

Prevalence of conflicts over the legitimacy of election results in Africa: can  
the regional economic communities (RECs) provide a panacea?

A case study of  
ECOWAS and SADC

Dissertation submitted in partial fulfilment of the requirements of the  
degree LLM (Human rights and Democratization in Africa)

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## DECLARATION

I, Frank John Mchomvu, do hereby declare that this dissertation is my own work and effort and that, to the best of my knowledge and belief, it has not been submitted to any other institution for any award. Where other people's works have been used, they have been duly acknowledged.

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Date.....

I hereby declare that this dissertation has been submitted for examination for the degree LLM with my approval as the University Supervisor.

Signature.....

Name: Professor Nii Ashie Kotey

Date.....

## DEDICATION

To my lovely grandmother

Hanna Sabuni

Who brought me up and trained me in a way I should be

Your love, tender care, kindness, support, encouragement, advice and instructions

are incalculable

For sure, you played a central role to make me who I am

I love you *bibi*.

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For any shortcomings that may remain in this study, I remain solely responsible.

## LIST OF ABBREVIATIONS

ACDEG	African Charter on Democracy Elections and Governance
APRM	African Peer Review Mechanism
AUDGDEA	African Union Declaration Governing Declaration Governing Democratic
AU	African Union
AUPW	African Union Panel of Wise
BAF	British- Angola Forum
BBC	British Broadcasting Corporation
CC	Constitutional Council
CCM	<i>Chama cha Mapinduzi</i>
CHADEMA	<i>Chama cha Demokrasia Na Maendeleo</i>
CNEO	Cameroon National Election Observation
DUCG	Declaration on the Unconstitutional Change of Government
ECOWAS	Economic Community of West African States
EMBs	Election Management Bodies Elections in Africa
GEOMM	Guidelines for the Electoral Observation and Monitoring Mission
GI	Government of Inclusion
GPA	Global Political Agreement
ICCPR	International Covenant on Civil and Political Rights
IEC	Independent Electoral Commission
MDC	Movement for Democratic Change
MoUISADCC	Memorandum of Understanding on the Institutions of the Southern African Development Co-ordinating Conference
NEC	National Electoral Commission
OAU	Organisation of African Unity
OPDSC	Organ on Politics Defence and Security Co-operation

PDGG	Protocol on Democracy and Good Governance
PPDSC	Protocol on Politics Defence and Security Co-operation
RECs	Regional Economic Communities
SADC	Southern African Development Community
SADC	Southern African Development Community
SADCC	Southern African Development Co-ordinating Conference
SEOM	SADC Election Observation Mission
SPF	SADC Parliamentary Forum
SPGGDE	SADC Principles and Guidelines Governing Democratic Elections
SPLM-DC	Sudan People's Liberation Movement for Democratic Change
UN	United Nations
UNSC	United Nations Security Council
US	United States
VOA	Voice of America
ZANU-PF	Zimbabwe African National Union Patriotic Front
ZEC	Zimbabwe Electoral Commission

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# CHAPTER ONE

## INTRODUCTION

### 1.1 Background to the study

Civil and political strife in Africa is in the main, this is due to an increase in disputes over who won elections. The disputed elections in Kenya, Zanzibar, Zimbabwe, Lesotho, Ethiopia and more recently Ivory Coast to mention but a few, indicate how disputes over election results in Africa have been escalating. 'Over the last couple of decades, many elections in Africa have been marred by 'extreme controversy'.<sup>1</sup> Elections 'rigging and brigandage', violence and elections invalidation are common phenomena in Africa.<sup>2</sup> The report prepared by the British-Angola Forum (BAF) following a conference on the challenges for free and fair elections in Angola, reveals that many elections in Africa are 'subject to human error and manipulation' and this is mainly because those who are in power want to cling onto it especially 'in countries where there is a perception that politics means money'.<sup>3</sup> Adejumobi argues that in Africa most elections in their current form appear to be 'a fading shadow of democracy' jeopardising the frail democratic project itself.<sup>4</sup> According to the African Union Panel of Wise (AUPW), while in some countries elections have built 'democratic governance and prosperity of citizens', in others they have led to disputed results and violence among the political actors.<sup>5</sup>

Disputes over elections results are not uncommon in Africa, many elections results have been disputed by opposition parties on the ground of malpractices such as rigging,<sup>6</sup> corruption, and stealing. In most cases, it is the incumbent regimes which have been sternly accused of perpetrating these malpractices so as to remain on power. Many elections management bodies

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<sup>1</sup> Enforcing and ensuring fair elections in Africa-African Union (AU) available at <http://kmun.kingsconnect.ca/kmun/assets/File/AU/AU-Enforcing%20and%20Ensuri%20Fair%20Elections.pdf> (accessed 20 May 2011).

<sup>2</sup> S Adejumobi 'Elections in Africa: a fading shadow of democracy? (2000) 21 *International Political Science Review* 59.

<sup>3</sup> See 'The challenges for free and fair elections in Angola'- conference report: British-Angola forum 4-5 July 2005 available at [www.aceproject.org/ero-en/regions/africa/AO/BAFelections.pdf](http://www.aceproject.org/ero-en/regions/africa/AO/BAFelections.pdf) (accessed on 20 May 2011).

<sup>4</sup> Adejumobi (n 2 above).

<sup>5</sup> AUPW 'Election-related disputes and political violence: strengthening the role of the AU in preventing, managing and resolving conflict' *the AU series* (July 2010) 8.

<sup>6</sup> Rigging of election can be defined as 'predetermining the outcome by cheating with votes' see [http://wiki.answers.answers.com/Q/What\\_is\\_the\\_definition\\_of\\_rigging](http://wiki.answers.answers.com/Q/What_is_the_definition_of_rigging) (accessed on 6 October 2011).

(EMBs) have equally been accused of fabricating results in favour of the incumbent regimes. It is due to these allegations, that some candidates mainly from opposition parties have been refusing to concede defeat arguing that the elections have been fabricated.<sup>7</sup> This has culminated in post elections violence in some African countries resulting not only in deaths of hundreds of people and displacement of thousands, but also the disturbance of peace and stability on the continent.<sup>8</sup>

It is due to the escalation of disputes over elections results in Africa and their aftermath, that various instruments both binding and non-binding, have been adopted at regional as well as sub regional levels in an attempt to redress the situation. In 2008, the African Commission on Human and Peoples' Rights (ACHPR) adopted a Resolution on Elections in Africa.<sup>9</sup> In that Resolution, the ACHPR notes, *inter alia*, that there has been a serious deterioration of the human rights situation in certain African countries before, during and after elections periods. In this regard, the Commission called all state parties to *inter alia* ratify the African Charter on Democracy, Elections and Governance (ACDEG), the African Union Declaration Governing Democratic Elections in Africa (AUDGDEA) and other regional and international guidelines in the area of elections.

The dangers associated with contested election results in Africa are also acknowledged by the African Union (AU) and it is on this regard, it has adopted various instruments in an attempt to ensure that elections consolidate democracy on the continent.<sup>10</sup> In 2000, the AU Assembly of Heads of State and Government (the AU Assembly), adopted a Declaration on Unconstitutional Changes of Government (DUCG).The DUCG *inter alia* defines situations of unconstitutional change of government and outlines steps to be taken in such cases. In 2002, the AUDGDEA was adopted. The AUDGDEA provides for principles of democratic elections which include, *inter alia*, democratic elections as a basis of authority of any representative government. It also

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<sup>7</sup> For instance, during 2010 Tanzania general elections, the presidential candidate for the main opposition party, Dr Slaa called the National Electoral Commission to rescind presidential results on the ground that they were fabricated in favour of the ruling party and refused to concede defeat see 'Slaa alleges vote rigging' available at <http://allafrica.com/stories/201011040238.html> (accessed on 10 June 2011).

<sup>8</sup> For instance it is alleged that more than 800 people died as a result of 2011 post election violence in Nigeria, see Human Rights Watch(HRW): '800 Nigerians killed in electoral violence' available at <http://www.voanews.com/english/news/africa/Human-Rights-Watch-Says-At-Least-800-Nigerians-Were-Killed-in-Electoral-1211889384.html> (accessed 10 June 2011).

<sup>9</sup> ACHPR/Res.133 (XXXVIII) 08: Resolution on Elections in Africa.

<sup>10</sup> AUPW (n 5 above) 8-9.

enshrines the responsibilities of member states to ensure the implementation of the principles of democratic elections as contained in the Declaration, and finally provides for rights and obligations associated with elections. Also, in its attempt to address electoral problems in Africa in 2007, the AU adopted the ACDEG.<sup>11</sup>

The AU has also been involved in the observation of elections in Africa and in 2004, it adopted the Guidelines for the Electoral Observation and Monitoring Mission (GEOMM). However, it should be understood that elections is a process not an event, thus, fairness of elections extend beyond polling day. This being the case, international observation cannot by itself ensure fair elections as most of them as Granenburgh notes, arrive a few days before polling day.<sup>12</sup>

Regional Economic Communities (RECs) have also taken various efforts in an attempt to promote credible elections in their regions. In this regard, they have adopted various instruments aimed at ensuring integrity, transparency and credibility of elections in their regions. In 2001 for instance, the Economic Community of West African States (ECOWAS) adopted a Protocol on Democracy and Good Governance (PDGG) with a view to consolidating democracy in the region<sup>13</sup>.

However, despite of all these efforts, this study argues that disputes relating to the legitimacy of elections results are still prevalent in many African countries. It is on this ground, this study has sought a need to interrogate the role of the RECs in redressing such disputes.

## **1.2 Statement of the problem**

Although Africa has been experiencing electoral related disputes for many years, disputes relating to the legitimacy of election results have been escalating in the past decade. Many presidential candidates especially from the opposition parties have refused to concede defeat mainly on the ground that the declared election results were not legitimate as they were

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<sup>11</sup> To date the Charter has not entered into force yet.

<sup>12</sup> OV Granenburgh 'Democratization in Africa: the role of election observation' in JA & G Hesselting (eds) *Election observation and democratisation in Africa* (2000) 29.

<sup>13</sup> The Protocol was adopted as a supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security with a view to providing more detailed provisions in the area of democracy and good governance which are not dealt in details in the Protocol for Conflict Prevention, Management, Resolution, Peacekeeping and Security.

fabricated in favour of the ruling party.<sup>14</sup> In some cases this has led to post electoral violence which has seriously affected the continent socially, politically and economically. In spite of various efforts taken by the RECs to address electoral related problems in their regions, this study argues that disputes over the legitimacy of election results have not been effectively redressed. It is on this basis that the need to interrogate the role of the RECs arises. This is done with a view to establishing the extent to which the RECs can provide a durable solution to this problem which has been prevalent for years in Africa.

### **1.3 Objectives of the study**

This study investigates the viability of the RECs in ensuring credible elections so as to eradicate disputes over the legitimacy of election results in Africa. It generally:

- (i) Examine reasons underlying disputes over the legitimacy of election results and their consequences in Africa.
- (ii) Interrogate the reactions of the RECs in cases of disputed elections in their regions and finally,
- (iii) Examine the existing legal frameworks of the RECs to find out the extent to which they are effective in ensuring the legitimacy of election results.

### **1.3 Significance of the study**

Disputes over election results in Africa have been prevalent for years now. There have been serious complaints from opposition parties claiming that incumbents fabricate election results. This study provides an insight into what measures need to be put in place so as to eradicate such disputes in Africa in order to maintain positive peace and stability on the continent. It has also offered suggestions that may be adopted by the RECs to prevent disputes relating to election results in their regions.

### **1.4 Research Questions**

This study has been conducted with a view to addressing the following main question namely:

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<sup>14</sup> n 7 above.

How can the RECs ensure legitimate election results in Africa? In addressing this question the following sub-questions are addressed:

(a) What are the reasons for disputing election results in Africa and what are the consequences of such disputes?

(b) How have the RECs reacted in such cases?

(c) Are there sufficient legal mechanisms within the RECs to address the problem, and if not, what reforms might be undertaken so as to effectively address the problem?

## **1.5 Methodology**

Relevant information for this study has mainly been collected through literature review. Various works including books, articles, conference papers and reports have been reviewed. Since the study is centred at the role of the RECs in ensuring legitimate election results, relevant instruments adopted by the RECs, both binding and non binding have also been reviewed. For want of space two regional bodies namely ECOWAS and SADC have been chosen as a case study

## **1.6 Overview of the chapters**

This study consists of five chapters. Chapter one comprises of introductory issues. It consists of: background, statement of the problem, objectives of the study, significance of the study, research question, research methodology, and presumption and limitation of the study as well as literature review. Reasons for disputing the legitimacy of election results in Africa and its consequences have been examined under the second chapter. The third chapter is centred on the analysis of the reactions by the selected RECs in cases where election results have been disputed. In this regard, Zimbabwe and Ivory Coast have been taken as a case study. A discussion on whether the RECs can provide a panacea for the disputes over the legitimacy of election results is examined in chapter four. For want of space, two RECs namely: ECOWAS and the Southern African Development Community (SADC) have been taken as a case study. To this end, the chapter examines the present legal frameworks within those RECs, to find out whether they can effectively tackle the problem in question. The study is wrapped up by chapter five which provides conclusions and recommendations.

## 1.7 Presumption and Limitations

This study proceeds from the assumption that disputes over election results can only be effectively addressed by the RECs. It also takes a preliminary position that for the problem in question to be addressed effectively, RECs need to put in place sufficient legal mechanisms.

The study was limited by a number of factors. Firstly, since the study was conducted in Ghana where there is no office for any RECs, the researcher had difficulties in obtaining information relevant to the study. The study was also constrained by time and resources. The time within which the study was supposed to be accomplished was not sufficient especially taking into account the significance and intensive nature of the study. The study was also limited in terms of volume (number of pages); this means that the researcher had to leave out some of the information that could have been useful for want of space so as to comply with the requirement. Also the study was constrained by resources since there is no fund dedicated for this study, as a result the researcher had to get most of information through library and internet researches.

## 1.8 Literature review

Various studies on elections generally and free and fair elections in particular, are available. According to Smith,<sup>15</sup> for an election to be fair, it must be administered by 'politically impartial' people. He argues that, in most cases the impartiality of EMBs is compromised because election officials 'come under intolerable pressure to mismanage the process in favour of the incumbents.'<sup>16</sup> This study focuses on the role of the RECs in ensuring legitimate election results.

Problems facing elections in Africa and how the international community can work towards promoting free and fair elections in Africa are generally discussed by Rukambe.<sup>17</sup> He argues *inter alia*, that, in Africa elections take place at a 'high stake environment' where winning means having control over all state resources and institutions including the EMBs. He further argues that all these are mobilised in such a way that, they protect the incumbent from being 'dislodged

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<sup>15</sup> BC Smith *Good governance and democracy* (2007) 25.

<sup>16</sup> As above.

<sup>17</sup> Promoting free and fair elections in Africa: the role of the UNDP and other international partners available at [www.lrct.go.tz/PROMOTING%AND%20FAIR%ELECTIONS%20IN%20AFRICA.Les.final.pdf](http://www.lrct.go.tz/PROMOTING%AND%20FAIR%ELECTIONS%20IN%20AFRICA.Les.final.pdf) (accessed 24 May 2011).

from power'.<sup>18</sup> However, in his work, Rukambe did not discuss the role of the RECs in ensuring free and fair elections in Africa.

The importance of building relevant institutions to manage elections in Africa is noted by the AUPW.<sup>19</sup> The AUPW notes that although elections are vital in the democratic process, they do not always ensure democracy. To enable elections enhance democracy, the AUPW argues that peace and security and relevant institutions need to be put in place.<sup>20</sup> The current study focuses on the role of the RECs in ensuring legitimacy of election results in Africa as one of initiatives towards enhancing credibility of elections to make them promote democracy, peace and security on the continent.

Mismanagement and manipulation of elections in favour of the ruling parties is also explored by Fombad in his journal article.<sup>21</sup> He argues that for elections to be free and fair, EMBs must be sufficiently independent. He contends that many EMBs in Africa lack, 'power autonomy and capacity' hence have 'merely served as instruments for perpetuating rituals of symbolic elections and disguise signs of authoritarian revival.'<sup>22</sup> His study focused on the role of the EMBs in Africa with a particular reference to Cameroon's National Election Observatory (CNEO). The current study focuses on the role of the RECs in ensuring legitimacy of election results in their regions.

In his journal article, Mangu<sup>23</sup> discusses the promotion of 'democracy and good political governance in Africa'. He assesses the extent to which the African Peer Review Mechanism (APRM) has been successful in promoting democracy and good governance. He argues that in spite of its deficiencies, the APRM can be used as one of the effective mechanisms in promoting democracy and good political leadership in Africa. His main focus is on the APRM, in promoting democracy and good governance. This study is divorced at, assessing the role of the RECs in ensuring credible elections so as to eradicate disputes over the legitimacy of election results in Africa.

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<sup>18</sup> As above.

<sup>19</sup> AUPW (n 5 above) 9.

<sup>20</sup> As above.

<sup>21</sup> CM Fombad 'Election management bodies in Africa: Cameroon's "national electoral observatory" in perspective' (2003) 3 *African Human Rights Law Journal* 25.

<sup>22</sup> As above.

<sup>23</sup> AMB Mangu 'Assessing the effectiveness of the APRM and its impact on the promotion of democracy and good political governance' (2007)7 *African Human Rights Law Journal* 354.



## CHAPTER TWO

### DISPUTES OVER THE LEGITIMACY OF ELECTION RESULTS IN AFRICA: CAUSES AND CONSEQUENCES

#### 2.1 Introduction

As argued in the preceding chapter, disputes over election results are not new on the continent. Despite the fact that elections constitute an essential ingredient of democratic governance, in Africa results have mainly been either contested or accepted conditionally.<sup>24</sup> It has been argued that 'the political path in Africa is littered with disputed elections and electoral violence'.<sup>25</sup> As a matter of fact, electoral disputes and their aftermath have been escalating over the past decade.<sup>26</sup> In fact, these disputes have wide range of impacts on the continent.<sup>27</sup> This chapter examines the causes as well as consequences of disputes over the legitimacy of election results in Africa. In doing so, it commences by briefly exploring the rationale and essence of elections and the concept of free and fair elections before embarking on a discussion of the causes and consequences of such disputes.

#### 2.2 The rationale and essence of elections

Elections are an important aspect in any democratic government as it is through it, that people participate in the conduct of public affairs. In other words, the conducts of elections are the means of achieving participatory governance which is an important aspect of democracy. The Universal Declaration of Human Rights (Universal Declaration) provides unequivocally that:

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal

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<sup>24</sup> FK Makoa 'Democratisation, elections and the problem of non-acceptance of election results in Africa' 2 available at [www.elections.org.za/content/WorkArea/DownloadAsset.aspx?id=1942](http://www.elections.org.za/content/WorkArea/DownloadAsset.aspx?id=1942) (accessed 20 August 2011)

<sup>25</sup> Unpublished: J Biegon 'The advent of unholy alliances? coalition governments in the aftermath of disputed elections and electoral violence in Africa; a case study of Kenya' unpublished LLM dissertation, University of Pretoria, 2008 7.

<sup>26</sup> See AG Mariam 'Why do things always fall apart in Africa?' available at <http://www.pambazuka.org/en/Category/features/69854n> (accessed 18 September 2011).

<sup>27</sup> See generally, US Institute of Peace (USIP) 'Trends in electoral violence in Sub-Saharan Africa' 13 *Peace Brief* (2010)

and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The same right is also enshrined in the International Covenant on Civil and Political Rights (ICCPR).<sup>28</sup> The ICCPR stipulates that this right may be exercised 'directly or through freely chosen representatives'.<sup>29</sup> It is through elections that citizens express their preferences about who should govern, and who should be voted out of office, and who should replace who.<sup>30</sup> Thus, any authority that ignores the conduct of elections is not only tramping on the fundamental principle of democratic governance, but also infringes the fundamental human right entrenched in the international instruments.

While it is true that elections themselves do not guarantee democracy, 'they remain one of the key requirements for this system of government'.<sup>31</sup> Elections are considered as the most important symbol of democracy.<sup>32</sup> According to Adejumobi,<sup>33</sup> elections 'constitute an important element in liberal democracy'. They are a practical way of ensuring the orderly process of leadership succession and change, as well as 'an instrument of political authority and legitimation'.<sup>34</sup> Countries holding fair and credible elections regularly are mostly regarded as democratic.<sup>35</sup> Omotola<sup>36</sup> argues that apart from allowing for political competition, participation and legitimacy, elections also permit change of power amicably thereby making it possible for those governing to be held accountable. It is also generally accepted that democratically elected leaders are to a greater extent, 'likely to uphold human rights and serve the basic needs of their people'.<sup>37</sup>

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<sup>28</sup> Art 21 of the ICCPR.

<sup>29</sup> Art 21(a) of the ICCPR.

<sup>30</sup> M Harrop & W Miller *Election and votes- a comparative introduction* (1987) 2, cited in Biegon (n 25 above) 7.

<sup>31</sup> Olivier, J 'The independent electoral commission (IEC): the quest for free and fair elections' in Muthien, Y (ed) *Democracy in South Africa: evaluating the 1999 election* (1999) 21.

<sup>32</sup> See generally P Navia 'Fair play at voting precincts: a comparative of Mexican and Chilean elections' (2000) *Democratisation* 183.

<sup>33</sup> Adejumobi (n 2 above).

<sup>34</sup> As above.

<sup>35</sup> As above.

<sup>36</sup> S Omotola 'Explaining electoral violence in Africa's "new" democracies' (2008) 54 available at <http://www.ajol.info/index.php/ajcr/article/viewFile/63320/51203> (accessed 27 August 2011).

<sup>37</sup> As above.

Generally, it is through elections that government is vested with 'political authority and legitimacy'.<sup>38</sup> However, it is important to note that for elections to be meaningful and achieve their purposes, they must be free and fair.<sup>39</sup>

## 2.3 The concept of free and fair elections

Free and fair elections imply, conducting elections under an open and transparent environment in which all political parties and candidates, can campaign freely without any kind of fear.<sup>40</sup> The importance of free and fair elections in inculcating democratic governance need not be over emphasised. According to Smith,<sup>41</sup> when the principles for free and fair elections are infringed, both political and economic developments are compromised by the political violence that is likely to ensue unless suppressed severely. The following part briefly discusses the meaning of free and fair elections.

### 2.3.1 Free elections

Generally, free elections refer to the people's right to freely choose a particular party or candidate.<sup>42</sup> Elections are said to be free when the people have the right and opportunity to choose their leaders.<sup>43</sup> For elections to be free they must meet certain minimum conditions such as, freedom of assembly and association, freedom of movement, freedom of speech, absence of intimidation and universal suffrage.<sup>44</sup> Free elections require that citizens must be free to express their views without any kind of fear, harassment or intimidation from those in power.<sup>45</sup>

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<sup>38</sup> Biegon (n 25 above) 8

<sup>39</sup> J Elklit & P Svensson 'What makes elections free and fair' (1997)8 *Journal of Democracy* 32.

<sup>40</sup> 'The politics of elections in Africa today' [http://www.informante.web.na/index2.php?option=com\\_content&do\\_pdf=1&id=6710](http://www.informante.web.na/index2.php?option=com_content&do_pdf=1&id=6710) (accessed 14 August 2011).

<sup>41</sup> Smith (n 15 above).

<sup>42</sup> N Steytler, J Murray, P de vos, & M Rewlamira *Free and fair elections* (1994) XXI cited in Unpublished: T Alemu 'The African Charter on Democracy, Elections and Governance: a normative framework for analysing electoral democracy in Africa' unpublished LLM dissertation, University of Pretoria, 2007 3.

<sup>43</sup> Promoting free and fair elections: address by the South African Chief Electoral officer (11 May 2011) 3 available at <http://www.elections.org.za.content/WorkArea/Download/Asset.aspx?id=1828> (accessed 15 August 2011).

<sup>44</sup> As above.

<sup>45</sup> Smith (n 15 above) 22-23.

Freedom of expression is essential because it complements the freedom of association on which political competition and full accountability hinge on.<sup>46</sup>

Freeness of elections also entails freedom to form and join a political party without unreasonable restrictions. It should not be an offence to form and/or join an opposition political party. Smith notes that 'enforcement of political accountability requires electoral choice between competing sets of leaders and policies.'<sup>47</sup> For elections to be free there should also be freedom to participate in the electoral process. This implies that all eligible citizens should be free to register as voters or candidates. It is generally accepted that there might be some restrictions on this aspect, but these restrictions must be rational, based on reasonable grounds such as age and citizenship.

### 2.3.2 Fair elections

Basically fairness of elections refers to an impartial process of voting and counting, administered fairly by an uninterested EMB.<sup>48</sup> For elections to be fair a series of equally difficult principles and procedures are required.<sup>49</sup> Smith<sup>50</sup> argues that EMBs must be professional, non partisan and free from a government manipulation. Constitutional rules to protect the independence of EMBs must be entrenched to prevent the incumbent from changing the management of elections arbitrarily.<sup>51</sup>

The process of vote counting is also essential aspect of fairness of elections. The process must be transparent and all competing candidates must be represented to avoid real or perceived fabrication of results in favour of the incumbent. This is also very important in ensuring the legitimacy of election results which in turn, will ensure that losing candidates accept defeat as all contestants will be aware of what transpired in the entire process of vote counting.

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<sup>46</sup> As above.

<sup>47</sup> As above.

<sup>48</sup> M Harrop & W Miller *Election and votes: a comparative introduction* (1987) 2, cited in Biegon (n 25 above)7.

<sup>49</sup> Smith (n 15 above) 24.

<sup>50</sup> As above.

<sup>51</sup> Smith (n 15 above) 25.

As argued in the preceding chapter, elections are a process and not an event. Thus, for elections to be free and fair, the whole process leading up to and after elections must be free and fair. The electoral process must be credible, with a high degree of adherence to the electoral laws, transparency, accountability, competition and participation'.<sup>52</sup> Fairness of elections extends to the pre-election period, polling day, votes counting, declaration of results and post election period.<sup>53</sup>

## **2. 4 Causes of disputes over the legitimacy of election results in Africa**

In most cases electoral disputes are not spontaneous or random.<sup>54</sup> More often than not, leaders of political parties 'premeditate protesting election results, often in response to perceived or actual electoral malfeasance that other parties and/or EMBs perpetrate.'<sup>55</sup> For the past decade, disputes over the legitimacy of election results in Africa have been mounting.<sup>56</sup> This part examines causes underlying such disputes in Africa.

### **2.4.1 Electoral malpractices**

According to Birch,<sup>57</sup> electoral malpractices can be examined from three definitional approaches namely: legal, perceptual (best practice) and normative. She argues that from the legal perspective it implies an infringement of electoral laws or regulations governing elections.<sup>58</sup> The perceptual approach is more of a sociological, based on a common perception of what is regarded as a violation of norms of a given culture and the normative approach demands defining electoral malpractice against international norms recognised as the best practice by the

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<sup>52</sup> Omotola (n 36 above) 55.

<sup>53</sup> Zimbabwe Human Rights NGO forum (NGO Forum) 'Can the election in Zimbabwe be free and fair in the current environment? (March 2008) 3 available at <http://www.kubatana.net/docs/hr/zhrf> elections report 080320.pdf (accessed 29 August 2011).

<sup>54</sup> B Hoffman & E Smith 'Preventing post election violence in Africa' (2010)1 available at [http://www.kubatana.net/docs/hr/zhrf\\_elections\\_report\\_080320.pdf](http://www.kubatana.net/docs/hr/zhrf_elections_report_080320.pdf) (accessed 20 August 2011).

<sup>55</sup> As above.

<sup>56</sup> Mariam (n 26 above)

<sup>57</sup> S Birch 'Conceptualizing Electoral Malpractice' 5 available at [www.essex.ac.uk/.../electoralmalpractice/1](http://www.essex.ac.uk/.../electoralmalpractice/1) (accessed 18 August 2011).

<sup>58</sup> As above.

international community.<sup>59</sup> She argues that in the normative approach, the Universal Declaration and the ICCPR provides the threshold for international law in this sphere.<sup>60</sup>

There are many forms of electoral malpractices including, rigging, falsification of results and inflating the electoral rolls with names of non eligible people. For example, it has been argued that in some countries not only do children's names contained on the electoral rolls, but it would also appear that even the deceased cast votes from graves.<sup>61</sup> This study argues that most of the allegations on electoral malpractices occur in Africa and it is one of the main grounds for the rejection of election results in many African countries. Elections malpractices can take place before, during or after elections.

### **(i) Pre-election malpractices**

Pre-election malpractice include, intimidation of voters and/or candidates, refusing to register eligible people and rigging. Sometimes pre-election malpractices lead to parties declaring openly that they will not accept results in case they lose the elections. For instance, during the 2010 general elections in Tanzania, the opposition party presidential candidate Dr. WP Slaa of *Chama Cha Demokrasia na Maendeleo (Chadema)* alleged that the ruling party *Chama cha Mapinduzi (CCM)* rigged the presidential election.<sup>62</sup> In this regard, he called upon the National Electoral Commission (NEC) to rescind announcing the results and call a fresh polling on the grounds of irregularities before and after the polling day and warned that he would not accept the presidential results.<sup>63</sup>

Pre-election malpractices were also alleged in Zimbabwe during the 2008 elections. These allegations were levelled against the ruling party, the Zimbabwe African National Union-Patriotic Front (ZANU-PF). In this regard, Sachikonye<sup>64</sup> argues that 'the rigging of the presidential run-off election in Zimbabwe did not occur at the vote counting stage, but much earlier.' He argues that

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<sup>59</sup> As above.

<sup>60</sup> As above.

<sup>61</sup> C Daniel 'Election rigging and how to fight it' (2006) 17 *Journal of Democracy* 138.

<sup>62</sup> See 'Slaa alleges vote rigging' *The Citizen* 4 November 2010 available at <http://www.thecitizen.co.tz/component/content/article/37-tanzania-top-news-story/5262-/content/article/37-tanzania-top-news-story/5262-slaa-alleges-vote-rigging.html> (accessed 18 August 2011).

<sup>63</sup> As above.

<sup>64</sup> L Sachikonye '*When a state turns on its citizens: institutionalized violence and political culture* (2011) 58.

violence and terror perpetrated by the ruling party was in itself part of the election rigging process.<sup>65</sup> ZANU-PF was also accused of using intimidating language, especially during the elections campaign period. For instance, it is alleged that President Robert Mugabe declared that his government was ready to go into war rather than ceding power to the opposition party.<sup>66</sup> He was quoted telling his supporters “we fought for this country, and a lot of blood was shed, we are not going to give up our country because of a mere X. How can a ballpoint fight with a gun’?<sup>67</sup>

Elections marred with malpractices cannot only be regarded as unjust, but also their results are likely to be contested. According to the AUPW,<sup>68</sup> when elections are impaired by different forms of malpractices such as multiple registration, deliberate late arrival of voting material, fabrication of results, and unreasonable delay of results declaration, there is a likelihood of electoral disputes to ensue.

## **(ii) Malpractices on polling day**

Some of the electoral malpractices take place on polling day. These include, deliberate delaying of electoral equipment such as ballot papers, late opening of polling centres without any reasonable cause and messing up with names of voters.<sup>69</sup> For instance, during the 2010 elections in Southern Sudan, the opposition party, the Sudan People’s Liberation Movement-Democratic Change (SPLM-DC) wrote a letter to the National Electoral Commission complaining of late opening of polling stations.<sup>70</sup> SPLM-DC also lamented that some voters failed to cast their ballots as a result of their names being messed up, something which made them to move from one station after another until stations were closed.<sup>71</sup> This study argues that these and other kinds of malpractices are mainly engineered by the ruling parties, especially in

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<sup>65</sup> As above.

<sup>66</sup> ‘Robert Mugabe warns Zimbabwe's voters: 'How can a pen fight a gun?' *The Sunday Times* 17 June 2008 available at <http://www.timesonline.co.uk/tol/news/world/africa/article4152337.ece> (accessed 19 August 2011).

<sup>67</sup> As above.

<sup>68</sup> AUPW (n 5 above).

<sup>69</sup> Messing up with names of voters may be done intentionally so as to make them move up and down looking for their names hence discouraging them from casting their ballots.

<sup>70</sup> See letter to NEC 2: irregularities on the first day of polling available at <http://www.splm-dc.org/letter-nec-2-irregularities-first-day-polling> (accessed 19 September 2011).

<sup>71</sup> As above.

areas with high number of opposition supporters so as to discourage them from casting their ballots.

### (iii) **Post-election malpractices**

Post-election malpractices include unreasonable delay in announcing results and falsification of results during vote counting. This study argues that these kinds of malpractices normally occur when there is likelihood that incumbents may lose elections. For instance, it is alleged that delaying in declaring results is one of the techniques employed by President Mugabe to extend his term of office during the 2008 Zimbabwe election.<sup>72</sup> By delaying the announcement of presidential results, Mugabe would remain in power in accordance with the Zimbabwe's Constitution which allows incumbent to stay in power until the new president enters the office thereby giving him opportunity to manipulate results.<sup>73</sup> In this regard, Birch<sup>74</sup> argues that incumbent leaders have 'incentive to manipulate elections to ensure their continued hold on power'. Post-election malpractices generally and unreasonable delay of results in particular, creates higher possibility of questioning legitimacy of such results. No wonder the Movement for Democratic Change (MDC) disputed the results which retained Mugabe in power.

## **2. 5 Consequences of disputed election results**

It is an undeniable fact that disputed election results are not without serious impacts in Africa. Consequences of such disputes are evident in countries which have gone through such experience. Even in those countries where rejection of results did not instigate any violence, still consequences have been felt. The following part examines some of such consequences.

### **2.5.1 Electoral violence**

Electoral violence refers to 'political violence aimed at the electoral process.'<sup>75</sup> Most of the post electoral violence are triggered by disputed results where losing parties question legitimacy of

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<sup>72</sup> D Matyszak Law, *politics and Zimbabwe's unity government* (2010) 50.

<sup>73</sup> As above.

<sup>74</sup> Birch 'Patterns of electoral malpractice' (working paper no 4) 2 available at [www.essex.ac.uk/.../electoral\\_malpractice/4\\_PatternsofElectoralMalpractice](http://www.essex.ac.uk/.../electoral_malpractice/4_PatternsofElectoralMalpractice) (accessed 19 August 2011).

<sup>75</sup> SM Atuobi 'Election-related violence in Africa' 11 available at [se1.isn.ch/serviceengine/Files/ISN/101888.../Chapter+2.pdf](http://se1.isn.ch/serviceengine/Files/ISN/101888.../Chapter+2.pdf) (accessed 22 August 2011).



the results.<sup>76</sup> As a matter of fact, electoral violence is the main consequence following most of the disputed elections. Electoral violence is manifested by acts such as murder, looting, destruction of properties, assault, torture, fighting, and violent street protests.

Electoral violence is normally instigated by those who claim to have lost elections unfairly. However, in most cases governments also respond by violent means claiming to crack down violence, to maintain order and security. Electoral violence has serious consequences in Africa including loss of lives and property. For instance, the report of the UN on post election violence in Kenya indicates that the violence led to the killing of more than 1 200 people, leaving several hundreds of thousands in displacement and a massive destruction of property.<sup>77</sup> In Nigeria, it is alleged that post electoral violence of 2011 led to the death of more than 800 people.<sup>78</sup>

## **2.5. 2 Loss of confidence in EMBs**

This study argues that in most cases, electoral malpractices are engineered by impartial and unprofessional EMBs. It further argues that most of EMBs in Africa are neither impartial nor independent. This is mainly due to the fact that in most cases, members of these bodies are appointed by the incumbent president and do not include members from the opposition parties something which makes it difficult for them to operate independently. For EMBs to be impartial and independent, their appointment and composition must also be regulated on impartial basis.<sup>79</sup> Absence of independent EMBs can seriously lower levels of trust from the public. Unless EMBs are independent and impartial, their integrity will always be questioned.<sup>80</sup> It has been argued that creation of 'independent and strong' EMBs can prevent post election violence in Africa.<sup>81</sup>

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<sup>76</sup> AUPW (n 5 above) 22.

<sup>77</sup> UN Report from the OHCHR fact-finding mission to Kenya (2008) 4.

<sup>78</sup> n 8 above.

<sup>79</sup> M Ott *et al Malawi's second democratic elections: process, problems and prospects* (2000) 29

<sup>80</sup> As above.

<sup>81</sup> A Hammerstad *African commitments to democracy in theory & practice : a review of eight NEPAD countries* (2004) 27-28

### **2.5. 3 Loss of confidence in the electoral system**

There is evidence to suggest that when elections are marred by disputes, some people lose confidence on the electoral process. This is due to the fact that some people believe that no matter what happens, some candidates are destined to win. This discourages them from voting leading to a serious drop of number of voters as evidenced in some countries recently. For instance, Sachikonye<sup>82</sup> argues that in Zimbabwe most people have very little confidence in the electoral process. He further notes that most of them seem 'disillusioned with the electoral system' and this has made a number of voters to decrease steadily over the years.<sup>83</sup> According to him, the number of voters in the country has almost remained the same between 1980 and 2008.<sup>84</sup> In Tanzania, it has been reported that there has been a drastic fall of a number of voters since 2005. For instances, while in 2005 elections, 72% of all registered voters turned out to vote, in 2010 elections, only 42.8% of registered voters turned out.<sup>85</sup> This study argues that this has a far reaching impact, because countries end up having leaders who lack popular support and this can sometimes lead to their legitimacy being questioned.

### **2.6 Conclusion**

Although Africa has been experiencing disputes over election results for so long, the situation has notably been exasperating in the past decade. Every part of the continent has been afflicted with electoral woes. This situation does not only hamper democratisation on the continent, but also peace, security and stability. While it is true that elections by themselves cannot avail democracy, they still remain an important recipe towards democratic governance. However, unless elections are conducted freely and fairly, they cannot yield the desired outcomes. As this chapter has revealed, elections are not an event but a process, thus for them to be credible a series of difficult principles need to be set in place. Towards this end, establishment of impartial and credible EMBs is an indispensable pre-requisite because, it will not only create small/no room for election malpractices, but also will restore people's confidence in the process.

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<sup>82</sup> Sachikonye (n 64 above) 82.

<sup>83</sup> As above.

<sup>84</sup> As above.

<sup>85</sup> See 'Africa election database, election in Tanzania' <http://africanelections.tripod.com/tz.html> (accessed 28 August 2011).

## CHAPTER THREE

### RESPONSE OF THE RECs IN THE DISPUTED ELECTION RESULTS: A CASE STUDY OF ZIMBABWE AND IVORY COAST

#### 3.1 Introduction

The foregoing chapter has revealed that there are plenty of examples of disputed election results on the continent. In most cases, where such disputes have ensued, the RECs have reacted in one way or another. This chapter examines the reactions by SADC and ECOWAS in cases of disputed election results. For want of space, only two examples are examined namely, Zimbabwe and Ivory Coast representing SADC and ECOWAS respectively. The chapter commences with a brief background of each disputed elections, before an analysis of the reactions of the relevant RECs.

#### 3.2 SADC and the 2008 Zimbabwe elections

This part examines SADC's response in the 2008 Zimbabwe disputed election. It commences by an overview of the disputed election before embarking on a discussion of SADC's response.

##### 3.2.1 A brief overview of the disputed elections

It is alleged that the Zimbabwean elections of 29 March 2008, 'constituted an extraordinary electoral process which was disputed from its inception.'<sup>86</sup> By the time the elections day was announced by President Mugabe, SADC-sponsored negotiations led by the former South African President Thabo Mbeki were still in progress.<sup>87</sup> The MDC was still pressing Mbeki to persuade the ZANU-PF government to first adopt constitutional amendments before announcing the date of elections.<sup>88</sup> Therefore, by the time the elections' date was announced, the MDC was still hoping for constitutional amendments prior to the holding of elections.<sup>89</sup> No wonder, the MDC described the decision as 'an act of madness and arrogance'.<sup>90</sup> However, notwithstanding the MDC's disappointment at President Mugabe's announcement of date for the elections amid

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<sup>86</sup> EISA election observer mission report Zimbabwe (2008) 27 available at <http://www.eisa.org.za/PDF/zimomr08.pdf> (accessed 22 August 2011).

<sup>87</sup> As above.

<sup>88</sup> Mail & Guardian online 'Zim rules out new Constitution before election ' available at <http://mg.co.za/article/2008-01-28-zim-rules-out-new-constitution-before-election> (accessed 22 August 2011).

<sup>89</sup> As above.

<sup>90</sup> As above.

negotiations for a new Constitution, they effectively participated in the elections. A problem however, ensued when the results were delayed by Zimbabwe Electoral Commission (ZEC). The delay in announcing the results attracted a lot of pressure and criticism, both locally and internationally including from the UN and the AU, appealing for the release of the results.<sup>91</sup> The MDC decided to file an application to the High Court in Harare to compel ZEC to announce the results, but lost the application on the ground that there were contested matters that must be resolved before the release of the results.<sup>92</sup>

Finally, on 2 May 2008, ZEC declared the results but without declaring a winner stating that no one reached the threshold in accordance with the Zimbabwe Electoral Act.<sup>93</sup> This being the case, a runoff between the candidates who obtained the most votes, the incumbent Robert Mugabe from ZANU-PF and Mr. Morgan Tsvangirai from MDC, was declared.<sup>94</sup> The MDC vehemently objected to the results on the ground that they have been fabricated as their projections indicated that their candidate won the election.<sup>95</sup> However, MDC's protests fell on deaf ears, as ZEC proceeded to fix the runoff for 27 June 2008. Initially the MDC did not boycott the runoff election until 23 June 2008, when Mr. Tsvangirai wrote a letter to ZEC's Chairman withdrawing from the election on the ground that, the election to be held was a nullity as the situation that prevailed in the country made it impossible for a proper election to be held.<sup>96</sup> In his letter of withdrawal, Mr. Tsvangirai enumerated many irregularities and flaws which he believed vitiated free and fair elections. These included non-access to media, intimidation, threat of war and violence.<sup>97</sup>

However, ZEC disregarded Tsvangira's withdrawal on the ground that it has no legal force as it has been filed out of time and insisted that, the election would take place as scheduled and his name would remain on the ballot paper.<sup>98</sup> As a matter of fact, the run-off election took place

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<sup>91</sup> EISA report (n 86 above) 59.

<sup>92</sup> As above 60-61.

<sup>93</sup> According to sec 110 of the Electoral Act, for a candidate to win a presidential seat he/she has to obtain the majority of the poll i.e. at least 50% + 1 vote, otherwise a second election has to be held within 21 days.

<sup>94</sup> See EISA 'Zimbabwe: 2008 presidential election results-first round available at <http://www.eisa.org.za.WEP/zim2008results5.htm>

<sup>95</sup> As above.

<sup>96</sup> See MDC vote pull-out letter to ZEC by Morgan Tsvangirai available at <http://www.zimonline.co.za/Article.aspx?Article=3350> (accessed 22 August 2011).

<sup>97</sup> As above.

<sup>98</sup> EISA 'Zimbabwe's 2008 presidential election results-second round available at <http://www.eisa.org.za.WEP>

on 27 June 2008 as scheduled, notwithstanding Tsvangira's withdrawal. On 29 June 2008, results were formally declared and unsurprisingly the incumbent Mugabe won by 90.22%.<sup>99</sup>

Contrary to the March elections which were generally accepted as reasonably free, the runoff election was described as 'inexcusably flawed'.<sup>100</sup> It was discredited by the whole international community including SADC, AU, and the UN.<sup>101</sup> For instance, the preliminary report issued by the SADC Election Observer Mission (SEOM) concluded that, the period prior to the election was characterised by politically motivated violence, intimidation and displacements, acts which infringed the credibility of the whole electoral process.<sup>102</sup> The SEOM further observed that the election fell short of the SADC Principles and Guidelines Governing Democratic Elections (SPGGDE) and that it did not represent the will of the Zimbabwean people.<sup>103</sup>

### 3.2.2 The reaction of SADC

It has been argued that before the year 2000, Zimbabwe's elections did not attract 'intensive international concern' mainly due to the fact that, there was no serious opposition to ZANU-PF.<sup>104</sup> Problems however, brewed from the year 2000 when for the first time ZANU-PF encountered a serious opposition from MDC.<sup>105</sup> Since then, the elections of the year 2000 and all subsequent elections in the country became a subject of scrutiny at both local and international levels.<sup>106</sup> However, SADC has been silent and for many years it has been criticised for its unwillingness to openly condemn ZANU-PF's government on human rights issues generally and the electoral process in particular.<sup>107</sup> It has been contended that SADC has been restraining from issuing public and direct criticism against Mugabe and the ZANU-PF

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/zim2008results6.htm

<sup>99</sup> As above.

<sup>100</sup> S Badza 'Zimbabwe's 2008 harmonized elections, regional and international reaction (2008) 149 available at [www.kas.de/upload/dokumente//2010/05/Defying\\_9.pdf](http://www.kas.de/upload/dokumente//2010/05/Defying_9.pdf) (accessed 22 August 2011).

<sup>101</sup> Badza (n 100 above) 152.

<sup>102</sup> SEOM preliminary statement on the Zimbabwe Presidential runoff and House of National Assembly by-elections Available at [www.sadcpf.org/...](http://www.sadcpf.org/)(accessed 23 August 2011).

<sup>103</sup> As above

<sup>104</sup> Matyszak (n 72 above) ix

<sup>105</sup> As above.

<sup>106</sup> As above.

<sup>107</sup> G Gawthra 'The role of SADC in managing political crisis and conflict: the cases of Madagascar and Zimbabwe (2010) 29 available at [www.fes.de/cgi-bin/gbv.cgi?id=07874&ty=pdf](http://www.fes.de/cgi-bin/gbv.cgi?id=07874&ty=pdf) (accessed 23 August 2011).

government and instead, it has preferred 'quiet diplomacy'.<sup>108</sup> Perhaps SADC opted for this approach believing that it may achieve 'some limited changes that fell short of the regime change'.<sup>109</sup> It has been argued that, the regional body has been congratulating the government of Zimbabwe and all Zimbabweans after each election.<sup>110</sup> For instance, in a communiqué issued by SADC following the extraordinary SADC summit held on 28-29 March 2007 in Dar es Salaam, Tanzania, SADC recalled that the Zimbabwe's election of 2002 was democratic, free and fair and the summit reaffirmed its solidarity with the government and the people of Zimbabwe.<sup>111</sup> This was done despite the fact that the opposition lamented that the election was unfair and fraudulent.

It is alleged that SADC has been supporting President Mugabe's proposition that the problem in the country, was basically a land redistribution issue and from time to time, it has issued statements to commend the government for redistributing the land successfully.<sup>112</sup>

However, following the deteriorating political and humanitarian situation in Zimbabwe, on 28 and 29 March 2007, SADC convened an extra ordinary summit of heads of state and government to discuss among other things, the situation in Zimbabwe.<sup>113</sup> It has been suggested that the summit was prompted by an event of 11 March 2007, when the police brutally assaulted members of the opposition including MDC leader Morgan Tsvangirai.<sup>114</sup> The police were preventing a coalition of civic groups and churches (save Zimbabwe campaign) from holding a prayer meeting in Harare residential area.<sup>115</sup> It was during this extraordinary summit that SADC for the first time, adopted a declaration to *inter alia* mandate Mr. Thabo Mbeki the former President of South Africa, to facilitate dialogue between the MDC and ZANU-PF.<sup>116</sup> The

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<sup>108</sup> Badza (n 100 above) 155.

<sup>109</sup> As above.

<sup>110</sup> Gawthra (n 107 above).

<sup>111</sup> See Communiqué 2007 Extra-Ordinary SADC Summit of Heads of State and Government, 28th - 29th March 2007, Dar-es-Salaam available at <http://www.dfa.gov.za/docs/2007/sadc0330.htm> (accessed 23 Aug 2011).

<sup>112</sup> As above.

<sup>113</sup> API 'SADC countries convene extra ordinary summit in Tanzania' available at <http://africanpress.worldpress.com/2007/03/30/sadc-countries-convene-extraordinary-summit-in-tanzania/> (accessed 21 September 2011).

<sup>114</sup> EV Masunungure 'Zimbabwe's power sharing agreement (2009) 149 available at [www.american.edu/sis/.../upload/Paper-3-Political-Inclusion\\_Zimbabwe.pdf](http://www.american.edu/sis/.../upload/Paper-3-Political-Inclusion_Zimbabwe.pdf) (accessed 24 August 2011).

<sup>115</sup> As above.

<sup>116</sup> As above.

appointment of Mbeki as a mediator, was not well received by the MDC on the ground that he was partial and pro Mugabe and ZANU-PF.<sup>117</sup>

As for the year 2008 contested election, SADC remained silent until the matter was discussed by the AU at its ordinary session in Sharm El-Sheikh in Egypt from 30 June - 1 July 2008, in which the AU decided that mediation of the crisis, be vested into SADC.<sup>118</sup> It is on this ground, it has been argued, that SADC's role in the 2008 Zimbabwe disputed election, emanated from the AU.<sup>119</sup>

Following the AU's call on SADC to deal with the crisis in Zimbabwe, at its ordinary summit held in South Africa from 16-17 August 2008, SADC convened an extra ordinary summit of the Organ on Politics, Defence and Security Cooperation to discuss the issue.<sup>120</sup> The summit *inter alia* recalled the Dar es Salaam and Sharm El-Sheikh Resolutions which encouraged parties to form an all inclusive government (IG) and encouraged the parties to finalise negotiation urgently so as to restore political stability in the country and reiterated its commitment to support implementation of the agreement that would be reached.<sup>121</sup> The Summit also mandated Mr. Mbeki to facilitate agreement between the parties. Since Mbeki had already been appointed as a mediator in 2007, this appointment was regarded as a continuation of his role.<sup>122</sup>

Apart from appointing Thabo Mbeki as a mediator of the crisis, SADC did not issue any public criticism against the 2008 election which was marred by a lot of irregularities. SADC abstained not only from stopping the recognition of Mugabe as the lawful head of Zimbabwe, but also from preventing him from attending the SADC summit held in Johannesburg, South Africa on 17 August 2008 and other subsequent summits.<sup>123</sup> This is surprising especially bearing in mind that vigorous criticism was levelled against the runoff election by the international community including SEOM which pointed out clearly that the election, did not comply with the SPGGDE.<sup>124</sup> This situation has been interpreted as support for the ZANU-PF

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<sup>117</sup> Gawthra (n 107 above) 30.

<sup>118</sup> As above 29-30.

<sup>119</sup> As above.

<sup>120</sup> Communiqué available at <http://www.sadc.int/index/browse/page> (accessed 25 August 2011).

<sup>121</sup> As above

<sup>122</sup> Matyszak (n 72 above) 66.

<sup>123</sup> Badza (n 100 above) 154-155.

<sup>124</sup> SEOM preliminary statement (n 102) above.

government.<sup>125</sup> It has been argued that in the early stages of the crisis, SADC was seen as 'acting as if the Zimbabwean liberation struggle was still under way, solidarity was the key and public statements against Zimbabwe were not made'.<sup>126</sup> Thus implicitly, SADC endorsed the Zimbabwe's runoff election and its outcome as legitimate.<sup>127</sup> It has been contended that the manner SADC has dealt with the political crisis in Zimbabwe, has led to a 'growing pessimism' on how the regional body may tackle similar crises in future.<sup>128</sup>

However, it is worth noting that the position taken by SADC in Zimbabwe's crisis does not represent the position of all its members in the region, as some of them openly criticised Mugabe's regime. For example, Botswana openly criticised Mugabe and declined to recognise him as the legitimate leader of Zimbabwe following the 2008 disputed election.<sup>129</sup> It is also argued that other countries like Tanzania and Zambia are willing to support the position taken by the opposition and speak out against Mugabe.<sup>130</sup> It is also important to note that the position taken by SADC has also been shifting slightly, especially following the appointment of President Jacob Zuma as Mbeki's successor in the negotiation role.<sup>131</sup>

However, despite all the criticism levelled against SADC about the manner it has been dealing with the dispute in Zimbabwe, it should be noted that SADC's involvement in Zimbabwe's crisis was not in vain as it was through its sponsored mediation led by Thabo Mbeki, that the Global Political Agreement (GPA) which resulted in the formation of the GI was signed on 15 September 2008.<sup>132</sup> Since then, Zimbabwe has always been featuring in all agenda of SADC meetings. For example, in March 2011, the Summit of the Organ Troika on Politics, Defence, and Security Co-operation, was held in Livingstone, Zambia to *inter alia* consider security and political situation on Zimbabwe.<sup>133</sup> The Summit recalled its previous

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<sup>125</sup> Gawthra (n 107 above).

<sup>126</sup> As above.

<sup>127</sup> As above.

<sup>128</sup> Badza (n 100) above 158-159.

<sup>129</sup> See Botswana refuses to recognise Mugabe government available at [http://www.mofaic.gov.bw/index.php?option=com\\_content&task=view&id=316&Itemid=97](http://www.mofaic.gov.bw/index.php?option=com_content&task=view&id=316&Itemid=97) (accessed 2 September 2011).  
September 2011)

<sup>130</sup> As above.

<sup>131</sup> As above.

<sup>132</sup> S Eppel & B Raftopoulos 'Political crisis, mediation and the prospects for transitional justice in Zimbabwe (2008) 1 Available at [http://www.csls.ox.ac.uk/documents/EppelandRaftopolous\\_Zim\\_Final.pdf](http://www.csls.ox.ac.uk/documents/EppelandRaftopolous_Zim_Final.pdf) (accessed 2 September 2011).

<sup>133</sup> See the Communiqué of the Summit available on <http://www.sadc.int/index/browse/page/858>



decisions on the implementation of the GPA and noted its disappointments at the delay in the implementation of the agreement and expressed its intolerance in such delay.<sup>134</sup> In this regard, the Summit adopted a resolution to *inter alia*, call for an immediate end of all forms of malpractice that hampers effective implementation of the GPA such as political violence, intimidation and hate speech.<sup>135</sup> Most importantly, the Summit resolved that SADC should assist Zimbabwe in formulating guidelines that will assist in holding credible elections.<sup>136</sup>

The Political situation in Zimbabwe also came under review during an extraordinary Summit of heads of state and government held on June 2011.<sup>137</sup> The Summit among other things insisted on the need for all parties to implement the GPA and mandated the Organ Troika to continue assisting parties in implementing the agreement.<sup>138</sup>

It has been suggested that Mugabe has not been happy with SADC's pressure on him and his party and during the June extraordinary Summit in Sandton, South Africa, he argued for a nullification of the Resolution reached during the March 2011 Summit, on the ground that procedures were not followed.<sup>139</sup> However, the Summit did not accept his arguments and it has been reported that his position was vehemently criticised by South African President Jacob Zuma, who is also the current mediator between the ZANU-PF and the MDC.<sup>140</sup> It has been contended that the position taken by Zuma indicates the regional's growing impatience with Mugabe.<sup>141</sup> It has also been argued that the Sandton Summit marks 'a historic moment for the MDC as they have always been defeated by ZANU-PF on previous Summits.<sup>142</sup>

Zimbabwe also came under review on the 31<sup>st</sup> Summit of the Heads of State and Government held on 18 August 2011. The Summit reiterated its position on the implementation of the GPA as reached in the previous Summits, and urged parties to remain committed to the

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(accessed 4 October 2011).

<sup>134</sup> As above.

<sup>135</sup> As above.

<sup>136</sup> As above.

<sup>137</sup> See Sandton SADC Summit communiqué available at <http://www.newzimbabwe.com/news-5333-Sandton%20SADC%20summit%20communique/news.aspx> (accessed 4 October 2011).

<sup>138</sup> As above.

<sup>139</sup> SADC Angers Mugabe As It Intensify GPA Monitoring available at <http://www.thezimbabwean.co.uk/news/40368/sadc-angers-mugabe-as-it-intensify-gpa-monitoring.html> (accessed 4 October 2011).

<sup>140</sup> As above.

<sup>141</sup> As above.

<sup>142</sup> As above.

agreement and resolve outstanding issues.<sup>143</sup> It is worth noting that SADC has remained seised with Zimbabwe's crisis since 2007, and up to now the mediation is still in progress under the facilitation of Jacob Zuma.

Thus, in spite of all criticism mounted against SADC on its soft approach against Mugabe and ZANU-PF, it is important to note that its position on Zimbabwe has been shifting with time and this is a positive development which is commendable for this regional body.

### **3.3 ECOWAS and the disputed election in Ivory Coast**

Having examined the 2008 Zimbabwe disputed election and the reaction by SADC, this part provides an analysis of the 2010 Ivory Coast disputed election and the response by ECOWAS.

#### **3.3.1 Overview of the disputed election results**

In December 2010, the world was engrossed by Ivory Coast following a contested election that triggered violence between followers of the then incumbent president Laurent Gbagbo and Allassane Quattara the opposition leader. Basically, the dispute was sparked by the election results declared by the Independent Electoral Commission (IEC) which unseated Gbagbo by declaring Quattara the winner.<sup>144</sup> Gbagbo vehemently contested the legitimacy of results on the ground of malpractices.<sup>145</sup> This was the second round of election following the first one that took place in October which had failed to produce a winner, as neither of the contestants obtained at least 50%, the minimum threshold.<sup>146</sup>

In the second round, Quattara was declared the winner by obtaining 54% of the votes.<sup>147</sup> The incumbent Gbagbo refused to concede defeat and relinquish power arguing that in some

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<sup>143</sup> See the Communiqué of the Summit available at <http://www.sadc.int/news/communique-of-the-31st-sadc-heads-of-state-and-government-summit/> (accessed 5 October 2011).

<sup>144</sup> See VOA Africa 'Electoral Commission Says Opposition Candidate Wins Ivory Coast Election' available at <http://www.voanews.com/english/news/Ouattara-Named-Winner-of-Ivorian-Presidential-Vote-111203414.html> (accessed 30 August 2011).

<sup>145</sup> As above.

<sup>146</sup> L Arnim 'Cote D'Ivoire's elusive quest for peace: IBIS discussion paper no. 4 in the discussion series: patterns of conflict resolution (2010) 7 available at [http://www.operationspaix.net/IMG/pdf/IBIS\\_Coted\\_IvoireElusiveQuestForPeace\\_2010-12-01\\_.pdf](http://www.operationspaix.net/IMG/pdf/IBIS_Coted_IvoireElusiveQuestForPeace_2010-12-01_.pdf) (accessed 30 August 2011).

<sup>147</sup> See 'Ivory Coast election dispute raises questions over reconciliation' available at <http://www.gurdian.co.uk/co>

places in the Northern part of the country which is Quattara's stronghold, the election was marred by violence and intimidation from Quattara's supporters.<sup>148</sup> The incumbent in turn, petitioned to the Constitutional Council (CC) for invalidation of some votes in some constituencies in the Northern part of the country on the ground of malpractices.<sup>149</sup> The CC agreed with his allegations and invalidated some votes for Quattara in seven regions in the North and declared Gbagbo the winner by 51% against Quattara's 48%.<sup>150</sup>

It is alleged that while the IEC was purportedly dominated by Quattara's supporters, the CC was dominated by Gbagbo's supporters.<sup>151</sup> The international community recognised the results of the IEC and indorsed Quattara as the legitimate president of Ivory Coast. The United States (US) president Barack Obama, for example, congratulated Quattara noting that the US has confirmed the results by the IEC and has attested to its credibility.<sup>152</sup> Apart from the US, the UN, AU and ECOWAS also recognised Quattara and urged Gbagbo to relinquish power urgently.<sup>153</sup> As a matter of fact, Gbagbo's claim that he was the legitimate winner of the election was vigorously criticised not only by the opposition, but also by the whole international community.

To facilitate peaceful transition of power and avoid bloodshed, the AU appointed the Kenyan Prime Minister Mr. Raila Odinga to meet Gbagbo and persuade him to step down, but Odinga's visit to Ivory Coast in early January 2011 was fruitless.<sup>154</sup> The US President Mr. Barack Obama also tried to persuade Gbagbo to step down by promising him US support if he accepted defeat and cede power.<sup>155</sup> However, despite all these persuasions, he chose not to take heed insisting

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mmentisfree/2010/dec/12/ivory-coast-election-dispute-reconciliation (accessed 25 August 2011).

<sup>148</sup> Reuters 'Ivory Coast's Gbagbo rejects results in 3 regions' available at <http://www.reuters.com/article/2010> (accessed 25 August 2011).

<sup>149</sup> D Zounmenou & IK Souaré 'What way out of the post-election imbroglio in Cote d'Ivoire?' available at <http://www.the-african.org/blog/?p=384> (accessed 30 August 2011).

<sup>150</sup> CNN World 'Ivory Coast invalidates earlier results; declares win for incumbent' available at [http://articles.cnn.com/2010-12-03/world/ivory.coast.election\\_1\\_ivory-coast-laurent-gbagbo-prime-minister-alassane-ouattara?\\_s=PM:WORLD](http://articles.cnn.com/2010-12-03/world/ivory.coast.election_1_ivory-coast-laurent-gbagbo-prime-minister-alassane-ouattara?_s=PM:WORLD) (accessed 30 August 2011).

<sup>151</sup> O Taiwo 'Resolving the crisis in Ivory Coast: the role of regional organizations' available at [http://www.brookings.edu/opinions/2011/0127\\_ivory\\_coast\\_taiwo.aspx](http://www.brookings.edu/opinions/2011/0127_ivory_coast_taiwo.aspx) (accessed 26 August 2011).

<sup>152</sup> As above.

<sup>153</sup> ECOWAS, African, UN, USA leaders uphold Quattara, reject incumbent Gbagbo as Ivory Coast's duly elected President available at <http://www.usafricaonline.com/2010/12/08/ecowas-african-leaders-ivory-coast-crises/> (accessed 26 August 2011).

<sup>154</sup> As above.

<sup>155</sup> Obama joins African leaders in pressing Gbagbo to step aside in Ivory Coast ' available at <http://www.guardia>

that he was the legitimate winner of the election. Consequently the country was thrown into a 'political deadlock' as both candidates were crowned as heads after swearing in and each proceeded to appoint his cabinet.<sup>156</sup> The dispute escalated and the country was divided in two parties, the Southern part largely controlled by Gbagbo with the support of the army, and the Northern party largely under the control of Quattara backed by rebels.<sup>157</sup> The clashes went on for several months resulting not only in loss of hundreds of people's lives but also to massive displacement of people and destruction of property.<sup>158</sup>

### 3.3.2 The reaction of Ecowas

Unlike SADC's reaction in the Zimbabwe's crisis, ECOWAS took a hard line against the situation in Ivory Coast. Immediately after the dispute over the results, ECOWAS convened an extraordinary summit of the Authority of Heads of State and Governments (the Authority) in Abuja, Nigeria on 7 December 2010, to review the political situation in Ivory Coast. In the final communiqué issued after the deliberations on the matter, the authority *inter alia* reaffirmed its commitment to the PDGG and issued a stern condemnation against the attempt to suppress the will of the Ivorian people as expressed on 28 November 2010.<sup>159</sup> The Authority also endorsed the results declared by the IEC that gave victory to the opposition leader Quattara against the incumbent Gbagbo, hence officially recognising him as the president of Ivory Coast.<sup>160</sup> The Authority further urged the incumbent to respect the results declared by the IEC and relinquish power to the winning candidate in the best interest of his people.<sup>161</sup> It also imposed sanctions on Ivory Coast and suspended its membership to all ECOWAS decision making bodies in accordance with article 45 of the PDGG.

However, Gbagbo still chose to defy ECOWAS's call and clung onto power. As a result, on 24 December 2010, ECOWAS convened a second extraordinary summit of the Authority, to

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n.co.uk/global-development2010/dec/08/ivory-coast-elections-obama-letter accessed 25 August 2011.

<sup>156</sup> See AllAfrica.com 'Ban again calls on Gbagbo to step down to avoid further turmoil' available at allAfrica.com/stories/201101280984.html (accessed 29 August 2011).

<sup>157</sup> Reuters (n 148 above).

<sup>158</sup> T Ogwang 'The root causes of the conflict in Ivory Coast' Africa Portal (backgrounder no 5) (2001) 7 available at <http://www.africaportal.org/http/sites/default/files/Root%20Causes%20of%20Ivorian%20Conflict.pdf> (accessed 30 August 2011).

<sup>159</sup> See final communiqué on the extraordinary session of the authority of heads of state and government on cote d'Ivoire available at [http://www.isria.com/free/8\\_December\\_2010\\_x1.php](http://www.isria.com/free/8_December_2010_x1.php) (accessed 26 August 2010).

<sup>160</sup> As above.

<sup>161</sup> As above.

review developments in the Ivorian Crisis.<sup>162</sup> Basically the summit was seeking a means to force the incumbent out of office, having refused to relinquish power voluntarily.<sup>163</sup> However, after deliberations, the Authority decided to grant a last chance to Mr. Gbagbo to adhere to the call before resorting to legitimate military intervention.<sup>164</sup> In this regard, a delegation<sup>165</sup> of three heads of states was sent to Ivory Coast to persuade Gbagbo to relinquish power and offer him asylum if he choose to adhere to the call. The Authority also restated its position of 7 December in its first extraordinary meeting especially the recognition of Mr. Quattara as the lawful president of Ivory Coast, the position which it noted was not subject to negotiation.<sup>166</sup> The Authority once again demanded that Gbagbo peacefully relinquish power in recognition of the will of the Ivorian people, as expressed in the election.<sup>167</sup>

It is also worth noting that the Authority in its second extra ordinary session went further and warned the incumbent that unless he adhered to the immutable demand of ECOWAS and peacefully ceded power it would invoke other measures including legitimate military intervention to force him out of office.<sup>168</sup> In this regard, the Authority directed the ECOWAS Commission's President to immediately convene a meeting of chiefs of defence staff to plan future action in case the incumbent still defied its call.<sup>169</sup>

The crisis in Ivory Coast again came under review during the 39<sup>th</sup> ordinary summit of the Authority held on 23-24 March 2011 in Abuja Nigeria.<sup>170</sup> In the final communiqué issued after

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<sup>162</sup> See ECOWAS extra-ordinary summit on Cote d'Ivoire opens Abuja, Nigeria available at <http://www.panapress.com/ECOWAS-extra-ordinary-summit-on-Cote-d-ivoire-opens--12-748295-100-lang2index.html>(accessed 26 August 2011).

<sup>162</sup> See Reuters 'West African bloc threatens force in Ivorian crisis' available at <http://www.reuters.com/article/2010/12/24/us-ivorycoast-idUSTRE6BL1LF20101224> (accessed 26 August 2011)

<sup>163</sup> ECOWAS Communiqué news item' available at <http://www.cocorioko.net/?p=6065> (accessed 26 August 2010)

<sup>164</sup> As above.

<sup>165</sup> The delegation was constituted by the president of Sierra Leone, Burkina Faso and Benin see [http://www.africanews.com/site/list\\_message/32535?data%5Bsource%5D=rss](http://www.africanews.com/site/list_message/32535?data%5Bsource%5D=rss) (accessed 30 August 2011).

<sup>166</sup> See 'Extra ordinary session of the authority of heads of state and government on Cote D'Ivoire final communiqué available at [http://www.ecowas.int/publications/en/communique\\_final/session\\_extra/Communique\\_Final\\_CI\\_election.pdf](http://www.ecowas.int/publications/en/communique_final/session_extra/Communique_Final_CI_election.pdf) (accessed 29 August 2011).

<sup>167</sup> As above

<sup>168</sup> As above

<sup>169</sup> As above

<sup>170</sup> See ECOWAS summit reviews situation in Ivory Cote D'Ivoire available at <http://www.afriqueavenir.org/en/>

the session, the Authority expressed its deep concern over the deteriorating security and humanitarian situation in Ivory Coast, terming it a major threat to peace and security in the region, and decided to adopt urgent measures to preserve lives and transfer power to the elected candidate.<sup>171</sup> In its Resolution, the Authority *inter alia* noted that the crisis in Ivory Coast was a direct consequence of the refusal by Gbagbo to relinquish power to the elected candidate and that the crisis had become a regional humanitarian crisis.<sup>172</sup> The Resolution recalled the decisions of authority reached on its extra ordinary sessions on 7 and 25 December 2010 especially on the use of force in case of the incumbent's refusal to relinquish power and firmly decided that the time to enforce such decision has come so as to protect life and ensure transfer of power to Mr. Quattara.<sup>173</sup> To this end, the authority urged the UN Security Council (UNSC) to authorise ECOWAS to implement such decision.<sup>174</sup> In the Resolution the Authority also directed the ECOWAS Commission's President to accord the government of Mr. Quattara all the necessary legal and diplomatic means to exercise his authority, including admitting his government to all meetings of ECOWAS.<sup>175</sup>

Gbagbo was not only condemned by ECOWAS, but also the whole international community. For instance, the UN, the AU, the European Union (EU) and the US also refused to recognise him as the lawful president of Ivory Coast. The UN officially recognised a list submitted by Quattara as official representatives of the country in the UN.<sup>176</sup> To starve him financially so as to make it difficult for him to sustain his government, the West African Regional Central Bank (WARCB) and the World Bank (WB) blocked his access to the banks.<sup>177</sup>

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2011/03/25/ecowas-summit-reviews-situation-in-cote-d%E2%80%99ivoire/ (accessed 29 August 2011).

<sup>171</sup> See Thirty 39<sup>th</sup> ordinary session of ECOWAS final communiqué 25 available at [http://www.ecowas.int/publications/en/communiqué\\_final/39eme/comfinal.pdf](http://www.ecowas.int/publications/en/communiqué_final/39eme/comfinal.pdf) (accessed 29 August 2011).

<sup>172</sup> See Resolution A/RES.1/03/11 of the Authority of the Heads of State and Government of ECOWAS on the situation in Côte d'Ivoire available at <http://reliefweb.int/node/393474> (accessed 29 August 2011).

<sup>173</sup> As above.

<sup>174</sup> As above.

<sup>175</sup> As above.

<sup>179</sup> As above.

<sup>180</sup> As above.

<sup>181</sup> See The Telegraph 'Ivory Coast: Laurent Gbagbo captured by French special forces, rival claims' available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/cotedivoire/8443240/Ivory-Coast-Laurent-Gbagbo-captured-by-French-special-forces-rival-claims.html> (accessed 29 August 2011), see also VOA,

It is unfortunate that despite all these sanctions against his regime, Gbagbo still refused to cede power. This resulted in months of violent clashes between forces loyal to him and Quattara's supporters. However, before ECOWAS implemented its decision to use force to drive Gbagbo out of office, on 11 April 2011, he was arrested following a special operation allegedly conducted by the French Special Forces and that marked the end of the Ivorian leader who had been in power since the year 2000.<sup>178</sup>

### **3.4 Conclusion**

Although both the Zimbabwean and the Ivorian crises were triggered by disputed results, there are notable differences between the two. While in Ivory Coast both candidates were sworn in as president each one establishing his government, that was not the case in Zimbabwe. Also, while in Zimbabwe the incumbent was declared winner by ZEC and his victory was not invalidated, in Ivory Coast the results declared by IEC gave victory to the opposition but they were subsequently invalidated by the CC. Arguably, this is the main reason why even ECOWAS acted differently with regard to the Ivorian crisis compared to how SADC's responded in the Zimbabwe crisis. In Zimbabwe, even the AU did not take a position against Mugabe, and unlike ECOWAS, SADC mainly preferred negotiations than forcing the incumbent out of office or openly criticising him. For ECOWAS, the GI was not an option at all.

This study argues that, the position taken by ECOWAS in respect of the Ivorian crisis played a pivotal role in leading the incumbent out of office. The manner ECOWAS dealt with the Ivorian crisis indicates its willingness to consolidate democracy generally and credible elections in particular. The study further argues that, such position was inevitable to protect the integrity of electoral process especially taking into account the escalation of disputes over legitimacy of election results in Africa. ECOWAS has set a precedent that will inform other African leaders who are not prepared to respect the will of the people. Thus, although ECOWAS position in this regard was not free from criticism, this study concludes that such a response is commendable and was vital to promote credible electoral process in its region in particular and Africa as a

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voice of Africa 'Ivory Coast's Gbagbo Captured at Presidential Compound' available at <http://www.voanews.com/english/news/africa/west/Fresh-Clashes-Erupt-in-Ivory-Coast-After-UN-French-Attacks-119588724.html> (accessed 29 August 2011).

whole. Other RECs are urged to learn from ECOWAS in their efforts to combat electoral malpractices which have been one of the main sources of insecurity and instability in many African countries.



## CHAPTER FOUR

### RECs A PANACEA FOR DISPUTES OVER THE LEGITIMACY OF ELECTION RESULTS IN AFRICA? A CASE STUDY OF ECOWAS AND SADC

#### 4.1 Introduction

The preceding chapters have revealed that disputes over the legitimacy of election results have engulfed the African continent, and how the RECs have reacted in such cases. Electoral disputes do not only retard democratisation, but also clog the attainment of sustainable peace and security on the continent. As evidenced in the foregoing chapters, in most cases candidates or parties disputing results do so on the ground of election malpractices, such as rigging and fraud. In this regard, EMBs have been sternly accused of fabricating results in favour of the ruling parties. Kimenyi<sup>179</sup> argues that to make elections prolific and avoid woes resulting from their contestation, they must be administered appropriately. Towards this end, this study argues that RECs can play a vital role in ensuring free and fair electoral process to avoid disputes over the legitimacy of results. This chapter provides an analysis of the extent to which the RECs can ensure credible electoral process in Africa. Two bodies namely ECOWAS and SADC are used as a case study of the analysis. In doing so, the chapter briefly explores the frameworks of the RECs in question and critically analyses their effectiveness in ensuring legitimacy of election results in their regions.

#### 4.2 A case study of ECOWAS

ECOWAS was founded in 1975 by the Treaty<sup>180</sup> signed in Lagos, Nigeria. Initially, it was primarily concerned with the promotion of economic development and integration of its member states.<sup>181</sup> However, this objective was mainly constrained by political instabilities in the region and competition over the headship of ECOWAS, hence a need to also put emphasis on peace, defence and security so as to fully realise the main objective.<sup>182</sup>

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<sup>179</sup> MS Kimenyi 'Africa's 2011 elections'4 available at [http://www.brookings.edu/~media/Files/rc/reports/2011/01\\_economy\\_agi/01\\_africa\\_economy\\_agi\\_kimenyi.pdf](http://www.brookings.edu/~media/Files/rc/reports/2011/01_economy_agi/01_africa_economy_agi_kimenyi.pdf) (accessed 23 September 2011).

<sup>180</sup> Any reference to ECOWAS Treaty in this study means the Revised Treaty of 1993.

<sup>181</sup> See art 2(1) of the Treaty.

<sup>182</sup> GO Yabi *The role of ECOWAS in managing political crisis and conflict : the cases of Guinea & Guinea- Bissau* trans R Addah (2010) 11 available at <http://library.fes.de/pdf-files/bueros/nigeria/07448.pdf> (accessed 22

#### 4.2.1 The framework

The provisions relating to democracy generally and elections in particular are found in various instruments adopted by ECOWAS; namely, the ECOWAS Treaty, the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution Peacekeeping and Security (the Protocol on Conflict prevention) and the PDGG Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution Peacekeeping and Security. The discussion in this chapter is centred on the analysis of provisions of these instruments relevant to democracy generally and elections in particular with a view to establishing the extent to which they can be invoked to ensure legitimacy of election results in the region.

##### (i) The ECOWAS Treaty

One of the fundamental principles stipulated in the Treaty, is the 'promotion and consolidation of a democratic system of governance in each member state'.<sup>183</sup> The most relevant provision in the Treaty having a direct bearing on democracy generally and elections in particular is article 58. This article deals with the maintenance of peace, stability and security of the region, and commits member states to take measures towards attainment of peace, stability and security. To this end, the treaty commits member states to *inter alia*, co-operate with the ECOWAS on various aspects including the provision of necessary assistance in the observation of democratic elections.<sup>184</sup> This is the article which establishes the basis for ECOWAS participation in elections held by its member states through elections observation. Apart from this provision, there is no any other provision in the Treaty with reference to democracy generally and elections in particular. Thus in accordance with the Treaty, it can be argued that ECOWAS cannot play any other role in elections conducted by its member states save election observations.

This provision cannot be effective in consolidating democracy and ensuring credible electoral process, for two main reasons. Firstly, the provision does not establish any legal obligation on the member states. The wording of the provision unequivocally states that, assistance in elections observation shall be provided 'at the request of member states'. Thus a decision on whether or not to invite ECOWAS to observe elections is solely left at the discretion of member states. Therefore, if a country conducting elections decides not to invite ECOWAS election

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September 2011).

<sup>183</sup> Art 4(j).

<sup>184</sup> Art 58(g).

observers, the regional body cannot participate in such elections as it has no legal basis for doing so. Secondly, the current elections observation by itself is ineffective in ensuring fairness and freeness of elections because election observers do not fully participate in the whole electoral process. The practice indicates that most observer missions are deployed only few days before Election Day. This practice makes it difficult for the missions to effectively monitor pre-election period especially campaigns period where a lot of irregularities occur. Many election observation missions also do not effectively monitor post election period. It has been argued that one of the main flaws of international elections observation is its 'lack of interest in post election period'.<sup>185</sup> Observation of this nature cannot guarantee credible elections because, as argued in the foregoing chapter, election is a process not an event. This being the case, fairness of elections extends beyond polling day. On the basis of this analysis, we conclude that the Treaty is undoubtedly not an effective instrument in the promotion of democratic elections so as to ensure legitimate results in its member states.

## **(ii) Protocol on conflict prevention**

Adopted in Lome, Togo in the year 1999, the Protocol aimed at creating 'a mechanism for collective security and peace' namely Mechanism for Conflict Prevention, Management, Resolution Peacekeeping and Security.<sup>186</sup> The Protocol makes reference to ECOWAS Treaty particularly article 58.<sup>187</sup> By making reference to article 58 of the Treaty, it implies that the Protocol was mainly adopted with a view to *inter alia*, giving effects to article 58 of the Treaty which deals with peace, stability and security in the region. It also reaffirms the principles enshrined in the Charters of the UN and the then Organisation of African Unity (OAU) now the AU as well as the Universal Declaration.<sup>188</sup>

Among the principles reaffirmed by the Protocol which has a bearing on the present study, is the need to advance and strengthen democratic government and institutions in the member states. Since the Protocol mainly aims at resolving and managing conflicts, it is unsurprising that it takes note of consolidation of democracy as this is one of the principles that if strictly adhered to, can help to a greater extent in eradicating many conflicts in Africa. It is interesting to note that Unlike the ECOWAS treaty which has a provision on the observation of elections only, the

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<sup>185</sup> W Teshome 'International election observation in Africa: the case of Ethiopia' (2008) 7 *Turkish Journal of International Relations* 121.

<sup>186</sup> Art 1 of the Protocol.

<sup>187</sup> See the Preamble to the Protocol.

<sup>188</sup> As above.

Protocol goes further by enshrining a provision empowering ECOWAS to participate in the 'preparation, organisation, and supervision of elections in the member states'.<sup>189</sup> It also empowers ECOWAS to oversee and 'actively support the development of democratic institutions of member states'.<sup>190</sup> This is a positive development towards consolidating democracy generally and free and fair elections in particular. However, the Protocol does not specify how ECOWAS can accomplish this role and arguably, to a great extent the objective cannot be attained as it is crafted in a vague language. It is for this reason that the Authority had to adopt the PDGG as a supplement to this Protocol with a view to giving effect to its provisions. The next part examines the provisions of the supplementary Protocol to establish the extent to which it can be effective in ensuring credible elections in the ECOWAS region.

### **(iii) PDGG**

The Protocol was adopted by the Authority in Dakar, Senegal in 2001. The PDGG, which also makes reference to article 58 of the Treaty, was adopted as a supplementary to the Protocol on Conflict Prevention. The Protocol came into force on 20 August 2008, having received nine ratifications which according to article 49 is the minimum number of ratifications required for it to enter into force.<sup>191</sup> It has been contended that the Protocol indicates the region's determination to lead its member states, to 'new political and institutional standards' with a view to promoting stability in the region.<sup>192</sup> It establishes a nexus between adherence to democratic and good governance principles and realisation of peace and security.<sup>193</sup> The Protocol is the 'last and certainly the most ambitious of the texts adopted by ECOWAS' with a view to consolidating democracy and stability within the member states.<sup>194</sup> It 'marks a turning point in ECOWAS' political construction' and it mainly aims at consolidating democracy, good governance and the rule of law.<sup>195</sup>

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<sup>189</sup> Art 42(1).

<sup>190</sup> As above.

<sup>191</sup> See N Magbagbeola 'Economic and political integration in West Africa' (2009) 23 available at [http://www.europarl.europa.eu/intcoop/acp/04\\_regional/pdf/magbagbeola\\_en.pdf](http://www.europarl.europa.eu/intcoop/acp/04_regional/pdf/magbagbeola_en.pdf) (accessed 5 September 2011)

<sup>192</sup> As above 13.

<sup>193</sup> As above.

<sup>194</sup> ECOWAS Protocol on Democracy and Good Governance in Sierra Leone http available at [//news.sl/drwebsite/exec/view.cgi?archive=3&num=1959](http://news.sl/drwebsite/exec/view.cgi?archive=3&num=1959) (accessed 5 September 2011)

<sup>195</sup> See the ECOWAS Supplementary Protocol and defense and security forces relationships to political power

The Protocol commences by establishing 12 constitutional principles to be shared by all member states.<sup>196</sup> These principles include, accession of power through free fair and transparent elections, zero tolerance for power obtained unconstitutionally, popular participation in decision making and strict adherence to democratic principles. The Protocol forbids making substantial changes to the electoral laws six months prior elections, save where the changes have been endorsed by the majority of political actors.<sup>197</sup> Independence and impartiality of EMBs is also called upon in the Protocol.<sup>198</sup> Most importantly, apart from calling for transparency in the preparation of elections and declaration of results, it also requires adequate mechanisms in settling any disputes relating to the conduct of elections and declaration of results.<sup>199</sup> The Protocol also requires the party or candidate who loses election, to accept the results and prohibits intimidation of defeated candidates and their supporters by power holders.<sup>200</sup>

The Protocol also contains provisions complementing article 42 of the Protocol on Conflicts Prevention which relates to, elections monitoring and assistance by the ECOWAS. According to the Protocol, ECOWAS may assist in the conduct of elections of its member states upon the request from such member states.<sup>201</sup> The Protocol does not specify the kind of assistance that may be provided but it generally states that the assistance may take any form.<sup>202</sup> It provides that ECOWAS may send its monitoring team to oversee the conduct of elections in a particular country.<sup>203</sup> It also empowers the Executive Secretary, to dispatch fact finding and exploratory missions to any member state as elections approach.<sup>204</sup> The exploratory mission aims at *inter alia*, collecting all information on the situation in which the elections will be held, making an assessment of the status of elections preparation and collecting relevant information to the candidates and political parties. Further, the Protocol requires the mission to remain in the country until the electoral process is finalised and results declared.<sup>205</sup> It is important to note that

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3 available at <http://www.oecd.org/dataoecd/43/16/38961785.pdf> (accessed 5 September 2011).

<sup>196</sup> Art 1.

<sup>197</sup> Art 2(1).

<sup>198</sup> Art 3.

<sup>199</sup> Arts 6 & 7.

<sup>200</sup> Arts 9 & 10.

<sup>201</sup> Art 12(1).

<sup>202</sup> Art 12(2).

<sup>203</sup> Art 12(3).

<sup>204</sup> Art 13(1) & (2).

<sup>205</sup> Art 16 (1).

the Protocol does not only outlaw undemocratic change of government, but also establishes sanctions to be imposed, including suspension from membership, in the event democracy is brusquely ended.<sup>206</sup> This provision was invoked against Niger and Ivory Coast in 2010 and 2011 respectively.

It is interesting to note that the language used in the Protocol is clear and unambiguous. The unequivocal nature of the language used, creates little chance for unruly states to 'legally circumvent' its provisions.<sup>207</sup>

However, despite the fact that the Protocol enshrines elaborative provisions aimed at consolidating democracy in the region, this study contends that it cannot provide an effective redress in cases of disputes relating to the legitimacy of election results. This is mainly because the provisions relating to the provision of assistance in the conduct of elections are crafted in a non mandatory language. For instance, it provides that 'at the request of any member state, ECOWAS may provide assistance in the conduct of any election'.<sup>208</sup> This clearly means that ECOWAS cannot *suo motu* decide to oversee the conduct of elections in its member states as the Protocol leaves its invitation at the sole discretion of member states. This may be an impediment towards ensuring free and fair elections in the region because, as argued above, if a member state decides not to invite ECOWAS to oversee the conduct of its elections it cannot do so as it would have no legal basis for that. Thus, the participation of ECOWAS in the conduct of elections of any of its member state depends on the goodwill of such member state. Although the experience indicates that member states have been inviting ECOWAS observer missions whenever conducting elections, it is important to have a binding provisions that will compel members to invite observer missions to avoid a possibility of abusing this discretion.

The only mandatory provision relating to the conduct of elections is article 13 of the Protocol which provides for the fact finding mission. However, this cannot guarantee fairness of elections since the fact finding mission does not actively participate in the whole electoral process. The fact finding missions does not only arrive to a country few days prior elections,<sup>209</sup> but also it is constituted by very few members something which makes it difficult for it to do a thorough

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<sup>206</sup> Art 45.

<sup>207</sup> F Cowell 'The impact of the ECOWAS Protocol on Good Governance and Democracy' (2011) 19 *African Journal of International and Comparative Law* 333.

<sup>208</sup> Art 12(1).

<sup>209</sup> According to art 15 of the Protocol, the mission is supposed to arrive at least 48 hours before elections, this is a very short time for an effective assessment of elections.

assessment of the elections in a country. The observer mission also spends very few days in a country holding elections. For example, the fact finding mission which was dispatched to Nigeria during the 2007 elections, was constituted by six members only and spent 18 days only in the country.<sup>210</sup> It is doubtful whether it is possible to do an effective assessment concerning the fairness of elections within 18 days and by the team of six individuals only, especially in such a large country like Nigeria. This practice makes it difficult for such missions to effectively assess the fairness of the whole electoral process.

The absence of supranational body to solve disputes relating to the legitimacy of results is another serious drawback of the Protocol. This is a serious omission which may provide room for intractable member states to legally circumvent the provisions of the Protocol with their domestic laws. The Protocol only calls for the establishment of 'adequate arrangements' for the purpose of determining disputes on the 'conduct of elections and announcement of results'.<sup>211</sup> In this regard, it has been argued that since the Protocol requires any party disputing the election results to abide by guidelines stipulated by domestic law,<sup>212</sup> there is a possibility of using domestic legislation as a defence as was the case in the 2010 disputed election in Ivory Coast.<sup>213</sup> According to the Ivory Coast Constitution,<sup>214</sup> it is the CC which has the mandate to determine disputes relating to the election of president. The Constitution also empowers the CC to declare 'definitive results of the presidential elections'.<sup>215</sup> As a matter of fact, it is the CC which annulled the results by the IEC that gave victory to Quattara and declared Gbagbo the winner. In this regard, Cowell<sup>216</sup> argues that in accordance with the Ivory Coast Law, and in accordance with the PDGG, the decision of the CC remained lawful. He further argues that since the Protocol does not establish any mechanisms to settle such disputes at the supranational level, the incumbent Gbagbo 'technically complied' with the provisions of the

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<sup>210</sup> ECOWAS Mission measures Nigeria's polls readiness available at <http://politics.myjoyonline.com/pages/news/200702/2051.php> (accessed 18 October 2011).

<sup>211</sup> Art 7.

<sup>212</sup> See arts 7 & 9.

<sup>213</sup> Cowell (n 207) above 334.

<sup>214</sup> See art 94 of the Constitution of Ivory Coast, see also A Quashigah 'where is Allassane Quattara's legitimacy; in Ivory Coast or in the west?' available at <http://www.citifmonline.com/index.php?id=1.360953> (accessed 16 October 2011).

<sup>215</sup> As above.

<sup>216</sup> Cowell (n 207 above) 334-335.

Protocol by adhering to the decision of the CC which is the body with the final say in such disputes.<sup>217</sup>

It has been argued that the Ivorian crisis is the most important 'test the Protocol has had to date, and the incident has highlighted some of the weaknesses inherent in the structure of the Protocol'.<sup>218</sup> We contend that it is due to the absence of clear mechanism for settling election related disputes at the supra national level that provided an opportunity for the incumbent Gbagbo to 'legalise' his refusal to cede power, as he was declared the winner by the body legally entitled to do so under Ivorian law.

### **4.3 A case study of SADC**

Formed in 1992, SADC replaced the then Southern African Development Co-ordinating Conference (SADCC). SADCC was formed in 1980, through the signing of a Declaration and subsequently formalised in 1981 by the signing of the Memorandum of Understanding on the Institutions of the Southern African Development Co-ordination Conference (MoUISADCC) on 20 July 1981.<sup>219</sup> To give SADCC legal status, the heads of state and government at its meeting in Harare Zimbabwe decided to replace the MoUISADCC by a Treaty or a Charter.<sup>220</sup> Thus in August 1992, the Treaty was signed in Windhoek Namibia replacing SADCC with SADC.<sup>221</sup>

Like ECOWAS, SADC's primary objective is also centred in the achievement of economic integration of its member states development and regional integration.<sup>222</sup> However, with time SADC has also been placing much emphasis on the consolidation of democracy in its region. This part examines the SADC framework to find out the extent to which it can be effective in ensuring legitimate election results

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<sup>217</sup> As above.

<sup>218</sup> Cowell (n 207 above) 340.

<sup>219</sup> See SADC profile available at <http://www.sadc.int/index/browse/page/52> (accessed 10 October 2011).

<sup>220</sup> As above.

<sup>221</sup> As above.

<sup>222</sup> SADC profile (n 217 above) 3, see also SADC Treaty art 5.



### 4.3.1 The Framework

Like ECOWAS, SADC also has a number of instruments aimed at the consolidation of democracy generally and elections in particular. These instruments are the SADC Treaty, Protocol on Politics, Defence and Security Co-operation (PPDSC), SADC Principles and Guidelines Governing Democratic Elections (SPGGDE) and SADC Parliamentary Forum Norms and Standards for Elections in the SADC Region (SPF Norms). Discussion in this part is centred on the critical analysis of these instruments with a view to finding out the extent to which they can ensure credible elections in the region.

#### (i) SADC Treaty

The main principles and objectives of SADC are set out under chapters four and five of the Treaty. According to the Treaty the principles of SADC includes, solidarity, peace and security, human rights, democracy and the rule of law.<sup>223</sup> SADC also aims at consolidation, protection and maintenance of democracy, peace, security and stability.<sup>224</sup> However, the Treaty does not provide as to how these objectives and principles can be implemented by SADC, but rather leaves it to its member states to put in place adequate steps to ensure realisation of such objectives and abstain from acts likely to hinder the implementation of the provisions of Treaty.<sup>225</sup> The treaty also provides for a possibility to impose sanctions<sup>226</sup> in cases where a member fails to comply with its provisions without reasonable cause. It is also important to note that the Treaty establishes various organs, to oversee its implementation and one of the organs established is the Organ on Politics, Defence and Security Co-operation (OPDSC).<sup>227</sup> The Treaty does not enumerate functions, powers and structure of the OPDSC but rather states that such features will be provided for in the protocol.<sup>228</sup>

It is suggested that despite the fact that the Treaty lists consolidation of democracy as one of the principles of SADC, the absence of specific provisions relating to the conduct of elections makes the Treaty ineffective in ensuring the legitimacy of election results. Also, the fact that the Treaty lacks provisions on how to implement the objectives of the Treaty creates room for

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<sup>223</sup> See art 4.

<sup>224</sup> Art 4(1) (c).

<sup>225</sup> Art 6(1).

<sup>226</sup> Art 33(1).

<sup>227</sup> Art 9(1) (b).

<sup>228</sup> Art 10(5).

manipulation by member states. It is therefore contended that the SADC Treaty does not provide an effective solution to the problem raised in the study.

## **(ii) PPDSC**

The protocol was adopted in Blantyre, Malawi in 2001 by the Heads of State and Government. It enumerates the functions of the OPDSC which is established by article nine of the SADC Treaty. Generally, the organ aims at advancing peace and security in the region.<sup>229</sup> To ensure that this general objective is attained the Protocol sets out several specific objectives which include, advocating the 'development of democratic institutions and practices' and encourage the adherence to human rights.<sup>230</sup>

However, in spite of providing promotion of democratic institutions and human rights as one of its specific objectives, the Protocol does not provide any indications on how this may be achieved. It is also surprising to note that despite the fact that there are many disputes in the region resulting from disputed elections the Protocol makes no provision for ensuring free and fair elections. It mainly focuses on the structure of OPDSC and prevention and management of conflicts without addressing the root causes of such conflicts. We therefore conclude that the PPDSC cannot be used to prevent conflict resulting from disputed election results, as it does not have any mechanisms to ensure credible elections within the member states.

## **(iii) SADC Principles and Guidelines Governing Democratic Elections (SPGGDE)**

Adopted in 2004, by the Heads of State and Government, the SPGGDE contains the comprehensive principles of democratic elections aimed at consolidating democracy in the region. The SPGGDE explicitly states that the principles enshrined in it, aim at strengthening the 'transparency and credibility of elections and democratic governance as well as ensuring the acceptance of election results by all contesting parties'.<sup>231</sup> Principles enshrined in the SPGGDE include, principles for conducting democratic elections,<sup>232</sup> guidelines for election observation<sup>233</sup> and the responsibilities of member states in which elections take place.<sup>234</sup> It also calls on member states holding elections to *inter alia*, ensure equal access to media, provide voter

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<sup>229</sup> Art 2(1).

<sup>230</sup> Art 2(2) (g).

<sup>231</sup> See the introduction part.

<sup>232</sup> Sec 2.

<sup>233</sup> Sec 4.

<sup>234</sup> Sec 7.

education and calls losing candidates to accept defeat and respect results. As indicated above, the SPGGDE is a comprehensive instrument which was adopted with a view to ensuring credible electoral processes in the region.

However, in spite of enshrining comprehensive provisions on the conduct of elections, it is the contention of this study that the SPGGDE cannot be effective to ensure legitimate election results in the region due a number of reasons. Firstly, the instrument as the name suggests is a mere guideline, hence a soft law which does not impose any legal obligation on member states to comply with its provisions. Thus SADC cannot compel its members to comply with the provisions of this instrument. Due to its non binding nature, the provisions of this instrument can be easily diluted by the domestic legislation. To ensure credible elections and avoid disputes over the legitimacy of results, adoption of a comprehensive binding instrument is inevitable. Arguably, this is why Zimbabwe has been reluctant to comply with the requirements for free and fair elections in spite of several calls from different institutions including from civil societies as well as SADC.<sup>235</sup> No wonder, a conference organised the SPF in 2005, called for a legally binding SADC instrument in the area of elections.<sup>236</sup>

Secondly, like the ECOWAS PDGG, the instrument provides for the settlement of election disputes in accordance with municipal laws. In such cases, where a body with the last say in such disputes is under the control of the ruling party, legitimate results cannot be ensured. This is what happened in Ivory Coast in 2010.

Thirdly, like the ECOWAS PDGG, the SPGGDE does not oblige member states to invite SEOM.<sup>237</sup> The discretion to invite SEOM is left to state party holding elections if it deems necessary to do so. This implies that a country is not breaching any obligation by deciding not to invite an observer mission as it is not under any legal obligation to do so. This does not only dilute the essence of elections observation, but also it will create difficulties for SADC to assess the fairness of elections in cases where a member state will decline to invite the observer mission. Although in practice, member states have been complying with the instrument by inviting the SEOM to observe their elections, the truth of the matter remains that they are under

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<sup>235</sup> See for example A Bell 'Civil society call for urgent SADC intervention in Zim' available at <http://www.swradioafrica.com/news310311/civilsoc310311.htm> (accessed 18 October 2011).

<sup>236</sup> Call for binding SADC protocol on elections available at <http://www.mmegi.bw/2005/November/Tuesday22/417053586840.html> (accessed 11 September 2011).

<sup>237</sup> See sec 3.1.

no legal obligation to do so and it is no guarantee that there will always be a compliance with these provisions.

Fourthly, the instrument is not detailed on who should form the observer mission. It provides that the SEOM is supposed to be lead by an 'appropriate official from the office of the Chairperson of the Organ'<sup>238</sup> and requires that in constituting the mission, gender should be taken into account and that observers may come from different political parties.<sup>239</sup> This may not be a serious omission as the experience indicates that SEOM have been constituted by members from various institutions including from civil society organisations. For instance, the SEOM to Zimbabwe in 2008 and Tanzania in 2010 elections were constituted by parliamentarians, civil organisations and civil servants.<sup>240</sup> However, it is important that the composition of SEOM be clearly stipulated in the instrument.

#### **(iv) SADC Parliamentary Forum Norms and Standards for Election in the SADC Region (SPF Norms)**

The norms were adopted by the SPF Plenary Assembly on March 2001, in Windhoek, Namibia. The norms and standards provided in this instrument are more detailed, than those provided in the SPGGDE. The instrument consists of 17 sections each section identifying problems and offering recommendations on how the problem can be dealt with. For instance, it clearly states that the counting of votes is one of the problematic areas where many allegations of election rigging have been mounted against the party declared a winner.<sup>241</sup> It provides that the transportation of ballot boxes from various polling stations to the central polling station 'creates opportunities for missing ballot boxes and other ballot boxes being sneaked in', and that this amounts to an infringement of free and fair elections.<sup>242</sup> In this regard, SPF recommends *inter alia*, that votes should be counted at the polling station in the presence of contestants and/or their agents, and that upon the completion of counting process results must be immediately released, signed and confirmed by all relevant parties.<sup>243</sup> SPF also recommends that before

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<sup>238</sup> Sec 6:1:10.

<sup>239</sup> Sec 3.4.

<sup>240</sup> SEOM preliminary report (n 102 above) 3, See also SEOM preliminary report to Tanzania (2010) 4 available at [http://www.tz.undp.org/ESP/docs/Observer\\_Reports/SADC\\_preliminary\\_report.pdf](http://www.tz.undp.org/ESP/docs/Observer_Reports/SADC_preliminary_report.pdf) (accessed 17 October 2011).

<sup>241</sup> See sec 11.

<sup>242</sup> As above.

<sup>243</sup> Sec 11(i)-(iii).

voting commences, there should be a verification and reconciliation of all polling boxes in the presence of contestants and their agents.<sup>244</sup>

Regarding the acceptance of results, SPF notes that reluctance in accepting results is not uncommon in SADC member states.<sup>245</sup> It notes that in some cases all contestants dispute the legitimacy of each other.<sup>246</sup> In this regard, SPF recommends the need to inculcate and foster the culture of conceding defeat especially if the results have been approved by the observers and after a 'fair contests'.<sup>247</sup>

It is worth noting that all recommendations offered by the SPF, aims at ensuring transparent electoral process and if were to be implemented, they could greatly help in avoiding disputes relating to the legitimacy of results.

However, in spite of its detailed provisions, like the SPGGDE, SPF Norms are mere recommendations and have no legal force. Thus, member states are not obliged to comply with the provisions of the SPF Norms. This study contends that these recommendations have not been effectively implemented by the member states. This contention is evidenced by the fact that to date, ten years after the adoption of the SPF Norms, there are still many disputes relating to the legitimacy of results in the region. For example, many SADC member states still lack independent EMBs in spite of the recommendations by the SPF that members should create impartial bodies as part of the process towards ensuring credible elections in the region.<sup>248</sup> Therefore, this study contends that the instrument cannot be effective in ensuring legitimacy of election results in the SADC region.

### 4.3 Conclusion

Despite the fact that the RECs have put in place certain mechanisms to ensure credible elections in their regions, as this chapter has revealed, those mechanisms are ineffective to address the prevalent problem of disputes over the legitimacy of election results. This is due to various flaws in the present legal frameworks as identified in this chapter. Therefore, it is the

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<sup>244</sup> As above.

<sup>245</sup> Sec 12.

<sup>246</sup> As above.

<sup>247</sup> Sec 12(i)&(ii).

<sup>248</sup> See sec 5 of the Norms.

contention of this study that with the present framework, RECs can never effectively address the problem raised in this study. Thus, to redress the situation, sophisticated means need to be put in place by the RECs. There is a need to create safe environment for credible elections to take place, so as to avoid controversies leading to the disputes over the legitimacy of results and its aftermath as have been witnessed in many African Countries. The following chapter offers recommendations on what the RECs need to put in place so as to effectively remedy the situation

## **CHAPTER FIVE**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **5.1 Introduction**

This study has concluded that with the current legal frameworks, RECs cannot provide a panacea for disputes over the legitimacy of election results in Africa. For the RECs to be in a position to effectively combat the problem raised in this study, certain steps must be taken. This chapter wraps up the study by concluding remarks and provides recommendations on what the RECs need to put in place, so as to effectively address the problem.

#### **5.2 Conclusions**

The following are the conclusions that flow from the analysis of the study:

##### **5.2.1 RECs can play a pivotal role in ensuring credible elections in Africa**

Although this study noted that the efforts that have been employed by the RECs to ensure credible electoral process in their regions is minimal and ineffective, it however, concludes that RECs can play a crucial role in ensuring free and fair elections and combat disputes over the legitimacy of election results in Africa. The role played by ECOWAS in the Ivorian crisis after the 2010 disputed elections, evidences the fact that RECs can play a central role in preserving democracy generally and respect for electoral process in particular. As a matter of fact, the unprecedented ECOWAS reaction in the Ivorian crisis has set the best precedent for the RECs in Africa. If all the RECs in Africa will react in the same way in similar situations, credible electoral process will be restored in Africa and elections will produce the desired outcomes.

##### **5.1.2 Ineffective framework for the RECs**

Despite the fact that RECs have a central role to play in promoting democracy generally and ensure fairness in elections, this study concludes that they lack effective legal frameworks to enable them effectively redress the problem discussed in this study. There are serious flaws in the present electoral frameworks of the RECs. All the instruments analysed in this study, indicate that there are no effective provisions that can be used by the RECs to ensure legitimacy of election results. Thus, despite the fact that the RECs try to call for credible elections in their regions, elections will remain contentious unless there is serious overhaul of the present legal system. RECs must revamp their current electoral frameworks so as to be

actively involved in the electoral process. Although this study was centred on the two RECs only, it concludes that the shortcomings identified are not peculiar to those two bodies. The study concludes that all RECs in Africa, lack the effective mechanisms to enable them fight for fairness of elections in their regions. The next part provides recommendations on what the RECs need to do if they want to ensure credible elections so as to avoid disputes over legitimacy of election results in their regions.

### **5.2.3 Lack of political will by the RECs**

Apart from lacking effective framework to address the problem in question, the study concludes that RECs also lack political will to deal with the problem. Besides adopting comprehensive and binding instruments to address the problem, there should also be political will from the regional as well as national levels. Even if the RECs will adopt comprehensive framework in tackling the problem identified in this study very little will be achieved, without the political will. To actively tackle the problem in question, RECs must not only have political will, but also adequately translate it into actions. There must be absolute political commitment to implement all instruments adopted for purposes of ensuring credible elections. Political will is also needed at the national level in the sense that all member states have to be willing to implement all decisions reached at the regional level such as, ratification of instruments that will be adopted and implementation of all decisions that will be made at the regional level.

Failure by SADC to act in the Zimbabwe crisis was not only due to lack of comprehensive framework, but also lack of political will. That is why it never publicly condemned Mugabe and his government in spite of many years of political violence against members of the opposition. With the exception of Botswana which publicly condemned Mugabe, no statement that was issued by SADC to condemn him. This study concludes that the manner ECOWAS dealt with the Ivorian crisis in 2010, it has shown a way and this should be a norm for all RECs where any candidate attempts to suppress the will of the people by trying to manipulate results.

### **5.3 Recommendations**

In view of the shortcomings identified in this study, we would like to put forward recommendations on what the RECs need to put in place with a view to effectively addressing the problem. Although recommendations given here are a result of the case study of ECOWAS and SADC, they are also relevant to other RECs. It is important to note that the order in which recommendations are listed does not represent their priorities.



### **5.3.1 Adoption of a binding instrument on elections**

Many RECs in Africa do not have binding instruments in the area of elections. This is one of the obstacles they face in their attempt to ensure credible elections in their regions. As noted in the preceding chapter, RECs cannot effectively address the problem of disputes over the legitimacy of election results with loose and non binding instruments whose implementation mainly depends on the goodwill of its member states. In view of this shortcoming, it is recommended that there is a need for the RECs to have in place binding instruments whose implementation will not depend on wishes of member states. This is inevitable if at all they need to effectively address the problem of disputes over the legitimacy of election results in their regions. Such an instrument should also incorporate provisions on sanctions to be imposed on member states that will not comply with it.

### **5.3.2 Amendment of the current frameworks**

RECs that already have binding instruments on the consolidation of democracy but lack effective provisions to ensure credible elections, should be amended them to remedy all flaws which can prevent the RECs from ensuring credible elections. This should be done with a view to avoiding disputes over who won an election.

### **5.3.3 Strengthening the election observation missions**

As part of the measures to prevent disputes over the legitimacy of election results in Africa, this study recommends that elections observation should be strengthened. As noted in this study, despite the presence of provisions for elections observation by the RECs; such observations are weak. The provisions establishing elections observation do not impose legal obligations as they are not mandatory. Although the experience shows that member states have been inviting the RECs to observe their elections, this does not necessarily imply that they are bound to do so. Crafting the provisions dealing with elections observation in a non mandatory language leaves room for non compliance. This is what happened in Ethiopia during the 2000 elections when it refused to invite international observers.<sup>249</sup> Thus, it is recommended that RECs should craft the provisions for elections monitoring and observation in a mandatory language and stipulate sanctions to be imposed in case a member state fails to comply with such provisions.

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<sup>249</sup> Teshome (n 185 1bove) 122.

Enshrinement of mandatory provisions on elections observation will enhance the credibility of international elections observation. It is generally accepted that the international elections observation increases the credibility of the electoral process, and their assessments are likely to have a positive impact on the public opinion hence creating minor chances for disputes over the legitimacy of results. Therefore, towards eradication of disputes over the legitimacy of election results, it is crucial that RECs include a provision that will oblige all member states to invite observer missions in their elections.

Further, it is recommended that RECs should closely monitor the pre and post Election Day periods. The practice indicates that most observer missions are deployed only a few days before Election Day. This practice makes it difficult for the missions to effectively monitor the whole electoral process especially campaigns period where a lot of irregularities occur. Thus, it is recommended that there should be a provision requiring observer mission to arrive within a reasonable time before Election Day. This recommendation if implemented will play a crucial role in avoiding disputes over the legitimacy of results and prevent post electoral disputes.

Since implementation of this recommendation implies that the observer mission will have to spend more time in a country holding elections, it is obvious that it will have cost implications. Therefore, it is further recommended that member states should be willing to contribute more so that the RECs can be in a position to sustain these missions.

It is also recommended that the election observation missions be constituted by members from the academic field as well, such as lawyers and political scientists, instead of the present practice where members of these missions are mainly drawn from political parties, civil service and civil society organisations. This will strengthen these missions and enable them monitor elections more effectively and professionally.

### **5.3.4 Establish electoral dispute settlement mechanism at the regional level**

The absence of a supranational body to settle electoral disputes is one of the main obstacles towards ensuring legitimacy of election results. This is due to the fact that bodies mandated to settle such disputes at national level may be easily manipulated by candidates especially ruling parties and also in some countries such bodies do not exist. Thus, it is recommended that RECs should consider establishing a supranational body to hear and determine electoral disputes at the regional level to ensure that all disputes relating to the legitimacy of results are fairly adjudicated.

The establishment of such body is very important especially taking into account that there are countries where presidential election results, are not subject to inquiry by anybody. For example in Tanzania, once presidential result is declared by the NEC, it is not subject to inquiry by any court of law.<sup>250</sup> In such cases, even if any of the candidates is dissatisfied by the results he/she has no remedy but to wait for many years for next elections. This is very dangerous because when people do not have any means to claim their right legally they may resort into violence as the only option. Therefore, the creation of such body at the regional level will provide an opportunity for candidates discontented with results to file and let their claims be heard and determined by an impartial body. Such a body can play an important role in ensuring credible electoral process.

It is further recommended that before any proceeding is instituted, the rule requiring the exhaustion of domestic remedies should be applicable. Thus, before a dispute is lodged at the regional level local remedies must be exhausted first unless not available or cannot reasonably exhausted. To avoid unreasonable delay, the RECs should require all member states to put in place legislation compelling national courts/tribunals to resolve all election disputes within a reasonable time. Such a requirement should also be incorporated at the regional level so as to ensure that disputes lodged at this level are also dealt with promptly. To avoid leadership vacuum, there should also be a provision allowing a candidate declared to have won an election to continue ruling while a dispute is yet to be finally determined.

It is also recommended that for decisions of these bodies to be effective, they must be legally binding rather than its enforcement depending on discretion of member states. There should be provisions outlining stringent sanctions to be imposed to those member states which will not comply with decisions of this body. Rules and Procedures of this body should also be simple and friendly so as to make its accessibility easier.

***Word count = 17 882, including footnotes but excluding: cover page, declaration, dedication, acknowledgements, list of abbreviations, table of contents and bibliography).***

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<sup>250</sup> See Art 41(7) of the Constitution of the United Republic of Tanzania of 1977 as amended in 2008.

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