

# Judicial independence at the regional and sub-regional African courts

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## ***Abstract***

Qualified and independent judges are essential for the legitimacy of the Courts. African regional courts will only contribute to the rule of law if the courts are legitimately composed. The purpose of this article is to consider whether judicial independence at the African regional and sub-regional courts has contributed to setting standards for the rule of law in Africa. The focus will be on the African Court of Human and People's Rights as well as the courts of the most prominent subregional communities. Because of the influence of the African Commission the composition of this body will also be considered.

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## **1 Introduction**

An independent judiciary and the associated consistent implementation of the principle of separation of powers are important characteristics of the transition to the rule of law.<sup>1</sup> What standards would be standards that strengthen the rule of law? The promotion of human rights would be one such standard. Other factors that are particularly relevant in setting standards for the rule of law include the enforcement of judicial decisions, judicial independence and coordination and coherence between the various regional and sub-regional African Courts. The purpose of this article is to ask whether judicial independence at the African regional and sub-regional courts has contributed to set standards for the rule of law in Africa.

It can be argued that the African regional and sub-regional courts will only contribute to the rule of law and to standard-setting if the Courts are legitimately

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<sup>1</sup>Terhechte 'Judicial accountability and public liability – The German 'judges privilege' under the influence of European and international law' (2012) *German LJ* 313.

composed. The African regional court that will be considered in this article is the African Court of Human and Peoples' Rights. The sub-regional courts that will be examined include the courts of the most prominent regional economic communities such as ECOWAS, the East African Community and the Southern African Development Community (SADC). Although not a court, the African Commission on Human and Peoples' Rights will be considered because of its significant role in the African human rights system.

Qualified and independent judges are essential for the legitimacy of the Courts. Yuval Shany explains the connection between judicial independence and legitimacy.<sup>2</sup> He writes that judicial independence increases the legitimacy of international court decisions and 'strengthens the court's overall legitimacy capital'.<sup>3</sup> It is important for a court to build up initial legitimacy capital as a structured asset held by the court in question. Such initial capital can later be affected or eroded by perceptions of the procedural fairness of the court and its judicial process. In the case of the African regional courts it seems that the courts have built up such initial capital. The reason for this is that the courts have complied with some of the basic requirements of the rule of law. The founding documents and treaties of the courts refer to democracy and the rule of law. It will be argued in this article that the judges of the courts have displayed a high level of independence. Once the courts become more active it will be possible to assess the extent to which the initial capital is still intact or has been eroded.

In assessing the judicial independence of judges at the regional African courts, a distinction has to be made between formal independence and substantive independence.<sup>4</sup> Formally, all the founding documents of the regional courts claim that the judges of the courts are independent. The foundational documents use phrases typical of modern constitutional documents of international courts,<sup>5</sup> that the judges of the court should be 'persons of proven, integrity, impartiality and independence and who fulfil the conditions required in their own countries for the holding of such high judicial office or who are jurists of recognised competence in their own countries'<sup>6</sup> (the wording in the Treaty for the Establishment of the East African Community). Judges are also required to

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<sup>2</sup>Shany 'Assessing the effectiveness of international courts: A goal-based approach', available at: [http://portal.idc.ac.il/He/schools/Law/about\\_us/Documents/Assessing\\_the\\_Effectiveness\\_of\\_International\\_Courts.pdf](http://portal.idc.ac.il/He/schools/Law/about_us/Documents/Assessing_the_Effectiveness_of_International_Courts.pdf) (accessed 2014-08-26).

<sup>3</sup>*Ibid.*

<sup>4</sup>Formal independence involves the question of whether the judicial appointment procedures at the various courts require judges to be independent. A judge displays substantive independence if she/he acts independently and impartially in a concrete case before her/him.

<sup>5</sup>See the Statutes of the ICTY, and ICTR and ICC and the Statute for the Special Court for Sierra Leone in this regard.

<sup>6</sup>Article 2 of the Treaty for the Establishment of the East Africa Community as amended on 14 December 2006 and 20 August 2007.

take an oath or solemn declaration of independence before they take up office.<sup>7</sup> Another formal provision which aims at securing independence (and which is present in most of the founding documents of the courts) is a provision limiting the term of office of the judges. In the case of SADC judges they will hold office for a fixed term of five years (which is renewable).<sup>8</sup> As a general rule, judges of the regional African courts do not act as delegates of their own governments, at least not in a formal sense.

As Mackenzie and others have observed, the process by which international judges are chosen generally consists of two phases: (1) the nomination of candidates by states<sup>9</sup> (or in the case of the International Court of Justice, by a state's Permanent Court of Arbitration national group), and (2) the election of judges by intergovernmental political bodies from among the candidates nominated. In the case of regional African courts, the two phases can be observed. Similar to other international courts, the governing instruments of regional African courts establish criteria to be fulfilled by the individual judges as well as criteria regarding the composition of the bench as a whole.

Although not a court, the African Commission will be included in this article because of its significant role and influence in the African human rights system. The nomination and election of judges and independence questions particular to a court will be discussed with respect to each of these courts.

This article will examine the extent to which the judges at African regional and sub-regional courts have displayed independence. The question of institutional independence of the courts as well as formal independence will also be considered. The question of independence will be assessed according to well-established criteria of judicial independence such as the manner of appointment of judges; their terms of office; the existence of safeguards against outside pressure; and whether they reflect an appearance of independence. Recent trends with regard to the independence of the international judiciary will also be discussed. One such trend is the increasing acknowledgement that gender and geographical representivity in the judiciary increases judicial independence. A diverse bench is more likely to reflect a balanced and independent bench. Justice should not be perceived as the dominance of one group over another. Judicial independence includes independence from political ideology including ethnic and sectarian interests.

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<sup>7</sup>This is required by art 5 of the SADC Protocol which requires judges to make a solemn declaration that they will exercise their powers independently, impartially and conscientiously.

<sup>8</sup>See Bangamwabo 'The right to an independent and impartial tribunal: A comparative study of the Namibian judiciary and international judges' in Horn and Bösl *The independence of the judiciary in Namibia* (2008) 243 at 262.

<sup>9</sup>Mackenzie *et al* (eds) *Selecting international judges* (2010) 100.

## 2 Judicial independence and the rule of law

Regional African Courts have the potential to play a significant role in promoting the international rule of law in Africa.<sup>10</sup> By cooperating with the regional African human rights system and by implementing the decisions of the regional African courts, states will fulfil their human rights obligations and provide individuals with supranational fora for human rights protections when national fora fail. In so doing, they will strengthen the rule of law.<sup>11</sup> Bingham wrote that the international protection of human rights is important to the rule of law because human rights are founded on values that command widespread acceptance throughout most of the world.<sup>12</sup> In turn, the international protection of the rule of law is important because of the extent to which national courts are drawn into the process of determining questions of international law.<sup>13</sup> Bingham pointed out that this is a field in which individual claimants feature very prominently.<sup>14</sup> The individual complaints procedures at the majority of the regional African courts provide opportunities for African citizens to assert their rights as *individuals* (author's emphasis). The fact that the SADC Tribunal recently lost its capacity to hear individual complaints is therefore a setback from the point of view of the rule of law.<sup>15</sup> One of the most important aspects of the rule of law is judicial independence. The extent to which the various courts can be said to uphold and promote the rule of law is therefore at least partially reliant on the independence of the judges of a court.

## 3 International v domestic process

Judicial independence is universally recognised as fundamentally important to democracy. Various international treaties including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (Banjul Charter)

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<sup>10</sup>Chesterman. 'An international rule of law?' (2008) *American J of Comp L* has described the international rule of law as the application of rule of law principles to relations between states and other subjects of international law at 355.

<sup>11</sup>Bingham emphasised the necessity of states to comply with international law. See 'The rule of law and the international legal order' in McCorquodale *The rule of law in international and comparative context* (2010) 4.

<sup>12</sup>In describing the close relationship between international protection of human rights and the rule of law Bingham wrote that 'no other field of law rests so directly on a moral foundation' *The rule of law* (2011) 117. The Security Council has frequently made reference to the rule of law in resolutions.

<sup>13</sup>*Ibid.*

<sup>14</sup>*Ibid.*

<sup>15</sup>Final Communique of the 32<sup>nd</sup> Summit of SADC Heads of State and Government of the Southern African Development Community (SADC), Maputo, 2012-08-10.

contain provisions affirming the importance of this principle. For instance, article 14 of the ICCPR states that:

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.

Article 26 of the African Charter states that:

State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

Furthermore, judicial independence is intertwined with the doctrines of separation of powers and of checks and balances. These doctrines have become essential to many modern day democracies.

The question of judicial independence is currently a contentious topic in many African countries including South Africa. In the South African context the question of the relationship between transformation and judicial independence has been the topic of much debate.<sup>16</sup> Judicial independence is also at the core of judicial politics in Kenya.<sup>17</sup> It is said that the Kenyan judiciary forms an arm of the executive and has a history of corruption and inefficiency.<sup>18</sup> This article will however focus on the international context and specifically on the African regional context. In the context of the ICTY, Morrison writes that if the perception of the public is important in national courts, how much greater, 'in the overall amalgam of jurisprudence and lay confidence', is the need for a positive international perception of an international tribunal.<sup>19</sup>

The debate on judicial independence in the context of international courts differs from the debate in domestic jurisdictions. On a formal rhetorical level at least there is at the national level a universal commitment to and consensus

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<sup>16</sup>See Gordon and Bruce (2007) 'Transformation and the independence of the judiciary in South Africa' Centre for the Study of Violence and Reconciliation, available at <http://www.csvr.org.za/docs/transition/3.pdf> (accessed 2014-08-26).

<sup>17</sup>Ojwang 'The independence of the judiciary in Kenya' *Kenya Law* (2008), available at: <http://kenyalaw.org/kl/index.php?id=1926> (accessed 2014-08-26). See also 'Strengthening judicial reforms in Kenya: Administrative reforms' Kenyan section of *International Commission of Jurists Report* (2005), available at [http://www.icj-kenya.org/dmdocuments/books/sjr\\_10.pdf](http://www.icj-kenya.org/dmdocuments/books/sjr_10.pdf) (accessed 2014-08-26).

<sup>18</sup>Ochieng 'Guilty as charged: Corruption rife in the judiciary' *News from Africa* (2003), available at: [http://www.newsfromafrica.org/newsfromafrica/articles/art\\_1860.html](http://www.newsfromafrica.org/newsfromafrica/articles/art_1860.html) (accessed 2014-08-26).

<sup>19</sup>Morrison 'Judicial independence – Impartiality and disqualification' in Hocking and May (eds) *Essays on ICTY procedure and evidence in honour of Gabrielle Kirk MacDonal* (2000) 115.

regarding the idea that judicial independence requires judges to act entirely independently of the government.<sup>20</sup> The relationship between judges and states is more complicated in the context of international courts.<sup>21</sup> Mackenzie and others write that the reason for this is that whereas most international judges decide cases on the basis of law rather than the interests of the state, there is also recognition that judges cannot entirely leave their nationality at the door of the court. In deciding whether to cooperate with an international court, states could be motivated by the fact that to have a national from the particular state on the bench can further the interest of the state in some way.<sup>22</sup>

In *Incal v Turkey*, the European Court of Human Rights identified core criteria to be used in assessing the independence and impartiality of judges within the meaning of article 6(1) of the ECHR – the right to be heard before an independent and impartial tribunal.<sup>23</sup> The *Incal* criteria include: the manner of appointment of judges; their terms of office; the existence of safeguards against outside pressure; and whether they reflect an appearance of independence.

It might be asked what the relevance of a European case such as *Incal v Turkey* is for the African context. The criteria formulated in *Incal* have been cited by many international courts. Since international human rights law is *international* in nature it is appropriate to refer to leading foreign case law on matters such as independence. *Incal v Turkey* has also been cited in the context of the Inter-American Court of Human Rights.<sup>24</sup> In terms of home-grown authority, the African Commission on Human and Peoples' Rights have referred to Principle 10 of the Basic Principles on the Independence of the Judiciary.<sup>25</sup>

This article will refer to these criteria in evaluating the independence of judges at the sub-regional and regional African courts.

## 4 Innovations and developments pertaining to judicial independence in the Rome Statute

Since judicial independence is universally accepted as an important component of the rule of law, it is instructive to consider the position at other international

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<sup>20</sup>UN Basic Principles on the Independence of the Judiciary, G.A resolution 40/32, 29 November 1985; 40/146, 13 December 1985.

<sup>21</sup>Mackenzie (n 9) 25.

<sup>22</sup>*Ibid.*

<sup>23</sup>Judgment of 9 June 1998, 4.

<sup>24</sup>Beattie and Christou for example cite the *Incal v Turkey* case in Beattie, Christou and Starmer (eds) *Human rights manual and sourcebook for Africa* (2005) 110.

<sup>25</sup>ACHPR, *Media Rights v Nigeria*, Communication No 224/98, decision adopted during the 28th session, 28 October–6 November 2000, para 60, available at: <http://www1.umn.edu/humanrts/africa/comcases/224-98.html> (accessed 2014-08-26).

courts. Significantly, the Rome Statute requires that in selecting judges states should take the following into account: '(T)he representation of the principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges'.<sup>26</sup> The fairly innovative requirements of geographical and gender representation calls for some elaboration. The Rome Statute created a 'regional group system' which requires representation from all the major regions of the world.<sup>27</sup> In spite of the ICC's efforts to ensure fair regional representation, it has not taken away all concerns. It has for example been suggested that Asian states are underrepresented.

The Rome Statute created a new framework for nominating and electing judges. It contains detailed criteria and minimum quotas. The minimum quota system extends to expertise: it requires certain quotas for judges with criminal law, human rights law and humanitarian law expertise. As in the case of diversity generally, having judges with various forms of legal expertise increases the independence of the judiciary because increasing the pool of expertise creates a more competent and varied bench. Similarly, the Rome Statute introduces an unusual requirement of mandatory gender representation. The lack of gender balance in the international judiciary has been attracting increasing criticism and measures to promote equitable gender representation on international courts are still new and relatively controversial. Mackenzie and others comment that 'whereas the requirements for geographical, legal and linguistic diversity are widely accepted, in principle, as necessary to ensure a competent, politically legitimate court, attitudes towards gender balance are generally more ambivalent'.<sup>28</sup>

Rwelamira writes that the question of the terms of office and security of tenure of judges are fundamental to the independence of the judiciary.<sup>29</sup> The prevailing view at the Rome Conference was that judges should be appointed for a term of nine years – as in the case of the ICJ. Many delegations did not, however, endorse the analogy with the ICJ on the ground that the ICC was essentially a criminal court and therefore required a unique composition.<sup>30</sup> It was finally agreed upon that judges should not be eligible for re-election, although allowance was made for judges elected for a three-year term who would be eligible for re-election to a full term.<sup>31</sup> It is generally accepted that allowing judges to be re-elected could pose a threat to judicial independence in the sense that

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<sup>26</sup>Article 36(8)(a)(i) – (iii) of the Rome Statute.

<sup>27</sup>Article 36(8)(a).

<sup>28</sup>Mackenzie (n 9) 49.

<sup>29</sup>'Composition and administration of the Court' in Lee (ed) *The International Criminal Court: The making of the Rome Statute: Issues, negotiations, results* (1999) 157.

<sup>30</sup>*Ibid.*

<sup>31</sup>Article 36(9)(a) and (b) of the Rome Statute.

judges would not like to alienate the interests of those with the power to re-elect them.

In spite of the innovative provisions on judicial independence at the ICC, the system does not work perfectly in practice. Reservations have been expressed about the quality and competence of ICC judges.<sup>32</sup> With a few exceptions, ICC judges do not have judicial backgrounds but have been politicians, diplomats, academics and human rights activists.<sup>33</sup> The Japanese judges appointed to the Court form a good example. Fuiko Saiga was appointed to the position of ICC judge in late 2007. Prior to her appointment she was Japan's ambassador to Norway and Iceland. She has no legal training or judicial experience.<sup>34</sup> Not surprisingly, some of these appointments were heavily criticised.<sup>35</sup>

## 5 Judicial appointments: Procedures at the regional courts

### 5.1 African Court of Human and Peoples' Rights

#### 5.1.1 Nomination and election

The eleven judges at the African Court are appointed for a fixed term of six years. Their terms are renewable once.<sup>36</sup> Judges are nominated by member states to the Protocol. In theory, member states have a great deal of latitude in deciding whom to nominate for the Court. Only state parties to the Protocol may nominate candidates. Each state may provide three names, two of whom must be nationals of that state. They may also nominate candidates from AU member states that have not accepted the Protocol.

The nomination process was designed to give civil society an important role in the domestic nomination process. It is suggested that NGOs and individuals should become involved by nominating competent persons or challenging inappropriate candidates at the domestic level.<sup>37</sup> At the very least governments should find a way to allow for meaningful forms of public participation in the

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<sup>32</sup>See Swart 'To recuse or not to recuse: How independent are the judges of the International Criminal Tribunals?' (2003) *SAYIL* 189.

<sup>33</sup>For a particularly critical view see Hoile 'Court rise, enter your honours!' *New African* (March 2012) 24 at 25.

<sup>34</sup>Questions have also been raised about the experience of the other Japanese judge, Prof Kuniko Ozaki, Saiga's replacement. Ozaki has spent most of her career in the Japanese foreign ministry (*ibid*).

<sup>35</sup>Hirsch 'System for appointing judges "undermining international courts"' *The Guardian* (2010-09-08).

<sup>36</sup>Article 15 of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights ('Court Protocol').

<sup>37</sup>Viljoen *International human rights law in Africa* (2012) 422.



domestic nomination process.

The AU Assembly elects the judges. This is a sign of the AU taking political responsibility for the functioning of the Court and the enforcement of its judgments. The Court reports annually to the Assembly, and the Assembly is responsible for the monitoring of judgments. One advantage to this is that it may encourage states to ratify the Protocol. The election process is governed by the suitability of candidates and the more general need for balance. In terms of personal attributes, the candidates must be AU nationals and they must be 'jurists' by profession with demonstrated human rights experience. They should also be persons of 'high moral character'.<sup>38</sup> In terms of balance there has to be 'adequate gender representation'.<sup>39</sup> Also required are geographical representation and the representation of 'Africa's principal legal traditions'.<sup>40</sup> The Protocol requires that the position of a judge is incompatible with 'any activity that might interfere with the independence or impartiality of judges'.<sup>41</sup>

It is not unusual for the body involved in the appointment of judges to also be responsible for the functioning of the courts. In many domestic jurisdictions the Ministry of Justice would have a role in the appointment of judges. The Ministries of Justice would also be responsible for the functioning of the courts in a particular domestic jurisdiction. In England and Wales, the Judicial Appointments Commission is responsible for selecting judges. This commission is a non-departmental public body which was created on 3 April 2006. Judges are elected in their individual capacities.

Judges may be re-elected once. As is the case in most international courts, the African Court may not include more than one national from the same state.<sup>42</sup> The independence of the judges is guaranteed under international law. They enjoy the diplomatic immunities and privileges necessary for them to discharge their duties. As in the case of many international courts, these privileges and immunities are contained in the constitutive Protocol of the African Court.<sup>43</sup> These immunities are of course merely indicators of the formal independence of judges.

To guarantee the moral independence of judges may not hear any case in which they have previously taken part in any capacity and must decline to give an opinion in all cases in which their states have an interest. As far as professional ethics is concerned, judges may not carry out any activity which is incompatible with the demands of office or which might interfere with their independence and

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<sup>38</sup>Article 11(1) of the Court Protocol.

<sup>39</sup>Article 14(3) of the Court Protocol.

<sup>40</sup>Article 14(2) of the Court Protocol.

<sup>41</sup>Article 18 of the Court Protocol.

<sup>42</sup>Article 3(6) of the Court Protocol.

<sup>43</sup>Court Protocol.

impartiality.<sup>44</sup> The African Court judges perform their functions on a part-time basis. The President of the Court however fulfils his or her functions on a full-time basis.<sup>45</sup>

### 5.1.2 Independence questions particular to the African Court

Article 12 of the African Court Protocol states the following with regard to judicial independence:

1. The independence of the judges shall be fully ensured in accordance with international law.
2. The Court shall act impartially, fairly and justly.
3. In performance of the judicial functions and duties, the Court and its Judges shall not be subject to the direction or control of any person or body.

Viljoen suggests that the legal traditions on the African continent should be considered.<sup>46</sup> These traditions include the Islamic/Shariah based systems, common law system, civil law system, the variety of customary African systems and the Roman-Dutch hybrid legal system in South Africa.

Most of the members of the African Court have served on domestic courts. This stands in contrast to the qualifications of the Inter-American Court where most of the judges have experience as academics.<sup>47</sup> In the case of the *ad hoc* international criminal tribunals the courts have been criticised for appointing too many academics with no courtroom experience. In general practical experience is seen as an important asset, especially at international criminal courts. Ingadottir has made the point that experience in criminal procedure and in running complicated trials is absolutely necessary for fair and effective trials and paramount for the success of international criminal courts.<sup>48</sup>

In spite of the provisions aimed at securing the independence and human credentials of the judges, the candidates were not always of the standard befitting a senior court such as the African Court. Judge Faraj Fanoush for example served as the Libyan ambassador to Cameroon. After he was elected to the

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<sup>44</sup>Article 18 of the Court Protocol.

<sup>45</sup>Article 14(4) of the Court Protocol.

<sup>46</sup>Viljoen (n 37).

<sup>47</sup>*Id* at 424. See also the website of the Inter-American Court of Human Rights, available at <http://www.corteidh.or.cr/index.php/en/about-us/composicion> (accessed 2014-08-26).

<sup>48</sup>In the election of judges to the ICTY in March 2001, an official at the Office of the Prosecutor at the ICTY, criticised the list of candidates as having too many academics. Former ICTY Judge Patricia Wald has been outspoken in this regard. See Ingadottir 'The International Criminal Court Election and Nomination of Judges' A Discussion Paper, June 2002 available at: [http://www.pictpcti.org/publications/ICC\\_paprs/election.pdf](http://www.pictpcti.org/publications/ICC_paprs/election.pdf) (accessed 2014-08-26).

African Court he stated that Libya 'has the best human rights situation in Africa'.<sup>49</sup>

The issue of the gender imbalance of the bench at the African Court is a matter of some concern. In 2008 nine of the eleven judges were men. Wachira observes that this trend can be contrasted with the position at the African Commission where seven out of the eleven Commissioners are currently female.<sup>50</sup> Whereas gender representation is increasingly becoming a crucial part of judicial independence internationally,<sup>51</sup> the representation of women on African judiciaries is particularly important because such representation can potentially play a ground-breaking role in strengthening women's rights in Africa.<sup>52</sup>

The fact that judges to the African Court fulfil their functions on a part-time basis has important consequences for judicial independence. Judges hold positions alongside their judgeships which might impact on their independence and impartiality. The propriety of judges holding 'outside' jobs has often been questioned since this could lead to a conflict of interest.<sup>53</sup>

### 5.1.3 Backgrounds of individual judges on the African Court

In assessing the backgrounds of judges at the regional and sub-regional courts, it is appropriate to consider the backgrounds of judges of a particular court. Do the backgrounds of these judges equip them for the task at hand? I will use the judges at the African Court as an example. If one examines the backgrounds of the current group of judges on the African Court it is clear that a significant amount of judges on the Court served as senior judges in their domestic jurisdictions. Judges Niyungeko, Somda and Mutsinzi served on the Constitutional

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<sup>49</sup>See Viljoen (n 37) 423. See 'Coalition for an effective African Court on Human and People's Rights' *E-bulletin*, June 2006, available at: <http://www.africancourtcoalition.org> (accessed 2014-12-26).

<sup>50</sup>Wachira and Abiola 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) *AHRLJ* 465.

<sup>51</sup>In the UK it is increasingly argued that there is a close link between increased diversity in the judiciary and judicial independence. See the report by the UK Ministry of Justice, available at: <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/27206.htm> (accessed 2014-08-26).

<sup>52</sup>Wachira and Abiola (n 50). Wachira and Abiola cite Butegwa, a Communications Officer with the African Women's Development and Communication Network (FEMNET), who is of the view that: 'having more women and gender-sensitive men as judges in the African Court on Human and Peoples' Rights will contribute to the progressive development of [the African Women's Protocol] and ensure the promotion of women's rights, peace and development. It is hoped that when the terms of office of male judges come to an end in June 2008 and June 2010, competent women judges will replace them'. Butegwa 'Election of women judges to the African Human Rights Court' 2006 *African Court Coalition Newsletter* 7.

<sup>53</sup>See, eg the Code of Conduct for Judiciary Employees for New Jersey which includes provisions on how judges should avoid conflicts of interest. The Code is available at: <https://www.judiciary.state.nj.us/rules/ap> (accessed 2014-08-26).

Courts of their respective countries.

The first president of the African Court, Gerard Niyungeko of Burundi (appointed in 2006) had an illustrious judicial and academic career before being appointed as President. Between 1992 and 1996 he was President of the Constitutional Court of Burundi.<sup>54</sup> He was a Professor of Law at the University of Burundi at Bujumbura. During his presidency, he continued to hold the UNESCO Chair in Education for Peace and Conflicts Resolution.<sup>55</sup>

The current President of the African Court, the Ghanaian Judge Sophia Akuffo Hasan has an illustrious judicial record.<sup>56</sup> Akuffo served as judge on the Supreme Court of Ghana and as Vice President of the African Court. Justice Fatsah Ougerougouz, an Algerian jurist, was Professor of Law at the University of Geneva.<sup>57</sup>

The current Vice President of the African Court, the South African judge, Judge Bernard Ngoepe, similarly has a strong judicial background. He served as acting judge on South Africa's two superior courts: the Supreme Court of Appeal and the Constitutional Court.<sup>58</sup> He formerly served as the Judge President of the North Gauteng High Court. In 2014 he was appointed as the tax ombudsman for South Africa.

Justice Jean Mutsinzi, a former President of the Court, also has a background both in the judiciary and in academia. He served as Chief Justice of the Supreme Court of Rwanda.<sup>59</sup> Earlier in his career he was a lecturer in public and private international law at the University of Zaire.<sup>60</sup> In addition he has experience as an international judge – he served as a judge at the COMESA Court of Justice between 2001 and 2003.

In terms of the judicial experience of the judges and the level of seniority, the

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<sup>54</sup>He is the author of several publications, including: *Les droits de l'homme, cours destiné aux formateurs* (1994). See the website of the Coalition for an Effective African Court, available at: [http://www.africancourtcoalition.org/index.php?option=com\\_content&view=article&id=41%3Aafricourt-judge-niyungeko&catid=14%3Aafricourt-judges&Itemid=30&lang=en](http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=41%3Aafricourt-judge-niyungeko&catid=14%3Aafricourt-judges&Itemid=30&lang=en) (accessed 2014-08-26).

<sup>55</sup>He is also a consultant to the Political Affairs Commission of the African Union. He has also worked as an international expert for the United Nations Programme for development in the judicial domain and in the domain of human rights.

<sup>56</sup>Judge Akuffo was elected at the 26th Ordinary Session, held from 17–28 September 2012, in Arusha, Tanzania.

<sup>57</sup>He is the author of numerous publications including 'L'Application de la Charte Aricaine des Doits de l'Homme et des peuples par les autorités nationales en Afrique occidentale' in Flauss and Lambert-Abelgawad (eds) *L'Application nationale de la Charte Africaine des Droits de l'Homme et des Peuples* (2004); *The African Charter of Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003); *La Charte Africaine des Droits de l'Homme et des Peuples* (1993).

<sup>58</sup>He was also a member of the Amnesty Committee of the Truth and Reconciliation Commission.

<sup>59</sup>1995-1999.

<sup>60</sup>1966-1982.

judges on the African Court generally compare well with other international judges – for example judges of the International Criminal Court (ICC). It is however difficult to get the balance of expertise right. Many ICC judges have, for example, often been criticised for not having sufficient experience in international law. Other international judges have been criticised for lacking courtroom experience.

## 5.2 *African Commission of Human and Peoples' Rights*

### 5.2.1 *Nomination and election*

The African Commission of Human and Peoples' Rights is composed of 11 Commissioners elected by the AU Assembly. Commissioners are elected for six year terms and may be re-elected indefinitely.<sup>61</sup> The Commissioners serve part-time and in their personal capacity. Commissioners are nominated by state parties from among 'African personalities of the highest reputation' and known for their 'competence in matters of human and people's rights'.<sup>62</sup>

### 5.2.2 *Independence questions particular to the African Commission*

Although the Commissioners on the African Commission do not have the status of judges they are expected to meet 'judicial' standards of impartiality and independence. Allegations have been made about the lack of independence of the Commissioners of the African Commission and the impact that government pressure has been implied to have on the Commission. This is reflected in the mission reports that have not been published and the limited publication of communications. In addition the still confidential nature of the communications proceedings casts doubt on the openness and independence of the system.

Regional representation has been an ongoing problem at the African Commission. This is partly due to the fact that the Charter does not include provisions on geographical or gender representation. This led to occasional over-representation of some regions.<sup>63</sup> Whereas the initial membership of the Commission was all male, more and more female Commissioners were appointed.

Close ties between Commissioners and their nominating governments remains a problem. This has led to questions about the institutional independence of commissioners.<sup>64</sup> As Ahmed Motala writes, African states have undermined the independence of the African Commission by nominating and electing Commissioners whose independence was compromised or who lacked

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<sup>61</sup>Article 36 of the African Charter.

<sup>62</sup>Article 3(1) of the African Charter.

<sup>63</sup>Viljoen (n 37) 422.

<sup>64</sup>Viljoen mentions the following examples: Ben Salem (Tunisian, who was Ambassador of Tunisia to Senegal); Chigovera (Attorney General to Zimbabwe) (*id* 290).

independence by virtue of their position in their government.<sup>65</sup> Over the last twenty years various Commissioners have held positions of ministers, attorneys-general, ambassadors and advisers to their respective presidents. This has not only coloured the perception of the African Commission but has affected the willingness of the Commissioners to take initiative to address serious human rights violations facing African countries.

### 5.3 *ECOWAS*

#### 5.3.1 *Nomination and appointment*

Judicial appointment at the ECOWAS Court is provided for in Article 3 of the Protocol of the ECOWAS Community Court of Justice. The judges are appointed by the Authority of Heads of State and Government of the Community and selected from a list of candidates nominated by the member states. Interestingly, no person below the age of 40 or above the age of 60 shall be eligible for judicial appointment.<sup>66</sup>

According to the Protocol, the ECOWAS Court consists of seven members appointed from ECOWAS member states. No two judges may be from the same state. The term of office of the judges is five years and members can be reappointed for a period of five years.<sup>67</sup> Member states elect the President and Vice-President of the Court in accordance with the provisions of the Protocol. Article 4 states that no member of the Court may exercise any political or administrative function or engage in any other occupation of a professional nature.<sup>68</sup> Before taking up office members of the Court take an oath of office that they will perform their duties faithfully, impartially and conscientiously.<sup>69</sup>

#### 5.3.2 *Issues particular to ECOWAS Court*

The issue of the representation of the three linguistic blocs within ECOWAS has been a relevant issue at the ECOWAS Court. In an article written in 2007,

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<sup>65</sup>Motala mentions the example of the African Commission's Special Rapporteur on Extra-judicial Executions whose appointment came on the eve of the genocide in Rwanda in April 1994. During his tenure he failed to investigate the events in Rwanda or to visit the country. During his tenure at the African Commission the incumbent was the diplomatic representative of his country in Ankara and subsequently in Geneva. Motala 'Celebrating two decades of the African Charter on Human and Peoples' Rights' CSVr, available at: <http://www.csvr.org.za/index.php/media-articles/latest-csvr-in-the-media/2210-celebrating-two-decades-of-the-african-charter-on-human-and-peoples-rights.html> (accessed 2014-08-26).

<sup>66</sup>Article 3(7) of the Protocol of the ECOWAS Community Court of Justice.

<sup>67</sup>Article 4. Initially, however, it was decided, pursuant to art 4 of the Protocol, that four of the judges will have five year terms and three of the judges will have three year terms.

<sup>68</sup>Article 4(11).

<sup>69</sup>Article 5.

Adewale Banjo comments that at the time there was no representation from Lusophone countries<sup>70</sup> The non- representation of Lusophone countries in the opinion of Banjo did not indicate any deliberate attempt to exclude Lusophone countries.

The ECOWAS judges have been described as 'highly experienced and distinguished judges'.<sup>71</sup> The first President of the Court, Justice Hansine Napwaniyo Donli, for example, has held several judicial positions.<sup>72</sup>

## 5.4 *East African Court*

### 5.4.1 *Nomination and appointment*

The East African Court consists of a maximum of five judges in the First Instance Division and of five judges in the Appellate Division. The judges are appointed by the East African Community Summit, the highest organ of the community, from among persons recommended by the Partner States who are of proven integrity, impartiality and independence and fulfil the conditions required in their own countries for high judicial office, or are jurists of recognised competence. Interestingly, the Protocol of the Court states that no more than two judges can be appointed on recommendation of the partner state.<sup>73</sup> Judges are appointed for a maximum period of seven years.<sup>74</sup> Judges have to resign upon attaining 70 years of age. The brief tenure of the judges and the *ad hoc* (temporary) nature of their appointment have been described as among the primary obstacles facing the court.<sup>75</sup> These obstacles are probably contributing to the current low productivity of the court.

### 5.4.2 *Independence questions particular to the East African Court of Justice*

The controversy surrounding the election of the Kenyan and Ugandan members to the Legislative Assembly and the response of the Court highlighted the extent of political interference in the election of the judges of the East African Court of Justice.

The controversy was triggered by the election of members to the Second Legislative Assembly. The Treaty requires that the Assembly should be constituted of nine members from each of the partner states of the community

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<sup>70</sup>Banjo 'The ECOWAS Court and the politics of access to justice' 2007 (32) 1 *Africa Development* 69 at 74.

<sup>71</sup>*AU Magazine* (December 2004–February 2005) 2.

<sup>72</sup>She was a Kaduna State High Court Judge and has also served as the Kaduna State Attorney General and Commissioner for Justice.

<sup>73</sup>Article 24 of the Treaty Establishing the East African Community.

<sup>74</sup>To ensure continuity it was decided that the tenure of judges would be staggered. The first group of judges had a staggered tenure of five years, six years and seven years.

<sup>75</sup>The East African Court of Justice, Ten Year Report (November 2011) 43.

and five *ex officio* members.<sup>76</sup> The Treaty requires that each partner state should provide a legislative framework for the purposes of the electoral process.

In Kenya the electoral process entailed the putting forward of lists of nominees by the major political parties: the Kenya African National Union (KANU), the Forum of Democracy People (FORD-P) and the National Rainbow Coalition (NARC). Two lists were submitted by NARC, one by the party leader and another by the Chief Whip. The committee adopted the latter list. Officials from various political parties subsequently filed a reference to the court regarding non-compliance with article 40 of the Treaty.<sup>77</sup>

On 27 November 2006 the East African Court granted an interim injunction to prevent the nine 'elected' Kenyan members from taking office. The East African Court found that neither the electoral law in Kenya nor the process complied with article 50 of the Treaty. According to the EAC the Kenyan legislative body did not 'undertake or carry out an election within the meaning of article 50 of the Treaty'.<sup>78</sup>

Following the granting of the injunction, the partner heads of state adopted several amendments to the Treaty in an extraordinary summit in December 2006. This was followed by Kenya filing an application at the Court on 22 January 2007 imputing bias and lack of impartiality in the EAC's Kenyan judges and seeking to have the interim injunction set aside.<sup>79</sup> This followed a call by Kenya's solicitor general that Justice Mulwa recused himself from hearing the reference. The recuse of the two Kenyan EAC judges were sought on the basis that they failed to disclose their suspension from judicial duties in Kenya pending an inquiry into judicial misconduct.

The EAC dismissed the recusal application and stated that the rule of law was one of the Community's principles and emphasised the importance of 'respect for court decisions'.<sup>80</sup> According to Onoria the imputing of bias on behalf of the Kenyan Judges placed the integrity of the EAC in question.<sup>81</sup> He agrees with the EAC's observation that the Kenyan government's responses 'undermined the rule of law as a fundamental principle of the Community'.<sup>82</sup>

The election of Ugandan members to the Assembly was similarly shrouded in controversy. According to a new legal framework adopted in Uganda the

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<sup>76</sup>Article 48(1).

<sup>77</sup>*Prof Peter Anyang'-Nyong'o & 10 others v Attorney General of Kenya & 2 Others* EAC Ref no 1/2006 (unreported).

<sup>78</sup>*Prof Peter Anang'-Nyong'o & 10 Others v Attorney General of Kenya & 2 Others* (n 77).

<sup>79</sup>Onoria 'Botched-up elections, treaty amendments and judicial independence in the East African Community' *Journal of African Law* (2010) 4.

<sup>80</sup>*Attorney General of the Republic of Kenya v Prof Peter Anyang'-Nyong'o & 10 others* EAC Ref no 5/2007 (unreported).

<sup>81</sup>Onoria (note 79) 80-82.

<sup>82</sup>*Attorney General of the Republic of Kenya* (n 80) 23 and 26-27.



Parliament of Uganda elected Uganda's members to the African Court and only allotted slots to political parties and not to independent candidates.<sup>83</sup> This electoral procedure and electoral law was challenged before the Ugandan Constitutional Court by a former Member of Parliament who wanted to stand as an independent. The Constitutional Court held in favour of the petitioner and held that barring 'independents' infringed upon the right to freedom of association.<sup>84</sup> This can be regarded as another instance in which the pre-eminence of politics triumphed over the observance of proper electoral procedure.<sup>85</sup>

Many commentators have been sceptical of the timing of the establishment of an Appeals Chamber of the EAC. According to Onoria it is clear that the timing of the amendment to introduce an Appeals Chamber is suspect and was meant to intimidate the Court.<sup>86</sup> The Court itself observed that the attempts to amend the treaty could have been 'capable of unduly influencing the pending judgment in Anyang' Nyong'o case'.<sup>87</sup> The Court further noted that '[t]he fact that it did not have that effect is credit to the sense of independence on the part of the two judges together with the other judges on the panel and to their resolve to uphold the principles of judicial integrity and judicial independence'.<sup>88</sup>

## 5.4 SADC Tribunal

### 5.4.1 Nomination and appointment

Although the SADC Tribunal was suspended in August 2010<sup>89</sup> which was a retrogressive move for human rights protection in Africa, the Court formed an important part of the sub-regional human rights landscape and it is worthwhile looking at the nomination and procedures at the now-defunct Court. The appointment of judges to the SADC Tribunal proceeded as follows: 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. The Summit then makes the final appointment from the said list of recommendations.<sup>90</sup> Ten judges are appointed for a five year period. This period can be renewed by the common accord of the governments of the member

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<sup>83</sup>Onoria (n 79) 3.

<sup>84</sup>*Jacob Oulanyah v Attorney General* Constitutional Petition no 28/2006 (unreported).

<sup>85</sup>Onoria (n 79) 10.

<sup>86</sup>*Id* 5.

<sup>87</sup>*East Africa Law Society and 4 Others v Attorney General of the Republic of Kenya* EACJ reference no 3/2007 (unreported) 34.

<sup>88</sup>*Ibid*.

<sup>89</sup>At the 2010 SADC Summit of Heads of State. The individual complaints procedure at the Court was suspended at this Summit.

<sup>90</sup>Article 4(4) of the SADC Tribunal.

states. According to article 4(2) due regard should be taken to ensure fair gender representation in the appointment and nomination process.

#### 5.4.2 Independence questions particular to the SADC Tribunal

Since security of tenure is a crucial element of judicial independence, the suspension of the SADC Tribunal violated the independence of the judiciary. The SADC judges remaining in office for the sole purpose of finalising cases that were already before the Tribunal did so without any contractual security as to their terms of office. For this reason, any resulting judgments may be challenged for lack of judicial independence.<sup>91</sup> By suspending the Tribunal the leaders of the Southern African Development Community (SADC) have dealt a serious blow to the rule of law in Southern Africa.<sup>92</sup>

In August 2012 SADC leaders dealt a further blow to the rule of law during the SADC Summit when it decided not to allow individuals to have access to the Tribunal.<sup>93</sup> The Summit considered the Report of the Committee of Ministers of Justice/Attorneys-General and the observations by the Council of Ministers and resolved that a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States.<sup>94</sup>

Whereas most international and regional courts such as the European Court of Justice forbids its judges from engaging in any occupation, whether gainful or not,<sup>95</sup> for practical reasons the judges of the SADC Tribunal are employed part-time and can therefore hold other judicial offices. The principle of *nemo iudex in re sua* applies and article 9(2) of the Protocol states that 'no Member of the Tribunal shall participate in any decision of any case (dispute) in which he was previously involved'.

Judges may however not hold any political or administrative office in the service of a state.<sup>96</sup> This is also the case for the judges of the African Court (who have been appointed on a part-time basis). Appointing judges on a full-time basis will probably strengthen the independence of the judges at courts such as the African Court.

Since the five-year term of office of the judges is renewable, the concern

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<sup>91</sup>Lee 'SADC Tribunal: Will regional leaders save it or suspend it?' 13 July 2011 <http://www.osisa.org/openspace/regional/sadc-tribunal-will-regional-leaders-save-it-or-sabotage-it> (accessed 2014-08-26).

<sup>92</sup>News Release: For Mugabe's sake: SADC leaders sabotage the SADC Tribunal and undermine the rule of law, 2011-05-23 (Southern African Litigation Centre).

<sup>93</sup>See Killander *Africblog* 23 August 2012.

<sup>94</sup>Final Communiqué of the 32<sup>nd</sup> Summit of SADC Heads of State and Government, August 18, 2012 para 24.

<sup>95</sup>Article 4 of Protocol (no 3) on the Statute of the Court of Justice of the European Union.

<sup>96</sup>Bangamwabo (n 8) 265

naturally arises that judges could be encouraged to please their governments to get a renewal of their terms.

## 6 Conclusion

The concepts of 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 law. Their absence leads to a denial of justice and makes the credibility of judicial process dubious.

*Dato Param Cumaraswamy*<sup>97</sup>

As Cumaraswamy, former Special Rapporteur on the independence of judges and lawyers, asserts, the issue of judicial independence is not only relevant to democracy and the rule of law but judicial independence has a crucial influence on the credibility and legitimacy of a court.

Although there have been a handful of incidents regarding the nomination processes in East Africa that can be questioned, overall there seems to be little controversy regarding whether the judges are formally independent. From a formal point of view the courts can therefore be said to set standards with regard to judicial independence for the rule of law in Africa. Given the fact that the regional African courts are still in their infancy, it is premature to make a substantive assessment of judicial independence. The experience so far suggests that judges have demonstrated the independence of mind required by substantive independence. In the view of Judge Ngoepe, judges at the SADC Tribunal have been 'fiercely independent' and it is precisely because of their independence that the executive clamped down on human rights protection for individuals before the Tribunal.<sup>98</sup>

Public awareness of judicial appointment processes is increasingly recognised as having an impact on the legitimacy of international courts.<sup>99</sup> Without meaningful public awareness of and public involvement in the crafting and assessment of the qualities of candidates for judicial office, doubts are more likely to arise as to whether the best judges are selected.<sup>100</sup> The legitimacy of international and regional courts is undermined if there is no minimum level of public awareness of judicial selection (and preferably much more than a minimum level). At the regional African courts much can be done to improve the level of

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<sup>97</sup>Report of Special Rapporteur, Dato Param Cumaraswamy, submitted in accordance with Commission on Human Rights Resolution 1994/4 6 Feb 1995 UN Doc E/CN.4/1995/39 at par 33 (Cumaraswamy was quoting Singhvi's observation made in the Final Report to the Sub-Commission in 1985 (E/CN.4/Sub.2/1985/18 and Add. 1.6 par 75.)

<sup>98</sup>Telephone interview with Judge Bernard Ngoepe 2012-08-24.

<sup>99</sup>See Mackenzie (n 91) 1.

<sup>100</sup>*Ibid.*

public awareness in the various member states.

The constitutive instruments of the various African regional and sub-regional courts consistently provide for formal judicial independence. This formal independence should translate into substantive independence. Whereas in general the judges have acted independently, it is too early to make an evaluation of the performance of the judges at most of the courts.

Significant improvements and reforms can be made to the level of judicial independence in Africa. States should be free to nominate for judicial office who they wish. The possibility of executive interference as illustrated by the Ugandan debacle show that the formal freedom states have in this regard do not always translate into practice.

The suspension of the SADC Tribunal has vividly illustrated the threats posed to judicial independence. It seems judges are left alone as long as they do not exercise significant power or power that could threaten the executive. The challenge is to uphold the independence of regional court judges even if they exercise power of this kind. This is particularly relevant to domestic judges in Africa – the greater degree of power held by domestic judges (because domestic court orders are generally enforceable) means that the executive typically has a greater hand in their appointment. Formally the courts can draw from the innovations of the Rome Statute. In substantive terms every effort should be made to prevent executive interference in the functioning of the courts.