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Overcoming challenges to the adjudication of election-related disputes at the African Commission on Human and Peoples' Rights: Perspectives from the *Ngandu* case

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Summary: *The African Commission on Human and Peoples' Rights is increasingly taking on the role of a regional electoral adjudication body in resolving election-related human rights violations. While this role is essential because of the contested nature of elections in Africa and the inability of many national election resolution mechanisms to sanction election irregularities, the African Commission must master the intricacies of election dispute resolution in member states for its recommendations to be based on sound legal principles. Its decision in the Ngandu case provides an opportunity to assess the nature of some of the challenges faced by the Commission when adjudicating election-related disputes and how to overcome these. In this decision, the African Commission found that the Democratic Republic of the Congo had violated the complainant's right to defence, to political participation and to work following the annulment of his election as a member of the National Assembly by the country's interim Constitutional Court (the Supreme Court of Justice). The analysis of the case suggests that, despite the*

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African Commission's ability to re-affirm the relevance of the right to political participation for the consolidation of democracy in Africa and protecting the right to a fair trial and to work, it must address three types of challenges in its role as election-adjudication body using the procedural mechanisms provided for in both the African Charter and the Rules of Procedure. These challenges are the knowledge of electoral justice systems operating in the DRC and Africa at large; the impossibility of restitution as a form of reparation; and the state's participation in proceedings and the implementation of recommendations.

Key words: *African Commission on Human and Peoples' Rights; Ngandu case; election-related disputes; exhaustion of local remedies; restitution; electoral justice systems*

1 Introduction

This article examines some of the challenges to the adjudication of election-related disputes at the African Commission on Human and Peoples' Rights (African Commission) through the lens of its decision in *Albert Bialufu Ngandu v Democratic Republic of Congo* (Ngandu case)¹ where it found that the Democratic Republic of the Congo (DRC) had violated the rights of Albert Bialufu Ngandu (the complainant) to defence, to political participation and to work as a result of the unlawful and unfair invalidation of his election. This communication forms part of a body of African Commission decisions where it has decided on different aspects of electoral-related disputes in Africa using its human rights protection mandate.² It exemplifies the increasing 'regionalisation' of electoral justice or electoral dispute settlement which has seen regional human rights bodies play a significant role in diffusing violence and tension arising from contested elections at the domestic level.³

Of late, scholars have been interested in exploring the ability and appropriateness of and the extent to which regional and sub-

1 Communication 433/12 *Albert Bialufu Ngandu v République démocratique du Congo* (February 2016) para 86, https://www.achpr.org/fr_sessions/descions?id=258 (accessed 20 July 2021) (Ngandu case).

2 These decisions include *Modise v Botswana* (2000) AHRLR 25 (ACHPR 1994); *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire (II)* (2008) AHRLR 75 (ACHPR 2008); *Constitutional Rights Project & Another v Nigeria* AHRLR 191 (ACHPR 1998); *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005); *Legal Resource Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001).

3 G Kakai 'The role of continental and regional courts in peace-building through the judicial resolution of election-related disputes' (2020) 4 *African Human Rights Yearbook* 343; S Adjolohoun & E Youmbi 'L'émergence d'un juge électoral régional africain' (2019) 3 *Annuaire africain des droits de l'homme* 22.

regional human rights bodies can serve as forums to settle domestic elections-related disputes.⁴ These bodies are believed to be insulated from domestic politics and pressures, the more so in countries where ruling regimes have managed to establish election dispute-resolution mechanisms that are beholden to them.⁵ Regional human rights bodies pay close attention to human rights violations that occur during elections. This stands in sharp contrast to many national courts that, for the most part, approach electoral disputes from a technical standpoint⁶ and give less or no consideration to human rights violations.⁷ In several cases, national courts and tribunals are institutionally weak, corrupt⁸ and fearful of the powers that incumbents wield.⁹ While domestic courts in two African countries – Kenya and Malawi – have recently nullified results of presidential elections marred by irregularities,¹⁰ this has tended to remain the exception. This attitude is evidenced by the remarks of the then president of the Supreme Court of Ghana, who suggested that the ‘judiciary in Ghana, like its counterparts in other jurisdictions, does not readily invalidate a public election but often strives in the public interest to sustain it’.¹¹ Most judges appear to be ready to err on the

- 4 See broadly J Gathii (ed) *The performance of Africa's international courts: Using litigation for political, legal and social change* (2020); A Olinga ‘La promotion de la démocratie et d’un ordre constitutionnel de qualité par le système africain des droits fondamentaux: entre acquis et défis’ (2017) 1 *Annuaire africain des droits de l’homme* 234-236; C Heyns et al ‘The right to political participation in sub-Saharan Africa’ (2019) *Global Journal of Comparative Law* 143-146; Kakai (n 3) 345-351; Adjolahoun & Youmbi (n 3) 24.
- 5 O Kabaa ‘The challenge of adjudicating presidential election disputes in Africa: Exploring the viability of establishment an African supranational elections tribunal’ LLD thesis, University of South Africa, 2015 172 (on file with the author); Kakai (n 3) 369. See also CM Fombad ‘The Cameroonian Constitutional Council: Faithful servant of an accountable system’ in CM Fombad (ed) *Constitutional adjudication in Africa* 80.
- 6 O Kabaa ‘The challenges of adjudicating presidential election disputes in domestic courts in Africa’ (2015) 15 *African Human Rights Law Journal* 338-343; C Fombad ‘Democracy, elections, and constitutionalism in Africa: Setting the scene’ in C Fombad & N Steytler (eds) *Democracy, elections, and constitutionalism in Africa* (2021) 29; D Meledje ‘Le contentieux électoral en Afrique (2009) 129 *Pouvoirs* 140.
- 7 D Asha ‘Note juridique sur l’opinion dissidente du juge Corneille Wasenda en marge de l’arrêt *RCE 001/PR.CR* rendu en réponse à la requête contre la décision portant publication des résultats provisoires de l’élection présidentielle du 30 décembre 2018’ (2018) 3 *Annuaire congolais de justice constitutionnelle* 592.
- 8 B Kahombo ‘La Cour constitutionnelle et la rectification d’erreurs matérielles contenues dans ses arrêts relatifs au contentieux des résultats des élections législatives du 30 décembre 2018’ (2019) 4 *Annuaire congolais de justice constitutionnelle* 197-198.
- 9 O Kabaa & CM Fombad ‘Adjudication of disputed presidential elections in Africa’ in Fombad & Steytler (n 6) 361-362.
- 10 See *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & Others* Presidential Petition 1 of 2017 (Kenya) and *Saulos Klaus Chilima & Another v Arthur Peter Mutharika & Others* Constitutional Reference 1 of 2019; *Arthur Peter Mutharika & Another v Saulos Klaus Chilima & Another* MSCA Constitutional Appeal 1 of 2020 (Malawi).
- 11 M Azu ‘Lessons from Ghana and Kenya on why presidential election petitions usually fail’ (2015) 15 *African Human Rights Law Journal* 162; MG Nyarko &

side of caution to help the ruling coalition maintain its grip on power. Sadly, this attitude has led to a situation where, in many cases, the decisions of the courts in electoral disputes have created havoc and plunged countries into violence and deadly skirmishes.¹²

However, there are legitimacy issues surrounding the exercise by regional bodies, such as the African Commission, of certain adjudicative functions related to elections, which may lead them to be more deferential to the state's preference.¹³ No African constitution or (human rights) treaty stipulates that regional bodies will play a role in electoral justice.¹⁴ As such, this places the African Commission, particularly, in a tricky position since the power to validate candidacies to various types of elections or to validate election results lies with domestic courts.¹⁵ International law ensures that states determine the constitutional system – including rules governing electoral dispute resolution – that better suits their needs and aspirations.¹⁶ Although states have the obligations to comply with basic international (human rights) principles and standards,¹⁷ and regional human rights bodies are established to oversee the implementation of the African Charter on Human and Peoples' Rights (African Charter), the involvement of these bodies in what states could consider political matters *par excellence* could erode their legitimacy and lead to the contestation of their jurisdiction.¹⁸ These contestations at times are unavoidable and are mainly guided by political motives especially when regional bodies adopt judgments and decisions that do not match the political preference of governments.¹⁹ The least regional

T Makunya 'Selected developments in human rights and democratisation during 2017: Sub-Saharan Africa' (2018) 2 *Global Campus Human Rights Journal* 149.

12 Meledje (n 6) 143.

13 For the African Court, see SB Traoré & PA-A Leta 'La marge nationale d'appréciation dans la jurisprudence de la Cour africaine des droits de l'homme et des peuples: Entre effacements et remise en cause' (2021) 31 *Revue suisse de droit international et droit européen* 439-444.

14 Kakai (n 3) 367-368; Kabaa (n 5). See generally the ECOWAS Court of Justice in *Dr Jerry Ugokwe v Nigeria and Dr Christian Okeke* (2005).

15 Meledje (n 6) 139.

16 See in particular art 2(2) of the International Covenant on Civil and Political Rights; CCPR General Comment 25: Article 25 (Participation in public affairs and the right to vote) adopted at the 57th session of the Human Rights Committee (12 July 1996) para 1; art 20(1) of the African Charter. See broadly C Anyangwe 'The normative power of the right to self-determination under the African Charter and the principal of territorial integrity: Competing values of human dignity and system stability' (2018) 2 *African Human Rights Yearbook* 49.

17 *Mouvement Ivoirien des Droits Humains* (n 2) paras 72 & 77. See Olinga (n 4) 226; Communication 320/06 *Pierre Mamboundou v Gabon* (2014) para 45.

18 TM Makunya et al 'Selected developments in human rights and democratisation in Africa during 2020' (2021) 5 *Global Campus Human Rights Journal* 204-206.

19 TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: Trends and lessons' (2021) 21 *African Human Rights Law Journal* 1258-1259; 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* 7.

bodies could do is to ensure that their decisions or judgments are irreproachable at law.

In the next part the article presents a summary of the *Ngandu* case, the arguments of the parties and the African Commission's findings on admissibility, merits and remedies. In part 3 it reviews the challenges posed by the resolution of electoral disputes, while in part 4 the article offers some reflections on how these challenges could be overcome to enhance the legitimacy and acceptability of the African Commission's involvement in electoral disputes. In part 5, the article concludes that given the central role of the African Commission in safeguarding political rights at the regional level, its understanding and rigorous assessment of the election-related issues that arise in the adjudication of election petitions at the national level will improve the lot of those whose election-related rights are continually being infringed.

2 Ruling in the *Ngandu* case

This part reviews the facts and alleged violations, the consideration of admissibility requirements by the African Commission, the merits and reparation.

2.1 Facts and alleged violations

Following the 2011 national legislative elections in DRC, the National Independent Electoral Commission (CENI) provisionally declared the complainant elected. He was then sworn in as a member of parliament (MP) in the National Assembly pending the publication of final results by the Supreme Court of Justice (CSJ)²⁰ acting as the interim Constitutional Court.²¹ The 2006 DRC Constitution (Constitution) and the General Electoral Law vest the Constitutional Court with the power to proclaim final presidential and national legislative election results and to adjudicate election petitions within seven days and two months for presidential and legislative elections respectively.²² A total of 519 petitions alleging irregularities in the 2011 legislative elections were then filed in the CSJ, 32 of which were successful, resulting in the invalidation of the mandate of 32

20 *Ngandu* (n 1) para 3.

21 Art 223 Constitution of DRC.

22 Art 161(2) of the Constitution of DRC and art 72 of Act 06/006 of 9 March 2006 Governing the Organisation of Elections as modified by Act 11/003 of 25 June 2011, Act 15/001 of 12 February 2015 and Act 17/013 of 24 December 2017. On 29 June 2022, Act 22/029 Amending the General Electoral Act was enacted.

provisionally-elected MPs, including the complainant,²³ and their replacement with other MPs.

According to the complainant, the nullification of his election by the CSJ on 25 April 2012 was unlawful as the Court relied on results that were incorrect and not published by the CENI.²⁴ There was a significant discrepancy between the number of voters in the presidential and national parliamentary elections in the same district.²⁵ He further noted that, on the basis of article 75 of the Electoral Act, the CSJ had limited competences under national law in this regard, which do not include the power to replace elected candidates with other candidates.²⁶ After the 'unlawful' nullification of his election, he approached the CSJ twice (in May and June 2012) urging it to correct clerical errors in the hope that the correction of these errors would prompt the CSJ to overturn its 25 April 2012 ruling. The result of these two requests was predictable since the Supreme Court decisions are final and not subject to appeal.²⁷ Another appeal lodged with the CSJ in February 2012 was rejected two months later.²⁸ The National Assembly then stopped paying his monthly salary, and on 4 May 2012 validated the mandate of the candidate by whom he had been replaced by the CSJ.²⁹

Before the African Commission, the complainant alleged the violation of the following rights protected under the African Charter. First, he argued that the lack of appeals against decisions of the Supreme Court violated his right to equality and equal treatment as petitioners appearing before courts other than the Supreme Court enjoy the right to appeal.³⁰ Second, the complainant argued that his right to political participation under article 13 of the African Charter had been violated as the Court had confirmed a candidate who had not been elected by the people. Third, the unlawful invalidation of his mandate consequently deprived him of work, a right protected under article 15 of the African Charter.

This petition was aimed at remedying the harm suffered by the complainant as a result of an apparently flawed electoral adjudication

23 M Wetsh'Okonda & B Kahombo *Le pari du respect de la vérité des urnes en Afrique: Analyse des élections présidentielles et législatives du 28 novembre 2011 en République démocratique du Congo* (2014) 202-203.

24 *Ngandu* (n 1) para 5.

25 *Ngandu* para 4. To illustrate the discrepancy, he demonstrated that 279 763 persons voted in presidential elections (807 polling stations) while 307 417 voted in legislative elections but based on 748 polling stations.

26 *Ngandu* (n 1) para 5.

27 Art 168(1) Constitution of DRC.

28 *Ngandu* (n 1) para 6.

29 *Ngandu* para 7.

30 *Ngandu* para 38.

system. Prospectively, the application was to address what has become an endemic scourge of 'unjust' invalidation of mandates of elected parliamentarians by the DRC Constitutional Court.³¹ Not only did the Court annul the election of 32 MPs in 2011, but a similar situation also occurred in 2007 when 18 MPs were invalidated. In 2018, 31 MPs lost their seats following controversial and contested judgments by the Constitutional Court.³² This curse of invalidation has clearly cast a spell over the progress of the country's electoral justice system. It has given the impression that the national electoral dispute mechanism is no more than a sham,³³ leaving petitioners with no choice other than to resort to regional human rights bodies such as the African Commission which, they believe, provide some guarantees of independence.

2.2 Admissibility

The African Commission relied exclusively on factual elements provided by the complainant, given that DRC did not submit its arguments on admissibility and merits.³⁴ The decision is silent as to what prompted DRC not to engage the Commission, and it is unclear so far why the country has not engaged the Commission in several other communications.³⁵ The Commission started by analysing whether every condition laid down under article 56 of the African Charter had been met. As is often the case, the requirement of exhaustion of local remedies and the submission of the petition within a reasonable time were discussed at length. The African Commission started by noting how the complainant's attempts to overturn the Supreme Court's judgment of 25 April 2012 which invalidated him had failed. The Supreme Court was the court of first and last instance in national legislative and presidential elections and its decisions were final and not subject to appeal. Having invalidated the complainant and rejected his two applications to correct material errors, no other local remedy was available.³⁶ In its reasoning, the African Commission conceived the procedure to rectify material

31 See generally Kahombo (n 8) 203-205.

32 Kahombo (n 8) 203-204.

33 Kahombo (n 8) 205.

34 *Ngandu* (1) para 24.

35 The pattern of the absence of state submissions, effective engagement with the African Commission and compliance with its recommendations may be observed in other cases, including *Institute for Human Rights and Development in Africa & Others v Democratic Republic of Congo* (2017); *Marcel Wets'Okonda Koso & Others v Democratic Republic of Congo* (2008); *Mr Kizila Watumbulwa v Democratic Republic of Congo* (2012); *Dino Noca v Democratic Republic of Congo* (2012); and *Maitre Mamboleo M. Itundamilamba v Democratic Republic of Congo* (2013 in relation to admissibility).

36 *Ngandu* (n 1) para 30.

or clerical errors to be a 'remedy' in the sense envisaged by article 56(5) of the African Charter. This conception impacted on the way in which the Commission examined the rule of submission within a reasonable time. The Commission considered that the date of the Supreme Court's judgment (5 September 2012) rejecting the complainant's applications to correct clerical errors was the starting point to assess the compliance with article 56(5). It did not consider the date of the earlier judgment (25 April 2012) which invalidated the complainant. The Commission assumed that the two applications to correct material errors indeed were 'appeals' against the judgment of 25 April 2012, and that the judgment of 5 September 2012 was a response to the 'appeals'. The Commission's Secretariat was seized on 13 December 2012, four months from the moment the Supreme Court rejected the applications to correct clerical errors. The Commission thus concluded that the application complied with article 56(5).

2.3 Merits

The African Commission concluded that the following rights had been violated: the right to defence (article 7(1)(c));³⁷ the right to political participation (article 13) owing to the complainant's unlawful invalidation and replacement;³⁸ his right to work (article 15) as the 'unlawful' invalidation prevented him from holding his paid position in the National Assembly³⁹ while there were no sufficient elements to prove the violation of the petitioner's right to be tried within a reasonable time;⁴⁰ the right to an impartial tribunal;⁴¹ and the obligation to institute courts.⁴² In what follows, the article discusses the African Commission's ruling in relation to the alleged violations of articles 3, 7, 13 and 15.

The applicant claimed that he had been discriminated against due to the lack of appeal to decisions by the CSJ in electoral matters, as the CSJ sits as a court of first and last instance in such matters. The African Commission framed the complainant's claim to be one related to the right to equality, the assessment of which requires

37 In the decision's operative part, the African Commission notes that it found a violation of art 7(1)(a) while this right in para 57 was found not to have been violated. Instead, the Commission found that the respondent state had violated the right to defence (art 7(1)(c)).

38 *Ngandu* (n 1) paras 75-76.

39 *Ngandu* para 78.

40 *Ngandu* para 68.

41 *Ngandu* para 69.

42 *Ngandu* para 81.

one to 'identify a reference in a similar or comparable situation'.⁴³ It proceeded to assess whether the complainant was in a similar situation as individuals who appear before courts other than the CSJ and whether the decision of the latter violated the right to equality. With regard to the first question, the Commission noted that the complainant could not claim to be in a similar situation as other litigants before the ordinary courts given that the subject matter of their respective claims differs (electoral disputes versus non-electoral disputes) and that the Constitution and the electoral law specifically empower the CSJ to deal with these disputes in the first and last resort.⁴⁴ Regarding the second question, the Commission found that the lack of appeals against Supreme Court decisions would have been discriminatory had there been sufficient evidence that other candidates had been allowed to appeal Supreme Court decisions.⁴⁵

The African Commission subsequently considered whether the complainant's right to appeal had been violated due to the lack of appeal mechanisms against judgments of the CSJ. Before doing so, the Commission first distinguished the centralised from the decentralised constitutional or electoral justice systems. According to the Commission, DRC is a civil law country that adopts a centralised model of constitutional review. Unlike common law countries, the centralised model confers on a specialised jurisdiction the power to review the constitutionality of laws and adjudicate electoral petitions.⁴⁶ The Commission subsequently examined the justifications for the appeal procedure⁴⁷ before reviewing the reasons behind the choice of the centralised constitutional review model and whether or not that prevented petitioners from appealing against decisions. According to the Commission, the centralised constitutional review model is 'often preferred to the decentralised system which brings about low rigidity of the Constitution, mistrust of judges, duality of the courts and a separation of the legal order'.⁴⁸ It added, in a manner that is difficult to understand, that the two situations must be distinguished: 'the one in which the highest court endowed with exclusive centralised power gives judgments which cannot be appealed against; and the one in which the same court gives

43 *Ngandu* para 47.

44 *Ngandu* para 49.

45 *Ngandu* para 51.

46 *Ngandu* paras 50 & 53.

47 The African Commission notes three functions of appeals, namely, (i) to avoid or correct miscarriages of justice and to protect parties from arbitrary decisions by the judge; (ii) to ensure legal and judicial certainty through harmonisation of the law; and (iii) to enhance the legitimacy of the judicial system in the eyes of the public through the consistent and controlled application of the law that harmonisation provides.

48 *Ngandu* (n 1) para 55.

provisional judgments which can subsequently be appealed in the event of a dispute'.⁴⁹

The Commission averred that

even in the centralised constitutional or electoral justice delivery system, the definitive nature of the judgment delivered is only relative, since there is almost always a remedy such as rectification of material error and an action for the annulment of the previous court judgment, among others.⁵⁰

As it did in the case of admissibility of the petition, the Commission concluded that the complainant enjoyed the right to appeal as he had submitted two applications for the correction of clerical errors.

The African Commission further reached the conclusion that the way in which the CSJ dealt with the complainant's case violated his right to defence (equality of arms between parties). It indicated that the Supreme Court judgment of 25 April 2012 was sufficiently motivated but procedurally unfair and substantively illegal.⁵¹ The Commission noted that the said judgment lacked reasonable legal ground as it was based on minutes not transmitted by the electoral commission as provided by the law but by parties.⁵² Relying on the Congolese electoral law, the Commission also averred that the Supreme Court should simply have annulled the electoral results and ordered a re-run instead of unlawfully replacing the complainant with another MP.⁵³ The procedure followed by the Supreme Court was deemed 'unfair' given that it recounted the votes in the absence of the candidates whose election had been invalidated and did not allow him to challenge the count and the documents used in it.⁵⁴

Political participation and the right to work are intimately linked when one's mandate is arbitrarily invalidated. The African Commission confirmed that the right to political participation had been violated due to the lack of reasonable grounds in the Supreme Court's decision to replace the complainant with another candidate.⁵⁵ As the results on which it relied did not emanate from the electoral commission and were not confirmed by witnesses, its judgment lacked any legal foundation.⁵⁶ The complainant did not have the opportunity to verify the substance of the recount that led to the said decision

49 As above.

50 *Ngandu* para 56.

51 *Ngandu* para 62.

52 *Ngandu* para 63.

53 *Ngandu* paras 64-65.

54 *Ngandu* para 67.

55 *Ngandu* para 75.

56 As above.

and he was not fully informed about the judgment.⁵⁷ In the end, the Commission found that the judgment of the Supreme Court of Justice, for the replacement of the complainant with another when a re-run was the legal option in case of irregularities in the election results, violated Congolese electoral laws.⁵⁸ The Commission's findings reinforced the position of African Union (AU) member states and its own jurisprudence on how fair and equitable elections are essential to strengthening a democratic culture in Africa.⁵⁹ Over the years, the Commission has developed aspects of the right to political participation in its soft law instruments and case law.⁶⁰ Consequently, state (in)actions that arbitrarily annul election results must not be tolerated, in part because they deprive lawfully-elected individuals of the work for which they were elected.

The right to work was the last right that the African Commission found to have been violated.⁶¹ It considered that this right included 'access to employment, security of employment and reintegration unless appropriate compensation is paid'.⁶² The Commission argued that MPs have a permanent but fixed-term position, with remuneration and related benefits. For the Commission, it is 'an employment, the loss of which, in many countries, if one is not re-elected, it gives room to the right to enjoy unemployment benefits'.⁶³

2.4 Remedies

The complainant sought to move the African Commission to order DRC to effect three types of prayers. First, DRC should redress the alleged violations by reinstating him in the National Assembly. Second, the DRC should compensate him for the damage caused with all other benefits of the office, including parliamentary immunities. Finally, DRC should ratify the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) and make the declaration pursuant to its article 34(6).⁶⁴ The first prayer was

57 Ad above.

58 *Ngandu* para 76.

59 African Charter on Democracy, Elections and Governance (2007/2012) chs 2 & 3.

60 See cases cited in n 2. See, among others, Resolution on Elections in Africa – ACHPR/Res 174 (XLVIII)10 African Commission on Human and Peoples' Rights (24 November 2010).

61 *Ngandu* (n 1), para 78. See generally African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples Rights paras 56-59.

62 *Ngandu* (n 1) para 77.

63 *Ngandu* para 78.

64 *Ngandu* para 10.

rejected as it had become difficult to reinstate the complainant. The Commission enjoined the state to pay the complainant's salaries and benefits due for the time of the mandate during which he was unable to perform the duties. It refrained from ordering the state to ratify the African Court Protocol and making the declaration given the discretionary nature of such a decision and the absence of the Commission's power to do so.⁶⁵

3 Some challenges to the adjudication of election-related disputes at the African Commission

The *Ngandu* case provides an opportunity to evaluate some of the challenges the African Commission faces in pursuing its role as a regional electoral adjudicator. Legally, understanding these challenges could help the Commission to develop, in future similar cases against state parties to the African Charter, legal principles based on accurate information about domestic election disputes mechanisms. Politically, it can spare the Commission from additional backlashes with member states that have over the past two decades demonstrated their determination to protect and defend their human rights records,⁶⁶ all the more when the African Commission employs inaccurate domestic legal standards or information.⁶⁷ Moreover, the experience of the African Court on Human and Peoples' Rights (African Court) and the Southern African Development Community (SADC) tribunals shows how, when regional adjudication bodies are too assertive of their authorities in politically controversial matters,⁶⁸ several states tend to react in a manner that undermines courts' ability to decide over individual complaints.⁶⁹ Three main

65 *Ngandu* para 84.

66 J Biegon 'Diffusing tension, building trust: Proposals on guiding principles applicable during consideration of the Activity Reports of the African Commission on Human and Peoples' Rights' (2018) *Global Campus Africa Policy Briefs* 7.

67 In its response on information on state reporting contained in the African Commission's combined 48th and 49th Activity Report, Egypt vehemently reacted that it was 'factually incorrect to list Egypt as having an overdue periodic report submitted under Article 62 of the African Charter on Human and Peoples' Rights'. On the 47th report, it called on the African Commission to 'base itself on verified information, and commit to impartiality'. Responding to the Commission 47th Activity Report, Malawi noted that 'the allegation contained in paragraph 46(xvii) ... is unfounded since there was simply not such shutdown; neither was there even an attempt by the authorities to shut down any communication platform'. Zimbabwe for its part argued that 'the [African Commission] reports should focus on facts, not allegations and respect procedures of the [African Charter] itself that only facts are published. Zimbabwe objects the inclusion of unproven allegations under a section that focuses on areas of concern.'

68 TA Zewudie 'Human rights in the African Union decision-making processes: An empirical analysis of states' reaction to the Activity Reports of the African Commission on Human and Peoples' Rights' (2018) 2 *African Human Rights Yearbook* 301.

69 Kabaa (n 5) 216. See generally Adjolohoun (n 19) 1-40.

challenges arise from the consideration of the *Ngandu* case: the knowledge of electoral justice systems operating in DRC and Africa at large; the impossibility of restitution as a form of reparation; and the state's participation in proceedings and the implementation of recommendations.

3.1 Knowledge of electoral justice systems

Two problems arise from the knowledge of electoral justice systems operating in DRC and Africa at large. The first relates to how the African Commission understands legal remedies that exist in election-related disputes in DRC and, relatedly, how it considers the violation or not of the right to appeal under the African Charter. The first is a procedural question while the second is a substantive one. These two issues are considered at length in what follows.

It is fair, however, to start by positing that constitutional review differs from the electoral justice system even when the same judicial organ (the Constitutional Court) performs the two procedures. Constitutional review aims to safeguard the supremacy of the Constitution by reviewing the constitutional validity of norms that are hierarchically inferior to the Constitution, also known as infra-constitutional norms irrespective of where they originate from. In DRC, these norms are international treaties and agreements; laws; acts having the force of law; edicts; internal regulations of the parliamentary chambers, the Congress and the institutions supporting democracy; as well as the regulatory acts of the administrative authorities.⁷⁰ Acts of deliberative assemblies and judicial decisions can be added to these norms.⁷¹ By contrast, the electoral justice system aims to settle disputes broadly arising from elections (the validity of candidacies, presidential, legislative and local elections and referendums). Favoreu and others consider that both procedures are part of constitutional adjudication given that they aim to ensure that 'the constitutional order is respected in all its aspects'.⁷² In the *Ngandu* case the African Commission from time to time refers to constitutional review to distinguish how the electoral

⁷⁰ Art 160 of the 2006 DRC Constitution; art 43 of Act 13/026 of 15 October 2013 Regulating the Organisation and Functioning of the Constitutional Court.

⁷¹ See DRC Constitutional Court *Decision R.Const.1800* of 22 July 2022.

⁷² L Favoreu and others *Droit constitutionnel* (2019) 282. A centralised constitutional review system is one where the review of the constitutionality of legislation, administrative actions and conduct can be challenged before specialised bodies, generally known as the Constitutional Court, the Constitutional Council or the Constitutional Tribunal, some of which are situated outside the ordinary hierarchy of the judiciary while the decentralised constitutional review system is one that empowers other courts in the judiciary, generally started from high courts, to entertain constitutional matters. Broadly speaking, the centralised

justice system is regulated under the two major legal traditions – common law and civil law – operating in Africa.

Be that as it may, one of the questions arising in the *Ngandu* case was whether the procedure to rectify clerical errors was a ‘legal remedy’ and whether by initiating it before the CSJ, the complainant had exercised an appeal and could thus not claim the violation of his right to appeal under article 7(1)(a) of the African Charter. This difficulty arose as the CSJ is a court of first and last instance in presidential and national legislative elections disputes, its judgments being final and not subject to appeal.⁷³ Parties may approach the CSJ simply to correct material errors found in decisions.

The African Commission seems to have characterised the procedure to correct material errors as a ‘legal remedy’ by stating that its existence ‘is the manifestation of an option for appeal of the judgments of the Supreme Court’.⁷⁴ The procedure to correct material errors is neither an appeal nor a legal remedy strictly speaking. The rectification of clerical errors does not in essence aim to reverse, to withdraw, to replace or to annul the decision adopted by a court which a legal remedy normally seeks to achieve.⁷⁵ It cannot question the authority of the decision and, based on the doctrine of *res judicata*, the matter cannot be adjudicated any further.⁷⁶ A clerical error is generally defined as ‘an inaccuracy that inadvertently slips into the execution of an operation (a calculation error, for example) or the drafting of a document (in the case of the omission of a name)’.⁷⁷ In electoral disputes, clerical errors encompass

typing error resulting in a discrepancy between the number of votes cast in the motivation of the judgment and those declared in its operative part; the indication of an erroneous date on the day of counting or the posting of results at the level of the electoral district.⁷⁸

The rectification of clerical errors is not unique to electoral disputes. Other domestic courts and tribunals as well as regional and sub-

model is applicable in French, Arabic, Hispanic and Portuguese-speaking Africa and the decentralised model is mainly applied in Anglophone Africa.

73 Art 168(1) Constitution of DRC.

74 *Ngandu* para 57.

75 G Cornu *Vocabulaire juridique* (2018) 2270; J Kimpele ‘L’erreur matérielle dans le scrutin du 28 novembre 2011’ (2014) *Bulletin des Arrêts de la Cour Suprême de Justice 2011-2012* 283.

76 Kahombo (n 8) 189; B Wa Lwenga ‘Tribune du Prof Blaise Eca Wa Lwenga sur la rectification des erreurs matérielles par la Cour constitutionnelle’, <https://www.7sur7.cd/2019/06/21/tribune-du-prof-blaise-eca-wa-lengwa-sur-la-rectification-des-erreurs-materielles-par-la> (accessed 11 August 2022).

77 Kimpele (n 75) 281.

78 Kimpele (n 75) 291.

regional human rights bodies are empowered to do so with regard to their decisions.⁷⁹

Conflating the rectification of clerical errors with an appeal had two main consequences. First, the African Commission considered that domestic remedies had been exhausted at the time the Supreme Court rejected the complainant's requests for rectification of clerical errors (September 2012) and not when the first judgment annulling his election and replacing him with another candidate had been adopted (April 2012).⁸⁰ Concretely, the Commission should have considered that local remedies had been exhausted eight months before approaching it⁸¹ and not four.⁸² The absence of a clear definition of what constitutes 'reasonable period' under the African Charter warrants a justification of the Commission's decision to admit this case.⁸³ Given that the Commission has had to declare inadmissible applications introduced after six months of having exhausted local remedies,⁸⁴ the Commission and the complainant were expected to justify, whether on grounds of fairness and justice or the peculiarity of the case,⁸⁵ why an eight-month period was reasonable within the meaning of article 56(6) of the African Charter⁸⁶ for the petition to be declared admissible.⁸⁷

Second, since there clearly does not exist an appeal against Constitutional Court decisions, the African Commission's failure to address a critical issue related to the violation of the complainant's right to appeal against Supreme Court decisions can be inconsistent with the African Charter's promise to protect fair trial rights. While there is no unqualified right to a second hearing under international law, the African Commission has interpreted the right to appeal as a fundamental aspect of fair trial.⁸⁸ Its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa are even more generous because an 'entitlement to an appeal to a higher judicial

79 African Court on Human and Peoples' Rights, Rules of Procedure, Rule 79; Economic Community of West African States Court of Justice, Rules of Procedure, art 63(1); East African Community Court of Justice, Rules of Procedure, Rule 81; European Court on Human Rights, Rules of Procedure, Rule 81; Inter-American Court of Human Rights, Rules of Procedure, art 76.

80 *Ngandu* (n 1) para 31.

81 The last decision of the Supreme Court of Justice; 5 September 2012.

82 On 13 December 2012.

83 *Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008) para 108.

84 *Majuru* (n 83) paras 109-110.

85 *Majuru* para 109.

86 *Ngandu* (n 1) para 31.

87 See S Dzesseu 'Le temps du procès et la sécurité juridique des requérants dans la procédure devant la Cour africaine des droits de l'homme et des peuples' (2019) 3 *Annuaire africain des droits de l'homme* 77-78.

88 R Murray *The African Charter on Human and Peoples' Rights: A commentary* (2019) 221.

body' is seen as a significant component of a fair hearing under the African Charter in all kinds of proceedings.⁸⁹ In *Jebra Kambole v Tanzania* the African Court was emphatic in observing that 'among the key elements of the right to a fair hearing, as guaranteed under article 7 of the 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'.⁹⁰

The question, therefore, is whether the absence of appeal against judgments of constitutional courts in presidential and national legislative elections can be considered compatible with the need to establish 'effective' electoral jurisdictional bodies,⁹¹ and how the existence of appeals, where they are absent, can help countries to defuse the tensions and discontent that arise from elections. The absence of appeal against Constitutional Court judgments in presidential and national legislative election-related disputes stems from the nature of judgments of the Constitutional Court, as they are not susceptible to appeal, and the choice made by the DRC constituent power to follow the model adopted in fellow civil law African jurisdictions by not instituting appeal procedures against judgments of the Constitutional Court. However, the chaotic management of electoral disputes generally results in the loss of public confidence in the judiciary and creates a sense of the illegitimacy of the judiciary as an instrument to ensure the truthfulness of the ballot. An appeal would have allowed the litigant's matter to be heard by another judge and would have offered an opportunity to the losing party to challenge the reasoning of the previous court, a process which could potentially restore confidence in domestic courts as independent and effective electoral adjudicators and perhaps reduce the likelihood of seeking restitution as a form of redress before regional (human rights) bodies.

3.2 The impossibility of restitution as a form of reparation

The period within which the African Commission adopts its recommendations in election-related communications is relatively long. By the time recommendations are adopted, the complainants

⁸⁹ African Commission Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 2003 2(j).

⁹⁰ My emphasis. *Jebra Kambole v United Republic of Tanzania* (Judgment) (2020) 4 AfCLR 430 para 99.

⁹¹ Art III(c) of the OAU/AU Declaration on the Principles Governing Democratic Elections in Africa (AHG/Decl.1(XXXVIII)); art 17(2) of the African Charter on Democracy, Elections and Governance (2007/2012) in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 130.

can no longer be placed in the situation in which they were prior to the occurrence of the 'internationally wrongful act'. In the *Ngandu* case it took the African Commission three years and two months to make its final pronouncement (13 December 2012 to 25 February 2016), 10 months before the new legislative elections. Restitution as a form of reparation that aims to withdraw the wrongful measure,⁹² in this case, for example, reintegrating the complainant in the National Assembly, could not be contemplated.

One might, therefore, assume that whenever litigants approach the African Commission in election-related human rights violations, they will hardly obtain the measure of restitution that the complainant sought.⁹³ The delay in issuing its recommendations seems to be a general problem before the African Commission if one examines other election-related communications it adjudicated. The *Constitutional Rights Project* case was adjudicated in a period of five years and three months (July 1993 to October 1998) while the outcome in *Pierre Mamboundou v Gabon* came after eight years and three months of adjudication (March 2006 to July 2014). Supposing that the Commission had ruled in favour of Pierre Mamboundou, by the time the decision was adopted in 2014, Gabon had already, in 2009, held anticipated elections following the death of President Omar Bongo – against whom Mamboundou had approached the Commission – and was two years into the organisation of other presidential elections in 2016. Worse still, the complainant passed away in 2011, three years before the Commission settled the matter.⁹⁴ A similar consequence may be drawn from the *Constitutional Rights Project* where the time of the African Commission's ruling colluded with the organisation of the 1999 presidential elections in Nigeria. In relation to presidential elections petitions, there is also the risk that the government tasked to defend the case before the African Commission is the very same government whose election is being contested. The now pending *Communication 721/19 Martin Fayulu Madidi v Democratic Republic of Congo* for which the Commission decided to be seized in 2019 is an illustration. Besides, this petition may be resolved while DRC will have moved on to another electoral cycle starting in 2023. While the Commission can be partly blamed for delays in decision making on its communications, the participation of the respondent state

92 M Forteau, A Miron & A Pellet *Droit international public* (2022) 1131; J Crawford *Brownlie's principles of public international law* (2012) 567.

93 *Ngandu* (n 1) para 10.

94 G Dougueli 'Gabon: décès de l'opposant Pierre Mamboundou' 16 October 2011 *Jeune Afrique*, <https://www.jeuneafrique.com/178975/politique/gabon-d-c-s-de-l-opposant-pierre-mamboundou/> (accessed 15 July 2021).

in proceedings and its willingness to implement the decision are equally vital.

3.3 State's participation in proceedings and the question of implementation

The African Commission's involvement in electoral disputes must demonstrate any prospect that its findings will most likely solve the predicament applicants submit to it and possibly ensure that its ruling will prevent similar wrongs in the respondent state. However, the *Ngandu* case was not complied with and the Constitutional Court once again nullified the election of 31 members of parliament through the rectification of clerical errors in 2018. The state clearly failed to learn from the 2007 and 2011 experience, the African Commission's findings in the *Ngandu* case and the Inter-Parliamentary Union's Human Rights Commission recommendation that the country 'carry out appropriate legislative and constitutional reforms to end the recurrence of these violations and to improve the mechanisms for resolving electoral disputes'.⁹⁵

The lack of engagement between the African Commission and DRC in this case may have meant that the state was not willing to reform its constitutional and regulatory frameworks to implement the African Commission's decision and probably to prevent what has become a pandemic of annulment of the election of MPs. Judging by previous communications submitted against it before the African Commission, DRC hardly presents its arguments on admissibility and merits. Examples include the following cases: *Institute for Human Rights and Development in Africa & Others v Democratic Republic of Congo* (2017);⁹⁶ *Marcel Wetsh'Okonda Koso & Others v DRC* (2008); *Mr Kizila Watumbulwa v Democratic Republic of Congo* (2012);⁹⁷ *Dino Noca v Democratic Republic of Congo* (2012);⁹⁸ *Maître Mamboleo M Itundamilamba v Democratic Republic of Congo* (2013 in relation to admissibility).⁹⁹ This reduces the prospects of meaningful

95 Inter-Parliamentary Union's Human Rights Commission, Décision adoptée par le Comité des droits de l'homme des parlementaires à sa 161e session, DH/2020/161-R.2 (Geneva 20-30 January 2020) 3.

96 Communication 393/10 *Institute for Human Rights and Development in Africa & Others v Democratic Republic of Congo* (2017).

97 Communication 285/04 *Mr Kizila Watumbulwa v Democratic Republic of the Congo* (2013).

98 Communication 286/04 *Dino Noca v Democratic Republic of the Congo* (2012).

99 I Derek et al 'The (un)willingness to implement the recommendations of the African Commission on Human and Peoples' Rights: Revisiting the *Endorois* and the *Mamboleo* decisions' (2018) 2 *Annuaire africain des droits de l'homme* 418.

engagement and 'positive dialogue' among the African Commission, the state and complainants.¹⁰⁰

Some litigants whose rights have been infringed during electoral adjudication processes attempt to seek solace before the African Commission, later to realise that this remedy clearly is not 'capable of redressing'¹⁰¹ their complaint. The Commission's recommendations are adopted long after the wrong has been overtaken by events,¹⁰² and the state against which they approach the Commission seems not to bother about regional human rights litigation against it. What then will be the relevance of a regionalised electoral justice if recommendations are hardly complied with and states are unwilling to engage with the regional body? Conversely, how beneficial will such a mechanism be if its recommendations are issued after too much water has flowed under the bridge?

It is generally believed that the non-binding nature of the African Commission recommendations adversely affects their implementation as states are not bound to comply with 'recommendations'. This position should be nuanced given that examples of the non-compliance with the African Court orders and judgments, although binding in nature, may reveal that the problem can also lie in the attitude of states towards regional human rights bodies. It takes some actions by the African Commission to ensure that its recommendations are complied with. Available information does not indicate whether DRC has taken steps to implement the *Ngandu* ruling¹⁰³ or that Mr Ngandu received the payment of his salaries and benefits. Yet, DRC was requested, as it usually is the practice of the African Commission pursuant to Rule 125(1),¹⁰⁴ to indicate within 180 days the type of measures it adopted to give effect to the Commission's recommendations.¹⁰⁵ Considering that DRC did not participate in the proceedings before the Commission and that it generally is not responsive to urgent appeals,¹⁰⁶ the African Commission may be called upon to assume a more proactive role, as discussed below.

100 *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) 39.

101 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 32.

102 This is likely to be the situation in Communication 721/19 *Martin Fayulu Madidi v Democratic Republic of Congo*.

103 Nothing transpires from the African Commission's 44th, 45th and 46th Activity Reports.

104 Rule 125(1) of the 2020 Rules of Procedure of the African Commission.

105 *Ngandu* (n 1) para 86(iii).

106 Combined 48th and 49th Activity Reports of the African Commission on Human and Peoples' Rights (11 November-3 December 2020) 17-20.

4 Overcoming challenges to the adjudication of election-related disputes

One way of addressing the challenges discussed under part 3 of this article is for the African Commission to be proactive with regard to grasping the intricacies and vagaries of domestic systems. The lack of state submissions to enlighten the Commission, notably on issues such as domestic remedies, cannot be used as an excuse for a regional human rights body not to seek to understand issues related to local remedies and obtain a state's cooperation. The African Commission could, among other approaches, have explored two ways to fill in this gap.

First, it could have approached knowledgeable research institutions in Africa or DRC to appear as *amici curiae* and provide specific responses to questions such as those raised by the *Ngandu* case. In fact, both the 2010 Rules of Procedure based on which the *Ngandu* case was decided and the current 2020 Rules of Procedure empower the Commission 'to invite or grant leave to an *amicus curiae* to intervene in the case by making written or oral submissions in order to assist the Commission in determining a factual or legal issue'.¹⁰⁷

It is clear in practice that the African Commission has been reluctant to request *amicus* submissions while, for example, the African Court has not hesitated to take a proactive approach and notify institutions to submit *amicus* briefs.¹⁰⁸

Second, the African Commission could undertake studies on domestic remedies in the various legal systems of its member states in order to understand the ins and outs of domestic processes including electoral adjudication mechanisms. Article 45 of the African Charter enables the Commission to 'undertake studies and research on African problems in the field of human and peoples' rights', while Rule 7 of the Commission's Rules of Procedure allows commissioners to 'propose ... studies, research and resolutions on human rights issues on the continent or in a state party'. The pluralism of legal traditions and systems in Africa and the existence of differences within legal systems that belong to similar legal traditions warrant against generalisation on models of constitutional review operating

¹⁰⁷ Rules 104 and 105 of the 2020 Rules of Procedure.

¹⁰⁸ See eg *Request for advisory opinion by the Pan African Lawyers Union (PALU) on the compatibility of vagrancy laws with the African Charter on Human and Peoples' Rights and other human rights instruments applicable in Africa* 1/2018 (4 December 2008) para 9.

in Africa. Such studies will not be novel in the practice of African regional human rights bodies that have often conducted them. The partnership that the African Commission has over the years maintained with African human rights organisations can be used as the starting point for conducting such studies. In fact, most General Comments the African Commission has adopted have been drafted with the help of African civil society organisations.¹⁰⁹

Besides, the expeditious settlement of electoral disputes is of paramount importance both at the domestic and regional level given that complainants generally expect restitution as a form of reparation. Two mechanisms – amicable settlement and provisional measures – could be explored by the African Commission. An amicable settlement would, perhaps, have been ideal in the *Ngandu* case considering that most often, when the Supreme Court invalidates the mandate of parliamentarians, the latter are given salaries, relevant benefits and employment in parastatal institutions. There is no other avenue for settling the matter through domestic judicial means.¹¹⁰ A commissioner could thus be sent to DRC to ‘find an amicable solution to the dispute’¹¹¹ and emphasise the importance of adopting a holistic approach so that similar mischiefs do not occur.¹¹² However, an amicable settlement requires ‘good faith of the parties concerned’,¹¹³ and the lack of responses from the state could probably have warned the African Commission that an active approach and constructive dialogue with the state were needed. This approach could manifest in various ways. The Commission could engage in constructive dialogue on broader issues related to political participation and the ‘unjust’ invalidation of MPs when considering countries’ state reports. The Commission might also resort to promotional missions to countries that generally

109 R Adeola, F Viljoen & TM Makunya ‘A commentary on the African Commission’s General Comment on the right to freedom of movement and residence under article 12(1) of the African Charter on Human and Peoples’ Rights’ (2021) 65 *Journal of African Law* 138-141.

110 The Inter-Parliamentary Union’s Human Rights Commission equally averred that a political settlement of the matter can be envisaged by the National Assembly and the executive in such instances. See Inter-Parliamentary Union’s Human Rights Commission, *Décision adoptée par le Comité des droits de l’homme des parlementaires à sa 161e session, DH/2020/161-R.2* (Geneve 20-30 January 2020) 3.

111 See *Association pour la Défense des Droits de l’Homme et des Libertés v Djibouti* (2000) AHRLR 80 (ACHPR 2000) para 10; *Peoples’ Democratic Organisation for Independence and Socialism v The Gambia* (2000) AHRLR 104 (ACHPR 1996) 24.

112 On amicable settlement and its critics before the African Commission, see BD Mezmur ‘No second chance for the first impressions: The first amicable settlement under the African Children’s Charter’ (2019) 19 *African Human Rights Law Journal* 65-68.

113 *Free Legal Assistance Group & Others v Zaïre* (2000) AHRLR 74 (ACHPR 1995) paras 39-40; *Organisation Mondiale Contre la Torture & Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996) para 19.

fail to appear before it.¹¹⁴ These two approaches may, at least, reduce the confrontation that the consideration of communications may tend to be characterised with and establish a dialogue between the Commission and the state.

Furthermore, the issuance of provisional measures could also be an antidote to safeguard the rights and interests of complainants. The 2020 Rules of Procedure of the African Commission, and the 2010 Rules of Procedure before it, allow the latter to issue provisional measures 'to prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands'.¹¹⁵ The Commission can act on its own volition or at the request of 'a party to the communication' and, once issued, it does not 'constitute a prejudgment on the merits of a communication'.¹¹⁶ However, the complainant's request for provisional measures was rejected by the Commission for reasons not elucidated.¹¹⁷

The African Commission and the African Court should collaborate in the future on urgent matters, including in cases related to electoral justice, notably through the referral of cases by the Commission to the Court which can issue binding provisional measures. The Court has since its inception rendered 77 orders for provisional measures.¹¹⁸ This can be done only against states that have ratified the African Court Protocol. At the time the African Commission was adjudicating the *Ngandu* case, DRC had not yet done so. Despite glaring evidence that states are increasingly disregarding African Commission¹¹⁹ and African Court¹²⁰ orders for provisional measures, their (provisional measures) ability to hold states to their international obligations is undisputed. As with an amicable settlement, provisional measures as

114 Centre for Human Rights *Guide to the African human rights system: Celebrating 40 years since the adoption of the African Charter on Human and Peoples' Rights 1981-2021* (2021) 48.

115 Rule 100(1) 2020 Rules of Procedure; Rule 98(1) 2010 Rules of Procedure.

116 Rule 100(6) 2020 Rules of Procedure; Rule 98(5) 2010 Rules of Procedure.

117 *Ngandu* (n 1) para 16.

118 By 14 December 2022; see <https://www.african-court.org/cpmt/provisional-measures> (accessed 14 December 2022). One of the early provisional measures of the Court resulted from *African Commission on Human and Peoples' Rights v Libya* (Provisional Measures) (2013) 1 AfCLR 145 referred to it by the African Commission.

119 African Commission Combined 48th & 49th Activity Reports (11 November 2019-3 December 2020) paras 42-44; African Commission 47th Activity Report (14 May-10 November 2019) paras 32 & 34; African Commission 46th Activity Report (14 November 2018-14 May 2019) paras 30-32. See also F Viljoen *International human rights law in Africa* (2012) 417.

120 For illustration, see Activity Report of the African Court on Human and Peoples' Rights (1 January-31 December 2020) 30-32; Activity Report of the African Court on Human and Peoples' Rights (1 January-31 December 2019) 18-24; Activity Report of the African Court on Human and Peoples' Rights (AfCHPR) (1 January-31 December 2019) 45-55; Activity Report of the African Court on Human and Peoples' Rights (1 January-31 December 2018) 12-33.

well as any other approaches to improve the enjoyment of human rights at the domestic level will require strong engagement with states by the Commission.

While acknowledging inherent limitations some of the proposed mechanisms may have in addressing the challenges discussed in part 3, especially towards ‘reluctant or outright uncooperative states’,¹²¹ most of them aim to ensure that the Commission takes an active stance in fulfilling its mandate under the African Charter.¹²² International law already attaches legal consequences to behaviours of states that constitute ‘a breach’ of their international (human rights) obligations.¹²³ Active efforts by the African Commission can be a way of exposing the hypocrisy of states that pledge to protect human rights, yet make little effort to ‘translate these sentiments into practice’.¹²⁴

5 Conclusion

The African Commission remains pivotal in addressing election-related disputes using its conventional powers to ‘promote human and peoples’ rights’.¹²⁵ The ease with which it can be accessed as compared, for example, to the African Court where direct access is simply possible with respect to eight states, gives some hope to litigants that a body exists that can still hear their matters and possibly resolve them. During the chaotic adjudication of the 2018 elections in DRC, the losing presidential candidate and political parties whose members of parliament were ‘arbitrarily’ invalidated by the Constitutional Court indicated with assurance that they would approach the African Commission and submit their complaints.¹²⁶

121 One reviewer used these words to characterise limitations some proposed mechanisms in this article may have toward states that have clearly demonstrated their reluctance to engage with the African Commission. While agreeing with them, it is important that the Commission do what is within its control, which is, to adopt a proactive and constructive stance *vis-à-vis* states in accordance with its mandate.

122 Art 45 African Charter.

123 International Law Commission *Responsibility of states for internationally wrongful acts* (2001) arts 1-3. See Forteau et al (n 92) 1086.

124 C Heyns (ed) *Human rights law in Africa* (1996) viii; C Heyns *Human rights law in Africa* (1998) vii-viii.

125 Art 45 African Charter.

126 ‘Le MLC va saisir la Commission africaine des droits de l’homme pour le rétablissement de 5 députés invalidés définitivement’ 5 July 2019 *Politico.cd*, <https://www.politico.cd/encontinu/2019/07/05/le-mlc-va-saisir-la-commission-africaine-des-droits-de-lhomme-pour-le-retablissement-de-5-deputes-invalides-definitivement.html/44499/> (accessed 20 July 2021); ‘La Cour africaine de droits de l’homme saisi par Martin Fayulu sur le contentieux électoral n’est pas compétente’ 8 February 2019 *Politico.cd*, <https://www.politico.cd/encontinu/2019/02/08/la-cour-africaine-de-droits-de-lhomme-saisi-par->

The Commission has argued that democratic regimes, those where people directly vote for their representative and where their will is respected, are indeed poised to protect human rights more effectively. Article 13 of the African Charter, despite its deficiency,¹²⁷ was informed 'by the desire to wrest political power and governmental authority from the hands of the emerging post-colonial despots and vest in citizens'.¹²⁸ The Commission has thus given solace to aggrieved individuals who possibly could not obtain justice in member states owing to the lack of independence of domestic courts, corruption, judges' inability to courageously sanction electoral malpractices – some of the evils that have bedevilled elections.

However, it is relevant and timely for the African Commission to resolve challenges that arise in the way in which it approaches and decides in relation to petitions submitted to it for it to gain much acceptance and respectability from both states and litigants. Its involvement should provide complainants some form of assurance that the decision will be adopted in a period when it will still be useful to obtain the remedy sought, for example, reinstatement in the National Assembly as Albert Ngandu demanded. The Commission should also show a command of knowledge of domestic legislation and procedure in electoral dispute mechanisms. As the Commission is increasingly working in an environment where states are closely scrutinising its activities and are ready to come after it when inaccurate or ill-founded allegations are made, circumspection is much needed.

[martin-fayulu-sur-le-contentieux-electoral-nest-pas-competente.html/34773/](https://www.africanhumanrightsjournal.com/martin-fayulu-sur-le-contentieux-electoral-nest-pas-competente.html/34773/) (accessed 20 July 2021).

127 M Mbondenyi 'The right to participate in the government of one's country: An analysis of article 13 of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 political crisis' (2009) 9 *African Human Rights Law Journal* 187.

128 As above.