

## Recent developments

# Decisions of the African Court on Human and Peoples' Rights during 2020: Trends and lessons

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**Summary:** *The African Court on Human and Peoples' Rights has made considerable progress in its jurisprudential activities in the year 2020. Between January and December 2020 the African Court delivered 55 decisions and received 40 new cases and one request for an advisory opinion. The swift response the African Court adopted to the challenges posed by the COVID-19 pandemic in holding three out of four sessions virtually has enabled the Court to reduce the backlog of cases. This article examines the main features of decisions the African Court adopted in 2020. It analyses trends emerging from them and draws possible lessons. The Court's 2020 decisions give an opportunity to critically review the jurisprudential direction of the Court, the number and types of decisions rendered, the quality of the protection of human and peoples' rights it offered as well as its normative contribution to the human rights corpus. While the Court has boldly and uncompromisingly asserted its authority over sensitive domestic issues – prompting four states so far to*

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*withdraw their declarations allowing individuals and non-governmental organisations to approach it directly – the Court’s 2020 decisions persuasively demonstrate that it has not shied away from its mandate to hold states and their organs to the obligations to which they have committed under international human rights law.*

**Key words:** *African Court on Human and Peoples’ Rights; fair trial; provisional measures; judgment in default; separate opinion; Rules of the Court; Court Protocol; article 34(6) declaration; African Commission*

## 1 Introduction

The African Court on Human and Peoples’ Rights (African Court) held four sessions in the year 2020 and adopted 55 decisions. The Court delivered 24 judgments on jurisdiction, admissibility, review, merits and reparations; 19 rulings on provisional measures; one advisory opinion; five orders for reopening pleadings; two orders on striking out applications; two orders on request for intervention; and one order for joinder.<sup>1</sup> The number of decisions the Court adopted in 2020 is slightly higher than what was obtained in 2019 during the four ordinary sessions and one extraordinary session.<sup>2</sup> Due to the unforeseen outbreak of the COVID-19 pandemic, the Court organised three virtual sessions which enhanced its ability to swiftly perform its judicial functions and reduce the backlog of cases. Indeed, 80 per cent of the 2020 decisions were delivered during these virtual sessions. The Court received 40 new contentious cases and one request for an advisory opinion.<sup>3</sup>

This article examines the main features of decisions the African Court adopted in 2020. It analyses trends emerging from them

<sup>1</sup> Activity Report of the African Court on Human and Peoples’ Rights (1 January-31 December 2020) para 13. The Court’s Activity Report contains a number of discrepancies. Eg, judgments on jurisdiction, admissibility, review, merits and reparations are 24 on the Court website and not 20 as indicated in the report. There was one advisory opinion delivered in 2020 and not two as indicated in the report. The table in the report indicates 19 rulings on provisional measures but the summary of the report indicates 22. A close review of what appears on the African Court website reveals that the African Court delivered more than 55 decisions in 2020. The following decisions do not appear in the Court’s Activity Report: *Christopher Jonas v Tanzania* (Reparations) Appl 11/2015 (25 September 2020); *Babarou Boucoum v Mali* (Provisional Measures) Appl 23/2020 (23 October 2020); and *Ghati Mwita v Tanzania* (Provisional Measures) Appl 12/2019 (9 April 2020).

<sup>2</sup> Activity Report (n 1) para 12. These decisions are available in the *African Court Law Report* Volume 4 (2019).

<sup>3</sup> Activity Report (n 1) para 10. However, statistics on the African Court website indicate that the Court received 48 new cases in 2020. By December 2020 the Court has received a total of 300 cases since its operationalisation.

and draws possible lessons. The article dissects the peculiarity of cases brought before and decided by the Court, the singularity of the Court's approach, and its position on major human rights and democracy questions that frequently arise in African countries.<sup>4</sup> Examining the 2020 decisions of the Court offers an opportunity to appraise the level of engagement the Court had with countries that withdrew their declarations made pursuant to article 34(6) of 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) (article 34(6) declaration) during proceedings against them. Overall, cases against countries that have withdrawn article 34(6) declarations make up 76,8 per cent of cases submitted to the Court.<sup>5</sup> The Court has generally held that the withdrawal of the article 34(6) declaration must take effect after one year.<sup>6</sup> However, this position could not guarantee that states would continue to participate in proceedings after they had withdrawn their declaration. Besides, the obligation to participate in such proceedings after withdrawal is not explicitly imposed on states by the treaty (African Court Protocol) that they have ratified. The risk of states not participating thus was greater.

Furthermore, the Court in 2020 adopted new Rules of Procedure (Rules of the Court) which had the potential to affect cases already submitted or pending before the Court. While the Rules of the Court safeguard the rights of individuals whose applications were filed before its entry into force,<sup>7</sup> it is only by looking at how the Court has applied the new Rules in concrete cases that one can understand their effects.<sup>8</sup> Lastly, two states applied in 2020 to intervene in

4 See generally 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 effleurements et remise en cause' (2021) 31 *Revue suisse de droit international et droit européen* 438-444; AK Abebe 'Taming regressive constitutional amendments: The African Court as a continental (super) Constitutional Court' (2019) 17 *International Journal of Constitutional Law* 106-112; TG Dally & 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; T Ondo 'La jurisprudence de la Cour africaine des droits de l'homme et des peuples: Entre particularisme et universalité' (2017) 1 *Annuaire africain des droits de l'homme* 244-262.

5 Rwanda, Tanzania, Côte d'Ivoire and Benin. See African Court statistics, <https://www.african-court.org/cpmt/statistic> (accessed 8 September 2021).

6 *Ingabire Victoire Umuhoya v Rwanda* (Jurisdiction) (2016) 1 AfCLR 562 paras 67-68. See MG Nyarko & AO Jegede 'Human rights developments in the African Union during 2016' (2017) 17 *African Human Rights Law Journal* 307-308. By contrast, art 127(1) of the Rome Statute of the International Criminal Court enables states to withdraw from the Statute and the withdrawal takes effect after one year.

7 2020 Rules of the Court Rule 93.

8 In 2020 some cases were decided and delivered based on the 2010 Rules of Procedure while others were adjudicated based on the 2020 Rules of Procedure. The first category of cases were delivered during the 56th and 57th ordinary

proceedings pending before the Court. As the second intervention of states before the Court in contentious matters,<sup>9</sup> these applications and the Court order enable us to review the nature of interest states are likely to defend before the African Court and the types of states that can apply for intervention. Indeed, decisions of the Court have an impact beyond parties to the dispute and may influence future cases. For this reason, broad participation should be welcomed and encouraged to help the Court develop human rights solutions and principles grounded in the experience of individuals and the practice of African states.

The second part of this article reviews the trends in the African Court's 2020 jurisprudence by examining the nature of applicants and respondents, the variety of findings of the Court, judges' voting pattern, the duration of proceedings, issues arising from reparation and peculiarities of orders for provisional measures. The third part analyses the main features of the 2020 jurisprudence both at the procedural and substantive levels. Procedurally, the article discusses issues arising from default judgments, the applications by states to intervene in proceedings pending before the Court and the standards the Court used when assessing the compliance of applications with the requirement for submissions within a reasonable time. Substantively, the article notes how the Court has either clarified or failed to clarify the normative content of certain rights and principles to strengthen the protection of fundamental rights.

## 2 Trends in the African Court's 2020 jurisprudence

### 2.1 Nature of applicants and respondents

The 54 decisions in contentious matters were adopted by the Court in litigation involving Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Rwanda, Tanzania and Tunisia.<sup>10</sup> All these countries have before been involved in litigation before the Court; 156 applications have been lodged against Tanzania since the inception of the Court, 48,2 per cent of the total applications received by the Court. Tanzania

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sessions (22 decisions) and the second were delivered during the 58th and 59th ordinary sessions (33 decisions).

9 The first was by Côte d'Ivoire in *Guehi v Tanzania* (Merits and Reparations) (2018) 2 AfCLR 477 para 12. See also *African Commission on Human and Peoples' Rights v Kenya* (Intervention) (2019) 3 AfCLR 411 and *African Commission on Human and Peoples' Rights v Kenya* (Intervention) (2019) 3 AfCLR 424.

10 In *Bernard Anbataayela Mornah v Benin & 7 Others* Tunisia was accused jointly with seven other states (Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi and Tanzania) that, as of 2018, have made the art 34(6) declaration.

is followed by Benin (43), Côte d'Ivoire (38), Mali (29), Rwanda (16) and Tunisia (nine).<sup>11</sup> More than half of the 2020 decisions concern cases filed against Tanzania (17 decisions)<sup>12</sup> and Benin (16 decisions),<sup>13</sup> followed by Côte d'Ivoire<sup>14</sup> and Rwanda<sup>15</sup> with five cases each. Four decisions involve Mali<sup>16</sup> while one decision each concerns Burkina Faso,<sup>17</sup> Ghana<sup>18</sup> and Malawi.<sup>19</sup> Two applications against The Gambia were struck out by the registry of the Court on procedural grounds.<sup>20</sup> Two decisions were adopted in a case

- 11 African Court statistics, <https://www.african-court.org/cpmt/statistic> (accessed 8 September 2021).
- 12 *Nguza Vicking (Alias Babu Seya) and Johnson Nguza v Tanzania* (re-opening of pleadings) Appl 6/2015; *Nguza Vicking (Alias Babu Seya) and Johnson Nguza v Tanzania* (Reparations) Appl 6/2015; *Andrew Ambrose Cheusi v Tanzania* (Merits and Reparations) Appl 4/2015; *Kalebi Elisamehe v Tanzania* (Merits and Reparations) Appl 28/2015; *Ramadhani Issa Malengo v Tanzania* (Review) Appl 1/2019; *Jebra Kambole v Tanzania* (Merits and Reparations) Appl 18/2018; *Thobias Mang'ara & Another v Tanzania* (Re-opening of Pleadings) Appl 5/2015; *Anudo Ochieng Anudo v Tanzania* (Re-opening of Pleadings) Appl 12/2015; *James Wanjara & Others v Tanzania* (Merits and Reparations) Appl 35/2015; *Hamad Mohamed Lyambaka* (Admissibility) Appl 10/2016; *Job Mlama & Others v Tanzania* (Merits) Appl 19-2016; *Chananja Luchagula v Tanzania* (Merits) Appl 39/2016; *Benedicto Mallya* (Striking out Application) Appl 18/2015; *Abdallah Ally Kulukuni v Tanzania* (Striking out Application) Appl 7/2018; *John Lazaro v Tanzania* (Reopening of Pleadings) Appl 3/2016; *Masudi Said Selemani v Tanzania* (Re-opening of Pleadings) Appl 42/2019; and *Legal and Human Rights Centre and Tanganyika Law Society v Tanzania* (Provisional Measures) Appl 36/2020.
- 13 *Ghaby Kodeih v Benin* (Provisional Measures) Appl 6/2020; *Ghaby Kodeih and Naby Kodeih v Benin* (Provisional Measures) Appl 8/2020; *Sébastien Germain Marie Aikoué Ajavon v Benin* (Provisional Measures) Appl 62/2019; *Komi Koutché v Benin* (Provisional Measures) Appl 13/2020; *Houngoue Eric Noudehouenou v Benin* (Provisional Measures) Appl 3/2020; *Houngoue Eric Noudehouenou v Benin* (Provisional Measures) Appl 4/2020; *Houngoue Eric Noudehouenou v Benin* (Provisional Measures 2) Appl 3/2020; *Glory Cyriaque Houssou & Another v Benin* (Provisional Measures) Appl 16/2020; *Conaïde Togia Latondji Akouedenoudje v Benin* (Provisional Measures) Appl 24/2020; *Sébastien Germain Marie Aikoué Ajavon v Benin* (Provisional Measures) Appl 27/2020; *Houngoue Eric Noudehouenou v Benin* (Provisional Measures) Appl 28/2020; *Houngoue Eric Noudehouenou v Benin* (Provisional Measures) Appl 32/2020; *XYZ v Benin* (Merits and Reparations) Appl 59/2019; *XYZ v Benin* (Merits and Reparations) Appl 10/2020; *Sébastien Germain Marie Aikoué Ajavon v Benin* (Merits and Reparations) Appl 62/2019; and *Houngoue Eric Noudehouenou v Benin* (Merits and Reparations) Appl 3/2020.
- 14 *Guillaume Soro & Others v Côte d'Ivoire* (Provisional Measures) Appl 12/2020; *Konaté Kalilou and Doumbia Ibrahim v Côte d'Ivoire* (Provisional Measures) Appl 36/2019 and 37/2019; *Suy Bi Gohore Emile & 8 Others v Côte d'Ivoire* (Merits and Reparations) Appl 44/2019; and *Laurent Gbagbo v Côte d'Ivoire* (Provisional Measures) Appl 25/2020.
- 15 *Mulindahabi Fidèle v Rwanda* (Merits and Reparations) Appl 4/2017; *Mulindahabi Fidèle v Rwanda* (Admissibility) Appl 5/2017; *Mulindahabi Fidèle v Rwanda* (Admissibility) Appl 10/2017; *Mulindahabi Fidèle v Rwanda* (Admissibility) Appl 11/2017; *Léon Mugesera v Rwanda* (Merits and Reparations) Appl 12/2017.
- 16 *Boubacar Sissoko & 74 Others v Mali* (Merits and Reparations) Appl 37/2017; *Yacouba Traoré* (Admissibility) Appl 10/2018; *Babarou Bocoum v Mali* (Provisional Measures) Appl 23/2020; and *Collectif des anciens travailleurs de la Semic Tabakoto v Mali* (Admissibility) Appl 9/2018.
- 17 *Harouna Dicko & Others v Burkina Faso* (Provisional Measures) Appl 37/2020.
- 18 *Akwasi Boateng & 351 Others v Ghana* (Jurisdiction) Appl 59/2016.
- 19 *Charles Kojoloweka v Malawi* (Provisional Measures) Appl 55/2019.
- 20 *Muhammed Bassirou Secka & 2 Others v The Gambia* (Striking out of Application) Appl 1/2020; and *Emil Touray & 6 Others v The Gambia* (Striking out of Application) Appl 2/2020. These cases are not included in the 2020 Court Activity Report. They are not part of the 55 decisions.

implicating eight countries<sup>21</sup> and two others in a case involving four countries.<sup>22</sup>

It is evident that the 2020 decisions were adopted in applications concerning states that have made the article 34(6) declaration.<sup>23</sup> Direct access remains the principal routes through which contentious cases have been brought before the African Court. It has been suggested several times, but the argument bears repeating, that African states are reluctant to challenge one another before regional human rights bodies.<sup>24</sup> If the haemorrhagic trend for states to withdraw their article 34(6) declarations continues, it is more likely that individuals will not have the opportunity to effectively engage the Court and that the ability of the latter to serve as a regional arbitrator of human rights violations will be significantly undermined. In 2020 two states withdrew their declarations, but this did not stop the Court from hearing cases lodged against them before the withdrawal took effect.<sup>25</sup> Benin, Côte d'Ivoire and Tanzania continued to engage with the Court regarding cases against them. They submitted arguments on admissibility, jurisdiction, merits and, sometimes, reparation. As discussed in part 3.1.1 below, the position Rwanda adopted was different.

Geographically, 49 per cent of the 2020 decisions were delivered in litigations involving West African states. In fact, before Rwanda, Tanzania, Benin and Côte d'Ivoire withdrew their article 34(6) declarations, 60 per cent of countries that made the declaration were from West Africa. With the ratification of the African Court Protocol and the making of the declaration by Guinea Bissau in November 2021 and by Niger (in late October 2021), West African states make up 75 per cent of states against which the Court can be approached directly.<sup>26</sup> Petitioners alleging human rights violations against these

21 *Sahrawi Arab Democratic in Application 028/2018 v Benin & 7 Other States* (Intervention) Appl 1/2020; and *Republic of Mauritius in Application 028/2018 v Benin & 7 Other States* (Intervention) Appl 2/2020.

22 *Elie Sandwidi and Mouvement Burkinabè des droits de l'homme et des peuples v Burkina Faso & 3 Others* (Provisional Measures) Appl 14/2020 and 17/2020; and *Elie Sandwidi and Mouvement Burkinabè des droits de l'homme et des peuples v Burkina Faso & 3 Others* (Joinder of Cases) Appl 14/2020 and 17/2020.

23 See generally F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67 *International and Comparative Law Quarterly* 65.

24 F Viljoen 'A procedure likely to remain rare in the African system: An introduction to the inter-state communications under the African human rights system' 27 April 2021 *Völkerrechtsblog*, <https://voelkerrechtsblog.org/a-procedure-likely-to-remain-rare-in-the-african-system/> (accessed 26 November 2021).

25 Rwanda, Tanzania, Côte d'Ivoire and Benin; 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* 5.

26 'The Republic of Guinea Bissau becomes the eighth country to deposit a declaration under article 34(6) of the Protocol establishing the Court'

West African states now have an additional avenue to hold their states to their human rights obligations since they can still approach – and most have not shied away from doing so – the Economic Community of West African States (ECOWAS) Court of Justice that equally adjudicates violations of the African Charter on Human and Peoples’ Rights (African Charter). The work of the African Court, nonetheless, will have more impact if many non-West African states<sup>27</sup> equally make the declaration 34(6) to allow individuals – who cannot otherwise bring a case to a regional human rights body that issues binding decisions – to bring their grievances to a regional court.

Be that as it may, applicants in the 2020 decisions were mainly individuals. However, three cases were brought directly by non-governmental organisations (NGOs) – two in contentious procedures<sup>28</sup> and one as a request for advisory opinion.<sup>29</sup> Two states also requested to intervene in proceedings pending before the Court making these applications the second requests after the Côte d’Ivoire intervention in *Guehi v Tanzania*.<sup>30</sup> In general, individuals have brought before the Court a total of 299 applications while NGOs have submitted 21 cases.<sup>31</sup> A paltry three cases have so far been referred to the Court by the African Commission on Human and Peoples’ Rights (African Commission).<sup>32</sup> No case decided by the African Court in 2020 emanated from the African Commission.

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3 November 2021, <https://www.african-court.org/wpa/c/the-republic-of-guinea-bissau-becomes-the-eighth-country-to-deposit-a-declaration-under-article-346-of-the-protocol-establishing-the-court/> (accessed 23 November 2021).

- 27 Out of 32 states that have ratified the African Court Protocol, 21 are non-West African. Among these, individuals can only directly petition the Court against Malawi and Tunisia. They are bereft of direct access to regional human rights courts against 19 countries.
- 28 *Legal and Human Rights Centre and Tanganyika Law Society v Tanzania* (Provisional Measures) Appl 36/2020; and *Mouvement Burkinabè des droits de l’homme et des peuples (MBDHP) v Burkina Faso & 3 Others* Appl 17/2020. This latter case was joined with Application 14/2020. They are referred to as *Elie Sandwidi and Mouvement Burkinabè des droits de l’homme et des peuples v Burkina Faso & 3 Others* (Provisional Measures) Appl 14/2020 and 17/2020.
- 29 *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* (Advisory Opinion) Appl 1/2018.
- 30 (Merits and Reparations) (2018) 2 AfCLR 477. See also *African Commission on Human and Peoples’ Rights v Kenya* (Intervention) (2019) 3 AfCLR 411; and *African Commission on Human and Peoples’ Rights v Kenya* (Intervention) (2019) 3 AfCLR 424.
- 31 African Court statistics, <https://www.african-court.org/cpmt/statistic> (accessed 8 September 2021).
- 32 *African Commission on Human and Peoples’ Rights v Libya* (Merits) (2016) 1 AfCLR 153; *African Commission on Human and Peoples’ Rights v Kenya* (Merits) (2017) 2 AfCLR 9; and *African Commission on Human and Peoples’ Rights v Libya* (Provisional Measures) (2011) 1 AfCLR 17 which was struck out by the Court ‘as it had not received the submission it had requested from the Applicant, the African Commission on Human and Peoples’ Rights’. See *African Commission on Human and Peoples’ Rights v Libya* (Order) (2013) 1 AfCLR 21.

There was no *amicus curiae* participation in contentious cases dealt with by the Court in 2020. *Amicus* participation in contentious proceedings before the Court, in general, has not attracted much attention.<sup>33</sup> Nevertheless, NGOs have participated as *amici* in several requests for advisory opinion.<sup>34</sup> Six NGOs submitted their *amicus* briefs in the *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 (Vagrancy Opinion)*<sup>35</sup> delivered in December 2020. As advisory opinions clarify the meaning of human rights standards in non-contentious matters, the relevance of the participation of NGOs working daily on an array of human rights issues in Africa cannot be overemphasised. In the *Vagrancy Opinion* the Court approached NGOs to submit their *amicus* briefs on its own motion. States have not always been enthusiastic about submitting their briefs in advisory proceedings. Only Burkina Faso made its submissions in the *Vagrancy Opinion*.<sup>36</sup> The authoritative interpretation of human rights instruments the Court provides can impact the way states implement their human rights treaty obligations. Broader participation of NGOs, and particularly states, may thus be key in ensuring legitimacy of the interpretation provided. It can dispel some of the beliefs that many African Union (AU) member states may hold that AU human rights

33 See, however, Prof Christof Heyns (University of Pretoria) and Prof Sandra Babcock (Cornell University) admission as *amici curiae* in *Guehi v Tanzania* para 14; Centre for Human Rights, *Comité Pour la Protection des Journalistes*, Media Institute of Southern Africa, Pan African Human Rights Defenders Network, Pan African Lawyers' Union, Pen International and National Pen Centres (Pen Malawi, Pen Algeria, Pen Nigeria, Pen Sierra Leone and Pen South Africa), Southern Africa Litigation Centre and World Association of Newspapers and News Publishers in *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314, para 20; paras 141-144 as well as the National Commission for the Fight Against Genocide in *Ingabire Victoire Umuhoza v Rwanda* (procedure) (2016) 1 AfCLR 553, paras 38-39.

34 See generally TM Makunya & SZ Bitagirwa 'La compétence consultative de la Cour africaine des droits de l'homme et des peuples: Entre restrictions organiques et limitations matérielles' in EB Bope & M Mubiala (eds) *La République démocratique du Congo et le système africain de protection des droits de l'homme* (2021) 87; MS Sangbana 'Les organisations non gouvernementales dans le système africain des droits de l'homme: Essai de systématisation du rôle des ONG dans le contentieux régional des droits de l'homme en Afrique' (2022) 5 *Annuaire africain des droits de l'homme* (forthcoming).

35 *Vagrancy Opinion* (n 29) para 12.

36 In the *Request for Advisory Opinion by Rencontre Africain pour la défense des droits de l'homme* (2017) only Kenya submitted its observations (para 18) while no state submitted observations in the *Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria & 4 Others* (2017) and the *Request for Advisory Opinion by l'Association africaine de défense des droits de l'homme* (2017). Two states submitted their observations to the Court in the *Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians* (2017) (para 15). In the *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child* (2014) the Court received comments from three states (para 26) while six states submitted their observations (para 24) in the *Request for Advisory Opinion by Socio-Economic Rights and Accountability Project (SERAP)* (2017).

bodies, in general, simply are being used by NGOs, especially those based outside Africa, to advance their own agendas.<sup>37</sup>

## 2.2 Findings of the Court

The findings of the Court were diverse. One out of the four cases filed by *Mulindahabi Fidèle* against Rwanda (*Mulindahabi* cases) was declared admissible.<sup>38</sup> However, the Court concluded that there was no violation to be found.<sup>39</sup> The same occurred in *Boubacar Sissoko v Mali* where the Court found no violation.<sup>40</sup> In *Léon Mugesera v Rwanda* (*Mugesera* case) the Court established three violations out of six allegations of violations made by the complainant, while in *Suy Bi Gohore & Others v Côte d'Ivoire* (*Suy Bi Gohore* case), the Court decided that Côte d'Ivoire had violated five rights. In the same vein, cases against Tanzania alleging the violation of fair trial rights, as detailed in the following lines, were not always successful. In *Andrew Ambrose Cheusi v Tanzania* (*Cheusi* case) the applicant alleged that the state had violated his right to equality and equal protection and that he had been subjected to cruel, inhuman and degrading treatment. He also alleged that his right to fair trial was violated since he was not able to challenge evidence and that his alibi was not considered. He subsequently indicated that his rights to legal assistance and to be tried within a reasonable time had been violated by Tanzania. The Court found a violation of the latter two rights. In *Kalebi Elisamehe v Tanzania* (*Elisamehe* case) the applicant invoked six violations related to his trial including the violation of his right to defence and of the right to be heard, his right to be tried within a reasonable time and his right to legal assistance. Only the latter was found to have been violated. In *James Wanjara & 4 Others v Tanzania* (*Wanjara* case) the Court found a violation of the right to legal assistance. In most cases brought before the Court by Tanzanian prisoners, the right to legal assistance was generally found to have been violated.<sup>41</sup> These cases against Tanzania and the findings of the Court demonstrate a continuous role played by the African Court in 'humanising' criminal law and procedures.

37 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* 318.

38 *Mulindahabi Fidèle v Rwanda* (Merits and Reparations) Appl 4/2017.

39 Para 115.

40 Para 140.

41 *Andrew Ambrose Cheusi v Tanzania* para 184(viii); *Kalebi Elisamehe v Tanzania* para 117(x); and *James Wanjara & 4 Others v Tanzania* para 112(g).

Of the Court's 54 decisions in contentious cases handed down in 2020, a significant number of human rights violations were found in cases involving Benin. While the state did not violate four out of the five rights invoked in the *XYZ (059) v Benin (XYZ (059) case)*, in *XYZ (010) v Benin* the state was culpable of four out of the five allegations made by the complainant.<sup>42</sup> These violations include the obligation to guarantee the independence of the courts; the amendment of the Constitution without observing the principle of national consensus; the right to information; the right to peace; the right to economic, social and cultural development; and the right to an impartial tribunal.<sup>43</sup> In *Houngoue Eric Noudehouenou v Benin (Houngoue case)* the Court equally found that Benin violated the principle of national consensus in relation to constitutional amendment and the right of access to public services and goods.<sup>44</sup> The Court found several violations in *Sébastien Germain Marie Aikoue Ajavon v Benin (Ajavon case)*.<sup>45</sup> This petition was lodged by a Benin political refugee alleging the violation of his civil and political rights by laws that were promulgated in anticipation of elections.<sup>46</sup> The applicant argued in particular that the amendment of the country's Constitution was not consensual and that the law on the Supreme Council of the Judiciary (CSM) violated the independence of the judiciary. As in the *Houngoue* case, the Court ruled that Benin violated the African Charter on Democracy, Elections and Governance (African Democracy Charter) because the amendment to the Constitution violated the principle of national consensus. Benin also violated article 13(1) of the African Charter by preventing individuals who have not resided in the country one year prior to elections from running for office. The African Democracy Charter and the ECOWAS Protocol on Democracy and Good Governance were violated when Benin failed to establish an independent and impartial electoral management body.

An analysis of various decisions adopted in 2020 exposes the poor quality of argument by both states and litigants, and of the reasoning of the Court itself. First, a number of states endlessly rehash arguments that have already been rejected by the Court. This may indicate that states do not seek to systematically understand the main positions adopted by the Court over the years on relevant legal issues, even though they (the states) have before been involved in similar litigations. For example, Tanzania relied on the argument that the African Court cannot act as an appellate jurisdiction<sup>47</sup> and that

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42 *XYZ (010) v Benin* para 159.

43 As above.

44 Para 123.

45 Para 368.

46 Para 1.

47 *Cheusi* paras 22-24.

of the possibility for litigants to introduce a constitutional petition as a domestic remedy before resorting to the African Court, while in previous cases the Court had made its position clear in relation to the two arguments.<sup>48</sup> Benin equally has not learned much from the Court's jurisprudence on limitations of rights and how important it is that a state must demonstrate that such limitations are necessary, proportionate and justified in particular circumstances.<sup>49</sup> Furthermore, states did not address some of the issues raised by complainants, prompting the Court to rely on a one-sided version of the story. Second, as in the case of states, some litigants have not mastered the contour of the Court's jurisprudence on issues related to reparation and the exhaustion of local remedies. In a time when the African human rights system has developed an extensive jurisprudence on local remedies,<sup>50</sup> it is also difficult to understand why and how the applicants in *Boubacar Sissoko & 74 Others v Mali* relied solely on the jurisprudence of the European Court of Human Rights.<sup>51</sup> Third, although some of its judgments enhanced the protection of individuals' rights at the domestic level,<sup>52</sup> the Court's reasoning in a number of cases was simplistic, not sufficiently motivated and unlikely to convince states against which they were made.<sup>53</sup> Taking all these aspects into account, states and litigants must take litigation before the African Court seriously; and the latter exercise its functions with rigour to increase its legitimacy and acceptability.

### 2.3 Judges' voting pattern

Most decisions in contentious and advisory procedures were adopted unanimously. Nonetheless, judges wrote a total of 11 separate (concurring or dissenting) opinions. Justice Tchikaya wrote a full dissenting opinion in the *Jebra Kambole v Tanzania (Kambole)* case, while Justice Ben Achour wrote a partial dissenting opinion in the *Mugesera* case. Out of the five joint opinions written by judges, Tchikaya and Ben Achour wrote four opinions together in the *Mulindahabi* cases; and Kioko and Matusse wrote one in the *Kambole* case. In addition, Tchikaya wrote an individual opinion in the *Vagrancy* Opinion and the two orders for intervention by Mauritius

48 *Alex Thomas v Tanzania* (Merits) (2015) 1 AfCLR 465 para 130; *Kennedy Ivan v Tanzania* (Merits and Reparations) (2019) 3 AfCLR 48 para 26; *Armand Guéhi v Tanzania* (Merits and Reparations) (2018) 2 AfCLR 477 para 33; *Mohamed Abubakari v Tanzania* (Merits) (2016) 1 AfCLR 599 para 25.

49 *Ajajon* paras 202-203, 208 & 219.

50 AK Diop 'La règle de l'épuisement des voies de recours internes devant les juridictions internationales: le cas de la Cour africaine des droits de l'homme et des peuples' (2021) 62 *Les Cahiers de Droit* 239.

51 Paras 38-39.

52 Discussed further in part 3.2.1 and 3.2.2 below.

53 Discussed further in part 3.2.3 below.

and the Sahrawi Arab Democratic Republic in Application 28/2018 *Bernard Anbataayela Mornah v Benin & 7 Other States (Sahrawi intervention case and Mauritius intervention case)*. Bensaoula wrote two opinions in the *Cheusi* and *Boateng* cases respectively. Generally, judges who have been more prolific in writing opinions in the history of the Court are the former Judge Ouguerouz (24); current judges Bensaoula (17); Tchikaya (15); and Ben Achour (14).<sup>54</sup>

Although only Tchikaya appended his dissenting judgment in the *Kambole* case clarifying the reasons why he thought the Court erred in its reasoning, other judges – Chizumila, Anukam, Oré and Mengue<sup>55</sup> – also dissented on several questions. However, no one – perhaps apart from the judges who sat with them – knows the reasons for their disagreement as they did not make their opinions public. Article 70(1) of the Rules of the Court does not make it compulsory for judges to ‘append’ the text of their separate or dissenting opinion to the main judgment.

The most disagreement in 2020 arose in the *Kambole* case.<sup>56</sup> The facts of this case are important to understand the nub of contention. Jebra Kambole challenged article 41(7) of the Constitution of Tanzania which bars courts from adjudicating contestation of presidential election results on grounds that it is discriminatory, that it violates citizens’ rights to equality and their right to appeal to competent national organs.<sup>57</sup> The Court ruled in favour of the applicant. It found that the impugned provision does not allow citizens to air their grievances related to elections before competent courts. For the Court, states have the duty to ensure access to courts and tribunals by citizens in all matters, including those related to elections.<sup>58</sup> The right to a fair hearing cannot be dissociated with the right of access to a court and to appeal against its decisions. By barring everyone from contesting presidential election results, the state deprives them of any remedies notwithstanding the nature of their grievances.<sup>59</sup> On the question of whether article 41(1) of the Constitution of Tanzania was inconsistent with the equality clause under the African Charter, there was a tied vote. It was resolved through the casting vote of the President pursuant to Rule 60(4) of the 2010 Rules of Procedure of the Court, now Rule 69(4). While the preference of the vote of the

54 African Court statistics, <https://www.african-court.org/cpmt/statistic> (accessed 8 September 2021).

55 This does not seem surprising since they are among the judges who have written the fewest opinions. See African Court statistics, <https://www.african-court.org/cpmt/statistic> (accessed 8 September 2021).

56 Para 127.

57 Para 4.

58 Para 97.

59 Para 99.

President in instances of tie vote disrupts the equality of vote among judges, examples from other regional human rights courts suggest that it is common practice among international courts. This is the case of article 16(4) of the Rules of Procedure of the Inter-American Court of Human Rights. Rule 23(1) of the Rules of Procedure of the European Court of Human Rights (European Court) slightly differs from the equivalent provision of the Rules of the Court and of the Inter-American Court. Rule 23(1) of the Rules of the European Court requires that 'a fresh vote' be taken in the 'event of a tie'. It is only when the tie vote persists that the President can use their casting vote privilege. This rule aims to seek consensus among judges and shows that the resort to the casting vote of the President should be a measure of last resort.

In any case, the disagreement in the *Kambole* case reveals the existence in the Court of two jurisprudential trends. Some judges are inclined to defer to states as the ideal forum for dealing with constitutional issues, particularly those related to the adjudication of presidential elections, while others believe that the African Court must do more, using the African Charter and other international human rights instruments to strengthen the protection of political rights.<sup>60</sup>

## 2.4 Duration of proceedings

Certain judgments on merits and reparation take longer to be adopted than others. It took the Court four years and five months to adopt a judgment in the *Cheusi* case. In this case written proceedings were closed nine months before the adoption of the final decision. The period between the filing of the application and the closure of written proceedings was equally long in several other cases: two years and six months in the *Kambole* case; four years and nine months in the *Wanjara* (case); four years and six months in the *Job Mlama v Tanzania (Mlama)* case; three years and three months in *Fidèle Mulindahabi v Rwanda*; four years in *Akwesi Boateng v Ghana*; two years and nine months in *Boubacar Sisoko v Mali*; and three years

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60 Tchikaya averred that 'even considering the established human rights provisions, it is not trivial to deprive a state of its sovereignty of domestic legal order, which international human rights law otherwise recognises' (para 39). Relying on the margin of appreciation theory, he believed in the existence of a 'diversity of internal laws' or 'plurality of constitutional systems' 'on issues such as the status of the elected President' which, arguably, the Court would have left to the discretion of the state (para 39). There are judges who also believed that the Court did not go far enough in protecting the rights of the complainants to equal treatment before domestic judicial bodies. Kioko & Matusse in *Kambole* (n 12) para 11.

and nine months in *Leon Mugesera v Rwanda*. These delays can be attributed to the Court's lack of diligence in organising the pleadings after having received the parties' submissions or in organising deliberations after closing pleadings as well as on the parties, especially some states that submit their responses after several reminders and postponements.<sup>61</sup> However, other cases, such as *Suy Bi Gohore & Others v Côte d'Ivoire*, *Hongoue v Benin*, *Sebastien Ajavon v Benin* and the two *XYZ v Benin* cases were adjudicated in a relatively short period. A close examination of cases that took a long time to be adjudicated also reveals that the time between the closure of written proceedings and the adoption of the decision spans between 15 days and two years.

By contrast, orders for provisional measures in 2020, on average, were adopted within less than a year. It took 11 months for the Court to adopt its order for provisional measures in *Konaté and Doumbia v Côte d'Ivoire* (*Konaté and Doumbia* case); six and four months in the joint application *Elie Sandwidi and Mouvement Burkinabè des droits de l'homme et des peuples v Burkina Faso & 3 Other States*; five months and nine days in *Charles Kajoloweka v Malawi*; and six months in *Ghati Mwita v Tanzania*. In the *Konaté and Doumbia* case the state failed to submit its responses to the request for provisional measures. Five months after the complainants had lodged the request, the state requested an extension of the period for submission, but up to February 2020 it had not done so.<sup>62</sup> It took the Court five additional months to issue its decision in this matter, only to dismiss the request.<sup>63</sup> Whether granted or not, an order for provisional measures will not serve its purpose – 'to avoid irreparable harm to persons' 'in case of extreme gravity and urgency' – if it is issued with delays such as those observed in 2020 for some cases. Conversely, the Court adopted its order in *Komi Koutché v Benin* in seven days. It adopted its order in the *Legal and Human Rights Centre and Tanganyika Law Society v Tanzania* and *Ghaby Kodeih v Benin* within 14 days and 18 days in *Laurent Gbagbo v Côte d'Ivoire*.

The above numbers demonstrate the difficulty the Court often faces in meeting legal requirements set by the Protocol in relation to the time within which decisions on merits must be delivered. According to article 28(1) of the Court Protocol, after the completion of deliberations in a case, the Court 'shall' render its judgment within 90 days. These deliberations have to be completed 'within two consecutive ordinary sessions of the Court following the close

61 *Cheusi* paras 11-15; *Wanjara* paras 10-15.

62 Paras 14-15.

63 Para 31.

of pleadings'.<sup>64</sup> Article 28(1) of the Protocol is replicated under Rule 69 of the Rules of Procedure of the Court.<sup>65</sup> The 90-day period aims to prevent unnecessary delays in the adoption of judgments.<sup>66</sup> The Protocol seems to make it an 'obligation' on the Court to render the judgment within 90 days after it has completed deliberations in a case. However, this obligation applies only to 'judgment' such as judgment on admissibility, merits and reparation, and advisory opinions; and excludes other forms of decisions such as the ruling on provisional measures, an order on re-opening of pleadings or an order on intervention. In a sense, there seems not to exist a timeframe within which an order for provisional measures must be delivered. Since article 28(1) of the Protocol specifically targets 'judgment' and not broadly decisions of the Court – understood as 'any pronouncement of the Court, in the exercise of its judicial powers, which is in the form of a judgment, ruling, opinion or order'<sup>67</sup> – it is hard to argue, based on the text of the Protocol, for the extension of the 90-days requirement to all decisions of the Court.<sup>68</sup> Rendering provisional measures promptly and without significant delay may thus remain a matter of justice and fairness considering the aim of provisional measures and the situation of the complainant, or else the procedure will lose its essence.

Furthermore, neither article 28(1) of the Protocol nor Rule 69 imposes a timeframe within which cases must be decided, from the period the application was filed before the Court to deliberations. As the *Cheusi* and *Mlama* cases illustrate, many cases are resolved on merits after a considerable time. As one commentator puts it, it is self-defeating and ironical for a regional court that condemns domestic courts that took an unreasonable time before deciding cases to find itself delivering decisions with significant delays.<sup>69</sup>

## 2.5 Applicants' inability to adduce evidence of material damages

Applicants, especially those that are or were jailed in Tanzania and Rwanda, had difficulties adducing evidence of material damages for

64 Rule 67(3) of the 2020 Rules of the Court.

65 Rule 59(2) of the 2010 Rules of the Court.

66 J Kom 'Arrêt de la Cour' in M Kamto (ed) *La Charte africaine des droits de l'homme et des peuples et le Protocole y relatif portant création de la Cour africaine des droits de l'homme: Commentaire article par article* (2011) 1483.

67 Art 1(k) of the 2020 Rules of the Court.

68 I am indebted to an anonymous reviewer who drew my attention to this question.

69 SFM 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* 84.

the Court to order reparation. It is relevant to start by positing that there were two types of petitions for reparation brought before the Court, namely, petitions brought by individuals whose subjective rights were directly violated, and petitions of political activists and public interest lawyers challenging the conformity and compatibility of legislative and constitutional norms with the African Charter and other international human rights instruments. The first type is generally known as subjective human rights litigation, and the second as objective or public interest litigation.<sup>70</sup> The focus here is on issues of reparation arising from subjective litigation where the Court is likely to order material compensation.

Under article 27(1) of the Protocol, ‘if the Court finds that there has been violation of a human or peoples’ right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation’.<sup>71</sup> The Court’s jurisprudence has clarified the normative content of article 27(1). The Court has ordered monetary compensation to applicants, who have been direct victims of human rights violations but also to indirect victims including family members – spouse, children, wife, siblings of the applicant.<sup>72</sup> While material damages, including financial loss and loss of income, must be proven, the Court held that moral damages for the direct victim (the applicant in general) are accrued by the mere fact that a right has been violated. In this instance ‘the causal link between the wrongful act and moral prejudice “can result from the human right violation, as a consequence thereof, without a need to establish causality as such”’.<sup>73</sup> The Court has determined the criteria for indirect victimhood – the relationship to the applicant – and the evidence required to attest to the nature of damages from which a spouse, a sister, child or mother has suffered.<sup>74</sup>

In the cases where the Court ruled on reparation for the violation of subjective rights, only Leon Mugesera obtained compensation for his lawyer’s fee and for indirect victims, the wife, the son and the

70 L. Hennebel & H Tigrudja *Traité de droit international des droits de l’homme* (2018) 445-447.

71 See also R Nemedeu ‘Décisions de la Cour’ in M Kamto (ed) *La Charte africaine des droits de l’homme et des peuples et le Protocole y relatif portant création de la Cour africaine des droits de l’homme: Commentaire article par article* (2011) 1466.

72 H Adjolahoun & S Oré ‘Entre imperium illimité et decidendi timoré: La réparation devant la Cour africaine des droits de l’homme et des peuples’ (2019) 3 *Annuaire africain des droits de l’homme* 330.

73 *Andrew Ambrose Cheusi v Tanzania* para 150; *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabè des Droits de l’Homme et des Peuples v Burkina Faso (Reparations)* (2015) 1 AfCLR 258 para 55; *Lohé Issa Konaté v Burkina Faso (Reparations)* (2016) 1 AfCLR 346 para 58.

74 *Zongo* (n 73) para 46.

daughter who received an amount of 5 000 000 Rwandan francs each.<sup>75</sup> His claim for material damage was rejected.<sup>76</sup> In *Cheusi* the Court held that ‘the prejudice resulting from the lengthy judicial proceedings could also have been supported by proof of payment of lawyers’ fees, as well as procedural and other related costs’.<sup>77</sup> It also held that the ‘claim for compensation based on the disruption of his life plan, chronic illness and poor health ... is simply a general statement that is not supported by any evidence’.<sup>78</sup> For the Court, ‘applicant’s parentage should be proved with a birth certificate or any other equivalent proof; spouses must produce their marriage certificate or any other equivalent proof; the siblings must provide a birth certificate or any other equivalent document attesting to their filial link with the applicant’.<sup>79</sup> In the *Cheusi*,<sup>80</sup> *Nguza Viking*<sup>81</sup> and *James Wanjara*<sup>82</sup> cases the applicants failed to adduce such evidence. In *Mugesera* the Court indicated that it had the power to ‘obtain all evidence it considers appropriate to enlighten itself the facts of the case’,<sup>83</sup> including those in the public domain. This power was used to determine the link between the applicant and her daughter who had appeared before other jurisdictions as daughter of the applicant and did not as such have to prove her relationship to the applicant.<sup>84</sup>

Nearly seven years since the Court delivered its first decision on reparation,<sup>85</sup> which was followed by other decisions that clarified the standard of proof in reparation petitions, one might have expected applicants to learn from this abundant jurisprudence to strengthen their claims. Most of them were assisted by lawyers from NGOs that are familiar with the Court and, arguably, its jurisprudence on merits and reparation.<sup>86</sup> The unsuccessful claims for reparation, however, may be a call for the Court to relax its standards of proof for material damages or the filial link between the indirect victim and the applicant. After several years behind bars, it may be impracticable to certain applicants to adduce documentary proof. The Court may resort to a case-by-case analysis of reparation claims in each case

75 *Mugesera* (n 15) paras 149-152; para 156.

76 Para 133.

77 Para 145.

78 Para 146.

79 *Cheusi* (n 12) para 157; *Mugesera* (n 15) para 148.

80 Paras 154-159.

81 Paras 43-57.

82 Paras 103-107.

83 Para 152.

84 As above.

85 *Reverend Christopher Mtikila v Tanzania* (Reparations) (2014) 1 AfCLR 72.

86 Andrew Cheusi, Nguza Viking and Johnson Nguza were represented by Pan-African Lawyers Union; Leon Mugesera was represented by three lawyers – two academics and one legal practitioner; James Wanjara and four others and Kalebi Elisamehe were represented by the East Africa Law Society.

taking into account the particularities of the case and the situation of the complainant.

## 2.6 Provisional measures

The Court delivered 24 orders for provisional measures in 2020.<sup>87</sup> These orders can be grouped into four categories, namely, orders that were granted (10),<sup>88</sup> those partially granted (two),<sup>89</sup> dismissed applications for provisional measures (11),<sup>90</sup> and an application for provisional measures that became moot (one).<sup>91</sup> By contrast, the Court delivered nine orders for provisional measures in 2019 among which two were successful,<sup>92</sup> one partially granted<sup>93</sup> and six dismissed.<sup>94</sup> The likelihood of failure of a request for provisional measures, remains high. In 2020 and 2019, 45,8 and 66,6 per cent of provisional measures requests were denied compared to 41,6 and 22,2 per cent success rates in those two years, respectively. Benin remained the country against which most orders for provisional measures were directed in 2020 and 2019: 12 out of 24 in 2020 as against five out of nine in 2019. Four orders were made against Côte d'Ivoire in 2020 as against one in 2019. Some of these applications were linked to the political and electoral crisis that resulted in the exclusion of opposition leaders' elections in Benin and Côte d'Ivoire.<sup>95</sup> The remaining orders delivered in 2020 are shared as follows per country: Tanzania (three) as against three in 2019; Mali

87 However, the Court's Activity Report indicates that the Court delivered 22 orders for provisional measures.

88 *Ghaby Kodeih v Benin*; *Charles Kajoloweka v Malawi*; *Guillaume Soro & 19 Others v Côte d'Ivoire* (1); *Guillaume Soro & 19 Others v Côte d'Ivoire* (2); *Sébastien Germain Marie Ajavon v Bénin* Appl 62/2019; *Masudi Said Selemani v Tanzania*; *Laurent Gbagbo v Côte d'Ivoire*; *Houngoue Eric Noudehouenou v Benin* (1); *Ghati Mwita v Tanzania*; *Ghaby Kodeih & Nabih Kodeih v Benin*.

89 *Houngoue Eric Noudehouenou v Benin* Appl 4/2020; *Houngoue Eric Noudehouenou v Benin* Appl 3/2020.

90 *Komi Koutché v Bénin*, *Konaté and Doumbia v Côte d'Ivoire*; *Glory Cyriaque Houssou & Another v Benin*; *Elie Sandwidi and Mouvement Burkinabè des droits de l'homme v Burkina & 3 Others*; *Conaïde Togia Latondji Akouedenoudje v Benin*; *Legal and Human Rights Centre and Tanganyika Law Society v Tanzania*; *Sébastien Germain Marie Ajavon v Bénin* Appl 27/2020; *Houngoue Eric Noudehouenou v Benin* Appl 32/2020; *Houngoue Eric Noudehouenou v Benin* Appl 28/2020; *Harouna Dicko & Others v Burkina Faso*; *XYZ v Benin*.

91 *Babarou Bocoum v Mali*.

92 *Tembo Hussein v Tanzania* (Provisional Measures) Appl 1/2018; and *Chalula v Tanzania* (Provisional Measures) (2019) 3 AfCLR 232.

93 *Koutché v Benin* (Provisional Measures) (2019) 3 AfCLR 725.

94 *Thomas Boni Yayi v Benin* (Provisional Measures) Appl 23/2019; *Ndajigimana v Tanzania* (Provisional Measures) (2019) 3 AfCLR 522; *Suy Bi & Others v Côte d'Ivoire* (Provisional Measures) (2019) 3 AfCLR 732; *XYZ v Benin* (Provisional Measures) (2019) 3 AfCLR 745; *XYZ v Benin* (Provisional Measures) (2019) 3 AfCLR 750; *XYZ v Benin* (Provisional Measures) (2019) 3 AfCLR 754.

95 *S Dabiré 'Les ordonnances de la Cour africaine des droits de l'homme et des peuples en indication de mesures provisoires dans les affaires Sébastien Ajavon c Bénin et Guillaume Soro et autres c Côte d'Ivoire: Souplesse ou aventure?' (2020) 4 Annuaire africain des droits de l'homme 477-480.*

(one); Malawi (one); and Burkina Faso (one). One order is directed at four countries: Burkina Faso, Benin, Côte d'Ivoire and Mali.

The foregoing indicates that, contrary to what some authors may hold, the African Court is not always lenient towards applicants when it comes to the issuance of provisional measures.<sup>96</sup> The Court seems to remain conscious of the effects provisional measures can have on pending cases including those that are politically sensitive. By clarifying that its rulings do not 'prejudge in any way the decisions that the Court may take on its jurisdiction, on admissibility of the application and on the merits',<sup>97</sup> the Court reminds parties to the litigation of the temporary and non-final nature of its orders. Successful orders for provisional measures, especially in those politically-charged cases, should in my view serve as an incentive for parties to diligently engage with the Court on the remaining aspects of the procedures (admissibility/merits) – and possibly request that the matter be considered on an urgent basis – so that the orders for provisional measures do not remain indefinitely in force.

### 3 Features of the African Court's 2020 jurisprudence

This part reviews two types of features of the African Court's 2020 jurisprudence. It first examines features related to procedural aspects of cases dealt with by the Court before analysing their substantive features.

#### 3.1 Procedural features

Three procedural features of the Court jurisprudence are discussed in this part, namely, default judgment, the applications for intervention by two states and the examination of the rule on submission of petitions within a reasonable time.

##### 3.1.1 Default judgment

Five default judgments were delivered against Rwanda in 2020 given that the state had failed to make submissions on admissibility, merits and reparation. The failure to make submissions is a result of

<sup>96</sup> Traoré & Leta (n 4) 443.

<sup>97</sup> *Laurent Gbagbo v Côte d'Ivoire* (Provisional Measures) Appl 25/2020 para 36. For the International Court of Justice, see *Lagrand case (Germany v United States of America)* Request for the Indication of Provisional Measures 3 March 1999 para 13.

Rwanda's 2016 withdrawal of its article 34(6) declaration.<sup>98</sup> In the five cases Rwanda repeatedly 'informed the Court it will not take part in any proceedings before the Court and consequently, requested the Court to desist from transmitting any information on cases concerning Rwanda'.<sup>99</sup> Rwanda's stance differs from those of Benin, Tanzania and Côte d'Ivoire which, despite having withdrawn their article 34(6) declarations, continued to make submissions before the Court in cases against them. The stance taken by the three countries as opposed to Rwanda indirectly legitimises the African Court's ruling in *Ingabire* regarding states' obligation to engage the Court on cases that are pending when the declaration is withdrawn or those submitted within the one-year time line.<sup>100</sup> This legitimising position is crucial also given that the obligation to engage the Court after withdrawal was not overtly contemplated by the Protocol and the Court's Rules of Procedure.

Be that as it may, what criteria does the Court apply to render a judgment by default against a party to proceedings and on which legal basis? To begin with, the legal basis for a default judgment is not treaty-based, that is, the procedure is not contemplated under the Protocol. It is rather regulated by the Rules of Court. Rule 55 of the 2010 Rules<sup>101</sup> was the first to clarify possible conditions for the application of a default procedure. It was applied for the first time in *African Commission on Human and Peoples' Rights v Libya (Kadhafi case)*.<sup>102</sup> However, the revision of the Court Rules in 2020, while retaining the fundamentals of Rule 55, explicitly empowered the Court to enter a default judgment on 'its own motion'. By so doing, the Court seems to have learned from the dissenting opinion of Judge Bensaoula in *Mulindahabi v Rwanda* (2019) where she argued that the Court lacked the power to render a judgment by default

98 'Report: Rwanda withdrawal of its acceptance of direct individual access to the African Human Rights Court' 22 March 2016, <https://www.chr.up.ac.za/news-archive/2016/1241-report-rwanda-s-withdrawal-of-its-acceptance-of-direct-individual-access-to-the-african-human-rights-court> (accessed 26 November 2021). The withdrawal notice reads: 'NOW THEREFORE, the Republic of Rwanda, in exercise of its sovereign prerogative, withdraws the Declaration it made on the 22nd day of January 2013 accepting the jurisdiction of the African Court on Human and Peoples' Rights to receive cases under article 5(3) of the Protocol and shall make it afresh after a comprehensive review.'

99 *Mugesera* (n 12) para 6.

100 *Ingabire* (n 6) paras 67-68.

101 '1 Whenever a party does not appear before the Court, or fails to defend its case, the Court may, on the application of the other party, pass judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all other documents pertinent to the proceedings. 2 Before acceding to the application of the party before it, the Court shall satisfy itself that it has jurisdiction in the case, and that the application is admissible and well founded in fact and in law.'

102 O Windridge 'In default: *African Commission on Human and Peoples' Rights v Libya*' (2018) 18 *African Human Rights Law Journal* 758.

against a party in the absence of an application by the other party to proceedings.<sup>103</sup>

The Court applied a three-fold test to render a judgment by default in the five decisions against Rwanda. There must be default by one of the parties; the request for default must be made by the other party or of the Court's own volition; and the defaulting party must be notified.<sup>104</sup> These requirements are cumulative. The Court started by noting that by clearly indicating its intention not to appear before it or to receive transmission of documents from the Court, Rwanda 'voluntarily refrained from exercising its defence'.<sup>105</sup> The situation is slightly different from that of Libya in the *Kadhafi* case.<sup>106</sup> Libya was served with all the documentation but did not bother to respond. In both situations states failed to engage with the Court. As Ouguegouz noted, 'non-appearance of one of the parties to a case necessarily has a negative impact on the proper administration of justice and that it substantially complicates the task of the Court in the exercise of its mission'.<sup>107</sup>

Subsequently, the Court noted that there was no application for default judgment lodged by any of the parties in the four *Mulindahabi* cases. However, it ruled that it was within its judicial discretion to decide whether or not a judgment by default could be delivered.<sup>108</sup> It indicated that it 'shall have jurisdiction to render judgment in default *suo motu* if the conditions laid down in Rule 55(2) of the Rules are fulfilled'.<sup>109</sup> The *Mugesera* case was decided after the adoption of the 2020 Rules. As such, the power of the Court to deliver a judgment by default was not in contention since the new Rule 63(1) is explicit to that effect. The last condition on notification is fulfilled by verifying whether the state duly and regularly received documentation relating to the case. The Court examined this by recalling different letters and correspondences served on the state and the lack of engagement therewith. The fulfilment of this condition was beyond any doubt since Rwanda effectively responded to different documentations implying that it had received these.

103 *Mulindahabi v Rwanda* (Jurisdiction and Admissibility) (2019) 3 AfCLR 389, dissenting opinion: Bensaoula para 4.

104 *Mugesera* (n 12) para 14.

105 *Mugesera* para 15.

106 *African Commission on Human and Peoples' Rights v Libya* (Merits) (2016) 1 AfCLR 153 para 41.

107 *African Commission on Human and Peoples' Rights v Libya* (Merits) (2016) 1 AfCLR 153, separate opinion: Ouguegouz para 26.

108 *Mulindahabi* Appl 10/2017 para 30.

109 As above.

### 3.1.2 *Applications that opened the 'road' not always 'taken': Intervention by state parties*

The Court granted requests from Sahrawi Arab Democratic Republic (Sahrawi) and Mauritius to intervene in an application submitted by Bernard Anbataayela Mornah. In November 2019 Mornah filed a case against eight member states to the Court Protocol that had made article 34(6) declarations for their failure to protect the 'sovereignty, territorial integrity and independence of the Sahrawi Democratic Republic'.<sup>110</sup> In his application Mornah alleged that this failure constituted a violation of the African Union Constitutive Act, the African Charter, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>111</sup> Both Sahrawi and Mauritius claimed to have an interest in Mornah's application based on the occupation of Sahrawi's territory by Morocco.

These two applications raised questions related to the nature of states that can be allowed to intervene in proceedings pending before the Court, conditions under which they may do so and the nature of interest states may seek to defend before the Court. As this procedure has been rarely utilised – only three applications for intervention have been made before – these two applications provided the Court with an opportunity to clarify conditions for intervention under the Protocol and its Rules. When the Court first considered a state application to intervene in a matter concerning its citizen, it had barely developed applicable standards for the admission of such applications.<sup>112</sup> Article 5(2) of the Protocol allows 'the state party' that has an 'interest in a case' to voluntarily apply for intervention, thereby excluding instances of forced intervention.<sup>113</sup> This provision is clarified under the Rules of Court. In 2020 the Court granted itself the discretionary power to allow, in the interests of justice, 'any other person' to intervene in proceedings before the Court.<sup>114</sup>

In relation to the Sahrawi and Mauritius interventions, the main question to resolve was the nature of 'legal interest' the two countries

110 *Bernard Anbataayela Mornah v Benin & 7 Others* (Case Summary) Appl 28/2018 para 3.

111 Para 10.

112 *Guehi v Tanzania* (Merits and Reparations) (2018) 2 AfCLR 477 para 12. See opinion by Bensaoula 519 para 13.

113 PE Kenfack 'Saisine de la Cour' in M Kamto (ed) *La Charte africaine des droits de l'homme et des peuples et le Protocole y relatif portant création de la Cour africaine des droits de l'homme: Commentaire article par article* (2011) 1275-1276.

114 See Tchikaya opinion in *Sahrawi and Mauritius Intervention* cases para 23, questioning whether this possibility was envisaged by the Court Protocol.

sought to protect. The assessment of this interest depended on 'the nature of issues involved in the case, the identity of the intervenor and the potential impact of any of the decisions of the Court on the intervenor and third parties'.<sup>115</sup> Based on this, the Court found that Sahrawi had a legal interest to protect because the main application sought to safeguard Sahrawi's sovereignty and to protect several rights of individuals living on its territory.<sup>116</sup> The interest of the Sahrawi to intervene in this case thus was straightforward, unlike that of Mauritius.

Mauritius justified its interest on the idea that its own decolonisation process was yet to finish and that the right to self-determination under international law was *erga omnes* and, as such, it should be protected by any member of the international community.<sup>117</sup> To permit intervention by Mauritius, the Court relied on the ICJ Advisory Opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.<sup>118</sup> It demonstrated that the decision that may be adopted in Mornah's application can have implications on Mauritius and its people, some of whom remain under colonial domination.<sup>119</sup> Mauritius's membership of the AU was the second basis for its legal interest to intervene in this application. In fact, the Court argued that the main application contests the decision by the AU to re-admit the Kingdom of Morocco as member despite it continuing to 'colonise' the Sahrawi Republic; a stance which is contrary to AU principles and values. On this basis, any member state of the AU can arguably have a legal interest to intervene in cases such as this.

The Court supported this assertion by noting that the protection of the Sahrawi sovereignty and of its peoples' right to self-determination goes beyond the interests of Sahrawi. It is a matter of continental concern for which each state must stand and defend. As the Court pointed out, certain rights in the African Charter are linked to the continent's colonial past and must be duly protected. These include

115 *Republic of Mauritius in Application 028/2018 v Benin & 7 Other States* (Intervention) Appl 2/2020 para 16.

116 ICJ Advisory Opinion *Western Sahara* 1975 para 55; C Anyangwe 'The normative power of the right to self-determination under the African Charter and the principle of territorial integrity: Competing values of human dignity and system stability' (2018) 2 *African Human Rights Yearbook* 50, 70-71.

117 ICJ Advisory Opinion *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* 25 February 2019 para 180.

118 Discussed in R Mahadew & S Aukhajah 'The advisory opinion of the International Court of Justice on Chagos: A critical overview' (2019) 3 *African Human Rights Yearbook* 414-434; R Ben Achour 'Le droit à l'autodetermination en tant que droit fondamental de l'homme et des peuples à la lumière de l'avis de la Cour internationale de Justice sur l'archipel des Chagos' (2019) 3 *Annuaire africain des droits de l'homme* 344-354.

119 Para 20.

'the right to self-determination and freedom from colonisation and oppression, the right of people to freely dispose of their wealth and natural resources, and the right to national and international peace and security'. Already at the global level, the obligation of states to realise equality of rights among peoples and peoples' rights to self-determination is enshrined in UN General Assembly Resolution 2625 (XXV). The analysis of legal interest in intervention petitions must thus be conducted on a case-by-case basis.

One question that may be raised is whether Morocco, which is accused of illegally occupying Sahrawi and violating Sahrawi's peoples' rights to self-determination and development, can be allowed to intervene in the main case. The question becomes more interesting when one adds another variable: Of all the AU member states, Morocco is the only state that has not ratified the African Charter. A literal reading of article 5(2) of the Court Protocol bars Morocco from seeking to intervene in proceedings launched by Mornah. Intervention is simply open to state parties. This clearly suggests that article 5(2) is aimed at a 'state party' to the Protocol which Morocco is not, let alone to the African Charter. If drafters of the Protocol had intended to allow states that are not party to the Protocol to intervene, they would have made it explicit through the use of the term 'member state of the OAU/AU' as is the case under articles 4(1) and 13(2) of the Protocol.

### **3.1.3 *Two routes taken to assess submission within reasonable time rule***

The Court took two different routes in defining the criteria for assessing what constitutes submission within a reasonable time under article 56(6) of the African Charter. This resulted in the Court admitting the *Kambole* case but rejecting the three *Mulindahabi* cases. Applicants in the *Kambole* and *Mulindahabi* cases submitted their applications within a relatively long period: eight years and four months and two years and nine months respectively. The Court had to (re)define the normative content of article 56(6) of the Charter and Rule 40(6), both of which are couched in value-laden terms. In its jurisprudence the Court has generally relied on two tests to define the reasonability of time within which it is to be approached by applicants, one of which derives from article 56(6) of the African Charter and applies to cases where local remedies to exhaust exist at the domestic level. In the absence of local remedies, this test does not apply. Its Rules added a second limb to the test, namely, that the

computation of the time limit from which to assess reasonability may be determined by the Court itself.<sup>120</sup>

This second test generally applies when no local remedies exist for particular litigation. In the *Kambole* case the Court reiterated that the date when the defendant state deposited its article 34(6) declaration was the starting point for the computation of time limit.<sup>121</sup> Since *Kambole* challenged the normative validity of a constitutional provision that entered into force in 1977, the Court considered that violations caused by the constitutional provision were of a continuous character because they renewed themselves ‘every day as long as the state fails to take steps to remedy’ them.<sup>122</sup> The eight-year period between the declaration and the submission of the application were deemed reasonable. Judge Tchikaya challenged the assessment of the reasonableness requirement conducted by the majority.<sup>123</sup> He argued that the Court erred in its reasoning and contradicted its own jurisprudence on the reasonability test.<sup>124</sup> I will come back to Tchikaya’s position later.

The route the Court took in the *Mulindahabi* cases was different. In these cases local remedies were available and the applicant exhausted them. The Court used its case-by-case analysis to assess reasonableness. This approach is based on an objective examination of the situation of the applicant, whether they were in prison, lay, indigent and illiterate or were provided with legal assistance for them to be aware of the existence of the Court.<sup>125</sup> The *Mulindahabi* cases did not pass this test. For the Court, *Mulindahabi* was not in prison and his movements were not restricted. He was not indigent and was educated, a situation that enabled him to defend himself before the Court.<sup>126</sup> Finally, Rwanda deposited the article 34(6) declaration

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120 Rule 40(6) of the 2010 Rules of the Court.

121 Para 51.

122 Para 52. In *Boateng* the Court took a different approach in defining the continuing nature of violations. It distinguished ‘continuous’ violations from ‘instantaneous acts’. The latter ‘are those which are occasioned by an identifiable incident that occurred and is completed at an identifiable point in time’. These acts occurred before the state became part of the Protocol and deprived the Court of its temporal jurisdiction (para 55). This approach is based on the ‘nature’ of the acts and not their ‘impact’ and ‘effects’. However, an instantaneous act may have lasting impact. This point was raised by Judge Bensaoula in her dissenting opinion. She argued that the Court failed to consider the specific aspects of the case, the fact that the case pertains to the rights of the most marginalised peoples in African communities who are at the centre of the legal regime established by the Charter to protect people and that the acts had an enduring impact on land rights and right to development of applicants even after impugned legislation were abrogated (para 39 of the opinion).

123 Dissenting opinion of Judge Tchikaya para 24.

124 Para 25.

125 *Mulindahabi* para 42; *Jonas v Tanzania* (Merits) (2017) 2 AfCLR 101 para 54; *Anudo v Tanzania* (Merits) (2018) 2 AfCLR 248 para 57.

126 Para 45.

four years and three months before it had exhausted local remedies and, as such, Mulindahabi should have known of the existence of the Court.

The Court applied these objective criteria of assessment in the *Mulindahabi* cases and did not do so in the *Kambole* case. This is one of the many reasons why Tchikaya dissented in this decision. As stated earlier, the main difference between the two cases in relation to local remedies is that the latter did not exist and, therefore, could not be exhausted in the *Kambole* case contrary to the *Mulindahabi* case. For Tchikaya, Kambole's status as lawyer and member of the Tanganyika Law Society indicated that he was 'very familiar with the laws of his country'. As such, the applicant was intellectually equipped to be aware of the existence of a constitutional provision barring citizens from challenging presidential election results. He should also have known about the existence of the African Court and its ability to decide over the compatibility of article 41(7) of the Constitution of Tanzania with the African Charter. These objective facts point to the idea that a delay of eight years simply was unreasonable.<sup>127</sup> Tchikaya reasoned that reasonableness within the meaning of article 56(6) of the Charter must not be equated to 'excessive' time.<sup>128</sup>

The position of the Court in the two cases renders its jurisprudential approach to article 56(6) unstable and unpredictable. A rigorous approach to such a provision can contribute to strengthening the legitimacy of a Court already facing a backlash from states accusing it of not following the subsidiarity and exhaustion of local remedies principles.

### 3.2 Selected substantive features

This part discusses three substantive features of the 2020 African Court jurisprudence, namely, the continuous trend towards the judicialisation of domestic politics; the review of amnesty laws; and the clarification of normative content of human rights and principles.

#### 3.2.1 *Continuous judicialisation of domestic politics*

Several decisions adopted in 2020 continue to reaffirm the African Court's key role in adjudicating election-related human rights

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<sup>127</sup> Para 27.

<sup>128</sup> Para 25.

violations.<sup>129</sup> This was done through orders for provisional measures and judgments on merits. Provisional measures were aimed at protecting applicants' rights to participate in elections in Benin and Côte d'Ivoire specifically. Orders of the Court were far-reaching as states were requested to suspend the holding of elections in Benin,<sup>130</sup> to stay the conviction of applicants or to ensure that obstacles to their participation in elections are removed.<sup>131</sup> Some merits decisions had equally wide-ranging findings. For example, in the *Ajavon* and *XYZ (010)* cases the Court found that Benin had violated the principle of national consensus inscribed under article 10(2) of the African Democracy Charter by amending the Constitution without seeking consensus among citizens and political stakeholders.<sup>132</sup> In reaching this conclusion, the African Court relied on certain decisions of the Benin Constitutional Court which were instrumental in demonstrating that the state had an obligation to consult citizens more broadly given that the way in which Benin's 1990 Constitution was adopted favoured consensus and dialogue. National consensus was an unwritten constitutional rule in Benin constitutionalism, also recognised by the African Democracy Charter, which Benin has ratified.<sup>133</sup>

In *Suy Bi Gohore & Others* and *Ajavon* cases the African Court decision strengthened the independence of electoral management bodies in Côte d'Ivoire and Benin. The *Gohore* case is important in underscoring how the Court reviewed the extent of the implementation of orders made in *Actions pour la protection des droits de l'homme (APDH) v Côte d'Ivoire (APDH case)*<sup>134</sup> when for the first

129 GW 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* 352-357.

130 *Sébastien Germain Marie Aikoue Ajavon v Benin* Appl 62/2020 para 69.

131 *Laurent Gbagbo v Côte d'Ivoire* para 37; *Guillaume Kigbafori Soro & Others v Côte d'Ivoire* Appl 12/2020 para 36.

132 *Sébastien Germain Marie Aikoue Ajavon v Benin* (Merits and Reparations) Appl 62/2020 paras 336-344 and *XYZ v Benin* (Merits and Reparations) Appl 10/2020 paras 88-106.

133 11 July 2012. See ratification table, <https://au.int/sites/default/files/treaties/36384-sl-AFRICAN%20CHARTER%20ON%20DEMOCRACY%2C%20ELECTIONS%20AND%20GOVERNANCE.PDF> (accessed 27 September 2021). See Decision DCC 06-074 of 8 July 2006. Nonetheless, by the time the Court adopted its decisions in 2020, the Benin Constitutional Court had already reversed its earlier decisions which recognised 'national consensus' as an unwritten constitutional rule through Decision DCC 18-126 of 21 June 2018. Expressed differently, 'national consensus' no longer existed as a constitutional imperative under Benin constitutionalism. The African Court thus was expected to draw inspirations from recent Benin Constitutional Court decisions which contradict the Court's approach. See L Gamai 'Constitution béninoise: Salami contre-attaque les 3 arguments de la Cour africaine' 3 December 2020 in *Banouto*, <https://www.banouto.bj/article/politique/20201203-constitution-beninoise-salami-contre-attaque-les-03-arguments-de-la-cour-africaine> (accessed 29 September 2021).

134 (2016) 1 AfCLR 668.

time it delineated conditions for the independence of an electoral management body.<sup>135</sup> In the *Suy Bi Gohore & Others* case the petitioners argued that although the state had modified the Act on the Independent Electoral Commission as requested by the African Court in *APDH*, it still failed to meet its obligation to establish an independent and impartial electoral management body pursuant to article 17 of the African Democracy Charter.<sup>136</sup> The Court ruled that the applicants had failed to demonstrate how procedures leading to the adoption of the law reforming the electoral management body were inappropriate for one to consider that an electoral management body established through that process lacked the confidence of relevant stakeholders.<sup>137</sup> The Court, however, found that electoral management bodies at the local level were unequally composed in favour of the ruling party.<sup>138</sup> The process of appointing members of opposition political parties and those from civil society organisations (CSOs) to the electoral management bodies, moreover, was not driven by these entities but by the government, thus hindering citizens' participation in the management of public affairs.<sup>139</sup> In the *Kambole* case the African Court reiterated the relevance in a democratic society of the ability of citizens to challenge presidential election results in line with article 7 of the African Charter.

The Court was also involved in deciding over the independence of the Benin judiciary and of the Constitutional Court, in particular. In the *Ajalon* case the petitioner alleged that the amendment of the law on the Supreme Council of Magistracy (CSM) in 2018 violated the independence of the judiciary. He questioned the rationale for including the President of the Republic, the Minister of Justice, the Minister of Economy and the Minister of Public Service as members of the CSM.<sup>140</sup> Early in January 2018 the Constitutional Court ruled that these amendments were partially in contradiction with the Constitution. However, the Constitutional Court reversed its position in June 2018<sup>141</sup> and ruled that the amendments were consistent with the Constitution.<sup>142</sup> The African Court ruled that the Constitutional Court could not overturn its earlier ruling through an interpretation

135 Paras 116-118.

136 Para 12(i).

137 Paras 226 & 227.

138 Para 228.

139 Para 229.

140 Para 302.

141 Para 318; RM Owona 'L'autorité de la chose jugée des décisions du juge constitutionnel en Afrique francophone' in O Narey (ed) *La justice constitutionnelle* (2016) 425.

142 Para 316. See the discussion in TM Makunya 'The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin' in F Viljoen et al (eds) *A life interrupted: Essays in honour of the lives and legacies of Christof Heyns* (2022) 484-485.

procedure, as the decisions of the Constitutional Court are final and binding on all.<sup>143</sup>

The African Court further reiterated the prohibition of executive interference in matters concerning the judiciary.<sup>144</sup> It found that the membership of the President of the Republic and other executive officials deprived the CSM of its independence.<sup>145</sup> The Court further ruled in the *XYZ (010)* case that the lack of clarity on criteria used by the President of the Republic and National Assembly to renew the term of office of judges of the Constitutional Court violated the Constitutional Court's independence according to article 26 of the African Charter.<sup>146</sup> The constitutional context must be understood here, in particular the unchecked power most Presidents of the Republic and National Assemblies wield in appointing, and sometimes removing, judges of constitutional jurisdictions in African civil law countries.<sup>147</sup>

It is clear from these cases that the African Court has gone the extra mile to protect the independence of the judiciary and the rights of opposition leaders and candidates who could hardly rely on domestic courts to hold the executive and the legislature accountable to democratic principles and international human rights treaties ratified by states. As the organisation of the judiciary and election-related questions are matters of national sovereignty *par excellence*, some scholars have argued for the observance of the margin of appreciation doctrine by the African Court. This can prevent the erosion of the Court's already waning legitimacy and 'restore confidence' of states.<sup>148</sup> The withdrawal of states such as Rwanda, Tanzania, Benin and Côte d'Ivoire would thus have been pre-empted<sup>149</sup> had the Court been mindful of African states' absolute attachment to their sovereignty and provided them an opportunity to settle domestic matters through their own judicial mechanisms. Similar concerns were voiced in the Court by Tchikaya in the *Kambole* case.<sup>150</sup> These concerns are genuine. However, they must be contextualised. If the Court is to allow some degree of discretion to national authority, as it has done, this should continue to be done on a case-by-case basis. Some withdrawals arguably

143 Para 318.

144 Para 312.

145 Paras 320-323.

146 *XYZ (010)* paras 69-72.

147 CM Fombad 'Constitutional adjudication and constitutional justice in Africa's uncertain transition: Mapping the way forward' in CM Fombad (ed) *Constitutional adjudication in Africa* (2017) 354.

148 Traoré & Leta (n 4) 421.

149 Adjolohoun (n 25) 39-40.

150 *Kambole* (n 12), dissenting opinion of Judge Tchikaya paras 34-40.

were sparked by the fact that the Court gave a forum for opposition leaders and political dissidents,<sup>151</sup> who otherwise could not use domestic courts against 'repressive national governments',<sup>152</sup> to air their grievances, for example, against the remaking of electoral and constitutional norms.<sup>153</sup> The 2019 constitutional amendments that instituted the principle of sponsorship for presidential candidates in Benin hampered the participation of several candidates who could not secure 16 supports from a ruling party-controlled parliament in Benin's 2021 presidential elections.<sup>154</sup> Besides, the President of Côte d'Ivoire maintained his grip on power by running for a third presidential term and ensuring that some opposition candidates are not allowed to compete.<sup>155</sup> These examples may suggest that a non-strategic application of the margin of appreciation doctrine, especially one that is oblivious to the repressive and unaccountable nature of certain African governments, can undermine the protection of human rights at the regional level and weaken the ability of the African Court to protect individuals' rights. Human rights litigation before the African Court and the Court's willingness to 'chop the ugly head of impunity off its stiffened neck' can serve to expose the hypocrisy of rulers who undertake to protect human rights yet make little effort to 'translate these sentiments into practice'.<sup>156</sup>

### 3.2.2 *Determining conditions of validity of amnesty laws*

For the first time the African Court ruled on the validity of amnesty laws under the African Charter in the *Ajavon* case. The applicant challenged the enactment of a parliamentary Act that prevented the prosecution of perpetrators of 2019 post-election violence on account that the Act deprived victims of their right to an effective remedy. The Benin government passed legislation to pardon perpetrators of post-election violence and took no measures to ensure accountability for such acts.

151 Viljoen (n 23) 66.

152 OD Akinkugbe 'International decision commentary: *Houngue Eric Noudehouenou v Republic of Benin*' (2021) 115 *American Journal of International Law* 285.

153 The reason invoked by Rwanda was difficult to understand. It indicated that 'the Republic of Rwanda, in making the 22nd January 2013 Declaration never envisaged that the kind of person described above [genocide convict who is a fugitive from justice] would ever seek and be granted a platform on the basis of the said Declaration'. Viljoen rightly qualifies this argument as being 'disingenuous'. See Viljoen (n 23) 66.

154 See *Decision DCC 21-067* of 4 March 2021; *Decision EP 21-008* of 17 February 2021 2; *Decision DCC 21-011* of 7 January 2021 3 (Constitutional Court of Benin).

155 D Zounmenou 'Côte d'Ivoire should learn lessons from past election crises' *ISS Today* 29 October 2020, <https://issafrica.org/iss-today/cote-divoire-should-learn-lessons-from-past-election-crises> (accessed 26 November 2021).

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

The question of validity of amnesty legislation, in particular those adopted in the context of transitional justice, remains unsettled under international law.<sup>157</sup> Most scholars and international tribunals tend to favour conditional amnesties because blanket amnesties exclude any form of accountability.<sup>158</sup> This is the approach the African Commission recently adopted.<sup>159</sup> In the *Ajavon* case the African Court held that only an amnesty law accompanied 'by restorative measures for the benefit of the victims' can be said to be compatible with states' obligations under the African Charter. In *Thomas Kwoyelo v Uganda* the African Commission was of the view that 'amnesties should not totally exclude the right of victims for remedy, particularly remedies taking the form of getting the truth and reparations'.<sup>160</sup> The absence of these remedies in the Benin context rendered the enjoyment of article 7 rights illusory and gave the impression that the adoption of the amnesty law aimed to entrench impunity for post-election violence.

The Court's position emphasises the need to implement different forms of accountability, whether punitive or non-punitive, to ensure respect for the rights of victims and survivors of human rights violations.<sup>161</sup> The power of states to grant amnesty to perpetrators of various violations of international (human rights) law is constrained by, among others, states' obligations to investigate and prosecute human rights violations and to ensure that victims have their cases heard before competent tribunals. In the context of an increasing adoption of amnesty laws as part of transitional justice processes in certain African countries that ratified the African Charter, the Court's position thus is pre-emptive of complete disregard of accountability in peace processes.<sup>162</sup>

157 SA Dersso 'Interrogating the status of amnesty provisions in situations of transition under the Banjul Charter: Review of the recent jurisprudence of the African Commission on Human and Peoples' Rights' (2019) 3 *African Human Rights Yearbook* 382.

158 Dersso (n 157) 383.

159 *Thomas Kwoyelo v Uganda* (25 April-9 July 2018) Communication 431/12 para 293.

160 Dersso (n 157) 387.

161 SP Tunamsifu 'The right to justice: A challenge for survivors of conflict-related sexual violence in the Eastern Democratic Republic of the Congo' (2015) 15 *African Human Rights Law Journal* 473; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005.

162 See also FF Taffo 'Amnesties and human rights within the framework of the African Charter on Human and Peoples' Rights' (2019) 3 *Current Trends* 30.

### 3.2.3 *Clarifying normative content of fundamental rights and guarantees*

#### *Right to peace and security*

Linked to the electoral process and constitutional reforms, the applicant in the *XYZ (010)* case argued that the amendment of the Benin Constitution in the absence of ‘national consensus’ jeopardised peace for the Benin people.<sup>163</sup> The Court started by defining the concept of ‘peace’. It considered that peace means ‘the absence of worry, turmoil, conflict or violence’. This notion generally is considered ‘negative’ peace which must be distinguished from positive peace.<sup>164</sup> The Court captures positive peace by noting that citizens must live ‘without danger, without risk of being affected in its physical integrity and its heritage’ as this can positively impact on national stability.<sup>165</sup>

Human rights violations directly affect peace and stability. For example, a constitutional amendment without the participation of certain citizens constitutes a threat to peace and stability.<sup>166</sup> The Court reiterates that the observance of human rights is essential to the maintenance of peace and security in Africa and can prevent conflicts that are ravaging the continent. This connection is of utmost importance in the African context given that the mismanagement of electoral processes leads to deadly skirmishes, instability and result in the loss of public confidence in democratic institutions.<sup>167</sup>

#### *Right to economic, social and cultural development*

The Court also demonstrates that non-consensual amendment of constitutional rules negatively impacts on economic, social and cultural development of people. This follows allegations by the applicant in the *XYZ (010)* case that the amendment of the Benin Constitution, the stability of which rested on the consensus prevailing during its adoption, disrupted the development of the country and its people.<sup>168</sup>

<sup>163</sup> Para 129.

<sup>164</sup> M Kassa & D Mallow ‘Evaluating the nature of peace in post-1991 Ethiopia in light of Johan Galtung’s typology of positive and negative peace’ (2017) 3 *International Journal of Humanities and Social Science Research* 85-86.

<sup>165</sup> Para 133. See also Kakai (n 129) 350.

<sup>166</sup> *XYZ (010)* para 136.

<sup>167</sup> D Bere ‘Pre-electoral period: Election environment law and practice for restoring the promise of African elections’ in C Mbazira (ed) *Budding democracy or judicialisation: Lessons from Africa’s emerging electoral jurisprudence* (2021) 50-52.

<sup>168</sup> Para 122.

However, the analysis of the Court was laconic. In a single sentence-paragraph, it indicated that non-consensual amendment of the Constitution 'may constitute a major disruption of the economic, social and cultural development in Benin'<sup>169</sup> and concluded that there was a violation of article 22(1) of the African Charter. Little effort was made to demonstrate the clear link between constitutional amendment and development, what the negative effects of such amendments were and the extent to which they affected the country's development.

The Court did not engage with the jurisprudence of the African Commission in emphasising the utmost importance of and developing the right to development. In *Institute for Human Rights and Development in Africa v Democratic Republic of Congo* the Commission considered that the right to development under article 22 of the African Charter was both an individual and a collective right.<sup>170</sup> In *Endorois* it held that the right to development was 'both *constitutive* and *instrumental*, or useful as both a means and an end'.<sup>171</sup> These normative standards could have helped the Court to make a robust and convincing finding on the right to development in the context of non-consensual constitutional changes, clarifying which aspects of the right to development are most likely to be endangered by such constitutional amendments and how the free, meaningful and active participation of citizens, which is at the heart of the right to development, can help diffuse the negative effects of such reforms.

### ***Principle of non-retrogression***

In *Ajavon* the applicant challenged the enactment of several laws that deprived certain individuals of their rights to strike guaranteed under article 31 of the Constitution of Benin. The Court held that states should not renege on a socio-economic right already guaranteed in their constitutions. The Court argued that the principle of non-retrogression prevents member states to ICESCR from adopting 'any measure which directly or indirectly marks a step backwards with regards to the rights recognised in the ICESCR'.<sup>172</sup> According to the Court, states simply are empowered to provide a framework to realise socio-economic rights.<sup>173</sup>

<sup>169</sup> Para 127.

<sup>170</sup> *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 277.

<sup>171</sup> Para 277.

<sup>172</sup> *Sébastien Germain Marie Aikoue Ajavon v Benin* (Merits and Reparations) Appl 62/2020 para 137.

<sup>173</sup> Para 138.

This principle has been recognised by the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) and the African Commission as key in safeguarding the protection of socio-economic rights.<sup>174</sup> The African Court, therefore, did not hesitate to subject strict scrutiny on Benin to enhance the protection of a right provided both in ICESCR and its Constitution. The ESCR Committee interpreted article 2(1) of ICESCR to mean that it prohibits retrogressive measures.<sup>175</sup> The principle of non-retrogression works hand in hand with the principle of proportionality which the Court has regularly used to assess the validity of restrictive measures. The principle requires that retrogressive measures to socio-economic rights be properly justified taking consideration of other socio-economic rights and the maximum available resources requirement.<sup>176</sup> The African Commission's Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, although not referred to in the *Ajavon* case, provides a detailed check-list of requirements states must meet for their measures not to violate the principle of non-retrogression.<sup>177</sup>

#### 4 Conclusion

The African Court has made progress in reducing its backlog of cases in 2020. It delivered decisions on admissibility, jurisdiction, merits and reparation as well as orders for provisional measures which not only strengthened the quality of fair trial rights of prisoners but, significantly, that of political rights in Benin and Côte d'Ivoire. Both individuals and civil society organisations have come to realise the tremendous role the Court can play in ensuring that states and their organs, particularly the judiciary, do not hide behind frivolous technical grounds to deprive their citizens of basic rights they must enjoy and which states have committed to realise. Clearly, claims of the violation of fair trial rights by individuals facing trials in Tanzania and Rwanda and election-related human rights violations remained the most adjudicated issues in 2020. Apart from Tanzania, allegations of the violation of article 7 of the African Charter were also raised in applications against Rwanda, Ghana, Côte d'Ivoire, Mali, Benin and Burkina Faso. Allegations of the violation of article 7 of the African Charter remain common before the African Court. These were made

174 S Liebenberg 'Austerity in the midst of a pandemic: Pursuing accountability through the socio-economic rights doctrine of non-retrogression' (2021) 37 *South African Journal on Human Rights* 10.

175 UN ESCR Committee General Comment 13: The Right to Education para 45.

176 Liebenberg (n 174) 8.

177 (2004) para 20.

in 24 cases decided in 2019,<sup>178</sup> 26 cases decided in 2017 and 2018<sup>179</sup> and 27 cases decided between 2006 and 2016.<sup>180</sup>

The cases decided by the Court also reveal that some citizens and political activists increasingly lose confidence in the ability of their leaders to establish independent and neutral electoral management bodies and justice mechanisms. The independence of the judiciary and the principle of separation of powers are some of the most important features of democracy and constitutionalism and their observance in times of election may help in preventing violence and instability which generally mar electoral processes in Africa. By hearing the numerous claims raised by Beninese citizens, even though some of them were ill-founded, and by adopting provisional measures to safeguard political rights of individuals such as Laurent Gbagbo and Guillaume Soro, the Court seems to send out an unequivocal warning that the legal regime established under the African Charter and other human rights instruments will not tolerate manipulations of electoral and constitutional norms to consolidate personal rule. This is true for the Court goes on to ascertain that states' obligation to establish an independent judiciary is anathema to the establishment of a supreme council of the judiciary controlled by political actors. Given the repressive and unaccountable nature of some African governments, the African Court's 2020 jurisprudence in cases related to elections, presidential election dispute resolution and independence of the judiciary, undoubtedly gives great hope to all those whose effective exercise of their political rights depends on the goodwill of institutions and leaders whose only ambition is the consolidation of personal power.

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178 African Court Law Report Vol 3 (2019) xxi & xxii.

179 African Court Law Report Vol 2 (2017-2018).

180 African Court Law Report Vol 1 (2006-2016).