International Tribunals are unique subsidiary organs as they are independent judicial organs outside the sphere of authority and control of the Security Council.

That the threatened independence of the Tribunals has a correlative effect on the right of the accused to a fair trial is evident from the proceedings at the Tribunals in their attempt to give effect and carry out the conditions of the

³⁹ See Daryl Mundis *The Judicial Effects Of The "Completion Strategies" On The Ad Hoc International Criminal Tribunals* (2005) 99 AJIL 142. The author is with the Office of the Prosecutor at the ICTY. Cf. Larry D. Johnson *Closing An International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity* (2005) 99 AJIL 158. This author is the Chef de Cabinet, Office of the President at the ICTY. Dominic Raab *Evaluating the ICTY and its Completion Strategy* (2005) 3 JICJ 82 and Sarah Williams *The Completion Strategy of the ICTY and the ICTR in International Criminal Justice- A Critical Analysis of Institutions and Procedure* 153 Michael Bohlander (Ed) (London;Cameron May; 2007). All articles set out the genesis of the Completion Strategy, its components, its goals and the measures taken to achieve those goals.

⁴⁰ There are arguments to the contrary. See Johnson, *ibid* and Williams *ibid*

Completion Strategy. It is argued that independence of the Tribunals, when compromised thusly, may have an effect on the impartiality of the judges.

(ii). JUSTICE HURRIED IS JUSTICE BURIED

It was clear from the outset that the International Tribunals were established on an *ad hoc* basis, and consequently their life spans would be limited.⁴¹ As the Tribunals were established by resolutions of the Security Council, termination of their life spans by resolutions of the Council would be the appropriate action.⁴² This reflects the general principle that the principal organ must clearly evince its intention that the subsidiary organs would be terminated.⁴³ The position of the International Tribunals was clear from the early stages of their establishment. Their mandates would come to an end once the aims of the establishment had been fulfilled, which is the restoration and maintenance of peace and international security in the affected areas. So even if there was no time frame set out for the winding-up of the Tribunals,⁴⁴ recourse could be made to the *Chapter VII* powers that were used to justify their establishment for the determination of their life spans.

As the Secretary-General said in his Report:

*As an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto.*⁴⁵

⁴¹ 1 Morris & Scharf *The ICTR Prologue supra* n.10 89, 106, 107

⁴² However, it has been pointed out that the efforts to terminate the Tribunals came from the Tribunals themselves, rather than the Security Council as the parent organ. It is argued that whilst this may be true on record, the Tribunals were put in a position where they had to think out eventual phasing out of their duties.

⁴³ Sarooshi *supra* n.20, 449

⁴⁴ Williams, *supra* n.39 153

⁴⁵ *Report of the Secretary-General*, Chapter One *supra* n.91, Paragraph 28.

However, as events unfolded, it became quite clear that the strategy that would see an end to the Tribunals was as a result of concerns relating to other factors such as escalating financial costs and the extensive length of time for a trial to be completed, resulting in accused being held in detention for an undue period of time.⁴⁶ Financial outlay was the major factor that raised concern among members of the United Nations. It is therefore arguable whether the life spans of the Tribunals are about to be terminated because they have been, as *Chapter VII* mechanisms, successful in restoring and maintaining international peace and security in that area, or due to worrying and escalating costs. The termination of the tribunals in reality was motivated by the prosaic issues of financing the tribunals and donor fatigue rather than the loftier goal of achieving justice.⁴⁷

In 1998, the Secretary-General appointed an expert group to review the operations and efficiency of the Tribunal and make such recommendations as necessary.⁴⁸ The *Report of the Expert Group* made forty-six recommendations which identified procedural and institutional defects that needed to be addressed.⁴⁹ Following that report, which was submitted to the General Assembly, the ICTY was asked for its response. The response became what is known as the *Completion Strategy*.⁵⁰

⁴⁶ Williams, *supra* n.39 154

⁴⁷ Steven D. Roper, Lilian A. Barria *Designing Criminal Tribunals: Sovereignty and International Concerns in Protection of Human Rights* (London: Aldgate Publishing Ltd; 2006)

⁴⁸ This question did not raise or evince any intention of the Security Council to end the life spans of the International Tribunals. Mundis, *supra* n.39

⁴⁹ *Report of the Expert Group to Conduct a Review of the Effective Operations and Functioning and Operations of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda*. See Daryl Mundis *Improving the Operations and Functions of the International Tribunals* (1999) 94 AJIL 759. See also *The Completion Strategy for the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda* 71 in Roper & Barria, *supra* n.47.

⁵⁰ *Report on the Operation of the International Criminal Tribunal for the former Yugoslavia* submitted by Judge Claude Jorda, President on behalf of the Judges of the Tribunal UN Doc.A/55/382-S/2000/865 Annex 1 (2000). Mundis *ibid*

This document sets out the plans and deadlines for the Tribunals to wind up their work. There are two aspects to the *Completion Strategy*. The first aspect is that the focus of the Tribunals and their priorities should be on the highest-ranking suspected violators of international humanitarian law.⁵¹ The second aspect is the referral of cases to the national courts. This involved case disposal is dealt with by allowing only important “*crimes which most seriously violate international public order*” to be prosecuted at the Tribunal. All crimes committed by “*intermediate-level accused*” would be sent back to the national courts for trial.⁵² The *Completion Strategy* was framed by the then President of the ICTY, Judge Claude Jorda in his Annual Report to the Council when he set out the proposed dates that the Tribunal envisaged for completion of investigations, trials and appeals.⁵³ The Security Council endorsed the Completion Strategy for each of the Tribunals by adopting *Resolution 1503 (2003)*.⁵⁴

There are many perplexing issues arising from this *Strategy*. Matters such as whether the national courts are able to try trials of this enormity, involving complex issues of substantive international criminal law, procedure and over and above all this, the respect for the due process of law, the independence

⁵¹ A consequence of the Completion Strategy is the creation of a separate position of the Prosecutor for the ICTR. Mundis *supra* n.39 147

⁵² Michael Bohlander *Last Exit Bosnia- Transferring War Crimes Prosecution From The International Tribunal to Domestic Courts* (2003) 14 Crim. LF 59 which gives an overview on the development of the Completion Strategy. Also by the same author: *The Transfer of Cases from International Criminal Tribunals to National Courts*, Paper presented at the Prosecutor’s Colloquium in Arusha, November 1994.

Available at <<http://69.94.11.53/ENGLISH/colloquium04/bohlander/Bohlander.pdf>>. The paper, *inter alia*, discusses in detail the transfer of cases from the ICTY to the national courts of various Balkans states, and the mechanics and the problems arising from such transfers. Doubts have been raised as to whether national courts have adequate resources to deal with the trials. Patricia M. Wald *The “Horizontal Growth of International Courts and Tribunals: Challenges and Opportunities?”* (96) ASIL Proc. 369, 377,378. The situation is slightly different for Rwanda where referrals could be made to the national courts of that country or of any other State willing and able to take over the prosecution. Rule 11bis(A) of the Rules of Procedure and Evidence of the ICTR. Bohlander, *ibid*

⁵³ *Ninth Annual Report 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* Doc.A/57/397- S/2002/985.

Available at: <<http://www.un.org/icty/rappannu-e/2002/AR02-e.pdf>>

⁵⁴ U.N.Doc S/RES/1503(2003) The completion dates set for both the International Tribunals were the end of 2004 for investigations, the end of 2008 for trials and the end of 2010 for appeals. The resolution also calls for Member States to cooperate with national jurisdictions as well the Balkan States and the African States to help bring leading indictees to the jurisdiction of the Tribunals.

and impartiality of such courts, the failure to prosecute major war crimes suspects have raised concern.⁵⁵

However, the most perplexing issue is the very conception of the *Strategy* itself. Whilst it is true that the *Strategy* was conceived by the ICTY,⁵⁶ it does not necessarily mean that the Tribunal could not point out the weaknesses or defects in the winding-up plan especially since such defects would or could affect their credibility as a judicial organ. It also does not mean that questions of any compromise or curtailment of their independence should and would not arise.⁵⁷ Whilst it may be true that the Strategy was framed by the ICTY itself,⁵⁸ it would also be fair to say that such a "strategy" was "nudged" into place as a result of the findings and recommendations made by the Expert Group.⁵⁹ A detailed study of the events that led up to the creation of the Strategies show that the Tribunals were put in a position where they had to react to those findings and that reaction was in form of the *Completion Strategy*.⁶⁰ It was not as if the Tribunals had acted out of their own initiative.⁶¹ Once the *Completion Strategy* was presented to the Security Council, it was endorsed by them and acquired a significantly binding status.

It is argued however, that it is immaterial how the *Completion Strategy* came about. The stand of the Security Council on the *Completion Strategy* appears uncompromising. Interpreting the surrounding circumstances and the

⁵⁵ Bohlander, *supra* n. 52. The author discusses at length the capacity and the ability of national courts to try complex criminal trials involving legal issues arising out of international criminal law.

⁵⁶ Williams, *supra* n.39, 161

⁵⁷ Williams, *supra* n.39 161

⁵⁸ The ICTY put forward its proposal, i.e. the Completion Strategy to the Security Council which endorsed it.

⁵⁹ See Roper and Barria, *supra* n. 47 71 see also Johnson, *supra* n.39 159 Williams, *supra* n.39. 160..

⁶⁰ As Professor Bohlander put it *Judges began thinking ahead towards a completion or exit strategy – after getting a little nudge from the Expert Group...*” (emphasis is mine). Bohlander *Last Exit Bosnia supra* n.52 61. The issues of who started what and in response to who are quite pertinent when it comes to the discussion of the independence of the Tribunals vis-à-vis the Completion Strategy. It is a common-held belief and opinion amongst the international circles that the International Tribunals were under pressure from the United Nations to wind up its proceedings and terminate its operations. See Patricia Wald *Reflections on Judging: At Home and Abroad* (2004-2005) 7 U. Pa J. Const. L 219 and Raab, *supra* n.39, 84.

⁶¹ Daryl Mundis *Current Developments at the ad hoc International Criminal Tribunals* (2004) 2 JCIJ 879.

responses that the Security Council has made, it appears that the Council is more interested in winding up proceedings than ensuring that the right of the accused to a fair trial is protected. **Resolution 1503** states *inter alia*, “*recalling and reaffirming in strongest terms*” the **Strategy** as put forward by the President of the ICTY. It further “*requests*” that biannual progress reports be submitted to the Council. It is opined that the Resolution is couched in peremptory tones regardless of the words used and reading the expressions used, the cumulative effect is that, it was a clear and unequivocal message to the Tribunals stating that now that the Tribunals have set forth the dates, they have to make sure that they comply with them. It is most improbable that the International Tribunals would refuse a Security Council’s request. There should be some degree of flexibility, which this Resolution does not seem to show.⁶² It is difficult for a judicial organ to ensure that its cases will be completed by a certain date, as opposed to “*may*” be completed by a certain date. “*Completion*” here does not merely mean that the case should come to an end; it should mean that it comes to an end; it should come to an end not only after “*all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments*” have been provided, but also protected.

Further, it has been stated that **Resolution 1503** has set forth target dates, and not deadlines.⁶³ This, with due respect, is mere labelling. It needs to be emphasised that bearing in mind that the status of the International Tribunals is *ad hoc*, it is not the **Completion Strategy** that is a threat to the institutional independence of the International Tribunals. It is the deadlines that are

⁶²Any lawyer or judge familiar with litigation and the trial process would admit that setting deadlines for completion of cases *in toto* as the Strategy seems to have done, including the completion of appeals, is very risky as practically, there would be many variables that could crop up such as absence of witnesses, illness of the accused, examination-in-chief and cross-examination that spills over the trial dates, filing and hearing of preliminary motions and so on. The list is endless. See the reasons given by the President of the ICTY for the “*slippages past previously estimated completion dates*” in the latest Completion Strategy Assessment Report *Assessment and report of Judge Fausto Pocar, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004)* Paragraph 45. (Submitted 13th May 2008) Available at <<http://www.un.org/icty/publications-e/assessments/documents/2008-326eng.pdf>>

⁶³Williams *supra* n.40 161, Johnson, *supra* n. 39, 159.

contained therein. By *Resolution 1329 (2000)*,⁶⁴ the Security Council “*requests the Secretary-General to submit to the Security Council, as soon as possible, a report containing an assessment and proposals regarding the date ending the temporal jurisdiction of the International Criminal Tribunal for the former Yugoslavia*” (emphasis added).⁶⁵

Resolutions 1503 and *1534* give an overall picture that reiterates the impression that the Security Council is very firm in its intention to wind up the Tribunals and that the times set were prescribed timetables.⁶⁶ *Resolution 1534* is indicative of how determined the Security Council is in keeping with the schedules. In fact *Resolution 1534* went further. The Resolution was demanding in nature, in that it compelled the President of the International Tribunals to make biannual status reports to the Council. Whilst in *Resolution 1503*, the Presidents were requested to *apprise* the Security Council of their steps to implement Completion Strategy in their Annual Reports, in *Resolution 1534 (2004)*⁶⁷, they were asked to submit Completion Strategy Assessments *every six months*.⁶⁸ (Emphasis is mine). A commentator attributes this *Resolution* to the finding in a report by the UN Office of Internal

⁶⁴ See <<http://69.94.11.53/ENGLISH/Resolutions/1329e.htm>>

⁶⁵ Paragraph 6. *Ibid.* The Resolution was not aimed at the ICTR. See Williams, *supra* n.39, 159.

⁶⁶ Two permanent members of the Security Council, Russia and China are unbending on the deadlines and expect the Tribunals to comply strictly with the deadlines. Russia has actually stated that it “will not accept attempts to reinterpret the completion strategy”. However, there are other members are of the view that 2010 as an indicative date rather than one set in stone. Since Russia and China have powerful voices in the Security Council, it would be interesting to note, towards the end of 2010, the progress of the Completion Strategy. See *Security Council Report on the International Criminal Tribunals, August 2007* available at <http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.3041227/k.E5DC/August_2007BRInternational_Criminal_Tribunals.htm>

⁶⁷ U.N.Doc S/RES/1534 (2004). On 8th October 2003, the then-President of the ICTY, Judge Theodor Meron highlighted to the General Assembly of the United Nations the problems the Tribunal faced in executing the Completion Strategy

⁶⁸ Paragraph 6: “*Requests* each Tribunal to provide to the Council, by 31 May 2004 and every six months thereafter, assessments by its President and the Prosecutor, setting in detail the progress made towards implementation of the Completion Strategy and what measures have to be taken to implement the Completion Strategy and what measures remain to be taken, including the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions; and expresses the intention of the Council to meet with the President and Prosecutor of each Tribunal to discuss these assessments.” Of course, it could be argued that this is an administrative matter and that the Security Council has every right as a principal organ to be kept apprised of the progress of the Completion Strategies but that does not dispel the notion that the independence of the International Tribunals carries the risk of being compromised.

Oversight Services on the Offices of the Prosecutors of the ICTY and the ICTR to the effect that there was insufficient evidence that the *Completion Strategy* were on track to meet their target dates and that the Office of the Prosecutor lacked a specific and strategic plan to fulfil the requirements of the *Strategy*.⁶⁹ All these factors, taken cumulatively, go to show that the Security Council has now decided to hold a tight rein over the Tribunals, raising the risk of perception that the Tribunals as judicial organs, are being controlled by their parent organ and therefore their independence may be compromised, infringed or even questioned.⁷⁰ The pressure is immense; the independence of the International Tribunals as judicial organs would definitely fall under scrutiny.⁷¹

There was a fear that the *Completion Strategy* would cause the International Tribunals to wind up before its proceedings before the main high-ranking accused were apprehended and tried for the serious crimes that they would be charged with. Besides Slobodan Milosevic and Biljana Plavic, a former deputy of Radovan Karadzic and the former President of the Republika Srpska, no other high-ranking accused had been tried by the Tribunal when the Completion Strategies were endorsed.⁷² There was a fear that the ICTY winds down without prosecuting these accused at large, it would appear that those accused of war crimes could get away with impunity. In this regard, the

⁶⁹ Mundis *Judicial Effects* *supra* n. 39 145

⁷⁰ A note of warning had already been raised by one of ICTY's judges, Judge David Hunt.

⁷¹ Karen Zoglin *The Future of War Crimes Prosecution in the Former Yugoslavia: Accountability or Junk Justice?* (2005) 27 HRQ 41. See also Amnesty International's concerns on case referrals to the national courts of Bosnia and Herzegovina, arguing that it was to "effect the quickest and cheapest possible withdrawal of the international community and the acceleration of the exit strategy of the Tribunal" Amnesty International *Bosnia-Herzegovina: Shelving Justice- War Crimes Prosecutions in Paralysis* (2003). Available at

<<http://web.amnesty.org/library/Index/ENGEUR630182003?open&of=ENG-332>>. Mundis, *supra* n.210, 154 n.105. The Human Rights Watch published an article where the authors also firmly hold the view that the Completion Strategy was evolved with a 2010 deadline regardless of whether the date allows the Tribunals to fulfil their mandates. Richard Dicker and Elise Keppler *Beyond the Hague: the Challenges of International Justice*. Available at <www.hrw.org/wr2k4/10.htm>

⁷² General Ante Gotovina, the Croatian General allegedly responsible for the ethnic cleansing of Serbs was on the run from the prosecutors of the ICTY and was finally arrested four years later. He is now facing proceedings at the ICTY.

Prosecutor of the ICTY has argued before the Security Council that it is inconceivable that:

“..... the ICTY closes its doors with Radovan Karadzic and Ratko Mladić at large. I want to stress again before the Council that impunity for these two most serious architects of the crimes committed in Bosnia and Herzegovina, both accused of genocide, would represent a terrible blow not only to the success or failure of the Tribunal, but to the future of international justice as a whole.”⁷³

However, on the 21st of July 2008, the ICTY issued a statement that Radovan Karadzic has been arrested in Belgrade.⁷⁴ This adds a new twist to the *Completion Strategy*. At the time of writing, Karadzic is yet to be transferred to the custody of the Tribunal still in Serbia. He has to be transferred to The Hague. It would be interesting for legal commentators and human rights activists alike to see whether the ICTY would accord Karadzic the full rights of an accused or whether in the haste to comply with the demands of the Completion Strategy and the deadlines as well as the pressure of Security Council, corners will be cut to hasten the closure of arguably one of the most impactful international judicial organs of the 20th and 21st centuries just because it became too expensive to be maintained.

(iii). RULE 11BIS

One of the elements of *Completion Strategy* is the referral of cases indicted at the ICTY to the national courts under *Rule 11bis* of its Rules of Procedure and

⁷³ Address by the Prosecutor to the Security Council, 7th June 2006. Available at: <<http://www.un.org/icty/pressreal/2006/p1085e-annex.htm>> Note also Resolution 1534 (March 26, 2004) where the Security Council asserted that the new indictments should focus on the most senior leaders suspected of being most responsible for crimes within the relevant jurisdiction”. Mundis, *supra* n.210, 144. 1 Morris & Scharf *The ICTR supra* Prologuen.10,107 raising concerns that the ICTR and ICTY may be prematurely terminated before those who are most responsible for the atrocities committed are brought to justice. See also Alvarez, *supra* n.167254

⁷⁴ “Statement of the Office of the Prosecutor on the Arrest of Radovan Karadzic” available at <<http://www.un.org/icty/pressreal/2008/pr1274e.htm>>

Evidence. Rule 11*bis* authorises the trial chambers to order cases be referred to authorities of the state (a) where the crime is committed (b) or where the accused was arrested or (c) which has jurisdiction and is willing and prepared to take the case. A trial chamber considering a request for referral should be satisfied that the accused would receive a fair trial in the national courts and the death penalty will not be imposed.⁷⁵

The *Completion Strategy* must take into account the stability and efficiency of the national legal systems and whether they offer fair trial guarantees in accordance with the international standards of due process and impartiality. Concerns raised on the transfer of the cases to the national courts include political and other influences on the proceedings, the independence of the judiciary, ethnic bias and questions of competence and failure to meet international standards.⁷⁶ Otherwise they would be transferring cases from a developed international criminal justice system to a defective national one. The rights of the accused should not be derogated from and there might be a risk of that occurrence if the domestic systems are either not equipped to ensure that the international standards of fair trials are observed or do not observe them at all. The results of these case referrals to national legal systems have been mixed. In Croatia for example, there were great discrepancies in the number of Serbian and Croatian prosecutions, including the use of trials in absentia, which was applied widely to Serb accused, significant disparities in the rates of convictions between the Serbs and the Croats and length of proceedings.⁷⁷

The accused at the ICTY have been contesting the referrals by the Prosecutor of their cases to national courts on various grounds, including the right to a

⁷⁵ Available at <<http://www.un.org/icty/legaldoc-e/index.htm>> In June 2007, the Government of Rwanda voted to abolish the death penalty, thereby paving the way for the referral of cases from the ICTR to its national courts.

⁷⁶ Office of the High Representative's Consultants' Report of 27th May 2002. See Bohlander in *Last Exit supra* n.215, 60, 66. It has observed that national judiciaries lack full capacity to conduct trial proceedings in accordance with universal standards. Raab *supra* n.39, 94.

⁷⁷ Mundis, *supra* n.39, 151 n.60

fair trial.⁷⁸ Challenges have been made on various grounds. One of the grounds of challenges to *Rule 11bis* cases is perceived national or ethnic bias in national judicial system of Bosnia and Herzegovina against Serb accused which would adversely affect the impartiality of the national courts resulting in the accused deprived of their fair trial rights.⁷⁹ However, the ICTY have rejected these challenges.⁸⁰

That an enforcement measure would come to an end once the purpose for which it was established is no longer in existence is a logical consequence. The International Tribunals however, are, as it has been reiterated repeatedly, enforcement measures with special characteristics. They are judicial organs. They should not be ordered to wind up just because it was getting too expensive to maintain them. As judicial organs, it is the duty of the Tribunals to ensure that justice is achieved, convictions secured but not at the expense of circumscribing the right of the accused to receive a fair trial. The request for bi-annual reports by the President and the Prosecutor of the Tribunals to the Security Council may be perceived as a control on their independence as well as pressure to speed up the trials.⁸¹ This is particularly of concern as justice hurried may be justice buried and will give rise to the impression that the trials conducted were anything but fair.⁸²

⁷⁸ See for example *The Prosecutor v Pasko Ljubivic Decision on Appeal against Decision on Referral Under Rule 11 bis dated 4th July 2006*.

Available at <<http://www.un.org/icty/ljubovic/appeal/decision-e/acdec040606e.pdf>>.

⁷⁹ *The Prosecutor v Radovan Stankovic (Case No. IT-96-23/2-PT) Decision of Referral of Case under Rule 11 bis dated Available at*

<<http://www.un.org/icty/stankovic/trialc/decision-e/050517.htm>> Paragraph 27.

Also *Decision on Rule 11bis Referral*, Decision of the Appeals Chamber dated 15th November 2005 in *The Prosecutor v Gojko Jankovic* Case No. IT-96-23/2-AR11bis.2 The Appeals Chamber in *Stankovic* held that they were satisfied that the accused would receive a fair trial in the national courts of Bosnia. This ruling was applied in *Jankovic*.

⁸⁰ *Ibid*

⁸¹ In domestic systems such as Malaysia for example, the judges do not have to report to the Legislature or the Executive. All internal matters are taken care of by the head of the Judiciary.

⁸² See the dissenting opinion of Judge David Hunt in *Milosevic* Case, dated 23rd August 2003 in *Decision on the Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the form of Written Statements* where the learned judge stated that he was of the view that the ICTY is changing its previous decisions and amending its procedural rules to the detriment of the accused in order to bring the Completion Strategy to a speedier conclusion. Available at <<http://www.un.org/icty/milosevic/appeal/decision-e/031021diss.htm>>

The dilemma that the President and the Prosecutor is facing in their attempts to observe the dictates of the Security Council resolutions remains unresolved. Admittedly there was pressure on them to wind up the proceedings at the International Tribunals but the troubling impression that is given is that the *Completion Strategy* was short-sighted and not well thought out.⁸³ Having committed themselves to wind-up the Tribunals, which was taken up enthusiastically by the Security Council, the Tribunals have found themselves in the uncomfortable position of being held in a tight grip by the Security Council who seem to be rather concerned at the rising costs of the Tribunals rather than the respect of the right of the accused to a fair trial, especially the right of the accused to have his case heard by an independent and impartial tribunal. If a tribunal conducts its proceedings dictated by target dates fixed by its parent organ, the suspicion on its independence may arise and may very well be justified.⁸⁴

It was argued that “*placing a restriction on the life span of an international tribunal is not necessarily incompatible with the independence of the tribunal and the judicial function*”.⁸⁵ This is true if the Tribunals had respected the right of the accused to a fair trial. That should be the overriding concern of the Tribunals as well as the Security Council and not the deadlines. In fact, commentators would have little cause to complain if the deadlines were set at the time the Tribunals were established, or even shortly after. There would be a time frame for the Tribunals to complete their work and they would not have to cut corners to expedite the trials.

⁸³ This problem can be gleaned from the statements made by former President of the ICTY, Judge Meron on 8th Oct 2003. “*While we are striving in every way possible to meet the goals of completing all trials by the end of 2008 and all appeals by the end of 2010, one cannot predict the completion date of judicial proceedings with scientific accuracy. Many factors may affect the outcome. Some of those influences are within the control of the Tribunal, others not, and of the former some are within the control of the judges and others within the power of the Prosecutor.*” See *Address of Judge Theodor Meron, President of The International Criminal Tribunal For The Former Yugoslavia, To The United Nations General Assembly.*

Available at <<http://www.un.org/icty/pressreal/2003/p789-e.htm>>

⁸⁴ Gregory P.Lombardi *Legitimacy and Expanding Power of the ICTY* 37 New Eng. L.Rev 889 (2002-2003), criticising the decision of the Appeals Chamber in the *Prosecutor v Jelusic* Case No: IT-95-10-A Judgement of 5th July 2001.

⁸⁵ Williams, *supra* n.39, 154

Judge Hunt seems to echo concerns of many commentators when he said in his *Dissenting Opinion*:

*“This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials. The Majority Appeals Chamber Decision and others in which the Completion Strategy has been given priority over the rights of the accused will leave a spreading stain on this Tribunal’s reputation.”*⁸⁶

Judge Hunt was disappointed with the trend in the recent decisions of the Appeals Chamber in reversing of ignoring its previously carefully considered interpretations of the law or of the procedural rules *“with a consequential destruction of the rights of the accused enshrined in the Tribunal’s Statute and in customary international law.”*⁸⁷

The concerns of Judge Hunt are warranted. Far from giving effect to fully respect the internationally recognised rights of the accused, the Tribunal appears to cut corners in order to give effect to the *Completion Strategy*. This in turn has incurred the impression that the Tribunal is acting at the behest of the Security Council at the expense of the accused, which in turn has had an adverse effect on the independence of the Tribunal. This may very well fortify Milosevic’s criticisms that the Tribunal is a political tool.

There is a duty and responsibility on international criminal tribunals to comply with and observe international human right standards to ensure and maintain their credibility and legitimacy. Rightly or wrongly, the Completion Strategy has cast a pall on the credibility of the International Tribunals to

⁸⁶*Decision on the Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the form of Written Statements supra* n.82 Paragraph 22

⁸⁷*Ibid* Paragraph 20.

observe the right of the accused to a fair trial due to their control by the Security Council through the Completion Strategy.⁸⁸

3.4 FINANCING: THE POWER OF THE PURSE STRINGS

In the traditional triumvirate of the concept of Government, the judicial organ is in a unique position regarding the practical aspects of its operation. This is not an enviable one for in matters of finance, budget, and personnel, the courts rely on the other two arms. Finance is critical to the efficient and credible operations of courts. It is an important factor and vital to the performance of the courts as dispensers of justice.

Financial considerations play a significant role in maintaining judicial independence.⁸⁹ They provide structural safeguards of the institutional independence and reliance on external sources for the functioning of the courts makes them vulnerable to potential threats to the independence of the courts.

International courts are no exception to this general premise. The financial burden is one of the many burdens that they have to overcome. Unlike national courts which receive their budgets from the Government,⁹⁰ the International Tribunals have to rely on the United Nations who in turn has to rely on the cooperation and generosity of Member States. This in itself carries

⁸⁸ Another negative consequence of the Completion Strategy is a departure from the Tribunals of experienced and skilled personnel, resulting in depletion of knowledge and expertise available to the judges. This has been acknowledged to be a serious problem and is detrimental to the expeditious completion of the Strategy. Even more worryingly, the lack of skilled officers of the Court may hurt the right of the accused to a fair trial. See the Completion Strategy Assessment Report, *supra* n. 62 Paragraph 30.

⁸⁹ As *Valente* held, one of the three components of judicial independence is financial security. Chapter Two, *supra* n.34

⁹⁰ The independence of domestic courts are not free from the danger of lack of funding either. See for example James W. Douglas and Roger E. Hartley *The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?* (2003) 63 Public Administration Review 441.

a latent danger. This situation would be susceptible to the risk of control and manipulation being exercised, however slight, by both the contributing States and the principal organs of the United Nations.⁹¹

Unfortunately, whilst the aims of the establishment of the International Tribunals were praiseworthy, the facts in reality did not seem to facilitate the achievement of those aims. Justice is expensive and international justice even more so.⁹² The use of the budget to limit the operations of a court, inadvertently or otherwise, would have a direct impact on its institutional independence, for budgets can be used as means to control the court, one of the very factors that judicial independence eschews at all costs for fear of compromise. It should be noted that just as in domestic systems, finance has an impact on individual independence of the international criminal judges as well. How their independence may be affected by financial considerations is a potentially troubling factor for the overall independence of the International Tribunals. The *Completion Strategy* has had an effect on this aspect. As had discussed earlier, the prevalent view was that the scheme of the *Completion Strategy* was designed due to complaints of the rising escalating costs of maintaining the International Tribunals.

The financing of the International Tribunals, the ICC and the hybrid courts are provided for in the Statutes. *Article 32* of the *Statute of the ICTY* states as follows:

*The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.*⁹³

⁹¹ Ruth Mackenzie and Phillippe Sands *supra* Chapter Two n.94 284

⁹² Michael P. Scharf *The Tools for Enforcing International Criminal Justice in the New Millenium: Lessons from the Yugoslavia Tribunal (1999-2000)* 49 DePaul L. Rev 925.

⁹³ Available at <www.un.org/icty/legaldoc-e/index.htm>

Article 30 of the *Statute of the ICTR* on the other hand states as follows:

*The expenses of the International Tribunal for Rwanda shall be the expenses of the organization in accordance with Article 17 of the Charter of the United Nations.*⁹⁴

The expenses incurred by the International Tribunals are varied, numerous and colossal. Their expenses are unlike the expenses incurred by national courts. Besides the salaries of the judges and staff, the Tribunals incur tremendous expense in other areas, such as legal aid, translation of documents, interpretation of proceedings, the maintenance and operating of the Detention Unit, the witness relocation programmes and other expenses incidental, but necessary to achieving justice.⁹⁵ In this regard, the International Tribunals go beyond the role of courts of law in domestic legal systems. The role of national courts is strictly that of arbiter of the law and facts between conflicting parties. Matters such as translation, witness relocation programmes and legal aid are outside their responsibilities and purview. It is therefore unsurprising that the International Tribunals should incur expenses that swallow a large portion of the United Nations' financial pie.⁹⁶

The activities at the Tribunals are discussed annually at the proceedings before the General Assembly and Security Council. Dissatisfaction has been voiced at these proceedings over several issues pertaining to the International Tribunals, one of those being the escalating costs.⁹⁷ The fact was that the United Nations found itself paying out a huge portion of its regular budget to cover the expenses of the Tribunals, especially the ICTY.⁹⁸ At one point, the

⁹⁴ Available at <<http://www.un.org/ictt/statute.html>>

⁹⁵ The Cost of Justice, available at <<http://www.un.org/icty/glance-e/index.htm>>

⁹⁶ Bohlander, *Last Exit* supra n.52

⁹⁷ See for example the *EU Presidency Statement – Financing the ICTR and the ICTY* dated 24th November 2004.

Available at <http://www.europa-eu-un.org/articles/en/article_4198_en.htm>

⁹⁸ Bohlander, *Last Exit* supra n.52 60. “*The Tribunals proved an expensive means of securing accountability*” Williams, *supra* n. 39 154. The combined annual budget of the two Tribunals exceeded quarter of a billion US dollars, which amounted to 15% of the overall budget of the United Nations:

ICTY stopped recruitment of legal professionals due to budgetary constraints, thus compromising the professional knowledge and skills that are required for the satisfactory completion of cases.⁹⁹ This would have put the independence of the Tribunals at risk as lack of knowledge, skills and expertise may result in, at one extreme a cavalier attitude and on the other, an ignorant one on the part of the judges regarding the requirements of scrupulously respecting the right of the accused to a fair trial and observing the proper administration of justice.

That the donor States could use their financial power to “control” the Tribunals was evident from the Completion Strategy as argued earlier in this work. The United States was one such donorState.¹⁰⁰

The question of finance posing as a threat to the judicial independence of the International Tribunals was discussed in a case before the Special Court for Sierra Leone. In the *Prosecutor v Sam Hinga Norman (Case No: SCSL-2004-14-AR72(E)), Decision on Preliminary Motion based on Lack of Jurisdiction (Judicial Independence)*¹⁰¹ the defence challenged the independence of the hybrid tribunal. The Appeals Chamber discussed two provisions of the *Agreement of 16th January 2002 between the United Nations and the Government of Sierra Leone*¹⁰² relating to the funding of the Special Court. These are *Article 6* and *Article 7*.

Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/1616, Paragraphs 54-55. Quoted in Mahnoush H. Arsanjani and W. Michael Reisman *The Law-in-Action of the International Criminal Court* (2005) 99 AJIL 385

⁹⁹ This was partly due to the financial crisis faced by the United Nations itself, a main cause being the massive arrears owed by the United States of America to the United Nations. Scharf, *supra* n.92 935, 936.

¹⁰⁰ See Diana Marie Amann *Impartiality Deficit and International Criminal Judging*, (November 28, 2006), 14 n.30 Available at SSRN: <<http://ssrn.com/abstract=955431>>

¹⁰¹ Decision dated the 13th of March 2004. Available at <<http://www.sc-sl.org/Documents/CDF/SCSL-04-14-PT-034-I.pdf>>

¹⁰² *supra* Prologue n.36

Article 6:

Expenses of the Special Court

The expenses of the Court shall be borne by voluntary contributions¹⁰³ from the international community. It is understood that the Secretary-General will commence the process of establishing the Court when he has sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations plus pledges equal to the anticipated expenses of the following 24 months of the Court's operation. It is further understood that the Secretary-General will continue to seek contributions equal to the anticipated expenses of the Court beyond its first three years of operation. Should voluntary contributions be insufficient for the Court to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Court.

Article 7:

Management Committee

It is the understanding of the Parties that interested States may wish to establish a management committee to assist the Special Court in obtaining adequate funding, provide advice on matters of Court administration and be available as appropriate to consult on other non-judicial matters. The management committee will include representatives of interested States that

¹⁰³*Cf* the other modes of financing the other international tribunals. The expenses of Cambodian Extraordinary Chambers are to be borne by the United Nations who would carry 75% of the expenses and the Government of Cambodia who would carry the remainder 25%. See Thodis Ingadottir, *Financial Challenges and their Possible Effects on Proceedings* (2006) 4 JCIJ 294

contribute voluntarily to the Special Court, as well as representatives of the Government of Sierra Leone and the Secretary-General. ¹⁰⁴

Based on these two articles, the accused doubted that his right to a fair trial would be respected since he argued that the independence of the Tribunals was compromised. The funding of the Special Court was through donations from States and he alleged that there would be a risk of donor States holding back their funds to show their displeasure or disapproval of any decision made by the Special Court. He argued that the funding arrangements under *Article 6* and the role of the Management Committee under *Article 7* create a legitimate fear of interference in the duties of the Special Court in dispensing justice through “economic manipulation.”¹⁰⁵ The crux of the argument of the defence was that the independence of the Court and the impartiality of the judges were therefore suspect because of this.

The objections by the accused were dismissed by the Appeals Chamber. The Court held that merely alleging that the Court derives its funding from a source which *may* be displeased by the decision of the Court is not sufficient. There are other factors which should be taken into account, the main one being whether the funding arrangement raises a real likelihood that the Court will give its decision to please its funding agency. ¹⁰⁶

The approach of the Special Court focused more on judicial impartiality. In its judgment, the Court discussed the issue of bias.

¹⁰⁴ The Court averred that the Management Committee comprised of important contributors to the Special Court. Paragraph 16 of the Decision, *supra* n.96

¹⁰⁵ *Ibid* Paragraph 18

¹⁰⁶ *Ibid*. Paragraph 19.

However, it should be noted that the issue of judicial independence also cropped up, since funding affects the independence of the Court if it could be shown that some form of control was exercised. Control need not be direct or overt. Any attempt by the Management Committee or State or a principal organ in curtailing the proceedings of the courts in any manner would raise the spectre of judicial dependence if there is a perception that decisions were made by the International Tribunals that resulted in the convictions of the accused to please the financing parties.¹⁰⁷

The provisions of *Article 6* are rather unsettling: the finances of the Special Court are not certain. Unlike the International Tribunals which are part of the United Nations framework, the Special Court occupies a unique position. Whilst the Tribunals will get their budgets from the United Nations, the Special Court does not enjoy that privilege. The disturbing impression one gets from reading *Article 6* is that its functions and operations depend on whether or not the Secretary-General obtains funding. This should not be the case and goes against the very grain of judicial independence, which is the freedom to dispense its judicial functions without fear or favour. As was put succinctly by a legal commentator “*It seems that in any event that circumstances of precarious finances create a danger of encroachment on the independence of any chambers.*”¹⁰⁸

¹⁰⁷ Todorovic is an example of this premise. See the discussion on this case in the following section.

¹⁰⁸ Amann, *supra* n. 95, 15. See also Peter Takirambudde & Richard Dicker, Human Rights Watch *Recommendations for the Sierra Leone Special Court: Letter to Legal Advisors of UN Security Council Member States and Interested States*, March 7, 2002.

Available at <<http://hrw.org/press/2002/03/sleone0307-ltr.htm>>.” *It is important to ensure that the Special Court is free from improper influence by donor States.*” This problem is endemic amongst international criminal tribunals, whatever their status may be. Financial problems have been a

As has been seen, States can show their displeasure of the courts in various ways. Withholding finance, cutting down on the budget or simply not making any payments at all, could affect the independence of the courts and even threaten their existence.¹⁰⁹ Such improper influence should ideally be avoided, but the *realpolitik* of this type of scenarios make it impossible to rule out that possibility.

What are the matters that could be controlled through inadequate funding? Facilities such as properly erected courtrooms, offices, technological equipment go to structural effectiveness. Skilled personnel such as judges, prosecutors, legal assistants, translators, investigators, secretaries are necessary to ensure that the accused receives a fair trial. If there are inadequate resources,¹¹⁰ then the Tribunals may not be able to ensure that the trials are proceeded with expeditiously and hence their character as an independent court may be affected since the lack of funding has affected their judicial functions adversely.¹¹¹

In this regard, the role of the General Assembly is also of relevance. Whilst the General Assembly was not involved in the establishment of the International Tribunals, the Assembly does have a significant say in crucial issues relating to the membership, operations and administration of the courts. *Article 17* of the Charter confers the General Assembly exclusive control over the finances of the United Nations including the power to apportion expenses of the principal organs and their subsidiaries. This power of the General Assembly

hindrance to the smooth running of the CEC: Ingadottir *supra* n.103 as well as to UNMIK : Anthony J. Miller *UNMIK- Lessons from the Early Institution- Building Days* (2004) 39 New Eng L Rev 9

¹⁰⁹ The Special Court itself faced this doom if not for the intervention of the General Assembly. Ingadottir *supra* n.103 299.

¹¹⁰ See Scharf, *supra* n.92 for a detailed account of the budgetary allocations to the Tribunals, 934-936

¹¹¹ Scharf *ibid*. That there were problems in this kind of financing i.e. voluntary contributions were highlighted by the Secretary-General to the General Assembly when discussing the financing of the Cambodian Extraordinary Chambers. These included States' failure to deliver what they promised. Ingadottir *supra* n.103 295-296

has been explicitly recognised by the Statute of the Tribunal itself. It is a power that it guards jealously. This was no more apparent than the Assembly's clash with the Secretariat over the funding of the *ICTY*.¹¹²

The General Assembly was dissatisfied with the Secretary-General's contention that there was no barrier to the Security Council deciding for itself on the appropriate funding of the Tribunals subject to the approval by the General Assembly.¹¹³ In other words, the Secretary-General implied that the principal organ had the discretion to decide on budgetary matters relating to the Council's subsidiary organs. The relevant factor here was the relationship between the Security Council and the *ICTY* which was a parent-subsidiary organs relationship. The Assembly showed its displeasure at the usurpation of its powers over budgetary matters by first, expressing its dissatisfaction that the Security Council impinged on its exclusive prerogative over budgetary matters of the United Nations and secondly, by showing equivocal support of the Tribunal by approving the budget for only "*immediate and urgent requirements of the Tribunal*"¹¹⁴ The danger arising from this power is only too apparent: it could be used to restrict the effective operations of the court and would therefore have a significant effect on the independence of the Tribunals.

An offshoot of the fact that the International Tribunals are unique entities compared to national courts is the internal funding of the Tribunal as a whole. It is the Registry who controls the purse strings.¹¹⁵ This could also give the

¹¹² It became a constitutional tug-of-war between the two primary organs of the United Nations as to who has the competence to decide on budgetary and financial matters. See Shraga and Zacklin, *The International Criminal Tribunal for Rwanda* Prologue, n.22, 512.

¹¹³ Note by the United Nations to the General Assembly. A/47/1002 para.12. *Sarooshi supra* n.20475 See also *Report of the Secretary-General, supra*, Chapter One, n.91 Paragraph 12

¹¹⁴ *Sarooshi supra*, n.21475

¹¹⁵ Article 17 of the Statute of the *ICTY*: *The Registry shall be responsible for the administration and servicing of the Tribunal*. In an interview with the author, a senior officer with the Registry (one of the three organs of the *ICTY*) said in rather derisive tones of some of the rather "extravagant" expenditures claims by the Prosecution: "Given a choice, they (the Prosecution) would want helicopters to fly everywhere and have swimming pools in their backyards." He made it clear that the Registry held a tight rein on the funds of the *ICTY* as it controlled the budget and budgetary expenses. On file with the

appearance that the Chambers, as the solely judicial organ of the International Tribunals bears the risk of its independence being threatened by the Registry. There is no doubt though that the General Assembly could exercise control over the International Tribunals by cutting down funds for the proper functioning of the Tribunals.¹¹⁶

One aspect of the character of the International Tribunal as an independent court established by law is that financing can also affect the right of the accused to a fair trial. Almost all of the accused at the International Tribunals were and are on legal aid.¹¹⁷ Legal aid in national jurisdictions is usually provided for by an entity separate from the judicial organ.¹¹⁸ At the International Tribunals however, such monies come from their budgets. If financing is reduced or limited, then the legal aid available to the accused is also affected.¹¹⁹ Should such a case occur, the chances of the accused retaining a competent lawyer to represent him are slim as there are simply no adequate resources.¹²⁰ The quality of legal representation and skills presented during trials would be compromised and since it is the responsibility of the International Tribunals of obtaining competent and qualified counsel to ensure that the right of the accused to a fair trial, it needs to get the financial

author. See also recommendation of the Human Rights Watch to the Secretary-General, that the Registry of the (then proposed) Special Court should not be subordinate to and not equal to Chambers and Office of the Prosecutor. See Peter Takirambudde & Richard Dicker, *supra* n.103.

¹¹⁶Wald, *Reflections on Judging* essay, *supra* n.60. 233 Judge Wald is also of the view that the United Nations is threatening to cut off all funds for the International Tribunals because *they are no longer worth the investment. Op cit* 238.

¹¹⁷**Article 21** of the *Statute of the ICTY*: the right to a fair trial includes the right to receive legal assistance where the interests of justice so require. Such assistance will be given without payment if he is does not have sufficient means to pay for legal representation. See *Report of the Secretary-General: Comprehensive report on the progress made by the International Criminal Tribunal for the Former Yugoslavia in reforming its legal aid system. Available at* <<http://www.un.org/icty/legaldoc-e/index.htm>>

¹¹⁸ In Malaysia for example, members of the Malaysian Bar make a compulsory payment to the Bar Council towards the Legal Aid fund that is maintained by the Legal Aid Committee established by the Bar Council. See also the work of the Legal Services Commission of the United Kingdom.

¹¹⁹ The same officer informed the author that there were problems regarding legal aid. There were cases where the counsel assigned by the Registry to represent indigent accused had applied for their families to be retained. A more serious problem was the practice of fee-splitting, where assigned counsel would split the fees paid by the International Tribunals to the accused for the “favour” of being appointed as counsel. This practice was rampant at the ICTR too. Such unethical practice would definitely raise the ire of the General Assembly when deliberating the financing of the Tribunals..

¹²⁰ A complaint voiced by several defence counsel to the Registry. Interview with the said officer of the Registry. On file with the author.

assurances from the United Nations. Its dependency on the United Nations for funding also restricts its ability to give the accused to a fair trial.

A corollary issue of the financing aspect has emerged as a problematic one in the aftermath of the Completion Strategy. Since International Tribunals were being wound-up, judges are seeking security for their retirement from the Tribunals. Unfortunately, the United Nations has been rather reticent about this matter, causing the President of the ICTY to state:

*Also of critical importance at this juncture is a positive resolution of the legal entitlement of the Judges to receive a pension in full parity with Judges of the International Court of Justice in accordance with the Statute of the International Tribunal, as was recommended in the independent consultant's study commissioned by the Secretary-General. The claim of the Judges to this entitlement has been long outstanding, and the failure to resolve it expeditiously and fairly has been detrimental to the morale of the Judges. Many of the International Tribunal's Judges are currently serving their second term, while a few are in their third term. **The efficiency of the International Tribunal's work is premised upon the experience and dedication of all of its Judges, and the retention of these qualified and highly experienced Judges is critical to meeting the aims of the Completion Strategy.**¹²¹ (emphasis added)*

The judges are put in a precarious position here because of the failure of the United Nations to pay their claims for pensions. Pensions form part of the financial security that is crucial to individual independence of the judge.¹²² The uncertainty surrounding the payment of pensions to the Tribunal judges would surely raise a doubt as to their independence. Whether there is actual compromise of the independence of the judges is not the issue; the issue is whether the circumstances have given rise to a perception of dependence.

¹²¹ Completion Strategy Assessment and Report n.61, Paragraph 32

¹²² Valente *supra* Chapter 2, n.34

The second part of the President's statement gives an inference that skilled and experienced judges would leave the Tribunals if their pension claims are not met. He seems to make a veiled threat – pay up or they will leave and the Completion Strategy would not be accomplished. Here the financing issue relates to the individual independence of the judges and their security of tenure. President Pocar actually states it blatantly that the non-failure of the payment of the pensions have affected the morale of the judges adversely. This has given the implication that the impartiality of the judges may be affected as their financial security is not guaranteed.

Article 115 of the *Rome Statute* provides that funds for the Court would be made up of assessed contributions by the Assembly of State Parties and where a case referral is made by the Security Council, by the United Nations with the approval of the General Assembly.¹²³ *Article 116* allows the Court to receive voluntary contributions from Governments, Non-Governmental Organisations and various other entities.¹²⁴ The Assembly of State Parties have already formulated and adopted budgets for the Court.¹²⁵ The ICC is already facing the same problems that the Special Court faced and indeed the United Nations itself faces – that of non-payment of its assessed contributions. Only a few States had paid their assessed contributions. Others made partial payments and some, none at all.¹²⁶ This poses a possible emasculation of the performance and functions of the ICC and hence, its independence.

¹²³ See < http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf>

¹²⁴ *Ibid*

¹²⁵ See Jonathan O'Donohue *Towards a Fully-Functional International Criminal Court: the Adoption of the 2004 Budget* (2004) 17 LJIL 579. By the same author *The 2005 Budget of the International Criminal Court: the Contingency, Insufficient Funding in Key Areas and the Recurring Question of the Independence of the Prosecutor* (2005) 18 LJIL 591. The Committee on Budget and Finance, made up of 12 members who have expertise and knowledge of finance at the international level. There were concerns that these members could take instructions from their States, but the Assembly have reasserted their individual independence. O'Donohue, *The 2005 Budget* 584

¹²⁶ O'Donohue, *supra* n.126585

Secondly, there may be threats to the independence of the ICC from another potential source. The Committee on Budget and Finance, whose duty and responsibility includes preparing the budget, made recommendations on cutting the funds of all the organs of the ICC with the exception of the internal auditors and the Committee itself. The reasons given for the cuts were vague.¹²⁷ However, the possibility of the ICC, especially the Chambers, having to request funding for its operations and thus putting itself at the mercy of a committee, is rather unpalatable with its institutional independence.

In order for a judicial organ to function properly, it must have the necessary resources, through finance and manpower. The needs of the International Tribunals are particularly complex as the law applied and practised there are sophisticated areas of international criminal law. The skills of the persons involved, especially in the legal arena, must be excellent. Finance is vital in ensuring that the Tribunals are able to perform properly. Lack of funds would handicap the Tribunals and there may be a danger that the independence will be threatened.

3.5 THREAT TO INDEPENDENCE: THIRD PARTIES

The Tribunals have had a mixed record of assuring its critics and supporters¹²⁸ alike of their institutional independence. Its position in the international arena is precarious as it has to depend on third parties for its operations – investigations, evidence gathering and enforcement of its judgments, decisions and orders. The independence of the Tribunals is at risk should a third party, whose assistance and cooperation are vital to the

¹²⁷ The Committee on Budget and Finance is made up of 12 financial experts who have expertise and knowledge of finance at the international level. There were concerns that these members could take instructions from their States, but the Assembly have reasserted their individual independence from their States. O'Donohue, *The 2005 Budget* 584

¹²⁸ Note the change in the views of Professor Michael Scharf, from the positive comments in his book co-authored with Virginia Morris on the ICTY *supra* Chapter One, n.11 and his subsequent article *Have We Really Learnt the Lessons from Nuremberg?* *supra* Prologue, n.9.

Tribunal, are withheld if the decisions of the Tribunals are not to their approval. There are two decisions which bear truth to this type of threat to judicial independence.

3.5.1. THE PROSECUTOR v STEVAN TODOROVIC: THE ICTY AND NATO

The interlocutory decision of the ICTY in the case of the *Prosecutor v Stevan Todorovic*¹²⁹ was made against Stabilization Force (“SFOR”), an arm of North Atlantic Treaty Organisation (“NATO”). The facts in brief are as follows. Todorovic was initially charged with twenty-seven counts ranging from war crimes, crimes against humanity and grave breaches of the *Geneva Conventions of 1949*. Whilst in custody, he had filed several motions disputing key issues such as the legality of his arrest¹³⁰ and his detention.

One of the motions filed by defence counsel¹³¹ sought an order from the Trial Chamber to compel certain third parties, mainly SFOR and its responsible authority, the North Atlantic Council¹³² to deliver documents relating to his arrest and witnesses to the defence to help them to prepare their case in the preliminary action of challenging the legality of the arrest of the accused. The Trial Chamber granted the motion after hearing submissions of all parties, including SFOR.¹³³ The *Separate Opinion* of Judge Robinson went further than the decision of his colleagues on the issue of recognising and respecting

¹²⁹ *The Prosecutor v Simic et al, "Bosanski Samac"* Case IT-95-9/1.

Available at <<http://www.un.org/icty>>

¹³⁰ *Separate Opinion of Judge Robinson*. Available at:

<<http://www.un.org/icty/simic/trialc3/decision-e/01018EVT13779.htm>>

Paragraph 3

¹³¹ *Notice of Motion for Judicial Assistance* dated 24th November 1999

¹³² The policy-making organ of North Atlantic Treaty Organisation (NATO)

¹³³ *Decision on Motion for Judicial Assistance to be provided by SFOR and others*, The Prosecutor v Simic, Case No.IT-95-9 dated 18th Oct 2000. Available at:

<<http://www.un.org/icty/simic/trialc3/decision-e/01018EV513778.htm>>

of the rights of the accused in criminal proceedings.¹³⁴ The *Separate Opinion* reiterated the observation that it is incumbent upon a legal system, regardless of whether it is international or domestic, to ensure that the standards of the fair trial right of the accused are observed¹³⁵ and highlighted a consciousness on the part of the Tribunal as to possible criticisms to its independence. As a matter of principle, so the Judge held, the ICTY must be competent to make certain orders relevant to the right of the accused to challenge the legality of his arrest.¹³⁶ A further consideration underlying this ruling is that legitimate questions could be asked of the independence of a judicial body, in this case, the Tribunal, if it claimed itself powerless to require the detaining or arresting authority to produce the necessary documents in a challenge to the legality of that detention.¹³⁷

The decision was appealed against, but a subsequent development changed the course of proceedings. The prosecution and defence entered into a plea agreement. Twenty-six of the twenty-seven charges were dropped. The accused changed his plea from non-guilty to guilty to the remaining charge. The accused also withdrew all the motions filed on his behalf including the one challenging the legality of his arrest.¹³⁸ Todorovic was sentenced to ten years imprisonment.¹³⁹

Several issues arise out of the decision on the Trial Chambers on *the Motion of Judicial Assistance*. First, the order demonstrated that the Tribunal is willing to ensure that the right of the accused to a fair trial is guaranteed by granting him an order so that he could prepare his defence properly and

¹³⁴ *Supra* n.131

¹³⁵ *Ibid* Paragraph 7

¹³⁶ **Article 9(4)** of the *ICCPR*. This right is also reflected in the UDHR and the European Convention. Although the Statutes of the International Tribunals are silent on this issue, the Trial Chamber acknowledged that this right is also applicable to international criminal proceedings. See also *Decision on Preliminary Motions ("Kosovo")* dated 8th November 2001 in the Prosecutor v Slobodan Milosevic. Available at <<http://www.un.org/icty/milosevic/trialc/decision/111087351829>>

¹³⁷ *Separate Opinion, supra* n.52, Paragraph 7

¹³⁸ *Decision, supra* n.51, Paragraph 4

¹³⁹ Prosecutor v Stevan Todorovic, *Sentencing Judgement*

Available at <<http://www.un.org/icty/todorovic/judgement/index.htm>> Paragraph 115

adequately.¹⁴⁰ Secondly, it acted on the issues and law presented to it, even though some of the members of the organisation adversely affected by it were also permanent members of its creating body. Third, the tribunal also heard all parties, including a party not directly involved either in the proceedings before it or in the general business of the court. Its decision was therefore based on all the facts presented to it, and the law.

However, there were also negative repercussions arising from this decision. All parties adversely affected by the Tribunal's decision had filed motions for review.¹⁴¹ The United States also sought judicial review on the decision of the Trial Chamber issuing a subpoena against one of its generals who was the commanding officer of the base where Todorovic was arrested, to give evidence at the trial.

The United States in its legal brief stated that the decision of the judges will be of utmost significance to the future of the tribunal as well as "*the relationship with those engaged in the apprehension of persons indicted for war crimes*".¹⁴² Although the matter was settled, it was admitted that there was a decline in arrests of war crime suspects by SFOR following the *Todorovic* decision.¹⁴³

Here is a case of where a thinly veiled threat had an effect on the operations of the Tribunal. Despite giving valid legal reasons for issuing the orders for assistance and the subpoena, the court was given the impression that it should be careful of what it decided. In national jurisdictions, a court of law would have had no compunction in issuing an order against the authorities and expecting that order to be complied with. However, in the international arena, the courts have no such luxury as they do not have a proper enforcement system and have to rely on the cooperation of third parties and

¹⁴⁰ Article 20(4) of the Statute of the ICTR gives the accused the right to have adequate time and facilities to prepare his case. This is a minimum fair trial guarantee.

¹⁴¹ Requests for review were filed by the Prosecutor, NATO and the Member States of the organisation against the decision of the Trial Chamber.

¹⁴² Cogan, *supra* Chapter One, n.86 126

¹⁴³ Statement by the then Deputy Chief Prosecutor of the ICTY, Graham Blewitt to the effect that he "wouldn't be surprised that [*Todorovic*] Case had something to do" with the decline in arrests *Ibid.* 127.

the coercive powers of the Security Council. In the *Todorovic* decision, there was covert pressure exerted on the independence of the Tribunal. Whether such threat would have succeeded is moot but *Todorovic* illustrates situations where threats to institutional independence of the Tribunal could emanate from a third party, in this case the unlikely third party being NATO. As matters stood at that stage, the decision of the court showed that it took into consideration legal arguments and was acting independently and in accordance with the law as well the right of the accused to a fair trial.

The connection between NATO and the ICTY was again highlighted in the aftermath of the bombing of the Federal Republic of Yugoslavia from 24th March to 9th June 1999. The Prosecutor of the ICTY was asked to look into the prosecution of senior political and military officials of member States of NATO for serious violations of international humanitarian law under *Articles 18(1) and (4)*¹⁴⁴ of the *Statute of the ICTY*. A committee was established to advise the Prosecutor on this matter and prepared a report entitled *The International Criminal Tribunal for the former Yugoslavia (ICTY): Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*.¹⁴⁵ The Report recommended that no investigations be undertaken for several reasons such as the ambiguity of the law and insufficient evidence to prove the commission of crimes by high-ranking officials or low-level officials.¹⁴⁶ The most telling factor in that Report was the observations of the Committee on the failure and reluctance on the part of NATO to cooperate with the Committee and provide

¹⁴⁴ Articles 18(1) and (4) relate to investigation and preparation of indictments of charges of crimes committed under the Statute.

¹⁴⁵ (2000) 39 ILM 1257. See also Allison Marston Danner *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court* (2003) 97 AJIL 510, 538 *et seq.* Paolo Benvenuti *The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (2001) 12 EJIL 503

¹⁴⁶ Danner, *ibid* 540

relevant information for the Committee and by extension, the Prosecutor, to act on.¹⁴⁷

Although the action of the Prosecutor in not proceeding against the persons responsible for the commission of the bombing campaign is not connected in any manner with the independence of the judicial organ of the Tribunal *per se*, it does have a reflection on its institutional independence. This is an example of a dilemma faced in an international criminal system where there is no separation of powers. The Office of the Prosecutor is considered as an organ of the Tribunal, unlike national systems where the Prosecutor is part of the Executive arm of the Government. There is an argument, with some merit, that the failure of the Prosecutor to proceed with the investigations has weakened the credibility of the Tribunal.¹⁴⁸ The independence and impartiality of the Tribunal was seen as compromised by a perceptible submission to the pressures from third parties in particular, NATO. The fact that the Office of the Prosecutor relies heavily on NATO and its agencies in carrying out some of its duties and responsibilities under the Statute could have been a key factor in the Committee arriving at the recommendations that it did.¹⁴⁹

¹⁴⁷ *Report, supra* n.146, Paragraph 90. It should be noted that the NATO action was not sanctioned by the Security Council, the primary international organ responsible for matters relating to international peace and security. That distinction in reality is marred by the fact that the majority of the permanent members of the Security Council are also members of NATO. Another issue that may be of some relevance is that the Committee was established by the previous Prosecutor, Judge Louise Arbour. Prosecutor Carla Del Ponte decided not to proceed with the matter and informed the Security Council so. Danner *ibid*

¹⁴⁸ Danner, *supra* n.145 *ibid*

¹⁴⁹ It could be argued that the Prosecutor was following the recommendations in the *Report*: Danner *ibid*, 540. On the other hand, there is opinion to the effect that the *Report* was merely advisory and that the Prosecutor could have exercised her inherent powers under the Statute to carry on with her investigations. Benvenuti *supra* n.145, 504

3.5.2. THE PROSECUTOR v JEAN-BOSCO BARAYAGWIZA: THE ABUSE OF PROCESS DOCTRINE

Inherent in the duty and responsibility to ensure the right of the accused to a fair trial, is a corresponding duty by the International Tribunals to ensure that there is no abuse of process by any other organ of the Tribunals. A strongly independent and impartial tribunal should be able to ensure that such a fair trial right is protected. When there have been grave violations of the accused have been committed, the court should redress these violations. Unfortunately the International Tribunal, having first stepped up and flexed its independence, then retreated and allowed the abuse of process by the Prosecution in the *Barayagwiza* case. A scrutiny of the facts surrounding the arrest, the detention and the production of the trial of the accused would lead the objective commentator to question whether there has been an infringement of the right of the accused to a fair trial. The *ICTR* was put in a position where it had to consider this issue and the application of the abuse of process doctrine in particular. The independence of the *ICTR* thus came under scrutiny as a result of two conflicting Appeals Chamber decisions arising from the same case and came out wanting.

The doctrine of abuse of process is a doctrine that has been evolved as a safeguard against the abuse of the right of the accused to a fair trial through undue process. It has been elucidated in the following manner:

*“Proceedings may be stayed in the exercise of the judge’s discretion not only where fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place.”*¹⁵⁰

¹⁵⁰ Decision of the House of Lords in the case of *Bennett v Horseferry Road Magistrates’ Court* [1993] All ER 138, quoted with approval by the Appeals Chamber in *Barayagwiza v Prosecutor* *infra* n.157, Paragraph 24.

Two main issues of this doctrine should be noted. First, the decision to halt proceedings is a discretionary matter, which could only be exercised by the judge. Secondly, the violations of the rights of the accused must be so egregious and serious that it would be impossible to grant him a fair trial. The court would look at all the circumstances of the case before it decides whether or not to stop or discontinue proceedings against the accused. The right of the accused to be tried without delay is a fair trial right that has been guaranteed in all regional and international human rights as well as the *Statute of the ICTY*. Delay in producing the accused to a trial expeditiously and without delay is a common ground for abuse of process.¹⁵¹ This was the ground that was raised in the case of *Jean Bosco Barayagwiza v The Prosecutor*.¹⁵²

Jean-Bosco Barayagwiza was indicted for genocide, conspiracy to commit genocide, complicity to commit genocide and crimes against humanity under *Articles 2 and 3* of the *Statute of the ICTR*. Barayagwiza fled Rwanda to Cameroon where he was arrested on the 15th of April 1996.¹⁵³ There were several complications arising in these proceedings, including irresolute conduct of the Prosecutor regarding the detention of the accused as well as the conduct of the Government of Cameroon.¹⁵⁴

The Appeals Chamber was asked to decide on a motion by the accused requesting for the quashing of his arrest¹⁵⁵ and for his immediate release. The court allowed the motion¹⁵⁶ and dismissed the indictment against the accused

¹⁵¹ See *Barayagwiza* generally.

¹⁵² “November 1999 Decision” Judicial Supplement No.9, November 1999. See also Sylvia de Bertodano: *Judicial Independence in the ICC* 15 (2002) LJIL 409, 415.

¹⁵³ William Schabas: *Barayagwiza v Prosecutor; Prosecutor’s Request for Review or Reconsideration* (2000) 94 AJIL 563, 564. When an accused is arrested by national authorities and taken into “constructive custody” on behalf of the International Tribunals, actual custody takes effect from the date the accused is physically delivered to The Hague or Arusha and placed in the detention facilities of the International Tribunals. 1 Morris and Scharf *supra* Chapter One, n.2, 237.

¹⁵⁴ Schabas, *supra* n.153 564

¹⁵⁵ There is no specific right of the accused to challenge the validity of his arrest in the *Statute of the ICTR* either.

¹⁵⁶ Available at <<http://www.un.org/icty/Supplement/supp9-e/barayagwiza.htm>> The actual order was to dismiss all charges against the accused and release him from the custody and jurisdiction of the

on several grounds, including an inordinate delay in informing the accused of the charges against him¹⁵⁷ and failure to try his case without undue delay.¹⁵⁸ The court found that the pre-trial length of detention of the accused was significantly longer than that was acceptable under international human rights standards.¹⁵⁹ The Appeals Chamber held that it would be a travesty of justice if the Tribunal allowed the prosecution of the accused to continue in view of the egregious violations of his rights under the Statute. This in turn would have affected the integrity of the Tribunal in protecting the rights of the accused as well as putting in doubt the independence of the Tribunal. The Tribunal asserted that its proper role as an independent judicial organ was to ensure that injustice to the accused was halted in this case.¹⁶⁰

Having decided to set the accused free, a somewhat differently constituted Appeals Chamber,¹⁶¹ in an unprecedented move, allowed the Prosecutor's Motion to review its earlier decision and reversed it in light of "*new evidence*".¹⁶² The Appeals Chamber allowed the Prosecutor's motion and ordered the accused to remain in custody until trial.

Tribunal to the authorities in Cameroon. *Ibid*, Paragraph 106. Shahabuddeen J was the only judge who was of the view that the accused should be released unequivocally.

¹⁵⁷ *November 1999 Decision*, *supra* n.153 Paragraph 85. The Appeals Chamber found that the accused had spent "*an inordinate amount of time in provisional detention without knowledge of the general nature of the charge against him.*" *Ibid*

¹⁵⁸ Article 21(4) (c) of the Statute of the ICTR relates to the right of the accused "*to be tried without undue delay*". The accused was detained for a period of 19 months from the date he was arrested in Cameroon until his transfer to the ICTR. The European Court has held that a period of four days in detention prior to being brought before a judicial officer violated the rights of the accused. *Brogan v the United Kingdom* (1988) 11 EHRR 117. Bassiouni & Manikas *supra* Prologue n.22 963

¹⁵⁹ *November 1999 Decision*, *supra* n.153 Paragraph 112.

¹⁶⁰ *Ibid*

¹⁶¹ Three of the judges in the panel of the Appeals Chamber that considered the Prosecutor's Motion for Review sat in the original panel that dismissed the charges against the accused, namely Judge Lal Chand Vohrah, Judge Mohammed Shahabuddeen and Judge Rafael Nieto-Navia.

¹⁶² *Jean Bosco Barayagwiza v The Prosecutor, Decision (Prosecutor's Request for Review or Reconsideration)* Case No. ICTR-97-19-AR72 31 March 2000. ("March 2000 Decision") <<http://www.ictor.org/default.htm>>. The new evidence included a transcript of the court proceedings of the Court of Appeal in Cameroon that revealed that Barayagwiza knew of the charges against him under the Statute of the ICTR in 1996, and not in 1997 as was admitted in the proceedings of *November 1999 Decision*. The second new fact was new information to the effect that the delay in the transfer of the accused to the ICTR was caused by political difficulties in Cameroon and not through the Prosecutor's negligence and the final "new fact" related to a procedural strategy of the defence counsel, resulting in a waiver of a certain time period which was taken into account when calculating the "undue delay" in the *November 1999 Decision*. Schabas, *supra* n.153, 566. However, these were not "new facts" as such since they were already in existence when the Appeal Chambers sat in the

In the course of her submissions to the Appeals Chamber, the Prosecutor informed the court that as a result of its *November 1999 Decision*, the Government of Rwanda had suspended all cooperation with the Tribunal. The consequence of this was that “*justice as dispensed by this Tribunal was paralysed*”.¹⁶³ The Prosecutor admitted that the ability of the prosecution to carry out its work¹⁶⁴ and by extension, the ability of the Tribunal to fulfil its mandate depended on the cooperation by Rwanda.¹⁶⁵

The Appeals Chamber did not accept the validity of the submissions of the Prosecutor but there was no doubt whatsoever as to the subtle issue in her submission, which was basically a threat to the duty of the Tribunal to form a judicial decision independently without fear or favour from two quarters. The thrust of her argument was that if the Appeals Chamber did not issue a decision that would appease the Government of Rwanda, the court would be signalling its own demise.

The threat to the independence of the Tribunal came from two sources: first, from the Prosecutor herself and secondly, from the Government of Rwanda. The Attorney-General of Rwanda appeared as *amicus curiae* in the hearing of the Prosecutor’s Notice of Motion and expressly threatened non-cooperation of Rwanda if the Appeals Chamber dismissed the request for review.¹⁶⁶ If Rwanda had carried out its threat, the Tribunal’s work would have been severely and adversely affected¹⁶⁷ and it would not be able to carry out its mandate.

November 1999 Decision. The Prosecutor had not brought these facts to the attention of the Chamber. *Ibid* 568. It is therefore arguable that the first decision was inaccurate due to lack of knowledge of certain factual circumstances. De Bertodano, *supra* n.152, 416.

¹⁶³ *Ibid* Address of the Prosecutor to The Tribunal cited in the *Declaration of Judge Rafael Nieto-Navia*, Paragraph 2. Available at <<http://www.ictt.org>>

¹⁶⁴ The Prosecutor was refused a visa to visit Rwanda *Ibid*

¹⁶⁵ *Ibid*

¹⁶⁶ *March 2000 Decision*, *supra* n.162, Paragraph 34

¹⁶⁷ As it was in the case of *Bagilishema* which had to be adjourned as the Rwandan Government did not allow 16 witnesses to appear before the Tribunal. De Bertodano, *supra*, n.152, 416. This then put the

Rwanda had renewed cooperation prior to the hearing of the Prosecutor's Motion but made it clear that its cooperation was conditional and that it would withdraw cooperation if it was faced with an "*unfavourable Decision*".¹⁶⁸ In light of this statement and the submissions of the Prosecutor, the *March 2000 Decision* was controversial and raised a perception that the Appeals Chamber had bowed to external pressure from the Government of Rwanda.

Barayagwiza is a case where the Tribunal was asked to weigh the rights of the accused against the mandate of the Tribunal which is to prosecute the perpetrators of the crimes mentioned under the Statute. The accused came out wanting. The Tribunal came out with a dented reputation. By reversing its earlier decision which had addressed the injustice caused to the accused by breach his statutory rights, the Appeals Chamber appeared to give the impression that it had capitulated to external pressures, namely the dictates of a State and a forceful stance by the Prosecutor of the Tribunal, and therefore had compromised its independence.¹⁶⁹

The Appeals Chamber attempted to assert its independence when it said the following:

*"The Appeals Chamber wishes to stress that the Tribunal is an independent body, whose decisions are based solely on justice and law. If the decision in any case should be followed by non-co-operation, that consequence would be a matter for the Security Council."*¹⁷⁰

right of "being tried without undue delay" of the fair trial rights of the accused in jeopardy, ironically the very breach *Barayagwiza* complained of and which was upheld by the first decision.

¹⁶⁸ *March 2000 Decision*, *supra* n.78, Paragraphs 12, 34

¹⁶⁹ The credibility of the Tribunal and the Prosecutor "had taken a beating": Schabas, *supra*, n.153 at 566,568 and 571. See also Cogan, *supra* Chapter One, n.86 who observed that the *Barayagwiza* Case was the most egregious example of political meddling. 134

¹⁷⁰ *March 2000 Decision*, n.162 Paragraph 34

The decision of the Appeals Chamber does not rest comfortably with the notion that the Tribunal must fully respect the international human rights standards at every stage of the proceedings. In this case, it includes the rights contained in *Article 9(3)*¹⁷¹ and *Article 14(3)* of the *ICCPR* which are the right of the pre-trial detainee to be tried within a reasonable time and the right of the accused to be tried without undue delay respectively.¹⁷² There is an overlap between these two rights, since the right of the accused to have his case tried without undue delay, a minimum guarantee of fair trial, may be affected if he was detained for an inordinate length of time.¹⁷³

That the Appeals Chamber was aware that their independence would be called into question was evident when three of the five judges issued separate Declarations denying expressly that there was any coercion on them for the new contrary decision.¹⁷⁴

The *Declaration of Judge Nieto-Navia* stressed that the independence of the Tribunal was not compromised by political pressures and that the decision taken was based on the law and not “*as a result of political pressure and threats to withhold co-operation being asserted by an angry Government*”¹⁷⁵

The judge further held:

“The principle of the independence of the judiciary is overriding and should at all times take precedence faced with any conflict, political pressures or interference. The

¹⁷¹ See also Article 5(2) and (3) of the European Convention. The right of the detainee to be informed adequately of the reason for his arrest is formulated to allow the detainee to judge the lawfulness of the detention and take steps to challenge it if he sees fit. *X v United Kingdom (Application No. 6998/75)* Bassiouni & Manikas *supra* Prologue n. 22 962

¹⁷² Joseph *et al, supra* Chapter One, n.12, 432.

¹⁷³ The former right is a specific right of the accused whereas the latter is a specific component of the more general and abstract fair trial right.

¹⁷⁴ *Declaration of Judge Rafael Nieto-Navia, Separate Opinion of Judge Shahabuddeen* at Paragraphs 71- 72 and *Declaration of Judge Lal Chand Vohrah* Paragraph 3.

¹⁷⁵ de Bertonado, *supra*, n.152, 416. See *Declaration of Judge Nieto-Navia, ibid*, Paragraph 7.

*proposition put forward by the Prosecutor that political considerations can play a role in the Appeals Chamber's decision making and actions is not acceptable.”*¹⁷⁶

Judge Nieto-Navia's declaration on judicial independence is correctly put. His admonition of the Prosecutor is also correct, since her submissions did give the impression that proceedings at the Tribunal are politicised. Whatever the reality of the situation at the Tribunal may be, judicial independence does not have room for political considerations. However, the Declaration as well as the Declarations of the other judges are unconvincing in light of the effect of the decision of the Appeals Chamber. The *March 2000* decision has unfortunately dented the integrity of the international criminal system, in particular the ICTR. *Barayagwiza* has demonstrated that political considerations did play a role in the Appeals Chamber and its independence in particular has been adversely affected.

The *Barayagwiza* decision is not a good precedent to support the contentions of the International Tribunal that they are “truly independent”. The judgement of this case seem to reflect “validate” abuse of process and are rather repugnant to the whole concept of fair trial. That “validation” can be traced back to pressures from third parties and somewhere alongst that path, the independence of the Tribunals was sacrificed.¹⁷⁷

3.6. THE SPECIAL COURT FOR SIERRA LEONE

Threats to the independence of the Special Court may emanate from two sources - the United Nations and the Government of Sierra Leone. Perhaps the analogous reference to the establishment of a judicial organ in a national system by the Appeals Chamber in *Tadic* once again might be of some

¹⁷⁶*Declaration of Judge Nieto-Navia, supra* n.65, Paragraph 3

¹⁷⁷de Bertonado, *supra*, n. 153 417. Also Schabas, *supra* n. 153 at 568,571

assistance. Comparatively, the Special Court is created by two political bodies. Whilst it does not mean that the Special Court may be tainted with the political characteristics, as all other courts, whether national or international, the Special Court bears the risk of indirect threat to independence through financial aspect.

The Appeals Chamber in the *Prosecutor v Moinina Fofana* ¹⁷⁸(Case NO. SCSL-2004-14-AR72 (E)) adopted the stance of the International Tribunals and asserted that the Court could not be controlled than in administrative matters, meaning advice and policy direction. ¹⁷⁹The question of control over the Special Court was succinctly answered by Justice Robertson:

*“Judicial independence requires courts to be “beyond the influence or control” of any political body in their judicial functioning”*¹⁸⁰

In the case before the Court, Judge Robertson held that there was nothing illegal in the Security Council decision that the non-judicial functions of the Special Court should be the responsibility of a Management Committee which was established to carry out the administrative and finance aspects of the Tribunal.

Indeed, the Appeals Chamber concluded that although termination of the Special Court and/or amendment to its Statute would need the agreement of the Government of Sierra Leone but *“in reality would follow from any such decision by the Security Council itself”*.¹⁸¹

The Appeals Chamber stated that the termination of its mandate lies in the hand of the Security Council. This is probably the correct statement as the

¹⁷⁸ Dated 25th May 2004. Available at <<http://www.sc-sl.org/CDF-decisions.html>> “Fofona Decision”

¹⁷⁹ *Ibid* Paragraph 22.

¹⁸⁰ *Separate Opinion, of Judge Robertson, ibid* Paragraph 5

¹⁸¹ *Separate Opinion of Justice Robertson* n.96 Paragraph 2, annexed to *the Decision, supra*, n.

Security Council's powers are very significant. It does not necessarily mean that the Appeals Chamber is indicating that it is dependent on the Security Council.

3.7 THE INTERNATIONAL CRIMINAL COURT

Potential sources of threats to independence are the members of the Assembly of State Parties and the Security Council. *Article 2* of the *Relationship Agreement* avers that the United Nations recognises the ICC as an independent court. *Article 16* of the *Rome Statute* allows the Security Council to exercise a certain degree of control over the ICC in its judicial capacity. *Article 16* states as follows:

*No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.*¹⁸²

The Security Council could issue mandatory orders to the Court to defer the proceedings before it for a period of 12 months. Theoretically this could go on infinitely, as there appears to be no limitation to the number of requests the Security Council could make. This provision, although arguably is necessary in order to avoid potential overlaps and conflicts between the duties and responsibilities of the Security Council and the ICC, is open to potential misuse by the Security Council resulting in an adverse effect on the ICC.¹⁸³ The role of the Security Council in the proceedings of the ICC is seen as a politicisation of the judicial process.¹⁸⁴ It allows investigations or proceedings

¹⁸² See <http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf>

¹⁸³ For example, the ICC could be instructed to defer proceedings against national of a permanent member of the Security Council.

¹⁸⁴ Nabil Elaraby: *The Role of the Security Council and the Independence of the International Criminal Court: Some Reflections* 43, 45 in in *The Rome Statute of the International Criminal Court - A*

against an accused to be deferred at the whim of the Security Council. Such deferral may go against the right of the accused to be tried without undue delay under *Article 67*.

3.8 SUMMARY

The nature and jurisdiction of the international courts in the international arena makes them particularly susceptible to political considerations.¹⁸⁵ An irreproachable distance is difficult to maintain as the operations of the Tribunals depend to a large extent on the organs of the United Nations and MemberStates whose cooperation may depend on policy and political issues. The various trial proceedings at the International Tribunals have sometimes put them in difficult situations. They have to ensure that the perpetrators of the crimes committed be punished and as a consequence, appease victims of those crimes by showing that justice is done and at the same time, they have to ensure that the rights of the accused to receive a fair trial are guaranteed as well. The dilemma posed by *Barayagwiza* was unfortunate; but as a court of law, the Tribunal was bound to apply the laws as provided for in its legal documents as well as the international human rights standards that it vowed to and was in fact expected to follow. In *Barayagwiza* the Tribunal did find that there were breaches of the statutory rights of the accused. The subsequent decision to allow the Prosecutor's motion did not reflect well on the independence of the Tribunal.¹⁸⁶ A tribunal that is independent has a duty to ensure that the due process of the law is served, and this means having to apply the law as it stands even though such a decision may be unpopular.¹⁸⁷

Challenge to Impunity Mauro Politi and Giuseppe Nesi (Eds) (Aldershot: Ashgate Publishing Ltd, 2001). See also Lionel Yee *The International Criminal Court and the Security Council: Articles 13(b) and 16* 143, 150 in *The International Criminal Court – The Making of the Rome Statute* Roy S. Lee (Ed) (The Hague: Kluwer Law International, 1999)

¹⁸⁵ de Bertodano, *supra*, n. 152 417.

¹⁸⁶ Cogan, *supra* Chapter Two, n.86 135

¹⁸⁷ Compare this to the situations where the ICTY had acquitted the accused of the crimes they were charged with. The acquittals of General Delalic and Ignace Bagilishema attracted adverse comment such as failure of justice. But as de Bertodano rightly puts it: *But an independent tribunal has a duty to*

Both *Todorovic* and *Barayagwiza* raised much debate. For all their efforts to meticulously safeguard their independence, they had to bow down to political pressure, as much as they tried to deny it.

There is no satisfactory solution to this dilemma; the choice the Tribunal has to make between guaranteeing the rights of the accused to a fair trial and fulfilling its mandate have resulted in decisions that have restricted the rights of the accused. A perception has arisen that the Tribunals have failed to fulfil the requirement in its mandate to scrupulously observe fair trial guarantees for the accused particularly with relation to its independence. Whatever choice the court may have made in two conflicting decisions such as these, it would have been a controversial one. If the Appeals Chamber had found for the Prosecution in the *November Decision*, the Court would have been criticised of not safeguarding the fair trial rights of the accused, not respecting the international fair trial standards and confirming criticisms that the International Tribunals are neither independent nor impartial.¹⁸⁸

Another dilemma faced by the International Tribunals in asserting its independence is the relationship that it has with the Security Council. Aside from their relationship *qua* principal organ and its subsidiary, the relationship between the Tribunals and the Council is not as distinct and unambiguous as a relationship between a political and a judicial organ in national systems. A pre-requisite of judicial independence is that there must be a clear demarcation of functions between these two organs.

ensure that justice takes its course, even if it leads to the acquittal of defendants widely believed to be guilty" 418

¹⁸⁸ See *Letter dated 19th May 1993 from the Charge d'Affaires A.I.(sic) of the Permanent Mission of Yugoslavia (Serbia and Montenegro) to the United Nations, supra* n.19.. The Economist made a telling remark "*Perhaps the verdict was correct, but the confidence in the court so low, many are doubtful that justice had been done.*" Dated 16th June 2001, *op.cit*, n.24

The Human Rights Committee said in the context of *Article 14(1)* that a situation where:

*“...the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal”*¹⁸⁹

Although the comments above were made in relation to domestic proceedings, they could be applicable by analogy to the international courts principally with regard to their relationships with the Security Council. Yet again, the peculiar set-up of the International Tribunals as an institution makes it markedly different from the national courts in the constitutional set-up. A major difference is the powers of the courts. In order that they are able to carry out the terms of their mandates efficiently the Tribunals should have coercive powers to ensure that its orders are complied with. The Tribunals does not have an enforcement or coercive mechanism. There is no police or security force to carry out its orders. It relies on the cooperation of national systems to carry out its mandate effectively as it cannot compel member States to comply with its orders.¹⁹⁰ Problems arise when States refuse to cooperate with the Tribunals. The intransigence of the Republic of Croatia in its refusal to cooperate with the ICTY as well as complying with its orders¹⁹¹ prompted two Presidents of the ICTY, first President Antonio Cassese and then his successor President MacDonald to officially complain to the Security Council.¹⁹² The Tribunal was as President Cassese put it, a “*giant who has no*

¹⁸⁹ *Bahamonde v Equatorial Guinea* (468/1991) 20 October 1993, paragraph 9.4.

¹⁹⁰ “The Tribunal remains heavily dependent on State cooperation to fulfil its mandate”. President’s Third Annual Report dated 16th August 1996, A/51/292 - /1996/665. All Annual Reports are available at the website of the Tribunal. <<http://www.un.org/icty>>

¹⁹¹ *Order for the Immediate Cessation of Violations of Protective Measures for Witnesses*, the *Prosecutor v Blaskic*, Case No.IT-95-14, Order of the Trial Chamber dated December 1 2000. The Tribunal ordered that there be a cessation of publication of in the Croatian media relating to particulars of and evidence given by a witness who was under a protection/anonymity order from the Court. Despite its requests, Croatia refused to enforce that order against its nationals.

¹⁹² Croatia was not the only State to defy the orders of the Tribunal. Bosnia and Herzegovina as well as the Federal Republic of Yugoslavia have also reneged on their international obligations under the Resolution 827(1993) to cooperate with the Tribunal. The Security Council called on all the errant

arms and legs".¹⁹³ The Tribunal's resort to the Security Council for assistance in compliance with a judicial order is damaging to the institutional independence of the Tribunal as it puts the ICTY in a position of dependence on the Security Council.¹⁹⁴

Certain other non-judicial activities of the ICTY as an institution has attracted criticisms and raised the issue of its independence vis-à-vis the Security Council. In February 1995, the judges of the ICTY issued a press statement requesting the Prosecutor to issue a "programme of indictments" to "meet the expectations of the Security Council and of the world community at large".¹⁹⁵ This statement clouded the institutional independence of the Tribunal as it gave the impression that the aim of the ICTY was to secure convictions as expected by the Security Council rather than doing justice between all parties concerned.¹⁹⁶ It brought a political angle to the operations of the ICTY as a judicial organ as it highlighted the alleged obeisance of the Tribunal to the Security Council.

In domestic systems, it would be very rare for judges to adopt a prominent role as the judges of the ICTY. It could be argued that the action by the ICTY should not be interpreted in negative terms as compromising its

States to cooperate fully with the Tribunal and comply with their orders. The Council did not take any form of sanctions on the States to enforce compliance. Shraga and Zacklin, *supra* Prologue n.22, 518

¹⁹³ The President's Second Annual Report to the United Nations 7th November 1995 See Olivia Q. Swaak-Goldman: *supra* Chapter One n.133 217

¹⁹⁴One disadvantage of the establishment of the Tribunals by the Security Council is that the Tribunals may appear to be too dependent on the political body that created them. Colin Warbrick *International Criminal Law* (1994) 44 ICLQ 466, 468

¹⁹⁵*De Bertodano supra* n.152, 417. Controversy also surrounded certain statements made by the then President of the ICTY, Antonio Cassese on the two most wanted suspects by the ICTY, namely Radovan Karadzic and Ratko Mladic as well as his call for the elections in Bosnia to be postponed and Serbia be expelled from the Olympic Games held in Atlanta until they surrendered Karadzic and Mladic. The extra-judicial remarks made by then President Cassese were seen as affecting the impartiality of the Tribunal and the judges as the statements implied a pre-conceived notion of guilt of the two suspects. Geoffrey Robertson "War Crimes Deserve a Fair Trial" The Times of London. June 25 1996. Ironically, the impartiality of the writer, later Judge Roberston, was challenged and upheld on a similar ground of objection by the accused at the Special Court for Sierra Leone. Chapter Five, *infra*. Cassese's remarks could also be construed as reflection of institutional bias against the accused as the continued existence of the Tribunal is dependent on them producing convictions. *Cogan, supra* , Chapter Two n.86 133.

¹⁹⁶ *Cogan, ibid.*

independence but rather calling attention to its inability to proceed with its judicial business, which was being hampered by lack of cooperation, by member States. However, such action by the judges could be interpreted as stepping out of their sphere of duties into the realm of the prosecution. It is the prosecutor's duty to issue indictments and the judges' duty to adjudicate. Press statements such as the one above may make their position vulnerable to the adage of being a "*football of political factions*".¹⁹⁷

¹⁹⁷Swagak-Goldman argues that the President Cassese was moved to act in that manner as the judge was concerned about the efficacy of the ICTY. *Supra* Chapter One n.133 216. That is understandable as the ICTY lacks enforcement mechanisms. However, the remarks made by the President would have been less controversial if the Press Statements were made by the Prosecutor or the Security Council. Even with best intentions, the President's remarks had raised doubts as to the independence and impartiality of the ICTY. Again, it could be argued that this state of affairs is caused by the lack of a proper Government-like structure in the international arena, causing the President to adopt a role that would have normally been assumed by a Minister of Justice or some law authority.

3.9 INDIVIDUAL INDEPENDENCE

In order for a judge to be able to assert his individual independence, he should be able to offer objective guarantees that the personal attributes to his term of office are secured. These personal attributes include matters such as manner of appointment, security of tenure, qualifications, promotions, pensions and other relevant factors. The existence of any safeguards against pressures is also pertinent.¹⁹⁸ They are keys to the core of that independence and must be secured to maintain it. The extent to which judicial independence is observed may be gauged from the objective conditions or guarantees that the judge individually and the tribunal as a whole possess and enjoy.¹⁹⁹ Once the judge has his essential conditions assured, his individual independence and consequently, the institutional independence of the tribunal are presumed guaranteed.

The European Court said in the case of *Campbell and Fell v United Kingdom*²⁰⁰

*“...the Court has had regard to the manner of appointment of its members (of the adjudicating body) 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.”*²⁰¹

Pressure on the judge’s individual independence through deprivation or compromise of those conditions, primarily by the Executive, may also result in jeopardising the institutional independence of the judicial organ²⁰² which may give an appearance of an organ that is subservient to and at the mercy of

¹⁹⁸ *Findlays* *supra* n.11 paragraph 73

¹⁹⁹ *Valente* Chapter Two, *supra* n.34, 417, Shetreet, S: “*Judicial Independence: New Conceptual Dimensions and Contemporary Challenges* in Shetreet and Deschenes *supra* n.17, 590,596, 612, 660. Shetreet argues that there are other facets to judicial independence.

²⁰⁰ (1984) 7 EHRR 165

²⁰¹ *Ibid* Paragraph 78

²⁰² See *Valente*, Chapter Two, *supra* n.34

the other limbs of Government. Further, when the objective guarantees of individual independence are compromised, the individual independence of the judge is affected and this may in turn have a negative bearing on his impartiality since any decision he may come will be open to criticism of bias. A dependent judge cannot, by definition, be impartial. Independence is therefore an innate and essential condition of impartiality.²⁰³

Individual independence has many aspects to it. These aspects must be secured to protect the individual independence of the judge. These include method of appointment, terms of appointment including security and conditions of tenure and personal characteristics of the judges such as qualifications and training. It was succinctly put by the Human Rights Committee when it said:

“a competent, independent and impartial tribunal” (as provided by Art. 14(1) of the ICCPR) raises many matters including the manner in which the judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition (sic) governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.”²⁰⁴(emphasis added)

Individual or personal independence was elucidated by the Trial Chamber of the ICTR in *Kanyabashi*²⁰⁵

.....the personal independence of the judges.....[is]underscored by Article 12 of the Statute....which states that persons of high moral character, integrity, impartiality, who possess adequate qualifications to become judges in their respective countries and

²⁰³ *Attorney-General v Lippe* [1991] 2 SCR 114 , 139 per Lamer C.J.

²⁰⁴ HRI/GEN, General Comment 13, paragraph 3. Quoted in the Report of the Special Rapporteur, *supra* Chapter Three n.1, Paragraph 14.

²⁰⁵ *supra* Chapter 2

*having widespread experience in criminal law, international law including international humanitarian law and human rights law”*²⁰⁶

Thus the independence of the judge is gauged in the manner as stated above. Whether the requirements are complied with or if they were, how detailed was the compliance are interesting issues that will be discussed below.

3.10 MANNER OF APPOINTMENT

The appointment of judges is a critical factor in gauging judicial independence. Two considerations arise from this particular aspect of individual independence. First, the nature and character of the organ appointing the judges may have a bearing on the personal independence of the judges. The second consideration is the process of the appointment itself which takes into account the necessary factors required for judicial office, such as qualifications, experience and expertise. The selection mechanism is important as this is the process that would ensure that only persons who are of excellent qualifications and very good character would be chosen to hold an office that commands essentially a great degree of responsibilities and power.

State practice of appointment of judges varies but the most common mode of appointment is by the Executive.²⁰⁷ The **European Court** has held that the appointment of judges by the Executive is acceptable.²⁰⁸ However, this is not to say that such appointments could not be doubted on grounds of eligibility,

²⁰⁶*Ibid* Paragraph 42

²⁰⁷ This practice is common in most Commonwealth countries. Note the decisions of the Human Rights Committee criticising this method of appointment. Joseph *et alsupra* Chapter One n.12, 405. Joseph argues that the HRC may have simply been making recommendations to States to adopt objective legal criteria to ensure that judicial appointments and tenure conditions to lessen the risk of “political appointments.”

²⁰⁸*Campbell v Fell supra* n.200

independence and their qualifications. The former Chief Justice of Australia, Sir Gerald Brennan observed

*“judicial independence is at risk when future appointment or security of tenure is within the gift of the Executive.”*²⁰⁹

Judgements issued by such persons may be set aside, not necessarily on their merits but merely on the fact that the judgements were made by a person whose appointment was a “gift by the Executive”.

The personal independence of a judge could be challenged on the manner of appointment aspect only if it could be shown that that particular practice of appointment is, as a whole, unsatisfactory or that that “*the establishment of the particular court deciding the case of which was influenced by improper motives*”.²¹⁰

The Human Rights Committee had made observations on the issue of the nature of the appointing body in State Practice. In its ***Concluding Observations on Slovakia***, the Committee said as follows:

*“The Committee notes with concern that the present rules governing the appointment of the judges by the Government with the approval of Parliament could have a negative impact on the independence of the judiciary. Therefore, the Committee recommends that specific measures guaranteeing the independence of the judiciary, protecting judges from any force of political influence through the adoption of laws regulating the appointment, remuneration, tenure, dismissal and disciplining of members of the judiciary”*²¹¹

²⁰⁹ F.G.Brennan: *The State of the Judicature* (1998) 72 ALJ 34, 35; see also Michael Kirby: *Independence of the Judiciary – Basic Principles, New Challenges*: Available at <<http://www.hcourt.gov.au/speeches/kirbyj>>

²¹⁰ Harris *et al supra* Chapter One, n.17 232

²¹¹ (1997) UN Doc CCPR/C/79/Add.79

Principle 10 of the *Basic Principles*²¹² makes it imperative that not only should candidates for the positions of judges have integrity but also ability, training and qualifications. It is imperative that the method of appointment of judges ensures that candidates who are best qualified for judicial office are appointed. Equally, such method should ensure that there are safeguards against improper influences on the appointments.²¹³ The pitfalls in appointing a person who is not qualified for the position of a judge are only too apparent. Misleading and misinformed judgements and improper or unreliable conduct of trials are examples of possible pitfalls of having non-qualified persons sitting on the bench. The judge has to be a good judge as it were, so that he could perform his functions efficiently, having the necessary knowledge, expertise and skills. These characteristics of a judicial office are very relevant in ensuring that the rights of the accused are not compromised.

At the International Tribunals, the mode of election of judges is a fairly complicated and comprehensive process. Two of the principal organs of the United Nations, namely the Security Council and the General Assembly are involved in the method of appointment of judges to the panels of the International Tribunals. This is akin to the national practice of electing of judges by the Government and Parliament. The procedure provides a role for Member States of the United Nations to participate in the election process. Since the Tribunals are exercising criminal jurisdiction on the part of international community, this involvement is appropriate.²¹⁴

Article 13 bis of the *Statute of the ICTY*²¹⁵ provides for nomination of candidates for judicial office at the Tribunal by member States and non-member States maintaining permanent observer missions at the United

²¹² Basic Principles, *supra* Chapter Two, n.16

²¹³ See also Principle 12 of the Beijing Statement, *supra* Chapter Two n.3

²¹⁴ 1 Morris & Scharf *supra* Prologue, n.3, 144

²¹⁵ Article 13 *ter* covers elections of *ad litem* judges. The process is the same as the election of permanent judges.

Nations Headquarters.²¹⁶ The Security Council then screens the nominations received and prepares a list for consideration by the General Assembly. The final decision of the appointment of judges lies with the General Assembly who would elect the candidates from the list submitted by the Security Council.

This method of election is geared towards negating any observation of lack of transparency in the election of process. The involvement of the General Assembly would avoid any possible criticisms of lack of institutional and individual independence of the International Tribunals and their judges from the Security Council. Such a method of appointment could theoretically be free from the criticism that the appointments of the judges could have political connotations since they were made solely by a political body.²¹⁷

The appointment of judges at the ICC is governed by *Article 36* of the *Rome Statute*. The relevant provisions concerning nominations and elections of judges are as follows:

Qualifications, nomination and election of judges

1. *Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.*
- 2.....
- 3.....

4. (a) *Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:*
 - (i) *By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or*

²¹⁶ *Ibid*

²¹⁷ Theoretically, the provisions seem well set out and geared towards protecting judicial independence by involving the Security Council and General Assembly so that the elections would be unprejudiced. However, the results of the elections of the judges first appointed to the ICTY reflected, not on their legal qualifications or expertise but rather the geographical representations that made up the composition of the court. Thus, in the first batch of judges, there were, amongst the judges elected, former diplomats and scholars without any trial experience, old and infirm judges and career judges as well. Such a motley combination has posed problems in the day-to-day proceedings at the International Tribunals, the problems of which are discussed below. See Wald *Reflections supra* n.60 226.

(ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

(i) The representation of the principal legal systems of the world;

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

The nomination and election process of the judges at the ICC are fairly complex processes which involve two lists of nominees with names of candidates who fall within the qualifications requirements of *Article 36(3)(b)(i)* and *Article 36(3)(b)(ii)*. Nominations are made only by States party to the Statute of the ICC, unlike the judges at the *ad hoc* tribunals who are nominated by members of the United Nations. States could nominate candidates who are not its nationals but nationals of another State party to the Statute.²¹⁸

Appointment of judges is done through a secret ballot at a meeting of the Assembly of State Parties²¹⁹ convened for that purpose.²²⁰ The main organs of the United Nations would not be able to exert direct pressure on the independence of the judiciary as they are not the appointing parties.²²¹ The involvement of the State Parties is not free from pitfalls either. The secret ballot method negates any transparency and as most secret ballot methods of election, it has its drawbacks and is open to abuse.

By *Article 12* of the *Statute of the Special Court at Sierra Leone*, the judges are elected through a consultation process between the Secretary-General of the United Nations and the Government of Sierra Leone as contractual parties to the Special Court Agreement. It could be said that *prima facie* this manner of appointment appears to be a sound method as two parties are involved in the appointment of judges.

²¹⁸ Article 36(4),

²¹⁹ Article 36(6)(a)

²²⁰ Article 112 sets out the composition, powers and responsibilities of the Assembly of State Parties.

²²¹ However, Member States of the United Nations who are also State Parties could, if desired, put forward nominations for judges who they might feel are sympathetic to the United Nations.

3.11 QUALIFICATIONS

A judge must be a qualified person in order to serve on a judicial panel. He should have proper legal training. A sophisticated criminal system as the international criminal justice requires judges to be persons of appropriate qualifications with knowledge and expertise of international humanitarian and criminal laws. An accused person is entitled to expect that the adjudicating officer is well-versed in the law and is equipped to ensure that he receives a fair trial.

Whilst *Article 11* of the *Statute of the ICTY* requires the judges be independent, *Article 13* states that they²²² shall be persons of high moral character, impartiality and integrity. They must have the necessary qualifications that are required in their respective jurisdictions to be appointed to the highest judicial office in their national legal systems. This requirement imposes a high threshold, as judges eligible to the highest possible judicial appointment in their national jurisdictions would have acquired experience, knowledge and skills in adjudicating trial proceedings. It could be argued that this provision means that the judges appointed to the *ad hoc* tribunals are the most senior and experienced members of the judiciary in their national jurisdictions. A natural corollary is that they bring their considerable knowledge and experience in the law as well as conduct of criminal trials to the international courts.²²³

²²² “Judges” include permanent as well as *ad litem* judges of the Tribunal

²²³ This sounds ideal on paper, but in reality this may not be the case. A judge appointed to the International Tribunals may not necessarily be someone who is eligible to the highest possible positions in their national jurisdictions. He or she could have obtained the appointment as he or she could have made the right impression on the nomination party. This argument ties in with the practice of horse-trading prevalent at the United Nations and discussed below. See Bohlander *supra* Chapter One, n.17, 357.

Article 13 has been amended to add *Article 13 bis* and *Article 13 ter* to encompass both permanent and *ad litem* judges.²²⁴

The qualifications of the judges at the ICC are set out in *Article 36(3)*. This states:

3. (a) *The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.*

(b) *Every candidate for election to the Court shall:*

(i) *Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or*

(ii) *Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;*

(c) *Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.*

The provisions here are similar to the provisions of the Statutes of the *ad hoc* Tribunals. Like the Statutes of the *ad hoc* Tribunals, the *Statute of the ICC* makes it clear that the judges must be highly qualified, experienced and impartial. The inherent requirement of impartiality personal to the office of the judge has been made into a statutory requirement. This is in line with the intent expressed in the Preamble to the *Basic Principles* that judicial independence and impartiality should be respected and incorporated into national legislation. That intention is reflected in the international criminal proceedings through the provisions of the Statutes of the Tribunals and ICC.

²²⁴ Although in many areas the *ad litem* judges enjoy the same terms of service as the permanent judges, there are limitations in their powers, for example they do not have the power to adopt the RPE or consult the President of the ICTY on the assignment of judges pursuant to Article 15 or more importantly will not be assigned to the Appeals Chamber. Article 13 *quarter*(2)(b) Statute of the ICC. See also, Daryl A Mundis, “*The Election of Ad Litem Judges and Other Recent Developments at The International Criminal Tribunals*” 14 LJIL (2001) 851, 854

However, the Rome Statute provisions are far more comprehensive than the provisions of the International Tribunals. It appears that *Article 36* was designed to cover the lacunae exposed by the Statutes and Rules of the International Tribunals, such as requirement of excellent command of one of the working languages of the court, specific expertise in areas germane to international criminal law and international humanitarian law as well as relevant professional experience.

Article 36(3)(b) is very comprehensive as to the qualifications required for a successful candidate. The requirements are specific, unlike the more general provisions of the Statutes of the *ad hoc* Tribunals.

The Article makes it mandatory that the candidates must have established competence in both criminal law and procedure and obtained the necessary experience either as a judge, prosecutor or a legal practitioner. The experience required under this requirement is “relevant”: *Article 36(3)(b)(i)* whereas a candidate seeking nomination under the international humanitarian law or human rights qualification limb of *Article 36(3)(b)(ii)* has to show that he is competent and has had extensive experience in a professional legal capacity which is relevant to the judicial work of the Court. Presumably this includes those who have legal experience but have not served as a judge or worked as a prosecutor or as a practitioner. This provision could mean that established academics may also be nominated as candidates.²²⁵ The second condition for suitability for candidacy for the positions of judges is that the candidate must be fluent in at least one of the working languages of the court: *Article 36(3)(c)*.

²²⁵ Article 36 seems to go down the same road as the Statute of the ICTY in that it allows academics and diplomats to sit on complex international criminal trials. There are disadvantages of having this class of non-career judges, an issue that is discussed in detail below. The ICC is currently composed of career judges, diplomats and academics. Upon examination of the curriculum vitae of the judges, it is most unfortunate that some of them have never stepped into a court as a legal professional. The curriculum vitae of the judges can be found at the official website of the ICC <<http://www.icc-cpi.int>>

Undoubtedly the requirements for the nominees for the ICC are more stringent than that required of the judges at the *ad hoc* tribunals. As the ICC will be dealing with highly-specialised areas of law, it is important that the judges hearing the cases should have in-depth knowledge of the areas of the relevant laws. Lack of knowledge and indeed experience would be an obstacle to fair and expeditious trials and also may jeopardise the right of the accused to a fair trial thus. This Article also avoids the problems international judges faced at the International Court of Justice, where their work in international law prior to their appointments to the Court have in the past invited challenges to their independence.²²⁶

The qualifications required of the judges at the *Special Court* are similar to their counterparts at the International Tribunals. *Article 13 (1)* of the Statute requires the judges to be of high moral character, impartiality and integrity. The provision is very clear in asserting the independence of the judges in the performance of their functions which should be executed without “taking instructions from any Government or source.” *Article 13(b)* requires the judges to have obtained experience in international law, international humanitarian law and human rights law.

The Articles relating to the qualifications of judges at the ICC are far more comprehensive than the requirements set by its *ad hoc* counterparts. The lacunae in the specifications for qualifications at the *ad hoc* tribunals has caused problems in the actual trial process, for having a string of first-class degrees from prestigious Universities are useless in reality if such brilliance is marred by hapless understanding of the practical approach towards trial proceedings.

²²⁶ This issue is discussed in detail in Chapter Four with reference to judges who are impugned on grounds of their prior activities and personal convictions.

An issue involving qualifications that have attracted much comment is peculiar to international judges. This relates to their linguistic skills, or rather lack of. It goes without saying that language is vital to proceedings, more so criminal proceedings, since a person's liberty is at stake. Therefore proceedings and evidence given during the proceedings must be understood by all parties, especially the judges who are the ones who bear the responsibility of making a finding of guilt of an accused.

Linguistic problems were rampant in the ICTY where the official languages of the Tribunal are English and French.²²⁷ The lack of fluency or knowledge in either of these languages on the part of the judges as well as in the native languages of the accused, victims and witnesses can be a hindrance to a fair trial.²²⁸ *Article 13* does not require any language skills on the part of the judicial candidate.²²⁹ What would be the effect of the lack of language skills on the part of the judges? For one, the trials would take longer than necessary, thereby breaching the right of the accused to a fair and expeditious trial. For another, it would take time to draft judgements and may hold back the right of the accused to appeal against the decision.²³⁰

A matter that is quite common in the International Tribunal is the attempt by the judges to get their legal assistants to write judgements on their behalf. The admission by a former serving judge that the task of initially drafting the judgement, "is not infrequently" delegated to a pool of legal assistants casts a

²²⁷ See also Vladimir Tochilovsky *International Criminal Justice: Strangers in the Foreign System* (2004) 12 CLF 319

²²⁸ Patricia Wald *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*. (2001) 5 Wash U J.L & Pol'cy 87, 92

²²⁹ Bohlander *supra* Chapter One, n.17 330. *Cf the linguistic requirements for legal staff*. The ICC requires its judges to be proficient in one of its working languages. Bohlander *op cit* .

²³⁰ *Language turned out to be a greater obstacle than I would have anticipated*" Judge Wald , *supra* n.228, 92. Language barrier causes substantial delays and requires enormous resources. *Op cit*. This problem was also communicated to the author by a senior legal officer who admitted that the trials were slow because of that and every document has to be translated into the judge's own language – and this may not necessarily be English or French! On file with author.

shadow on the knowledge and hence the individual independence of the judge.²³¹ Judge Wald states (and it is worth repeating what the judge said):

“Reading some of the several-hundred-pages-long, format-stylized judgments of the ICTY, one can guess that many of the judgements are the work of a committee rather than an individual judge or judges. Indeed sometimes judgements are parcelled out to different judges, sometimes the staff assistants prepare first drafts with guidance from the judges who then review, revise and approve the judgement.....I have recognised the risk of losing control of the process if the judge does not define the issues, work out the reasoning and responsibility in advance with law clerks, and meticulously analyze, revise and edit any draft presented to her.”²³²

That statement deserves analysis. Apparently it is a common culture at the International Tribunals to assign or delegate writing of judgements to legal assistants. Who exactly are the legal assistants?

An advertisement in the ICTY website in 2005, for the position of an Associate Legal Officer with the Chambers, carrying the rank of P-2²³³ specified the duties of the successful candidate. These included, *inter alia*, assisting the judges in drafting legal opinions and advice, draft background memoranda, decisions and judgements of the Tribunal and the preparation and case management and drafting decisions during pre-trial and pre-appeal phase. The expected competencies for candidates included theoretical, analytical skills and ability to apply legal principles, procedures and concepts, ability to carry out research., familiarity or experience in research and analysis on various international legislative instruments, *ability to make concise opinions, orally and written, excellent drafting skills, and ability to draft well under*

²³¹ Wald, *supra* n.228

²³² Wald, *supra* n.228 *Ibid.* 93

²³³ P-2 signifies those who are junior professionals employed in the United Nations. Candidates for this position usually possess a first-level degree and are not required to possess vast experience.

pressure.²³⁴ (Emphasis added) Overall, it appears that the qualifications requirement for a legal assistant is far more complex and detailed than what is required of a candidate to the position of a Tribunal judge.

The use of assistants to assist Judges in drafting judgements is not new or startling. National judiciaries make full use of that facility. However, the assistants or research officers do not write the judgement – that is for the judge alone. The assistant would assist by doing the requisite research. That is acceptable as it is also a common practice in domestic systems.²³⁵ However, drafting the judgement for the judge is not. It affects the personal independence of the Judge for it shows that the judge lacks the qualifications that are required of his office. It shows the delegation of judicial responsibility to non-judicial officers and there have been cases where there has been no proper control by the judges.²³⁶

Reading the requirements for such an Assistant Legal Officer, it is clear that she or he is expected to do more than assist the judge. Not only are they supposed to *assist* the judge, they are also expected to make concise opinions and have the ability to draft *well under pressure*. This paints the picture that the assistants are expected to draft opinions, judgements and decisions. It therefore begs the question: when a judgement is delivered in Court, was it drafted by the Judge or a junior assistant with scant legal experience? It may well be that this is not the actual scenario, but a reading of Judge Wald's statement and the terms and conditions in the advertisement above gives the

²³⁴ On file with the author. See also Bohlander, *supra* Chapter One, n.17 where an analysis of a similar advertisement is undertaken on the qualifications required of a Senior Legal Officer, 329.

²³⁵ In Malaysia for example, these “assistants” are known as Research Officers but they are senior legal officers with the courts.

²³⁶ Michael Bohlander and Mark Findlay *The Use of Domestic Sources as a Basis for International Criminal Principles* (2002) 2:1 *The Global Community Yearbook of International Law and Jurisprudence*.

impression that there is a likelihood of that happening. In fact, it would not be surprising if it did.²³⁷

There are pitfalls in this arrangement. Aside from the glaring irresponsibility of a Judge not writing his or her own judgement, this scheme can be abused by judges who are weak and inexperienced.²³⁸ These judges could delegate the drafting of the judgements to the assistants completely without any supervision. Secondly, a judge with no or scant knowledge of international criminal law may not even be able to correct any mistake the assistant makes. All these factors affect the judge's individual independence.

3.12 SUMMARY

On the whole the personal character qualifications of the judge are standards expected of a person who is holding judicial office – integrity and high moral character. The requirements of independence and impartiality are innate to the office of the holder, whilst the requirement of experience in specified areas of law is essential to the conduct of trial proceedings and the legal reasoning for decisions that would affect the accused. As international criminal law becomes more complex, developed and sophisticated, the requirements of personal attributes to the position of an international criminal judge have been amplified. Experience and qualifications are now longer sufficient – germane to the office of the international judge in the 21st Century is the relevant requirement of language skills. A worrying dependence on the skills of legal assistants to write judgements for criminal trials of major proportions is unsettling to the whole concept of judicial independence. Knowledge that is

²³⁷ A case where a judge had no knowledge of what was going on in the procedural matters arising out of the trial that the judge was involved in was the case involving Brdanin and Talic. The issue at hand was conflicting lists of agreed facts between the parties. See Bohlander and Findlay, *supra* n. 236, 13.

²³⁸ There are judges with no criminal law experience sitting on trials involving complex issues of law and procedure, and judges with no appellate experience sitting in the Appeals Chamber, reviewing decisions of experienced trial judges. Wald *supra* n.228 95

a personal attribute to individual independence, if lacking, compromises that independence. This is the risk that creators of international criminal judicial organs take when the range of qualifications for a position that requires skill and expertise is limited.

3.13 NOMINATION AND ELECTION OF JUDGES

A primary cause for concern amongst legal experts and commentators is the election to the Bench of judges who have had little or no trial experience at all.²³⁹ This is a sombre fact that raises questions whether the right of the accused to a fair trial in a highly-complex criminal matter that carries penal sanctions can indeed be secured by an inexperienced or worse, inept judge.²⁴⁰ Whilst the input of commentators such as academics is welcome and indeed helpful, the question that arises is how they would be able to conduct trial proceedings if they do not have the experience of a trial judge?²⁴¹ In an interview at the Hague on the 30th of June 2002, a senior legal counsel with the Chambers of the Tribunal informed the author that the International Tribunals do need academics as there are new points of law that come for elucidation. At the same time, a practical problem was highlighted. New judges who come into the Tribunal need time to settle in.²⁴² Invariably, they are immediately assigned to conduct cases. Without the benefit of prior trial

²³⁹ Michael Bohlander *The International Criminal Judiciary* article *supra* Chapter One, n.17

²⁴⁰ *Ibid*

²⁴¹ Judge Wald argues that the ICTY trials could have been expedited even more if the proceedings were controlled with a firmer hand.. Patricia Wald Prologue, *supra* n.5 469. Of course, this could be attributed to many reasons, including timorous souls sitting on the Bench, but this opinion is more concomitant with the view that the Tribunal would have been served better with experienced trial judges. Academics could be appointed as consultants or consultant judges whereby their duty is to observe proceedings and then help the trial judge in preparing the judgements. Judge Wald also noted that some judges would write judgements on a point of law that they had earlier espoused in a book or article that they had written. This is a practice that is not commendable, for it smacks of intellectual aberration in that the judges are using their own interpretation or theory of what the law should be, to become what the law is, when they should be more concerned with the primary questions of guilt and fair trial.

²⁴² On file with the author. The interview revealed a startling fact, at least a practitioner: some of the judges did not even know the Rules of Procedure and Evidence and had to be “re-educated”. This statement did not bore well for the numerous accused at The Hague awaiting trial.

experience,²⁴³ the trial judge is unable to control procedural issues being frequently raised during proceedings even though there may have been earlier court decisions on similar issues. Thus the judges find themselves being educated and trained all over again, and in some cases, for the first time about the proceedings at the Tribunal. Such real occurrences do not inspire the confidence of the accused himself and the international community on the individual independence of the judge to ensure that his right to a fair trial is guaranteed.

An experienced trial judge is no less informed about the law than an academic. Otherwise he or she is not qualified to be a judge. Academics lack the practical experience of trial proceedings. Would they be able to focus on trial proceedings of a criminal nature, where much relies on oral evidence and cross-examination, and at the same time ensure that the rules of fairness being observed? Judge Patricia Wald put it pithily:

*"Of course we need a mix, but you wouldn't put a judge who has never been in court in charge of a big conspiracy case....you wouldn't take a professor of anatomy and put him into an operating theatre and say, "Now perform this brain surgery." "*²⁴⁴

Candidates for the office of international judges are nominated by States. It is common for States to nominate candidates who share, in general terms at least, their stance on issues that the candidate would have to adjudicate on.

The nominations and elections of international judges are highly politicised processes involving intense canvassing by States and are neither transparent

²⁴³ The argument was applied to *ad litem* judges but could equally apply to academics as well as judges with little or no prior trial experience. Even if the trial judge has no criminal trial experience, he or she would have an advantage over a judge with no experience at all. See Stephan Bourgon *Procedural Problems Hindering Expeditious and Fair Justice* (2004) 2 JCIJ 526, 528. The author is the defence counsel in the *Hadzihasanovic and Kubura* Case IT-01-47-T

²⁴⁴ *New York Times* 24 Jan 2002 *Interview with Judge Patricia Wald*, quoted in Bohlander *International Criminal Judiciary*, *supra* Chapter Onen.17, 326. In a survey done 22nd March 2006, Professor Bohlander found that 1/3rd of the judges of the ICTY and the common Appeals Chamber of the International Tribunal had no prior criminal judicial experience. *op cit* 332-354.

nor subject to scrutiny.²⁴⁵ The involvement of diplomats and politicians in the election process already adds a political taint to the election process of judicial officers. It has been suggested that the election of the judges at the ICC should be done through an independent committee composed of international legal personae such as practitioners and retired judges.²⁴⁶ Despite the elaborate provisions contained in the Statute of the ICC, the election process was heavily criticised as States were accused in indulging in the practice of “horse-trading”²⁴⁷ and thereby ruining the integrity of the election process with political overtones.²⁴⁸ The danger of electing judges by politicians is that there would always be the risk of judges being appointed to the ICC by virtue of their backers and not their qualifications and experience. This, coupled with the fact that States are very overprotective of their right to nominate casts a shadow on judicial independence. This is a dangerous and unwelcome possibility with potential for abuse as there is a risk that an uninformed, inexperienced judge with scant knowledge of international humanitarian and criminal law would prejudice the fairness of a trial. Another risk is that the judges who are nominated by States may have been ministers or legal advisers or coming from the fields of politics and diplomacy with no judicial or courtroom experience at all.²⁴⁹ This argument applies to the International Tribunals as well.²⁵⁰

²⁴⁵Mackenzie and Sands, *supra* n.91, 277-278, de Bertodano *supra*n.152421

²⁴⁶*de Bertodano, ibid* 422

²⁴⁷ Horse-trading is a phrase used to describe the art of intense negotiation accompanied by concessions by the negotiating parties and shrewd bargaining. The concessions took the form of one State backing another State’s nomination to the Court and the latter would return the favour by supporting the former’s nomination of candidate in other areas of the United Nations. The procedures for nomination and election of the judges , prosecutors and deputy prosecutors have been some of the most contentious issues dealt by the ASP. The President of the ASP informally asked State Parties not to bring in the horse-trading tactics into the election process. Daryl A. Mundis *The Assembly of State Parties and the Institutional Framework of the International Criminal Court* (2003) 97 AJIL 132

²⁴⁸William R. Pace “*ICC Treaty Passes Half-Way Mark*” *The International Criminal Court Monitor* (2001) Issue 17 1,5: “The crudest kinds of horse-trading, rather than sincere evaluation of qualifications, dominates this process.” See also Press Release dated 31st January 2003, Lawyers Committee For Human Rights *available at* <<http://www.LCHR.org>> The campaigning process was termed unpleasant and aggressive. Schabas *supra* n.285 179

²⁴⁹ Mackenzie and Sands, *supra* n.91, 278

²⁵⁰Cherie Booth and Phillippe Sands *Keep Politics out of the Global Courts* *The Guardian*, July 13th 2001. Available at <<http://www.guardian.co.uk/Archive/Article/0,4273,4221020,00.html>>. On the independence of the international judges, primarily those at the International Court of Justice, see Gilbert Guillaume *Some Thoughts on the Independence of the International Judges vis-à-vis States*

Yet another one of the criticisms aimed at the election process in the ICC is the nomination committee under *Article 36(4)(c)*. This Article gives the Assembly of Parties the discretion to establish an Advisory Committee on nominations. The original suggestion of screening nominations put forward by the United Kingdom based on the system operative at the *European Court* was rejected as State Parties refused to make any concessions on their right to nominate their own candidates. The potential for political influence on the nomination process which may have an effect on the independence of the judge is latently present.²⁵¹

3.14 SECURITY OF TENURE

An essential condition of individual independence of a judge is security of tenure.²⁵² A judge should be able to enjoy a reasonable length of tenure in order to be able to exercise his independence without fear or favour. He should be removed from his office only under special circumstances and with very stringent measures. The terms of appointment and employment should not be compromised so that he could enjoy his independence.²⁵³ The Executive is usually responsible for the security of tenure as well as the financial aspects of the administration of justice. The notion of executive control over judicial terms of service is anathema to the concept of judicial independence.²⁵⁴ However, although ideally the role of the Executive should

(2003) 2 LPIT 163. The author, a former President of the ICJ, discusses the independence of the international judiciary in relation to incompatibility of the functions of the judges. See Chapter 4 for discussion of this topic under Judicial Impartiality.

²⁵¹Schabas, *supra* n.285 177

²⁵² See *Campbell v Fell supra* n.200 *Ciraklar v Turkey* Judgement of Oct 28 1998, Reports of Judgements and Decisions 1998 – VII where it was held that a four-year term of judicial office, though renewable, was one of the factors that led to lack of objective independence and impartiality in the adjudicating panel.

²⁵³ Shetreet, S: *Judges On Trial: A Study of the Appointment and Accountability of the English Judiciary* (1975) North-Holland Publishing Company 383

²⁵⁴ Shetreet *supra* n.199 623. One of the charges of “misconduct” levied against the then Lord President (the head of the judiciary) of Malaysia was that he had written a letter on behalf of all the judges to the

be minimal, it is the Executive who ultimately exercises a degree of control over the security of tenure of the judge and other matters ancillary to it such as transfers, salaries and pensions. There is a degree of control through the terms of service of the judges by the Executive. This is the norm in most domestic jurisdictions rather than the exception.

Primary characteristics of security of tenure are a guaranteed and a reasonable lengthy period of employment and the assurance that a judge could only be removed from his office in extreme cases and such process is fair.²⁵⁵

The insecurity of his tenure by virtue of it being short or renewable at the discretion of the Executive poses a threat to the judge's personal independence as it underpins the notion that the independence of the judge is at the mercy of the Executive. It raises the perception of control over the tenure of office by the Executive. Concerns that he may not be re-elected at the end of his short tenure would make him vulnerable to outside pressures, particularly those posed by the Executive. It may affect his performance and place his independence at risk, as there is a danger that he may be influenced by considerations irrelevant to the case he is called to decide. If the length of tenure is fixed for a short period,²⁵⁶ it could be used as a threat²⁵⁷ against an "undesirable" judge whose decisions may have not found favour with Executive who then chooses to "penalise" the judge by not re-electing him.

King complaining that in terms of budgetary claims, the Courts were at the bottom rank of the list of the Ministries and Departments. *Tun Salleh Abas and K. Das* "May Day for Justice: the Lord President's Version" (Magnus Books, Kuala Lumpur 1989). See also A.J. Harding *The 1988 Constitutional Crisis in Malaysia* (1990) 39 ICLQ 57. In a surreal turn of events early this year, the present Government admitted that the 1988 Crisis was an attack by the Executive on the judiciary. The surviving judges (three of them had since passed away) felt vindicated. *Ex-gratia* payments were made by the Government to the judges. See *Zaid: Govt has to apologise to victims of 1988 judicial crisis* dated March 23rd 2008. Available at <<http://thestar.com.my/news/story.asp?file=/2008/3/23/nation/20730100&sec=nation>>

²⁵⁵Valente, Chapter Two, *supra* n.34

²⁵⁶ See also the case of *Starrs and Chalmers v Procurator Fiscal, Linlithgow* [2000] HRLR 191 where the Appeal Court of Scotland held that the short tenure of the temporary sheriff of one year raised doubts as to his independence. The Court held that he was not an "independent and impartial tribunal" within the meaning of Article 6(1) of the ECHR.

²⁵⁷Shetreet *supra* n.199, 623

The judge should be able to enjoy the security of his tenure in order for him to be able to dispense his duties and offer sufficient guarantees that he is able to afford the accused a fair trial. These guarantees must be able to assure the reasonable man, who has full knowledge of the relevant circumstances, including the need for a judge to be independent, would conclude that the judge would come to an independent and impartial decision.²⁵⁸

There are other threats to a judge's security of tenure as well. A worrying trend in some national systems is the practice of appointing judicial officers as "Judicial Commissioners"²⁵⁹ and not as judges. The appointments are usually for one to two years, subject to confirmation. Apart from the short term of tenure, such appointment is akin to putting the judge on probation²⁶⁰; the practice of appointing these judicial commissioners was to gauge whether they conduct themselves in a manner agreeable to the Executive before being confirmed as judges.²⁶¹ The security of the judge's tenure is precarious and at the discretion of the Executive. In criminal cases, the independence of the judge in a situation like this would affect his impartiality since the State is a party to the proceedings.²⁶²

An essential condition of the security of tenure is that a judge should not be removed during his term of office. This is "a necessary corollary of his independence from the administration."²⁶³

²⁵⁸Valente, Chapter Two, *supra* n.34Starrs and Chalmers,*supra* n.256 Ciraklar v Turkey, *supra* n.252

²⁵⁹Judicial Commissioners in this context originally were *ad hoc* judges who were appointed for a certain period of time to clear backlog of cases. It was sparingly exercised.

²⁶⁰Appointment of judges on probation is contrary to judicial independence: *Shetreet*: The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration in *Shetreet and Deschenes*,*supra* n.18 393, 400

²⁶¹Addruse, Y.M. Raja Aziz: "Judicial Appointments: Who has The Last Say?" INSAF, Journal of the Malaysian Bar, Colloquium Issue: "Current Judicial Trends and the Rules of Justice" (December 2002) Vol XXXI No.4, 43, 50. The author himself was a Judicial Commissioner appointed in the context of n. 259.

²⁶²Addruse n.261 44-47

²⁶³*Campbell v Fell supra* n.200

The duration of the tenure of the judges of the International Tribunals is four years. That term may be renewed for another four years.²⁶⁴ Judges at the Special Court are appointed for a three year term and are eligible for re-election.²⁶⁵ The judges at the ICC shall serve for nine years and not be eligible for re-election.²⁶⁶ Experiences of the *ad hoc* tribunals have shown that a term of four years is short. This is unusual in criminal courts.²⁶⁷

Problems may arise when the judges are not re-elected and they have not completed the hearing of pending cases. The right of the accused to a fair trial is compromised as there is no speedy disposal of his trial. Re-election to the Tribunals is possible but not as of right. The short period of tenure of four years had led to anomalous situations where judges hearing a case could not complete the hearing as their terms had come to an end and they were not re-elected. An example of this was the *Celibici*²⁶⁸ case where all three judges of the Trial Chamber were ineligible to continue hearing the case as they were not re-elected.²⁶⁹ The Security Council was required to address the situation which was done by the passing of a resolution.²⁷⁰ The terms of service of all three judges were extended until they completed the hearing of the trial. This incident exemplifies the position of the ICTY when they find themselves in situations that fall outside the ambit of the Statute and the Rules. They have to depend on a political organ to validate an action needed to rectify the internal workings of the Tribunal. This shows again the defective international system as the relationship between the Security Council and the judicial organ is not

²⁶⁴ **Article 13 bis (3)**. Cf the tenure of the *ad litem* judges which is for 4 years and is not renewable. **Article 13 ter (1)(e)**. **Article 12ter** of the Statute of the ICTR. For conditions surrounding the tenure of the *ad litem* judges, see **Article 13** quarter <<http://www.un.org/icty/legaldoc/index.htm>> Judges in the context of this work include the *ad litem* judges unless otherwise stated.

²⁶⁵ **Article 13** of the Statute of the Special Court for Sierra Leone. <www.sl-sc.org>

²⁶⁶ **Article 36(9)** of the Statute of the ICC.

²⁶⁷ Warbrick, *supra*, n. 35, 59. Also Mackenzie and Sands, *supra* n. 91, 279

²⁶⁸ See <<http://www.un.org/icty/celebici/trialc2/judgement>>

²⁶⁹ Judge Odio-Benito did not seek re-election. Judge Karibi-White and Jan were not re-elected. *Decision of the Bureau on Motion on Judicial Independence* dated 4th September 1998. Paragraph 1. <http://www.un.org/icty/celebici/trialc2/decision-e/80904MSX5309.htm>. Judge Odio-Benito has now been appointed to the ICC as one of the two Vice-Presidents of the Court.

²⁷⁰ Note however **Rule 15 bis** of the Rules of Procedure and Evidence.

as detached as it would have been due to the lack of the separation of powers doctrine.

The difficulties caused by the *Celibici* case highlight one of the weaknesses of having a short period of tenure for the judges. The problems that would arise had the Security Council not addressed the situation would have been manifold; a rehearing would have to be ordered, witnesses would have to be recalled. All these would have resulted in the trial being prolonged and the right of the accused to a fair trial would have been prejudiced since his right to have his case heard expeditiously would have been prejudiced.

There is a body of opinion that views the relative short tenure of a judge may also pose a risk to his independence and impartiality.²⁷¹ Whether he was influenced by the short term in reaching decisions is open to speculation. In order to seek re-election, he may have to canvass his government and other States. This is deemed not a healthy practice as it makes him susceptible to political influence and carries the risk of his independence losing credibility.²⁷² A longer term, as envisaged by the Statute of the ICC without re-election is viewed as a better guarantee for the judicial independence as well as impartiality, as the judge concerned would be sufficiently secured in his tenure to decide matters without fear or pressure or influence. The fear is that such a short term of tenure with an uncertain chance of getting re-elected may risk the independence of the judge as he may issue decisions that might find favour with States who would re-elect him.

On the other hand, it may be argued that whilst the period of tenure may have a certain degree of effect on the independence of the judge, it may not be a conclusive factor in that an observer may not necessarily perceive a lack of independence just because a judge was appointed for six months or one year.

²⁷¹ See *Starrs*, *supra* n.256

²⁷² *Cogan*, *supra* Chapter One n.86, 133, f/n 123

The domestic judges in the Kosovo tribunals were appointed for six months but now this has been extended until the end of the mission.²⁷³ The international judges are also appointed for six months through the United Nations in New York.²⁷⁴ These appointments are renewable for further six months. Kosovo is an example where the judges are appointed for short-term but there has been no serious complaint about their lack of independence.²⁷⁵

It is argued that although short-term appointments are a serious factor that could affect judicial independence, it is not a decisive factor. Generally such appointments are discouraged, but where judges are appointed for such a term, it is submitted that his independence should be gauged by taking all the circumstances in consideration.

3.15 COMPOSITION OF COURT

*Article 12*²⁷⁶ of the Statute of the ICTY contains provisions that regulate the composition of its Chambers. It has been amended to include sixteen permanent *independent* judges and a maximum of twelve *ad litem independent* judges.²⁷⁷

Article 12 reflects the internal structure of the Chambers that was organised in a manner that ensured full respect for the rights of the accused, the effective performance of all judicial functions, the international character of the Tribunal and the efficient administration of justice.²⁷⁸ This amendment was

²⁷³ Murati. Chapter Two *supra* n.62, 8. As the tenure of the serving judges of the International Tribunals which now have been extended until the end of their lifespans.

²⁷⁴ Murati *Ibid*. Murati argues that the short term of office of the *international judges* is a serious threat to judicial independence and to the *quality of administration of justice*. The author quotes the Ombudsperson in Kosovo who stressed that the short term appointment of judges may affect the ability of the judges to act impartially. *ibid*, 9

²⁷⁵ *Ibid*

²⁷⁶ Article 11 is the corresponding article in the Statute of the ICTR

²⁷⁷ SC Res.1329, U.N. SCOR 55th Sess, 4240th Mtg, Annex.1, UN Doc S/Res/1329(2000) & SC Res.1431, U.N. SCOR 57th Sess, 4601st Mtg, UN Doc S/Res/1431(2002)

²⁷⁸ 1 Morris & Scharf *supra* Chapter One, n.2,139

necessary to ensure that the trials were conducted swiftly and to expedite the *Completion Strategy*.²⁷⁹

The article specifically states that no two judges may be the nationals of the same State. It applies equally to the permanent as well as the *ad litem* judges. This aims at avoiding favouritism and over-representation of certain countries in the Tribunal, particularly those from Member States of the Security Council.²⁸⁰ It will also avoid the suspicion of the impairment of judicial independence. The composition the Chambers is structured in such a manner as to ensure that there would be full respect for the rights of the accused and there was efficient administration of justice and judicial functions.²⁸¹ This includes ensuring only permanent judges sitting in the Appeals Chamber who would have had wide experience in trying cases involving important issues of international criminal law and human rights.²⁸² They would be able to use those skills at hand to decide on novel issues of international criminal law. *Article 12* adheres closely to the aim that the court should be truly international, with judges being appointed from different countries and from different legal systems.²⁸³

Article 36(7) of the Rome Statute also states that no two judges may be nationals of the same State. In the event that a candidate could be considered as a national of more than one State Parties, then he or she shall be deemed to be the national of the State Party in which that person ordinarily exercises his or her civil and political rights. This Article ensures that the ICC is indeed international in name as well as in practice. It is similar to the provision of the ICTY. It also is geared towards dispensing any notion of bias which may be perceived to arise just because the judges are fellow countrymen.

²⁷⁹ Mundis, *supra* n.39 158

²⁸⁰ There is no prohibition of a judge sitting on a matter where one of the parties is of the same nationality. *Bassiouni & Manikas, supra* Prologue n.22 800

²⁸¹ 1 Morris & Scharf, 139 *supra* Prologue, n.3

²⁸² Articles 12(3) and 14(5) of the ICTY Statute

²⁸³ Article 12(1) *Ibid*

In many respects the Statute of the ICC is much wider than the provisions of the Statutes of the International Tribunals that concern appointment of permanent judges. The selection process of the judges involve the consideration of many factors including geographical representation, representation of principal legal systems of the world, fair gender representation of the judges, and if necessary, judges with legal expertise on specific issues such as violence against women and children: *Article 36(8)*.

The Statute of the ICC seems to have covered the loopholes of the Statutes of the *ad hoc* Tribunals. The Statute states that the Court will consist of 18 judges but at the same time allows the President of the Court to propose an increase or a decrease in the number of judges in accordance with the workload of the Court.²⁸⁴ There is no need for the Statute to be amended to adjust the number of judges required to deal with the cases at the Court and allows the Court the flexibility to operate according to its needs and also cut down on expenses. The number of judges will always be 18.²⁸⁵

An interesting problem is that although the permanent judges are 18, only 3 would serve as full time judges upon being elected.²⁸⁶ The other 15 judges will be asked to serve in the court as and when the need arises. The problem arises as to the remuneration of the 15 judges. They should be allowed to seek alternative employment as they need to be remunerated. It is imperative that the alternative employment do not clash with their duties as judges of the international criminal court and therefore compromise their independence, either directly or indirectly. There was intense debate between the delegates who wanted to ensure that once the judges were elected, they should not undertake any other work outside the court and those delegates who wanted

²⁸⁴ Article 36(2)

²⁸⁵ M.R. Rwelamira: *Composition and Administration of the Court*, 153,155. *The International Criminal Court: The Making of the Rome Statute* Roy S. Lee (Ed) (1999) Kluwer Law International.

²⁸⁶ Article 35(2), *ibid*

a skeleton staff. A compromise was reached under **Article 40** of the Statute which stated *inter alia*, that the judges shall be independent in the performance of their functions and that they shall not engage in any activity that was likely to interfere with their judicial functions or affect the confidence in their independence. Judges who are required to serve full time are forbidden to work in any other professional occupation.²⁸⁷

Insofar as the membership of the court is concerned, it is observed that the Statute of the ICTY has not been amended to include provisions for the appointment of female permanent judges. The relatively low number of female judges in international courts has caused some concern.²⁸⁸ Contributions by female judges to the development of international legal jurisprudence are immense. Two former Presidents²⁸⁹ of the ICTY and ICTR were both women. The first lady judge in the International Court of Justice is an eminent jurist.²⁹⁰ Even the position of Judge Florence Mumba, the only female judge at the ICTY, was precarious as she stood to lose out on re-election and managed to get re-elected, partly due to pressure from non-governmental organisations.²⁹¹

The inclusion of rape as a crime against humanity falling under the jurisdiction of the *ICTY* and *ICTR*²⁹² posed uncharted waters for the Tribunals although the basic elements of the offence are similar to that under national laws. Women and young girls, the victims have to testify against their aggressors. Despite protections offered by the Tribunals, the possibility remains that a victim would feel daunted, fearful and embarrassed to testify

²⁸⁷ *Supra* n. 362

²⁸⁸ Mackenzie and Sands, *supra* n.91, 278. However, more than one-third of judges elected to the ICC are women, which is a remarkable achievement. William Schabas: *An Introduction to the International Criminal Court* Cambridge University Press (2004) 21

²⁸⁹ Judges Gabrielle Kirk MacDonald and Navaneetham Pillay. Judge Pillay has been appointed to the ICC.

²⁹⁰ Dame Rosalyn Higgins of the United Kingdom

²⁹¹ For example Women's Caucus For Gender Justice: <<http://www.iccwomen.org>>

²⁹² Article 5(g) of the Statute of the ICTY. Article 3(g) of the Statute of the ICTR.

before a male judge. The presence of a female judge would have been reassuring to the victim.

Although the provisions for elections of judges to the ICC²⁹³ and the *ad litem* judges urge the parties to take into account a fair representation of female and male judges, these provisions are meaningless if the parties ignore them or do not act positively on them. Appointment of judges to the tribunals and courts do not become invalid just because female judges are not appointed. If Judge Mumba had not been re-elected all fourteen judges at the ICTY would have been male. Ironically, Judge Mumba had served as a Vice-President of the ICTY, a position that she was voted into by her colleagues.

3.16 RECUSAL, DISQUALIFICATION AND REMOVAL OF JUDGES

Rule 15 of the *Rules or Procedure and Evidence* of the Statute of the ICTY bars a judge from sitting on a trial or an appeal of case where he is a personal interest or where he has had a previous association that may have affected his impartiality. In such a case he should recuse himself.²⁹⁴

The *Rules of Procedure and Evidence*²⁹⁵ of the ICC has much wider scope and effect than the Rules of the ICTY. The ICC Rules contain elaborate provisions for the recusal, disqualification and removal of judges.

A judge may be removed from his office on three grounds. The first ground is of removal is where the judge has committed *serious misconduct*. The second ground is where he is in *serious breach of his duties* and the third ground is

²⁹³ Article 36(8)(a) of the Rome Statute

²⁹⁴ See also Rule 15 of the Special Court for Sierra Leone.

²⁹⁵ Adopted by consensus in accordance with Articles 51 and 112 of the Rome Statute in September 2002. UN Doc. ICC-ASP/1/3.

Available at <http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf>

when he is *unable to exercise the functions* under the Statute.²⁹⁶ The level of seriousness appears on a sliding scale, the most extreme being *serious misconduct* and the least severe, but still unacceptable, being *an inability to exercise his judicial functions*. Whilst the first two grounds imply an intention to commit these acts, the third ground will operate when the judge is infirm mentally and even physically. **Rule 23** of the Rules of Procedure and Evidence²⁹⁷ states that a judge shall be removed from office or subject to disciplinary measures and with guarantees as established in the Statute and the Rules.²⁹⁸

Rule 24 defines “serious misconduct” and “serious breach of duty” as referred to in **Article 46(1)**. Serious misconduct of a judge may occur not just when he is carrying out his official functions but also outside of his official duties. Where the act complained of is committed in the course of his official duties, it has to be an act or misbehaviour that is incompatible with his official functions *and* either causes or likely to cause serious harm to proper administration of justice or “proper internal functioning” of the Court.²⁹⁹ In other words, such misconduct may occur in the court involving proceedings before him or in relation to the other organs of the Court. It may even include acts of misconduct vis-à-vis his colleagues. Serious harm to proper internal functioning may also include disclosing facts or information acquired in the course of his duties or on a matter which is *sub judice*. The disclosure must be seriously prejudicial to the judicial proceedings or to any person.

Further, serious misconduct may also occur where the judge conceals significant personal information that would have otherwise excluded him from holding office and where he abuses his position to obtain unwarranted

²⁹⁶**Article 46(1)**

²⁹⁷**Rule 23** also encompasses the removal of the Prosecutor, the Deputy Prosecutor, the Registrar and the Deputy Registrar.

²⁹⁸ The impugned judge is allowed to make representations on his behalf to allegations of misconduct under **Article 46**

²⁹⁹*Supra*, n.292

favourable treatment from any authorities, officials or professionals. The former relates to his personal qualifications and character. The list of acts of misconduct under *Rule 46* is not exhaustive.

The judge may also be accused of serious misconduct if he misbehaves himself outside the course of his official duties in such a serious and grave manner that it causes or likely to cause serious harm to the reputation of the Court.

Rule 24(2) defines “serious breach of duty” where the judge has been grossly negligent in the performance of his duty or alternatively, has knowingly acted contrary to the duties of his judicial office. It covers situations where the judge does not request to be excused where there are grounds to do so or causes repeated unwarranted delay in the exercise of his judicial powers. The provision covers both negligent and non-negligent activities.

If there are equivalent provisions of *Rule 24(2)* applicable to the jurisdiction of the United Kingdom situation, Lord Hoffman in the *Pinochet*³⁰⁰ case would have *prima facie* committed serious breach of duty as he had not requested to be excused since there are grounds to do so although the judge himself may be of the view that there is no reason for him to excuse himself. The best solution for a judge at the ICC who finds himself in a Hoffman-like situation is to seek advice from the Presidency.

Rule 25 defines misconduct of a less serious nature that falls within the ambit of *Article 47*. These are where such misconduct occurs in the course of official duties and causes or is likely to cause *harm* (as opposed to *serious harm* in *Rule 24*) to the proper administration of justice before the Court or the proper internal functioning of the Court. Conduct that is likely to cause harm is conduct such as interfering with the exercise of the functions of a judge, a

³⁰⁰ See discussion in Chapter Five

Prosecutor, a Deputy Prosecutor, Registrar, and Deputy Registrar., failure to comply with or ignoring requests by the Presiding Judge or the Presidency in the lawful exercise of their duties; such failure must be committed repeatedly. A judge could be chastised under this Rule for his failure to enforce disciplinary measures against the Registrar or Deputy Registrar or other officers of the court when he knows that the person concerned is in serious breach of duty by them.

Rule 25(1) (b) states that misconduct of a less serious nature occurs when the judge conducts himself outside the course of official duties in a manner that would cause or is likely to cause harm to the standing of the Court.

The rules relating to misconduct of judges are wide-ranging. It covers different degrees of offences and it covers their judicial as well as their extra-judicial activities. It is a useful instrument for it could be referred to should a judge conduct himself in an unbecoming manner. It remains to be seen whether the Rules would actually be enforced or remain good on paper.

Unlike the judges of the International Criminal Court, the judges of the *ad hoc* international criminal tribunals do not fall under any code of conduct, ethics or discipline relating to their offices and the exercise of their functions. There is no issue of accountability of the international judges at the International Tribunals.³⁰¹ Ironically, they would have had to be party to a code of conduct or ethics of their own national systems but not to any international code of conduct or ethics.³⁰² The Rules of the ICC are supplemented by the Code of

³⁰¹ See Bohlander, *International Criminal Justice supra* Chapter One n.17, 355

³⁰² Even the judges of Bosnia and Herzegovina have their own Code of Ethics called Code of Ethics for Judges and Prosecutors of Bosnia and Herzegovina. It contains the basic provisions for independence, impartiality, outside activities and so forth. However, it remains silent on the issues of discipline and removal of a judge.

See <http://www.ohr.int/ohr-dept/hr-rol/thedep/jud-reform/default.asp?content_id=5226>

Under Article 125(3)(3c) of the Federal Constitution of Malaysia, the Code of Ethics established under sub-Article (3)(3b) must be observed by every Judge of the Federal Court, the highest court in the apex of the court hierarchy of Malaysia. One of the first permanent judges at the ICTY, Judge Lal Chand Vohrah was from Malaysia, as were *ad litem* judges Tan Sri Azmi Kamaruddin and Tan Sri Lamin

Judicial Ethics,³⁰³ which provide for judicial independence,³⁰⁴ impartiality,³⁰⁵ integrity³⁰⁶ (including not directly or indirectly gifts, rewards and so on that can reasonably be perceived as being to intended to influence the performance of their judicial activities). *Article 8* relates to conduct during proceedings and is of particular interest:

1. *In conducting judicial proceedings, judges shall maintain order, act in accordance with commonly accepted decorum, remain patient and courteous towards all participants and members of the public present and require them to act likewise.*
2. *Judges shall exercise vigilance in controlling the manner of questioning of witnesses or victims in accordance with the Rules and give special attention to the right of participants to the proceedings to equal protection and benefit of the law.*
3. *Judges shall avoid conduct or comments which are racist, sexist or otherwise degrading and, to the extent possible, ensure that any person participating in the proceedings refrains from such comments or conduct.*

This provision is very wide and is probably wider than some provisions in national codes of conduct for judges. An Article like this would have addressed a situation like the notorious case of Judge Karibi-Whyte at the ICTY.³⁰⁷

Yunus. At the time of his appointment to the ICTY, Judge Vohrah was the highest ranking senior judge who would have been appointed to the Federal Court of Malaysia. Judge Lamin was the President of the Court of Appeal whereas Judge Tan Sri Azmi was a serving member of the Federal Court who was also a member of the (in)Famous Five judges who were suspended when they asserted their independence and convened a hearing to hear the appeal of the suspended Lord President, Tun Salleh Abas against the decision of the High Court in the Judicial Crisis of 1988. See Harding, *supra* n.254. Judge Azmi was reinstated to the Federal Court.. All three judges would be subject to the Code of Ethics of their country.

. Kosovo has its Code of Ethics and Professional Judges:

See <<http://www.pcti-pcti.org/courts/pdf/kosovo/CodeJudges.pdf>> Another domestic code of conduct is the Code of Conduct for United States Judges

See <http://www.uscourts.gov/understand03/content_5_0.html>

³⁰³ It is to be noted that the Code was adopted by the judges themselves. Available at <www.icc-cpi.int/library/about/officialjournal/ICC-BDO2-01-05_En.pdf>

³⁰⁴ Article 3

³⁰⁵ Article 4

³⁰⁶ Article 5

³⁰⁷ Rule 15 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone stipulates that a case relating to a judge unfit to sit as a judge shall be referred to a Council of Judges who will then consider the case and shall refer the matter to a Plenary meeting who will then make a recommendation

The accused in the *Celibici* case raised in his appeal that the Presiding Judge at his trial fell asleep a number of times during trial and this denied them the right to a fair trial. The accused questioned the judge's ability to perform his duties as a presiding judge. The Appeals Chamber held that the accused had failed to establish that the Judge was asleep during substantial portions of the trial.³⁰⁸ The judgement of the Appeals Chamber could be questioned. Having stressed that the charges the accused faced were serious and the consequences of conviction were equally serious, the Chamber dismissed the argument by the accused that his right to a fair trial is compromised. A judge found sleeping or not paying attention to the trial proceedings should be warned or asked to step down or even censured. No such steps were taken against Judge Karibi-Whyte; an existence of a similar Code of Ethics to that of the ICC would have assisted the judges at the ICTY to be more decisive on this issue. The situation is made worse by the fact that the judge was the Presiding Judge of the trial; who if possible should have been more alert to the proceedings than even his colleagues.³⁰⁹ The results of this deplorable situation were unsatisfactory, more so in light of the fact that the Appeals Chamber did find the conduct of the Judge as inappropriate for a judge.³¹⁰

Another related issue to those of discipline and accountability of judges is that there is no provision for removal of judges at the *ad hoc* Tribunals akin to the *Rome Statute* or *Article 18* of the *Statute of International Court of Justice*.³¹¹ It appears that the judges are not accountable to anyone, which basically gives

to the appointing authority. Nothing is said about the range of recommendations the Plenary Meeting may take and the sanctions that the judge may face. Bohlander, Chapter One *supra* n.17 388.

³⁰⁸ <<http://www.un.org/icty/celebici/appeal/judgement/index.htm>> Paragraph 620 et seq

³⁰⁹ See the detailed discussion and critique on this case in Bohlander *supra* n.2.39 375-383. The role of the presiding judge is grave. He wields a certain degree of control over the proceedings; he makes the rulings from the Bench (after consulting his colleagues) and other administrative and judicial functions vis-a-vis that trial he is presiding over and he is the official spokesman for the panel. See Patricia Wald *Judging War Crimes* (2000) 1 Chicago J. Int'l L 189, 195.

³¹⁰ Paragraphs 629-630 of Appeal Judgement, *supra* n.305.

³¹¹ Article 18 provides for the dismissal of a judge where in the *unanimous* opinion of his fellow judges, he has ceased to fulfil the required conditions relating to his office. It is a high threshold to achieve, but at least there is a removal mechanism.

them unfettered licence to “misbehave”. Judges at the ICJ are very senior judges; after all they are sitting in an institution that is a principal organ of the United Nations, as opposed to the judges of the *ad hoc tribunals*, which are subsidiary organs of the Security Council.³¹² If these judges can be subjected to discipline and removal, then why are the judges of the *ad hoc* tribunals exempt?³¹³ The various occurrences involving the judges from the sleeping judge at the *ICTY* to the laughing judges at the *ICTR*³¹⁴ should have prompted the President and other senior judges to draft something similar to the *ICC*’s Code of Judicial Ethics.

Finally, another problematic area relating to the dismissal of judges is the question of who has the responsibility of exercising that power? Should the offending judge be dismissed by a unanimous decision of his fellow judges as required by *Article 18*? That is a possibility but it is not clear whether unanimity can be achieved. It is uncertain that a judge would want his fellow to be dismissed, unless that offending judge has done something so manifestly and grossly wrong that dismissal is an obvious and inevitable outcome. “Judicial comity” could be an obstacle to the dismissal of an offending judge. So it leaves for the power to the Security Council and/or General Assembly to take that drastic action. In the case of the International Tribunals, the United Nations could simply refuse to re-elect the offending judge.³¹⁵

³¹²The salaries judges of the *ICTY* rank equal to that of a judge of the ICJ: *Article 13 ter* of the Statute of the *ICTY*.

³¹³ Professor Bohlander’s article offers an interesting insight into this issue. In his correspondence to Professor Bohlander, the former Legal Counsel of the United Nations, Hans Corell revealed that he had included an Article on the Dismissal of Judges but nothing came out of it. Bohlander, *International Criminal Justice*, *supra* Chapter One, n.17 388

³¹⁴*Ibid.*

³¹⁵ Interestingly, Judge Karibi-Whyte was not re-elected, although the reason for that is not known.

3.17 SUMMARY

The Articles and the Rules relating to the removal of judges introduce a new phenomenon into the arena of international law. These principles have not been arisen or tested in the context before. The approach suggested by the legal documents of the ICC raises many questions – procedural and legal. The idea of the Assembly of State Parties having the power to remove a judge rests unpalatably with the concept of separation of powers, even if such a concept does not exist in international law in its traditional sense.³¹⁶ Political threat to the security of tenure of a judge is highly undesirable. It remains to be seen what standards are to be applied, the legality of those standards, whether any national standards would have an impact to the standards that are to be applied in the international context and whether those standards would actually be applied by a non-judicial organ.

There is also no clarification as to what threshold needs to be reached before the particular conduct complained of could be deemed as serious harm, mere harm and gross negligence.

Although there are provisions to preserve the judge's internal independence under *Rule 25*, there are no provisions where judges could be obtain unwarranted favourable treatment from third parties other than professionals or authorities. It is submitted that this provision could have been widened to include all parties who could influence the judge such as an accused or parties connected to the accused.

On the other hand, the Rules of Procedure and Evidence have serious implications. It puts the security of tenure of judges in the hands of politicians. Although the process for removal of judges is complex and makes it difficult

³¹⁶ It could be argued that this situation is akin to certain domestic systems like the United Kingdom, where judges can only be removed by Parliament

to actually put the motion for removal in order, the independence of the judges is at the mercy of politicians.

Removal of judges is a serious matter. In certain national jurisdictions, the Executive uses it as a weapon to punish and threaten judges.³¹⁷ Such powers should not be left in the hands of a political body in as they can be abused. An alternative option would be to create an independent body with senior judges from the Assembly of State Parties as members and the Special Rapporteur for the Independence of the Judiciary and Legal Profession appointed in an advisory position.

The provisions also cover “acts of misconduct” that are committed during the course of his judicial activities as well as outside. The “offence” committed is one that could cause serious harm to the standing of the Court. The standing of the Court is a vague and broad statement. Would delivering a public speech to a non-legal audience relating to deficiencies in the ICC amount to a grave act of misconduct that affects the standing of Court? If a judge is interviewed by the press, is his freedom of expression curtailed because some of his opinions may be construed as affecting the “standing” of the Court?

³¹⁷ The judiciary crisis of 1988 in Malaysia where the Lord President was dismissed by the Government was a major blemish on the proud legal history that the country enjoyed since its independence from Britain in 1957. The judiciary and the legal profession never recovered from that black period. A panel of 5 judges (the usual Supreme Court coram is 3 judges) granted an injunction and stay of proceedings to the Lord President against a Tribunal that was convened to hear charges of misconduct against him. The spurious charges were drafted by the Attorney-General on behalf of the Government and were based on a letter written by the Lord President to the King on behalf of all the judges, complaining against the conduct of the then Prime Minister as well as cuts in funding. The Tribunal that was convened was objectionable on many grounds, the principal one being that it was headed by the then Chief Justice of Malaya, who would become the next Lord President if Tun Salleh Abas, the then Lord President was found “guilty”. The other judges who sat on the Tribunal were junior judges from the Commonwealth and a retired High Court judge who was being sued on a monetary claim in the national courts. Subsequently the five judges of the Supreme Court were also suspended and faced disciplinary proceedings. Other than the Lord President himself, the most senior judge who ordered the convening and headed the panel of the Supreme Court and another Supreme Court judge were dismissed. They lost their pensions and other benefits as well. See Mark Gillen and Ted L McDorman *The Removal of the Three Judges of the Supreme Court of Malaysia* (1991) 25 U Brit. Colum. L. Rev171. The “Judicial Crisis 1988”crippled judicial independence. Despite international condemnation from law and human rights groups, including the Bar of England and Wales, LAWASIA and Lawyers for Human Rights, the Executive continued with the disciplinary hearings against the judges. See *Abas and Das, supra* n.254, Harding *supra* n254. Also based on the author’s personal knowledge and experience.

These are difficult questions to answer for the simple reason that there is no obvious answer. There are situations where the acts of misconduct are so grave that the hypothetical fair-minded observer, with sufficient knowledge of the facts to make reasoned decision would come to the conclusion that acts of serious misconduct have been committed. However, there will be situations where the answers may not be that clear. The Presidency must draft clear standards that would decide the nature of the complaint, whether it is a meritorious one, and the necessary steps that need to be taken in pursuant of that complaint.

Another point of concern is that under *Rule 26* complaints under *Articles 46* and *47* will be received in confidence. The complaints will contain the grounds as well as the identity of the complainant but this information will remain confidential. Whilst a degree of secrecy is necessary to encourage a complainant to be able to voice his misgivings freely and voluntarily, there are two possible pitfalls to this situation. First, the judge will not know the identity of the accused and hence unable to confront his accuser, and secondly, it will be open to abuse by defendants which may in turn delay proceedings as the challenged judge may not be able to sit on that trial whilst the complaint against him is pending. One could only surmise the delays in the proceedings at the ICTR if such a provision was available in its Statute

Further, the provisions of the Rules are rather wide and this might actually constrain the independence of the judge who might be concerned with the threat of “serious harm” or “harm” looming over him when he is exercising his judicial functions. He could face complaints for not disciplining an officer of court when he “should have” known where such an officer is in serious breach of his duty. It remains to be seen what is the test that would be applied in ascertaining the responsibility of the judge concerned and whether the

reasonable man would be called to the fore again. The affected judge has no right of appeal or right to recourse to the courts.³¹⁸

It is argued that the conditions for any form of disciplinary action against the judge be made stringent. The removal and disciplinary provisions are far too wide and could easily be abused. States which have vested interests may have improper motives to get the judges removed from sitting on a case in which they may have an interest and they may harbour a perception that the judges would be against them.

3.18 CONCLUSION

The lack of a constitutional framework in the international legal system makes it difficult for the court to be insulated from political influence. There is no possibility of constitutional status for international courts in international law and there will be problems of securing complete independence.

The traditional definition of “judicial independence” is freedom to act on judicial matters from pressure or influence from the Executive. Most definitions of “judicial independence” perceive threats to judicial independence from the State or the Executive. An example of such a threat in an international criminal tribunal is the removal of the judge presiding over the former President of Iraq, Saddam Hussein by the Prime Minister and Council of Ministers of Iraq. *Article 4(4)* of the *Statute of the Iraqi High Tribunal* provides that the Iraqi Presidency Council, can upon the recommendation of the Council of Ministers transfer a judge from the court without any reason.³¹⁹ The transfer of the judge is a blatant and unwarranted

³¹⁸ In some national jurisdictions the removal of judges is left to specially constituted tribunals. In that event the judges have recourse to courts for judicial reviews. The complaint procedure is set out in Rule 29. The President of the Court’s role is limited to sieving the complaints; discarding the frivolous ones and submitting the serious ones to the Bureau of Assembly of States Parties.

³¹⁹ *Removal of Judge a Grave Threat to Independence of Genocide Court* Sept 19 2006. Available at <<http://hrw.org/english/docs/2006/09/19/iraq14229.htm>> The independence of the judges at the trial of Saddam Hussein have been under constant threat by the Executive.

interference with the judge's individual independence. The removal of the judge in this manner is in flagrant breach of a number of *Basic Principles* provisions including *Principles 2* and *4*. The reason given by the Executive is that the judge's impartiality was suspect for expressing a personal opinion on the character of the accused. Even if that was the case, Judge Abdullah Al-Amiri should have been asked to recuse himself or alternatively the proper procedures for disqualification should have been followed. It is not for the Executive to remove the judge.

There is an alarming increase of threats or undue pressure or influence on the judiciary emanating from parties other than the State.³²⁰ A wider approach to judicial independence, that the judiciary should be free from actual, direct, apparent or indirect interference³²¹ not just from the State, through the Government and its agencies but also from any third party should be adopted. The broader concept of "third party" is preferred to the older and narrower concept of State or Executive as threats to judicial independence may emanate from parties as varied as parties to the proceedings, influential institutions such as multi-nationals, non-governmental organisations, politicians and even senior judges and colleagues. In the context of the international arena, such threats include the principal organs of the United Nations, their agencies, MemberStates and international agencies such as NATO.

The concept of judicial independence has also been widened³²² to include different aspects of independence. Other than the personal independence and the institutional dependence already discussed, the modern definition includes substantive or functional independence.³²³ Basically this means that in discharging his judicial functions, a judge should do no more than decide on the issues according to the law and his conscience. It demands the judge

³²⁰ Threats to the independence of the judiciary at the national level could come from powerful pressure groups, multi-corporations and even the accused themselves through indirect means.

³²¹ Sir Guy Green, *The Rationale and Some Aspects of Judicial Independence* (1985) 59 ALJ 135

³²² *Ibid*

³²³ Labelled by American writers as "decisional independence". *Shetreet, supra* n.18, 630.

being neutral and free from irrelevant pressures. This aspect is also comparable to judicial impartiality.³²⁴

A fairly new aspect to judicial independence is internal judicial independence.³²⁵ Aside from the risk of pressure being applied by external factors, judges may face risks from his judicial colleagues or his superiors. He could be pressurised to decide on a case in a particular manner by his superiors. Internal censure could take the form of not selecting a judge to sit on a panel, the non-assignment of cases to him or having his cases assigned to another judge.³²⁶ The judge should be able to enjoy judicial independence from his judicial colleagues and superiors.³²⁷ Selection of judges to sit on a panel could affect the independence of the Tribunals if the individual judges are partial or biased.

The modern concept of judicial independence has many aspects to it. Other than the individual and institutional aspects, the objective guarantees surrounding his office are important. The practice at the international criminal courts varies with the ICC providing the most detailed provisions regarding the international judiciary. There is no doubt however that the judge at the international criminal courts should be independent as an individual and as a member of an institution to ensure that due process of law is observed. The terms of appointment, conditions of work and security of tenure varies in the different international criminal jurisdictions but these are vital matters that need to be secured for individual independence.

³²⁴*Shetreet* defines substantive independence as independent decision-making by the judge subject to no authority other than the law. *Ibid*

³²⁵*Ibid* 637

³²⁶*Ibid* 638-643

³²⁷*Ibid*

JUDICIAL IMPARTIALITY

Impartiality implies freedom from bias, prejudice and partisanship; it means not favouring one more than another; it connotes objectivity and an absence of affection or ill-will. To be impartial as a judge is to hold the scales even and to adjudicate without fear or favour in order to do right...."

Report of the Special Rapporteur on the Independence of the Judiciary and
the Legal Profession
6th February 1995¹

4.1 INTRODUCTION

There is a wealth of jurisprudence on judicial impartiality both at national courts and international courts. This chapter considers this concept not just at the international criminal courts but also State practice. This approach is helpful as a comparative study of the jurisprudence of different jurisdictions is useful in gauging the approach of the International Tribunals to this essential but at times problematic question. Judges at the International Tribunals have the benefit of this ample jurisprudence which they could consult and which would serve them as persuasive precedents when they are posed with issues of impartiality and bias.

Of particular interest are the different tests of impartiality that are applied in domestic courts. The threshold varies from jurisdiction to jurisdiction. The

¹*Report of the Special Rapporteur supra*, Chapter Two n.1. Paragraph 35

test is also applied at the International Tribunals and an examination is undertaken on the demands of that test.

A unique aspect to the position of the international judge is his activities prior to his appointment to an international court. States usually nominate candidates who had served as diplomats and advisors in the international arena. The issue that then emerges is whether the prior activities of that particular judge would have affected his impartiality at the international tribunals and court.

These and several other issues relating to the impartiality of the judges of the international courts and tribunals are the focus of this Chapter. Challenges made by the accused, changes made to the Rules of Procedure and Evidence and the functions of the judges themselves raise several issues of impartiality that are exceptional to the international legal system.

4.2 JUDICIAL IMPARTIALITY: GENERAL

Judicial impartiality, compared to judicial independence, is less abstract. Just as the concept of judicial independence, judicial impartiality has both individual and institutional postulates.

As established in Chapter Two, there is a close connection between the guarantees of judicial independence and impartiality. A tribunal that is connected to the Executive is neither independent nor impartial in cases where the Executive is a party. Likewise, a judge who is a connected to a party to the proceedings before him cannot be independent and impartial.²

²Harris *et al supra* Chapter One n.17, 234

The key element of impartiality is a lack of bias. A judge should bring an open mind, free from bias and prejudice, actual or perceived, to the case before him. He should abandon whatever personal opinion or conviction, if any, that he may have in relation to that particular case that he is trying. Even if he did harbour a personal opinion on a particular issue, he should decide the matter on the facts and the law without allowing his personal views influence him. One party should not be treated favourably at the expense of the other. In other words, he should be impartial.

An exposition on judicial impartiality by the HRC is also particularly helpful:

“Impartiality’ of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds of disqualification are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria.”³

A biased judge compromises the right of an accused to a fair trial. He should be able to offer objective guarantees so as to exclude any legitimate doubt as to his partiality. The question arises therefore as to how the impartiality of a judge can be gauged. Should he bear the responsibility of proving that he is impartial by offering objective guarantees or is the burden on the party alleging that he is not impartial?

Personal convictions or beliefs are intimate to a judge. The standard of proof is therefore high and proving the partiality of a judge in a particular matter is exceptional, though not rare. The burden lies on the party alleging bias to prove it. Mere allegation or the fear of an accused is not sufficient. There must be objective justification for the alleged bias.

³Referring to the decision of the Human Rights Committee in Communication No.387/1989, Karttunen v Finland Decision of 17th November 1992, CCPR/C/46/D/387/1989, paragraph 45.

Bias in a judge may take two forms. The first is where there is actual bias on the part of the judge. The second manner in which bias may arise is where there is a veneer of bias, or what is now known as an appearance of bias. The bias here is not as obvious or apparent as it is in the first situation. The consequence of both types of bias is the same though. If bias is proved, then impartiality is negated.

Again, bias may arise in many ways. The judge may be a party to the matter that he is asked to adjudicate or he may have a relationship with one of the parties to the action before him. That relationship may either be direct or indirect and the duty falls under the impugned judge that he should offer objective guarantees to exclude that perception of bias. A perception of actual bias will arise where the judge has a personal interest in that matter, regardless of the outcome. The personal interest may be pecuniary or non-pecuniary.

The impartiality of a judge is *prima facie* a rebuttable presumption. In order to decide whether a judge is impartial or not, a two-pronged test has been formulated. The first prong is the subjective aspect, which basically means determining the personal convictions of that impugned judge. Having decided on that, the next aspect is the objective one – whether the judge himself has offered guarantees to exclude any perception of impartiality.

Where there is actual bias on the part of the judge, disqualification from the trial he is sitting on is automatic. This issue needs actual proof as the consequences of such an issue are serious. Once his bias is established, the question of objective guarantees does not even arise. Actual bias needs no further proof.

The judge will also be disqualified where the circumstances would indicate to the reasonable man, having full knowledge of the facts and circumstances surrounding the matter that the judge might be biased. The standard for deciding what amounts to a risk of bias in the eyes of the reasonable observer varies in the jurisprudence of the national legal systems but at the international criminal proceedings before the Tribunals that issue has been resolved. How these issues are dealt with by regional and national courts as well as the international tribunals is quite elucidating.

In this context, most countries that are members of regional organisations are bound to take into consideration the decisions of the regional courts and apply the *ratio decidendi*⁴ when considering similar legal issues. This would also apply to decisions of the Human Rights Committee on complaints submitted to it under the ICCPR. Hence, decisions of the European Court on the impartiality of the judiciary such as *Piersack v Belgium*⁵ and *De Cubber v Belgium*⁶ would have a bearing on the practice of national courts.⁷ Similarly members of the Organisation of American States would be guided by the decisions of the Inter-American Court of Human Rights.

4.3 “BIAS” - THE VARIOUS APPROACHES

4.3.1 THE EUROPEAN JURISPRUDENCE

As already stated above, the standards of judicial impartiality applied in most Member States of the European Union are dictated by Strasbourg

⁴ See *Porter v Magill* [2002] 1 All ER 465

⁵(1982) 5 EHRR 169

⁶Judgment of 26 October 1984, Eur. Ct. H. R., Series A, No.86

⁷Colloquially referred to as “Strasbourg Jurisprudence.” An example of the national courts being guided by the Strasbourg Jurisprudence is the judgement of Lord Phillips MR in the case of *Re: Medicaments and Related Class of Goods (No.2)* [2001] 1 WLR 700 where the judge “modestly” changed the test for bias in England to be in line with the Strasbourg jurisprudence.

jurisprudence. The decision of the *European Court* in *Piersack* is particularly important for the two-prong test it formulated for gauging bias.⁸

Briefly, the facts are as follows. The Applicant was found guilty of murder and sentenced to eighteen years of hard labour by a Belgian assize court. The Applicant complained that there was a breach of *Article 6(1)* of the *European Convention* as he was not accorded a hearing by “an independent and impartial tribunal.” The President of the Court that found him guilty⁹ was the senior deputy prosecutor and head of the department that was dealing with the appellant’s file before he was appointed to the Court.

The *European Court* held that impartiality denotes absence of prejudice and bias. Bias under *Article 6* may be determined by embarking an approach that involves both subjective and objective elements. The first step is to assess the *subjective* aspect and ascertain the personal conviction of the given judge in a given case; having done so, the next step is to address the objective aspect which is the determination whether he had offered sufficient guarantees to eliminate any legitimate doubt that may prevail as to impartiality.¹⁰ The *objective* aspect is measured from the perception of a member of a public who is convinced that the guarantees offered by the impugned judge are sufficient to show his impartiality.

The actual extent of the involvement of the judge was not explored, but the Court found that as the hierarchical superior of the deputy prosecutors in charge of the file, the President of the Court was entitled to supervise their work including revision of written submissions and discussions on adoption of strategies in court as well as advise them on points of law. The Court found from the information obtained a confirmation that the President did in fact play a certain part in the proceedings.

⁸*supra* n.5

⁹The jury found the Applicant guilty by 7 votes to 5. The President and the other two judges agreed with them. Where an accused is found guilty on a principal charge on a simple majority by 7 to 5 as it was in this case, the judges then deliberate on the same issue. *supra* n.5, paragraphs 14, 22

¹⁰*Ibid*, paragraph 30. Legitimate doubt is the accepted phrase instead of real suspicion or danger or apprehension.

The judgment of the Court, insofar as relevant to judicial impartiality states as follows:

“30. Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 (art. 6-1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.

(a) As regards the first approach, the Court notes that the applicant is pleased to pay tribute to Mr. Van de Walle's personal impartiality; it does not itself have any cause for doubt on this score and indeed personal impartiality is to be presumed until there is proof to the contrary (see the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 25, § 58).

*However, it is not possible to confine oneself to a purely subjective test. In this area, even appearances may be of a certain importance (see the Delcourt judgment of 17 January 1970, Series A no. 11, p. 17, § 31). As the Belgian Court of Cassation observed in its judgment of 21 February 1979 (see paragraph 17 above), **any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw**. What is at stake is the confidence which the courts must inspire in the public in a democratic society.¹¹*

(Emphasis added)

The Court held that the public is entitled to fear that a judge does not offer sufficient guarantees of impartiality¹². Where there is a legitimate reason to fear a lack of impartiality on part of the judge, he must withdraw from the case. It was the perception of the public that is of importance. The Court found that personal impartiality of the impugned judge was intact under the

¹¹ *Supra* n.5, Paragraph 30

¹² *Ibid* paragraph 32

subjective aspect; personal impartiality is presumed until the contrary is proved.¹³ However the Court found that objectively, the judge could not offer any guarantee to remove any legitimate doubt as to the impartiality of the tribunal and held that there was a violation of *Article 6(1)* of the *European Court*. The test was applied in other cases such as *De Cubber v Belgium*¹⁴ and *Hauschildt v Denmark*¹⁵. Thus, the impartiality of the judge may be challenged but whether the challenge is upheld or not depends on the circumstances. *Hauschildt* held that special circumstances must exist in order to give rise to a legitimate doubt as to the impartiality of the judge. In any single case where the impartiality of a judge is doubted, such doubt must be resolved by applying the *Piersack* test.

The two-prong test of impartiality is now the accepted test in both civil and continental systems and has been incorporated into the ICTY jurisprudence.¹⁶

4.3.2 NATIONAL CASE-LAW AND PRACTICE

National standards of judicial independence and impartiality do not differ greatly from jurisdiction to jurisdiction.¹⁷ Some Constitutions¹⁸ give better protection to judges than others. In Belgium, for example, a judge cannot be transferred without his consent and his salary is established by law.¹⁹ In some jurisdictions the law is fairly lenient towards non-judicial activities; the judges in Austria, for example are allowed to be members of political parties and

¹³ Applying the principle in *Le Compte, Van Leuven and De Meyere*, (23 June 1981, Series A no. 43) referred to in paragraph 30(a). *Ibid.* “Legitimate doubt” is the common thread running through the European jurisprudence.

¹⁴ *Supra* n.6

¹⁵ (1989) 12 EHRR 169

¹⁶ *The Prosecutor v Anto Furundzija* Case No: IT-95-17/1. Available at <<http://www.un.org/icty/furundzija/appeal/judgement/index.htm>>

¹⁷ For studies on impartiality and independence in different countries, see *Shetreet* and *Deschenes*, *supra* Chapter 3, n.17

¹⁸ For example, Australia; see Michael Kirby at *Shetreet and Deschenes*, *ibid* at 219

¹⁹ *Ibid.* *Belgium* Prof Marcel Storme 43 See also *Piersack v Belgium*, *supra* n.5

even be Members of Parliament²⁰ whilst in others the judges are expected to conform to strict codes of conduct and ethics whether written or otherwise.²¹ However, the underlying principle of all these jurisdictions is that the tribunal and/or the judges are able to dispense their judicial functions impartially and without control or pressure from the Executive or any third party.

4.3.2. a THE UNITED KINGDOM EXPERIENCE

The jurisprudence in the English courts has been erratic on the proper test to be adopted in gauging whether there was apparent bias on the part of the decision-maker. On one hand some decisions favoured the “reasonable suspicion or apprehension of bias test”.²² On the other hand, certain decisions adopted the “real likelihood of bias”.²³ Then there was the “real danger of bias” test which was modified into “real possibility of bias”²⁴ test.

However, the test for bias was reformulated by the House of Lords in the case of *R v Gough*²⁵ where the House of Lords was called to consider the circumstances in which bias, in this case allegedly that of a juror, may affect the right of the accused to a fair trial by virtue of the tribunal not being impartial. The facts briefly were as follows. The Appellant appealed against his conviction on the grounds that a member of the jury who found him guilty was a neighbour of his brother’s and therefore this affected her impartiality towards him.

²⁰See Prof Dr. Hans Fasching *Austria Shetreet and Deschenes, supra*, Chapter Four, n.15

²¹For example the United Kingdom, Australia and Malaysia

²²See for example *R v Sussex Justices ex p McCarthy* [1923] All ER 233

²³*R v Barnsley County Borough Licensing Justices ex p Barnsley and District Licensed Victuallers Association* [1960]2 All ER 703

²⁴*Porter v Magill, supra* n.9

²⁵*R v Gough* (1993) A.C. 646. The test for bias in the English courts prior to *Gough* was “reasonable suspicion”. See also *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (Amsterdam: North Holland Publishing Co., 1976) 304. It is surprising that the House of Lords in *Gough* did not discuss the ECHR and the jurisprudence therein even though the Human Rights Act 1998 was not in existence then. See also Grant, *infra* n.30 at 56.

The main speech was delivered by Lord Goff of Chiveley. Faced with the two existing tests for impartiality in the form of “reasonable suspicion” and “real likelihood” of bias, the House of Lords opted for a third one, that of whether there was a “real danger of bias”. The reasonable man or fair-minded observer was also replaced. Placing the Court in place of the reasonable man, Lord Goff went to state further:

“Having ascertained all the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration.”²⁶

Although the case involved a juror, it was nevertheless important that the same rule of a fair hearing by an independent and impartial tribunal apply to the jurors as they are judges of facts. They should decide on the guilt of the accused impartially and on even-handedness.

The *Gough* test posed problems as it imposed a high standard of proof on the party alleging bias.²⁷ It was considered as too stringent and rigorous.²⁸ It rejected “real likelihood” in favour of “real danger of bias”.²⁹ It was also much narrower than the reasonable suspicion or apprehension test. The second problem posed by the judgement was that the Court dispelled the role of the reasonable person as the arbiter of bias and replaced him with the Court itself. It rejected the notion of a reasonable man and argued that the Court personifies reasonable man in cases like these more so since the Court may be privy to evidence that the ordinary and reasonable man may not.

²⁶*Supra* n.25,670

²⁷ See for example *Webb and Hay v the Queen* (1994) 181 CLR 41 See also judgement of Judge David Hunt in *The Prosecutor v Brdanin and Talic: Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge* dated 18th May 2000 where Judge Hunt criticised the *Gough* judgement. Paragraph 9.

²⁸*Ibid*

²⁹*Supra* n.25 670

Gough streamlined the test for bias. The House of Lords asserted that there was no difference between test for bias between judges and jurors and more importantly, that there is no difference between the test for actual bias and apparent bias.³⁰

The *Gough* test was considered in the case of *Locabail (UK) Ltd v Bayfield Properties Ltd and Another, Locabail (UK) Ltd and Another v Waldorf Investment Corps, Timmins v Gurley, Williams v HM Inspector of Taxes and Others, R v Bristol Betting and Gaming Licensing Committee ex parte O'Callaghan*³¹("Locabail")

The Court of Appeal was asked to determine questions relating to impartiality of judges. It was given a chance to review existing English authorities on the proper test of impartiality and it also considered the case-law from other jurisdictions including that of the *European Court*. It reiterated the principles enunciated in *Pinochet*³²and although the Court found that the test espoused in the *European Court* jurisprudence for gauging judicial impartiality was different from the *Gough* test - indeed that test was disapproved by cases in other jurisdictions, the Court was of the view that it was bound by the House of Lords decision in *Gough*³³ The Court of Appeal also followed the mechanism adopted by the House of Lords in gauging bias - the reasonable onlooker, personified by the Court.³⁴

The Court of Appeal found that in the overwhelming majority of cases the application of the two tests would lead to the same outcome.³⁵

³⁰ Evadne Grant: "*Pinochet 2: The Questions of Jurisdiction and Bias*" 41, 48-49. *The Pinochet Case*, Diane Woodhouse (ed) (Oxford; Hart Publishing 2000)

³¹ [2001] All ER 65. For a critical discourse on the Locabail case, see Kate Malleson *Safeguarding Judicial Impartiality* (2002) 22 *Legal Studies* 53 where the author argues that Locabail test was too restrictive. Locabail followed *Gough*, which in itself was too restrictive.

³² *Infra* n.42

³³ *Supra* n.25 74

³⁴ *Ibid* 87

³⁵ *supra* n.2574, paragraph 17

The confusion and criticisms³⁶ arising from the *Gough* test and the conflict between the jurisprudence of the English courts and the jurisprudence arising from the *European Convention* has now been resolved by the House of Lords in the case of *Porter and another v Magill*.³⁷ The House of Lords held³⁸ that the test in determining apparent bias on the part of a tribunal is no longer to simply ask itself whether, having regard to all the relevant circumstances there was a real danger of bias but whether the relevant circumstances, as ascertained by the court, would lead a *fair-minded and informed observer* to conclude that there was a *real possibility* that the Tribunal had been biased.³⁹ The test therefore allows the court to play a role in that it would determine the circumstances of the case and then the reasonable, fair and knowledgeable observer would step in and decide whether there is a real possibility of bias. The fair-minded and informed observer has therefore been reinstated in having the decisive say in whether or not bias exists.

The House of Lords followed the decision of the Court of Appeal in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 which altered the *Gough* test. The Court also followed the principle in *Hauschildt* where the *European Convention* held that what is decisive is the fears of the complainant can be *objectively* justified. The fears of the complainant are relevant at the initial stage but lose their importance on the next stage, which is when the matter is looked at objectively.

The test for judicial impartiality in the United Kingdom is now settled. It is a two-prong test and the decisive factor is the viewpoint of a reasonable observer on the real possibility of bias. As the House of Lords has said

³⁶ The *Gough* test was not followed in other jurisdictions which preferred the reasonable suspicion or apprehension test of the ECHR jurisprudence. Scottish courts applied the same test as well, using the perception of the reasonable man as the gauging device. See *Bradford v McLeod* [1986] S.L.T. 244

³⁷ [2002] 1 All ER 465.

³⁸ *Ibid* paragraph 108, p506

³⁹ *Ibid* p.467

emphatically that the test is now in line with the test in the *European Convention*, presumably in this context “real possibility” is not the same as “real danger” but “reasonable suspicion or apprehension”.

An aspect of judicial impartiality was discussed in *Gough* is the position of a judge where he is not a party to the proceedings or he does not have either a proprietary or pecuniary interest. *Gough* recognised however that besides actual bias, a judge might be automatically disqualified if he is shown to have an interest in the outcome of the case which he is to decide or has decided.⁴⁰ The question of bias in this situation does not depend on his relationship with the parties but rather hinges on the outcome of the case that may have a realistic effect on the judge’s interest. The principle of automatic disqualification, explored in the case of *Dimes v Proprietors of Grand Junction Canal*⁴¹ was initially limited to direct pecuniary interest or proprietary interest but was extended to apply to a limited class of non-financial interests.

In *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (2)*⁴² (“Pinochet”) the House of Lords held that the automatic disqualification principle would apply where the issue that raises concern relates not to a financial or an economic interest but a promotion of a cause.⁴³ The test for bias was discussed in detail in the context of the “automatic disqualification” vis-à-vis actual bias.

The *Pinochet* Case was concerned with the extradition of the former dictator of Chile to Spain to face various charges, including crimes against humanity. Warrants of arrest were issued against him. Both were quashed. The Crown

⁴⁰ The House of Lords stressed that “automatic disqualification” category should not be extended any wider. Lord Woolf, *Gough* supra n.25 at 673 as the creation of any other category of automatic disqualification would give rise to uncertainty as to the boundaries of that category and confusion would arise in the test to be applied. Lord Goff, 664. But see *Pinochet* infra

⁴¹ (1852) 3 HL Cas 759

⁴² [1999] 1 All ER 577. See also Kate Malleson *Judicial Bias and Disqualification after Pinochet (No.2)* (2000) 63 MLR 119

⁴³ *Ibid* 588

Prosecution Office, acting on pressure from the Government of Spain appealed against the decision of the Divisional Court quashing the second order of provisional warrant issued for the arrest of Pinochet.⁴⁴ The matter was heard in the House of Lords by Lord Slynn of Hadley, Lord Lloyd of Berwick, Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffman.

At this juncture Amnesty International (“AI”) and other parties who were not directly involved in the proceedings sought for leave to intervene in the proceedings. Leave was granted by a committee of the judges in the House of Lords that was comprised of three judges who were members of the main panel hearing the appeal but did not include Lord Hoffman, the judge subsequently challenged.

The appeal by the Prosecution was allowed by a majority of 3 to 2.

It later transpired that Lord Hoffman, who was with the majority allowing the appeal of the prosecution, was a director of the charity arm of AI, Amnesty International Charity Limited (AICL). The two were separate entities, the former being a registered charity incorporated to undertake the charitable aspects of the work of the latter. It was also noted that Lord Hoffman was not employed or remunerated by AI or the AICL and that Lord Hoffman was not even a member of AI. However, the Court was of the view that the judge was involved in an entity that was closely linked to AI which had become a party to the proceedings by virtue of the intervention order. Although there was no direct pecuniary interest gained by the parties in this suit, the fact that Lord Hoffman was involved, as a director, in promoting the causes⁴⁵ of AI, automatically disqualified him from sitting on the panel. There was no necessity to consider whether he was actually or apparently biased. Lord Hoffman’s situation fell under the *nemo iudex in sua causa* principle. Several facts were taken into account in arriving at this conclusion. Whilst the House

⁴⁴ For the facts in detail, refer to speech of Lord Browne-Wilkinson

⁴⁵ The House of Lords created a “new ground” for automatic disqualification. Grant *supra* n.30 53.

of Lords was at pains to highlight the observation that it did not consider the judge to be actually biased, they considered the fact that AICL had access to research papers and publications of AI, and one of the publications of AI was a report on Chile.⁴⁶ The House of Lords emphasised that each case should be decided on its facts. In this case, the relationship between the challenged judge with AI, although not direct was close and was neither tenuous nor nebulous since he was a director of one party which was closely and directly associated to another entity that was a party to the proceedings. It could therefore be said that the judge had an interest in the outcome of the proceedings. The other factors taken into consideration by the court in deciding that the judge was automatically disqualified were his position in AICL, the relationship between him and the concerned institutions, the duration and proximity of that relationship, the mandates and the purposes of those institutions.

The House of Lords concluded that by virtue of his position in AICL, Lord Hoffman was automatically disqualified. As such, he should have recused himself or revealed his interest to the parties.

In the course of his speech, Lord Browne-Wilkinson was of the opinion that there was no necessity to re-evaluate the real danger test of *Gough* even though courts in other jurisdictions in the Commonwealth have specifically refused to follow it in favour of the real suspicion or apprehension test. It was said that

*"If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company in promoting the same causes in the same organisation as is a party to the suit."*⁴⁷

⁴⁶Grant *ibid* 65

⁴⁷ Per Lord Browne-Wilkinson, *supra* n.42 588

Pinochet raises the interesting question of how far a judge's experiences gained through his non-judicial activities would affect his impartiality. Judges should not be barred from participating in non-judicial activities by virtue of their profession. On the other hand, they must ensure that their views, opinions and activities do not affect their impartiality when they are adjudicating. However, the experiences they gain through these activities would stand in positive stead when deciding on cases as it would negate the perception that judges are removed from the reality of everyday life.

In this regard, a lesser-quoted judgement in *Pinochet* is on point. The speech of Lord Hutton discusses in detail disqualification arising out of "association of a judge".⁴⁸ Whilst agreeing with Lord Goff in *Gough* that direct pecuniary interest automatically disqualifies a judge from sitting in a trial without the necessity to inquire whether there is bias, Lord Hutton was of the view that automatic disqualification was also applicable where the

*"interest of judge in the subject- matter of the proceedings from his strong commitment to some cause or belief or his association with a person or a body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation."*⁴⁹

Indeed the automatic disqualification rule covers cases in which the interest or association of the judge in the parties or the matter in dispute "make it difficult for him to approach the trial with the impartiality and detachment which the judicial function requires".⁵⁰

⁴⁸ See Rule 15 of the RPE of the ICTY.

⁴⁹ *Supra* n.42

⁵⁰ *Ibid*

Lord Hutton referred to the Australian decision of *Webb v The Queen*⁵¹ and in particular the judgement of Deane J for the purposes of this particular situation relating to the association between Lord Hoffman and AI. Four possible areas covered by the doctrine of disqualification were identified.⁵² It would be helpful to identify these areas to gauge how wide the “net” of judicial bias has been cast.

The first is “*disqualification by interest*” which would occur where there is some direct or indirect interest on the part of the judge in the proceedings whether pecuniary or otherwise that would give rise to reasonable apprehension of partiality or prejudice or prejudgement. The other category which is particularly relevant to *Pinochet* is “*disqualification by association*” where there is an apprehension of prejudgement or other bias that arises from some direct or indirect relationship. The relationship covers experience as well as contact with parties or individuals who are interested in or involved in the proceedings.” Ultimately he concurred with the other members of the panel that Lord Hoffman was automatically disqualified by virtue of his association. Lord Hutton’s reference to Deane J’s judgement in *Webb* did not address the issue of the *reasonable apprehension* test espoused by that case.⁵³

Pinochet was criticised for not making any reference to the *European Convention* and the extensive jurisprudence of the *European Court*.⁵⁴ The *Human Rights Act of 1998* which imposed a duty on the court “*determining any question which has arisen in connection with a Convention right must take into account, inter alia, any judgment, decision, declaration or advisory opinion of the*

⁵¹ (1994) 122 ALR 41

⁵² The other two categories covered by the doctrine of disqualification are disqualification by conduct and disqualification by extraneous information. The former covers situations where the conduct of the impugned judge, either in the course of, or outside the proceedings causes apprehension of bias or partiality. *Locabail* falls under this category. The latter category covers situations such as where the judge had sat on an earlier case. The four categories may overlap.

⁵³ *Supra* n.48

⁵⁴ Paul Catley and Lisa Claydon: “*Pinochet, Bias and the European Convention on Human Rights*” *The Pinochet Case: A Legal and Constitutional Analysis*, Diana Woodhouse (ed) (Oxford: Hart, 2000) 62

European Court or the Commission, which in the opinion of the court, is relevant to the proceedings before it.”⁵⁵The Act had received the royal assent before the hearing.⁵⁶

The approach of the courts in the United Kingdom to the issue of commitment to a cause by a judge is therefore very strict vis-a-vis the impugned judge. Although there is a possibility that the impugned judge does not stand to gain personally from the outcome of the case and his interest is neither pecuniary nor proprietary, he will be automatically disqualified under the disqualification by association principle. The need to ascertain whether there is bias on the part of the judge evidently does not arise. This is a complex situation. A judge who is active in human right matters, for example, and who has written and spoken extensively on the subject would be an advantage to a panel which is hearing a case on human rights. If he is an expert on torture and has expressed his opinions on it, should he be automatically disqualified just because he is interested in the outcome of a case on torture that he is hearing?⁵⁷ If he is disqualified on the grounds that he has an association, the court may be deprived of his knowledge in that particular field. A preferable approach would be for the court, instead of opting for the actual bias principle, to take the “reasonable apprehension” method and apply the reasonable man test instead of disqualifying the judge at the outset.

⁵⁵ Section 2(1).

⁵⁶ Catley and Claydon *supra* n.54

⁵⁷ Cf the position of Judge Geoffrey Robertson in Sierra Leone whose impartiality was challenged due to a book that he had written prior to his appointment to the Special Court. See discussion on this case text, *infra*

4.3.2. B

PRACTICE AT OTHER JURISDICTIONS

National standards in other jurisdictions were discussed at length in *Locabail* and *Furundzija*.

The case-law of various national jurisdictions seems to favour the reasonable apprehension or suspicion tests espoused in the European jurisprudence.⁵⁸ Judicial decisions in Australia, New Zealand,⁵⁹ South Africa, Canada and the United States all have adopted the reasonable apprehension test in gauging bias.

The cases also favoured the reasonable man/member of the public approach rather than the perception of the Court itself.⁶⁰

The High Court of Australia in *Webb and Hay* also dealt with judicial impartiality in depth and discussed decisions from other jurisdictions. It rejected the *Gough* test and found that the “reasonable likelihood” or “real danger” test, besides being rigorous,⁶¹ emphasised the viewpoint of the court of the facts rather than public perception. The Court said of the “real danger” test:

“They indicate that it is the court's view of the public's view, not the court's own view, which is determinative”.⁶²

⁵⁸ *Furundzija supra* n.16, Paragraph 183

⁵⁹ *R v Papadopoulos (No.2)* (1979) 1 NZLR 621, 629, 634 referred to by the High Court of Appeal in *Webb*, paragraph 5. There was a suggestion that the proper test to be applied should be “reasonable suspicion or real danger”. It was concluded that the test applicable was the reasonable suspicion standard.

⁶⁰ The cases discussed were *Webb and Hay v the Queen* (1994) 181 CLR 41, a decision from Australia, *President of the Republic of South Africa and Others v South African Rugby Football Union on Others, Judgement on Recusal Application*, 1999(7) BCLR 725 (CC) decision of the Supreme Court of South Africa, *R.D.S. v The Queen* (1997) Can.Sup.Ct., decision of the Supreme Court of Canada and *U.S. v Bremers et al*, 195 F. 3d 221, 226 (5th Cir.1999): see *Furundzija supra* Chapter 3 n.21 paragraphs 184-188

⁶¹ *Webb and Hay v the Queen* (1994) *Ibid*

⁶² *Ibid* Mason CJ and McHugh J, paragraph 11f

In Malaysia⁶³ however, the courts have adopted the *Gough* test. In the case of the *Allied Capital Sendirian Berhad v The Raintree Club of Kuala Lumpur*,⁶⁴ the Applicants applied for leave to appeal against the decision of the Court of Appeal on the merits of the case. At the Federal Court⁶⁵ the Applicant raised a preliminary issue of bias against the judge of the Court of Appeal, Dato Gopal Sri Ram J who delivered the main judgement against the Applicants. The Applicants did not allege actual bias but argued that the Judge was a member of the defendant club and secondly, that he had acted professionally as counsel for the Applicants on the very issues that were before the court.⁶⁶ The Federal Court followed its previous decision in the case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama Serbaguna Sungai Gelugur Dengan Tanggungan* ⁶⁷ where the Court applied the *Gough*⁶⁸ test in deciding whether there was bias on the part of the challenged judge. The Court also followed *Gough* in rejecting the viewpoint of the hypothetical reasonable man.⁶⁹ The Court preferred the *Gough* test, stating that the test would avoid setting aside the judgement upon “some insubstantial grounds and the flimsiest pretexts of bias”.⁷⁰

This reasoning is the other consequence of the *Gough* test. The real danger threshold is too high and this would make it difficult for an applicant to prove the risk of bias; the courts may very well view a challenge to the impartiality of a judge askance based on the assumption that the challenge is based on insubstantial and flimsy grounds. It is unsafe for the judges to step in the

⁶³Judicial impartiality is provided for in the *Judges Code of Ethics 1994* issued under Article 135(3)(a) of the *Federal Constitution*.

⁶⁴[2001]2 AMR 2097

⁶⁵The highest court in the hierarchy of the Malaysian judicial system.

⁶⁶*Supra*, n. 62 paragraph 6

⁶⁷[1999] 3 AMR 3529

⁶⁸In Singapore, the Court of Appeal suggested that the test for apparent bias is “*whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts had a reasonable suspicion that a fair trial for the litigant was not possible*” or alternatively “*a real danger of bias in the sense that the judge might unfairly regard with favour or disfavour, the case of a party in respect of the issue under consideration by him*” per L.P.Thean JA in *Tang Liang Hong v Lee Kuan Yew and anor* [1998] 1 SLR 97. This assessment is very unhelpful and allows the judges to pick and choose a test that may vary from case to case.

⁶⁹*Supra* n. 62 paragraph 9

⁷⁰*Ibid*

shoes of a reasonable man, for the judges with their specialised knowledge may not necessarily make a finding of bias when an ordinary reasonable member of the public, fair-minded and well informed, may very well reasonably apprehend bias. The “reasonable man” device was used to support the oft-quoted *dictum* of Lord Hewart CJ.⁷¹ In other words, it is the perception of the public that justice has been done is of paramount importance. A concern will also arise when judges are asked to decide on the alleged bias of one of their own. There may be a risk that they would not make an adverse finding against their colleagues. The question therefore arises: *quis custodiet ipsos custodies?* To quote *Webb*:

*“public confidence in the administration of justice is more likely to be maintained if the Court adopts a test that reflects the reaction of the ordinary reasonable member of the public to the irregularity in question.”*⁷²

The Federal Court in the *Allied Capital Case* distinguished *Pinochet* on the grounds that Lord Hoffman did not reveal his connections, whereas in the present situation, Justice Dato Sri Ram had informed counsel for all parties in chambers that he was a member of the Club. The meeting in chambers was held in the presence of the other judges of the panel that was hearing the appeal. The judge had specifically inquired whether counsel had any objections to his hearing the case. No objections were raised. The impugned judge also disclosed that as a member of the Bar, he had acted in a brief which he originally thought was connected with the subject matter of the appeal. He had checked with his former office and was informed that he had not acted for any of the parties in the appeal, but rather a third party and that the brief involved a subject which was unconnected with the subject matter of the

⁷¹R v Sussex Justices ex parte McCarthy [1924] 1 KB 256, 259. However, Lord Hewart himself was criticised for his inability to keep an open mind during trial; see Shetreet, Chapter Three n. 146 297

⁷² See also *Furundzija supra* Chapter 3 n.21, paragraph 185

appeal. The Federal Court found that the judge had made full disclosure of the facts within the best of his knowledge to all parties.⁷³

The Federal Court did not use the “reasonable man” test but rather chose to ask itself whether there was a real danger of bias of the part of the judge. The Court commented that the judge had an erroneous belief as to his participation in the case when he was a member of the Bar based on the knowledge supplied to him by his former office.⁷⁴ That erroneous decision as to his bias was not fatal as he had disclosed to all the parties of his involvement, albeit indirectly, in the matter.

Another risk that may arise when the reasonable man is substituted with the Court itself is that the viewpoints the Court may adopt may not necessarily inspire confidence. The Federal Court held that it was a very serious matter to raise against a judge that:

“he is biased or has a personal interest, financial or otherwise, in any case he is hearing or in any decision he makes in his judicial capacity.

If the allegation is true, then not only would his judgment or decision be vitiated, but disciplinary or criminal proceedings may be instituted against the errant Judge. However, if the allegation is unfounded, there would be an unwarranted aspersion cast on the integrity of the Judge even if the complainant categorically states that he does not question the integrity of the Judge in raising such objection or allegation.”⁷⁵

The part of the judgement does not take into account the basic concept of justice that it should not only be done but being manifestly seen to be done. It gives the impression that the personal impartiality of a judge is not presumed

⁷³ *Ibid* paragraphs 13-15

⁷⁴ An affidavit was filed by the Applicants affirmed by a solicitor who had acted for them in 1984, averring that the judge had acted for the Applicants on the very matter that was raised in the proceedings here. *Ibid.* paragraph 19.

⁷⁵ Per Mohtar Abdullah FCJ at paragraph 26.

but asserted and that raising the issue of bias is heavily discouraged on the basis of there being a risk of “unwarranted aspersion” being cast on the judge. The Court is giving undue preference to a perceived harm to the judge’s reputation over that of the legal maxim that judicial impartiality is one of the dual hallmarks of justice.

In fact, the Court was of the view that a party could be cited for contempt of court for raising bias. The Court said:

“It is unfortunate that the learned Judge now falls victim to his own observation in Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin[1995] 2 AMR 1332, at p 1339:

“I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is more capable of eroding public confidence in the judicial arm of the state than unwarranted and unfounded allegation of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.”⁷⁶

On the contrary, public confidence in the judiciary would erode if parties to proceedings are discouraged from requesting judges to recuse themselves by the veiled threat of contempt of court, which carries a penal sanction. This slant to judicial impartiality fortunately has not arisen in other jurisdictions.⁷⁷ Frivolous objections to a judge must of course be dismissed. However, if the parties genuinely thought that the judge’s impartiality may be prejudiced, they should be able to raise it. They should not be punished just because the complaint failed the “reasonable apprehension” or the “real danger” tests. The Federal Court held that, by applying the real danger test to the present case, the objections by the Applicants were without merit.⁷⁸

⁷⁶*Ibid*

⁷⁷ Except in Singapore; see *Public Prosecutor v Mary Tuen* [2003] SGDC 81

⁷⁸*Ibid* paragraph 28

4.4 SUMMARY

There are three clear situations where a disqualification of a judge may arise.⁷⁹ First, where he is a party to the proceedings. Secondly, where he has a proprietary or a pecuniary interest in the outcome of the case. In both cases, there will be automatic disqualification on the grounds of actual bias. The third situation is when the judge is neither a party to the proceedings that is before him nor having a pecuniary or proprietary interest in it but has a relevant interest in the case and its outcome. Ideally he should disclose his interest and recuse himself. He should only proceed hearing it if the parties do not object to his participation. Where he does not disclose his interest, the test that the court will apply is whether the relevant circumstances, as ascertained by the court, would lead the reasonable man to conclude that there was a real possibility of bias. Whilst the view of the complainant is relevant, it is not conclusive and will only be upheld if it is objectively justified.

There is now uniformity in standards applicable for judicial independence and impartiality. The majority of jurisdictions advocate the two-prong test espoused in *Piersack*⁸⁰. The real danger test is no longer applicable.

4.5 PRACTICE AT THE INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

The *locus classicus* on the independence and impartiality of international judges is set out in the judgement of the Appeals Chamber in the case of *The Prosecutor v Anto Furundzija*.⁸¹ The test espoused in this case has

⁷⁹ Of course there are situations where these scenarios may overlap.

⁸⁰ *Supra* n.6

⁸¹ IT-95-117/1-A. See: <<http://www.un.org/icty/furundzija/appeal/judgment/index.html>> The question of trial by an independent and impartial court was first addressed by the Appeals Chamber of the *ICTY* in the *Tadic(Merits)* Appeal Decision of 15th July 1999. However, that issue related more to equality of

subsequently been applied to other cases and is considered the authoritative judgment on these issues.⁸² The jurisprudence from the Tribunal has contributed to the development of the case-law of international criminal proceedings. The principles of judicial impartiality and independence are now well and truly enshrined in international criminal law.

4.5.1 RULE 15 AND JUDICIAL IMPARTIALITY

Rule 15 of the *Rules of Procedure and Evidence* of the international *ad hoc* tribunals encompasses the impartiality of the judges.⁸³ It states:

“(A) A judge may not sit on a trial or appeal in which the Judge has a **personal interest** or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.”⁸⁴ (emphasis added)

There are two limbs to *Rule 15 (A)*. The first limb highlights situations where a judge has a personal interest. In such a case, the disqualification should be automatic since personal interest connotes actual bias. Whilst personal interest is not defined, it includes both pecuniary and non-pecuniary interests.⁸⁵ However, it is the second limb that is more complex. It contains conjectures. It basically states that a judge may not sit where he has had any association that *might* affect his impartiality. This is the “apprehension of bias” or “perception of bias” limb that has been dealt by national and regional courts. If it is shown that the judge’s association might affect his impartiality,

arms between parties as one of the facets of fair trial rights. See <<http://www.un.org/icty/tadic/appeal/judgement/index.htm>>

⁸² For example the *Delalic Case*, *infra* and *The Prosecutor v Issay Hassan Sesay* (SCSL-2003-05), decision of the Appeals Chamber of the Sierra Leone Special Court. *infra* n.182

⁸³ Identical Rule in the Rules of Procedure and Evidence at the ICTR.

⁸⁴ <http://www.un.org/icty/legaldoc/index.htm>

⁸⁵ *Gough supra* n.22

then the disqualification is automatic.⁸⁶ The association could be a present one or could be one which the judge had in the past, prior to his appointment to the Tribunals. It could be direct or indirect. Each case should be decided on its own facts and merits. The crux of the issue is that the association has to have an effect on his impartiality and consequently, a negative and adverse bearing on his outlook towards the case particularly against one of the parties in the proceedings.

A challenge based on *Rule 15(A)* was made against Judge Orić by the accused in the case of *The Prosecutor v Krajisnik* where the accused sought to disqualify the judge on the ground that he had an *association which might affect his impartiality*. Judge Orić was one of the defence counsel for Dusko Tadić whom the accused intended to call as a defence witness. The challenge was rightly dismissed.

Judge Liu held that

*It would be erroneous to assume from the outset that every possible association, however remote, between the Judge and the Accused or for that matter a witness or the facts relating to another case automatically qualifies as "an association" within the meaning of Rule 15. For there to exist a relevant association, in my view, the party challenging the Judge's impartiality must demonstrate that the Judge entertains a personal interest in or a particular concern for any of the Parties, the witnesses or the facts of the case. Such personal interest or particular concern is certainly different from any lawyer's professional interest in the subject-matter of the case."*⁸⁷

Applying the hypothetical reasonable/fair-minded observer test, Judge Liu held that there could be no reasonable apprehension of bias. This is the right approach, for first, when Judge Orić appeared for Tadić, it was in his

⁸⁶ 1 Morris and Scharf 156, *supra* Chapter One, n.2

⁸⁷ *Decision on the Defence Application for Withdrawal of a Judge from Trial* dated 22nd January 2003. See D Mundis and F.Gaynor *Current Developments at the ad hoc International Criminal Tribunals* (2003) 1 JICJ 703, 710,711

professional capacity. This is akin to prior activities of the international judges. A demarcation must be made between personal interest and professional interest. Whilst the former may attract claims of bias, the latter will not.

Procedurally, any party, whether it is the defence or the prosecution, who is concerned whether a particular judge could bring an open and unbiased mind to the case should apply to the Presiding Judge of the Chamber if they wish to seek the disqualification and withdrawal of that judge. The challenged judge shall be consulted, rightly so, since he should be given an opportunity to explain his position and if need be, dispel any notion of partiality. If the judge himself has any doubts as to his impartiality, he should consult other judges. However, the final decision whether he should disqualify himself lies within him. The self-disqualification is within his discretion and is not subject to review in the event of a finding of disqualification by his colleagues.⁸⁸ If neither the challenged judge nor the President can decide on the impartiality issue then the Bureau⁸⁹ of the Court will be asked to determine the issue. Should the Bureau uphold the objections, the challenged Judge will be disqualified and another judge will be assigned in his place.⁹⁰

If a judge finds himself in a situation where he has an interest or connection or association, he should not wait for a challenge from the defendant. The judge should reveal all material facts to the defendants, like what transpired in the **Allied Capital Case**.⁹¹ It should be up to the defendant whether he wishes the judge to hear his case. If the defendant knew of the judge's personal interest in that matter, he should challenge the judge's impartiality at the outset in order to save time and costs of proceeding with the case. It could also be argued that the defendant was hoping to pick and choose his

⁸⁸ *Ibid.* Cf to the practice at the ICC, where he could be accused of misconduct if he does not excuse himself. Rule 24 of the RPE of the ICC.

⁸⁹ The Bureau shall be composed of the President, the Vice-President and the Presiding Judges of all the Trial Chambers. Rule 23, Rules of Procedure and Evidence. Available at <<http://www.un.org/icty/legaldoc/index.htm>>

⁹⁰ Rule 15(B). *supra*, n.424

⁹¹ *Supra* n.60

decision.⁹² It is contended that regardless of the conduct of the defendant, the judge should recuse himself for the reasonable observer would come to the conclusion that the trial was not conducted impartially.

Where the judge sat as a trial judge, he is stopped from sitting as an appellate judge on the same case.⁹³ This is a logical application of the automatic disqualification rule as it would be a flagrant breach of principles of natural justice if the judge sits on an appeal against his own judgement. He is also disqualified from sitting as an appellate judge on matters relating to *Rule 108 bis*⁹⁴ where he sat as a trial judge.⁹⁵

Disqualification of a judge from hearing a case is not automatic where he had sat as a reviewing judge on the indictment of the accused.⁹⁶

This sub-Rule has been amended. The new amendment is not inspiring.⁹⁷ The original *Rule 15(C)* stated that the judge of a Trial Chamber who reviews an indictment against an accused pursuant to *Article 19* of the Statute and *Rule 47* of the RPE *shall not* sit as a member of the Trial Chamber of the trial of that accused.⁹⁸ The amended *Rule 15(C)* removes that bar and a reviewing judge is not disqualified from sitting in the trial proper or its appeal. This situation raises some concern to a lawyer trained and practising in an adversarial legal system. The duty of the reviewing judge under *Rule 47*⁹⁹ of the RPE is to examine all the facts and evidence that the Prosecutor presents before an

⁹² See *Furundzija* where the Appeals Chamber expressed their opinion that the appellant could have raised the matter of Judge Mumba's qualifications much earlier and that the Court could find the Appellant had waived his right to raise the matter and it could dismiss the appeal. *supra* n.81

⁹³ Rule 15(D)(i) *Ibid.* But see Rule 27, discussion *infra* 261.

⁹⁴ Rule 108 *bis* relates to requests by a State to review a decision that affects it.

⁹⁵ Rule 15(D)(ii), *Ibid*

⁹⁶ *Ibid.* Rule 15(B)

⁹⁷ The original Rule 15(C) disqualified a judge who had reviewed the indictment from sitting in the actual trial of the accused. Subsequently it was amended in July 1999 to disqualify the judge from sitting on the trial but did not disqualify him from sitting in the appeal chamber on the matter. It was amended again to remove all bars for a reviewing judge to sit either on the trial of the matter or its appeal.

⁹⁸ 1 Morris & Scharf, *supra* Chapter One n.2 156

⁹⁹ Rules of Procedure and Evidence available at <<http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev41eb.pdf>>

indictment is to be issued against an accused. The judge has to be satisfied that there is a *prima facie* case against the accused¹⁰⁰ in order to confirm the indictment prepared by the Prosecutor. Even though all he has to do is to decide on the matter only on a *prima facie* basis, he must have had formed some view on the guilt of the accused when he decides to confirm that indictment. Admittedly, it is a *prima facie* view but the impartiality may not be absolute as set out in *Pinochet*. This is analogous to the cases in the civil law systems that came under review by the *European Court*.¹⁰¹

The accused in the case of *The Prosecutor v Galic*¹⁰² filed a motion challenging the impartiality of one of the judges assigned to his case who had confirmed an indictment in a different case, which included supporting evidence that implicated Galic. Needless to say, that challenge failed. In dismissing the challenge, the Bureau held that the determination of the confirmation of the indictment was tentative and is an initial judgement based on relevant evidence. This, said the Bureau, does not demonstrate bias.¹⁰³

However, it is argued that the apprehension for bias in this type of situations is valid. The judge may have formed certain opinions on the case based on the information tendered at the indictment stage. He may have been privy to evidence that may be inadmissible at the trial proper. Finally, he may be tempted to convict the accused in order to validate his decision to issue the indictment in the first place. He may not change his view on the guilt of the accused for apprehension of proving that he was wrong in confirming the indictment. These are possibilities. It does not mean that they would actually occur, but possibilities exist to raise a perception of partiality. **Rule 15 (C)** is incompatible with judicial impartiality. It would be preferable if the indicting judge does not sit on the actual trial of the accused.

¹⁰⁰ Article 19 of the Statute of the ICTY. Article 18 of the Statute of the ICTR

¹⁰¹ Hauschildt *supra* n.15

¹⁰² Case No. IT-98-29-AR54. Bureau Decision *The Prosecutor v Galic, Decision on Galic's Application pursuant to Rule 15(B)* dated the 28th March 2003.

¹⁰³ *Ibid* Paragraph 1

It is just not the adversarial-trained lawyer who is concerned however. **Rule 15(C)** would also be unacceptable to a continental lawyer as the defence is not represented at the confirmation stage since this is an *ex parte* proceedings whereby only the Prosecutor appears. The judge may not be able to make an impartial assessment of the facts before him.¹⁰⁴Hence how assured will the accused be that the judge will bring an impartial mind to the trial? The old **Rule 15(C)** would have gone some way in assuring the independence and impartiality of the judges participating at every stage of the proceedings.¹⁰⁵ It is uncertain that a reasonable observer, properly informed, *would not* reasonably apprehend bias.

The provisions in the **Rome Statute** for the disqualification and excusal of a judge from sitting on a panel in a matter where his impartiality might be in doubt are comprehensive and are provided for in the Statute itself.¹⁰⁶**Article 41** of the **Rome Statute** allows for the voluntary disqualification of a judge by submitting his request to the President. Sub-article (2) forbids a judge from participating in any case where his impartiality might “*reasonably be doubted on any ground*”. (*emphasis added*) The Article envisages the objective aspect of the impartiality test being satisfied by proving reasonable doubt, as opposed to reasonable danger or reasonable apprehension. There are no restrictions on the grounds of justification as long as those grounds may be objectively proved. This is a catch-all provision.

The second limb on disqualification under **Article 41(2)** imposes automatic disqualification of judges where they have previously been involved in *any* capacity in relation to that particular case before the Court or where they have

¹⁰⁴ Megan Fairlie *The Marriage of Common and Continental Law at the ICTY and its progeny, Due Process Deficit* (2004) 4 ICL Rev 243, 313

¹⁰⁵ I Morris and Scharf, *supra* n.2, 155 Prologue. See also Fairlie *ibid* Zappala *supra* Chapter One n.4, 23 where the author argues that the amendment i.e. the new Rule 15(C) *implies that a judge who has full knowledge of the materials supporting the charges against the accused is allowed to be a member of the Trial Chamber.*

¹⁰⁶ Cf the *ad hoc* tribunals where the provisions relating to disqualification are contained in the Rules.

been acting in a related criminal case in a national jurisdiction. This Article will apply to situations where a judge had acted as counsel or the prosecutor in that particular matter in the national jurisdictions prior to his appointment. His impartiality might also be affected if he was not directly involved in that particular case but in a different case that was related to the one before the ICC. The circumstances need to be examined and several factors need to be looked into, such as the capacity of his involvement, the type of involvement, whether such involvement was direct or indirect and the degree of involvement. Once that subjective element has been proved, the next question to be examined is whether there is a reasonable doubt, proved objectively, as to his impartiality.

Article 41(2)(c) leaves the question of disqualification to be decided by an absolute majority of the judges and the challenged judge will be given an opportunity to present his case but shall not take part in reaching a decision as to his impartiality. This is also a preferable approach as his impartiality is decided by all of his colleagues and not just the three judges in the Presidency. Additional grounds of disqualification are set out in *Rule 34*¹⁰⁷ of the Rules of Procedure and Evidence. The scenarios elaborated in this Rule are examples and are not all-exhaustive. They are very wide and would be of assistance in resolving any doubt as to potential bias, including resolving any differences between what amounts to actual bias and apprehended bias.

A judge will be disqualified if he has a “personal interest” in the case. “Personal interest” in this context relates to relationships, which include personal relationships, professional relationships and subordinate relationships with any of the parties involved in the case.¹⁰⁸ The second ground envisages cases where a judge, prior to his appointment, had acted in a private capacity in any legal proceedings initiated prior to his involvement

¹⁰⁷ Rule 34 covers the disqualification of a judge, Prosecutor and a Deputy Prosecutor.

¹⁰⁸ Rule 34(1)(a). *Cf* the meaning of personal interest in the United Kingdom and the ICTY jurisprudence.

in the case or where he himself had initiated the legal proceedings where the person being investigated or prosecuted was an opposing party.

The third ground for disqualification of a judge is set out in *Rule 34(1) (c)*. A judge who had performed functions prior to his appointment during which he could have reasonably expected to form an opinion on the case or the parties or their legal representatives will be disqualified if his impartiality is objectively and adversely affected.

The sub-rule will cover situations where the judge was involved in functions which may have elicited an opinion from him on a particular case. A situation where the judge had issued a legal opinion on a matter that subsequently comes up for hearing before him would attract *Rule 34(1) (c)*. Another situation where a judge was actively involved as a result of his membership of an organisation for example could very well affect his impartiality. Another example by analogy would be members of the Commission of Experts on Yugoslavia, whose involvement may give rise to the perception that it was reasonably expected for the members to form an opinion that may adversely affect their impartiality.

The sub-rule will also cover situations where the judges who prior to their appointment acted as diplomats or legal advisors to their States on matters that they were subsequently designated to hear. The essential elements are (i) prior to taking office (ii) performance of functions (c) an opinion that could have been expected to be formed (iv) which objectively affects his impartiality adversely.

Rule 34(1) (d) disqualifies a judge when he had expressed opinions, through the media,¹⁰⁹ either via publications or broadcasts, openly and publicly that

¹⁰⁹ A judge of the ICJ who has committed himself to an opinion in a treatise or an article on the pending matter would be subject to disqualification under Article 17(2). See W. Reisman :*Revision of*

could adversely affect his impartiality adversely. The connection between the publication and the impartiality is to be gauged objectively in deciding whether the former has affected the latter. The provision covers situations prior to his appointment as well as his tenure as a judge. If a judge, prior to his appointment, had published articles expressing opinions on legal issues and not merely on the guilt of the accused (particularly if the accused had been a major political figure), how would his impartiality be gauged?¹¹⁰ The provision could also entrap lawyers who had delivered lectures or present papers or written books on subjects that subsequently come before him adjudication.¹¹¹ The test applicable would be the general test of impartiality that has been applied by the *European Convention* and the *ICTY* in their jurisprudence by embracing both the subjective and the objective aspects.

4.5.2 CASE-LAW AT THE INTERNATIONAL TRIBUNALS

Furundzija is a significant decision on impartiality of a judge at the international criminal court. The case is an important one for its exposition of the concepts of independence and impartiality, including a discussion on various jurisprudence on those standards such as the genesis, evolution and application of those standards in the international legal arena and the effect of those concepts on the international *ad hoc* tribunals. Its judgement is authoritative on the concepts of judicial independence and impartiality in the international criminal proceedings and has been applied to other cases in the international criminal proceedings.¹¹²

the South West Africa Cases: An Analysis of the Grounds of Nullity in the Decision of July 18th 1966 and Methods of Revision Va. J.Int'l Law (1966) 7 41, 53

¹¹⁰ Former President Cassese and the current President Meron are two distinguished academics in international criminal law and have published numerous books and articles.

¹¹¹ See the case of Judge Geoffrey Robertson in the *Sesay* case, *infra* n.182.

¹¹² See for example the decision of the Special Court in *The Prosecutor v Issay Hassan Sesay* *infra*, n.182

There were two decisions of the Bureau of the ICTY that dealt with the issue of impartiality of the judges. Both of them challenged the impartiality of Judge Elizabeth Odio -Benito of Costa Rica.

i) **DECISION OF THE BUREAU ON MOTION ON JUDICIAL INDEPENDENCE**¹¹³

The accused in the case of *The Prosecutor v Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic and Esad Landzo (also known as Zenga)* ("the Celebici case") filed a motion challenging the individual independence and impartiality of Judge Odio-Benito. This was one case where both concepts were inter-related. The accused filed a motion under *Rule 15(B)*.¹¹⁴ *Rule 15(B)* insofar as relevant, states that any party may apply for a judge to be disqualified from the trial on the grounds set out in sub-rule (A). The application was made to presiding Judge who then referred the matter to the Bureau of the Tribunal.

The accused requested that Judge Odio-Benito cease to take any further part in the proceedings before the court. There were two grounds on which the applicants sought disqualification. The first ground was that the judge had ceased to meet the qualifications for a judge of the ICTY by virtue of her taking oath as a Vice-President of the Republic of Costa Rica. The second ground for seeking disqualification was that by becoming a member of the Executive branch of the Government of the Republic of Costa Rica, "*the Judge had ceased to possess the criteria required for independent (sic) judge in international law and has acquired an association which may affect her impartiality*"¹¹⁵ The

¹¹³ IT-96-21-T, *Decision of the Bureau dated 4th September 1998*, Judicial Supplement No.1, 15-11-99, page 4. The decision of the Bureau can be found in full at <<http://www.un.org/icty/ind-e.htm>> under the heading : "Delalic *et al.* (IT-96-21) "Celebici"

¹¹⁴ Rules of Procedure and Evidence, *supra* n.98

¹¹⁵ Decision, *supra*, n.113 paragraphs 1,2.

accused alleged that the Judge was no longer independent when she became a member of the Executive which in turn had an adverse effect on her impartiality. The argument adopted by the accused was rather convoluted. They argued that since the judge had assumed that position of the Vice-President, the qualification requirement in *Article 13*, that a judge of the Tribunal must be someone who would have held the highest judicial office in the national legal system of her country.¹¹⁶ By becoming a politician, she was no longer a high judicial officer in her country and as such, the requirements of impartiality and possession of the qualifications for appointment to the highest judicial offices in Costa Rica have not been met.¹¹⁷

The facts and the chronology of events are germane to the issue of impartiality of the judge in this instant. Judge Odio Benito was elected as a judge of the ICTY on 17th September 1993. She took up office in November 1993 and her term of office for four years was due to end in November 1997. She was not re-elected. This would have meant that her term of office would have expired whilst she was still hearing the *Celibici* case. By *Resolution 1126 (1997)*, the Security Council extended Judge Odio Benito's term of office together with the terms of the office of the other judges sitting on the *Celibici* case, so that they could complete the hearing.¹¹⁸

Whilst the case was still pending, Judge Odio-Benito was elected as one of two Vice-Presidents of the Republic of Costa Rica on 1st February 1998 and on 8 May 1998 she took the oath of office as the Second Vice-President. Certain facts are relevant as they would assist in deciding her impartiality as a judge. First, before seeking nomination of the position of the Vice-President of her country,¹¹⁹ the judge had written to the then President of the Tribunal, Judge

¹¹⁶*Ibid* Paragraph II.I

¹¹⁷*Ibid*

¹¹⁸*Ibid* 1.1

¹¹⁹*Article 131(2)* of the Constitution of Costa Rica bars judges of the Supreme Court of Costa Rica from seeking the post of President and Vice-President. This is in line with the doctrine of separation of powers and reinforces the maxim that there should be no overlap between political and judicial

Antonio Cassese, informing of her intention to do so. The issue was discussed by the judges at a plenary meeting where the letter was submitted.¹²⁰ Judge Odio Benito assured the plenary that until she completed her duties as a judge hearing the *Celibicicase*, she would not assume any of the political functions that the position of the Vice-President of the Republic of the Costa Rica entailed. Her letter was supported by a letter from the President of the Republic of Costa Rica, who also made the same assurance to the Tribunal. It was apparent that the judge was taking extra steps to ensure the Bureau of her impartiality. The Plenary unanimously decided that, given the express undertaking by the judge, such action would not be incompatible with her duties as a Judge of the Tribunal. Certain State systems forbid a judge assuming the position of a politician as this would be contrary to the doctrine of separation of powers and would have adverse implications to his or her judicial independence and impartiality. However, there were express guarantees from both the impugned judge as well as her Government that the two positions would not be in conflict as the judge would not assume her political office until her judicial duties were complete. Judge Odio Benito again took steps to safeguard her position by sending another letter to the President assuring him the same after she was elected. Again this matter was discussed at a plenary meeting and approval was given to her taking the oath of office.¹²¹

The independence and the impartiality of Judge Odio-Benito were addressed thus. The Bureau referred to the jurisprudence of the *European Court* on these issues under *Article 6(1)*. It applied the two-pronged test espoused in the *Hauschildt*¹²²Case. The subjective prong is the personal conviction of the judge whereas the objective approach is whether the judge has offered

functions. It is meant to apply to serving judges and those who had been a judge 12 months prior to the proposed candidacy. The Constitution of Costa Rica is available at

< <http://sanjose.usembassy.gov/engcons9.htm>>

¹²⁰ *Decision, supra* n.113 l.1

¹²¹ *Ibid*

¹²² *supra* n.15

sufficient guarantees to exclude “legitimate doubt” as to his impartiality.¹²³ In assessing the objective approach, the court must assess relevant circumstances that may give rise to an “appearance of partiality”. A legitimate reason to fear that there is a lack of impartiality means that the judge has to withdraw from the case.¹²⁴ The burden is on the judge to show objectively that he is impartial.¹²⁵ It is a rather high burden as the judge must show that there is no legitimate reason to fear a lack of impartiality. In other words, if there is an iota of evidence that shows there *may be* impartiality on the part of the judge, then he has to recuse himself.¹²⁶

The determination of the lack of independence varies from case to case. It is a question of fact to be decided on the circumstances peculiar to the case in hand. The Bureau examined the facts surrounding this case and came to the conclusion to the conclusion that there was no incompatibility of functions between Judge Odio Benito’s office as the Vice-President of the Republic of Costa Rica and her position a judge of the International Tribunal.¹²⁷ The mere fact that a person who exercises judicial functions is in another capacity subject to executive supervision, is not by itself enough to impair judicial independence. *There must be a link between the executive control and the judicial functions to raise a doubt as to the independence of the judge.* In any event, the Bureau dispelled any notion of incompatibility of functions as Judge Odio-Benito was not exercising any political or administrative function.

In this case, the objective test had been satisfied by the judge offering guarantees as to her independence. This conclusion is backed by the facts that she adduced, including getting approval of the Plenary before she was even

¹²³ The test was discussed in detail by the Appeals Chamber in *Furundzija* see below.

¹²⁴ *Supra Decision*, n.108 II.2. In this case, the independence and impartiality of the judge is linked. The Bureau applied the test in *Campbell v Fell*, *supra* Chapter 3 n.200.

¹²⁵ “Legitimate doubt” appears to be at variance with the “real suspicion” or “real possibility” tests.

¹²⁶ In reality however, with the exception of Judge Robertson, none of the challenges of the accused to the independence and impartiality of the judges succeeded. There have been cases where judges had recused themselves but these recusals took place before any challenge was made.

¹²⁷ The Bureau was referred to Article 16(1) of the Statute of the International Court of Justice which provides that “No Member of the Court may exercise any political or administrative function” *Ibid*

nominated for the position of a Vice-President and referring to the Plenary frequently to ensure that her colleagues were aware of developments.

The applicants argued further that the impartiality of Judge Odio Benito was affected by the fact that Republic of Costa Rica was, at the time the application was made, a member of the Security Council, the body that created the Tribunal.¹²⁸ The applicants argued that the Security Council has the power to alter the Statute of the Tribunal and it had done so in increasing the number of judges. They argued further that the Security Council had also extended the term of Judge Odio Benito to complete the hearing of the *Celibici* case. They urged the Bureau to take all these facts into consideration and conclude that the judge was not impartial. However, this fact is irrelevant as the extension of her term was not affected in a prejudicial manner by the membership of the Republic of Costa Rica in a non-permanent capacity of the Security Council. The Republic of Costa Rica was a member of the Security Council from 1st January 1997. The judge's term was extended on the 22nd of August 1997, before she was elected as a Vice-President which was on the 1st of February 1998.¹²⁹

The Bureau therefore did not find any reason to disqualify the judge especially since the judge had assured the Bureau that she would not assume the position of the Vice-President of the Republic of Costa Rica until the completion of her judicial duties.

Whilst there was a nexus between the judge and the Security Council, it was a tenuous link that could not sustain the argument that there is a reasonable apprehension or a legitimate doubt that the judge may be biased. The approach of the Bureau might have been different had the judge, prior to her appointment, was acting as legal counsel or a diplomat for her country in the

¹²⁸ *Decision, supra* n. 108

¹²⁹ *Ibid*

Security Council especially on matters relating to the establishment of the Tribunal. The decision of the Plenary also may have been different had the judge sought re-election and was successful. In such circumstances, the two positions held by Judge Odio Benito would have been inferred as incompatible, since a politician holding judicial office *contemporaneously* goes against the grain of the doctrine of judicial independence. As a politician, she may be put in a position where she has to offer opinions and act in official capacity which may then taint her office as an international judge. The Bureau was reassured by the guarantees of the judge and hence dismissed the claims by the accused that the judge was not independent or impartial. It found that the judge was not disqualified from hearing the case.

The application of the legal principles relating to the concepts of judicial independence and impartiality to this case are straightforward. On the facts of the case, the Bureau would have been hard-pressed to find the judge not independent or impartial. Indeed, here the challenges were spurious.

ii) DECISION OF THE BUREAU ON MOTION TO DISQUALIFY JUDGES PURSUANT TO RULE 15 OR IN THE ALTERNATIVE CERTAIN JUDGES RECUSE THEMSELVES¹³⁰

The accused¹³¹ filed another motion under *Rule 15* by which they requested for disqualification or recusal of all Judges who had participated in the Plenary sessions¹³² which had found Judge Odio Benito's nomination and subsequent election as Vice-President of Costa Rica was not incompatible with her service as a Judge of the Tribunal from sitting on their appeal against conviction. The Appellants were appealing against the decision of the Bureau

¹³⁰ Dated 25th October 1999. Available at <<http://www.un.org/icty/ind-e.htm>>*Delalic et al. (IT-96-21) "Celebici"*: Cited under Decisions of the Appeals Chamber.

¹³¹ With the exception of the defendant Delalic, *Ibid*, paragraph 1.1

¹³² *Decision supra* n.129

of 4th September 1998 that had ruled Judge Odio Benito was not disqualified from sitting on their trial. The judges who would have been affected by this motion were three of the judges of the Appeals Chamber sitting on their appeal, namely Judge Riad, Judge Wang and Judge Nieto-Navia.¹³³ The accused alleged that the judges had pre-judged an issue which was to be raised in their appeal. (Theoretically however, there was no guarantee that the judges who would have replaced the impugned judges would not have faced the same challenge.)

The accused alleged that the three judges in question had participated in the deliberations and decided on the issue of the Judge's impartiality as a judge vis-à-vis her position as the Vice-President of the Republic of Costa Rica. The judges concerned had pre-judged an issue which the accused were raising in appeal. The accused argued:

*“That taken together, Rules 15(A), 15(C) and 15(D) suggest that a judge who has already expressed an opinion on a case or who has taken part in a portion of a case cannot sit on a subsequent part, on the grounds that his or her fairness and impartiality could otherwise reasonably be questioned”*¹³⁴

In dismissing the Motion of the Appellants, the Bureau held that a distinction must be drawn between the requirements for a judicial office¹³⁵ at the Tribunal which then is linked to conduct and situations that are incompatible with the discharge of judicial functions and secondly, the question of grounds of disqualification of a judge from sitting in a particular case.¹³⁶ Whilst the former is a general premise on the qualifications of candidates appointed to the international bench, the latter relates to the position of a judge vis-à-vis a particular case. He could be a qualified judge under *Article 13* but be

¹³³ *Ibid*, paragraph 11

¹³⁴ *Decision, supra* n.125 paragraph 2 iii

¹³⁵ Article 13(1) of the Statute, labelled as “positive requirements” *ibid* paragraph 7

¹³⁶ *Ibid*, paragraph 6

disqualified from sitting on a particular case if he is in breach of the provisions of **Rule 15**.

Article 13(4) provides, *inter alia*, that the terms and conditions of service of the judges at the ICTY shall be the same as that of the judges at the International Court of Justice. Based on that indirect reference, the Bureau then referred to **Article 16** of the *Statute of the International Court of Justice*, insofar as relevant states as follows:

*“(1) No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature”*¹³⁷

The prohibition in the Statute is straightforward. There are no exceptions and as it is an outright bar against the overlap between political and administrative functions.

The objections of the appellants to Judge Odio-Benito was analogous to the embargo proviso of **Article 16** of the *Statute of the ICJ* and that falls under the purview of the Judges to consider as it is an administrative matter. However where the matter falls under **Rule 15**, it becomes a judicial matter.

The distinction between the administrative and judicial functions¹³⁸ exercised by the judge was stated to be thus:

“The two issues set out so far are different. The first issue relates to the question of whether or not a Judge possesses all the necessary requirements for serving as a Judge of the Tribunal. This is a matter of an administrative nature, internal to the Tribunal. It can only be settled by the relevant bodies of the Tribunal. If these bodies are satisfied that the Judge does not fulfil one of the requisite conditions, for instance because he or she has engaged in political or administrative functions incompatible with the judicial

¹³⁷ *Ibid*, paragraph 7. These are the “negative requirements”.

¹³⁸ Distinction between Article 13 of the Statute and Rule 15 of the RPE.

*function, the Judge is duty bound either to abandon those incompatible functions or to resign from the position of Judge.”*¹³⁹

This part of the judgment seems to suggest that it is the Judge himself or herself who has the responsibility to decide that he is disqualified from sitting by virtue of the incompatibility of functions principle. He should decide which office he would want to occupy and abandon the other.

“By contrast, the other issue is a judicial matter, which may be raised not only by the Judge concerned but also by any party to the proceedings before a Trial Chamber or the Appeals Chamber. It relates to the right of a Judge to sit in a specific case. If the Judge does not fulfil the requirements referred to in Rule 15(B), he or she is disqualified from hearing that particular case, although he or she is fully entitled to continue to exercise the functions of a Judge of the Tribunal and sit in other cases.” ¹⁴⁰

There are situations when these two issues of general disqualifications and specific disqualifications overlap. The overlap may arise if a Judge sitting in a particular case had engaged in political, administrative or professional activities which then resulted in the consequence that this Judge has a "personal interest" in the case or has some "association" with the case causing the Judge to be biased and hence to lack the required impartiality¹⁴¹. This would cover situations like the Zafrullah Khan case¹⁴²; the test for impartiality has to be fulfilled before a certain judge could be said to lack impartiality because of his prior involvement.

The Bureau found that in this case, President Cassese had discussed the matter with Judge Odio Benito and had dealt with the matter administratively. Again the decisions reached by the Plenary on the Odio Benito matter were considered to be administrative decisions. In dismissing the application, the

¹³⁹Decision, *supra* n.129, paragraph 9

¹⁴⁰*Ibid*

¹⁴¹*Ibid*

¹⁴²Text, *infra* 250

Bureau held that the judges were deciding on an administrative matter and said that the appellants in particular had failed to show that Judges Riad, Wang and Nieto-Navia had a personal interest in the question of whether Judge Odio Benito was entitled to sit in the *Celibici* Case or that they have any associations with this question which might affect their impartiality.

The Bureau held that the onus of proof was on the party alleging incompatibility and that he must prove that the alleged incompatibilities were to such a degree that there was a lack of impartiality in this particular case. It would not be sufficient for that party to allege that the impugned judge is exercising a political, administrative or professional function which is incompatible with his judicial functions. The applicant must show that the act complained of had a “*direct and specific impact*” upon the impartiality of a Judge in a particular case before a Chamber for it to consider the disqualification aspect.¹⁴³

It is suggested that whilst the distinction between the judicial and administrative, political and professional activities is a pertinent one, it is unnecessary to make a distinction of who should decide these issues. The ultimate concern should be whether the reasonable observer would reasonably apprehend that that particular judge is biased in the circumstances. The demarcation suggested by the Bureau is tedious. The requirement that the appellant need to show a “*direct and specific impact*” also seems to be different from the impartiality test. Admittedly, the “*impact*” aspect is to be determined before the disqualification aspect but there should not be any necessity for such a process in view of the *Furundzija* test.

The Bureau dismissed the application by the defendants.

¹⁴³*Decision supra* n.125 paragraph 10

However, as the judges had decided at the plenary sessions that Judge Odio Benito's appointment as the Vice-President is not incompatible with her position as a judge, it would be highly unlikely that they would change their minds at the full hearing of the motion. The issue was pre-judged at the Plenary hearing and the application by the Appellants was dismissed on the ground that it did not relate to the disqualification issue. Moreover the sitting judges had the decision on the independence of Judge Odio Benito made for them at the plenary sessions.¹⁴⁴ The fact that both the presidents of the court who dealt with the Odio Benito letters were also involved in the cases involving the Motions for disqualifications is a relevant consideration in this aspect.

4.5.2.b THE PROSECUTOR v ANTO FURUNDZIJA¹⁴⁵

The facts of the case need to be examined in order to relate to the principles involved in the test expounded by the court. The accused, Anto Furundzija was charged with several offences under the Statute of the ICTY. One of the offences he was charged with was violation of the laws or customs of war under *Article 3* of the *Statute of the ICTY* relating to outrages upon personal dignity including rape.¹⁴⁶ The accused was found guilty and sentenced to imprisonment.¹⁴⁷ The accused appealed against his conviction and sentence. He submitted five grounds of appeal. One of those grounds was against the decision on his challenge to impartiality of Judge Florence Mumba, one of the judges in the Trial Chamber who heard his case. The accused argued that she should have been disqualified under the second limb of the partiality provisions in *Rule 15(A)*. He submitted that Judge Mumba was not impartial and that by applying the objective test for impartiality that is "*whether a*

¹⁴⁴ No such problem will arise at the ICC since Article 41 and Rule 34 contain stringent provisions as to the qualifications of the judges.

¹⁴⁵ *supra* n.16

¹⁴⁶ Judgement, *Ibid* paragraph 1

¹⁴⁷ *Ibid*, paragraph 13

reasonable member of the public, knowing all of the facts would come to the conclusion that Judge Mumba has or had any associations, which might affect her impartiality”.¹⁴⁸

The grievance of the appellant was based on Judge Mumba’s activities, as a representative of Zambia. She was a member of the United Nations Commission on the Status of Women (“UNCSW”) *prior* to her appointment to the ICTY.

However, amongst the concerns of the UNCSW, which was explored during Judge Mumba’s membership therein was the war in the former Yugoslavia and the allegations of mass and systematic rape. Several resolutions were passed condemning the commission of these offences and urging the ICTY to give priority to the prosecution of the alleged offenders. This issue was again discussed at the UN Fourth World Conference on Women that was held in Beijing, China in 1995 and was identified as a critical area of concern in a document drafted by the participants called “Platform For Action”.¹⁴⁹ Three of the authors of the *amicus curiae* filed in court on this matter, as well as one of the Prosecutors of the trial attended a post-Beijing meeting of the Expert Group Meeting in Canada in 1997. Two points of note here are first, that Judge Mumba was appointed to the ICTY in May 1997. The Appeals Chamber made a finding of fact that she was no longer a member of the UNCSW by this time. The Appeal Chamber also found that she was not a member of the UNCSW whilst she was a serving judge of the ICTY.¹⁵⁰ The second point that is of relevance is that although the prosecutor concerned and the three authors of the *amicus curiae* were at the Meeting, Judge Mumba did not participate in that gathering.¹⁵¹

¹⁴⁸*ibid*, paragraph 169

¹⁴⁹ *Supra* n.16 Paragraphs 166-167. The UNSW was very involved in the Convention on the Elimination of all forms of Discrimination against Women. (CEDAW)

¹⁵⁰*Ibid* paragraph 166

¹⁵¹ An examination of the report of the Experts Group Meeting does not reveal Judge Mumba’s participation. See:

<<http://www.un.org/documents/ecosoc/cn6/armedcon/egmgbp1997-rep.htm>>

There was no evidence to show that there was a direct and significant link between Judge Mumba and the prosecutor and the authors of the *amicus curiae* other than the fact that they were involved in the same organisation. Even then, that involvement was not contemporaneous. These factors are important, for these are the considerations that a reasonable observer should take account into when deciding on the impartiality issue.

The impartiality of Judge Mumba was challenged on two grounds.

First, that by reason of her participation in UNCSW, she had helped to “advance a legal or political agenda which she helped to create whilst a member of the UNSW”¹⁵² This is the “personal convictions” factor. The second issue is the alleged relationship between the judge, the prosecutor and the authors of the *amicus curiae*. There is an appearance of bias if it is shown that the nexus of the relationship is so close and proximate that it would lead a reasonable fair-minded observer to reasonably apprehend bias.

The Appeals Chamber, having referred to *Article 13*, then determined the manner in which the requirement of impartiality should be interpreted and then applied to the circumstances of the case.

In advocating the test for impartiality for international judges, the Appeals Chamber did do no more than apply the provisions in the decisions of the European Court of Human Rights. It adopted the same two-prong approach of that Court, i.e. the subjective and objective tests.

“The existence of impartiality for the purposes of Article 6(1)¹⁵³ 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

See also Judgement, *Ibid* paragraph 194

¹⁵² *Supra* Chapter 3, n.21169

¹⁵³ of the *European Convention*

*ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect."*¹⁵⁴

After discussing various judgements from different jurisdictions¹⁵⁵ on this issue, the Appeals Chamber concluded that where a judge is exercising his judicial functions, the general rule is that he should be subjectively free from bias but also objectively there should not be surrounding circumstances that give an *appearance of bias*.¹⁵⁶

The approach advocated and adopted by the Court was as follows:

"A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

- i) a Judge is a *party* to the case, or has a *financial or proprietary interest* in the outcome of a case, or if the Judge's decision will lead to *the promotion of a cause in which he or she is involved, together with one of the parties*.¹⁵⁷ Under these circumstances, a Judge's disqualification from the case is automatic; or
- ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias. "¹⁵⁸(*emphasis added*)

The approach appears rather a straightforward one. If there is a perception that there is actual bias on the part of the judge, he is automatically disqualified. There is also an assumption of automatic disqualification if he is

¹⁵⁴ *Piersack supra* n.5 para. 30. The test was subsequently confirmed and applied in cases such as *De Cubber v. Belgium*, Judgment of 26 October 1984, Eur. Ct. H. R., Series A, No.86 ("*De Cubber*"), para. 24; *Hauschildt* n.15, para. 46 and other decisions.

¹⁵⁵ Judgment *supra* n.97, paragraphs 184-187

¹⁵⁶ *Ibid* paragraph 189

¹⁵⁷ Lord Hoffman in *Pinochet* would have been caught by this provisions.

¹⁵⁸ *Judgements supra* n.81 Paragraph 189

either a party to the proceedings or has a financial or proprietary interest in the outcome of the case. As this goes against the principle *nemo iudex in sua causa*, only automatic disqualification will suffice.

Disqualification is also automatic if the judge's decision will promote a cause he is involved in *together with one of the parties*. This is rather niggling; for it seems to imply that there must be a direct link with one of the parties. Looking at this hypothetically, assuming that Judge Mumba is an active member of UNSW and had been actively promoting its cause, including delivering speeches whereby she condemns the perpetrators of the crime of rape in the Balkans conflict and expresses her determination to send them to imprisonment. If her impartiality is then challenged by the accused, does the accused alleging bias have to show that the judge has a connection with one of the parties? Again, examining this issue hypothetically, on the assumption that there were no *amici curiae* and the prosecution team did not include any counsel who was involved in UNSW or CEDAW¹⁵⁹, how is the accused going to prove that Judge Mumba was involved in promoting a cause together with one of the parties? If there is no party who is interested in the common cause with the impugned Judge, does this mean that the challenge would fail? It is argued that actual bias should be proven if the judge is interested in the promotion of a cause or linked to a party to the action, not both. In *Pinochet (No.2)*, the House of Lords found both these elements.¹⁶⁰ However, the absence of one of these elements does not necessarily mean absence of bias on the part of the judge. It is argued that involvement "together with a party" requirement is superfluous.

The reasonable observer has to be an informed person, who has knowledge of all relevant circumstances, including the established principle that judicial independence and impartiality are integral to the judicial office. He should

¹⁵⁹ It must be remembered that counsel had no link with the Judge in the first place.

¹⁶⁰ *supra* n.42

also bear in mind that judicial impartiality is one of the duties that the judges swear to uphold.¹⁶¹

The burden of proof is on the party alleging the bias of the judge. He should be able to adduce sufficient evidence to rebut the presumption of impartiality. The standard of proof is high. These principles are only to be expected as it would disrupt expeditious proceedings of trials if allegations of impartiality could be proven with ease. This in turn would be the danger of applications for disqualifications becoming endemic.

Views on the attributes of a reasonable observer are varied. Whilst the Appeals Chamber described him (or her) as an informed person, with knowledge of all the relevant circumstances including the requirements of independence and impartiality, the Bureau said that the test to be applied is that of reaction of a “fair-minded person with sufficient knowledge of the actual circumstances to make a reasoned judgement”¹⁶² It is submitted that the former definition is preferable as the reasonable person should take into cognisance the importance of the concepts of judicial independence and impartiality for the observation of due process of law.

Since the Appellant specifically stated that they do not allege actual bias¹⁶³ on the part of Judge Mumba, the Appeals Chamber then turned on the question as to whether Judge Mumba was a party to the cause or had a “disqualifying interest”.¹⁶⁴

The Appeals Chamber assessed the facts in Judge Mumba’s case and held that the Appellant’s allegations did not have any merit. First, a comparison was

¹⁶¹ *Ibid* paragraph 190

¹⁶² *The Prosecutor v Radoslav Brdanin and Momir Talic* (IT Case 99-36/1) <<http://www.un.org/icty/brdjanin/trialc/decision-e/00518DQ212937.htm>>. For a discussion on the decision of the Bureau, see *infra* text

¹⁶³ Judgement *supra* n.21, Chapter One, paragraph 180

¹⁶⁴ *Ibid*

made with the position of Lord Hoffman in *Pinochet*. The main difference was that Judge Mumba's activities were not contemporaneous with the trial of the Appellant. Secondly, unlike Lord Hoffman and the Amnesty International, there is no link between the judge and the members of the prosecuting team as well as the *amicus curiae* in this present case. The link alleged by the Appellant was tenuous as he could not prove any connection between the other parties other than the fact that all four of them at one point or another were members of the same United Nations group.

The separate declaration of Judge Shahabuddeen¹⁶⁵ in *Furundzija* is relevant insofar as the judgement relates to the reasonable fair-minded observer in assessing judicial impartiality. The observer was given preference over the court as the assessor of impartiality as:

*"The litmus test of what is acceptable and what is not is the need to maintain public confidence in the integrity of the system under which justice is administered"*¹⁶⁶

Since public confidence is vital, the perception of a member of public, having all the characteristics ascribed to him by the Appeals Chamber is paramount in deciding whether the impugned judge was impartial or not. In his opinion, therefore, the test is interpreted as "to ask whether a fair-minded and informed member of the public would reasonably apprehend bias in all the circumstances of the case." Applying that principle to the circumstances and evidence in the particular case, the judge found that "the evidence in this matter returns a negative answer."¹⁶⁷

¹⁶⁵ Available at <<http://www.un.org/icty/furundzi.../fur-asojsha000721-e.ht>>

¹⁶⁶ *Ibid* paragraph 14. See also Rule 15(B) of the RPE.

¹⁶⁷ *Ibid* paragraph 15

4.5.2. c POST-FURUNDZIJA

i. THE PROSECUTOR V BRDNANIN and TALIC

In the case of *The Prosecutor v Radoslav Brdjanin and Momir Talic* (Case No. IT-99-36-PT)¹⁶⁸, the Bureau was again presented with a motion seeking the disqualification or recusal of Judge Mumba from both the trial proceedings and the determination of a preliminary issue at the Trial Chamber. The accused claimed that one of the issues that to be determined at his trial had already been determined by the Appeals Chamber in the *Tadic Conviction* decision. The accused claimed that as the judge had sat in the Appeals Chamber in that case and decided the issue in favour of the Prosecution, it would be difficult to see how she could change her opinion. He argued that by virtue of the second limb of *Rule 15(A)* the Judge had already formed an association which might affect her impartiality.¹⁶⁹

Judge Hunt dismissed the motion by the accused on the grounds that the opinion of the hypothetical fair-minded observer with sufficient knowledge of the actual circumstances to make a reasonable judgement would not have apprehended bias.¹⁷⁰

It would be difficult for the accused to prove bias based on this ground. Judges sit on various trials every day. The fact that ICTY is a specialised judicial institution with a small number of judges would give rise to judges sitting on matters where similar facts and points of law emerge. That does not necessarily mean that the judge is biased for each case is decided on its facts.

¹⁶⁸ Decision On Application by Momir Talic for the Disqualification And Withdrawal Of A Judge dated 18th May 2000<<http://www.un.org/icty/Supplement/supp15-e/brdjaninb.htm>.> Also see <<http://www.un.org/icty/brdjanin/trialc/decision-e/00518DQ212937.htm>>

¹⁶⁹ Decision, *supra* n.153, paragraph 1

¹⁷⁰ *Ibid* paragraph 14.

As the Appeals Chamber said in *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v the Prosecutor*¹⁷¹

“The Appeals Chamber recalls the Judges of this Tribunal and those of the ICTY are sometimes involved in several trials which, by their very nature, cover issues that overlap. It is assumed, in the absence of evidence to the contrary, that, by virtue of their training and experience, the Judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in that particular case. The Appeals Chamber agrees with the ICTY Bureau that “a judge is not disqualified from hearing two or more criminal trials arising out of the same series of events, where he is exposed to evidence relating to these events in both cases.”¹⁷²

If the accused in *Bradnin and Talic* were able to produce writings or tangible evidence of the impugned judge’s stand on the issues that were in contention at his trial, the challenge might have succeeded. However, mere allegation of lack of partiality was not enough. It appears that most of the challenges against the impartiality of the judges were based on flimsy grounds.

ii. DELALIC (THE APPEAL CHAMBERS DECISION)

The Appellants appealed on the ruling by the Bureau on the impartiality issue in their substantive appeal on the merits and judgement of their case.¹⁷³ Much of what was stated by the Bureau was repeated in the judgement of the Appeal Chamber. The Appeals Chamber held that *Article 13* contained essential qualifications which are applicable to all judges appointed to the Tribunal. These essential qualifications relate to character, which includes impartiality and integrity, to legal skills and expertise which is required for the appointment to the highest judicial office and experience in relation to the

¹⁷¹ Case No. ICTR-99-52-A

¹⁷² *Ibid* Paragraph 78.

¹⁷³ Available at <<http://www.un.org/icty/celebici/appeal/judgement/index.htm>> *Decision* dated 20th February 2001

laws that fall within the scope of jurisdiction of the Tribunal. The latter encompasses criminal law, international law, international humanitarian law and human rights law.¹⁷⁴

Insofar as the independence of the judge was concerned, the Appeal Chambers followed its earlier decision in the *Furundzija* case and held that *Rule 15(A)* encompassed circumstances establishing actual as well as an appearance or a reasonable apprehension of bias. Applying the test it had formulated in the *Furundzija* case, the Appeals Chamber dismissed the challenge by the Appellants.

The main reason for dismissing the appeal was that the factual situation before the Court did not fall within the traditional concept of the doctrine of separation of powers. That doctrine applies to the branches of Government within the same political sphere to ensure that the powers and duties of those branches remain separate and independent of each other. The purpose was to avoid conflict of interests between the organs. Here, as the organs in question arose in different systems – the national system and the international system, the potential for conflict has been “greatly reduced”.¹⁷⁵

The potential for conflict between the judicial and the political functions may be reduced but its existence is still there. If “different spheres” requirement is all that the ICTY need to concern itself in gauging whether there is a conflict of interest, then there is no need for disqualification of judges on grounds of their prior activities or association, since potentially these aspects to their independence arise in different political systems. The same argument could apply and many more nominees would qualify for appointment to the Tribunals on the ground that the potential for conflict of interest has been greatly reduced.¹⁷⁶

¹⁷⁴*Ibid* Paragraph 659

¹⁷⁵ This argument could be applied to the Judge Odio-Benito scenario.

¹⁷⁶ *Decision supra* n.172 Paragraph 690

In the course of their submissions, the Appellants argued that the Security Council “administers” the Tribunal so that it could affect the judicial decisions of the Court. The first premise is not accurate for the administration of the Tribunal is within its own hands and is accountable *both* to the Security Council and the General Assembly overall.¹⁷⁷ Inherent in this argument is that the Court is dependent on the Security Council, hence affecting its judicial independence and impartiality. The Appeal Chamber’s short answer to that was that the submission was fanciful and dismissed the overall challenge to the judicial independence of Judge Odio Benito.¹⁷⁸ The Appeals Chamber held that it was not satisfied that the fair-minded observer would in all those circumstances have reasonable grounds for thinking that Judge Odio Benito was neither impartial nor independent.

A second ground of challenge on Judge Odio Benito was that during the course of her position as a judge of the ICTY and sitting on the *Celibici* trial, she also served as a trustee of the United Nations Voluntary Fund for Victims of Torture (“Victims of Torture Fund”). As such she was automatically disqualified from sitting as a judge in the Appellants’ case.

Aside from the automatic disqualification issue, the Appellants also alleged that the Judge was disqualified by virtue of the fact that she had an undisclosed affiliation which could have cast doubts on her impartiality and which might affect her impartiality adversely. Further it was argued that by virtue of non-disclosure of that fact by the judge and her failure to obtain the consent of the defence counsel, she should have been automatically disqualified from participating in the proceedings.¹⁷⁹

¹⁷⁷ Article 34 of the Statute of the ICTY obligates the ICTY to submit Annual Reports to the General Assembly and the Security Council.

¹⁷⁸ *Decision supra* n.172 Paragraph 691(a)

¹⁷⁹ *ibid* Paragraph 695.

The Odio Benito scenario is similar to the situation involving Lord Hoffman in the *Pinochet* case as their involvement in the respective institutions were contemporaneous with their holding of judicial office. However, whilst the institution in which Hoffman was involved in was a party, albeit indirectly, to the proceedings, there was no such role for the Victims of Torture Fund in the *Celibici* case. There is another ground on which a finding of partiality *may be* made. This is the “personal interest” aspect, that the judge was personally interested in the outcome of the trial and was therefore biased against the accused.

The Appeal Chamber considered that the decision of the House of Lords in *Pinochet* was a national court decision which did not “constitute any kind of definitive code for matters arising in the unique context of this International Tribunal”¹⁸⁰ Whilst it should be expected that an international tribunal is not bound by nor should it consider itself bound by decisions of national courts, one would expect greater weight be given to decisions of superior courts. In any event, the *Pinochet* case could and indeed was distinguished on the links between the impugned judges and the organisations they were committed to. The Victims of Torture Fund did not participate in the *Celibici* case, unlike the Amnesty International.

The above cases involving Judges Mumba and Odio-Benito aimed at disqualifying them on grounds of bias and non-independence in relation to their non-judicial activities.¹⁸¹ However the grounds mooted by the accused in all the cases involving both the judges were unsuccessful as they were based

¹⁸⁰ *Ibid* Paragraph 703

¹⁸¹ There have been challenges to other judges on various issues such as sleeping during trial (Judge Karibi-Whyte in the *Celibici* case, discussed at length in Chapter 3), delay to trial caused by participation of judges in another trial and pre-judging the issues by the same judges thus resulting in their impartiality as the issues raised in that trial would be the same as the issues raised in the instant case (*Prosecutor v. Dario Kordic and Mario Cerkez* (IT-95-14/2-PT)), impartiality of judges in contempt proceedings compromised through their association with lead counsel (who is appearing as witness for prosecution) and the contemptor in the main trial. (*Prosecutor v Brjnanin and Talic*, IT-99-36-PT). All challenges were dismissed.

on mainly spurious grounds. At the Sierra Leone court however, the outcome was different.

In the case of *the Prosecutor v Issay Hassan Sesay*,¹⁸² the defendants sought the recusal of Judge Geoffrey Robertson, the President of the Appeals Chamber from sitting on their matter under *Rule 15* of the *Rules of Procedure and Evidence*.¹⁸³ The defence alleged that the judge ought to be disqualified on various grounds: that of actual bias, reasonable appearance of bias and financial or proprietary interest in the outcome of the case. The complaints of the defendants were based on the contents of a book authored by the President entitled “Crimes against Humanity – the Struggle for Global Justice”.¹⁸⁴ In that book, the President allegedly made comments and expressed opinions which revealed bias. The defendants alleged that:

a) There was *actual bias* on the part of the judge in that he had expressed strong and biased views in his book on two militant groups of which three accused who were waiting for trial were ex-members. The defendants alleged that the judge had prejudged many of the issues central to and in dispute in the cases before the court.¹⁸⁵

b) There was a *reasonable appearance of bias* that could be gauged from the contents of the book. A reasonable fair-minded person reading this material would consider that the President could not properly adjudicate on any matter on any matter in these cases.¹⁸⁶

¹⁸² *Case No: SCSL-2003-05* available at <<http://www.sc-sl.org>>

¹⁸³ Article 2 of the Agreement provides for the composition of the court, which is to be made up of 8 “independent judges.”

¹⁸⁴ The book was published in 2002, before the judge was appointed to the court.

¹⁸⁵ *Defence Motion Seeking Disqualification of Judge Robertson From the Appeals Chamber* dated 27th February 2004, paragraph 13. The groups were the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC).

¹⁸⁶ *Ibid*, paragraphs 15-16.

iii) There was a *financial or proprietary interest* in the outcome of the case as convictions of the accused would validate his published statements.¹⁸⁷

The Appeals Chamber held that Judge Robertson should disqualify himself.¹⁸⁸ A major factor in their decision was the concession by the prosecution that there was a valid argument that there was an appearance of bias on the part of Judge Robertson. The material could lead a reasonable observer, properly informed, to apprehend bias.¹⁸⁹

The impugned judge was asked to present his side of the case. He objected to the motion on the grounds that it had blanket consequences which in effect would disqualify him from sitting on all matters involving the two groups and not just a particular case. He argued that the motion was a threat to judicial independence as it threatened the security of tenure. The recusal should be his own decision and he should not be pushed out of his office. The end result of the Motion was that it sought to secure his resignation from the bench or any other office to which he had been appointed through an internal Chambers decision.¹⁹⁰

Whilst the misgivings of the judge were valid insofar as his security of tenure was concerned, it is vital to assess whether he had offered any objective guarantees to dispel any legitimate doubt or reasonable apprehension the a reasonable observer may have as to his impartiality. Judge Robinson's views on the alleged perpetrators of the atrocities in Sierra Leone are documented through his work and the passages that gave concern to his impartiality were annexed to the application by the accused.

¹⁸⁷ Paragraph 17

¹⁸⁸ *Decision dated 13th March 2004*

¹⁸⁹ *Ibid* paragraph 7

¹⁹⁰ *Ibid* Paragraph 11

The Appeal Chamber held that it was irrelevant whether there was truth in the passages quoted by the defendant. The test for impartiality is simply the “*crucial and decisive question whether an independent bystander or the reasonable man reading the passages quoted would have a legitimate reason to apprehend bias.*” The Appeal Chamber held that there was a reasonable apprehension of bias on the part of the judge.¹⁹¹ The Appeal Chamber held that there was reasonable apprehension of bias on the part of the judge. This is the correct approach, for here, there was cogent credible evidence that would raise a legitimate reason to apprehend bias. The accused had actually identified passages from the book where Judge Robertson had identified him as a perpetrator of the offences that were within the jurisdiction of the Special Court and for which he was charged. Compared to the cases of Judges Mumba and Odio-Benito, the facts arising from the case involving Judge Robertson were straightforward. The challenge was not spurious either.

The impartiality of Judge Renate Winter of the same court was challenged by the accused in the case of *The Prosecutor v Sam Hinga Norman*.¹⁹² The defence alleged Judge Winter’s activities with the United Nations Children Fund (UNICEF), who had applied to join in the proceedings as *amicus curiae* was proximate enough to lead to the conclusion that Judge Winter is actually biased towards him. He also alleged alternatively she has a personal association or interest in the case and should therefore be disqualified in accordance with the principles enunciated in *Pinochet*, *Furundzija* and *Sesay*.¹⁹³ His challenge was based on the involvement of the judge in the preparation of a report by UNICEF on child soldiers and the power of the Special Court to prosecute for conscripting and enlisting children as soldiers. UNICEF acknowledged Judge Winter’s contributions and said that they were recommending her to other country offices. Judge Winter was also listed with

¹⁹¹ *Ibid.* paragraph 15

¹⁹² Case No. SCSL-2004-14: *Decision on the Motion to Recuse Judge Winter From The Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers dated 28th May 2004.*

¹⁹³ *Decision, supra* n.191. Paragraphs 4-10.

senior UNICEF personnel in conducting a Master's degree in Children's Rights at the University of Frieburg.

The Appeals Chamber held that the applying the opinion of the hypothetical observer test, the defence failed to show any bias as they could not prove that Judge Winter was so closely associated with UNICEF that she could properly be said to have had an interest in the outcome of the proceedings.¹⁹⁴ An interesting comment made by the Appeals Chamber was that a party challenging the impartiality of a judge must demonstrate that the judge has a personal interest as opposed to professional interest in the subject matter of a case.¹⁹⁵ This is a helpful distinction in deciding whether the judge was not impartial, as she can be professionally interested in the outcome of the case due to her work with international human rights organisations without being biased towards the parties to the trial before her.

A distinction could also be made between this case and the Hoffman case because here, the judge was involved in her professional capacity as a legal expert. The matters that she was involved in were very wide and it is argued that there was no legitimate reason to apprehend bias. There was no indication that she had formed an opinion on the guilt of the accused just because he was charged with committing offences that she had a professional interest in.

The impartiality of the judges was also challenged at the *ICTR*. The handful of decisions includes *the Prosecutor v Akayesu, Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v Prosecutor, Kayishema and Ruzinda* and *Rutangada*. These cases reiterate no more than what was stated in *Furundzija*, that is, the impartiality of the judges at the International Tribunal is automatically presumed and that the accused has the burden of disproving

¹⁹⁴*Ibid*, paragraphs 27-28

¹⁹⁵*Ibid*

such impartiality. In the absence of evidence to the contrary, the assumption is that “judges can disabuse their minds of any irrelevant personal beliefs or predispositions.”¹⁹⁶ The *Furundzija* test was applied to all these cases. Needless to say, none of the accused succeeded in their challenges.¹⁹⁷

4.6 OTHER ASPECTS OF IMPARTIALITY AT THE INTERNATIONAL TRIBUNALS

Notwithstanding *Rule 15*, there are certain situations at the International Tribunals that could invite comments on the impartiality of the Tribunal’s judges.

4.6.1. The *compétence de la compétence* declaration

The decision of the Appeals Chamber in *Tadic (Jurisdiction)*¹⁹⁸ was momentous for several reasons. One of those reasons was the Appeals Chamber’s defiant assertion of judicial independence from the Security Council by declaring itself having the competence to review decisions of the Security Council.¹⁹⁹ The Appeals Chamber held that it had *compétence de la compétence*²⁰⁰ to decide

¹⁹⁶ Nahimana *et al* Appeal Judgement Paragraph 48.

¹⁹⁷ Exception was in the case of the *Prosecutor v Karemera et al* Case ICTR-98-44-T where Judge Vaz, the Presiding Judge recused herself when her impartiality was challenged due to a “personal relationship with one of the parties” to the case, i.e. prosecuting counsel. Judge Vaz had allowed the said counsel to stay with her whilst the latter was looking for her own accommodation in Arusha. This happened before Judge Vaz was assigned to Karemera’s case and before the trial began. The challenge also took place 2 days after the trial began. The Appeals Chamber, applying the *Furundzija* test held that a situation had arisen which would give an appearance of bias on behalf of Judge Vaz. See D. Mundis and F. Gaynor *Current Developments at the ad hoc International Criminal Tribunals* (2005) 3 JCIJ 268, 283, 284.

¹⁹⁸ *supra* Chapter One, 38

¹⁹⁹ Paragraphs 14-22, *Ibid* See for e.g. Geoffrey R. Watson *The Changing Jurisprudence of the International Criminal Tribunal for the former Yugoslavia* (2002-2003) 37 New Eng L. Rev 871: *The Tribunal’s earliest decisions were characterized by certain amount ofchutzpah.*

²⁰⁰ Commentators have raised doubts as to whether this doctrine, usually applied to arbitration panels, is applicable to judicial organs in an international legal setting. Watson *ibid* 703

on the validity of its establishment and that it had the jurisdiction to determine its own jurisdiction.²⁰¹

Having decided so, the Appeals Chamber proceeded to hold that the Tribunal was validly established. A concise evaluation of this facet of the Appeals Chamber's judgement states: "*The Tribunal, sitting in its own cause, declares itself legitimate.*"²⁰² It came as no surprise that the Tribunal validated its own existence.²⁰³ The general application of the *compètence doctrine* would apply where the court is *already in existence*. Here the court is asked to decide whether it was properly established *in the first place*.²⁰⁴ The court did not exercise its *jurisdiction to decide its jurisdiction*, as much as its *jurisdiction to decide its establishment*. It is the latter issue that has doubtful foundation. If it is not properly established, how could it have jurisdiction?

The exercise of the Tribunals in this particular manner attracts questions as to its impartiality. It is submitted that the Tribunal could not have come to any other conclusion but that it was validly established, for it would be unimaginable for the Tribunal to rule itself out of existence. Such a decision however smacks of biasness, because there is nothing in the judgement that would allay the reasonable apprehension of a reasonable observer that there was no bias.²⁰⁵ Not only would such a decision to the contrary rule out its existence, it would also mean that the judges, including those who sat in the Appeals Chamber, would lose their positions and salaries. It would have been far less controversial if the Appeals Chamber had adopted the stance of the Trial Chamber and Judge Li and simply ruled that it did not have the competence to consider this issue of legitimacy and validity of its establishment by the Security Council.

²⁰¹ *Ibid.* Paragraph 14. Geoffrey Watson *The Humanitarian Law of the Yugoslavia War Crimes Tribunal in the Prosecutor v Tadic* (1995-1996) 36 Va. JIL 687,696, 701, 702

²⁰² Watson, *ibid.*, 701.

²⁰³ *Ibid* 706

²⁰⁴ Bohlander, *The International Criminal Judiciary supra* Chapter One n.17 366

²⁰⁵ See also Michael Scharf *The Legacy of the Milosevic Trial supra* Chapter three, n.19.

4.6.2 Rule-making powers of the judges of the International Tribunals

A possible factor that could affect the impartiality of the judges at the International Tribunals is the power of the Tribunals to create and amend the Rules of Practice and Procedure. *Article 15* of the *Statute of the ICTY*²⁰⁶ empowers the judges to create rules of procedure and evidence for the conduct of proceedings from the pre-trial phase to appeals and other incidental issues such as protection of victims and witnesses.

The power endowed to the judges to make their own rules could be interpreted in the most simplistic of terms, that they are being judges in their own cause. They decide what rules will apply to the proceedings before them and they would then decide whether such rules are appropriate and applicable.²⁰⁷ This type of conduct may raise a perception of bias.²⁰⁸

4.6.3 Judges on rotation

Rule 27 of the *Rules of Procedure and Evidence* states that “Permanent Judges shall rotate on a regular basis between the Trial Chambers and the Appeals Chamber. Rotation shall take into account the efficient disposal of cases.”²⁰⁹

This provision is open to observations of apprehension of bias, for a judge may sit in one chamber or the other. Its relevance is questionable, it is one thing to say that certain judges will sit in the Appeals Chamber and certain judges to sit in the Trial Chamber such as in national jurisdictions where the most senior of judges

²⁰⁶ *Article 14* is the *Statute of the ICTR* equivalent.

²⁰⁷ Alvarez *Rush to Closure supra* Chapter One, n.94, 2064. The Rules have been amended 41 times. See <<http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev41eb.pdf>>

²⁰⁸ In some common law systems, it is not unique for judges to formulate their own Rules. However, this would be done through a Rules Committee whose members would comprise of representatives from the Judiciary, the Attorney-General’s Chambers and the Bar Council of that State. E.g. Malaysia. Also the practice at the ICTY was that the Prosecutor could propose amendments to the Rules but ultimately it is the judges who decide. Interview with the then Deputy Prosecutor Mr. Graham Blewitt on 28th June 2002 at the Office of the Prosecutor, ICTY, The Hague. (On file with author)

²⁰⁹ *supra* n.205

sit in the highest court at the apex of the hierarchy. Here, however, judges are allowed to rotate, to play the judicial version of musical chairs.

Assuming that Judge A sits in one case in the Trial Chamber and he makes a decision. In another case with similar facts, Judge A sits on the Appeals Chamber. Whoever is appealing would have a reasonable apprehension that the judge had pre-judged the issue because he had decided in the earlier case in a certain manner. In another scenario, Judge A sits in the Appeals Chamber and decides on certain issues. He then sits on a case in a Trial Chamber based on similar facts. How reassured would a reasonable observer be that there will not be bias on the part of the Judge?

The rotation proviso is rather strange as it allows the same judges to sit on trials as well as appellate stages. This is a system that is quite unique as it is hardly found in national systems. A provision that allows judges to sit interchangeably on trial and appellate proceedings is undesirable for it has potential to be abused.

4.7 PRIOR ACTIVITIES OF INTERNATIONAL JUDGES

The non-judicial activities of a judge, particularly prior to his appointment to the international court have posed a quandary to the international courts. When may the prior activities of a judge in international law be construed as adversely affecting his independence and impartiality?

The foremost international court of the United Nations, the International Court of Justice, has faced this problem during its years of operation. In the context of the ICJ, potential sources of threats to individual independence are the United Nations and the States of the judge's nationality. A respected jurist stated as follows:

“... it was explained that the judges ‘should be not only impartial but also independent of control by their own countries or the United Nations organization.’ (13 UNCIO 174). What this means – or is interpreted in practice to mean – is that after election the Members of the Court must become independent in this sense. It did not preclude the nomination or election of a candidate who, at the time of nomination or election, was in the service of a government or of an international inter-governmental organization – although it would be desirable for candidates in that situation to disengage themselves from their official activities once their candidatures are announced and until the election is completed.”²¹⁰

Hence, although the appointed judge could be under the service of his State or the United Nations agency, he may be nominated to the office of an international judge. There is no bar to the office of a judge even if he was, *at the time of nomination or election*, was in the service of a government or was actively involved in an institution which was very active in the fields of international law and affairs. He should divest himself of the relationship he has with the State once he is nominated to the position of a judge. The prior activities of a judge should generally not affect the independence and the impartiality of the judiciary. However, his independence and impartiality may be affected when he sits on a case where he has had a connection with the parties or the subject-matter of the case prior to his appointment to the Bench.

The relevant provision in the Statute of the Court is *Article 17(2)* which states that no member should participate in the proceedings of a case where he had *previously* taken part as an agent or counsel or advocate for one of the parties or as a member of a national or international court or commission of enquiry or *had acted in any other capacity*.²¹¹ The wide provisions of *Article 17(2)* would ensure that a judge who is connected to a State party to the proceedings

²¹⁰Shabtai Rosenne: “*The Court and the United Nations*” in “*The Law and Practice of the International Court, 1920-1996*. (Leyden : A. W. Sijthoff., 1965).367

²¹¹ Statute available at <http://www.icj-cij.org/>

before the Court in any capacity is disqualified from the panel if it could be shown that the connection between him and the State on this particular matter is so close and proximate that it would negate any impartiality on the part of the judge.

An examination of the legislative background of *Article 17* is helpful on the approach of the international community towards the need to appoint experienced judge balanced with the requirement that he is impartial and independent. It is imperative that in appointing judges, impartiality should not be compromised. On the other hand, judges who are appointed have to have knowledge and experience in international law. A balance needs to be reached between subjective impartiality and knowledge acquired. The question is how that balance is to be achieved.

In the *South West African Cases*, the disqualification of the Pakistani judge, Judge Sir Mohammed Zafrullah Khan raised some interesting questions. The judge was asked by the President of the ICJ to disqualify himself from participation in the case involving South Africa as it would be, in his opinion, improper for him to participate. It was believed that one of the factors taken into account was that Judge Khan was the President of the 17th session of the General Assembly and in that capacity, had presided over the debates on South Africa during his presidency.²¹² The question was whether it was a valid reason to disqualify the judge from hearing the case. The judge himself was not consulted on his view on this matter. Even so, the fact that he had been the President of the General Assembly should not have been held against him. As the President of the General Assembly he was acting in an official and objective capacity. By disqualifying him, the Court had deprived itself of a member who had wide experience in and knowledge of international law.²¹³ Further, it was thought that the recusal came not

²¹² *Reisman, supra* 99.

²¹³ Article 34 of the Statute was amended to rectify the anomalous situation of Zafrullah. *Rosenne, supra* n.192 1103. *Reisman ibid* 56-57

voluntarily but rather due to the pressure exercised on the judge by the then President of the Court, Sir Percy Spender.²¹⁴ This also raises the latent question of internal threat to the independence of a judge, that is, he is put in a position where he has to compromise his personal independence due to pressure from his superior.

There is no hard and fast rule that can be used as a gauge to decide when previous non-judicial activities²¹⁵ would affect the independence and impartiality of a judge as to disqualify him from sitting on a matter. Each case should be decided on its facts. There have been examples where judges who had acted as legal advisors to their Governments were not disqualified from sitting on a panel when *prima facie* their activities came under the purview of *Article 17(2)*.²¹⁶ The views expressed by a diplomat are *prima facie* not his own, but the official view and stand of the Government that he represented at that time. The position is not clear when he had acted as legal advisors to the States. Here, they would have expressed a legal opinion. Could they change their minds if subsequently they had to adjudicate on similar facts they had advised their Governments on?

The underlying reasons in the jurisprudence of the ICJ imply that the disqualification of a judge depends on the circumstances of his involvement.²¹⁷ If he was involved in the matter in an official capacity and had expressed a personal albeit professional view as counsel to his Government on that issue on that issue which then comes up for hearing before the Court where his Government is a party, he should disqualify

²¹⁴ Chester Brown *Evolution and Application of Independence Rules of the International Judiciary* (2003) 2 LPIT 63, 86

²¹⁵ Judicial or legal activities are covered by Article 17(2) of the Statute. .

²¹⁶ *Reisman, supra* n.99,50. Examples include Judges Basdevant and Hackworth in the U.S. Nationals in Morocco Case who were not disqualified from sitting when they had acted as legal advisors to their respective governments when the dispute was still at the diplomatic stage. 51. The approach of the ICJ to the disqualification of the judges under Article 17(2) has been inconsistent. See also *Shabtai Rosenne supra* n.192

²¹⁷ *ibid*, p.52

himself.²¹⁸ He could not possibly be seen to be impartial. When the particular judge represented his Government on matters discussed where the Government is not a party, would he still be disqualified? As the Appeals Chamber succinctly stated in *Furundzija*, the views expressed by the judge would have been the official stand of his Government and not his own views.²¹⁹ The proper approach, it has been suggested, is that disqualification should rest on the manner of his involvement. If his involvement is on the *law* that requires to be adjudicated, he should not be disqualified. However he should disqualify himself if his involvement was in connection to the *facts* that need to be adjudicated.²²⁰ The dilemma of international lawyers is that the sphere of international law is so small that if *Article 17(2)* is interpreted strictly, every member of the Court could be disqualified in certain cases.²²¹

In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*²²² case, the Government of Israel, one of the parties to the proceedings before the ICJ, objected to the composition of the court. The Government of Israel challenged the participation of Judge Nabil Elaraby on two grounds. First, that he had played an active, official role for a “cause that is in contention in this case”. The various roles of the judge prior to his appointment included his participation in proceedings and activities at the United Nations as representative as well as the principal legal advisor to various agencies of the Government of Egypt on issues relating to Israel. The second ground of request for disqualification was that Judge Elaraby had given an interview to an Egyptian newspaper. Israel alleged that the opinions expressed therein combined with his activities in his previous professional

²¹⁸ Dame Rosalyn Higgins recused herself from sitting on the *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* case as she had acted as counsel to the United Kingdom, one of the parties to the proceedings before the ICJ.

²¹⁹ *Furundzija supra* Chapter 4, n.16. Paragraph 199

²²⁰ Reisman, n.192 52

²²¹ *ibid*

²²² <www.icj-cij.org> Decision dated the 30th January 2004.

capacity showed an active opposition to Israel including on matters which were being directly dealt with by the Court.²²³

The ICJ relied on its earlier decision in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* where it ruled that statements made or participation by the impugned judges in their former capacity as representatives of their governments in United Nations in matters concerning South Africa did not attract the provisions of *Article 17(2)*.

The Court found that the activities of Judge Elaraby were performed in his capacity as a diplomat and that they took place long before the issue before the ICJ in this present case arose. Further the question that was to be decided by the Court in this present case was not discussed at proceedings in the United Nations until after the judge had ceased to participate as representative of Egypt. Finally, the Court held that the judge had not expressed any opinion on the question before the Court in this present case in the interview complained of. The Court found that Judge Elaraby could not be regarded as having “previously taken part” in the case in *any* capacity.²²⁴ The Court dismissed Israel’s complaint.

Judge Buergenthal dissented with the majority on this decision on the ground that the interview given by Judge Elaraby was made two months before he was elected to the Court when he was no longer an official of his Government and hence spoke in his personal capacity.²²⁵

The crucial issue was that he agreed with the majority that *Article 17(2)* would not apply where the prior activities of the impugned judge was performed in the discharge of his diplomatic and governmental functions as

²²³ *Ibid* paragraphs 2-5

²²⁴ *Order supra* n.189, paragraph 8.

²²⁵ *Dissenting Opinion of Judge Buergenthal*, paragraph 7

the views he was expressing were not his but of the government that he was representing.²²⁶ However, his disagreement with the finding of the majority on the second issue is valid, for the judge had expressed views that could lead a reasonably held belief that the judge did not bring an open and impartial mind to this case.

The jurisprudential disadvantage of the ICJ is that the Court does not have a *Furundzija* type test to help it gauge the question of partiality. The reliance is on *Article 17*, which only refers to the capacity of the judge and not to the mental outlook required, unlike the international criminal courts. This explains to an extent the inconsistent approach of the ICJ to the cases before it.

The dilemma faced by international law experts is that the statutory requirements of qualifications for judicial appointments include experience in international law.²²⁷ Such experience can be gained only if the judge had involved himself in international law prior to his appointment. This could be in various capacities - as diplomat, counsel and politician. Whilst the experience gained is to be seen as an advantage, it could be construed as a *disadvantage* if such involvement would affect the impartiality of the judge. It is submitted that the solution to the dilemma posed is to assess the views of the fair-minded, reasonable observer, having cognizance of all the circumstances, facts and the principles of judicial independence and impartiality as well as the requirement of experience in international law would reasonably apprehend that there was bias on the judge, taking into consideration of any objective guarantees that the judge may offer. Each case will be decided on its own facts. The extent of the impugned judge's involvement and the capacity that he had acted in are two main issues that the Court could consider.

²²⁶ *Ibid* paragraph 6

²²⁷ Chittaranjan Amerasinghe: “*Judges of the International Court of Justice – Elections and Qualifications*” (2001) 14 *Leiden Journal of International Law* 335

The situations of Judges Mumba, Odio-Benito, Robertson, Hoffman, Winter *et al* are now easily resolved under *Article 41(2)* and *Rule 34* of the *Statute* and the *Rules of Procedure and Evidence* of the ICC respectively. *Rule 34* is very comprehensive and is designed to avoid situations that have occurred at the ICJ as well as the international *ad hoc* tribunals. If there is a reasonable doubt as to the judge's impartiality, he should disqualify himself from hearing that situation. His involvement in the case, although relevant, is not the decisive factor. Neither is the capacity of his involvement. What is crucial is whether there exists a *reasonable doubt*.

4.8 CONCLUSION

Judicial impartiality is as crucial in international criminal proceedings as it is in State practice. A judge should be neutral, impartial and free from bias when he is deciding a case. However, there have been situations where his impartiality has been called in question and the courts have formulated a two-tiered test to gauge impartiality. The impartiality of national judges could be questioned in various ways, depending the nature of his interest in the matter and the connection or association he may have with the party to the trial proceedings before him.

The comparative study of the assessment of judicial impartiality in different jurisdictions stresses the importance of negating any form of biasness on the part of the judge. Different courts apply different tests, but the common thread that runs through the cases is that judges can be challenged as to their impartiality. The International Tribunals, having no point of reference to assess impartiality in their judiciary, had recourse to national jurisprudence and tailored the test of impartiality to their own needs.

Of all the tests advocated by various national courts, it is the two tiered test propounded by the *European Court* which is a comprehensive one as a judge should not be disqualified from a case by mere allegations of bias. The very nature of his office demands impartiality. Bias is a serious allegation as it goes against the very nature of the office of the judge that demands impartiality. The general rule therefore is that a judge is presumed impartial and it is for the party alleging to prove bias. The *Piersack*²²⁸ test rests on subjective and objective tests. The former rests on his personal conviction in a particular case and the latter relates to the perception of the reasonable man and whether the judge had offered objective guarantees to dispel any perception of bias.

The issue of recusal is very important in the international criminal proceedings. It is a particular problem in international arena where the judges are usually appointed by virtue of their knowledge and experience in international law.²²⁹ This knowledge and experience may be gained through their work in the international legal arena²³⁰ prior to their appointments to the international tribunals and courts. The involvement may be varied, in accordance with the capacity in which the judges were involved. The judges may have acted as diplomats or representatives of their Governments in political and non-political matters or worked with non-governmental organisations particularly on issues of human rights. They may have acted as counsel or advisors to one of the parties or non-governmental organisations who may have had a interest in the outcome of a case that particular judge subsequently was called to decide or who may appear as *amicus curiae* in the

²²⁸ *supra* n.5

²²⁹ Mackenzie and Sands, *supra* n.60 280

²³⁰ Expertise and knowledge of international law is a necessary qualification for appointment of judges to the international tribunals. See also *Amerasinghe* where the author analyses the international legal experience of judges appointed to the International Court of Justice and concludes that the United Nations has deemed candidates for judicial office in the ICJ qualified where their international legal experience included involvement in the International Law Commission or participation in diplomatic conferences or performing diplomatic functions on international law. Judges, who prior to their appointment were international legal advisors to their countries or to international organisations were also deemed to have experience in international law. He argues that something more is required other than reputation and experience as international lawyers and that election to the ICJ has become a matter of politics rather than merits. However, there is no suggestion as to what that “something more” should be.

proceedings. Some of the judges may have been academics who would have written and published articles expressing their views on the issues which they may later be called upon to decide. On one end of the scale, a judge needs to possess knowledge and experience of international law as he or she bears an extraordinary responsibility in deciding on pioneering cases of international and humanitarian laws. Specialised knowledge is not just essential, it is vital. This issue also relates to qualifications of judges. On the other end, he or she must ensure that knowledge and experience does not taint his impartiality, giving rise to a perception of bias or appearance of bias. A balance must be achieved between these two issues, which may not be easy. Each case has to be decided on its particular circumstances. It is difficult to formulate a fixed rule to decide on the impartiality of the judge in matters such as these. The most preferable solution would be to apply the two-tiered test to case-by-case. It is suggested that where the case before the court is one where the judge was involved so directly and intimately that it would be contrary to the due process that he is called upon to decide on the very issues that he had already expressed legal opinions on. This situation normally occurs when he had acted as legal counsel to one of the parties.²³¹ Where he had acted as a diplomat however, the situation is not so clear and the application of the test for impartiality is more than useful in deciding whether the judge was impartial.

The provisions for the appointment and disqualification of international judges are detailed particularly those relating to the judiciary at the ICC. A bigger role is envisaged for the ICC, and as it will be the foremost criminal court with universal jurisdiction, it is imperative that the judges who are appointed are not only qualified, but independent and impartial as well. The mechanisms of disqualification and removal of the judges at the ICC are very stringent and judges have to be very strict with their conduct. On the other hand, such stringent conditions would circumvent the problems that the

²³¹ See practice at the International Court of Justice.

international judiciary at the other international criminal tribunals face, namely the potential conflict and incompatibility between the office that they hold and the activities that they undertook prior to their appointments. Article 41 of the Statute of the ICC that deals with the concept of judicial impartiality is wide and covers potential situations where the judge may find his impartiality reasonably doubted.

The jurisprudence of the international criminal tribunals on these concepts is burgeoning and with the specific provisions of the Statute of the ICC, the accused and in particular his counsel, have legal points of reference that would guarantee a fundamental aspect of his right to a fair trial, the right to have his case heard by an independent and impartial tribunal. A future international criminal judge would have some guidance from the statutory provisions of the judicial organ he serves on and the jurisprudence of international criminal courts.

It is suggested that individual judicial independence is best summed-up by the following passage:

*By "independence" of a person we ordinarily mean that he does not act on instructions from superior authorities, and that he is not accountable to them. We do not, of course, mean ideal independence, implying absence of any environmental influence. We should insist, however, that this influence stop short of destroying the individual's ability or willingness, or both, to search for facts, to question dogma and to articulate his thoughts."*²³² (Emphasis added)

²³²Z.L.Zile *A Soviet Contribution to International Adjudication: Professor Kyrlov's Jurisprudential Legacy* (1964) 58 AJIL 359. Personal independence is tied in with impartiality, so this passage could apply equally to the issue of impartiality and the aspects of convictions and beliefs as well as prior activities.

To quote another passage

*"Let them (the judges) be seen, not as gowned robots, but men [sic], warts and all."*²³³

The modern international judge must have some knowledge of current and world affairs. It would have been really strange indeed, if an ICTY or ICTR judge did not know what was happening in the Balkans or Rwanda prior to his appointment to the Tribunals. That however does not mean he is biased or partial. He should be given the latitude of having his own beliefs and opinions. It is when those beliefs and opinions intrude into the trial proceedings and impinge his impartiality, he should be impugned and removed for that partiality would have an adverse effect on the right of the accused to a fair trial.

²³³ G. Henry *Case Note: Pinochet: In Search of the Perfect Judge* (1999) 21 Sydney L. Rev 667 quoting Shetreet *Judges on Trial*.25

CONCLUSION

CONCLUSION: THE RHETORIC AND REALITY OF THE INDEPENDENCE AND IMPARTIALITY OF THE INTERNATIONAL JUDICIARY

“History will judge how the accused were treated. It is the judges who are on trial here.”¹

Questions were asked at the inception of the International Criminal Tribunals.² Questions are still asked towards the near-end of their life spans.³ With the creation of the International Criminal Court, these questions are as relevant and as important. Are international criminal courts and tribunals “truly independent”? Do they afford the accused full guarantee of his fair trial rights? Or are they more intent on appeasing their creators, the victims and the international community?

To assert their legitimacy and credibility as international courts of law, the International Tribunals and the International Criminal Courts need to ensure that they are independent and impartial. The concepts of judicial independence and impartiality are therefore as relevant to the international legal system as they are to national systems.

¹ Comment made to the author by a senior defence counsel during an interview the author conducted at the ICTY, The Hague, 28th May 2002.

² Mirko Klarin *The Tribunal's Four Battles* (2004) 1 JCIJ 546, quoting Madeleine Albright's evidence at the sentencing proceedings of Biljana Plavic where a bleak picture was created regarding the future of the Tribunal, its establishment, its proceedings and its composition.

³ Perhaps the harshest criticisms of the Tribunal come not from its critics but the Assistant Secretary-General for Legal Affairs of the United Nations. Ralph Zacklin *The Failings of Ad Hoc International Tribunals* (2004) 2 JCIJ 54 where the author says that the ICTY and ICTR are “too costly, inefficient and ineffective.” Yet others have not been so condemning. “*This is not a victor's justice; this is a victim's justice*” Watson *supra* Chapter 4, n.197 719

Judicial independence and impartiality are more than mere legal concepts. They are core procedural and judicial guarantees which are fundamental to the due process of law and are in particular essential requirements to ensure that the rights of the accused to a fair trial are guaranteed.

These concepts are established in national legal systems but are relatively new in international criminal proceedings. It is argued that due to the intrinsic normative value of these concepts to the fair trial process, they are inherent in any system of justice, necessary to maintain the maxim that *justice must not only be done, but be manifestly seen to be done*. It is therefore immaterial whether the judicial process that is under scrutiny is a national system or an international one. It is argued also that it is immaterial whether the concepts are enshrined in a written instrument to be binding on the parties that create the judicial institution and the members that form its composition.

The lack of precedents in the international criminal law arena for the application of these concepts should not be a bar to the actual implementation in practice. The precedent set by Nuremberg, though of minimal guidance, does demonstrate that these concepts are given serious, if not paramount consideration in a system of justice. Nuremberg, despite its flaws, paid testimony to the operation of this principle of justice.

Judicial independence and impartiality are necessary to uphold the right of the accused to a fair trial. This is axiomatic throughout almost all legal systems in the world. Thus these issues are examined in the international criminal arena.

In the *Tadic (Protective Measures) Decision*, the Trial Chamber said:

In drafting the Statute and the Rules every attempt was made to comply with internationally recognized standards of fundamental human rights. The Report of the

Secretary-General emphasizes the importance of the International Tribunal in fully respecting such standards.The drafters of the Report recognized that ensuring that the proceedings before the International Tribunal were conducted in accordance with international standards of fair trial and due process was important not only to ensure respect for the individual rights of the accused, but also to ensure the legitimacy of the proceedings and to set a standard for proceedings before other ad hoc tribunals or a permanent international criminal court of the future. (See Morris and Scharf, supra, at 175.) In response to these concerns, the drafters adopted a liberal approach in procedural matters. Article 21 of the Statute provides minimum judicial guarantees to which all defendants are entitled and reflects the internationally recognized standard of due process set forth in Article 14 of the International Covenant on Civil and Political Rights ("ICCPR"). In fact, the Statute provides greater rights than the ICCPR by extending judicial guarantees to the pre-trial stage of the investigation.

It is the argument of this thesis that the International Tribunals have failed to provide the minimum judicial guarantees that they declared that they are obligated to. That is not to say that the Tribunals are a complete failure. It is contended that based on case studies and circumstances peculiar to the *ad hoc* Tribunals, the courts are not truly independent. They may be quite independent, fairly independent perhaps but not truly independent. There are many reasons for this view. The very unique mode of their creation puts them in a position peculiar to national systems. They are not regarded as a third arm of the Government but creatures of United Nations or agreements between parties. They rely on their creators for efficacy and effectiveness. From vital matters such as finance and State cooperation to other matters such as recruitment of professionals, they have to rely on external sources. Then there are matters that are unique to the Tribunals themselves, such as legal aid and Victims and Witnesses Units, which traditionally are not within the purview of a judicial organ. Thus, it is difficult at times to assert their independence when much is relied for their functions and operations on third

parties. This is the reality of the situation. As much as the International Tribunals have declared that political considerations do not affect their independence, it is regrettably inaccurate as observed by several of their controversial and debatable decisions. These decisions have compromised the rights of the accused and the structural framework is open to criticisms.⁴ However, having said all that, it is contended that the accused enjoys greater fair trial rights at the international tribunals than he would have had had he been charged at a national court; in some countries he may not even be charged in court.⁵ Based on the reasons given above, it is also argued that they have not conformed to the notions of independence familiar in national legal systems.

The International Tribunals have faced problematic cases which there have been challenges on the institutional independence of the Tribunal, the personal independence of the judges and their impartiality as well. It is argued that these cases, although raise legitimate questions as to the independence and impartiality, do not emanate startling consequences that would seriously put these issues in serious doubt.

⁴ Even the physical set-up of the ICTY has been criticised. By having the Chambers, Registry and the Office of the Prosecutor in the same building, commentators state that the independence of the Tribunal is open to criticism. De Bertonado *supra* Chapter Threen.152 419. However, the physical structure of the building is rather complicated with walls between the different organs as well as electronic entrances. Interview with Graham Blewitt, *supra* Chapter Four, n.208. These three institutions i.e. the Registry, Office of the Prosecutor and Chambers are considered as organs of the International Tribunal. Article 11 of the Statute of the ICTY. This organisational framework is peculiar to international criminal legal system, as in national legal systems, the Prosecution is hardly part of the court system.

⁵ In Malaysia for example, a war crimes suspect may be arrested under the Internal Security Act of 1960. Section 73(1) of the Act states as follows: "*Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe that there are grounds which would justify his detention under section 8; and that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to maintenance of essential services therein or to the economic life thereof.*" Section 8: "*(i) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years.*" A war crimes suspect would, it is submitted, fall under S.73(1). The ISA is anathema to due process and the author has been an active member of NGOs calling for its abolition.

There are two main issues relating to the judicial independence of the international criminal courts and tribunals. First, the constitutional issue of the establishment of the courts and the relationship with their creators and secondly, the fair trial issue where judicial independence is a procedural guarantee for the rights of the accused.

The mode of establishment of the International Tribunals by the Security Council has established a proximate association between the Security Council and the International Tribunals that is not comparable to associations between political and judicial organs in national systems. Thus the relationship between the Council and the International Tribunals is a potential source of threat to their institutional independence.

A complete detachment however is difficult to achieve in an international setting as there is no application of the doctrine of separation of powers that is crucial to the effective functioning of a democratic system. The International Tribunals exist outside a national system and therefore cannot exercise all of their jurisdiction and powers independently of the Security Council. They require the Council's powers and authority to obtain the attendance of the accused, the enforcement of orders, the compelling of State cooperation and other matters that are out of their powers. As such the independence of the Tribunals was always at a risk and the practice of the Tribunals seeking intervention by the Security Council may not be compatible with its judicial characteristics. However, there is no practical alternative for the International Tribunals. The mandates of the Tribunals which were established by the Security Council cannot be fulfilled due to their inability to properly carry out their jurisdictions in any particular case from its initiation to its completion. The Tribunals therefore face hard questions and opinions that their dependence on the Security Council do not concur with their responsibility to be completely independent are inevitable. The Tribunals find themselves in situations that cannot be avoided where they have to take controversial

decisions. The *Todorovic* case is a clear example of such a situation. There the ICTY asserted its independence by issuing a decision against an organisation whose members were made up of some permanent members of the Security Council. The consequences of that decision did not augur well for the continued cooperation between the Tribunal and NATO. It therefore raises the question as to the execution of the mandate of the International Tribunals to prosecute accused persons when they could not be secured to attend the trial proceedings.

The positions of the International Tribunals as subsidiary organs have put them in yet another precarious position. The Tribunals were measures intended to address the threats posed to international peace and security. It was made clear at the outset that the Tribunals cease operations as soon as international peace and security had been restored to the respective areas of conflict⁶. Tied to this assertion was the expectation that the Tribunals would be terminated. With that in mind, the *Completion Strategies* were implemented. However, the Tribunals are not the usual genre of measures adopted by the Security Council to combat threats to international peace and security. These are judicial organs who deal with the rights of the individuals – the accused, the victims and the witnesses. Although the Completion Strategies envisaged the transfer of cases involving middle and lower ranked suspects to national jurisdictions and thereby decreasing the caseload of the Tribunals, the Tribunals nevertheless are pressurised to complete their cases by certain deadlines. The problems that the Strategies caused are rather worrying. It would be difficult to achieve a trial that is fair involving the examination of complex factual and legal issues, the assessment of evidence gleaned from oral evidence as well as documents within a certain period of time. The imposition of this obligation on the International Tribunals makes it hard to avoid the legal adage “*justice hurried is justice buried*”. The hard-earned reputation of the Tribunals as independent judicial organs has taken a slight

⁶ Report of the Secretary-General, *supra* Chapter One, n.91

battering by the perception that they are more interested in achieving the dictates of their principal organ than carrying out their judicial responsibilities.

The individual independence of the judges at the international criminal courts invokes a discussion of several aspects. Various standards need to be secured before individual independence is guaranteed. These are key matters that should be preserved at the international courts themselves. Matters such as methods of appointment, qualifications, security of tenure, conditions of work at the international judicial organs are as important as they are in State practice. It has been argued that the nominations and elections of the international judges are highly politicised. This however cannot be avoided as the States are the parties nominating their nationals as judges. It is the general practice that they would nominate those who represent their views. Again, the overall picture is that the judges at the international criminal tribunals and courts are independent and impartial. They are highly-qualified individuals with varying degrees of expertise in international law, international criminal law, international humanitarian law and criminal law and the jurisprudence of the Tribunals have shown that they do ensure that their reasoning are backed with legal principles. It is argued that although nominations and elections are susceptible to politicisation, those appointed to the Bench have, to the best of their ability conducted the proceedings to ensure that the accused receives a fair trial. The writer, a member of the Bar of Malaysia, attended the trial proceedings of the late President of the Serbia, Slobodan Milosevic at the ICTY and witnessed firsthand the proceedings conducted. It is a considered view that despite the refusal of Mr. Milosevic to accept the jurisdiction of the court, the judges gave Mr. Milosevic a lot of leeway and the Tribunal itself had provided him with every facility, including *amicus curiae* and translation facilities so that he could participate in the proceedings.⁷ The trial conducted by the ICTY was in many ways far superior to certain national

⁷ See also Michael Scharf *The Legacy of the Milosevic Trial* Chapter 3, n.19

systems, including those systems that have arbitrary and violent practices such as detentions without trial and death penalty.⁸

International lawyers are interested in gauging whether an international criminal system works and it is argued that a very significant factor that contributes to the success of the international criminal system and the tribunals is an independent and impartial judiciary. The value of the precedents of the work of the International Tribunals to the International Criminal Court is another advantage.

A detailed discussion of the concept of judicial impartiality entailed a discussion of both State practice and the practice at the international criminal courts. The many challenges that the accused launched at the International Tribunals and the Special Court mostly evolved around their work prior to their appointment as international criminal judges. The decisions of the Appeal Chamber are particularly useful in assessing impartiality of the independent judiciary. This issue is raised largely due to the activities of the judges prior to their appointment to judicial office. At the International Tribunals the challenges that could have seriously affected the impartiality (and consequently the independence) were based on their activities in international arena, in particular with the United Nations – Judge Odio-Benito who once acted as the representative of her country, the Republic of Costa Rica to the Security Council, Judge Florence Mumba vis-à-vis her activities with the UNSW and Judge Renate Winter and her consultative work with UNICEF. The challenges launched by the accused at the International Tribunals against the judges were based on the assumption that the prior activities of the judges had affected their impartiality and in some cases, their independence.⁹ The activities of international judges in the international arena

⁸*Supra*

⁹ Although it is argued that the challenge to Judge Odio-Benito's alleged political involvement was well-founded on its face. Jules Deschenes. However, it is argued that the challenge is based on convoluted facts and arguments as explained in Chapter Five., *supra*

are however not a problem peculiar to the International Tribunals. It is an issue that has affected international judiciary generally. It is submitted that this should not be an issue at all, if the impugned judge was involved in an official capacity and represented the views of the State. It was not his personal opinions or convictions that were presented to the international community. Conversely, it could be argued that States would only nominate candidates who represent their views and a perception of bias could not be avoided but it is argued that once candidates are appointed, they are presumed to have discarded the official views of the State which they had earlier represented.

International law is a specialised and constantly developing area of law. The number of experts in international law is comparatively small and the chances that a diplomat would be elected to a judicial position are very high. It is submitted that comparatively the conduct of the judges at the international criminal tribunals have not attracted intense criticisms unlike the one-off situation in Sierra Leone. Judge Geoffrey Robertson's prior conduct as the author of a book that dealt specifically on the very issues which fell within the jurisdiction of the court he was President of should have automatically disqualified him from sitting on trials. The appointment of Judge Robertson is surprising. The party who had appointed him must have known of his activities prior to his appointment and the possibility of his impartiality being challenged outright as a result of his personal views expressed in his book, *The Work is a Broad Piece of Work*, spanning over the conflict in Sierra Leone and the organisations that were involved in the conflict and whose members are now in court facing trial. Judge Robertson was an international human rights lawyer before he was appointed as a judge and did bring to the court the benefit of his knowledge, skills and expertise. But no matter how excellent a judge is, a perception of bias would have compromised the fairness of the proceedings and the independence of the tribunal. The unique aspect of the finding of bias on the part of the judge by the Appeals Chamber is that Judge Robertson was not disqualified from just from the that particular trial but also

from all trials involving members of the organisations that were the subject-matter of his book.

The statutory provisions of the ICC on the disqualification and recusal of judges when their impartiality is doubted are very wide. This would avoid a perception of bias based on the extrajudicial considerations that has occurred at the International Tribunals and the Special Court. It is recommended that judges should recuse themselves out of their own accord instead of being challenged by the accused. Where the judge is in doubt he should consult the President of the Court.

It is contended that despite their weaknesses especially in maintaining a detached stance from their creating organ that is a highly political body, the international criminal tribunals have proven themselves to be more than adequate in ensuring that justice is achieved.¹⁰ The use of the word “adequate” is intentional as it is difficult for the tribunals to conduct themselves in an exemplary manner that would be expected of national courts by virtue of the lack of constitutional framework. Even so, the tribunals consider themselves as purely judicial organs and that they come in the purview of the United Nations only where the administration of the courts are concerned. Despite several controversial decisions, the judges have managed to ensure that the accused receive a fair trial not just within the Statute and the Rules of Procedure and Evidence but also in conformity with the international standards in the international and regional human rights instruments. These

¹⁰Leila Nadya Sadat relates an anecdotal example of the impact the ICTY has had in the international community. In 2001, during an Israeli Cabinet Meeting, the following transpired between the Infrastructure Minister Avigdor Lieberman and then Foreign Minister (and the current President of Israel), Shimon Peres over what steps Israel should take to address the threat of Palestinian suicide bombers.

Mr. Lieberman: At 8 a.m. we'll bomb all the commercial centres.....
 At noon, we'll bomb their gas stations....
 At two we'll bomb their banks....

Mr. Peres (interrupting): And at 6 p.m. you'll receive an invitation to the international tribunal at the Hague.

Legal niceties and correctness of that remark aside, that conversation reflects the effect of the ICTY has achieved amongst the international community. Sadat *The Legacy of the ICTY: The International Criminal Court* (2002-2003) New Eng L. Rev 1973.

instruments are not binding on the judicial organs. However the Secretary-General had expressed his hope that the International Tribunals do conform to the international standards and the judges have taken his comments into consideration. Some of the accused prefer to be tried at the International Tribunals rather than being sent back to the national courts as they believe that national proceedings is less independent and impartial than the proceedings at the International Tribunals.

It is recommended that the United Nations-sponsored and the regional instruments on the independence and impartiality of the judiciary are implemented at international stage. The mandate of the Special Rapporteur for the Independence of Judges and Lawyers should be widened to include the international judiciary including the International Criminal Court as a monitoring and a complaint mechanism and accessible to judges.

Several issues came to the fore upon interviews conducted by the author at the Hague in June 2002. First, the Chambers were very vehement and proud about their independence from the Security Council. To use a phrase used by a Senior Legal Officer, judges were “sternly independent”. It was opined by senior officers from Chambers that the judges are sensitive to the perceptions of the outside world and that they felt that they had to show that they had integrity. Integrity was the core of their qualifications. The prevalent feeling was that trials were very fair and that judges were very concerned with the rights of the accused, including understanding the proceedings. Judges were apparently understanding of the defence lawyers’ ignorance of the Rules. However, it was intimated by a defence counsel that as counsel and accused come from civil law systems, they find the common law systems confusing.

On the other hand, defence counsel interviewed were not that optimistic. Aside from the different legal systems of practice, they were of the view that the Tribunal was very “prosecution-orientated” and the atmosphere was “we

must convict". That there are non-career judges on the Bench was frustrating to the defence and the lack of judicial experience was telling. It was opined that the non-litigation judges had no clue as to how to conduct a criminal trial. Counsel also opined that the *ad litem* judges were more interested and less burnt-out. That the defence counsels were at a disadvantage was apparent. On the day I was at the ICTY, the defence counsel had signed a petition to the Chambers, complaining, *inter alia* on the double security checks they had to go through, lack of basic facilities such as facsimile machines, photostat machines, research facilities and the preferential treatment the Prosecution has in terms of financial and professional resources. Unfortunately, at that point in time, there was no defence bar and counsel were left to their own devices in preparing the cases for the accused.

However, it is concluded that notwithstanding the hard problems the international criminal justice faces, the International Tribunals are proof that independent international criminal courts can operate post -Nuremberg. Perhaps it is best summed-up in the following quote. It is not by a judge or a lawyer or a legal expert or even a commentator. It is by a victim and it is on what ultimately is the goal of the international criminal justice system.

"His name is Amor Masovic, and his mission, for the past 10 years, has been to search for the persons who have gone missing in the war. In most cases, he finds them in the mass graves scattered across the crags of Bosnia. He says:

Were it not for the Tribunal, we would probably be very, very far from the truth and justice. Were it not for the Tribunal, we would perhaps still be discussing whether Srebrenica happened or not, whether the eight thousand people who were killed ever existed at all. All that would be in question were it not for the Tribunal. Keraterm, Manjaca, Trnopolje, all those camps, the crimes in Visegrad, the crimes in Foca, in many other places, in Celebici, would be in question. Were it not for the Tribunal, all that would be in question. The Tribunal has therefore undoubtedly played an

extremely positive role. In fact, the only positive role, having in mind the way in which the international community treats what happened in the former Yugoslavia.”¹¹

¹¹ Mirko Klarin *The Tribunal's Four Battles* (2004) 2 JICJ 546, 557 n.8. On a personal note, the author had the opportunity to view the proceedings against the late Slobodan Milosevic, the former President of Federal Republic of Yugoslavia at the ICTY in the Hague. It appeared to me that the Judges of the Tribunal were bending over backwards to accommodate Mr. Milosevic, including his politic diatribes which he would indulge every few minutes or so. As a practitioner, I was amazed at the patience shown by the Tribunal. If a similar trial had taken place in the national legal system in which I practised, sanctions could have been taken against Mr. Milosevic, including for contempt of court. A cynic could say that the Judges were being careful in their treatment of Milosevic in order to avoid international criticism. My personal observation, however, was that the Judges were making every attempt to ensure that the trial against Mr. Milosevic was fair. See also Scharf, *supra* n.7

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Basic Principles on the Independence of the Judiciary

Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the

Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration. Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.