

The right to an independent and impartial tribunal: A comparative study of the Namibian judiciary and international judges

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Introduction

The principle that a court of law should be independent and impartial is firmly embedded in all legal systems and in all major international human rights instruments.¹ Indisputably, this requirement constitutes a general principle of law and it gives rise to one of the most fundamental of human rights.² Thus, in the *Farundzija* case,³ the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held as follows:

The fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognized as being an integral component of the requirement that an accused should have a fair trial.

The notion of *judicial independence* derives from the doctrine of the separation of powers, as advocated by Montesquieu, the French jurist and philosopher. In *L'Esprit des Lois* (1748), Montesquieu cautioned that –⁴

[t]here is no liberty, if the judiciary power be not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subjects would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

The learned scholar further opined that if the judiciary were not independent of the legislature and the executive, the law could not be employed as a means of ensuring liberty and advancing human rights. In those circumstances, the law

1 See e.g. Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR); Article 6(1) of the European Convention on Human Rights (ECHR); Article 8(1) of the American Convention of Human Rights (ACHR); and Article 78(2) and (3) of the Namibian Constitution.

2 Cassese, A. 2003. *International Criminal Law*. Oxford: Oxford University Press, pp 393–394.

3 Case No. IT-95-71/1-A99, para. 43.

4 Montesquieu, C de S. 1748. *De L'Esprit des Lois*, Book XI, Chapter 6. Whitefish: Kessinger Publishing.

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could not empower the affected citizen to challenge the lawfulness or otherwise of any piece of legislation or any executive order that impede his/her rights.⁵

The conditions for judicial independence and impartiality have been a subject of debate by both scholars and lawmakers. Briefly, these include but are not limited to the election and appointment of judges; security of tenure of their office; their immunities and privileges; their salaries and financial security; their discipline and removal (or disqualification); and the institutional independence. It is important to note that the conditions of judicial independence and impartiality apply *mutatis mutandis* to national and international judges alike.

In this paper, the author examines the concepts of *judicial independence* and *impartiality of the judiciary* as applicable to and interpreted by the Namibian judiciary as well as by international (and regional) courts or tribunals. To this end, Namibian case law and statute law as well as the statutes and judicial decisions of international courts on the topic are explored. Some of the international judicial fora explored are the recently created International Criminal Court, the ad hoc United Nations (UN) International Criminal Tribunals for Rwanda and the former Yugoslavia, the Special Court for Sierra Leone, the European Court of Human Rights, and the Southern African Development Community Tribunal. This paper is thus structured into three main parts: (i) the nature and content of the right to an independent and impartial tribunal; (ii) the independence and impartiality of the Namibian judiciary; and (iii) the independence of international or regional courts.

The nature and content of the right to an independent and impartial tribunal

The survey of international and regional human rights instruments shows that they all provide for the guarantee to a competent, independent, and impartial tribunal established by law.⁶ The common elements to all these texts appear to be *tribunal*, *independent*, *impartial*, and *established by law*. Additionally, the International Covenant on Civil and Political Rights (ICCPR) and the American Court on Human Rights require that the tribunal be “competent”: a requirement which, under the European Court on Human Rights (ECHR), can be construed as being equivalent to the term *established by law*.

5 (ibid.).

6 See e.g. Article 10 of the Universal Declaration of Human Rights; Article 14(1) of the International Covenant on Civil and Political Rights; Article 6(1) of the European Convention on Human Rights; Article 8(1) of the American Convention on Human Rights Law; and Article 7(a), (b) and (d) of the African Charter on Human and Peoples’ Rights.

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The words “independent and impartial tribunal” were used in the first draft of the Universal Declaration on Human Rights (UDHR).⁷ During the drafting process of the UDHR, the United Kingdom proposed a text which dropped the word “independent”, but it was later reinserted by Mr R Cassin, who was in charge of incorporating amendments, without any discussion. Equally, the early version of the ICCPR as suggested by the United States of America in 1947, only referred to a “competent and impartial tribunal”, but the Working Group incorporated and maintained the term “independent” in the final text.⁸ With regard to the words “established by law”, their origin can be traced back to Mr F Sages, the Chilean delegate, who suggested that the tribunal also had to be “regular”, namely “pre-established by law”.⁹

That the requirement of “an independent and impartial tribunal established by law” is one of the key parameters of the right to a fair trial, and thus vital to the protection of constitutional and human rights, is not questionable. This is because the guarantee ensures that the individual human and constitutional rights of a party to a dispute are decided by a neutral authority or body, be it judicial or quasi-judicial. On the other hand, the guarantee of “a competent, independent and impartial tribunal” is considered as the foundation of the rule of law. Indeed, without an independent and impartial judiciary, one may wonder whether the law itself can have any real meaning.

Originally, this requirement was conceived to address the inherent deficiencies posed by special jurisdictions, in particular tribunals set up *ex post*, for trying cases with political implications.¹⁰ In the ensuing discussion, the three elements of the guarantee are examined. First, the concepts of *independence* and *impartiality* are dealt with, and then the requirement that a “court be established by law” is discussed.

7 For more on this, see Trechsel, Stefan. 2005. *Human rights in criminal proceedings*, Vol. XII/3. Oxford: Oxford University Press, p 45; Weissbrodt, D. 2001. *The right to a fair trial: Article 8, 10, and 11 of the Universal Declaration of Human Rights*. The Hague: Kluwer Law International, pp 13–15, 17, 33, 45–46, 51–52, 54.

8 Weissbrodt (2001:45–46).

9 (ibid.:54).

10 Trechsel (2005:47); see also the findings of the UN Human Rights Committee, General Comment 13, Article 14, UN Doc. HRI/GEN/1/Rev. 1 at 14 (1994), para. 4, where the Committee found as follows:

The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial, and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice.

Judicial independence as distinguished from judicial impartiality

Some jurists opine that the concepts of *judicial independence* and *impartiality* overlap and can hardly be distinguished in a clear way.¹¹ Others stress that they are different notions and should, therefore, be distinguished.¹²

In ordinary language, *independence* essentially means “freedom from influence”. This ordinary meaning is somehow underscored by the legal definition of *judicial independence*, namely “the lack of subordination to any other organ of the state, in particular to the executive”. Specifically, *judicial independence* implies that judges are the authors of their own decisions, and that they should be free from any ‘inappropriate’ influence.¹³ Having said that, it is worth noting that a judge need not be free of influence from *all* individuals. For instance, a judge may be influenced by submissions (either oral or written) made by parties to the dispute and their respective witnesses, or by any third party who may have an interest in the case being adjudicated. Such influence or persuasion may not be referred to as ‘inappropriate’ influence.

The nature of ‘inappropriate’ influence and the identity of actors who may influence the presiding judge might differ, depending on the normative theory of adjudication from which the definition of *judicial independence* emerges. A theory of adjudication specifies the content of the obligation to decide a case. In turn, the obligations determine what constitutes inappropriate influence from various individuals.¹⁴

Two theories of adjudication exist, namely the so-called *Hart’s Theory of Mechanical Adjudication*, and *R Dworkin’s Theory of Adjudication*. According to the *Theory of Mechanical Adjudication*, the judge identifies the legal rule that governs the case by tracing its pedigree, and then applies the legal rule to the case at hand in a straightforward manner.¹⁵ Thus, under this theory, the parties may only guide the judge in highlighting the relevant statutes, case law, and other regulations, but no other influence by anyone else is legitimate.

11 See e.g. Trechsel (2005:45).

12 See e.g. Van Dijk, P & GJH van Hoof. 1998. *The right of an accused to a fair trial under international law*. The Hague: Kluwer Law International, p 451.

13 See Burbank, SB (ed.). 2002. *Judicial independence at the crossroads: An interdisciplinary approach*, New York: Sage Publishers, pp 46–49.

14 (ibid.:48).

15 (ibid.:49); Hart, HLA. 1961. *The concept of law*. Oxford: Oxford University Press, p 29.

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What happens if there are no legal rules governing the case to be decided? Under such circumstances, the judge is obliged to exercise discretion. In exercising this discretion, s/he may not act arbitrarily, and more importantly, s/he is required to render an even-handed judgment that promotes the end of the statute in question or makes good law. The judge cannot simply act capriciously.¹⁶ Thus, whether the law is clear or not, the resolution of the dispute does not depend on the identity of the presiding judge, but rather on the applicable law, the submissions by both parties, and the ends of justice.

In contrast, *Dworkin's Theory of Adjudication* holds that, before rendering a decision, a judge is required to interpret the political history of the jurisdiction in which s/he sits to make the law of that jurisdiction "the best it can be".¹⁷ In other words, this theory imposes an obligation on the judge to interpret the law in a way that makes it "the best it can be". Consequently, the outcome of the case has to both fit the past political history of the jurisdiction, and cast that political history in a favourable light.¹⁸ Undoubtedly, this theory brings in issues pertaining to the philosophical definitions of law, its contents, and its role in a given society. These are not, however, part of our discussion herein.

On the other hand, *judicial impartiality* relates to a specific case at hand. Essentially, it is this part of the guarantee which plays a vital role in the protection of individual rights. *Impartiality* means that a judge is not biased in favour of the other party. According to Stefen Trechsel, "a judge must be free to float hither and thither between the positions of the parties and finally reach a decision at the place which, in correct application of the law and rules of jurisprudence, marks the just solution".¹⁹ Thus, for an individual party to a civil or criminal proceeding, what matters most is the impartiality of the judge, and not necessarily his/her independence. For example, if a judge is not independent, there is definitely a suspicion that s/he will not be impartial; but in some specific cases, dependence may be irrelevant.²⁰ If, however, a judge is partial, s/he is not fit to sit; and it becomes immaterial whether s/he is independent or not.²¹

16 See Burbank (2002:49).

17 See Dworkin, R. 1978. *Taking rights seriously*. Oxford: Oxford University Press, pp 31–39.

18 (ibid.).

19 See Trechsel (2005:50).

20 See the foregoing paragraphs, which noted that a presiding judge may be influenced by either submissions from parties to the dispute, or a set of political and moral values prevailing in a given jurisdiction.

21 Trechsel (2005:50).

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The distinction between *judicial independence* and *judicial impartiality* has been addressed by both domestic and international jurisprudence. In the *Valente* case, the Canadian Supreme Court held as follows:²²

Although recognizing the ‘close relationship’ between the two, they are nevertheless separate and distinct requirements. Specifically, impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word “independent”, however, connotes not only the state of mind or attitude in the actual exercise of the judicial functions, but a status or relationship with others, particularly to the Executive Branch of government, that rests on the objective conditions or guarantees. [Emphasis added]

Also in Canada, in the *Lippe* case, the then Chief Justice Lamer stated that –²³

... judicial independence is critical to the public’s perception of impartiality; judicial independence is the cornerstone, a necessary prerequisite, for judicial impartiality.

In this context, *impartiality* is viewed as wider than *independence*, in that a tribunal can be independent and yet be biased against one of the parties to the dispute. However, it is difficult to understand how, in a criminal case, a tribunal can lack independence and yet be impartial. Surely, in all criminal proceedings, where the state is involved, the lack of independence of a trying magistrate or judge would result in bias, i.e. *a lack of impartiality*.

In *Prosecutor v Kanyabashi (Appeal)*, the International Criminal Tribunal for Rwanda (ICTR) also stressed the distinction between these two concepts where it found as follows:²⁴

Judicial independence connotes freedom from external pressures and interference. Impartiality is characterized by objectivity in balancing the legitimate interests at play.

In contrast with the above jurisprudence, it appears that the ECHR does not attach much importance to the distinction between *judicial independence* and *impartiality*. Thus, in *Findlay v United Kingdom*, the ECHR held as follows:²⁵

The concepts of independence and objective impartiality are closely linked and the court will consider them together as they relate to the present case.

22 *Valente* [1985] SCR 673, 23 CCC 3d 193 (Can. 1985), at 201–202.

23 *Lippe* [1991] 2 SCR 114, 64 CCC 3d 513, 530.

24 *Prosecutor v Kanyabashi* ICTR-96-15-A, Appeal Chamber, 3 June 1999, Decision on the Defence Motion for the interlocutory appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinions by Judge MacDonald and Judge Vohrah, para. 35.

25 *Findlay v United Kingdom*, Reports 1997 – I, 263, (1997) 24 EHRR 211, para. 73; also *Incal v Turkey*, Reports 1998 – IV, 1547, (2000) 29 EHRR 449, para. 65; *Sener v Turkey*, No. 26680/95, (2003) 37 EHRR 34, para. 56.

The requirement that a court be established by law

We now examine another essential component of the guarantee, to wit, a “competent tribunal established by law”.

In determining whether the guarantee to an independent and impartial court has been violated or otherwise, the first issue to be examined is this: Was the tribunal established by law? If the answer to this question is in the negative, this would be the end of the enquiry, and there is no purpose in considering other elements such as the right to a counsel of one’s choosing, the right to cross-examine witnesses from the other side, or the right to be informed of the nature of the charges or allegations, to name but a few.²⁶

The requirement that a court be established by law lies at the foundation of judicial independence. This was stressed by the European Commission of Human Rights in *Zand v Austria*, where it held as follows:²⁷

The judicial organization in a democratic society must not depend on the discretion of the Executive, but should be regulated by law emanating from Parliament.

The Commission further stated that the term “a tribunal established by law” in Article 6(1) of the European Convention on Human Rights envisages the whole organisational set-up of the courts, including not only matters coming within the jurisdiction of a certain category of courts, but also the establishment of the individual courts and the determination of their local jurisdiction.²⁸

In this context, Article 78(2) of the Namibian Constitution reads as follows:²⁹

The courts shall be independent and subject only to this Constitution and the law.

It goes without saying that the laws establishing courts or tribunals must themselves reflect the wishes of the people. Thus, the law-making processes are not only obliged to be transparent, but the lawmakers also need to be democratically elected – if courts or tribunals established by them are to have any legitimacy.

26 See e.g. the ECHR decision in *Rotaru v Romania*, (2000) 21/4-7 HRLJ 231, para. 62; *Pfeifer and Plankl v Austria*, (1992) 14 EHRR 692, p 25.

27 European Commission of Human Rights, Application 7360/76.

28 (*ibid.*).

29 A similar provision is found in most modern Constitutions.

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With regard to international tribunals or courts, while most of them are ordinarily established by a treaty or agreement, others have been created by the United Nations (UN) Security Council using its powers under Chapter VII of the UN Charter.³⁰ Most probably, the UN General Assembly, which is considered as the Parliament of the world body, was better placed to create the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) through treaties.

Nevertheless, there is a need to recognise inherent deficiencies involved in treaty-based tribunals. These include the following:³¹

- The time required for the elaboration, negotiation and conclusion of a treaty
- The additional time required to attain the necessary ratifications for its entry into force, and
- More importantly, the absence of any guarantee that states whose participation would be essential to the effective operation of the tribunal would become party to the treaty creating the tribunal.

Certainly, without prompt ratification of the underlying treaty by the states concerned, a tribunal established under this treaty would be *brutum fulmen*.

In contrast, a tribunal created by the Security Council under Chapter VII of the UN Charter would guarantee a quick and expeditious result. Moreover, it would be a very effective instrument, since all Security Council resolutions are binding on all states.³² Notably, not only did the General Assembly endorse the Security Council decisions to establish the ICTY and the ICTR,³³ it also plays a vital role in the functioning of these sister tribunals, e.g. in electing judges, approving the budget, and reviewing the tribunals' annual reports.³⁴

In the light of the foregoing, it can safely be argued that the two UN ad hoc international criminal tribunals are "tribunals established by law", as required by the guarantee. However, with the establishment of the International Criminal

30 See e.g. the creation of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda by, respectively, SC Resolutions 808 (1993) and 955 (1994).

31 See Morris, V. 1998. *The International Criminal Tribunal for Rwanda*, Vol. I & II. New York: Transnational Publishers Inc., pp 99–100.

32 See Article 25, UN Charter.

33 GA Res. 206, UN GA OR 49th Session, Supp. No. 49, Vol. I, at 227, UN Doc. A/49/49 (1995).

34 See Article 12 of the Rwanda Tribunal (election of judges), Article 30 (expenses of the tribunal), and Article 32 (annual report).

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Court, it is unlikely that the UN Security Council will, in future, establish other ad hoc international tribunal(s) using its powers under Chapter VII of the UN Charter.³⁵

Judicial independence and impartiality in the Namibian context

Article 78(1) of the Namibian Constitution vests judicial power in the courts of Namibia, which consist of a Supreme Court, a High Court, and Lower Courts. In addition, paragraphs 2 and 3 of the same Article provide as follows:

- (2) *The Courts shall be independent and subject only to this Constitution and the law.*
- (3) *No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the state shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law ...*

The reading of the above constitutional provisions clearly demonstrates that judicial independence and impartiality are protected by the highest law of the land. Additionally, judges and other judicial officers are only answerable to the Constitution and any other valid laws.

The question of judicial independence in Namibia was raised in the case of *S v Heita & Another*.³⁶ In this case it was recounted that members of a political party had made public threats against a judge for imposing what they believed to be lenient sentences in a treason trial. Indeed, a sentence imposed on 19 September 1991 in the case of *S v Kleynhans and Others*³⁷ in the Namibian High Court had led to then presiding Judge O'Linn and other judicial officers³⁸ being scandalised, insulted and threatened from public platforms through the media and through the structures of political parties, trade unions and churches.

Consequently, the issue of recusal from the ongoing treason trial by the trial judge was raised by the court ex mero motu. In its deliberations, the court held that the existence of a separation of powers among the three separate branches of government was certainly one of the main pillars of the Constitution and the

35 For excellent arguments on this, see Schabas, WA. 2006. *The UN International Criminal Tribunals*. Cambridge: Cambridge University Press, pp 32–34.

36 1992 NR 403 (HC).

37 This case involved another three accused persons in the same treason trial.

38 The Attorney-General and the Prosecutor-General.

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state. The independence of the judiciary and the preconditions for ensuring it are in fact clearly set out in Article 78 of the Constitution.

In regard to Article 78(2) and (3) of the Constitution, Justice O'Linn made the following points:³⁹

- That interference with judges and/or judicial officers in the exercise of their judicial functions was not allowed at any stage, be it before, during or after a verdict in a particular trial
- That the prohibition in Article 78(3) not to interfere with judges and/or judicial officers extended to each and every person, and was not restricted to members of the legislature or executive, and
- That –

... the aforesaid prohibitions and legal duties are imposed obviously to make it possible for judges and other judicial officers to perform effectively and responsibly their very onerous functions.

In the same case, the Justice O'Linn emphasised that it was not only the independence of the judges or judicial officers that had to be protected, but their dignity and effectiveness as well. Thus, judges are dependent on the proper functioning of sub-Article 78(3) of the Constitution for the protection of their independence, dignity and effectiveness, and for the maintenance of the independence of the judiciary as a pillar of the Constitution – without which the Constitution itself cannot survive. Thus, the Constitution makes it abundantly clear that independent courts are subject only to the Constitution and to any other laws properly enacted. Put differently, this means that Namibian courts are not subject to the dictates of any political party, even where that party is the ruling party.

In the end, the court held that the Presiding Judge should not recuse himself, mainly for the following reasons:

- Both the state and the defence counsel had indicated that the presiding judge should not recuse himself as they believed he would decide the case on its merits and in consideration of the arguments presented by parties, and
- There were indications that the Prosecutor-General might take the necessary action against individuals who had breached the law by insulting, threatening, intimidating, menacing, and verbally abusing the judiciary.

39 See at page 793B of the case.

As a corollary to the concept of *judicial independence* is *institutional independence*, i.e. the independence of the judiciary as an institution as opposed to individual judges. To assess the institutional independence of the Namibian judiciary, one needs to look at the standard criteria and conditions for judicial independence. These include the appointment and removal of judges, their remuneration and salaries, their security of tenure, and their discipline and disqualification (recusal). We now turn to these conditions as applied and adhered to in the Namibian context.

Appointment and security of tenure of Namibian judges and other judicial officers

Appointment of judges⁴⁰

According to Article 82(1) of the Namibian Constitution, all appointments of judges to the High and Supreme Courts are to be made by the President on the recommendation of the Judicial Service Commission. The Judicial Service Commission is established in terms of Article 85(1) of the Constitution. It consists of the Chief Justice, a judge appointed by the President, the Attorney-General, and two members of the legal profession nominated in accordance with the provisions of an Act of Parliament by the professional organisation or organisations representing the interests of the legal profession in Namibia. Once appointed, judges are required to make an oath or affirmation of office in the terms set out in Schedule 1 of the Constitution.⁴¹

Article 82(2) provides for the President to appoint acting judges of the Supreme Court at the request of the Chief Justice. Acting judges may be required to fill casual vacancies in the court from time to time, or as ad hoc appointments to sit in cases involving constitutional issues or an interpretation of the Bill of Rights if, in the opinion of the Chief Justice, it is desirable that such persons be appointed to hear such cases by reason of their special knowledge or expertise in such matters. Furthermore, Article 82(3) is similar, but it relates to the ad hoc appointments of High Court judges. Thus, in terms of the latter constitutional provision, at the request of the Judge-President, the President may appoint acting Judges of the High Court from time to time to fill casual vacancies in the court, or to enable the Court to deal expeditiously with its work.

40 In this part, our discussion only focuses on judges. With regard to other judicial officers such as the Prosecutor-General and the Attorney-General, their appointment and judicial independence are discussed elsewhere in this volume.

41 Article 82(1).

Security of tenure of Namibian judges

Article 82(4) of the Constitution states the following:

All Judges, except Acting Judges, appointed under this Constitution shall hold office until the age of sixty-five (65) but the President shall be entitled to extend the retiring age of any Judge to seventy (70). It shall also be possible by Act of Parliament to make provision for retirement at ages higher than those specified in this Article.

In regard to the removal of judges, Article 84(1) of the Constitution provides that a judge may be removed from office before the expiry of his or her tenure only by the President acting on the recommendation of the Judicial Service Commission. Judges may only be removed from office on the grounds of mental incapacity or gross misconduct, and then only in accordance with the provisions of Article 84(3).⁴² The latter states that the Judicial Service Commission is obliged to investigate whether or not a judge should be removed from office on such grounds, and if it decides that the judge should be removed, it informs the President of its recommendation.

Apart from the above constitutional provisions, a judge's security of tenure is also addressed in Acts of Parliament establishing the High Court and the Supreme Court. Thus, section 8(1) of the High Court Act, 1990 (No. 16 of 1990) provides as follows:

Any Judge of the High Court holding office in a permanent capacity –

- (a) *shall retire from office on attaining the age of 70 years;*
- (b) *may retire from office if he has attained the age of 65 years and has completed at least eight years pensionable service as defined by any law relating to the pensions of Judges;*
- (c) *may at any time with the approval of the President retire from office if he or she becomes afflicted with a permanent infirmity of mind or body disabling him or her from the proper discharge of his or her duties of office or any other reason exists which the President deems sufficient.*

Section 8(1) of the Supreme Court Act, 1990⁴³ is similar in all respects but one, namely that it applies to any judge of the Supreme Court holding office in a permanent capacity.

42 Article 84(2).

43 Act No. 15 of 1990.

Remuneration of judges

In terms of section 10(1) of the Supreme Court Act, the Chief Justice and other judges of the Supreme Court are entitled to receive or enjoy such remuneration, benefits, allowances or privileges as may be prescribed by law.⁴⁴ Subsection (2) states that the remuneration of any judge referred to in subsection (1) will not be reduced at any time while s/he is in office, but is subject to review from time to time. In light of the above, the judges' financial security is guaranteed in that their salaries can only be increased – and this is done in accordance of properly enacted laws.

The judicial independence and impartiality of international judges

In order to assess the compliance with and adherence to the concept of judicial independence by international judges, a number of international judicial fora are explored. These are the recently created International Criminal Court, the ICTY and ICTR created by the UN, the Special Court for Sierra Leone, the Southern African Development Community (SADC) Tribunal, and the ECHR. Other international courts or tribunals may be mentioned en passant, because their jurisprudence on the topic is either insignificant or non-existent. Thus, the present author's research on the International Court of Justice (the World Court) case law on the topic did not bear any fruit. The same applies to the African Court on Human and Peoples' Rights: although its Protocol entered into force in 2004 and its judges were sworn in in 2006, it is not yet operational.

The judicial independence of the Yugoslavia Tribunal and the Rwanda Tribunal

Nearly 50 years after the creation of international military tribunals by the victors of World War II, the international community, through the UN Security Council,⁴⁵ established the International Criminal Tribunal for the former Yugoslavia (ICTY) to deal with the atrocities committed in the Balkans whilst the world was sleeping.⁴⁶ The ICTY was mandated to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of

44 This is also found in section 5 of the High Court Act.

45 See SC Res. 808 (1993), 22 February 1993, UN SC OR, 48th Session, at 28, UN Doc. S/INF/49 (1994).

46 For a detailed background on the creation of the ICTY, see Schabas (2006:13–24); also Morris (1998:79–98).

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the former Yugoslavia after 1991.⁴⁷ The legality of the ICTY is fully discussed in the Report prepared by the UN Secretary-General at the behest of the Security Council.⁴⁸

At the time of ICTY's creation, a civil war was raging between the Hutu and Tutsi in Rwanda, which culminated in acts of genocide in April 1994. In the aftermath of the genocide, the UN and the international community – which had dismally failed to prevent or stop the massacres – thought that a creation of an ad hoc criminal tribunal for Rwanda would restore peace and stability to the region, and contribute to national reconciliation in Rwanda.⁴⁹ On 8 November 1994, the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR), with the mandate to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994.⁵⁰

Although the Rwanda Tribunal parallels the ICTY, it is worth noting that there are important differences with regard to jurisdiction *ratione materiae*. For example, whereas the armed conflict in the former Yugoslavia was both internal and international, in Rwanda the armed conflict was purely between two internal arch-rival ethnic groups.⁵¹ Finally, both judicial institutions were created by the UN Security Council under Chapter VII, have in common the Appeal Chamber and initially even shared the same Prosecution office.⁵²

As soon as the two ad hoc tribunals began their work, their judicial independence was challenged and questioned by defendants appearing before them. Thus, in

47 See SC Res. 808 (1993), para. 1.

48 See *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, presented 3 May 1993, S/25704, para. 18–30.

49 See e.g. Prof. A Cassesse, who argues that when the Great Powers and the UN are unwilling or unable to put an end to atrocities and serious political crises, they tend to fall back on the establishment of a tribunal. Cassesse, A. 2004. “*International justice, diplomacy, and politics*”. In Badinter, R (ed.). *Judges in contemporary democracy: An international conversation*. New York: New York University, pp 186–188.

50 See UN SC Res. 955 (1994).

51 See Schabas, WA. 1995. “Prosecuting international crimes: Searching solutions to impossible problems”. *Criminal Law Forum*, 7:550; *Prosecutor v Tadic*, Case No. IT-94-1-AR 72 (ICTY, Appeal Chamber, 2 October 1995).

52 On 2 August 2003, the UN Security Council adopted Res. 1503 (2003), splitting the Prosecution's Office of the two Tribunals. Thus, the Security Council appointed a new Prosecutor for the ICTR, Justice Hassan Bubacar Jallow, from the Gambia. Carla Del Ponte, who was combining prosecutorial duties for both Tribunals, was henceforth to deal with ICTY prosecutions only.

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the cases of *Prosecutor v Tadic* (ICTY)⁵³ and *Prosecutor v Kanyabashi* (ICTR)⁵⁴, both defendants contended that the two Tribunals lacked judicial independence in that they were creations of a political body, i.e. the UN Security Council. Moreover, the defendants argued that the independence of these Tribunals was derogated by their respective obligations to annually report to the Security Council in compliance with Article 35 of their respective Statutes.⁵⁵ Finally, the impartiality of the Rwanda Tribunal had not been demonstrated because of the ‘selective prosecution’ of only one side to the conflict (the Hutus).⁵⁶

In regard to the first of these challenges, both Tribunals held that all criminal courts worldwide were the creation of legislatures which were eminently political bodies. In regard to the second challenge, i.e. mandatory annual reporting to the Security Council, both Tribunals ruled that this requirement –⁵⁷

... is purely administrative and not a judicial act and therefore does not in any way impinge upon the impartiality and independence of their judicial decisions.

As to the third argument, to wit, the impartiality of the Rwanda Tribunal had not been demonstrated because of the ‘selective prosecution’ of one side, i.e. the Hutus, the Trial Chamber of the ICTR reiterated that, pursuant to Article 1 of the Rwanda Tribunal Statute, all persons suspected of having committed crimes falling within the jurisdiction of the Tribunal were liable for prosecution.⁵⁸

In regard to the issue of ‘selective justice’, it is the present author’s submission that the impartiality of the Rwanda Tribunal will remain doubtful for as long as it applies ‘selective prosecution’ of one party to the Rwandan conflict. It is common cause that, to date, the Rwanda Tribunal has not yet indicted any suspect from the Rwandese Patriotic Front (RPF), a former Tutsi rebel movement, currently the ruling party in Rwanda. Yet there is tangible and overwhelming evidence that some elements – and, indeed, some senior leaders in the RPF – have committed

53 Case No. IT-94-1-AR 72 (Appeals Chamber, 2 October 1995).

54 Case No. ICTR 96-15-T (18 June 1994).

55 The Tribunals now have to report twice a year in terms of their “Completion Strategies”; see SC Res. 1534 (2004).

56 *Prosecutor v Kanyabashi* ICTR-96-15-A, Appeal Chamber, 3 June 1999, Decision on the Defence Motion for the interlocutory appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinions by Judge MacDonald and Judge Vohrah, para. 35.

57 (ibid.:11).

58 (ibid.); Article 1 of the ICTR Statute provides for the jurisdictional scope of the Rwanda Tribunal. With respect to personal jurisdiction, the ICTR’s competence is limited to all persons who committed crimes on the territory of Rwanda, and to Rwandan citizens who committed crimes in the neighbouring states between 1 January and 31 December 1994.

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serious violations of International Humanitarian Law.⁵⁹ It remains a moot issue whether the Rwanda Tribunal will ever indict or prosecute alleged RPF perpetrators, considering that its lifespan ends in 2008.⁶⁰

In regard to the victor's justice, as practised by the ICTR, one of its former justices makes the following startling revelation:

I have to admit that defense counsels representing defendants at ICTR have so far furnished with the Tribunal enough evidentiary proofs that RPF soldiers and some of its key leaders have committed numerous crimes against humanity. That there is no indictment on RPF side to date, undoubtedly Hutu consider the Rwanda Tribunal as another form of victor's justice.⁶¹

Article 13(1) in the Statute of the ICTY stipulates that all judges are required to be persons of high integrity and impartiality. This provision is buttressed by Sub-rule 15(A) and (B), which provides for the disqualification of judge(s) for

59 See e.g. various reports on the massive and widespread killings committed by the RPF in 1994. These include, but are not limited to the following: (i) *Amnesty International – Rwanda: Reports of killings and abductions by the Rwandese Patriotic Army, April–August 1994*; (ii) the so-called *Gersony Report*, in which the author stated that “within only two months, RPF soldiers have killed and massacred more than 300 000 people, all of whom were of Hutu ethnic group”. This Report is now with the ICTR; (iii) *Rwanda: The preventable genocide*, authored by the International Panel of Eminent Personalities (IPEP); available at <http://www.visiontv.ca/RememberRwanda/Report.pdf>; last accessed 5 August 2008; (iv) the *UN Interim Report of the Independent Commission of Experts for Rwanda*, established in accordance with Security Council Res. 935 (1994), UN Doc. S/1994/1125 (1994); the Report states, inter alia, –

(i) *that individuals from both sides to the armed conflict in Rwanda have perpetrated serious breaches of international humanitarian law*, in particular of obligations set out in Article 3 Common to the four Geneva Conventions of 12 August 1949 and in Protocol II Additional to the Geneva Conventions, [and]

(ii) *that individuals from both sides to the armed conflict have perpetrated crimes against humanity in Rwanda.*[Emphasis added]

(v) Finally, early in 2008, Judge Fernando Andreu of the Spanish National Court, applying the doctrine of universal jurisdiction, issued indictments against 40 Rwandan senior army officers for war crimes, mass murder, genocide, and crimes against humanity allegedly committed in the aftermath of the 1994 Rwanda genocide; see *Los Angeles Times*, 7 February 2008; available at <http://articles.latimes.com/2008/feb/07/world/fg-rwanda7>; last accessed 23 August 2008.

60 According to the ICTR Completion Strategy, all trials are due to be completed by the end of 2008, whereas appeals are expected to extend to 2010, see *ICTR Press Release*, Arusha, 8 June 2006, ICTR/INFO-9-2-479.EN; available at <http://www.icttr.org>; last accessed 9 September 2008.

61 Justice Yakov Ostrovsky; translated from French by the author, in Thierry Cruvellier, *Diplomatie Judiciaire*, 23 April 2002.

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reasons that may lead to the lack of impartiality. On more than one occasion, the ICTY had to determine cases pertaining to the judicial independence and impartiality of its judges. For instance, in *Prosecutor v Delalic, Mucic, Delic and Landzo*, the Yugoslav Tribunal had to decide whether one of its judges – who had been appointed Vice-President of her country of origin – was still independent, considering that her new appointment involved political activities in the executive branch of government. After a survey of the case law from the ECHR and domestic jurisprudence, the Bureau of the Tribunal concluded that the impartiality of the judge in question was not affected by the new appointment, mainly because she had not yet taken up her new duties.⁶²

The Special Court for Sierra Leone and the concept of judicial independence

Another jurisdiction worth mentioning is the Special Court of Sierra Leone (SCSL). Unlike the two existing ad hoc UN tribunals, the SCSL was created by an agreement between the UN and the Government of Sierra Leone.⁶³ However, the SCSL applies international law, and both its Statute and Rules of Evidence and Procedure are the same as those of the ICTR. The jurisdictional scope of this hybrid court is to try persons who bear the greatest responsibility of the commission of crimes against humanity, war crimes, and other serious violations of international humanitarian law in Sierra Leone.⁶⁴

The guarantee for an independent and impartial tribunal is stipulated in Article 13(1) of the SCSL Statute. In addition, Rule 15(A) and (B) of the Court's Rules provides for the disqualification of SCSL judges if they lack judicial impartiality. With regard to the Court's jurisprudence, an important decision on the topic of impartiality is the case of *Prosecutor v Issa Hassan Sesay*.⁶⁵ In casu, the accused's defence counsel filed an application seeking the disqualification of one of the Court's judges, Justice Robertson, on the ground that said judge has expressed clear bias against the defendant.

62 For the full facts and submissions of the case, see *Prosecutor v Delalic et al.* Case No. IT-96-21-T, 4 September 1998; other cases include *Prosecutor v Farundzija*, ICTY Appeals Chamber, Judgment of 21 July 2000, Case No. IT-95-17/1-A 99, at para. 177; *Prosecutor v Blagovic*, Case No IT-02-60-PT, 19 March 2003; and *Prosecutor v Seselj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification, 10 June 2003.

63 See *Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, Freetown, 16 January 2002. For further reading on the SCSL, its jurisdiction and creation, see Schabas (2006:34–40).

64 UN Doc. S/RES/1315 (2000), para. 3.

65 Case No. SCSL-2004-15-AR 15.

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The crux of the application concerned comments, opinions, and statements made by Justice Robertson about the Revolutionary United Front (RUF) and the Armed Forces Revolutionary United Front (AFRC) in his book entitled *Crimes against humanity – The struggle for global justice*.⁶⁶ After reading written submissions from both the Prosecution – in fact the Prosecution conceded that there had been an appearance of bias on the part of Judge Robertson – and the Defence, the Appeals Chamber of the Court was convinced that Justice Robertson was not fit to sit in matters involving members of the RUF.⁶⁷ However, the Appeal Chamber dismissed another application which sought to bar Justice Robertson from participating in all of the Court's decisions, both administrative and judicial, even in the course of the Plenary Council of the Judges.⁶⁸ Considering that the bulk of the cases being tried by the SCSL involve members of the RUF and/or their accomplices, one wonders why Justice Robertson was not simply and permanently disqualified from sitting as a judge of the SCSL.⁶⁹

The International Criminal Court and the European Court of Human Rights

Drawing from the experience of the two ad hoc international criminal tribunals, and desirous to strengthen the human rights elements as per Article 14(1) of the ICCPR, the Rome Statute of the International Criminal Court (ICC)⁷⁰ provides detailed and perhaps the best provisions for the protection of the guarantee to a competent, independent, and impartial tribunal established by law.⁷¹ Specifically, Article 36(3)(a) of the Rome Statute provides for the nomination and election of judges who are persons of high moral character, integrity and impartiality. Article 40 is exclusively devoted to the judicial independence of the ICC judges. This Article prohibits any activity that may affect the judicial functions of the judges and, particularly, the confidence in their independence. Disqualification of ICC judges for any lack of impartiality is dealt with in detail in Article 41(2)(a)–(c). The independence and impartiality of the Prosecutor is stipulated in Article 42(1), (3) and (5). Finally, Article 67(1) provides for the right of the

66 See Robertson, G. 2002. *Crimes against humanity: The struggle for global justice*. New York: The New Press.

67 See *Prosecutor v Issa Hassan Sesay* Case No. SCSL-2004-15-AR 15, para. 18.

68 Decision in *Prosecutor v Issa Hassan Sesay et al.* Case No. SCSL-04-15-PT.

69 At the time of writing this paper, the author learnt that Justice Robertson was no longer with the SCSL.

70 For an excellent account on the creation of the ICC, its jurisdiction, structure and functioning, see Schabas, WA. 2004. *An introduction to the International Criminal Court* (Second edition). Cambridge: Cambridge University Press.

71 See Articles 36(3); 40(1)–(3); 41(2)(a)–(c); 42(1), (3) and (5); and 67(1).

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accused to an impartial hearing. Understandably, we are yet to benefit from the ICC jurisprudence, considering its recent creation.

The interpretation of the guarantee to an independent and impartial judiciary by the European Court of Human Rights (ECHR) is the most elaborate of the regional human rights systems to date. Its jurisprudence is widely cited and applied by both domestic and international courts. The guarantee to a competent, independent, and impartial court under the European Human Rights System is clearly stipulated in Article 6(1) of the European Convention on Human Rights.⁷² Generally, in interpreting the above provision, the ECHR uses the old maxim:⁷³

Justice must not only be done, but also it must be seen being done.

The criteria for judicial independence were drawn up by the ECHR in many cases, one of which is the decision in *Le Compte, Van Leuven and De Meyere v Belgium*.⁷⁴ In this case, the court reiterated that for a tribunal to be considered independent in terms of Article 6(1), regard must be had to, inter alia, the manner of appointment of its members and their terms of office, the existence of safeguards against outside pressures, and the question of whether it presents an appearance of independence.

With regard to judicial impartiality, the Court has used the ‘objective and subjective approach’. Thus, in *Incal v Turkey*, the Court held as follows:⁷⁵

As to the condition of impartiality, [t]here are two tests to be applied: the first consists in trying to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.

Put differently, these are objective and subjective tests. The issue to be considered in an objective test is whether the judge is objectively biased. In other words, —⁷⁶

[c]an the judge be said to be biased in the eyes of a reasonable person or an ordinary citizen?

72 Article 6(1) of the ECHR reads:

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 reasonable time by an independent and impartial tribunal established by law ...

73 See e.g. *Delcourt v Belgium*, 17 January 1970, para. 31.

74 *Le Compte, Van Leuven and De Meyere v Belgium*, Series A No. 43 (1982) 4 ECHR, para. 55.

75 Reports 1998 – IV, 1547, (2000) 29 EHRR 449, para. 65.

76 E.g. *Belilos v Switzerland*, Series A No. 132, (1998) 10 EHRR 466, para. 67.

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Thus, it is not sufficient that the applicant be apprehensive with regard to the impartiality of a tribunal. He also needs to give reasons for his fears, and the Court will decide whether they are sufficient to justify his fears.

As to the subjective test, this comes into play when determining the lack of impartiality because of a judge's personal bias. In general, the Court has been reluctant to address the lack of impartiality of individual judges. This is so because all judges are presumed impartial until strong evidence is adduced to the contrary.⁷⁷

The Court has also dealt with situations of a lack of impartiality pursuant to a judge's prior involvement in the same case. These mainly include prior involvement as a prosecutor (or *Ministere public* in Civil law systems), a member of the police, an investigator, a member of a body responsible for preparing the indictment, or as a judge on the merits. Virtually both the European Commission and the ECHR have repeatedly stated that any prior involvement in the pre-trial proceedings would amount to a lack of impartiality.⁷⁸ The leading case on this is *De Cubber v Belgium*,⁷⁹ where a trial judge had first acted as an investigating judge in the same case. The Court concluded that the prior involvement was not compatible with the objective requirement of impartiality.⁸⁰

The judicial independence of the SADC Tribunal

The SADC Tribunal was established in 1992 by Article 9 of the SADC Treaty as one of the institutions of SADC. The Summit of Heads of State and Government, which is the Supreme Policy Institution of SADC pursuant to Article 4(4) of the Protocol on the Tribunal, during its Summit in Gaborone, Botswana, on 18 August 2005, appointed the members of the SADC Tribunal. The inauguration of the Tribunal and the swearing in of its members took place on 18 November 2005 in Windhoek, Namibia. The seat of the Tribunal has been designated by the SADC Council of Ministers to be Windhoek, Namibia. Article 22 of the Protocol on the Tribunal provides that the working languages of the Tribunal will be English, French and Portuguese.⁸¹

77 See e.g. *Piersack v Belgium*, Series A No.53, (1983) 5 EHRR 169, para. 25; *Le Compte, Van Leuven and De Meyere v Belgium*, supra, note 69, para. 58.

78 See e.g. *Ben Yaacoub v Belgium*, Application 9976/82, Series A, No. 127 – A, (1991) 13 EHRR 418, para. 108.

79 Series A No. 53 (1983) 5 EHRR 169.

80 (*ibid.*:para. 29ff).

81 See <http://www.sadc.int/tribunal>; last accessed 20 July 2008.

Appointment of SADC Tribunal Judges

Article 16(3) of the SADC Treaty and Article 4 of the SADC Protocol provide for the appointment of judges. Ten judges are appointed for a five-year period, which can be renewed by the common accord of the governments of the member states. For obvious practical reasons, the number of judges cannot be equal to that of the member states. However, Article 3(5) of the Protocol provides that, if it eventually becomes apparent that there is need for an increase from the ten judges initially chosen, then the Council of Ministers may increase the number at the Tribunal's proposal.

Once the ten judges have been appointed, the SADC Council of Ministers has to designate five as regular members who also have to sit regularly. The remaining five constitute a pool from which the President of the Tribunal may invite a member to sit on the Tribunal whenever a regular member of the Tribunal is temporarily absent or otherwise unable to carry out his/her functions.⁸² At all times, the Tribunal is required to be constituted of three members, which forms the ordinary sitting. In cases where the Tribunal decides to constitute a full bench, then the members should be five.⁸³

The Tribunal may not include more than one national from the same state.⁸⁴ In the unlikely event that it happens that two such judges are in fact chosen, it might be worth adopting the position taken by the International Court of Justice (ICJ) according to which, if two candidates having the same nationality are elected at the same time, only the elder is considered to have been validly elected. At most, a judge may only serve for two consecutive terms, after which s/he ceases to qualify to hold office.⁸⁵

Article 6 of the Protocol provides that –

... of the members initially appointed, the terms of the two (2) of the regular and two of the additional members shall expire at the end of three years. The Members whose term is to expire at the end of three years shall be chosen by a lot to be drawn by the Executive Secretary immediately after the first appointment.

It is submitted that the above provision is included in order to ensure a certain measure of continuity. Two fifths of the Court, that is, four judges, are elected

82 Article 3(2), SADC Protocol.

83 Article 3(3), SADC Protocol.

84 Article 3(6), SADC Protocol.

85 Article 6, SADC Protocol.

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every three years; the other three fifths are left until their five years lapse. The same method was also adopted by the ICJ, whose judges run for a maximum term of nine years, but a third of them are elected every three years.⁸⁶

Member states have great latitude in choosing whom to nominate for the Tribunal. All state parties to the SADC Treaty have the right to propose a candidate. The only limitation is that they should qualify for appointment –⁸⁷

... to the highest offices in their respective States or [be] jurists of recognized competence.

It should be stressed that, once elected, a member of the Tribunal is a delegate neither of the government of his/her own country, nor of that of any other state. Unlike most other organs of international organisations, the Tribunal is not composed of representatives of governments. Tribunal members reach their decisions with complete independence and impartiality. However, in some way or other they do in fact represent their legal systems, that is, the judges' professional experience and background obviously has a way of showing in their decisions. This is in no way a weakness. In fact, this has the valuable consequence that the Tribunal operates as a comparative law jurisdiction, merging experiences and understandings of lawyers skilled in the wide range of different legal (civil and common law) systems and, indeed, families of law. As noted by Hunnings, –⁸⁸

... such a respect and understanding for alien legal systems as part of day-to-day decision making is both unique and revolutionary and goes in some way in ensuring the great strength of the court.

The procedure of appointment is that each member state nominates one candidate who meets the specifications laid down in Article 3 of the Protocol. This list of candidates is then forwarded to the Council of Ministers, who selects possible members and recommends such chosen members to the Summit. From the said recommendations, the Summit makes the final appointment.⁸⁹ However, due regard has to be taken to ensure fair gender representation in the appointment and nomination process.⁹⁰

86 See Muller, AS. 1997. *The International Court of Justice: Its future role after fifty years*. The Hague: Martinus Nijhoff Publishers, p 67.

87 See Article 3(1), SADC Protocol.

88 Hunnings, NM. 1996. *The European courts*. London: Cartermill Publishing, p 52.

89 Article 4(4), SADC Protocol.

90 Article 4(2), SADC Protocol.

Independence and impartiality of the SADC Tribunal

Certainly, a proper and concrete assessment of the judicial independence and impartiality of the SADC Tribunal is not easy without reference to its jurisprudence. This is, however, not possible, given the fact that the Tribunal is still in its infancy.

Several provisions have been included in the Protocol to guarantee the independence and impartiality of the judges. Before taking up their duties, members of the Tribunal are required to make a solemn declaration in open session that they will exercise their powers independently, impartially and conscientiously.⁹¹ The implication and essence of this solemn declaration by all members is that the Tribunal should only act on the basis of the law, independently of any outside influence or interventions whatsoever, in the exercise of its judicial function entrusted to it alone by the SADC Treaty and the Protocol.

In order to guarantee judicial independence, no member of the Tribunal can be dismissed unless in accordance with the rules.⁹² Members of the Tribunal may not simultaneously hold any political or administrative office in the service of a state, community, or any other organisation.⁹³ This provision seeks to protect the judges from member states or other institutions' influences. In addition, it fosters public confidence in the Tribunal as a separate and independent judicial entity.

While the European Court of Justice forbids its judges from *engaging in any occupation, whether gainful or not*, for practical reasons the judges of the SADC Tribunal are employed on a part-time basis and can, therefore, hold other judicial offices.⁹⁴ With regard to the well-known principle of *nemo iudex in sua causa*, Article 9(2) of the Protocol stipulates that –⁹⁵

... no Member of the Tribunal shall participate in the decision of any case (dispute) in which he was previously involved.

Another feature relevant to the independence of the Tribunal is the fixed term of office of its judges, namely five years, which term is renewable. It has been argued that the possibility of renewal of their appointment could encourage judges to try

91 Article 5, SADC Protocol. This provision is buttressed by Rule 3 of the Rules of Procedure of the Tribunal.

92 See Article 8(3), SADC Protocol.

93 See Article 9, SADC Protocol.

94 Hunnings (1996:52).

95 This may happen in many ways, e.g. where the judge has acted previously in the dispute at hand as an agent, an attorney or advocate, a legal adviser, or a judge at domestic level.

to please their governments in order to get another renewal nomination.⁹⁶ While this might pose a problem with the European Court of Justice, where each member state nominates one candidate, this does not apply to the SADC Tribunal. The process of selection is such that not all member states can have a candidate sitting on the bench. The result is that the Summit is forced to consider the qualifications of the candidates recommended by the Council of Ministers in order to make their choice. In the end, the judge on the bench will not feel compelled to please his/her government to ensure another term in office. Furthermore, when engaged in the business of the Tribunal, the judges enjoy privileges and immunities to ensure that their decisions are not tainted with the fear of being held accountable at the end of their tenure.⁹⁷ Nonetheless, as mentioned earlier, it is too soon to assess the judicial independence and impartiality of the SADC Tribunal in practice, as the case law of this jurisdiction is almost non-existent.

Conclusion

This paper has explored the concept of judicial independence and impartiality. The author examines the nature and content of the right to a competent, independent and impartial tribunal and its application and interpretation at both national and international levels. In this regard, the judicial independence of the Namibian judiciary and international judges was discussed with a focus on both case law and statute law. True, the conditions for judicial independence of national judges are applicable *mutatis mutandis* to international judges. These include the manner in which judges are appointed and removed; their financial and office security; their immunities and privileges; and their discipline and disqualification.

That the requirement of an independent and impartial tribunal established by law is one of the key components of the right to a fair trial and, therefore, vital to the protection of individual rights, is not questionable. This is because the guarantee ensures that individual rights of parties to a dispute are decided by a neutral authority or body, be it judicial or quasi-judicial. On the other hand, the guarantee of an independent and impartial tribunal is considered as the foundation of the rule of law. Indeed, without an independent and impartial judiciary, one may wonder whether the law itself can have a real meaning.

Notwithstanding the above, it is to be borne in mind that there is no such thing as 'pure judicial independence and impartiality'. Naturally, in the exercise of their judicial functions, judges, as human beings, will be influenced by the prevailing

96 Hunnings (1996:53).

97 See Article 10, SADC Protocol.

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political, social and economic conditions in their respective jurisdictions.⁹⁸ In addition, judicial decisions, more often than not, are influenced by a judge's personal history. Everyone has a personal history that affects their judgment pervasively. Thus, though personal history can be a cause of judicial fallibility, it is perhaps absurd to hold that a judge should decide as if s/he had no personal history.⁹⁹ Certainly, in a criminal case, a judge with a human rights defending background will be inclined to protect and uphold the defendant's rights, whereas a judge with crime prevention or prosecutorial background will be harder with accused persons in criminal matters.

98 For an excellent discussion on the relationship between judges and politics, see Guarnieri, C. 2002. *The power of judges: A comparative study of courts and democracy*. Oxford: Oxford University Press, pp 4–13.

99 Burton, SJ. 1989. "A discussion on the independence and impartiality of international judges". *American Society of International Proceedings*, 83:512–516; see also Shetreet, S. 1985. "Judicial independence: New conceptual dimensions and contemporary challenges". In Shetreet, S (ed.). *Judicial independence: The contemporary debate*. The Hague: Martinus NP, p 627.