

The role of continental and regional courts in peace-building through the judicial resolution of election-related disputes

Grace Wakio Kakai*

<https://orcid.org/0000-0002-3317-9196>

ABSTRACT: As a prerequisite for ensuring the rule of law, democracy and good governance, most African states carry out regular elections. Although they are conducted in a specific constitutional and legal framework aimed at ensuring a peaceful transfer of power, elections in Africa are increasingly characterised by electoral violence. Electoral violence is multifaceted and diverse, with various causes and consequences. If left unaddressed, electoral violence has the potential to destabilise states, result in civil conflict and affect regional stability and security. The article establishes that there has been increasing judicialisation of electoral contests, as evidenced by the growing body of electoral jurisprudence developed by constitutional and supreme courts across Africa. The African Court on Human and Peoples' Rights, and some of the Regional Economic Communities' courts, particularly, the Community Court of Justice of the Economic Community of West African States and the East African Court of Justice, are also being seized with such suits. These suits are premised on states' compliance with their obligations under various instruments. While there has been much scholarship on the emerging electoral jurisprudence at the national level, this has not been the case with regard to the role of the African Court and the regional courts. This article establishes that the approaches of the African Court and regional courts are linked to their material jurisdiction, the level of compliance with the decisions they render and their overall operating contexts. These factors have to be addressed holistically in order for the courts under study to play an effective role in addressing electoral disputes, and consequently curbing electoral violence and contributing to stability and security on the continent.

TITRE ET RÉSUMÉ EN FRANCAIS:

Le rôle des juridictions continentales et régionales dans la consolidation de la paix par le règlement judiciaire des différends liés aux élections

RÉSUMÉ: Pour garantir l'État de droit, la démocratie et la bonne gouvernance, la plupart des États africains organisent des élections régulières. Bien qu'elles se déroulent dans un cadre constitutionnel et juridique spécifique visant à assurer un transfert pacifique du pouvoir, les élections en Afrique sont de plus en plus caractérisées par la violence électorale. La violence électorale est multiforme et diverse, avec diverses causes et conséquences. Si elle n'est pas traitée, la violence électorale peut déstabiliser les États, entraîner des conflits civils affectant ainsi la stabilité et la sécurité régionales. L'article établit qu'il y a eu une judiciarisation croissante des compétitions électorales, comme en témoigne le corpus croissant de

* LLM (Pretoria), LLB (Nairobi); gracewakio@gmail.com. Head of Legal Division, African Court on Human and Peoples' Rights. The interpretations and conclusions in this article are entirely those of the author. They do not necessarily represent the views or positions of the African Court on Human and Peoples' Rights or the African Union at large.

jurisprudence électorale développée par les cours constitutionnelles et suprêmes à travers l'Afrique. La Cour africaine des droits de l'homme et des peuples et certains tribunaux des Communautés économiques régionales, en particulier la Cour de justice communautaire de la Communauté économique des États de l'Afrique de l'Ouest et la Cour de justice de l'Afrique de l'Est sont également saisis de telles affaires. Ces affaires sont fondées sur le respect par les États de leurs obligations en vertu de divers instruments, en particulier la Charte africaine des droits de l'homme et des peuples, la Charte africaine de la démocratie, des élections et de la bonne gouvernance ainsi que le Protocole de la Communauté économique des États de l'Afrique de l'Ouest sur la démocratie et la bonne gouvernance et le Traité instituant la Communauté de l'Afrique de l'Est. Bien qu'il y ait eu suffisamment de recherches sur la jurisprudence électorale émergente au niveau national, cela n'a pas été le cas en ce qui concerne le rôle de la Cour africaine et des tribunaux régionaux. Cet article établit que les démarches des différentes juridictions régionales sont liées à leur compétence matérielle, au niveau du respect des décisions qu'elles rendent et à leurs contextes généraux de fonctionnement. Ces facteurs doivent être traités de manière holistique pour que les tribunaux étudiés puissent jouer un rôle efficace dans le règlement des conflits électoraux, et par conséquent enrayer la violence électorale et contribuer à la stabilité et à la sécurité sur le continent.

KEY WORDS: Electoral violence, electoral disputes, electoral jurisprudence, peace-building, regional courts, African Court

CONTENT:

1	Introduction.....	344
2	Causes and consequences of electoral violence in Africa	346
2.1	Causes of electoral violence	346
2.2	Consequences of electoral violence.....	348
3	Judicial role in the resolution of electoral conflicts in Africa	349
4	African Court's role in the prevention and mitigation of electoral conflicts.....	352
4.1	<i>Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania</i>	353
4.2	<i>Actions pour la Protection des Droits de l'Homme v Côte d'Ivoire</i>	354
4.3	<i>Suy Bi Gohore Emile v Côte d'Ivoire</i>	355
4.4	<i>Jebra Kambole v Tanzania</i>	357
5	Regional courts as new actors in the prevention and mitigation of electoral conflicts.....	359
5.1	The ECOWAS Court.....	359
5.2	The East African Court of Justice.....	364
6	Lessons from the judicialisation of electoral contests at the African Court and regional courts in Africa	367
7	Conclusion	370

1 INTRODUCTION

African states are increasingly embracing elections as a key benchmark for affirming their democratic credentials.¹ At the same time, electoral violence has become a pervasive trait of electoral periods in many of Africa's multi party states.² Electoral violence has been experienced in Togo (2005), Democratic Republic of Congo (2006), Lesotho (2007), Nigeria (2007), Kenya (2007/2008), Guinea Bissau (2008), Zimbabwe

1 S Adejumbi 'Elections in Africa: a fading shadow of democracy?' (2000) 21(1) *International Political Science Review* 59 64.

2 SM Burchard *Electoral violence in sub-Saharan Africa: causes and consequences* (2015) 3.

(2008), Côte d'Ivoire (2010/2011), and Burundi (2015).³ The emerging pattern is that elections have become one of the causes of conflict in Africa.

The increasing prevalence of electoral violence on the continent highlights the need to develop and nurture institutional mechanisms for resolving electoral conflicts at the national, regional, and continental levels. This has seen increased judicial resolution of electoral disputes particularly over parliamentary and presidential elections.⁴ However, the capacity to settle electoral disputes, especially contests over the legitimacy of presidential elections, is weak in most African states due to concerns over judicial independence and impartiality.⁵

Given the actual and perceived weaknesses of domestic courts as suitable institutions for resolution of election-related conflicts, the continental court, the African Court on Human and Peoples' Rights (African Court) and the courts established under the auspices of the various Regional Economic Communities (RECs), particularly the Community Court of Justice of the Economic Community of West African States (ECOWAS Court) and the East African Court of Justice (EACJ), have increasingly become involved in resolution of election-related disputes. Taking into account the need for African states to prioritise the resolution of electoral conflicts, this article explores the contributions of the African Court and the regional courts in improving the legitimacy of electoral processes on the continent through judicial resolution of election-related disputes.

This article is divided into six parts. After this introductory part, part 2 briefly highlights the causes and regional consequences of electoral violence. Part 3 describes how judicial intervention contributes to peaceful resolution of electoral conflicts. This part is focused on the judicialisation of electoral disputes and how domestic courts in African countries are increasingly being presented with high stakes electoral disputes including the adjudication of disputes over the results of presidential elections. In part 4, by setting out the relevant cases determined, this article demonstrates that the African Court and regional courts in Africa are increasingly taking up a new role in resolution of election-related disputes. In part 5, this article examines the lessons emerging from the jurisprudence of the African Court and regional courts on the resolution of election-related disputes. Part 6 summarises the contribution of this article and sets out the conclusion.

3 See D Motsamai 'When elections become a curse: redressing electoral violence in Africa' (2010) EISA Policy Brief Series Number 1 1.

4 See the discussion in part 3 of this article.

5 See in this regard, O Kaaba 'The challenges of adjudicating presidential election disputes in domestic courts in Africa' (2015) 15 *African Human Rights Law Journal* 329.

2 CAUSES AND CONSEQUENCES OF ELECTORAL VIOLENCE IN AFRICA

Although election-related violence is a widespread phenomenon on the African continent, its causes and consequences do not necessarily follow the same trends in different countries. Such inter-country differences are, to a large extent, dictated by the historical, socio-economic, and political conditions specific to a given polity.⁶ Yet, there are commonalities cutting across different countries insofar as the causes and consequences of election-related violence on the continent are concerned, as highlighted in this section.

2.1 Causes of electoral violence

Although there are diverse factors which propel and trigger electoral violence in Africa, these generally revolve around structural and institutional flashpoints which create the potential for such violence.⁷ The adoption of multi-party democracy brought about the logic of periodic renewal of government leadership through elections. However, violence has usually ensued in situations where there is a strong possibility of changing existing power relations and the incumbents are unwilling to cede power.⁸ This is due to the fact that many African states still have an intolerant political culture, with different practices employed to manipulate the electoral outcome. Such practices include the use of security forces to harass opponents, bias on the part of electoral management bodies, restriction of movement of political opponents through establishment of 'no-go' areas during campaigns, expenditure of public resources to campaign for some parties, and manipulation of ethnic identities.⁹

The nature of the electoral system is also a potential cause of electoral violence.¹⁰ The structure of an electoral system can either exacerbate or de-escalate electoral conflict as it has a direct impact on identity and representation.¹¹ Violence often occurs when elections are

6 S Koko 'Understanding election-related violence in Africa: patterns, causes, consequences and a framework for preventive action' (2013) 12(3) *Journal of African Elections* 51 at 53.

7 D Kimemia *Africa's social cleavages and democratisation: colonial, postcolonial, and multiparty era* (2016) 215; J Ahere 'Kenyan elections, 2013: can the precipice be avoided?' (2012) 5(2) *Africa Peace and Conflict Journal* 27 29; K Höglund 'Electoral violence in conflict-ridden societies: concepts, causes, and consequences' (2009) 21(3) *Terrorism and Political Violence* 412 at 424.

8 Koko (n 6) 52.

9 K Mbugua 'Resolution and transformation of election related conflicts in Africa' (2006) 5(1) *Journal of African Elections* 22-25.

10 Höglund (n 7) 422.

11 For a study of the various types of electoral systems see for example: W Khobe 'the quest for a more perfect democracy: is mixed member proportional representation the answer?' in K Mbonyeni and others (eds) *Human rights and democratic governance in Kenya: a post-2007 appraisal* (2015) 121-147.

'zero-sum' events and 'losers' are excluded from participation in governance. Majoritarian electoral systems, like the first-past-the-post (FPTP) model, heighten the stakes of the electoral contest. The winner-takes-all dynamic and the high political premium awarded to the largest party under majoritarian rules imply that the electoral stakes are higher than they are under proportional representation systems, where electoral outcomes tend to disperse the nodes of political power across a broader range of groups.¹²

Another critical factor is the competence, autonomy, and neutrality of election supervision bodies, electoral commissions and courts.¹³ Where election supervision bodies are suspected of a lack of impartiality, this often leads to violence due to the perceived absence of a neutral arbiter of electoral disputes.¹⁴ Given that elections are complex processes, they are susceptible to errors that can generate protests and objections by parties competing for political positions. In anticipation of these inevitable errors, electoral processes should provide for recourse mechanisms that aggrieved parties may exploit to redress perceived or real injustices. In this regard, a lack of trust in the recourse or appeal mechanisms poses a major challenge to the electoral process as well as to peace and security.¹⁵

Also significant are the structural causes of electoral violence located in the social fabric of a society. Societies with a legacy of unequal political representation and developmental disparities are vulnerable to election-related violence.¹⁶ Regions perceiving themselves as victims of long periods of political exclusion and economic marginalisation come to regard elections not merely as a process of selecting the country's leaders but as a tool to overcome their predicament.¹⁷ This contributes to raising the stakes and the related tensions, which, unless properly managed, can degenerate into electoral violence.¹⁸ Other structural conditions that can contribute to electoral violence include extreme poverty, under-development, socioeconomic inequality, high levels of ethnic heterogeneity, the 'curse' of natural resources, pervasive corruption and a recent history of armed conflict.¹⁹

Lastly, in most African states, ethnicity plays a major role in determining how political parties recruit their members. Political parties recruit their members or supporters primarily on the basis of

12 H Fjelde & K Höglund 'Electoral institutions and electoral violence in sub-Saharan Africa' (2014) 46 *British Journal of Political Science* 297 at 302.

13 Adejumobi (n 1) 62.

14 Koko (n 6) 73.

15 L Smith 'Explaining violence after recent elections in Ethiopia and Kenya' (2009) 16(5) *Democratization* 867 at 870.

16 Koko (n 6) 68.

17 Report of the Global Commission on Elections, *Democracy and security, deepening democracy: A strategy for improving the integrity of elections worldwide* (2012) 27.

18 Koko (n 6) 68.

19 DA Akpan 'Appraisal of the role of political violence: the development of youths in Nigeria in the 21st century' (2015) 9(3) *African Research Review* 147 at 156.

the ethnicity of the top party leaders or the regions from which they originate.²⁰ This has resulted in major political parties having an ethnic outlook with localised support in specific regions only. Given that competitive elections are, by their nature, confrontational and adversarial, this ethnicisation of political parties can, when taken to extremes, predispose parties towards inter-ethnic clashes.²¹

2.2 Consequences of electoral violence

The worrying trend of election-related conflicts is that they threaten democracy, peace, stability and human development.²² Nationally, electoral violence violates the citizens' right to vote. It can also threaten the fundamental right to life, personal security, and property. If steps are not taken to resolve electoral disputes, they may have adverse effects on the democratic progress of a state, through protracted incumbent legitimacy crises, and loss of confidence in the electoral process. This impedes effective political competition and participation.²³ Moreover, electoral violence has the potential to undermine democratic transitions in countries emerging from dictatorship and conflict, furthering instability and social tensions in fragile states, increasing uncertainty and risks for investors, and jeopardising growth and development in low-income economies.²⁴

Although election-related violence occurs at the domestic level, it has regional implications on peace and security. If left unaddressed, electoral violence has the potential to destabilise states, result in civil conflicts and affect regional stability and security thus adversely impacting sustainable human development. Given the serious consequences of electoral violence at both the national and regional level, it is in the interest of international and regional peace and security, as well as in the interest of human rights, democracy and the rule of law, that measures should be taken to resolve electoral disputes.²⁵

20 Ahere (n 7) 43.

21 Mbugua (n 9) 25.

22 M Ruteere & K Wairuri 'Explaining and mitigating elections-related violence and human rights violations in Kenya' in K Njogu & PW Wekesa (eds) *Kenya's 2013 general election: stakes, practices and outcomes* (2015) 112 113.

23 EV Adolfo and others 'Electoral violence in Africa' (2012) 3 *The Nordic Africa Institute Policy Notes* 1-4; S Omotola 'Explaining electoral violence in Africa's new democracies' (2010) 10(3) *Journal of Conflict Resolution* 51-73.

24 See generally R Paris *At war's end: building peace after civil conflict* (2004); MW Doyle & N Sambanis *Making war and building peace* (2006); and P Collier *Wars, guns and votes: democracy in dangerous places* (2009).

25 EO Abuya 'Can African states conduct free and fair presidential elections?' (2010) 8(2) *Northwestern Journal of International Human Rights* 122 123.

3 JUDICIAL ROLE IN THE RESOLUTION OF ELECTORAL CONFLICTS IN AFRICA

Judicial adjudication forms part of the electoral dispute resolution architecture in Africa. Almost all African constitutions or electoral laws recognise that things can go wrong with elections and provide for the possibility of redress.²⁶ Courts are empowered to hear electoral disputes either as courts of first instance or in an appellate capacity on appeal from an administrative body.²⁷ This has led to what Prempeh has called ‘judicially settled election contests’ as, often in the context of ‘winner-takes-all’ politics, those who lose fear marginalisation and turn to the courts, with a view to overturning the election outcome.²⁸ This has in turn resulted in the ‘judicialisation of elections’.²⁹

The purpose of judicial resolution of electoral disputes is two-fold: first, to redress grievances and put things right; second, and more importantly, to calm down the tempers of supporters of a political party who may find it difficult to accept that their party could lose the election.³⁰ The judiciary has therefore become a major player in the resolution of electoral disputes in order to prevent escalation of violence that usually attends election processes.³¹

In a positive step towards attainment of democratic consolidation, politicians and voters in Africa are increasingly using the judicial process to resolve election-related disputes.³² For example, a number of presidential election petitions have been filed and adjudicated across

26 Kaaba (n 5) 332.

27 LA Nkansah ‘Dispute resolution and electoral justice in Africa: the way forward’ (2016) 41(2) *Africa Development* 97 at 104.

28 HK Prempeh ‘Comparative perspectives on Kenya’s post-2013 election dispute resolution process and emerging jurisprudence’ in C Odote & L Musumba (eds) *Balancing the scales of electoral justice: resolving disputes from the 2013 elections in Kenya and the emerging jurisprudence* (2016) 177 at 214.

29 K Kanyinga & C Odote ‘Judicialisation of politics and Kenya’s 2017 elections’ (2019) *Journal of Eastern African Studies* 1 at 3.

30 S Gloppen and others ‘Elections in court: the judiciary and Uganda’s 2006 presidential and parliamentary elections’ in J Kiiza and others (eds) *Electoral democracy in Uganda: understanding the institutional processes and outcomes of the 2006 multiparty elections* (2008) 53-89.

31 AO Oluwadayisi ‘The role of the judiciary in the application of peacebuilding theory and methods to election dispute resolution in Nigeria’ (2016) 45 *Journal of Law, Policy and Globalization* 138.

32 See A Schedler ‘What is democratic consolidation?’ (1998) 9(2) *Journal of Democracy* 91-107; J Linz & A Stepan *Problems of democratic transition and consolidation: Southern Europe, South America, and post-communist Europe* (1996) 5-6 for the argument that democratic consolidation consists of efforts to prevent democratic breakdown as actors subject themselves to the laid down rules in resolving conflicts.

Africa in recent times, in Ghana,³³ Kenya,³⁴ Namibia,³⁵ Nigeria,³⁶ Sierra Leone,³⁷ Uganda,³⁸ Zambia³⁹ and Zimbabwe.⁴⁰ This may be regarded as an affirmation of the confidence in the role of the judiciary as a credible mediator in political disputes.⁴¹

Even more audacious, the Supreme Court of Kenya in 2017⁴² and the Supreme Court of Appeal in Malawi in 2020,⁴³ nullified election results and ordered the conduct of fresh presidential elections. This shows that domestic courts in Africa are increasingly playing an assertive role as an independent and impartial arbiter in democratic politics in general and in electoral disputes more specifically. As a result, the courts' role in ensuring democratic advancement, peace, and stability within the African continent is enhanced.⁴⁴

33 *Nana Addo Dankwa Akufo-Addo & 2 others v John Dramani Mahama & 2 others* (Supreme Court of Ghana) 2013.

34 *Orengo v Moi & 12 others* (High Court of Kenya) 1993; *Mwau v Electoral Commission of Kenya & 2 others* (High Court of Kenya) 1993; *Kibaki v Moi & 2 others* (No 3) (2008) 2 KLR (EP) 351; *Moi v Matiba & 2 others* (2008) 1 KLR (EP) 622; *Raila Odinga v The Independent Electoral and Boundaries Commission & 3 others* (Supreme Court of Kenya) 2013; *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 3 others*, (Supreme Court of Kenya) 2017.

35 *Itula & others v Minister of Urban and Rural Development & others* (Supreme Court of Namibia) 2020.

36 *Buhari v Obasanjo* (2005) 13 NWLR 1; *Muhammadu Buhari v Independent National Electoral Commission & 4 others* (Supreme Court of Nigeria) 2008; *Abubakar v Yar'Adua* (Supreme Court of Nigeria) 2008.

37 *Sierra Leone People's Party v National Electoral Commission & Another* (Supreme Court of Sierra Leone) 2012.

38 *Besigye Kiza v Electoral Commission, Yoweri Museveni* (Supreme Court of Uganda) 2007; *Besigye Kiiza v Museveni Yoweri Kaguta, Electoral Commission* (Supreme Court of Uganda) 2001; *Amama Mbabazi v Yoweri Museveni & others* (Supreme Court of Uganda) 2016.

39 *Lewanika & others v Chiluba* (1999) 1 LRC 138; *Anderson Kambela Mazoka & 2 others v Levy Patrick Mwanawasa & 2 others* (Supreme Court of Zambia) 2002; *Hakainde Hichilema and Another v Edgar Chagwa Lungu and others* (Constitutional Court of Zambia) 2016.

40 *Morgan Tsvangirai v Robert Mugabe & 3 others* (Constitutional Court of Zimbabwe) 2013; *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & others* (Constitutional Court of Zimbabwe) 2019.

41 DU Enweremadu 'The judiciary and the survival of democracy in Nigeria: analysis of the 2003 and 2007 elections' (2011) 10(1) *Journal of African Elections* 114 at 134.

42 *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (Supreme Court of Kenya) 2017.

43 *Arthur Peter Mutharika & another v Electoral Commission & another* (Supreme Court of Appeal of Malawi) 2020.

44 W Khobe 'The institutional transformation and performance of the judiciary after 2010' in Y Ghai and others (eds) *Katiba 2010: achievements and challenges* (2020) 17 19; See also O Akinkugbe & JT Gathii 'Judicial nullification of presidential elections in Africa: Peter Mutharika v Lazarus Chakera and Saulos Chilima in context' available at https://www.afronomicslaw.org/2020/07/03/judicial-nullification-of-presidential-elections-in-africa-peter-mutharika-v-lazarus-chakera-and-saulos-chilima-in-context?fbclid=IwAR0l2WSXRXZZqHBL89N37uR1lhjIHTU3Q_zX8vW9N3EPiShQuiJrIo8zo (accessed 21 July 2020).

Moreover, even in instances where disputed election results are not nullified, the fact that litigants in election petitions are given a fair hearing by the court to vent their grievances is enough to obviate the need to resort to violence.⁴⁵ Thus in countries like Ghana, Nigeria, and Uganda, where election petitions challenging contested presidential election results were dismissed, the judiciary's role has been appreciated for enabling peaceful regulation of competition among the political actors.⁴⁶

Despite the progress noted earlier, there have been misgivings about the outcomes of judicial adjudication of most presidential election petitions.⁴⁷ Electoral disputes are not always resolved expeditiously and courts' decisions on such matters are sometimes overtaken by events.⁴⁸ There is also the perception of judicial bias, either due to the influence of corruption or lack of judicial independence, in some cases.⁴⁹

These misgivings and discontent with the resultant judicial outcomes from domestic courts and elections tribunals across the continent have led politicians and voters to seek alternative judicial recourse, to remedy electoral injustices. Thus, the search for electoral justice has in recent times moved beyond domestic courts.

- 45 C Kwarteng 'Swords into ploughshares: the judicial challenge of Ghana's 2012 presidential election results' (2014) 103(1) *The Round Table: Commonwealth Journal of International Affairs* 83 at 92.
- 46 AG Abdulai & G Crawford 'Consolidating democracy in Ghana: progress and prospects?' (2010) 17 *Democratization* 26 35; BK Twinomugisha 'The role of the judiciary in the promotion of democracy in Uganda' (2009) 9 *African Human Rights Law Journal* 1 21; OF Olayinka 'Towards the sustenance of democracy in Nigeria: the role of an independent judiciary in elections' in R Adeola & AO Jegede (eds) *Governance in Nigeria post-1999: revisiting the democratic 'new dawn' of the fourth republic* (2019) 131 at 137.
- 47 Kaaba (n 5) 354; M Azu 'Lessons from Ghana and Kenya on why presidential election petitions usually fail' (2015) 15 *African Human Rights Law Journal* 150 at 166.
- 48 JS Omotola 'Mechanisms of post-election conflict resolution in Africa's 'new' democracies' (2010) 19(2) *African Security Review* 2 5; JS Omotola 'Garrison' democracy in Nigeria: the 2007 general elections and the prospects of democratic consolidation' (2009) 47(2) *Commonwealth & Comparative Politics* 195-221; H Onapajo & UO Uzodike 'Rigging through the courts: the judiciary and electoral fraud in Nigeria' (2014) 13(2) *Journal of African Elections* 137 at 161.
- 49 M Thiankolu 'Role of the courts in ensuring free and fair elections in Kenya' (2019) 4 *Kabarak Journal of Law and Ethics* 53 63; F Sekindi 'Presidential election disputes in Uganda: a critical analysis of the supreme court decisions' (2017) 16(1) *Journal of African Elections* 154 155; and G Mwonzora & MB Xaba 'From the booth to the dock: 2018 elections in Zimbabwe and the elusive search for electoral integrity' (2020) 58 *Commonwealth and Comparative Politics* 1.

4 AFRICAN COURT'S ROLE IN THE PREVENTION AND MITIGATION OF ELECTORAL CONFLICTS

Political crises in Africa tend to have a multiplier effect on the region. It is therefore imperative that continental and regional institutions develop new strategies and approaches to prevent and resolve electoral conflicts.⁵⁰ To this end, the African Court and regional courts have adopted an approach to electoral conflict that has enabled them to deal with potential electoral problems before conflicts implode, thus allowing for the elaboration of a preventive response.

The role developed by the African Court (and the regional courts) can be typified as: resolving disputes over electoral rules and ensuring that the electoral rules create 'a level playing field – they engage in rule-evaluation'.⁵¹ By this, they make sure that the legal rules governing the conduct of elections are in consonance with the higher norms and principles embodied in continental and regional human rights instruments. It is the discharge of this role by the African Court that is the subject of interrogation in this part.

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol) provides in its article 3(1) that

[t]he jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the [African Charter on Human and Peoples' Rights], this Protocol and any other relevant human rights instrument ratified by the States concerned.

A similar provision found in article 4 of the Court Protocol, which deals with the jurisdiction of the African Court in advisory matters states that: '[t]he Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments'. With respect to the law applicable before the African Court, article 7 of the Court Protocol reiterates the same in the following words: '[t]he Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the states concerned'. The African Court has used this wide jurisdictional mandate to evaluate the electoral laws and constitutional provisions of various states to assess their

50 Mbugua (n 9) 33.

51 For the various roles that courts play in resolution of elections-related disputes see Gloppen and others (n 30).

compatibility with continental, regional and international human rights norms.⁵²

4.1 ***Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania***⁵³

In June 2011, the applicants, two Tanzanian non-governmental organisations (NGOs), and an opposition politician brought an application to the African Court alleging that the ban on independent candidacy in presidential and legislative elections pursuant to the Constitution of Tanzania was a violation of several rights enshrined in the African Charter on Human and Peoples' Rights (African Charter). The rights allegedly violated were freedom of association, the right to participate in public and governmental affairs, and the right against discrimination, as well as a broader argument that the state had 'violated the rule of law by initiating a constitutional review process to settle an issue pending before the courts of Tanzania.'⁵⁴ Tanzania argued that the resolution of the question before the Court 'should be left to the people of Tanzania',⁵⁵ which would make an appropriate determination on whether to retain or lift the ban on independent candidates through either parliament or a constituent assembly.

The African Court unanimously found the respondent state's constitutional ban on independent candidacy in presidential and legislative elections to be a violation of the African Charter. Specifically, the Court found violations of the rights, not to be discriminated against, to freedom of association and to participate in public and governmental

52 The African Court's exercise of its jurisdiction on election-related issues is poised to develop further as evidenced by the orders for provisional measures it has issued recently; See Application 62/2019 *Sebastien Ajavon v Benin*, Order on Provisional Measures 17 April 2020, suspending the holding of municipal and council elections in Benin pending the Court's decision on the merits of case; in Application 3/2020 *Houngue Eric Noudehouenou v Benin*, Order on Provisional Measures, 5 May 2020, the Court ordered Benin to take all necessary measures to remove any administrative, judicial and political obstacles for the candidacy of the applicant for the 2020 municipal, council and local elections and Ruling on Provisional Measures, 25 September 2020, granting provisional measures with similar orders to the respondent state with regard to the applicant's candidacy in the forthcoming 2021 Benin presidential elections; It has also issued orders for provisional measures in relation to the presidential election in Côte d'Ivoire scheduled for October 2020 – See Application 12/2020 *Guillaume Kigbafori Soro and 19 others v Côte d'Ivoire*, Ruling on Provisional Measures, 15 September 2020, directing the state to take all necessary measures to immediately remove all obstacles preventing Mr Sorro from enjoying his rights to vote and be elected in particular during the October 2020 presidential election; See also Application 25/2020 *Laurent Gbagbo v Côte d'Ivoire*, Ruling on Provisional Measures, 25 September 2020, ordering the respondent state to immediately remove all obstacles preventing the applicant from enrolling in the voters' register.

53 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania* (merits) 2013 1 AfCLR 34 (*Mtikila case*).

54 *Mtikila* (n 53) para 4.

55 *Mtikila* (n 53) para 80.1.

affairs. The Court therefore ordered the state to remedy the violations within a reasonable time through legislative, constitutional, and ‘all other necessary measures’, and to inform the African Court of the measures adopted. In effect, the state would have to remove the ban on independent candidates in the challenged electoral law and provisions of the Constitution to comply with the judgment. Despite this decision by the African Court, the respondent state has not fully complied with the judgment. Although the respondent state published the judgment on an official government website as directed by the Court,⁵⁶ it has not undertaken the constitutional or legislative measures to give effect to the Court’s judgment, arguing that these are contingent on the holding of a referendum without indicating when it would be held.⁵⁷

4.2 *Actions pour la Protection des Droits de l’Homme v Côte d’Ivoire*⁵⁸

This case offered an opportunity for the African Court to interpret what it considered to be a ‘human rights treaty’ as envisaged in article 3 of the Court Protocol. The applicant, an Ivorian NGO, alleged that by adopting a new law on the Independent Electoral Commission (IEC), Côte d’Ivoire violated the right of all citizens to equality before the law, as well as the right to an independent and impartial electoral body.⁵⁹

The African Court had to first determine whether the African Charter on Democracy, Elections and Governance, 2007 (African Democracy Charter),⁶⁰ and the Protocol on Democracy and Good Governance adopted by the Economic Community of West African States of 2001 (ECOWAS Democracy Protocol),⁶¹ could be considered human rights treaties in the sense of article 3 of the Court’s Protocol.⁶² The Court concluded that, since both instruments either expressly enunciate the subjective rights of individuals or place mandatory obligations on state Parties for the enjoyment of such rights, the instruments fall within the scope of article 3 of the Court’s Protocol.⁶³ The Court found that a violation of the African Democracy Charter and the ECOWAS Democracy Protocol led to a violation of the African Charter.⁶⁴

In the end, the African Court found that the composition of the IEC was imbalanced in favour of the government and that this imbalance

56 Activity Report of the African Court on Human and Peoples’ Rights (2018) EX.CL/1057(XXXII) 14.

57 Activity Report of the African Court on Human and Peoples’ Rights (2020) EX.CL/1204(XXXVI) 18.

58 *Actions Pour la Protection de Droits de l’Homme (APDH) v Côte d’Ivoire* (merits) 2016 1 AfCLR 668 (APDH case).

59 APDH (n 58) para 20.

60 APDH (n 58) paras 49-51.

61 APDH (n 58) para 63.

62 APDH (n 58) para 65.

63 APDH (n 58) paras 58-65.

64 APDH (n 58) para 153.

affected its independence and impartiality. Furthermore, the impugned law gave the President of the Republic an ‘incumbent advantage’ by placing him or any other candidate from his party in a much more favourable situation in relation to the other candidates. The Court therefore held that, by not placing all the potential candidates on the same footing, the law violated the right to equal protection of the law as enshrined in the human rights instruments ratified by the respondent state, especially article 10(3) of the African Democracy Charter and article 3 of the African Charter. The Court also found that Côte d’Ivoire did not fulfill its obligation as regards the right to equal protection of the law under article 10(3) of the African Democracy Charter, article 3(2) of the African Charter and article 26 of the International Covenant on Civil and Political Rights (ICCPR). The Court ordered the respondent state to amend its national legislation to be ‘compliant with the aforementioned instruments to which it is a Party’.⁶⁵

One of the salient features of the African Court’s judgment in *APDH v Côte d’Ivoire* is its affirmation of the broad subject matter of the jurisdiction of the court. As indicated above, article 3 of the Court Protocol gives the African Court the mandate to invoke not only those human rights treaties concluded under the auspices of the African Union, but also those at regional and international level to which a state is a party. This is very important, because it allows the African Court to address normative ambiguities and gaps that exist within the African human rights system.⁶⁶

With respect to compliance with the Court’s judgment, the respondent state submitted a communication to the Court on 28 August 2019 to indicate that it had promulgated a new law altering the composition of the IEC in compliance with the Court’s judgment.⁶⁷ The question of compliance with this judgment arose in the *Suy Bi Gohore Emile & others v Côte d’Ivoire* case which is discussed next.

4.3 *Suy Bi Gohore Emile & others v Côte d’Ivoire*⁶⁸

The nine applicants, all citizens of Côte d’Ivoire, brought an application to the Court challenging the independence and impartiality of the Independent Electoral Commission of Cote d’Ivoire. The applicants argued that a new law on the re-composition of the IEC promulgated in 2019 impaired the independence and impartiality of the IEC and violated the spirit of the judgments of the African Court of 18 November

65 As above.

66 B Kioko ‘The African Charter on Democracy, Elections and Governance as a justiciable instrument’ (2019) 63(1) *Journal of African Law* 39 56.

67 Activity Report of the African Court on Human and Peoples’ Rights (2020) EX.CL/1204(XXXVI) 20.

68 Application 44/2019, Judgment on Merits and Reparations, 15 July 2020 (*Gohore case*).

2016 in *APDH* case and of 28 September 2017 to interpret this judgment on merits.⁶⁹

The respondent state raised an objection on the Court's material jurisdiction, because in its view, the application was based primarily on allegations that it violated article 30 of the Court's Protocol. This meant, in the view of the respondent state, that the applicants were requesting the Court to monitor the execution of its judgment, despite there being no provision, either in the African Charter or in the Court's Protocol, which confers such competence on the Court.⁷⁰

With regard to this objection, the Court noted that article 30 of the Protocol explicitly imposes an obligation on states to comply with its judgments. In fact, it considered that this obligation constitutes the *conditio sine qua non* of any international litigation. It is the existence of this duty that separates international judicial mechanisms from quasi-judicial mechanisms that are not authorised to issue binding decisions. Therefore, considering the obligation to execute the Court's judgments, which generally imposes a duty on states to remedy established human or peoples' rights violations, the Court held that non-compliance with article 30 of the Protocol is tantamount to a 'violation of a human or peoples' rights', as referred to in article 27(1) of the Court's Protocol.⁷¹ Accordingly and through a combined reading of articles 3, 27(1) and 30 of the Court's Protocol, the Court found that it has material jurisdiction in a case or dispute on whether or not a state has complied with its judgment within the time stipulated, and make appropriate orders to remedy the violation, if necessary.⁷²

On the merits, the Court found that the applicants failed to demonstrate that the respondent state established an electoral body that is composed of members who are not independent and impartial and manifestly imbalanced in favour of the ruling party. The Court also found that the applicants failed to establish that the electoral body is overly institutionally dependent on the executive due to inadequate degrees of administrative or financial autonomy and that it is manifestly lacking confidence from political stakeholders based on its reform process.⁷³ However, considering the manifest imbalance of the number of Chairpersons of the Local Electoral Commission's proposed by the ruling party, following Bureau elections based on the previous law when the electoral body at the Local levels was still imbalanced in favour of the government, the Court found that the respondent state has not fully complied with article 17 of the African Democracy Charter and article 3 of the ECOWAS Democracy Protocol, and has therefore violated these provisions.⁷⁴ Following this finding, the Court ordered the respondent state to take the necessary measures before any election

69 *Gohore* (n 68) para 9.

70 *Gohore* (n 68) para 31.

71 *Gohore* (n 68) para 60.

72 *Gohore* (n 68) para 61.

73 *Gohore* (n 68) para 183.

74 *Gohore* (n 68) para 228.

to ensure that new Bureau elections, based on the new composition of the electoral body, are organised at the local levels.

In addition, the Court noted the absence of a mechanism to ensure that the process of nomination of members of the electoral body by political parties, especially opposition parties and civil society organisations, are driven by those entities. Accordingly, the Court found that the respondent state has not fully complied with its obligations to ensure public trust and transparency in the management of public affairs and effective citizens' participation in democratic processes as prescribed by article 3(7), article 3(8) and article 13 of the African Democracy Charter. The Court also found that the respondent state has not complied with its obligation to ensure that the electoral body has the confidence of all the political actors, as prescribed by article 3 of the ECOWAS Democracy Protocol. The Court therefore found that the respondent state has violated these provisions.⁷⁵ As at the time of writing this paper, the issue of implementation of this judgment is still under consideration by the African Court.

4.4 *Jebra Kambole v Tanzania*⁷⁶

The applicant, a public-spirited member of the Tanganyika Law Society, filed the application contesting the provisions of article 41(7) of the Constitution of the United Republic of Tanzania. The applicant alleged that Tanzania had violated his rights under the African Charter by maintaining article 41(7) in its Constitution, which bars any court from inquiring into the election of a presidential candidate after the Electoral Commission has declared a winner.⁷⁷

Specifically, the applicant alleged that article 41(7) of Tanzania's Constitution violated his right to non-discrimination, his right to equal protection of the law and the right to have his cause heard, especially the right to appeal to competent national organs against acts violating his fundamental rights as provided for under articles 2, 3(2) and 7(1)(a) of the African Charter, respectively.⁷⁸ The applicant also alleged that the respondent state had failed to honour its obligation to recognise the rights, duties and freedoms enshrined in the African Charter and to take legislative and other measures to give effect thereto as stipulated under article 1 of the African Charter.⁷⁹

The Court considered whether article 41(7) of Tanzania's Constitution violated the applicant's right to non-discrimination under article 2 of the African Charter. The Court found that article 41(7) of the Constitution creates a differentiation between litigants in that while Tanzania's courts are permitted to look into any allegation by any

75 *Gohore* (n 68) para 229.

76 Application 18/2018, Judgment on Merits and Reparations, 15 July 2020 (*Kambole* case).

77 *Kambole* (n 76) para 3.

78 *Kambole* (n 76) para 4.

79 *Kambole* (n 76) para 5.

litigant, they are not allowed to do so when a litigant seeks to inquire into the presidential election. The result is that those seeking to inquire into the election of a president are, practically, treated differently from other litigants, especially by being denied access to judicial remedies, while litigants with other claims are not similarly barred. The Court held, with six for, and four against, that in the absence of clear justification as to how the differentiation and distinction in article 41(7) of its Constitution is necessary and reasonable in a democratic society, this provision effects a distinction between litigants and that this distinction has no justification under the African Charter.⁸⁰ The Court held that this amounted to a violation of article 2 of the African Charter.

In relation to the alleged violation of article 7(1)(a) of the African Charter, the Court noted that among the key elements of the right to a fair hearing, as guaranteed under article 7 of the African Charter, is the right of access to a court for adjudication of one's grievances and the right to appeal against any decision rendered in the process. In this regard, the Court noted that article 41(7) of the Constitution ousts the jurisdiction of courts to consider any complaint in relation to the presidential election after the Electoral Commission has declared a winner. This, the Court reasoned, entails that irrespective of the nature of the grievance or the merits thereof, as long as the same pertains to the declaration by the Electoral Commission of the winner of a presidential election, no remedy by way of a judicial challenge exists to any aggrieved person within the respondent state. The Court also noted that there was nothing in the submissions of the respondent state which established that any of the conditions in article 27(2) of the African Charter were met in order to justify a limitation of the right to have one's cause heard. In the circumstances, the Court held, with nine for, and one against, that article 41(7) of the respondent state's Constitution violated the applicant's rights under article 7(1)(a) of the African Charter.⁸¹

On the basis of the violations found, the Court ordered the respondent state to take all necessary constitutional and legislative measures, within a reasonable time, to ensure that article 41(7) of its Constitution is amended and aligned with the provisions of the Charter so as to eliminate, among others, any violation of articles 2 and 7(1)(a) of the African Charter.⁸² The Court also ordered Tanzania to submit a report within 12 months of the notification of the judgment, on the measures taken to implement the orders and to submit further reports every six months thereafter until the Court is satisfied that there has been full implementation.

80 *Kambole* (n 76) para 82.

81 *Kambole* (n 76) para 103.

82 *Kambole* (n 76) para 118.

5 REGIONAL COURTS AS NEW ACTORS IN THE PREVENTION AND MITIGATION OF ELECTORAL CONFLICTS

Efforts aimed at regional integration within the African continent have led to the formation of Regional Economic Communities (RECs) such as the East African Community (EAC), the Economic Community of West African States (ECOWAS), and the Southern Africa Development Community (SADC). Given that the founding principles of the RECs provide that the protection and promotion of democracy and human rights and respect for the rule of law are part of their fundamental principles or goals, the regional courts formed to adjudicate disputes over regional integration, particularly, the EACJ, the ECOWAS Court, and the SADC Tribunal, have claimed jurisdiction in the protection of democracy and human rights.⁸³

However, the SADC Tribunal was disbanded by SADC member states in 2012. It was re-established in 2014 with a revised jurisdiction restricted to inter-state disputes thus it has no competence to adjudicate democracy and human rights related cases filed by individuals.⁸⁴ This part of the article is therefore restricted to analysing the approach adopted by the ECOWAS Court and the EACJ in the adjudication of election-related disputes.

5.1 The ECOWAS Court

Initially established as a court that is primarily charged with the interpretation of the ECOWAS Community law and development of jurisprudence that would deepen economic integration in the Western African region, the ECOWAS Court's jurisdiction has been expanded to include complaints involving human rights violations.⁸⁵ Thus whereas the ECOWAS Court was initially created to enhance economic integration, its trajectory both with respect to the substantive amendments to its protocol and the nature of the cases instituted before it is being shaped by good governance concerns and socio-political conflicts in the Community.⁸⁶

Though the ECOWAS Court lacks an express mandate to adjudicate over electoral disputes, it has claimed a limited jurisdiction in situations where an electoral cause is inextricably linked to alleged

83 ST Ebobrah 'Litigating human rights before sub-regional courts in Africa: prospects and challenges' (2009) 17(1) *African Journal of International and Comparative Law* 79-101; LN Murungi & J Gallinetti 'The role of sub-regional courts in the African human rights system' (2010) 7(13) *International Journal on Human Rights* 119-142.

84 KJ Alter and others 'Backlash against international courts in west, east and southern Africa: causes and consequences' (2016) 27(2) *European Journal of International Law* 293 306-314.

85 Articles 9(4) and 10(d) of the ECOWAS Community Court Supplementary Protocol (2005).

human rights violations. Litigants before the Court therefore view it as an important alternative forum to pursue their elections-related claims.⁸⁷

5.1.1 *Dr Jerry Ugokwe v Nigeria and Dr Christian Okeke*⁸⁸

The applicant, a member of the Nigerian House of Representatives whose election had been annulled by the Elections Tribunal and the Federal Appeal Court of Nigeria, alleged an infringement of his right to a fair hearing by the Elections Tribunal and the Nigerian Court of Appeal. He prayed for an interim order restraining the Elections Commission from invalidating his certificate of attestation, granting the said certificate to another person, and an order preventing the Federal National Assembly from relieving him of his position as an Assembly member. The applicant also asked the Court to declare as void the procedures and the judgment delivered by the Elections Tribunal and by the Court of Appeal. The Federal Republic of Nigeria filed a preliminary objection, arguing that the Court lacks the jurisdiction to entertain election disputes.

The Court held that the legal texts applicable confer no general or specific power to adjudicate on election disputes. In addition, it found that notwithstanding that a dispute has electoral dimensions, the determination of other rights of the parties may be referred to the Court.⁸⁹ Against this premise, the Court proceeded to examine whether the fundamental right of the applicant to a fair hearing was infringed in the course of the hearings before the Elections Tribunal and the Court of Appeal. The Court affirmed that it has jurisdiction in cases of alleged denial of fair hearing.⁹⁰ However, the Court dismissed the suit for lack of merit.

In sum the court carved a narrow jurisdictional basis to intervene in electoral causes where human rights violations are implicated in an electoral dispute. In delineating the scope of its jurisdiction, it affirmed that an application filed as an appeal against an election-dispute related decision of the domestic courts of member states would not be within

86 See generally KJ Alter and others 'A new international human rights court for west Africa: the ECOWAS Community Court of Justice' (2013) 107 *American Journal of International Law* 737; ST Ebobrah 'Critical issues in the human rights mandate of the ECOWAS Court of Justice' (2010) 54 *Journal of African Law* 1-25; and HS Adjolohoun 'The ECOWAS Court as a human rights promoter? Assessing five years' impact of the Koraou slavery judgment' (2013) 31(3) *Netherlands Quarterly of Human Rights* 342-371.

87 OD Akinkugbe 'Towards an analyses of the mega-political jurisprudence of the ECOWAS Community Court of Justice' available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186627 (accessed 23 July 2020).

88 Suit No ECW/CCJ/JUD/02/05, Judgment No ECW/CCJ/JUD/03/05, 7 October 2005 (*Ugokwe* case).

89 *Ugokwe* (n 88) para 19; See also similar reasoning in *Sule Audu et al v The Federal Republic of Nigeria*, Suit No ECW/CCJ/APP/02/16, Ruling of 20 March 2017; and *Omar Jallow & Another v Republic of The Gambia*, Suit No ECW/CCJ/APP/33/16, Judgment No ECW/CCJ/JUD/06/17, 10 October 2017.

90 *Ugokwe* (n 88) para 28.

the scope of the Court's jurisdiction where a violation of human rights could not be demonstrated.⁹¹

5.1.2 *Congrès pour la Démocratie et le Progrès (CDP) & others v Burkina Faso*⁹²

The dispute arose out of an amendment to the electoral laws of Burkina Faso that ousted the applicants who were supporters of the former President, Blaise Compaoré from participation in future electoral processes. The Burkina Faso Parliament's position was that the rationale of the transition was to mark a complete break with the previous regime and the governance system of Compaoré. In this way, the exclusion clause would guarantee that the transition was not recaptured *ex post facto* by Compaoré's cadres.⁹³

The principal question before the Court was whether the amendment of Burkina Faso's electoral law and its application violated the right of political parties and citizens to participate and vote in elections. The applicants, a group of opposition political parties and individuals, alleged the breach of their fundamental human rights by Burkina Faso's Transitional Government by enacting the impugned amendments to the electoral law. They contended that the new law adopted violates their right to participate freely in elections in Burkina Faso and violates several international legal instruments that Burkina Faso is a party to. On its part, Burkina Faso argued that the Court lacked jurisdiction to entertain the action.

The Court held that although it may lack the jurisdiction to adjudicate over electoral disputes in member states, 'it may be validly seized when it appears that the electoral process is marred by human rights violations, the punishment of which falls within its jurisdiction'.⁹⁴ Thus in electoral cases that are intertwined with allegations of breach of human rights, the ECOWAS Court will assume jurisdiction.

On the merits, the Court decided that the amendments to the electoral law were in violation of regional and international law and demanded that all obstacles to participation in transitional elections should be lifted.⁹⁵ The Court explained that there were no justifiable reasons for excluding such a broad number of individuals from

91 *Ugokwe* (n 88) para 32.

92 Suit No ECW/CCJ/APP/19/15, Judgment No ECW/CCJ/JUG/16/15, 13 July 2015 (*CDP* case).

93 See in the account in A Witt 'Where regional norms matter: contestation and the domestic impact of the African Charter on Democracy, Elections and Governance' (2019) *Africa Spectrum* 1 9-13; see also A Witt & S Schnabel 'Taking intervention politics seriously: media debates and the contestation of African regional interventions "from below"' (2020) 14 *Journal of Intervention and Statebuilding* 1 6-8.

94 *CDP* (n 92) para 19.

95 *CDP* (n 92) para 14.

participating in democratic elections specifically on the basis of such 'ambiguous criteria'.⁹⁶ Moreover, the Court also claimed that sanctions for unconstitutional changes of government can only be applied against regimes and states – including their leaders – but not the rights of ordinary citizens.⁹⁷ And finally, the Court held that the exclusion envisaged by the impugned law was neither legal nor necessary for the stabilisation of the democratic order in Burkina Faso. Rather, it significantly limited the choice of the Burkinabe electorate and thus undermined the competitive character of the elections.⁹⁸ In terms of compliance, the decision of the Court was rejected by the Burkinabe Transitional Government. The argument for non-compliance was founded on the view that a revision of the electoral code only four months prior to the scheduled elections was impractical.⁹⁹

5.1.3 *Centre for Democracy and Development and Center for Defence of Human Rights and Democracy v Mamadou Tandja & Niger*¹⁰⁰

The applicants, NGOs based in Niger, asked the ECOWAS Court for declarations that President Mamadou Tandja's decision to remain in power and to organise a constitutional referendum was null and void. They also sought a declaration that the violent suppression of protests was illegal and a violation of the human rights of the people of Niger's freedom of expression, assembly and association. The applicants also sought orders prohibiting President Tandja from organising a referendum, remaining in power beyond December 2009 and dispersing the protests against his plan to run for a third term. The respondents raised a preliminary objection, contending that should the Court find that it is competent to entertain the matter, it would be assuming jurisdiction over a matter that relates to the internal law of a member state, contrary to its powers.

The Court noted that convening an electoral body for a referendum on the Constitution of Niger is an exercise of regulatory power in a sovereign member state. Consequently, the court is not competent to adjudicate on the lawfulness or constitutionality of the acts complained of, or to prohibit the undertaking of such acts. Hence, it declared itself incompetent to prohibit President Tandja or the agents of the Republic of Niger from organising the referendum in order to remain in power or to disperse the protest marches against the organisation of the referendum.

96 *CDP* (n 92) para 11.

97 As above.

98 *CDP* (n 92) para 12.

99 Witt (n 93) 116.

100 Suit No ECW/CCJ/APP/07/09, Judgment No ECW/CCJ/JUD/05/11, 9 May 2011.

5.1.4 *Amnesty International Togo & others v Togo*¹⁰¹

The application concerned the allegations by the applicants that, following protests in 2017 in Togo calling for the adoption of presidential term limits, the internet was shut down. The first to seventh applicants, NGOs based in Togo and the eighth applicant, a Togolese journalist and blogger, claimed that the shutting down of the internet infringed their rights to freedom of expression as provided in article 9 of the African Charter and other international human rights instruments.¹⁰² The respondent state justified the shutdown as necessary in order to safeguard the national security interest of the country.¹⁰³ The Court held that it had jurisdiction to hear and determine the matter as allegations relating to human rights violations constitute grounds for the court to assume jurisdiction.¹⁰⁴

On the merits, the Court declared that shutting down of internet access by the Republic of Togo violated the rights of the applicants to freedom of expression and further directed the respondent state to enact and implement laws, regulations, and safeguards in order to meet its obligations with respect to the right of freedom of expression in accordance with principles contained in international human rights instruments.¹⁰⁵

5.1.5 *Obinna Umeh & others v Nigeria*¹⁰⁶

The applicants, public-spirited Nigerian citizens, approached the ECOWAS Court to challenge the electoral laws of Nigeria that proscribed independent candidacy by mandatorily requiring those seeking elective offices to do so on the platform of a registered political party. They argued that section 221 of the Constitution of Nigeria amounts to the denial of their right to direct participation in the government of their country and a violation of article 21 of the Universal Declaration of Human Rights, article 13 of the African Charter and article 25 of the ICCPR.¹⁰⁷

Nigeria argued that what the applicants were asking for is a constitutional amendment, an undertaking which is vested in the people of Nigeria through national and state assemblies and beyond the scope of the power of the Court. It also argued that the Court lacked jurisdiction to hear and determine the dispute.¹⁰⁸ The Court dismissed

101 Suit No ECW/CCJ/APP/61/18, Judgment No ECW/CCJ/JUD/09/20, 25 June 2020 (*Amnesty International Togo* case).

102 *Amnesty International Togo* (n 101) para 2.

103 *Amnesty International Togo* (n 101) para 3.

104 *Amnesty International Togo* (n 101) para 23.

105 *Amnesty International Togo* (n 101) para 45.

106 Suit No ECW/CCJ/APP/48/18, Judgment ECW/CCJ/JUD/10/20, 1 July 2020 (*Umeh* case).

107 *Umeh* (n 106) para 11.

108 *Umeh* (n 106) para 14.

the argument that it lacked jurisdiction to entertain the suit. It held that it has competence to compel member states to conform to, or meet their international obligations but does so where necessary by examining any impugned national laws with the view to ascertaining whether indeed any human rights violations occurred.¹⁰⁹

On the merits, the Court held that it cannot compel Nigeria to amend its Constitution, in the abstract, where there have not been any proven human rights violations. The Court held that section 221 of Nigeria's 1999 Constitution as amended, does not infringe on the applicants' right to participate freely in the government of their country, either directly or through freely chosen representatives in accordance with the provisions of the law.¹¹⁰

5.2 The East African Court of Justice

The East African Court of Justice, (EACJ), is established under the Treaty for the Establishment of the East African Community (the EAC Treaty).¹¹¹ In its original structure, the Court had one chamber. However, amendments to the EAC Treaty that came into effect in March 2007 created an Appellate Division, making the Court a two-chamber court.¹¹² In terms of jurisdiction, the EACJ is empowered to hear cases 'over the interpretation and application' of the EAC Treaty.¹¹³ The Treaty provides that the EACJ 'shall have such other original, appellate, human rights and other jurisdiction *as will be determined* by the Council at a suitable subsequent date'.¹¹⁴ However, the extension of the jurisdiction of the Court to cover human rights disputes is yet to be undertaken.

Despite the absence of an explicit provision on its human rights jurisdiction, the Court has claimed a limited jurisdiction based on the founding principles of the community and adjudicated on human rights and governance disputes. The EAC Treaty provides, that one of its founding principles is 'the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'¹¹⁵ and that one of its operational principles is 'the maintenance of universally accepted

109 *Umeh* (n 106) para 25.

110 *Umeh* (n 106) para 83; For comparison, see the contrary reasoning by the African Court in *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania* (merits) 2013 1 AfCLR 34; and the South African Constitutional Court in *New Nation Movement NPC and others v President of the Republic of South Africa and others* CCT 110/19 (11 June 2020).

111 Treaty for the Establishment of the East African Community, article 24, 30 November 1999, 2144 UNTS 255 (EAC Treaty).

112 The EAC Treaty provides that the Court 'shall consist of a First Instance and an Appellate Division,' article 23(2).

113 Note 109 above article 27(1); In addition, the EAC Establishment Treaty provides that the role of the Court shall be to 'to ensure the adherence to law in the interpretation and application of and compliance with this Treaty,' article 23(1).

114 EAC Treaty, article 27(2).

115 EAC Treaty, article 6(d).

standards of human rights'.¹¹⁶ In many applications before the EACJ, complainants have solely invoked these provisions in requesting declarations from the EACJ regarding violations of their human rights. In a number of cases, the EACJ recognised that it had jurisdiction to deal with alleged violations of the EAC Treaty, that in the end could amount to human rights violations, and that some human rights violations were direct violations of the Treaty itself.¹¹⁷ Thus, a major feature of the EACJ is the manner in which it has repurposed its original mandate over trade disputes to adjudicate what are, essentially, human rights cases.¹¹⁸ There have been several attempts to utilise this limited human rights jurisdiction claimed by the EACJ to litigate on election-related cases arising from Partner states.

5.2.1 *Sitenda Sebalu v The Secretary General of the East African Community*¹¹⁹

In this case, a Ugandan citizen applied to the EACJ challenging a decision of the Ugandan Supreme Court in a parliamentary election petition, which was decided against him. The applicant came to the EACJ intending to further appeal the Ugandan Supreme Court's judgment since, in his view, he still had a right of appeal to the EACJ under articles 6, 7(2), 8(1)(c), 23, 27(1) and 30 of the EAC Treaty and Rules 1(2) and 21 of the EACJ Rules of Procedure. The respondent state argued that the EACJ lacked appellate jurisdiction from the decisions of domestic courts of the Partner states. The Court found that article 23 of the EAC Treaty confers an appellate jurisdiction which is internal within the EACJ itself, namely, from the First Instance Division to the Appellate Division but that it is not competent to hear appeals from decisions of national courts in electoral disputes.

116 EAC Treaty, article 7(2).

117 See for example *James Katabazi and 21 others v Secretary General of the East African Community and others*, 1 November 2007 (EACJLR) (2005-11) 58, para 39; *Plaxeda Rugumba v The Secretary General of the East African Community and Another*, 30 November 2011, EACJLR (2005-11) 226 236-38, paras 42, 43 and 45; *Samuel Mukira Mohochi v The Attorney General of the Republic of Uganda*, 17 May 2013, EACJLR (2005-11) 274 281, para 25; *Venant Masenge v The Attorney General of the Republic of Burundi*, 18 June 2014, EACJLR (2012-15) 136 141, para 29.

118 See in this regard JT Gathii 'Mission creep or a search for relevance: the East African Court of Justice's human rights strategy' (2013) 24 *Duke Journal of Comparative and International Law* 249, 277; V Lando 'The domestic impact of the decisions of the East African Court of Justice' (2018) 18 *African Human Rights Law Journal* 463-485; A Possi 'The East African Court of Justice: towards effective protection of human rights in the East African Community' (2013) 17(1) *Max Planck Yearbook of United Nations Law Online* 173.

119 Reference No 1 of 2010, Judgment of 30 June 2011.

5.2.2 East African Civil Society Organization Forum v The Attorney General of the Republic of Burundi and 2 others¹²⁰

This reference sought to challenge the decision of the Constitutional Court of the Republic of Burundi in so far as it endorsed the legality of Mr. Pierre Nkurunziza's participation as a candidate in Burundi's 2015 presidential election. The applicant, a platform of civil society organisations in East Africa, faulted the impugned decision for purportedly violating the Arusha Peace and Reconciliation Agreement for Burundi, 2000 (Arusha Accord), as well as the Constitution of the Republic of Burundi and, consequently, the EAC Treaty.

Despite the provisions of the Arusha Accord and article 96 of the Burundi Constitution, President Nkurunziza was nominated as a presidential candidate for a third term. Fourteen senators of the Burundi Senate filed a case in the Constitutional Court of Burundi seeking interpretation of articles 96 and 302 of Burundi Constitution. The Constitutional Court validated President Nkurunziza's nomination for the presidential election. President Nkurunziza participated in the 2015 Burundi presidential election and was subsequently declared the winner.¹²¹

The crux of the reference was that the nomination and participation of Mr. Pierre Nkurunziza in the 2015 Burundi presidential election, despite his having been twice elected as the President of Burundi, contravened the Arusha Accord, the Burundi Constitution and the EAC Treaty. The applicant faulted the decision of the Constitutional Court of Burundi for violating Burundi's domestic law and the EAC Treaty. The applicant argued that the violation of the national laws and Community Law by an organ of an EAC Partner state, would amount to a violation of the rule of law principle enshrined in article 6(d) and 7(2) of the EAC Treaty.

The Court held that it was rightly seized with the duty to interrogate whether Burundi's Constitutional Court had complied with the principles of the rule of law and good governance as enshrined in the EAC Treaty.¹²² The Court went on to hold that it would review a judicial decision of a domestic court of a Partner state, first, where it established on the face of the record that, the decision depicted outrage, bad faith, and wilful dereliction of judicial duty, and, secondly, where no action, or manifestly insufficient action has been taken by the appropriate judicial disciplinary body to deal with the said decision.¹²³ The EACJ held that the decision and reasoning of the Constitutional Court of Burundi could not be categorised as an outrageous judicial decision, so as to invoke state responsibility attributable to the respondent state.

120 Reference No 2 of 2015, Judgment of 3 December 2019 (*East African CSO Forum case*).

121 *East African CSO Forum* (n 120) para 6.

122 *East African CSO Forum* (n 120) para 26.

123 *East African CSO Forum* (n 120) para 43.

Thus, the EACJ's international judicial review mandate was improperly invoked.¹²⁴

6 LESSONS FROM THE JUDICIALISATION OF ELECTORAL CONTESTS AT THE AFRICAN COURT AND REGIONAL COURTS IN AFRICA

The preceding part depicts the emergence of a continental and regional electoral adjudication regime centred on the activity of the African Court and regional courts which have claimed an adjudicatory mandate in electoral disputes. It is thus arguable that the African Court and regional courts in Africa are becoming alternative avenues for resolution of electoral disputes. This development conforms to the recent trend of judicialisation of (mega) politics, which includes subjecting electoral outcomes and other foundational collective identity questions, and nation-building processes to judicial resolution.¹²⁵

The evolving jurisprudence of the courts under study shows that cases involving election related disputes or complaints have been brought before these courts when litigants are dissatisfied with the fairness of the determinations by domestic courts or domestic processes. The African Court and regional courts have thus provided an avenue to peacefully channel electoral disputes for judicial resolution. In this sense, these courts are not only deciding and affirming the human rights of these litigants, but they also provide a forum to challenge restrictive and non-compliant electoral practices.¹²⁶ By doing so, the courts clarify the applicable international, continental and regional human rights standards applicable to the various aspects of the electoral process that the states should adhere to. States' adherence to these standards will enhance confidence in the electoral process and consequently acceptance of the outcomes of the electoral contests and legitimacy of those elected. When electoral disputes and conflicts are managed within the relevant legal frameworks, this ultimately impacts on democratic progress, stability and peace and security in the polity.

The jurisprudence developed by the African Court and the regional courts shows that the interplay between human rights and democratisation cannot be ignored and that these two concepts are two sides of the same coin. This can be seen in the approach adopted by these two courts with regard to their material jurisdiction. They have used the express human rights mandate to claim a role in adjudicating election-related disputes. Thus although no court under study has been granted an express jurisdiction to adjudicate electoral disputes, election-related cases, as seen in the *Christopher Mtikila, APDH, Suy*

124 *East African CSO Forum* (n 120) para 49.

125 R Hirschl 'The judicialization of mega-politics and the rise of political courts' (2008) 11 *Annual Review of Political Science* 93-118.

126 JT Gathii 'Introduction to the book' Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630722 (accessed 23 July 2020).

Bi Gohore and *Jebra Kambole* cases by the African Court and the *Jerry Ugokwe* case by the ECOWAS Court, still reach these courts by way of raising human rights violations, over which the courts have jurisdiction. It can therefore be argued that although states may be reluctant to expressly grant jurisdiction over electoral-related disputes to supranational courts, certain aspects of the conduct of elections (such as the rights to participation, freedom of expression and association and access to an appeal or to a remedy when aggrieved with the conduct of elections) will continue to reach these supranational courts.¹²⁷

The cases discussed exemplify an increasing expectation that the African Court and regional courts will adjudicate electoral conflicts, which often go to the heart of democratic politics on the continent. The cases also illustrate the centrality of human rights in resolving electoral disputes and conflicts. The inter-linkage between human rights and peacebuilding therefore means that these courts are emerging actors in resolving electoral disputes and conflicts and therefore in peacebuilding in general.

In view of the fact that the African Court and regional courts are not appellate courts with regard to decisions of national courts, litigants bring election-related disputes before the former courts, as claims of violations of treaty obligations that fall within their jurisdiction. The African Court and regional courts have also become important venues to channel political conflict where intractable conflicts are incapable of being channelled through domestic institutions. These include challenges to constitutional provisions as can be seen in the jurisprudence of the African Court in the *Christopher Mtikila*, and *Jebra Kambole* cases.¹²⁸

It is arguable that these courts are in the process of shaping a continental and regional normative system regarding the common problem of electoral conflicts. The emerging democratisation jurisprudence might be characterised as aimed at facilitating the creation of a democratic public sphere. That is, a significant zone of freedom for individual citizens, civil society organisations and political actors to engage in meaningful deliberation concerning key questions and challenges for the democratic community.¹²⁹

The African Court and the ECOWAS Court have tried to construct the minima of a democratic constitutional order through their elections-related case law. They have done this through the upholding of core democratic rights, and shaping an inclusive and fair electoral

127 O Kaaba 'The challenges of adjudicating presidential election disputes in Africa: Exploring the viability of establishing an African supranational elections tribunal' unpublished LLD Thesis, University of South Africa, 2015 216.

128 See also *General Kayumba Nyamwasa and others v Rwanda* (interim measures) 2017 2 AfCLR 1, where the African Court declined to grant the applicants' prayer for provisional measures to stop a referendum on constitutional amendments allowing the President of the Republic of Rwanda to run for a third term from the previously constitutionally stipulated two-term presidential term limit.

129 TG Daly *The alchemists: questioning our faith in courts as democracy-builders* (2017) 154.

system as shown in the *Christopher Mtikila, Jebra Kambole, and APDH and Suy Bi Gohore* cases by the African Court and the *Congrès pour la Démocratie et le Progrès* by the ECOWAS Court. The courts have claimed jurisdiction in matters that involve shaping electoral rules with the aim of ensuring a genuinely representative political system, insofar as these relate to the respect of human rights. With the wide material jurisdiction of the African Court and the ECOWAS Court's express human rights jurisdiction despite the caveat that it only deals with 'human rights questions' and not the internal laws of member states, these two courts symbolise great potential in this regard.

The EACJ's electoral adjudication has been comparatively light in contrast to the jurisprudence of the ECOWAS Court. This is arguably due to the fact that the EAC has a limited normative framework on human rights and democracy. The EAC Treaty, has no stand-alone provision elaborating on the conduct of democratic elections in Partner states and the term democracy is mentioned cursively.¹³⁰ Should the EAC Partner states adopt a human rights protocol expressly granting the EACJ human rights jurisdiction, there will be a clearer and wider framework for its consideration of election-related disputes.

The African Court and regional courts benefit from a range of advantages that makes them ideal for resolution of election-related conflicts. They are good alternatives in case of shortcomings in the domestic courts such as those related to concerns around judicial independence. Moreover, they might be more easily perceived as neutral since they do not have a particular stake in the outcome of the case. In the case of the African Court, judges are required to recuse themselves in matters filed against the state of which they are nationals.¹³¹ Thus, another way of strengthening election-related conflict prevention and resolution is to ensure that both domestic and regional courts have express jurisdiction and capacity to deal with these conflicts, so that the strengths of the national, regional and continental levels of adjudication can be effectively leveraged.¹³²

The increasing recourse to African Court and regional courts in resolving electoral conflicts signals a growing trend in Africa where judicial institutions at regional and continental levels are beginning to matter in ways that may not have been envisaged. Scholarly and other writers alike have traditionally depicted Africa as a place where formal institutional rules are largely irrelevant.¹³³ However, as shown in this article, political actors are increasingly seeking to resolve their electoral

130 Kaaba (n 127) 150.

131 Article 22 of the Court's Protocol and Rule 9(2) of the Rules of the African Court (25 September 2020) provide that a judge who is a national of a state that is a party to a case shall not hear that case; see also AA Olowofoyeku 'Sub-regional courts and the recusal issue: emergent practice of the East African Court of Justice' (2012) 20(3) *African Journal of International and Comparative Law* 365-387.

132 N Hadjigeorgiou *Protecting human rights and building peace in post-violence societies* (2020) 147.

133 DN Posner & DJ Young 'The institutionalization of political power in Africa' (2007) 18(3) *Journal of Democracy* 126 127.

grievances through judicial means and thus the African Court and regional courts are coming to matter much more than they used to, and have displaced violence as the primary means of resolving such conflicts.

It is to be noted that, for the African Court to exercise jurisdiction over applications filed by individuals and NGOs, the state concerned must have made a declaration in this regard, as required under Article 34(6) of the Court Protocol. Of the 30 state parties to the Court Protocol, only ten have made this declaration.¹³⁴ However, the possibilities of accessing the African Court in election-related disputes is facing a new threat with four of the ten states that had recognised the jurisdiction of the Court to receive cases filed by individuals and NGOs withdrawing the declarations. The countries that have withdrawn their declarations are Rwanda, in February 2016, Tanzania, in November 2019, and Benin and Côte d'Ivoire, in March and April 2020, respectively.¹³⁵ It is noteworthy that the election-related disputes adjudicated by the African Court and analysed in this article, were against Rwanda, Tanzania, Benin, and Côte d'Ivoire. To ensure that the role of the African Court in adjudicating election-related disputes is strengthened, the state Parties to the Court Protocol that have withdrawn their declaration should be encouraged to re-deposit them and those states have not done so, to do so.

Despite the fact that 25 member states of the African Union are not party to the Court's Protocol, the Court's democratisation jurisprudence has an impact on them by virtue of their ratification of the African Charter and other international and regional human rights instruments. Through its interpretation of these instruments, the African Court elaborates normative standards that apply to all state Parties to these instruments. For example, in terms of a spill-over effect, the Court's determinations in the *APDH* and *Gohore* cases are expected to influence how other African states compose and structure their election management bodies. In these cases, the African Court set minimum standards for the independence and impartiality of electoral management bodies, which if adhered to, will improve their legitimacy and acceptance of results of elections they conduct, therefore reducing the likelihood of occurrence of electoral violence on the continent.

7 CONCLUSION

Electoral disputes are acknowledged as one of the sources of conflicts and instability in Africa. This context has resulted in the African Court and regional courts providing channels for peaceful resolution of

134 Status List as at 22 September 2020, on the state parties to the Court Protocol and those that have made the Declaration (on file with author).

135 For analysis see SH Adjolohoun 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 1-40; and TG Daly & M Wiebusch 'The African Court on Human and Peoples' Rights: mapping resistance against a young court' (2018) 14 *International Journal of Law in Context* 294-313.

electoral disputes. It has become apparent that successful court intervention is contingent on the jurisdictional mandate conferred to the African Court and regional courts. This would require African states to grant the necessary competence to the African Court and regional courts in this regard. In addition, they should ensure prompt and full implementation of the decisions rendered by the African Court and regional courts on electoral disputes that they adjudicate on. Doing so would ensure that the African Court and regional Courts play an effective role in the prevention and resolution of conflicts precipitated by electoral violence, thus contributing to the continent's stability.